PSYCHIATRIC HOLDS AND THE FOURTH AMENDMENT

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Fourth Amendment jurisprudence governing emergency searches and seizures for mental health evaluation, crisis stabilization, and treatment is in disarray. The Supreme Court has yet to opine on what Fourth Amendment standards apply to these "psychiatric holds," and lower courts have not, on the whole, distinguished legal standards governing emergency holds from those governing routine criminal procedure.

This Article argues against the uncritical doctrinal overlay of criminal investigative rules and standards onto cases implicating noncriminal behavioral health concerns. Using a critical disability lens, it reconsiders key Fourth Amendment doctrines and standards applicable to people experiencing, or labeled as experiencing, mental crises. It situates emergency hold cases against a backdrop of disability policing and state institutionalization, connecting them to the broader privacy and security interests of disabled people and offering doctrinal interventions.

This Article unites two areas of law—Fourth Amendment law and mental health law pertaining to emergency civil commitments—to present a comprehensive view of mental health crisis response systems in the United States and the legal regimes governing these systems. Ultimately, it explores how to interpret Fourth Amendment doctrine in light of existing civil commitment regimes and disabled people's group-based history of subordination so as to protect their unique interests.

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INTRODUCTION

One night, Edward Caniglia and his wife, Kim, had a heated argument.[1] During the disagreement, Edward retrieved a handgun, placed it on the dining table, and told Kim to "shoot [him] now and get it over with."[2] Kim ignored the comment and decided instead to leave their home and spend the night in a hotel.[3] The next morning, Kim tried to reach Edward by phone but could not get a hold of him.[4] She called the police

1. Caniglia v. Strom, 141 S. Ct. 1596, 1598 (2021).
2. Id. (alteration in original) (internal quotation marks omitted).
3. Id.
4. Id.

to request that they go to the couple's home to perform a welfare check.[5] When the police arrived, they found Edward on the porch.[6] Edward spoke with the officers and denied that he was suicidal.[7] Nevertheless, police officers assessed that he posed a risk to himself and others.[8] The officers called an ambulance based on this assessment.[9] Edward agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms.[10] Despite agreeing to his request, after he left, the officers found and seized his firearms.[11]

Edward filed suit arguing that the warrantless entry into his home and seizure of his firearms violated his Fourth Amendment rights. The district court granted summary judgment to the police,[12] and the First Circuit affirmed on the ground that the community caretaking exception to the warrant requirement provided a constitutional basis for removing Edward and his firearms from his home.[13] In its opinion, the First Circuit stated that police functions can be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[14]

The Supreme Court held that community caretaking did not "create[] a standalone doctrine that justifies warrantless searches and seizures in the home."[15] In the majority opinion by Justice Clarence Thomas, the Court reasoned that "[n]either the holding nor logic" of a prior case called *Cady*[16] introduced that broad exception to the warrant requirement.[17] Though *Cady* "also involved a warrantless search for a firearm[,] . . . the location of that search was an impounded vehicle—not a home—[which made] 'a constitutional difference.'"[18] Recognizing that the Fourth Amendment only prohibits unwelcome intrusions on private property that are "unreasonable," the Court ruled that the search at issue

5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. See Caniglia v. Strom, 396 F. Supp. 3d 227, 236 (D.R.I. 2019), aff'd, 953 F.3d 112 (1st Cir. 2020), vacated and remanded, 141 S. Ct. 1596 (2021).
13. *Caniglia*, 953 F.3d at 124, vacated, 141 S. Ct. 1596.
14. Id. at 123 (internal quotation marks omitted) (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).
15. *Caniglia*, 141 S. Ct. at 1598.
16. Cady v. Dombrowski, 413 U.S. 433 (1973).
17. Id. at 1599.
18. Id. (quoting *Cady*, 413 U.S. at 439).

extended beyond a reasonable exception to the warrant requirement under existing precedent.[19]

Despite the narrow holding, three concurring opinions expressly declined to rule out possible caretaking functions performed by police officers that might constitute exigent circumstances (and, therefore, constitutionally reasonable intrusions) justifying warrantless entries into homes. Specifically, concurrences written by Chief Justice John Roberts, Justice Samuel Alito, and Justice Brett Kavanaugh, each emphasized a set of exigent circumstances where police may enter the premises without a warrant.[20]

Chief Justice Roberts wrote a short concurrence to note that *Brigham City v. Stuart*[21] and *Michigan v. Fisher*[22] allow police to enter a home without a warrant "when there is a 'need to assist persons who are seriously injured or threatened with such injury,'"[23] and where "there was an objectively reasonable basis for believing that medical assistance was needed, or persons were in danger."[24]

Justice Alito elaborated on his interpretation of the "broad category of cases involving 'community caretaking.'"[25] Acknowledging the breadth of these categories of police functions, Justice Alito emphasized that the Fourth Amendment's reasonableness command does not presumptively apply to all police functions that might conceivably be covered under the community caretaking exception.[26] He also questioned whether the Fourth Amendment rules in criminal cases necessarily applied to "non-law-enforcement purposes."[27] Finally, he acknowledged that existing precedent did not address what the Fourth Amendment commands in emergency situations requiring police involvement. While noting that, under existing precedent, police may enter a home without a warrant when exigent circumstances are present, Justice Alito stressed that such circumstances could be classified as exigent "only when there is not

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19. Id. Reasonableness is the touchstone of Fourth Amendment analysis. See Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." (citation omitted) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)))). As the *Caniglia* Court emphasized, "[t]he 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'"—a thread that this Article discusses further in section III.A. *Caniglia*, 141 S. Ct. at 1599 (quoting Florida v. Jardines, 569 U.S. 1, 6 (2013)).

20. *Caniglia*, 141 S. Ct. at 1600–05.

21. 547 U.S. 398 (2006).

22. 558 U.S. 45 (2009).

23. *Caniglia*, 141 S. Ct. at 1600 (Roberts, C.J., concurring) (quoting *Brigham City*, 547 U.S. at 403).

24. Id. (internal quotation marks omitted) (quoting *Fisher*, 558 U.S. at 49).

25. Id. at 1600 (Alito, J., concurring).

26. Id.

27. Id.

enough time to get a warrant . . . and warrants are not typically granted for the purpose of checking on a person's medical condition."[28]

Describing how Fourth Amendment doctrine would apply to "some heartland emergency-aid situations,"[29] Justice Kavanaugh's concurring opinion referred to a litany of cases in which police were permitted to enter homes without a warrant when they had "an objectively reasonable basis to believe that there [was] a current, ongoing crisis for which it [was] reasonable to act now."[30] These cases included, among other things, calls about missing persons, sick neighbors, premises left open at night, wellness checks for elderly persons, unattended young children, and, most relevant here, individuals who were experiencing (or labeled as experiencing) mental crises.[31] Drawing on the well-known proposition that the "ultimate touchstone of the Fourth Amendment is reasonableness,"[32] Justice Kavanaugh referred back to several cases when the Court found a warrant was not required after a reasonableness analysis and noted that under the exigent circumstances exception, exigencies included the "need to assist persons who are seriously injured or threatened with such injury."[33]

Taken together, the four concurring Justices made profound statements about law enforcement's role in crisis situations—statements that have huge implications for the rights of people experiencing mental crises. Despite extensively discussing emergency care *functions* that police officers might lawfully perform, the concurring Justices in *Caniglia* did not elaborate on what specific *standards* should govern emergency searches and seizures for the purposes of mental health evaluation, which was the purpose of the specific seizure at issue in *Caniglia*.[34] With little to no empirical evidence as to whether police are efficacious crisis responders, the four Justices lumped together various categories of emergencies and framed their hypotheticals to suggest the reasonableness of certain searches and seizures under the exigent circumstances exception.[35]

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28. Id. at 1602 (citing Missouri v. McNeely, 569 U.S. 141, 149 (2013); Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

29. Id. at 1604 (Kavanaugh, J., concurring).

30. Id.

31. See id. at 1604–05 (collecting examples).

32. See Riley v. California, 573 U.S. 373, 381 (2014) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

33. See *Caniglia*, 141 S. Ct. at 1603–04 (internal quotation marks omitted) (quoting *Brigham City*, 547 U.S. at 403).

34. See Graham v. Barnette, 5 F.4th 872, 883–84 (8th Cir. 2021) ("That said, the Court in *Caniglia* 'refrain[ed]' from addressing generally the standards governing 'emergency seizures for psychiatric treatment, observation, or stabilization.'" (quoting *Caniglia*, 141 S. Ct. at 1601 (Alito, J., concurring))).

35. See *Caniglia*, 141 S. Ct. at 1605 (Kavanaugh, J., concurring) (suggesting officers have an "objectively reasonable basis" for entering a home without a warrant in case where an elderly man is believed to have fallen and hurt himself).

Despite the breadth of the Justices' speculation, and the potential legal and physical injuries that their arguments might lead to in the real world, *Caniglia* slipped by without much legal commentary. Indeed, leading scholars and commentators maintained that *Caniglia* was far from a significant decision as far as Fourth Amendment doctrine was concerned.[36] This oversight was likely due to the narrow legal issue addressed by the Court. Yet, within a larger context, *Caniglia*'s discussions pose deeper questions than may appear at first glance. Missing from the commentary was scrutiny of the basis for the welfare-check-turned-warrantless-search-and-seizure that led to the legal issue in the first place. Yet the narrow legal issues should not distract from important questions raised by the case (and others like it) relating to the constitutional scope of police authority to perform a warrantless entry when there is an allegation of mental distress or suicidality.

This Article casts *Caniglia* in a different light.[37] It reframes and situates *Caniglia* in a broader historical and social context, as a case that reveals important constitutional questions implicating the rights to privacy and security of people experiencing, or labeled as experiencing, crises—including people with mental disabilities. Emergency holds, or brief involuntary detention of an individual to determine whether the criteria for individual civil commitment are met,[38] implicate the privacy and security interests of a group long ignored within Fourth Amendment jurisprudence: disabled people.[39] Using a critical disability lens, it reconsiders key doctrines (exigent circumstances, emergency aid, and

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36. See, e.g., Orin Kerr (@OrinKerr), Twitter (Mar. 22, 2021), https://twitter.com/OrinKerr/status/1374085650589253633 [https://perma.cc/44FG-GGJV] (describing the decision as "small"). Orin Kerr is a professor specializing in criminal procedure and the Fourth Amendment at Berkeley Law.

37. For some, *Caniglia*'s facts make it a hard case from which to launch a critique. The Supreme Court's opinion does not suggest that Kim had any other options but to call the police, and there is no indication that the jurisdiction had either a co-responder or community responder program. Yet it is for these reasons that *Caniglia* is the most appropriate launch point for this Article and its critique of Fourth Amendment doctrine. As discussed in Part II, *Caniglia* is typical of many cases referenced in this Article in which police are dispatched to respond to individuals in crisis, or labeled in crisis, when mental crisis response (not criminal law enforcement) is the primary reason for the dispatch. While on the surface this is a case that the Court "gets right" by doing away with the community caretaking exception to the warrant requirement, the concurring Justices seem to substitute exigent circumstances for what the community caretaking exception can no longer achieve.

38. Leslie C. Hedman, John Petrila, William H. Fisher, Jeffrey W. Swanson, Deirdre A. Dingman & Scott Burris, State Laws on Emergency Holds for Mental Health Stabilization, 67 Psychiatric Servs. 529, 529–30 (2016).

39. This Article's discussion of individuals with disabilities uses identity-first language to refer to disabled people as a group or class. See Disability Language Style Guide, Nat'l Ctr. on Disability & Journalism, https://ncdj.org/style-guide/ [https://perma.cc/CJ9Y-XUBA] (last updated Aug. 2021) ("In the past, we have encouraged journalists and others to use person-first language . . . . Even with the caveat that this does not apply to all, we have heard from many people with disabilities who take issue with that advice. . . . [S]o we are no longer offering advice regarding a default.").

special needs) and legal standards (probable cause and reasonableness) most relevant to people experiencing, or labeled as experiencing, mental crises. With these doctrinal interventions, this Article proposes that courts scrutinize the reasonableness of the government's conduct by assessing both whether it was reasonable to dispatch law enforcement to the scene *in the first place* and whether the manner of performing the search or seizure was reasonable according to professional guidelines and practices relating to prevailing behavioral health standards. This Article argues that Fourth Amendment doctrine should align with disabled people's unique history of group-based subordination—specifically, the histories of criminalization, segregation, and exclusion that characterized the height of eugenics and institutionalization.

This Article make three doctrinal interventions. First, it argues that police are not reasonable first responders as a constitutional matter and that, when possible, mental health providers should contribute to assessments of exigency.[40] In destabilizing existing doctrinal rules and standards that defer to nonexpert police as though they were mental health experts, this Article proposes that when evaluating emergency searches and seizures for the purpose of mental health evaluation, courts should not apply the same legal rules and standards derived from cases involving criminal law enforcement—including exigent circumstances, emergency aid, and probable cause, among others. To advance this argument, section II.C explains how mental health exigencies are different from other exigencies in the criminal law enforcement context. Unlike other emergencies, mental health emergencies are harder to diagnose as actual emergencies and are often misinterpreted as emergency situations.[41] Importantly, these exigencies do not always implicate "traditional" criminal law enforcement functions and, moreover, do not always necessitate a police response. Dispatching law enforcement to the scene increases the likelihood of injury or even death.[42] Indeed, for a significant portion of mental health exigencies, the presence of police might actually hasten (or lead to, rather than prevent) harm to the individual.[43] Even with their oft-lauded crisis intervention training, police are often not equipped to provide necessary emergency aid—namely, therapeutic support necessary for de-escalation—without

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40. To put the point differently, dispatching police officers to perform mental health searches and seizures does not comport with the Fourth Amendment requirement that all searches be reasonable. See supra notes 19, 25–28 and accompanying text. Including mental health providers in assessments as to exigency should not be taken to mean that the expertise of mental health providers (MHPs) is superior to that of individuals with experience living with psychiatric disabilities. It also should not be taken to mean that involving MHPs would remove all the risk of coercive or abusive conduct. It does suggest that, at the very least, by including MHPs, the risk of violence would decrease because MHPs are unarmed.

41. See infra section II.C.2.b.

42. See infra section I.B.2.

43. See infra section II.D.

causing physical injuries (including death) or resorting to unnecessary criminal arrests.[44] With more careful analysis and fine-tuned legal rules, it becomes easier to notice whether individual intrusions to one's privacy—intrusions posed by law enforcement's crisis response—likely outweigh the stated government interest justifying the police intervention in the first place.

Second, this Article argues against importing probable cause standards from the criminal seizures context into the mental health seizures context. Psychiatric holds are authorized under state civil commitment laws. To be detained for emergency evaluation, these laws require law enforcement to have probable cause that individuals (1) pose a danger to themselves or others, (2) have a disability that prevents them from meeting their basic needs, or (3) are refusing treatment.[45] Section II.E traces the origin of probable cause definitions in these situations to cases involving criminal investigations. Definitions of probable cause vary widely across court opinions, and there is little guidance as to exactly what counts as probable cause in the context of mental health seizures. In opposing this practice, this Article argues that, rather than defer to law enforcement's "know-it-when-I-see-it" approach, probable cause should be more structured in incidents involving mental health seizures. This Article proposes guidelines to cabin police discretion with respect to probable cause. First, probable cause for alleged criminal conduct should be distinguishable from probable cause assessments for emergency holds; and second, when available, the reasonable officer's belief as to the sufficiency of probable cause must be based in part on information obtained from the individual in crisis and a credible medical professional.

Searches lacking in probable cause should not be classified as special needs searches. Under existing doctrine, warrantless searches conducted without probable cause are permissible when classified as special needs searches that extend "beyond the normal need for law enforcement" and "make the warrant and probable-cause requirement impracticable."[46] These special needs searches conducted without a warrant have been upheld as reasonable when they further important regulatory or administrative purposes.[47] In cases where there is no evidence of exigent

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44. See infra section III.B.

45. See, e.g., Alaska Stat. § 47.30.708(b) (2024) (referencing "serious harm to self or others"); Cal. Welfare & Inst. Code § 5150(a) (2024) (addressing when a person "is a danger to others, or to themselves"); Ind. Code Ann. § 12-26-5-0.5 (2024) (emphasizing dangerousness or grave disability combined with an "immediate need of hospitalization and treatment"); Miss. Code Ann. § 41-21-65(5) (2024) (qualifying any person "alleged to be in need of treatment" by a relative or "interested person").

46. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (internal quotation marks omitted) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

47. See id. ("[I]n certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" (quoting Camara v. Mun. Ct., 387 U.S. 523, 538 (1967))); McCabe v. Life-Line

circumstances, courts have found that local policies governing emergency holds fall within the category of searches known as special needs searches.[48] Section II.F argues against classifying emergency searches and seizures for the purpose of mental health evaluation as special needs searches. This Article notes the drawbacks of assessing the reasonableness of a particular mental health crisis response under the special needs exception to the warrant requirement. Specifically, because the Supreme Court has weakened Fourth Amendment protections governing administrative searches,[49] classifying policies governing psychiatric holds as special needs searches would seriously undermine the privacy and security interests of people in crisis—a group that includes disabled people.

Finally, this Article calls for more rights-protective legal standards governing emergency searches and seizures for the purpose of mental health evaluations. Specifically, given the documented risks of police involvement in mental health crisis response, the Fourth Amendment balancing of interests (as between the individual and the state) leans in favor of individual rights and away from the government's interest in conducting these searches and seizures without a warrant in certain cases.

This Article looks to develop guidelines to constrain police discretion in mental health crisis response and to offer a set of arguments that question the appropriateness of police involvement in crisis response as an initial matter. Though the risk of suicide is a real concern, courts should also avoid developing constitutional rules and standards that expose classes of people—here, people in crisis and disabled people—to diminished Fourth Amendment protections.[50] Exigencies may seem patently reasonable for constitutional purposes only to the extent that competing values and considerations are excluded from the analysis. That

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Ambulance Serv., Inc., 77 F.3d 540, 545 (1st Cir. 1996) (describing a warrantless procedure as potentially reasonable if the search was performed "in furtherance of an important administrative or regulatory purpose").

48. See, e.g., *McCabe*, 77 F.3d at 545.

49. See Eve Brensike Primus, Disentangling Administrative Searches, 111 Colum. L. Rev. 254, 277 (2011) (explaining that the Supreme Court weakened and eliminated doctrinal safeguards that were previously required for administrative searches, facilitating "warrantless searches unsupported by probable cause").

50. Research indicates that people diagnosed with psychiatric disorders are thirteen times more likely to die from suicide than people who do not have those conditions. Shanti Silver, Research Weekly: Early Treatment Engagement and Self-Harm, Treatment Advoc. Ctr. (Apr. 5, 2023), https://www.treatmentadvocacycenter.org/research-weekly-early-treatment-engagement-and-self-harm/ [https://perma.cc/8YTX-AKX5]; see also Lay San Too, Matthew J. Spittal, Lyndal Bugeja, Lennart Reifels, Peter Butterworth & Jane Pirkis, The Association Between Mental Disorders and Suicide: A Systematic Review and Meta-Analysis of Record Linkage Studies, 259 J. Affective Disorders 302, 311 (2019) (finding, compared with the general population, an increased risk of suicide associated with borderline personality disorder (45-fold greater risk), "anorexia nervosa in women (31-fold greater risk), depression (20-fold greater risk), bipolar disorder (17-fold greater risk), opioid use (14-fold greater risk), and schizophrenia (13-fold greater risk)").

is to say, it might seem reasonable to have police enter the residences of people in crisis without warrants, seize them, and take them to hospitals for evaluation or stabilization if this reasonableness assessment does not factor in the risks of harm police pose when they participate in mental health crisis response. Police should rarely be involved in mental health crisis response, and Fourth Amendment doctrine should not make legally reasonable what is practically unreasonable. The analysis that follows incorporates into the range of doctrinal tests these risks and concerns to prevent this aspect of Fourth Amendment doctrine from continuing to serve as a vehicle for undermining protections for people in crisis and disabled people.

In Part I, this Article provides an overview of mental health crisis response and the police role in mental health crisis response. Part II examines Fourth Amendment doctrine as it relates to psychiatric holds and outlines the shortcomings of existing legal rules and standards governing emergency seizures for the purposes of mental health evaluation and treatment. Part III sets forth new standards and rules for assessing the constitutionality for emergency seizures for mental health evaluations. This Article concludes on that note.

I. MENTAL HEALTH CRISIS RESPONSE: AN OVERVIEW

To understand how police come to be involved in mental health crisis response, a brief overview of behavioral health infrastructure is in order. Mental health crisis response services are a fundamental component of any well-functioning, effective, and safe behavioral health system. There are a number of elements that make up an effective crisis care system—elements sometimes referred to as a "continuum of care."[51] In its toolkit for behavioral health crisis care, the Substance Abuse and Mental Health Services Administration (SAMHSA) defines mental health crisis response as "for anyone, anywhere and anytime."[52] A robust crisis response system includes: (1) "crisis lines accepting all calls and dispatching support based on the assessed need of the caller"; (2) "mobile crisis teams dispatched to wherever the need is in the community (not hospital emergency departments)"; and (3) "crisis receiving and stabilization facilities that

51. Comm. on Psychiatry & the Cmty. for the Grp. for the Advancement of Psychiatry, Roadmap to the Ideal Crisis System: Essential Elements, Measurable Standards and Best Practices for Behavioral Health Crisis Response 85 (2021), https://www.thenationalcouncil.org/wp-content/uploads/2021/03/031121_GAP_Crisis-Report_Final.pdf?daf=375ateTbd56 [https://perma.cc/B6QF-F6C6].

52. Substance Abuse and Mental Health Servs. Admin., National Guidelines for Behavioral Health Crisis Care—A Best Practice Toolkit 8 (2020), https://www.samhsa.gov/sites/default/files/national-guidelines-for-behavioral-health-crisis-care-02242020.pdf [https://perma.cc/B2NG-6NXP] [hereinafter SAMHSA, Best Practice Toolkit].

serve everyone that comes through their doors from all referral sources."[53] Other mental health advocacy organizations support this view.[54]

The demand for mental health crisis response services is high. More than a million emergency holds take place every year, though state and national aggregate data is hard to come by.[55] The lack of data frustrates any effort to examine—and critique—emergency holds systematically. Yet a partial picture emerges from publicly available data sources: A recent report found that "[i]n 2016, among 22 states, the median and mean emergency detention rates were 196 and 309 per 100,000 people, respectively."[56] Between 2011 and 2018, across 25 states, emergency detention rates per 100,000 people ranged from 29 in Connecticut to 966 in Florida.[57] Data from 2017 indicates that there were 37,209 psychiatric beds in state and county psychiatric facilities.[58] If 24-hour residential treatment centers, VA hospitals, private hospitals, and hospitals with separate psychiatric units are included, the number of beds in patient facilities rises to 170,200.[59] As the next section discusses, law enforcement

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53. Id.; see also Nat'l Ass'n of State Mental Health Program Dirs., A Comprehensive Crisis System: Ending Unnecessary Emergency Room Admissions and Jail Bookings Associated With Mental Illness 4 (2018), https://www.nasmhpd.org/sites/default/files/TACPaper5_ComprehensiveCrisisSystem_508C.pdf [https://perma.cc/4NB8-CB4B] (defining essential crisis services as "(1) regional or statewide crisis call centers coordinating in real time, (2) centrally deployed, 24/7 mobile crisis response teams and (3) short-term, 'sub-acute' residential crisis stabilization programs").

54. See, e.g., Getting Treatment During a Crisis, Nat'l All. on Mental Illness, https://nami.org/About-Mental-Illness/Treatment/Getting-Treatment-During-a-Crisis [https://perma.cc/Z6X7-VYGT] (last visited Mar. 8, 2024) (stating that effective response systems include 24-hour crisis lines, walk-in crisis services, and mobile crisis teams); Continuum of Care, Treatment Advoc. Ctr., https://www.treatmentadvocacycenter.org/resources/continuum-of-care/ [https://perma.cc/ENJ4-WDVB] (last visited Feb. 14, 2024) (endorsing a local crisis phone number, peer respite, and residential services as evidence-based crisis services).

55. See Nathaniel P. Morris, Detention Without Data: Public Tracking of Civil Commitment, 71 Psychiatric Servs. 741, 741 (2020) ("[B]asic statistics about civil commitment remain unavailable in many parts of the United States. At a 2019 conference, researchers highlighted that 'the number of people detained nationally has never been reliably estimated' and identified yearly psychiatric detention data in just eight states." (citing Gi Lee & David Cohen, Poster Presentation at the 23rd Annual Conference of the Society for Social Work and Research, How Many People are Subjected to Involuntary Psychiatric Detention in the US? First Verifiable Population Estimates of Civil Commitment (Jan 18, 2019), https://sswr.confex.com/sswr/2019/webprogram/Paper34840.html [https://perma.cc/BES8-FQJR])).

56. Gi Lee & David Cohen, Incidences of Involuntary Psychiatric Detentions in 25 U.S. States, 72 Psychiatric Servs. 61, 64 (2021).

57. Id.

58. Substance Abuse and Mental Health Servs. Admin., Civil Commitment and the Mental Health Care Continuum: Historic Trends and Principles for Law and Practice 7 (2019), https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf [https://perma.cc/FJB5-E6Y4].

59. Id.

officers serve as the default responders and primary conduits for crisis response services for individuals in need.[60]

A. *Law Enforcement's Role in Mental Health Crisis Response*

Law enforcement is a primary component of the provision of crisis services in jurisdictions across the United States.[61] In Arizona, law enforcement drop-offs to crisis facilities or emergency departments are the vast majority of all admissions to those facilities.[62] In Mississippi, police are the only conduit to services: An individual cannot access inpatient crisis services without being accompanied by law enforcement.[63] In other jurisdictions, police officers are part of mental health crisis responses where they make determinations for whether an individual is eligible for involuntary commitment, specifically for psychiatric holds.[64] And, in still

60. Jackson Beck, Melissa Reuland & Leah Pope, Behavioral Health Crisis Alternatives: Shifting From Police to Community Responses, Vera Inst. Just. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives [https://perma.cc/4AQR-9DLW] (describing police as "default first responders" for a large number of social problems, including behavioral health crises).

61. Police officers are not the only pathways into a crisis system. The individual in crisis, family, friends, primary care and social services providers, and crisis call centers are other conduits into the crisis care system. Nat'l Action All. for Suicide Prevention, How Does Your Crisis System Flow?, https://crisisnow.com/wp-content/uploads/2020/02/CrisisNow-HowDoesThatFlow.pdf [https://perma.cc/7RT7-RLJT] (last visited Feb. 14, 2024) (noting that, according to the National Action Alliance for Suicide Prevention, "[m]ost all community crisis referrals flow through the hospital [emergency department]").

62. See, e.g., SAMHSA, Best Practice Toolkit, supra note 52, at 58–59, 59 fig.4 (finding that eighty-one percent of all admissions to an Arizona Crisis Recovery Center were law enforcement drop-offs in 2019).

63. See N. Miss. State Hosp., Commitment, http://www.nmsh.state.ms.us/commitment.html [https://perma.cc/SJ6R-324J] (last visited Feb. 14, 2024) ("Admission to North Mississippi State Hospital is primarily initiated through an involuntary committal process. . . . If inpatient treatment is ordered, the person is brought to [the hospital] by the appropriate law enforcement officials . . . .").

64. See, e.g., Va. Code Ann. § 15.2-1704 (2024) ("A police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders and any other powers granted to law-enforcement officers . . . ."); see also Cal. Welfare & Inst. Code § 5150(a) (2024) ("When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, a peace officer . . . may, upon probable cause, take, or cause to be taken, the person into custody . . . ."); D.C. Code § 21-521 (2024) ("An accredited officer or agent of the Department of Mental Health . . . or an officer authorized to make arrests . . . or a physician or qualified psychologist of the person in question, who has reason to believe that a person is mentally ill . . . [may] take the person into custody . . . ."); N.H. Rev. Stat. Ann. § 135-C:28(III) (2024) ("When a peace officer . . . [has] reasonable suspicion to believe that the person may be suffering from a mental illness and probable cause to believe that . . . the person poses an immediate danger of bodily injury to himself or others, the police officer may place the person in protective custody."); N.Y. Mental Hyg. Law § 9.41 (McKinney 2024) ("Any peace officer . . . or police officer . . . may take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm . . . . Such officer may direct the removal of such person or remove him to any hospital . . . ."). For an overview of each state's standards for emergency evaluation, see generally Treatment Advoc. Ctr., State Standards

other jurisdictions, law enforcement officers provide security in emergency rooms and psychiatric hospitals responsible for providing care to individuals in crisis.[65]

Mental health crisis response services constitute anywhere from one out of ten to one out of three calls for police services.[66] When police get involved in crisis care implementation, the risk of violence is real. Individuals in mental crisis are more than sixteen times more likely to die in encounters with law enforcement.[67] To take one example, in Los Angeles, nearly a third of the more-than-thirty people shot by LAPD officers in 2021 were identified as having a psychiatric disability.[68] Furthermore, recent reporting by the *LA Times* indicates that for many individuals living with psychiatric disabilities, the interaction when officers deploy force typically isn't the first time they've encountered police or criminal legal system actors more broadly.[69]

Though crisis response takes up police time, it is not generally regarded as a "traditional" law enforcement function.[70] Predecessors to modern police forces were not involved in transporting people in crisis to hospitals; people in crisis were cared for by their families or their local communities that had resources to provide care. Historian Kim Nielsen notes that in the seventeenth century, care for individuals with psychiatric disabilities and individuals with cognitive disabilities was a local and

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for Emergency Evaluation (2020), https://www.treatmentadvocacycenter.org/storage/documents/state-standards/state-standards-for-emergency-evaluation.pdf [https://perma.cc/2RSD-PVKH].

65. See Ji Seon Song, Policing the Emergency Room, 134 Harv. L. Rev. 2646, 2654 (2021).

66. See Etienne Blais & David Brisebois, Improving Police Responses to Suicide-Related Emergencies: New Evidence on the Effectiveness of Co-Response Police-Mental Health Programs, 51 Suicide & Life-Threatening Behav. 1095, 1095 (2021) ("According to various estimates, between 7% and 31% of all police calls in North America involve an individual with mental health problems or in psychosocial crisis."); Treatment Advoc. Ctr., Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters 1 (2015), https://www.treatmentadvocacycenter.org/reports_publications/overlooked-in-the-undercounted-the-role-of-mental-illness-in-fatal-law-enforcement-encounters/ [https://perma.cc/5DYR-V27Q] [hereinafter Treatment Advoc. Ctr., Overlooked].

67. Treatment Advoc. Ctr., Overlooked, supra note 66, at 1.

68. Kevin Rector, String of LAPD Shootings Exposes L.A.'s Broken Mental Health System, Officials Say, L.A. Times (Nov. 18, 2021), https://www.latimes.com/california/story/2021-11-18/string-of-lapd-shootings-exposes-l-a-s-broken-mental-health-system-officials-say (on file with the *Columbia Law Review*).

69. Id.; see also Kevin Rector, Shootings by LAPD Officers Rising Again After Years of Decline, L.A. Times (Oct. 15, 2021), https://www.latimes.com/california/story/2021-10-15/string-of-recent-lapd-shootings-pushes-2021-count-beyond-2020-2019-totals (on file with the *Columbia Law Review*).

70. See Benjamin Andoh, The Evolution of the Role of the Police With Special Reference to Social Support and the Mental Health Statutes, 38 Med. Sci. & L. 347, 348 (1998) (discussing "non-traditional" social support roles performed by police).

communal concern within the American colonies.[71] Though wealthy individuals with disabilities could rely on their families for support, the community at large was responsible for caring for individuals labeled as "dangerous" and "insane." For instance, according to Nielsen, "A 1694 Massachusetts statute guaranteed that each community had the responsibility 'to take effectual care and make necessary provision for the relief, support and safety of such impotent or distracted person.' If the insane person was destitute, they became the town's fiscal responsibility."[72] Similar statutes were passed later in Connecticut, New York, Rhode Island, Vermont, and Virginia.[73]

Beginning in the second half of the nineteenth century, U.S. cultural and social norms shifted the care of disabled people from the purview of local families and local jurisdictions to state-run asylums "established and administered by the states."[74] During this period, smaller rural and agrarian communities gave way to larger urban and industrial centers while the numbers of individuals labeled as "mentally ill" increased.[75] Historian Gerald Grob explains this shift from familial and community care to the large asylum as partly due to the increased visibility of people with psychiatric disabilities in public spaces and growing "public concern about security."[76]

At the same time, law enforcement entities that preceded organized police forces—constables and justices of the peace—did play a role in managing individuals in crisis in public spaces, particularly when individuals in crisis were labeled as dangerous. Eighteenth century English statues specifically provided constables with a basis for seizing individuals labeled as "mentally disordered" who were found wandering in public spaces.[77] England's Vagrancy Act of 1714 permitted constables to arrest individuals labeled as "lunatics" and take them to a Justice who could issue an order to return the individual to that person's home district. This law

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71. See Kim E. Nielsen, A Disability History of the United States 25 (2012); see also Donna R. Kemp, Mental Health in America 2 (2007) (explaining that care for individuals with psychiatric disabilities was the responsibility of family members and the local community or parish).

72. Nielsen, supra note 71, at 25.

73. Id.

74. See Gerald N. Grob, The Mad Among Us: A History of the Care of America's Mentally Ill 40 (1994) [hereinafter Grob, The Mad Among Us]; Jefferson D.E. Smith & Steve P. Calandrillo, Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After *Olmstead v. L.C.*, 24 Harv. J.L. & Pub. Pol'y 695, 706 (2001) ("Before the proliferation of institutions in the mid-1800s, the care of mentally disabled individuals was left to families, jails, poorhouses, and ad hoc community arrangements.").

75. See Grob, The Mad Among Us, supra note 74, at 23–24 (explaining that "[t]he dramatic growth in population was accompanied by a proportionate increase in the number of insane persons," with "the mental hospital . . . designed to serve more densely populated areas and to assume functions that previously had been the responsibility of families").

76. Id. at 24.

77. Andoh, supra note 70, at 350.

and the Vagrancy Act of 1744 were primarily concerned with removing from public places "dangerous lunatic[s]," defined as "persons who, by their lunacy or otherwise, are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad."[78] The laws permitted detention of such persons in a "secure place within the parish."[79]

More modern accounts of the police role rarely point to this history; more often they take police involvement in crisis response as given.[80] Longstanding views that police are necessary, if not appropriate, responders to mental health crises are reflected in policing literature.[81] Sociologist Egon Bittner's classic study referred to the police role in mental crisis response as "psychiatric first aid."[82] More recently, researchers on the role of police in crisis services have recognized that "[t]he police have a great deal of discretion in the exercise of their duties, including determining what to do when dealing with a person with acute mental illness in the community."[83] They often use "informal tactics, such as trying to 'calm' the person or taking the person home."[84] These accounts suggest some of the field's foundational literature takes the police role in mental health crisis response as given.

Justifications for police involvement in mental crisis response are buttressed by existing interpretations of parens patriae authority and the state's police power. The state's relationship to individuals in crisis, in particular, is structured by the state's police power to regulate the general welfare and has been used to justify police involvement in caring for people with psychiatric disabilities in general.[85] Parens patriae is a legal

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78. Id. (internal quotation marks omitted).

79. Id.

80. See, e.g., Linda A. Teplin, Managing Disorder: Police Handling of the Mentally Ill, *in* Mental Health and Criminal Justice 157, 157 (Linda A. Teplin, ed., 1984) ("Police have long been recognized as a primary mental health resource within the community.").

81. See, e.g., Egon Bittner, Police Discretion in Emergency Apprehension of Mentally Ill Persons, 14 Soc. Probs. 278, 278 (1967) ("The official mandate of the police includes provisions for dealing with mentally ill persons."); Robin Shepard Engel & Eric Silver, Policing Mentally Disordered Suspects: A Reexamination of the Criminalization Hypothesis, 39 Criminology 225, 225 (2001) ("Contact with mentally disordered citizens has long been a part of police work.").

82. Bittner, supra note 81, at 288.

83. H. Richard Lamb, Linda E. Weinberger & Walter J. DeCuir, Jr., The Police and Mental Health, 53 Psychiatric Servs. 1266, 1267 (2002).

84. Id.

85. See, e.g., McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 547 (1st Cir. 1996) ("The legitimacy of the State's parens patriae and 'police power' interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others is beyond dispute." (emphasis omitted)); John Kip Cornwell, Understanding the Role of the Police and Parens Patriae Powers in Involuntary Civil Commitment Before and After *Hendricks*, 4 Psych. Pub. Pol'y, & L. 377, 377–78 (1998) ("The state's authority to commit individuals involuntary for psychiatric care is derived from two sources: its *parens patriae* power . . . and its police power . . . .").

concept that descended from English law.[86] The doctrine refers to the powers and duties "exercised by the King in his capacity as 'father of the country.'"[87] Parens patriae traditionally referred to the power of the king to act as guardian for those persons who were unable to act on their own behalf. Historically, those deemed incapable of caring for themselves were individuals labeled as having physical, mental, and cognitive disabilities. Blackstone referred to the king's role under parens patriae as "the general guardian of all infants, idiots, and lunatics," and as superintendent of "all charitable uses in the kingdom."[88] As the Supreme Court has said, a state has "a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[89] Today, parens patriae and the police power provide powerful (and rarely questioned) justifications for the protection of citizens who are unable to care for themselves or who pose a risk of harm to others, including individuals who are in mental crisis.[90]

Though these doctrines are longstanding, the state's responsibilities with respect to individuals in crisis shifted markedly after deinstitutionalization.[91] The delivery of mental health services shifted from large, congregate facilities to a constellation of smaller public and private entities.[92] After deinstitutionalization, policymakers failed to fund programs required to meet the level of need within local communities,[93] including crisis response and chronic care services in communities that

86. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972).

87. Id. (citing Michael Malina & Michael D. Blechman, Parens Patriae Suits for Treble Damages Under the Antitrust Laws, 65 Nw. U. L. Rev. 193, 197 (1970)); Michael L. Rustad & Thomas H. Koenig, State Protection of Its Economy and Environment: Parens Patriae Suits for Damages, 6 Colum. J.L. & Soc. Probs. 411, 412 (1970)).

88. 3 William Blackstone, Commentaries *47.

89. Addington v. Texas, 441 U.S. 418, 426 (1979). On the limits of a state's power to detain, see O'Connor v. Donaldson, 422 U.S. 563, 565–67, 576 (1975) (holding that a finding of mental illness alone is insufficient to justify confinement of a "nondangerous individual").

90. See Stephen J. Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 Calif. L. Rev. 54, 58 (1982) (noting that "[i]nvoluntary commitment is an extraordinary exercise of the police power and paternalism of the state").

91. See Chris Koyanagi, Learning from History: Deinstitutionalization of People With Mental Illness as Precursor to Long-Term Care Reform, Kaiser Comm'n on Medicaid and the Uninsured 6–8 (2007), https://www.kff.org/wp-content/uploads/2013/01/7684.pdf [https://perma.cc/LQJ2-V94V] (discussing the history of deinstitutionalization from 1955–1980).

92. See Bernard E. Harcourt, Reducing Mass Incarceration: Lessons From the Deinstitutionalization of Mental Hospitals in the 1960s, 9 Ohio St. J. Crim. L. 53, 59 n.18 (2011) (defining deinstitutionalization as "the decline in patient populations and the use of large-scale, state-run psychiatric facilities for treatment of the mentally ill").

93. See Koyanagi, supra note 91, at 2.

fall within these community-based services. Rather than receive chronic care services in their communities, some individuals were tracked into the criminal legal system, a pattern that continues to this day.[94] As one advocacy organization put it, "Deinstitutionalization, . . . discriminatory federal Medicaid funding practices, and the prolonged failure by states to fund their mental health systems drive those in need of care into the criminal justice and corrections systems, rather than into the public health system where they belong."[95]

By most accounts, after deinstitutionalization, police began to play a more prominent role "in the management of persons . . . experiencing psychiatric crises."[96] Changes to laws governing civil commitment and affirming patient rights and liberties also led to increased interactions between law enforcement and people experiencing mental crises.[97] Again, a brief overview of the history of societal responses to "mental illness" is instructive here. In the colonial era, individuals who needed mental treatment but lacked support from their families were housed in jails and almshouses, with no therapeutic treatment.[98] The first involuntary civil commitment occurred in Philadelphia in 1752, with private and public facilities developing across the states by the early nineteenth century.[99] During the Progressive Era, states started developing inpatient psychiatric hospitals for acute treatment and emergency psychiatric holds.[100] It is during this era that police (but also physicians) became involved in implementing emergency, involuntary psychiatric holds without prior judicial approval.[101] Yet by the late 1940s, advocates began to complain about police involvement, jail detention, and procedures that mirrored criminal procedures.[102]

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94. See Harcourt, supra note 92, at 87 (discussing the "transinstitutionalization" of mental health patients into jails, prisons, and nursing homes). But see Liat Ben-Moshe, Decarcerating Disability: Deinstitutionalization and Prison Abolition 147 (2020) [hereinafter Ben-Moshe, Decarcerating Disability] (contending that the transinstitutionalization thesis oversimplifies the relationship between deinstitutionalization and larger jail and prison populations).

95. Criminalization, Treatment Advoc. Ctr., https://www.treatmentadvocacycenter.org/key-issues/criminalization [https://perma.cc/S7Z5-YR3F] (last visited Feb. 14, 2024).

96. Lamb et al., supra note 83, at 1266; see also Linda A. Teplin, Keeping the Peace: Police Discretion and Mentally Ill Persons, 244 Nat'l Inst. Just. J. 8, 9 (2000) [hereinafter Teplin, Keeping the Peace] (explaining why "responding to mentally ill people has become a large part of the police peacekeeping function").

97. See Teplin, Keeping the Peace, supra note 96, at 9 (listing several factors that increased the likelihood of police encounters with individuals with psychiatric disabilities).

98. Stuart A. Anfang & Paul S. Appelbaum, Civil Commitment—The American Experience, 43 Isr. J. Psychiatry & Related Scis. 209, 209 (2006).

99. Id. at 210.

100. See id.

101. Id.

102. Id. at 210–11.

In the 1960s and 1970s, states modified their civil commitment laws in response to litigation and advocacy. State civil commitment laws shifted from the easily satisfied requirement that the patient "needs treatment" to a heightened legal standard that the patient pose a "danger to self" or have a "grave disability" as the basis for commitment.[103] These changes to the legal standards were in response to concerns that the state's power to detain people was too broad and eclipsed the autonomy and individual rights of patients.[104] As one commentator put it, "danger-or-grave-disability statutes were . . . responding to inaccurate medical doctrines [and] . . . the horrors of judicial opinions that, for instance, sanctioned the sterilization of the mentally ill in the early twentieth century."[105]

Today, civil commitment laws in forty-seven states and the District of Columbia permit three forms of involuntary commitment: (1) emergency hospitalization for evaluation or "psychiatric holds," (2) inpatient civil commitment, and (3) outpatient civil commitment, or assisted outpatient treatment, a community-based intervention.[106] Emergency hospitalization for evaluation refers to crisis response programs in which a patient is admitted to a treatment facility for psychiatric evaluation for up to a few days. Inpatient civil commitment, or involuntary hospitalization, refers to the process by which a judge orders hospital treatment for someone who continues to satisfy the state's civil commitment criteria following an emergency hold.[107] The criteria for whether an individual is eligible for involuntary commitment vary from state to state.[108] Finally, outpatient civil commitment, or assisted outpatient treatment, is a coercive treatment option in which a judge orders a qualifying person with symptoms of mental illness to adhere to a mental health treatment plan while living in the community.[109]

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103. See David D. Doak, Note, Theorizing Disability Discrimination in Civil Commitment, 93 Tex. L. Rev. 1589, 1598–1601 (2015).

104. Rachel A. Scherer, Note, Toward a Twenty-First Century Civil Commitment Statute: A Legal, Medical, and Policy Analysis of Preventive Outpatient Treatment, 4 Ind. Health L. Rev. 361, 363–67 (2007).

105. Id. at 364 n.11 (citing Buck v. Bell, 274 U.S. 200, 207 (1927)). Courts also incorporated criminal procedures into the civil commitment process citing the Supreme Court's opinion in In re Gault, 387 U.S. 1, 70 (1967). See, e.g., Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972).

106. See Lisa Dailey, Michael Gray, Betsy Johnson, Sabah Muhammad, Elizabeth Sinclair & Brian Stettin, Treatment Advoc. Ctr, Grading the States: An Analysis of Involuntary Psychiatric Treatment Laws 6, 9–11 (2020), https://www.treatmentadvocacycenter.org/wp-content/uploads/2023/10/grading-the-states-6.pdf [https://perma.cc/3BAD-9ELG] (showing that Connecticut, Maryland, and Massachusetts have not yet adopted court-ordered outpatient treatment).

107. Id.

108. See Dailey et al., supra note 106, at 18–21 (discussing varying standards and definitions utilized by states for inpatient civil commitment laws).

109. Id. at 22–23, 25.

State statutes confer discretion on police to determine whether a person meets the criteria for emergency hospitalization. In some states, statutes explicitly identify police as qualified to evaluate whether the criteria for involuntary commitment are met.[110] In other states, police are eligible to make such determinations, or at least not expressly excluded from making them.[111] That said, police do not assess potential "harm to self," harm to others, or "grave disability" in isolation. Social workers, behavioral health specialists, and case workers connected to child protective services, among others, may also play a role in these determinations.[112]

Frequently, the police are called into crisis situations by a relative, neighbor, or friend and asked to perform so-called welfare checks.[113] The reporting here is not always the typical call to law enforcement to report an alleged crime, though in some cases family members, friends, and neighbors have reported allegations of violence.[114] Lacking alternatives to

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110. See, e.g., Ariz. Rev. Stat. Ann. § 36-524 (2024) (authorizing "peace officer[s]" to apply for "emergency admission" based on their determination that a person "is a danger to self or others or has a persistent or acute disability or a grave disability, and is unable or unwilling to undergo voluntary evaluation"); Iowa Code Ann. § 229.22(2)(a)(1) (2024) ("[A]ny peace officer who has reasonable grounds to believe that a person is mentally ill, and because of that illness is likely to physically injure the person's self or others if not immediately detained, may without a warrant take . . . that person . . . to the nearest available facility or hospital . . . ."); Ky. Rev. Stat. Ann. § 202A.041(1) (West 2024) (authorizing "peace officer[s]" to act upon their determination that "an individual is mentally ill and presents a danger or threat of danger to self, family, or others if not restrained" by transporting them to the appropriate facility).

111. See, e.g., Cal. Welfare & Inst. Code § 5150(a) (2024) (authorizing "peace officer[s]" to "take . . . the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention"); D.C. Code § 21-521 (2024) (permitting an "officer authorized to make arrests" to take someone into custody who he "has reason to believe . . . is mentally ill and . . . likely to injure himself or others"); Ga. Code. Ann. § 37-3-42(a) (2024) (allowing a "peace officer" with probable cause, after consulting with a physician and gaining transport authorization, to "take any person to an emergency receiving facility").

112. See, e.g., Myers v. Patterson, 819 F.3d 625, 633–34 (2d Cir. 2016) (discussing personal observations of police officer and case worker from Nassau County Child Protective Services).

113. Policing Project, Reimagining Public Safety Issue Brief Series: Welfare Checks 1 (2024), https://assets-global.website-files.com/622ba34c0b752e795eb9334b/65c6820cc07ca237f1e377de_Welfare%20Checks%2002.08.24.pdf [https://perma.cc/66QL-QXZ4].

114. See, e.g., Hannah Fry, Fatal Shooting of Autistic Teen Raises Concerns About Police Response to People With Mental Health Issues, L.A. Times (Mar. 12, 2024), https://www.latimes.com/california/story/2024-03-12/fatal-police-shooting-of-autistic-teen-raises-concerns-about-police-response-to-mental-health-issues (on file with the *Columbia Law Review*) ("Some people with autism experience heightened emotions, and on that day Ryan responded [to a disagreement with his parents] by breaking glass on the front door . . . ." (quoting attorney DeWitt Lacy)); Adrienne Hurst, Black, Autistic, and Killed by Police, Chi. Reader (Dec. 17, 2015), https://www.chicagoreader.com/chicago/stephon-watts-police-shooting-autism-death/Content?oid=20512018 [https://perma.cc/8DE8-T2J9] ("Like many families with autistic children, the Watts family relied on emergency

police, family members also call 911 to request assistance with relatives who may be off their medications and to resolve nonviolent disputes.[115] In some cases, reports include witness statements that these individuals are armed, or appear to be armed.[116] And in yet another subset of cases, in which individuals are armed with a deadly weapon, whether they actually pose a threat of imminent harm is often—or could be—contested.[117] In any event, the point is that there are a variety of reasons why relatives call the police to report family members experiencing mental health crises—violence (against themselves or others) is one reason, but it's not the only one. Callers may report that an individual is showing signs of mental distress or behaving "abnormally," or they may call to report a missing person or an escape from a mental facility or group home.[118] Given the variety of cases, it is unsurprising that many encounters that lead to deadly force by law enforcement stem from officers arriving to the scene wholly unprepared to respond to a mental health crisis or arriving prepared to respond using one tool: force.[119]

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services for help when Stephon became agitated or wandered off. . . . [After a] violent outburst, [his mother] called 911 in order to get him back on his medication and into emergency psychiatric treatment.").

115. See Jennifer D. Wood, Amy C. Watson & Anjali J. Fulambarker, The "Gray Zone" of Police Work During Mental Health Encounters: Findings From an Observational Study in Chicago, 20 Police Q. 81, 94–95 (2017) ("A common category of mental health-related calls originates from families who lack the resources to support members with mental illness over the long term.").

116. See, e.g., Nieto v. City of San Francisco, No. 14-cv-03823 NC, 2015 WL 7180609, at *1 (N.D. Cal. Nov. 16, 2015) (adjudicating the police killing of a man reported as being armed, despite subsequent eyewitness testimony that the only weapon present was a holstered Taser); Benjamin Mueller & Nate Schweber, Police Fatally Shoot a Brooklyn Man, Saying They Thought He Had a Gun, N.Y. Times (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/nyregion/police-shooting-brooklyn-crown-heights.html (on file with the *Columbia Law Review*) (describing the police killing of well-known local man carrying a metal pipe after a "frantic[]" woman's 911 call that "a man was pointing a gun at people").

117. See Hurst, supra note 114.

118. See, e.g., Gray v. Cummings, 917 F.3d 1, 16 (1st Cir. 2019) ("[A woman involuntarily committed for mental illness] absconded from the hospital on foot. Hospital staff called the Athol Police Department, asking that [she] . . . be 'picked up and brought back.'"); Jury Deadlocks on North Miami Cop Who Shot Unarmed Caretaker, CBS News (Mar. 15, 2019), https://www.cbsnews.com/news/charles-kinsey-shooting-clears-officer-jonathan-aledda-on-1-count-deadlocks-on-others-today-2019-03-15/ [https://perma.cc/QF5D-ZW5B] ("Prosecutors say [a mentally ill man] had left his nearby group home and sat down in the road to play with his toy. A motorist called 911, saying the man was holding what may be a gun and appeared suicidal.").

119. See, e.g., C.R. Div., DOJ, Investigation of the Baltimore City Police Department 75 (2016), https://www.justice.gov/d9/bpd_findings_8-10-16.pdf [https://perma.cc/7UG9-7GZV] (finding "reasonable cause to believe that BPD officers use unreasonable force in violation of the Fourth Amendment, and fail to make reasonable modifications necessary to avoid discrimination in violation of Title II of the Americans with Disabilities Act" (footnote omitted)).

B. *Pathways to Police Violence: Structural Deficiencies in Crisis Response*

Structural deficiencies in behavioral health systems coupled with high demand create what Professor Devon Carbado referred to as "[p]athways to [p]olice [v]iolence" and, as this Part argues, lead to increased encounters with law enforcement—whether in hospitals or on the streets.[120] Failures to adequately invest in a robust, community-based behavioral health system and fund effective crisis response systems track individuals in crisis into confrontations with law enforcement, often leading to arrests and incarceration in local jails.[121] Ultimately, the structural deficiencies in crisis care lead to institutionalization in prisons and jails and overreliance on emergency rooms. Police provide the conduit to these forms of crisis care within criminal legal systems and often within emergency rooms, which increases exposure to violence.

1. *Structural Deficiencies in Crisis Response.* — Each year, millions of Americans with behavioral healthcare needs—whether for mental disabilities, substance use dependencies, or both—are denied access to appropriate services. According to the SAMHSA, approximately fifty million adults in the United States report living with a mental health disability and about one-quarter report not receiving necessary mental health services.[122] Government officials, crisis care advocates, and administrators agree that jurisdictions across the United States are failing to meet these minimum standards of mental healthcare. In a recent guidance document, the SAMHSA recognized that "[t]he current approach to crisis care is patchwork and delivers minimal treatment for some people while others, often those who have not been engaged in care, fall through the cracks; resulting in multiple hospital readmissions, life in

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120. See Devon W. Carbado, From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence, 105 Calif. L. Rev. 125, 125, 131 (2017) (describing how Fourth Amendment doctrine "exposes African Americans not only to the violence of frequent police contact but also to the violence of police killings and physical abuse").

121. See Nat'l Ass'n of State Mental Health Program Dirs., supra note 53 ("[L]aw enforcement agencies report waiting an average of three hours to connect someone in crisis with a medical facility . . . compare[d] with 30 minutes to book them into jail . . . . [T]he average distance is five times longer to reach an access point for care than it is to reach the closest jail."). According to one study, individuals with psychiatric disabilities are more likely to be arrested for theft and trespassing offenses than people who do not have psychiatric disabilities. See Michael T. Compton, Adria Zern, Leah G. Pope, Nili Gesser, Aaron Stagoff-Belfort, Jason Tan de Bibiana, Amy C. Watson, Jennifer Wood & Thomas E. Smith, Misdemeanor Charges Among Individuals With Serious Mental Illnesses: A Statewide Analysis of More Than Two Million Arrests, 74 Psychiatric Servs. 31, 34 (2023).

122. Substance Abuse & Mental Health Servs. Admin., Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health 5 (2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf [https://perma.cc/Y8SC-GEX2].

the criminal justice system, homelessness, early death and suicide."[123] Deficiencies exist among private healthcare providers as well. A 2019 analysis of preferred provider organization claims data found that only one percent of healthcare spending went to treatment for substance use dependencies, and only a little more than four percent went to mental health treatment.[124]

The immense demands on crisis response systems place significant strain on state and local mental health services, often spilling over into the criminal legal system. Troublingly, about a third of individuals have their first experience with mental health treatment through law enforcement contact.[125] Beyond this, disjointed,[126] underfunded systems put a strain on healthcare systems and emergency departments, increasing the cost of healthcare.[127] As one advocacy organization put it, "With non-existent or inadequate crisis care, costs escalate due to an overdependence on restrictive, longer-term hospital stays, hospital readmissions, overuse of law enforcement and human tragedies that result from a lack of access to care."[128]

The DOJ under President Barack Obama identified similar shortcomings. The Obama DOJ launched numerous investigations into states and state-run entities based on allegations that they were providing inadequate crisis care and mental health services. Generally, these investigations included site visits, research, data collection, review of standing policies and procedures, and interviews with relevant staff, officials, community members, advocates, and individuals who received care services from the state or state-run entities.[129] At the conclusion of the

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123. SAMHSA, Best Practice Toolkit, supra note 52, at 3, 8 ("[W]e based this information in this toolkit on the experience of veteran crisis system leaders and administrators.").

124. See Steve Melek, Stoddard Davenport & T.J. Gray, Milliman, Addiction and Mental Health vs. Physical Health: Widening Disparities in Network Use and Provider Reimbursement 17 (2019), https://www.milliman.com/en/insight/addiction-and-mental-health-vs-physical-health-widening-disparities-in-network-use-and-p [https://perma.cc/ZB92-HF9J].

125. Treatment Advoc. Ctr., Road Runners: The Role and Impact of Law Enforcement in Transporting Individuals With Severe Mental Illness 1 (2019), https://www.treatmentadvocacycenter.org/wp-content/uploads/2024/01/Road-Runners.pdf [https://perma.cc/T8P9-3SMS].

126. See Nat'l Ass'n of State Mental Health Program Dirs., supra note 53, at 5 ("Far too often, crisis services do not represent a systemic approach to addressing community needs but rather a collection of disconnected, overlapping and non-coordinated services . . . often missing essential pieces needed to align the service delivered with the needs of the individual.").

127. See id. at 10 ("[A] lack of [mental health crisis] resources translates into paying for inefficiencies such as unnecessary [emergency department] bills that are estimated to typically cost between $1,200 and $2,264 . . . .").

128. SAMHSA, Best Practice Toolkit, supra note 52, at 8.

129. See, e.g., C.R. Div., DOJ, Investigation of Alameda County, John George Psychiatric Hospital, and Santa Rita Jail 3–4 (Apr. 22, 2021), https://www.justice.gov/crt/case-

investigations, the DOJ published letters detailing its findings—threatening to file suit against the state or state-run entities and outlining suggested and minimum remedial measures that the entities should begin implementing to avoid further violations.[130] Taken together, these suggested remedial measures often outlined different aspects of the same goal: developing effective and adequate mental health crisis response systems.[131]

DOJ investigations found an overreliance on police and unnecessary institutionalization, which resulted in violations of the Constitution and federal disability laws.[132] At the root of these allegations was the lack of adequate crisis care services, which could prevent reliance on police, institutionalization, and unlawful conduct.[133]

Investigations into Alameda County and the Portland Police Bureau are illustrative and highlight the general systemic issues and rights violations that occur when there is an overreliance on police and institutionalization. In April 2021, the DOJ completed an investigation into Alameda County, California, the Alameda County Sheriff's Office, and the Santa Rita Jail.[134] The investigation found that the county's

document/file/1388891/download [https://perma.cc/83BZ-XLWD]; Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., DOJ, on United States' Investigation, Pursuant to the Americans with Disabilities Act, of Louisiana's Use of Nursing Facilities to Serve People With Mental Health Disabilities to John Bel Edwards, Governor, La. 3 (Dec. 21, 2016), https://www.justice.gov/opa/file/920141/download [https://perma.cc/2LE7-TRRA]; Letter from Thomas E. Perez, Assistant Att'y Gen., DOJ, on United States' Investigation of the State of Mississippi's Service System for Persons With Mental Illness and Developmental Disabilities to Haley R. Barbour, Governor of Miss. 5–6 (Dec. 22, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2012/01/26/miss_findletter_12-22-11.pdf [https://perma.cc/C4UX-REQ9] [hereinafter Perez, Mississippi]; Letter from Thomas E. Perez & Amanda Marshall, Assistant Att'y Gen. & Att'y, DOJ, on Investigation of the Portland Police Bureau to Sam Adams, Mayor, City of Portland 4–5 (Sept. 12, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf [https://perma.cc/C8BM-HLBR] [hereinafter Perez & Marshall, Portland].

130. See, e.g., C.R. Div., DOJ, supra note 129, at 36–39; Gupta, supra note 129, at 28–29; Perez, Mississippi, supra note 129, at 32–33; Perez & Marshall, Portland, supra note 129, at 40–41.

131. See C.R. Div., DOJ, supra note 129, at 36–37; Gupta, supra note 129, at 28–29; Perez, Mississippi, supra note 129, at 32–33; Perez & Marshall, Portland, supra note 129, at 40–41.

132. See C.R. Div., DOJ, supra note 129, at 1–2; Gupta, supra note 129, at 1–2; Perez, Mississippi, supra note 129, at 2–4; Perez & Marshall, Portland, supra note 129, at 2–4.

133. See C.R. Div., DOJ, supra note 129, at 11–13 ("It is the County's failure to provide evidence-based, community-based treatment, including crisis services and processes to divert people from psychiatric institutionalization, that results in and perpetuates the cycle of needless institutionalization described above."); Perez & Marshall, Portland, supra note 129, at 6–8 (identifying the lack of "an adequate support system to help people avoid a mental health crisis" and of "an adequate crisis response system to provide services to and help stabilize people in crisis" as "the most significant issues" in the state's mental health system that cause more police encounters).

134. Letter from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., DOJ, to Keith Carson, President, Alameda Cnty. Bd. of Supervisors; Gregory J. Ahern, Alameda Cnty.

inadequate crisis care system was causing a risk of unnecessary institutionalization and that inadequate crisis care and mental health services in Santa Rita Jail were resulting in serious Americans with Disabilities Act (ADA) violations against incarcerated people.[135] In 2012, another DOJ investigation found that the Portland Police Bureau exhibited a pattern or practice of using unnecessary or unreasonable force against people who had or were perceived as having a "mental illness" as a result of "deficiencies in policy, training, and supervision."[136] The report revealed that a lack of adequate crisis care services had caused an overreliance on police, which in turn exacerbated the impact of the police's lack of training and pattern of excessive force against individuals experiencing mental health crises.[137]

Other investigations have revealed ADA violations in state-run nursing facilities that were failing to provide community-based services and placing individuals in institutions unnecessarily.[138] These investigations all point to the lack of crisis care services as a cause of unnecessary institutionalization and suggest developing such services as a remedial measure to prevent individuals from ending up in these facilities in the first place.[139]

In most jurisdictions without a comprehensive crisis service system, involving law enforcement contributes to increases in wait times and access to care. Oftentimes, police will encounter someone in crisis and lack knowledge about where exactly to take them to access care. When police do have knowledge of local crisis response providers, space at the facility may not be available. In both scenarios, police might take people in crisis to emergency departments or even jail.[140] As one crisis services provider found, this process is deeply inefficient: "It can take hours or even days in an emergency department" for a person to access mental health crisis services.[141] The outcomes of such systemic failures are beyond inefficient; they are deadly. Such local deficiencies are even more troubling when considering the surging demand for mental health services alongside increased suicide rates. According to the CDC, suicides rose in 2021, after

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Sheriff/Coroner; & Mark Fratzke, Alameda Health Sys. Interim Chief Operating Officer 1 (Apr. 22, 2021).

135. Id. at 1–2.

136. Perez & Marshall, Portland, supra note 129, at 1–3.

137. See id. at 7.

138. See, e.g., Gupta, supra note 129, at 1–2; Perez, Mississippi, supra note 129, at 2–5; see also Letter from Grace Chung Becker, Acting Assistant Att'y Gen., to Theodore R. Kulongoski, Governor of Or. 5 (Jan. 9, 2008), https://www.justice.gov/sites/default/files/crt/legacy/2011/04/14/oregon_state_hospital_findlet_01-09-08.pdf [https://perma.cc/2P9B-6WR8] ("Many of these deficiencies stem from a system that does not have clear, specific standards of care or an adequate number of trained professional and direct care staff.").

139. See C.R. Div., DOJ, supra note 129, at 13–14; Perez & Marshall, Portland, supra note 129, at 19–23.

140. Nat'l Ass'n of State Mental Health Program Dirs., supra note 53, at 5–6, 8.

141. SAMHSA, Best Practice Toolkit, supra note 52, at 54.

two years of decline, from 45,979 in 2020 to 47,646 in 2021.[142] Suicide claimed the lives of more than 48,000 Americans in 2018.[143]

2. *Street-Level Violent Encounters Between Police and Individuals in Mental Crisis.* — When police serve as a gateway for accessing mental health services, there is a high risk that individual encounters will turn violent. A *Washington Post* database indicates that in almost sixty percent of the reported cases of an individual being killed by police, individuals (disabled *and* nondisabled) reportedly had a gun.[144] Reporting from the *Boston Globe* found that "[a]bout 90 percent of [disabled and non-disabled] people shot by police [in Massachusetts] had weapons and did not respond when told to drop them."[145] That said, although most individuals killed by the police are armed with *something*, including but not limited to guns, many are not. For example, data collected since 2015 show that 155 people killed by police were found to be holding toy guns.[146] According to the *Globe*, "Most often—in 65 percent of shootings involving apparent mental illness—that weapon was a knife or other sharp object, such as a hatchet, machete, or screwdriver. However, 13 percent of the time, police shot people holding firearms."[147] Police use of force against unarmed people also reveals disparities along racial lines. Black people, though they comprise a disproportionate share of police killings, make up one-third of unarmed victims.[148] Whether similar disparities exist for disabled people—

142. Sally C. Curtin, Matthew F. Garnett & Farida B. Ahmad, CDC, Provisional Numbers and Rates of Suicide by Month and Demographic Characteristics: United States, 2021, at 1 (2022), https://www.cdc.gov/nchs/data/vsrr/vsrr024.pdf [https://perma.cc/M4K3-R38Q].

143. Id. at 3; 988 Suicide and Crisis Lifeline, FCC, https://www.fcc.gov/suicide-prevention-hotline [https://perma.cc/JN7B-CUDG] (last updated Nov. 30, 2022) ("In 2020 alone, the U.S. had one death by suicide about every 11 minutes—and for people aged 10-34 years, suicide is a leading cause of death."). The concurring Justices surfaced these concerns at oral argument as they articulated a set of exigencies that might justify warrantless searches and seizures for the purposes of mental health evaluation and treatment. See Transcript of Oral Argument at 39–41, 53, 79, Caniglia v. Strom, 141 S. Ct. 1596 (2021) (20-157), 2021 WL 1123794 ("[E]very single day on average, there are 65 suicides by gunshot in the United States . . . .").

144. Joe Fox, Adrian Blanco, Jennifer Jenkins, Julie Tate & Wesley Lowery, What We've Learned About Police Shootings 5 Years After Ferguson, Wash. Post (Aug. 9, 2019), https://www.washingtonpost.com/nation/2019/08/09/what-weve-learned-about-police-shootings-years-after-ferguson/ [https://perma.cc/GK5V-A8CW].

145. Jenna Russell, Michael Rezendes, Maria Cramer, Scott Helman & Todd Wallack, Families Failed by a Broken Mental Health Care System Often Have No One to Call but Police, Bos. Globe (July 6, 2016), https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/police-confrontations/ [https://perma.cc/2LS7-J38W].

146. Fox et al., supra note 144.

147. Russell et al., supra note 145.

148. See Deidre McPhillips, Deaths From Police Harm Disproportionately Affect People of Color, U.S. News (June 3, 2020), https://www.usnews.com/news/articles/2020-06-03/data-show-deaths-from-police-violence-disproportionately-affect-people-of-color (on file with the *Columbia Law Review*) ("More than 1,000 unarmed people died as a result of police harm between 2013 and 2019 . . . . About a third of them were black."); see also Campaign

and not just those showing "signs of mental illness"—is unknown as there is no national database containing this information. What is known is that disabled people of color make up a disproportionate number of police killings.[149]

The frequency of deadly encounters between individuals in crisis and law enforcement has led to a series of protests, hashtags, and calls for systemic and structural change.[150] When Walter Wallace Jr., a twenty-seven year old Black man with bipolar disorder and in mental crisis, was killed by police in Philadelphia, local communities rallied.[151] Police reported Wallace was brandishing a knife and waiving it "erratically."[152] The Wallace family honed in on the inappropriate and violent police response to Walter's mental health crisis in the media, and an attorney for the family put it this way: "You don't deal with crisis with a firearm."[153]

Beyond this, stereotypes about people with psychiatric disabilities can facilitate violent encounters at the individual level. Constructions of dangerousness reflect deep-seated and pervasive stereotypes, myths, and tropes about mental illness and its connections to dangerousness and criminality in U.S. society. These biases show up in clinical assessments of dangerousness for the purpose of civil commitment and have garnered

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Zero, Mapping Police Violence, https://mappingpoliceviolence.org/ [https://perma.cc/PR87-Y5AR] (last updated Mar. 17, 2024) (aggregating comprehensive data on police killings in the United States from 2013 to the present).

149. See Fatal Force, Wash. Post, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (on file with the *Columbia Law Review*) (last updated Apr. 7, 2024); Vilissa Thompson, Understanding the Policing of Black, Disabled Bodies, Ctr. for Am. Progress, https://www.americanprogress.org/article/understanding-policing-black-disabled-bodies/ [https://perma.cc/C9CZ-XRKX] (Feb. 10, 2021) ("In the United States, 50 percent of people killed by law enforcement are disabled, and more than half of disabled African Americans have been arrested by the time they turn 28—double the risk in comparison to their white disabled counterparts.").

150. Nicole Hong, Rochester Officers Suspended After Pepper-Spraying of 9-Year-Old Girl, N.Y. Times (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/nyregion/rochester-police-pepper-spray-child.html (on file with the *Columbia Law Review*); Bill Hutchinson, Police Handcuffed Lifeless Andre Hill Instead of Helping Him, Family's Lawyer Says, ABC News (Dec. 31, 2020), https://abcnews.go.com/US/police-handcuffed-lifeless-andre-hill-helping-lawyer/story?id=74988393 [https://perma.cc/8MB8-L252]; Claudia Lauer, Walter Wallace Jr.'s Family Called for Ambulance, Not Police, His Parents Say, NBC Phila. (Oct. 29, 2020), https://www.nbcphiladelphia.com/news/local/family-of-walter-wallace-called-for-ambulance-not-police-lawyer-says/2575903/ [https://perma.cc/459X-HMNY]; Christina Morales, Andre Hill's Family Reaches $10 Million Settlement With City of Columbus, N.Y. Times (May 14, 2021), https://www.nytimes.com/2021/05/14/us/andre-hill-columbus-settlement.html (on file with the *Columbia Law Review*).

151. Nicole Chavez, Walter Wallace Jr Struggled With Mental Health Issues, Family Says, CNN (Oct. 28, 2020), https://www.cnn.com/2020/10/28/us/walter-wallace-jr-family-reaction/index.html [https://perma.cc/9UXJ-URTJ].

152. Id.

153. Id. (internal quotation marks omitted).

significant criticism in the scholarly literature.[154] Similarly, tasking police with responding to individuals experiencing mental crises both reflects and reinforces societal stereotypes that link people with psychiatric disabilities to characteristics of dangerousness and criminality.[155] Historically, disabled people were segregated into large-scale institutions as part of eugenics policies aimed at violently suppressing their reproductive capacities and preventing them from passing on supposedly defective traits.[156] Beyond the institution, disabled people were policed heavily in public spaces and arrested for violating quality-of-life offenses and so-called "ugly laws." Professor Susan Schweik explains that during the late nineteenth and early twentieth centuries, some municipalities enacted laws that expressly prohibited the public appearance of certain "unsightly" disabled people.[157] In some localities, disabled people were subjected to removal and criminal sanction for simply appearing in public with physical disabilities such as blindness, deformities, and other "unsightly" features.[158] Beyond this, local jurisdictions passed a bevy of laws aimed at preserving order in public and private spaces, from public squares and streets to "bawdy" and "disorderly" houses, ridding these places of persons labeled disorderly—including so-called vagrants, beggars, and panhandlers.[159]

These historical practices likely have informed (and continue to inform) how the public thinks about people with psychiatric disabilities, particularly with respect to notions of dangerousness. According to one study, "[M]embers of the public undoubtedly exaggerate both the strength of the relationship between major mental disorders and violence, as well as their own personal risk from the severely mentally ill."[160] Indeed, researchers have concluded that "[p]ublic perceptions of the link between mental illness and violence are central to stigma and discrimination as people are more likely to condone forced legal action and coerced treatment when violence is at issue."[161] Such public perceptions are concerning in light of extensive research as to the ineffectiveness of

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154. See, e.g., Michel Foucault, About the Concept of the "Dangerous Individual" in 19th Century Legal Psychiatry, 1 Int'l J.L. & Psychiatry 1, 2, 6–7 (1978).

155. Jamelia N. Morgan, Policing Under Disability Law, 73 Stan. L. Rev. 1401, 1423–24 (2021) [hereinafter Morgan, Policing Under Disability Law].

156. Id. at 1413–14.

157. Susan M. Schweik, The Ugly Laws: Disability in Public 1–2, 33 (2009).

158. Id. at 31–33, 35–36.

159. See William J. Novak, The People's Welfare: Law & Regulation in Nineteenth-Century America 167–71 (1996) (describing local laws).

160. Heather Stuart, Violence and Mental Illness: An Overview, 2 World Psychiatry 121, 123 (2003).

161. Id. (citing Bernice A. Pescosolido, John Monahan, Bruce G. Link, Ann Stueve & Aeko Kikuzawa, The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons With Mental Health Problems, 89 Am. J. Pub. Health 1339, 1339–45 (1999)).

involuntary treatment, as well as the harms of such coercive treatment to mental health consumers.[162]

Misconceptions about psychiatric disabilities and violence show up in the attitudes of law enforcement towards people with psychiatric disabilities. For example, according to one study, researchers found that police officers perceived people with psychiatric disabilities to be more dangerous than the general population, despite research indicating that these individuals are accused of serious crimes at a rate proportional to their population numbers.[163] Another study found that younger, white officers with less training on people with psychiatric disabilities "perceived persons with mental illness as being more dangerous than . . . their older, nonwhite, and better-trained colleagues."[164] At the same time, another study found that while police officers viewed people with schizophrenia as "less responsible, more deserving of pity, and more worthy of help than a

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162. See Joshua T. Jordan & Dale E. McNiel, Perceived Coercion During Admission Into Psychiatric Hospitalization Increases Risk of Suicide Attempts After Discharge, 50 Suicide & Life-Threatening Behav. 180, 186 (2019) ("[P]atients who perceived their hospitalization as coercive were significantly more likely to make a postdischarge suicide attempt . . . ."); Damian Smith, Eric Roche, Kieran O'Loughlin, Daria Brennan, Kevin Madigan, John Lyne, Larkin Feeney & Brian O'Donoghue, Satisfaction With Services Following Voluntary and Involuntary Admission, 23 J. Mental Health 38, 43 (2014) (finding associations between lower levels of satisfaction following psychiatric admission and the following factors: "involuntary admission, co-morbid substance use disorder, less procedural justice, greater perceived coercion, experiencing the use of seclusion and medication without consent"); Sophie Staniszewska, Carole Mockford, Greg Chadburn, Sarah-Jane Fenton, Kamaldeep Bhui, Michael Larkin, Elizabeth Newton, David Crepaz-Keay, Frances Griffiths & Scott Weich, Experiences of In-Patient Mental Health Services: Systematic Review, 214 Brit. J. Psychiatry 329, 329 (2019) (showing that "averting negative experiences of coercion" was one of the "four dimensions [that] were consistently related to significantly influencing in-patients' experiences of crisis and recovery-focused care"). As one civil rights group put it, "Forced treatment is not treatment at all." Letter from Civil Rights Advocates to New York State Legislators to Reject Expansion of Forced Psychiatric Commitment Laws 1 (Mar. 25, 2022), https://secureservercdn.net/198.71.233.111/d25.2ac.myftpupload.com/wp-content/uploads/2022/03/Kendras-Law-Letter-to-State-Legislators.pdf [https://perma.cc/MLU4-2E2U]. Stigma also contributes to negative treatment outcomes. See Nathalie Oexle, Mario Müeller, Wolfram Kawohl, Ziyan Xu, Sandra Viering, Christine Wyss, Stefan Vetter & Nicolas Rüsch, Self-Stigma as a Barrier to Recovery: A Longitudinal Study, 268 Eur. Archives Psychiatry & Clinical Neurosci. 209, 209–12 (2018) (showing a positive correlation between recovery and interventions supporting persons with mental illness to cope with self-stigma); Stigma, Prejudice and Discrimination Against People With Mental Illness, Am. Psychiatric Ass'n, https://www.psychiatry.org/patients-families/stigma-and-discrimination (last visited Feb. 14, 2024) [https://perma.cc/7AAS-JSRX] (noting the association between self-stigma and less effective recovery from mental illness over two years, including because of reluctance to seek treatment, social isolation, and other factors).

163. See Linda A. Teplin, The Criminality of the Mentally Ill: A Dangerous Misconception, 142 Am. J. Psychiatry 593, 593 (1985).

164. Amy C. Watson, Patrick W. Corrigan & Victor Ottati, Police Officers' Attitudes Toward and Decisions About Persons With Mental Illness, 55 Psychiatric Servs. 49, 49 (2004) (citing Michael J. Bolton, The Influence of Individual Characteristics of Police Officers and Police Organizations on Perceptions of Persons With Mental Illness (Nov. 2000) (Ph.D. Dissertation, Virginia Commonwealth University) (on file with the *Columbia Law Review*)).

person without a mental illness label," the officers also perceived individuals with the schizophrenia as more dangerous and more violent, even controlling for other variables.[165] Researchers in the study noted that "exaggerated perceptions of dangerousness could lead to behaviors that escalate the situation."[166]

Widespread perceptions that people with psychiatric disabilities are more dangerous should be considered alongside racial disparities. Black patients are 1.6 times more likely to experience an involuntary psychiatric hospitalization than white patients.[167] Racial disparities also exist with respect to accessing outpatient mental health treatment in general. According to one recent study, Black and Latinx people are less likely than white people to receive outpatient mental health care, even when controlling for differences in mental health need, income, education, age, gender, insurance coverage, and employment status.[168]

For some, the connection between systemic failures to invest in healthcare systems more broadly and police violence is more of a nexus: Actors and entities tasked with providing care instead coerce, control, sterilize, and otherwise inflict harm.[169] Some public health researchers have framed policing itself as a public health issue, calling on public health educators to use evidence to "reorient[] perspectives on public safety and advocat[e] to shift funding priorities toward evidence-based programs focused on the social determinants of health."[170] Similarly, abolitionists rooted in disability justice have campaigned to defund and decouple police from crisis care services.[171] Advocates for disability rights and

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165. Id. at 52; see also M. Mengual-Pujante, I. Morán Sánchez, A. Luna-Ruiz Cabello & M.D. Pérez-Cárceles, Attitudes of the Police Towards Individuals With a Known Psychiatric Diagnosis, BMC Psychiatry, Dec. 2022, at 8 (noting police officer perceptions of dangerousness linked to mental illness diagnosis).

166. Watson et al., supra note 164, at 53.

167. See Timothy Shea, Samuel Dotson, Griffin Tyree, Lucy Ogbu-Nwobodo, Stuart Beck & Derri Shtasel, Racial and Ethnic Inequities in Inpatient Psychiatric Civil Commitment, 73 Psychiatric Servs. 1322, 1326 (2022).

168. Mark Olfson, Samuel H. Zuvekas, Chandler McClellan, Melanie M. Wall, Sidney H. Hankerson & Carlos Blanco, Racial-Ethnic Disparities in Outpatient Mental Health Care in the United States, 74 Psychiatric Servs. 674, 676 (2023).

169. Medical Industrial Complex Visual, Leaving Evidence (Feb. 6, 2015), https://leavingevidence.wordpress.com/2015/02/06/medical-industrial-complex-visual/ [https://perma.cc/F64K-VY8X].

170. Paul J. Fleming, William D. Lopez, Maren Spolum, Riana Elyse Anderson, Angela G. Reyes & Amy J. Schulz, Policing Is a Public Health Issue: The Important Role of Health Educators, 48 Health Educ. & Behav. 553, 555 (2021).

171. See Mission and Vision, Fireweed Collective, https://fireweedcollective.org/mission-vision-values/ [https://perma.cc/HC7E-8X2W] (last visited Feb. 14, 2024) ("Our work seeks to disrupt the harm of systems of abuse and oppression, often reproduced by the mental health system."); Welcome to CAT-911.ORG, CAT-911.ORG, https://cat-911.org/ [https://perma.cc/57C4-FQMZ] (last visited Feb. 14, 2024) (describing and, in the case of Southern California, providing Community Action Teams as 911 alternatives "based on a framework of Transformative Justice, which aims to

disability justice seek community-based options for care and treatment instead of hospitalization in psychiatric hospitals or emergency departments.[172] So, though most jurisdictions have a shortage of inpatient psychiatric beds, these advocates seek community-based care and support, along with peer-based support—not more hospital beds.[173]

In the midst of these structural and systemic failures is the law. As this Article will show, there is a considerable lack of clarity regarding how precisely the Fourth Amendment regulates mental health crisis response. The next Part describes current Fourth Amendment doctrine governing psychiatric holds. A close examination of the jurisprudence demonstrates how uncritically importing legal rules from the criminal law context undermines legal protections for people experiencing mental crises in their homes. The next Part centers on the histories of disabled people in the United States before turning to a critique of key doctrinal rules—exigent circumstances, emergency aid, probable cause, and special needs—within this area of law.

II. PSYCHIATRIC HOLDS AND THE LIMITS OF FOURTH AMENDMENT DOCTRINE

A. *Disabled People, the Home, and Independent Living*

The sanctity of the home is a cherished principle in Fourth Amendment jurisprudence—and the subject of important criticisms.[174] While the Fourth Amendment provides for the "right of the people to be secure in their persons, houses, papers, and effects," the Supreme Court has framed the home as "first among equals."[175] The privileged place of the home in Fourth Amendment jurisprudence has prevented warrantless

create a world governed on principles of mutual respect, interrelatedness and reciprocity rather than violence, domination and disposability"); see also Navigating Crisis, The Icarus Project, https://fireweedcollective.org/wp-content/uploads/2020/03/IcarusNavigatingCrisisHandoutLarge05-09.pdf%20 [https://perma.cc/DF8T-JWKJ] (last visited July 8, 2024) ("Calling the police or hospital shouldn't be the automatic response.").

172. See, e.g., Jennifer Mathis, Medicaid's Institutions for Mental Diseases (IMD) Exclusion Rule: A Policy Debate—Argument to Retain the IMD Rule, 70 Psychiatry Servs. 4, 5 (2019) ("What I needed was a stronger community-based system to divert patients from inpatient hospitalizations and the community resources to discharge my patients who were ready for community placement . . . ." (internal quotation marks omitted) (quoting Dr. Jess Jamieson)).

173. Id. at 6.

174. See Groh v. Ramirez, 540 U.S. 551, 559 (2004) ("'[T]he right of a man to retreat into his own home and there be free from unreasonable government intrusion' stands 'at the very core of the Fourth Amendment.'" (quoting Kyllo v. United States, 533 U.S. 27, 31 (2001)); see also Ric Simmons, *Lange*, *Caniglia*, and the Myth of Home Exceptionalism, 54 Ariz. St. L.J. 145, 147–49 (2022) ("The sanctity of the home has deep roots in Anglo-American law, dating to Blackstone, who said that the law has a 'particular and tender regard to the immunity of a man's house.'").

175. U.S. Const. amend. IV; Florida v. Jardines, 569 U.S. 1, 6 (2013).

searches and seizures or limited their scope.[176] "[T]he overriding respect for the sanctity of the home," as Justice Lewis Powell put it in his *Payton v. New York* concurrence, "has been embedded in our traditions since the origins of the Republic."[177] While this Article takes no position as to the propriety of centering the home in Fourth Amendment analysis and whether the sanctity of the home is more rhetoric than reality,[178] it does offer a discussion of the importance of the home from the standpoint of disability rights movements.

For decades, disability rights movements and organizations have centered independent living as an essential aspect of equal rights and societal inclusion for disabled people.[179] The focus on independent living as a central goal of disability rights makes sense given the historical treatment of disabled people in society. The birth of the asylum in the mid-nineteenth century coincided with the move to institutionalize people with psychiatric disabilities and intellectual disabilities, which removed disabled people from their homes and denied them access to community living.[180] Locked away in large-scale institutions, disabled people were forced into total dependence on the institution to meet their daily needs.[181]

By some accounts, conditions within asylums were characterized as neglectful, abusive, and violent, targeting even reproductive capacities.[182] The rise of the eugenics period intensified the focus on controlling the reproductive capacities of disabled people.[183] Once institutionalized,

176. See, e.g., Payton v. New York, 445 U.S. 573 (1980) (holding that the Fourth Amendment prohibits law enforcement from conducting warrantless entry into a suspect's home to make an arrest for a felony).

177. Id. at 601 (Powell, J., concurring).

178. See Kate Weisburd, The Carceral Home, 103 B.U. L. Rev. 1879, 1884 (2023) (discussing the contradiction of the carceral home in criminal procedure); see also Simmons, supra note 174, at 149–58 (discussing the myth of home exceptionalism).

179. See About Independent Living: What is Independent Living?, Nat'l Council on Indep. Living, https://ncil.org/about/aboutil/ [https://perma.cc/C9TZ-RUYK] (last visited Mar. 14, 2024); What Is Independent Living?, Centers for Independent Living, Admin. for Cmty. Living, https://acl.gov/programs/aging-and-disability-networks/centers-independent-living [https://perma.cc/573L-L8EY] (last visited Feb. 14, 2024) (describing function of centers for independent living).

180. See David J. Rothman, The Discovery of the Asylum: Social Order and Disorder in the New Republic 130–31 (Routledge rev. ed. 2017) (2002) (describing the origins of the asylum and the move to institutionalize people with disabilities).

181. See generally Erving Goffman, Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (Routledge 2017) (1961) (describing asylums as total institutions characterized by bureaucratic control of every aspect of individuals' basic needs).

182. See Madeline M. Atwell, The Madness They Endured: A Biocultural Examination of Women's Experiences of Structural Violence Within 20th-Century Missouri State Mental Hospitals, 39 Int'l J. Paleopathology 75, 76–78 (2022) (describing public asylums as "known for egregious neglect and abuse").

183. See Alexandra Minna Stern, Eugenic Nation: Faults and Frontiers of Better Breeding in Modern America 52–53 (2d ed. 2016) (describing the common Progressive view

disabled people were forcibly sterilized to prevent them from passing on so-called "defective" traits to offspring.[184] Infamously, in 1927, the Supreme Court sanctioned this practice and gave it the imprimatur of constitutionality in *Buck v. Bell*.[185] As discussed above, these abuses spurred the deinstitutionalization movement in the early 1960s, which focused on closing down these large congregate asylums and institutions.

Deinstitutionalization was a triumph for disability rights but remains an unfulfilled mandate. In 1963, President John F. Kennedy signed the Community Mental Health Act, declaring that the "cold mercy of custodial isolation [would] be supplanted by the open warmth of community concern and capability."[186] Despite its ambitions, community mental health centers were never adequately funded.[187] According to one commentator, "Instead of 'care,' in the 1980s and 1990s, presidents from Ronald Reagan through Bill Clinton pushed policies that punished the poor, curtailed access to health care and welfare, and promoted incarceration."[188]

The unmet promises of deinstitutionalization did not go unrecognized. In enacting the Americans with Disabilities Act in 1990, Congress recognized institutionalization and segregation as forms of discrimination.[189] Similarly, the Supreme Court in *Olmstead v. L.C.* interpreted Title II of the ADA to prohibit unjustified institutionalization and recognized it as a form of unlawful discrimination under the Act.[190] Today, centers for independent living help individuals transition from institutions to their homes and other community-based living

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of the early twentieth century that "depriving [disabled persons] of their reproductive capacity benefited both the individual and society").

184. Id. at 83.

185. 274 U.S. 200, 205–07 (1927).

186. President John F. Kennedy, Special Message to the Congress on Mental Illness and [Intellectual Disability], Am. Presidency Project, https://www.presidency.ucsb.edu/documents/special-message-the-congress-mental-illness-and-mental-retardation [https://perma.cc/BV9E-SYEE] (last visited Mar. 28, 2024).

187. See, e.g., Blake Erickson, Deinstitutionalization Through Optimism: The Community Mental Health Act of 1963, 16 Am. J. Psychiatry Residents' J. 6, 7 (2021) ("Because of construction and long-term funding impediments, states built approximately half of the 1,500 centers outlined in the CMHA." (citing Gerald N. Grob, From Asylum to Community: Mental Health Policy in Modern America (1991))).

188. Elliott Young, Locking Up the Mentally Ill Has a Long History, Wash. Post (Jan. 3, 2023), https://www.washingtonpost.com/made-by-history/2023/01/03/history-mental-illness-incarceration/ (on file with the *Columbia Law Review*).

189. See 42 U.S.C. § 12101 (2018) (acknowledging that "society has tended to isolate and segregate individuals with disabilities" and that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization"); see also Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 588 (1999) (recognizing the same).

190. 527 U.S. at 587, 600.

arrangements,[191] while disability rights groups, like protection and advocacy organizations,[192] assist disabled people with obtaining and retaining access to social security and Medicaid benefits that facilitate the personal care assistance and support necessary to remain in their homes and communities.[193] In light of this history, the home remains an important symbol of disability rights and a cornerstone of independent living.

At the same time, decades-long failures to invest in affordable and accessible housing threaten this longstanding movement goal. Housing shortages have contributed to homelessness and a surge of tent communities across major American cities, including New York, Los Angeles, and Seattle, and disabled people are among their ranks.[194] Cities have responded punitively and violently to unsheltered communities residing in public spaces, conducting "sweeps" and citing and arresting individuals for any number of quality-of-life offense violations.[195] Indeed,

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191. Centers for Independent Living, Admin. for Cmty. Living, https://acl.gov/programs/aging-and-disability-networks/centers-independent-living [https://perma.cc/VL4D-5QD3] (last updated Mar. 25, 2024).

192. Protection and advocacy agencies provide an array of services to people with disabilities including investigating allegations of abuse or neglect, monitoring facilities, and pursuing litigation, among other duties. See Protection & Advocacy Systems, Admin. for Cmty. Living, https://acl.gov/programs/pa-programs [https://perma.cc/C2NF-QCAK] (last updated July 7, 2023).

193. See, e.g., Government Benefits and Disability Advocacy Project, Legal Aid Soc'y, https://legalaidnyc.org/programs-projects-units/government-benefits-and-disability-advocacy-project/ [https://perma.cc/V8ZY-Z7B4] (last visited Mar. 9, 2024).

194. See Mike Baker, Homeless Residents Got One-Way Tickets Out of Town. Many Returned to the Streets., N.Y. Times (Sept. 14, 2019), https://www.nytimes.com/2019/09/14/us/homeless-busing-seattle-san-francisco.html (on file with the *Columbia Law Review*) (last updated Sept. 15, 2019) (describing programs busing unhoused populations to other locations, which have been used by major cities to address rises in homelessness); Rick Paulas, Instead of Helping Homeless People, Cities are Bussing Them Out of Town, Vice (Feb. 13, 2020), https://www.vice.com/en_us/article/bvg7ba/instead-of-helping-homeless-people-cities-are-bussing-them-out-of-town [https://perma.cc/5CED-YZNG] (same); Heidi Schultheis, Lack of Housing and Mental Health Disabilities Exacerbate One Another, Ctr. for Am. Progress (Nov. 20, 2018), https://www.americanprogress.org/article/lack-housing-mental-health-disabilities-exacerbate-one-another/ [https://perma.cc/V8VZ-LJDB] ("Coupled with deinstitutionalization, the nation's growing affordable housing crisis has exacerbated conditions for people with mental health disabilities who experience homelessness.").

195. See Nat'l Health Care for the Homeless Council, Impact of Encampment Sweeps on People Experiencing Homelessness 4 (2022), https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf [https://perma.cc/XQL8-GFE8] (explaining that sweeps of homeless encampments increase arrest rates and generate collateral consequences for residents); Claire Rush, Janie Har & Michael Casey, Cities Crack Down on Homeless Encampments. Advocates Say That's Not the Answer, Associated Press (Nov. 28, 2023), https://apnews.com/article/homelessness-encampment-sweeps-cities-08ff74489ba00cfa927fe1cf54c0d401 [https://perma.cc/QWM5-MJ7C] (using data requests and interviews from cities across the United States to show that "attempts to clear encampments [have] increased" in recent years).

what legal scholar Chris Slobogin called the "poverty exception to the Fourth Amendment" might have a particularly harmful effect on disabled people who occupy spaces less likely to have reasonable expectations of privacy.[196]

Beyond this, current behavioral health systems and mental health crisis response programs threaten the ability of disabled people to live at home and in their communities in several ways. First, lack of community mental health treatment options leads to unnecessary inpatient hospitalizations and emergency room admissions.[197] Such reliance on involuntary hospitalization and emergency rooms is costly and does not produce optimal treatment outcomes.[198] Second, lack of access to chronic mental health care *facilitates* reliance on hospitalization and emergency rooms, as failures to treat chronic mental health conditions can often lead to crisis situations. Finally, police involvement in crisis response can lead to institutionalization of a different kind—jail or prison. A host of quality-of-life offenses can provide a basis for citation and arrest and a pathway into incarceration. For example, individuals experiencing crises have been arrested for disorderly conduct for exhibiting symptoms related to their underlying psychiatric disabilities.[199] Even more troubling, when police do not have sufficient grounds for detaining someone under state civil commitment laws, quality-of-life offenses provide ample grounds for arrest

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196. See Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 Fla. L. Rev. 391, 401 (2003) [hereinafter Slobogin, Poverty Exception] (arguing that "Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls"); see also id. at 401 n.65 (collecting cases where individuals living in makeshift shelters in public spaces have no reasonable expectation of privacy that would classify police intrusion as a search triggering Fourth Amendment protections). The *Katz* test, which articulated the "reasonable expectation of privacy" as a heuristic, is under immense scrutiny—and there are arguments for its replacement. See Matthew Tokson, The *Carpenter* Test as a Transformation of Fourth Amendment Law, 2023 U. Ill. L. Rev. 507, 509 (arguing that the *Katz* test provides a "vague, unpredictable, circular, underinclusive . . . , and unprotective" standard for determining what constitutes a search receiving Fourth Amendment protections (footnotes omitted)); see also Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

197. See Disability Rts. Or., The 'Unwanteds': Looking for Help, Landing in Jail 6, 34–36 (2019), https://s3.documentcloud.org/documents/6158693/Report-the-Unwanteds-Looking-for-Help-Landing-in.pdf [https://perma.cc/P934-P2AL] (citing rising housing costs and unmet behavioral health needs as major drivers of emergency department admissions and showing "fewer emergency room visits and hospitalizations," among other benefits, in a pilot program providing community-based housing, medical, and mental health supports).

198. See infra notes 415–416 and accompanying text.

199. See Jamelia N. Morgan, Rethinking Disorderly Conduct, 109 Calif. L. Rev. 1637, 1651 (2021) (arguing that disorderly conduct laws are used to proscribe "behaviors linked to disability . . . perceived as deviant or threatening").

through what are referred to as "mercy bookings"—a grim term used to refer to the practice of arresting people in crisis in order to book them in jail, where they can access what little treatment is available there.[200]

Taken together, the history of disability rights and ongoing deficiencies with behavioral health systems nationwide provide a basis for vigorous enforcement of the protections that the Fourth Amendment affords. In the next section, this Article argues against the uncritical importation of criminal law enforcement standards and rules to psychiatric holds—jurisprudence that diminishes Fourth Amendment protections for disabled people. Further, this Article argues that importing existing doctrines as they have been applied by courts does little to constrain police discretion and fails to adequately protect the privacy and security interests of people experiencing (or labeled as experiencing) mental health crises.

B. *Disability and Dangerousness*

A substantial number of state civil commitment laws require probable cause that an individual poses a danger to themselves or others, among other criteria, for involuntarily commitment.[201] The prevalence of dangerousness as a key criterion in most state civil commitment regimes is not without controversy. Legal scholars and researchers, including psychiatrists, debate whether it is even possible to clinically assess dangerousness.[202] At the same time, dangerousness itself is viewed by critics of existing state civil commitment regimes as creating too high a bar for commitment.[203] In other words, dangerousness makes it too difficult to involuntarily commit people who do not pose an imminent threat to themselves or others. These critics have advocated instead for detaining individuals who are "mentally ill" or are unable to take care of

200. E. Fuller Torrey, Criminalization of Individuals With Severe Psychiatric Disorders, Mental Illness Pol'y Org., https://mentalillnesspolicy.org/consequences/criminalization.html [https://perma.cc/FAC5-WM7H] (last visited Feb. 14, 2024).

201. See supra note 45 and accompanying text; see also Dan Moon, The Dangerousness of the Status Quo: A Case for Modernizing Civil Commitment Law, 20 Widener L. Rev. 209, 218–19 (2014) (providing examples of dangerousness standards found in state civil commitment laws).

202. See, e.g., Hadar Aviram, Yesterday's Monsters: The Manson Family Cases and the Illusion of Parole 182–83 (2020) ("[T]he psychiatric documentation in the inmate's file is a panacea in which one can find evidence of dangerousness as well as lack thereof.").

203. See, e.g., M.M. Large, C.J. Ryan, O.B. Nielssen & R.A. Hayes, The Danger of Dangerousness: Why We Must Remove the Dangerousness Criterion From Our Mental Health Acts, 34 J. Med. Ethics 877, 880 (2008) ("[J]urisdictions with [a dangerousness standard] may be subjecting . . . other citizens to an increased risk of harm from those in their first episode of psychosis."); Moon, supra note 201, at 210 ("The [dangerousness] standard is difficult to meet, varies by state, and withholds involuntary treatment until it is too late to protect the public or help the mentally ill individual.").

themselves.[204] California governor Gavin Newsom's CARE Court and New York City Mayor Eric Adams's involuntary hospitalization policy exemplify the trend of moving beyond existing standards of dangerousness under civil commitment laws and towards the use of preventative detention as a way of removing individuals who "appear[] to be mentally ill" or are unable to care for themselves.[205] Key to these policies is the notion that individuals with untreated psychiatric disabilities are at risk to themselves or others—albeit a lesser degree of risk than what is required for involuntary commitment. Critics of these policies recognize them as punitive efforts to remove unsheltered communities from public spaces.[206]

Yet there is an even longer history of using the fear of dangerousness to eliminate or scale back the rights of people with psychiatric disabilities, dating back to the rise of the asylum in the mid-nineteenth century and extending through to the eugenics period in the early twentieth century. The "dangerousness" label provided a justification for placement into asylums, though assessments as to the label (and justification for placement) were far from scientific.[207] Dominant society perceived people with psychiatric (and cognitive) disabilities as a threat to the well-functioning social order, and segregation became a pathway to their

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204. See, e.g., Moon, supra note 201, at 235–36 (discussing "the adoption of broader standards for involuntary commitment" that "would allow earlier state intervention, which would prevent individuals from deteriorating").

205. See Jaclyn Cosgrove & Thomas Curwen, L.A. County Is Launching CARE Court. Here's What to Expect, L.A. Times (Nov. 30, 2023), https://www.latimes.com/california/story/2023-11-30/l-a-county-launches-gov-newsom-care-couirt (on file with the *Columbia Law Review*) (noting that "[c]ivil rights advocates have long expressed concerns that CARE Court will lead to more people being forced into involuntary treatment" and that the program's focus will be medication compliance instead of social support); Press Release, Office of the Mayor of N.Y.C., Mental Health Involuntary Removals (Nov. 28, 2022), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2022/Mental-Health-Involuntary-Removals.pdf [https://perma.cc/7HU9-H9XM] (authorizing "the removal of a person who appears to be mentally ill and displays an inability to meet basic living needs, even when no recent dangerous act has been observed").

206. See, e.g., Sam Levin, California Proposal Would Force Unhoused People Into Treatment, The Guardian (Mar. 3, 2022) https://www.theguardian.com/us-news/2022/mar/03/california-proposal-forced-unhoused-treatment [https://perma.cc/47N9-4A75] ("Subjecting unhoused people to forced treatment is extremely draconian, and it would take us back to the bad old days of confinement, coercive treatment and other deprivations of rights targeting people with disabilities." (internal quotation marks omitted) (quoting Eve Garrow, Policy Analyst, ACLU of Southern California)).

207. See Rothman, supra note 180, at 261–62 (describing the use of asylums and reformatories to effectively incarcerate those society considered to be of the "dangerous classes," particularly children "from the bottom layers of the social structure"); id. at 126 ("The discussions of insanity, like those of crime, conveyed a heightened, almost hysterical sense of peril, with the very safety of the republic and its citizens at stake."); see also Charles Loring Brace, The Dangerous Classes of New York and Twenty Years' Work Among Them 26–28 (1880) (describing the "dangerous classes" as children of immigrants, the descendants of "peasantry," and generally "ignorant, untrained, passionate, [and] irreligious boys and young men").

incapacitation, social exclusion, and in many cases, forcible sterilization.[208] Per the eugenicists of the day, the danger they posed stemmed from the risk that their "deviant" traits would pass to their offspring and increase crime, disorder, and dependency in society.[209]

But dangerousness plays a more pernicious function according to critical disability scholars. Critical disability theory scholars provide methods for analyzing disability as a category of subordination, along with race, gender, sexual orientation, class, and other categories of difference.[210] These scholars define disability as a social construct and reject medical and biological models of disability.[211] But beyond this, as Dr. Sami Schalk argues, a critical disability theory analysis "involves scrutinizing not bodily or mental impairments but the social norms that define particular attributes as impairments, as well as the social conditions that concentrate stigmatized attributes in particular populations."[212] Along these lines, as I've argued elsewhere, "disability as constructed in Fourth Amendment doctrine reinforces associations between disability and criminality."[213] This socially constructed meaning of disability links certain disabilities with attributes of criminality, particularly psychiatric disabilities and intellectual disabilities. The perceived risks of particular disabilities to society "will vary based on the nature of the disability and how it is expressed."[214]

"[T]he presence of disability renders . . . individuals with multiple marginalized statuses and identities vulnerable to policing . . . [and

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208. See Rothman, supra note 180, at 125–26.

209. Stern, supra note 183, at 16–18.

210. See, e.g., Subini Ancy Annamma, David Connor & Beth Ferri, Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability, 16 Race Ethnicity & Educ. 1, 4 (2013) (discussing intersectional approaches to disability, race, gender, and class).

211. See, e.g., Christopher Newell, The Social Nature of Disability, Disease and Genetics: A Response to Gillam, Persson, Holtug, Draper and Chadwick, 25 J. Med. Ethics 172, 172, 174 (1999) (criticizing the then-dominant "biomedically informed view of disability" and arguing for an increased acceptance of the "social nature of disability . . . especially in terms of oppression").

212. Sami Schalk, Critical Disability Studies as Methodology, Lateral, Spring 2017, http://csalateral.org/issue/6-1/forum-alt-humanities-critical-disability-studies-methodology-schalk/ [https://perma.cc/TLK9-8KH6] (internal quotation marks omitted) (quoting Julie Avril Minich, Enabling Whom? Critical Disability Studies Now, Lateral, Spring 2016, https://csalateral.org/issue/5-1/forum-alt-humanities-critical-disability-studies-now-minich/ [https://perma.cc/T37L-N89Z]); see also Rabia Belt & Doron Dorfman, Response, Reweighing Medical Civil Rights, 72 Stan L. Rev. Online 176, 186–87 (2020), https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/10/72-Stan.-L.-Rev.-Online-Belt-Dorfman.pdf%20 [https://perma.cc/8QFK-ZG72] ("Disability is therefore formulated through a complex interaction between the impairment and the social environment.").

213. Jamelia Morgan, Disability's Fourth Amendment, 122 Colum. L. Rev. 489, 510 (2022) [hereinafter Morgan, Disability's Fourth Amendment].

214. Id.

produces] vulnerabilities to police violence."[215] When multiply-marginalized individuals encounter police during a perceived or actual mental crisis, stereotypes that associate disability with criminality are reinforced, specifically those that label disabled people as "suspicious, deviant, risky, dangerous, or threatening."[216]

Particular manifestations of actual or perceived mental disability—mumbling, screaming, public expressions of anger, frustration, or dismay—read as inherently risky, uncontrollable, unpredictable, and therefore, dangerous. These stereotypes make it seem as though if individuals with particular disability labels are not closely monitored and managed, even using force, they will lash out and harm themselves or the public at-large. Critical disability studies scholar Liat Ben-Moshe has argued that the label of disability itself functions as a kind of risk management: "[D]isability [is a kind of] risk coding, . . . an aspect of population management."[217] In other words, by "labeling certain differences as disabilities, society communicates what it considers a social risk, which in turn serves to control through policing, surveillance, and the use of force [against] those behaviors labeled as risky."[218]

"Mental illness" itself has been pathologized in ways that construct all individuals who have a mental illness diagnosis or who are perceived to be "mentally ill" as dangerous. Indeed, the construction of mental illness as a deviance in itself can be traced to its being medicalized in the first place.[219] Through medicalization, "mental illness" became a pathology to be treated, cured, or rehabilitated.[220] If a cure was not possible, the

215. Id.

216. See id. (citing Elliot Oberholtzer, Police, Courts, Jails, and Prisons All Fail Disabled People, Prison Pol'y Initiative (Aug. 23, 2017), https://www.prisonpolicy.org/blog/2017/08/23/disability/ [https://perma.cc/WLC9-TQZF]) (discussing how, as with race, enforcement practices can reinforce associations between disability and criminality).

217. Liat Ben-Moshe, The State of (Intersectional Critique of) State Violence, Women's Stud. Q., Fall/Winter 2018, at 308 (book review).

218. Morgan, Disability's Fourth Amendment, supra note 213, at 512; see also Christopher Slobogin, Eliminating Mental Disability as a Legal Criterion in Deprivation of Liberty Cases: The Impact of the Convention on the Rights of Persons With Disabilities on the Insanity Defense, Civil Commitment, and Competency Law, 40 Law & Psych. Rev. 297, 303–04 (2016) (noting that "[m]ental disability is usually seen as . . . a risk factor in a preventive regime").

219. See Peter Conrad & Joseph W. Schneider, Deviance and Medicalization: From Baldness to Sickness 17 (1992) ("[O]ur approach focuses on how certain categories of deviant behavior become defined as medical rather than moral problems and how medicine, rather than, for example, the family, church, or state, has become the dominant agent of social control for those so identified.").

220. Morgan, Policing Under Disability Law, supra note 155, at 1425 ("[D]isabilities were not only medicalized but also pathologized. Medicalization provides pathways to criminalization in part because it positions disability as a problem to be cured—through medication, treatment, therapy, and containment." (footnote omitted)); see also Ben-Moshe, Decarcerating Disability, supra note 94, at 28 ("[A race-ability framework] is also an understanding that antiblack racism is composed of pathologization and dangerousness,

individual would be segregated away from society to prevent their "illness" from spreading to others and that person from procreating.[221] Such pathologization was a feature of historical narratives surrounding disability, but its legacy continues to this day.[222] Pathologizing disability is a social activity; individuals lacking medical education or training routinely hurl mental diagnoses at public figures, characterizing them as possessing an array of "disorders" under the Diagnostic and Statistical Manual of Mental Disorders.[223]

Any legal criterion—or exercise of state power for that matter—that relies on danger in the context of disability will incorporate not just the individual biases against people with psychiatric disabilities but also the structural harms and social processes that produce group-based subordination on that basis. Whether state power is exercised to prevent "danger," or to provide "care" or "treatment," the subordinating function of the disability label—"mentally ill," "disordered," "deranged," "insane," etc.—is a product of the nature of disability, its manifestation in the individual, and that individual's positionality within society. To accept that account is to see a legal criterion like danger as socially constructed, historically contingent, and variable. And, if that is so, then danger as a basis for a vast intrusion of state power into the lives of individuals deemed eligible for civil commitment, or other kinds of preventative detention whether "CARE Courts" or involuntary hospitalization, should be scrutinized particularly when constitutional rights are at stake.

That brings us back to civil commitment, psychiatric holds, and other forms of so-called preventative detention. If dangerousness is a social meaning that attaches to psychiatric disabilities (i.e., mental illness), then protecting the privacy and security interests under the Fourth Amendment of disabled people requires scrutinizing the factual basis for the assessment

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which lead to processes of criminalization and disablement, for instance, constructing people as Other or as deranged, crazy, illogical, unfathomable, or scary.").

221. See Morgan, Policing Under Disability Law, supra note 155, at 1414 ("Social policies that segregated disabled people reinforced ideologies that persons with disabilities *should be* segregated in institutions to correct and contain their supposed physical, psychological, and moral deficiencies and abnormalities. Disability itself was conceived of as a social contagion or pathology to be contained through policing and carceral control." (footnotes omitted)).

222. See, e.g., David I. Hernández-Saca, Laurie Gutmann Kahn & Mercedes A. Cannon, Intersectionality Dis/ability Research: How Dis/ability Research in Education Engages Intersectionality to Uncover the Multidimensional Construction of Dis/abled Experiences, 42 Rev. Rsch. Educ. 286, 303 (2018) (highlighting how pathologizing disability is particularly detrimental to students from underrepresented backgrounds).

223. See, e.g., Nick Davis, The Goldwater Rule: Why Commenting on Mental Health From a Distance Is Unhelpful, The Guardian (July 28, 2017), https://www.theguardian.com/science/head-quarters/2017/jul/28/the-goldwater-rule-why-commenting-on-mental-health-from-a-distance-is-unhelpful [https://perma.cc/SPK9-8RXV] ("Donald Trump . . . Princess Diana and Winston Churchill, Carrie Fisher and Robin Williams, Britney Spears and Genghis Khan have all been the subject of public speculation about their mental health . . . .").

of dangerousness. Disabled people's right to be "secure in their persons, houses, papers, and effects"[224] requires scrutinizing legal exceptions to the warrant requirement and the facts that support the requirement of probable cause that threaten to undermine the Fourth Amendment rights of that group.

C. *Mental Health Exigencies Are Not Like Other Exigencies*

Warrantless entries into the homes of persons who are alleged to be experiencing mental health crises are constitutional when reasonable.[225] Though nonconsensual searches are presumptively unreasonable,[226] warrantless entries may still be reasonable when one of several exceptions is satisfied.[227] As is relevant to mental health seizures, there are two exigencies that count as exceptions to the warrant requirement. One of those exceptions is the exigent circumstances exception and includes cases where there is an imminent threat to the safety of police officers, relatives, members of the public, or the person who is alleged to need mental health treatment. The other is the emergency aid exception, which will be discussed in section II.C.

1. *Mental Health Exigencies at Common Law.* — Under the Supreme Court's common law approach to Fourth Amendment questions, history informs questions of constitutional reasonableness as an initial matter. In *Virginia v. Moore*, Justice Scalia reiterated the Court's common law approach to assessing constitutional reasonableness: "In determining whether a search or seizure is unreasonable, we begin with history. We look

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224. U.S. Const. amend. IV.

225. See Cady v. Dombrowski, 413 U.S. 433, 439–40 (1973) ("The ultimate standard set forth in the Fourth Amendment is reasonableness."); cf. Wyman v. James, 400 U.S. 309, 318 (1971) (finding a social services case worker's home visit permissible under the Fourth Amendment "because it does not descend to the level of unreasonableness"); Camara v. Mun. Ct., 387 U.S. 523, 537–38 (1967) (indicating a lower reasonableness bar to pass constitutional muster for searches "[w]here considerations of health and safety are involved," distinguished from those "where a criminal investigation has been undertaken" (internal quotation marks omitted) (quoting Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting))).

226. See Kirk v. Louisiana, 536 U.S. 635, 637–38 (2002) ("[P]olice need both probable cause to either arrest or search and exigent circumstances to justify a nonconsensual warrantless intrusion into private premises . . . ." (internal quotation marks omitted) (quoting App. to Petition for Writ of Certiorari, at 1–2, *Kirk*, 536 U.S. 635 (No 01-8419))); Welsh v. Wisconsin, 466 U.S. 740, 748–49 (1984) (discussing the Court's long-recognized principle that "searches and seizures inside a home without a warrant are presumptively unreasonable" (quoting Payton v. New York, 445 U.S. 573, 586 (1980))).

227. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." (citing Flippo v. West Virginia, 528 U.S. 11, 13 (1999) (per curiam); Katz v. United States, 389 U.S. 347, 357 (1967))); Morse v. Cloutier, 869 F.3d 16, 23–24 (1st Cir. 2017) (discussing "well-delineated exception[s]" to the warrant requirement (internal quotation marks omitted) (quoting United States v. Romain, 393 F.3d 63, 68 (1st Cir. 2004))).

to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."[228]

At common law, justices of the peace in eighteenth-century America were authorized "to confine individuals with dangerous mental impairments."[229] "[M]ere suspicion of serious mental illness was [not] sufficient at common law to deprive someone of his rights."[230] But anyone could arrest so-called "dangerous lunatics"[231] that posed a risk of imminent harm to themselves or the public.[232] And although "the common law prohibited the warrantless arrest of those thought to have lost their reason, . . . it allowed for the deprivation of the fundamental right to liberty or the fundamental right to control one's property *only* upon a valid judgment from a civil tribunal."[233] Imminent dangerousness in public was an essential component of warrantless seizures at common law, making that finding (or lack thereof) essential to determining Fourth Amendment rights violations.

This history instructs that without a finding of imminent dangerousness, emergency aid for the purpose of mental health evaluation does not clearly fit within the kinds of exigencies that permitted peace officers to arrest people experiencing crises in public places at common law.[234] An originalist view would suggest that the finding of actual dangerousness is the key criterion authorizing public and private exercises of the coercive power to arrest.[235] Less clear, however, is whether such

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228. 553 U.S. 164, 168 (2008). For criticisms of the Supreme Court's common law approach, see generally David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1743 (2000) ("[T]he Fourth Amendment on its face says nothing about common law, but bans all unreasonable searches and seizures, whether or not they were legal before the Amendment was adopted.").

229. Carlton F.W. Larson, Four Exceptions in Search of a Theory: *District of Columbia v. Heller* and Judicial Ipse Dixit, 60 Hastings L.J. 1371, 1378 (2009); see also id. at 1377 (citing Henry Care & William Nelson, English Liberties, or the Free-Born Subject's Inheritance 329 (6th ed. 1774)).

230. Tyler v. Hillsdale Cnty. Sheriff's Dep't, 837 F.3d 678, 706 (6th Cir. 2016) (Batchelder, J., concurring) (citing Henry F. Buswell, The Law of Insanity in Its Application to the Civil Rights and Capacities and Criminal Responsibility of the Citizen 26–28, 33–34 (1885)).

231. Despite many variances, early nineteenth century legal theorists mainly defined "lunatics" as individuals who lost their reason. See *Tyler*, 837 F.3d at 705 (Batchelder, J., concurring) (listing sources utilizing this definition). For one such variance, see, for example, A. Highmore, A Treatise on the Law of Idiocy and Lunacy 1 (1822) ("Lunatic is one whose imagination is influenced by the moon: a madman.").

232. *Tyler*, 837 F.3d at 706 (Batchelder, J., concurring).

233. Id. (emphasis added).

234. See Henry F. Buswell, The Law of Insanity in Its Application to the Civil Rights and Capacities and Criminal Responsibility of the Citizen 33 (1885) ("[I]f any person is so insane that his remaining at liberty would be dangerous to himself or the community, any other person may, without warrant, or other authority than the inherent necessity of the case, confine such dangerous insane person . . . .").

235. One counterpoint might be that if anyone had the power to arrest individuals labeled as "dangerous lunatics," that power also authorized constables to arrest. For further

authority permitted peace officers to *enter homes* without a warrant in order to arrest individuals labeled in crisis and deemed dangerous. At least one leading treatise on the topic suggested this power was limited to "dangerous lunatics" found in public spaces[236]—a limitation that makes sense given references to individuals as dangerous when they risked engaging in breaches of the peace, which are public order offenses.[237] It is also not clear whether imminent danger had to be linked to a possible crime, like criminal mischief or breach of peace.[238] Distinguishing mental health emergencies from other emergencies helps make it clear that common law analysis fails to offer a clear answer to resolve the Fourth Amendment inquiry, and so reasonableness analysis should control.[239]

2. *(Un)Reasonable Exigencies.* — Warrantless entries pursuant to exigent circumstances are reasonable. Under the exigent circumstances exception to the warrant requirement, "'exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[240] With real exigencies, police are called to intervene because postponing or failing to act would lead to serious consequences.[241] In *Brigham City v. Stuart*, the Supreme Court held that police may enter a home without a warrant if they have an "objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury."[242] The government bears the burden of establishing that exigent circumstances justified the warrantless entry.[243]

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discussion of the common law power of constables, see also supra notes 77–79 and accompanying text.

236. See Highmore, supra note 231, at 136 ("[The statute] which empowers magistrates to take care of lunatics, upon complaint of outrages committed, [r]elates to vagrant lunatics only, who are strolling about, and does not extend to persons of rank and condition, whose relations can take care of them properly.").

237. See Buswell, supra note 234, at 33–34 (specifying that magistrates may "order into custody an insane person who is in the act of committing a breach of the peace").

238. See id. at 34 ("[A]n officer . . . is justified in arresting and detaining one whom there is probable cause to believe insane and about to commit a mischief which would be criminal in a sane person; and such detention may lawfully be continued till . . . the person detained has forgotten or abandoned his mischievous purpose.").

239. See Virginia v. Moore, 553 U.S. 164, 170–71 (2008) (noting that there was "not a case in which the claimant [could] point to 'a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since'" (second alteration in original) (internal quotation marks omitted) (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 345 (2001))).

240. Kentucky v. King, 563 U.S. 452, 460 (2011) (alteration in original) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)); see also Payton v. New York, 445 U.S. 573, 590 (1980) (requiring exigent circumstances to enter a home without a warrant).

241. See, e.g., Thacker v. City of Columbus, 328 F.3d 244, 253 (6th Cir. 2003) ("Exigent circumstances are situations where 'real immediate and serious consequences' will 'certainly occur' if the police officer postpones action to obtain a warrant." (quoting Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002))).

242. 547 U.S. 398, 400 (2006); see also *King*, 563 U.S. at 460.

243. See State v. Samuolis, 278 A.3d 1027, 1035 (Conn. 2022).

Courts are applying the exigent circumstances doctrine in unsound ways in cases involving mental health seizures. To begin with, courts tend to treat mental health exigencies just like any other kind of emergency.[244] Yet mental health emergencies are distinguishable from other kinds of emergencies in several ways.

a. Mental Health Is Different. — Exigent circumstances can justify warrantless intrusions into the home.[245] In the traditional law enforcement context, four circumstances count as exigent and therefore give rise to reasonable searches under the Fourth Amendment: (1) hot pursuit of a fleeing felon,[246] (2) imminent destruction of evidence,[247] (3) the need to prevent a suspected person's escape,[248] and (4) a risk of danger to the police or others.[249] But mental health exigencies are not like other exigencies developed in traditional criminal procedure cases. To begin with, substantial risk of flight and "hot pursuit" are not implicated when individuals labeled in crisis are in their homes. Similarly, imminent destruction of evidence is not relevant in most cases either because there is no suspected criminal activity at issue or because there's no tangible evidence that can be destroyed. Mental health exigencies are personal

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244. See Sutterfield v. City of Milwaukee, 751 F.3d 542, 558 (7th Cir. 2014) (arguing that *Brigham City* "effectively made [emergency aid] a subset of the latter [exigent circumstances]"); Ziegler v. Aukerman, 512 F.3d 777, 786 (6th Cir. 2008) (recognizing suicide as a different kind of "danger" to police but nonetheless characterizing that kind of danger as similar to traditional dangers that pose a risk to law enforcement); McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 546 (1st Cir. 1996) (declining to "enter the skirmish over the distinctions between 'emergencies' and 'exigent circumstances'"); Elifritz v. Fender, 460 F. Supp. 3d 1088, 1111–12 (D. Or. 2020) ("When police use deadly force against a person who has committed serious crimes and presents an immediate threat of serious injury or death to others, the presence of emotional disturbance does not reduce the governmental interest in using deadly force."). But see United States v. Christy, 810 F. Supp. 2d 1219, 1269 (D.N.M. 2011) ("It is important to recognize that there is not a suicide exception to the warrant requirement; there is an exigent circumstances exception. The self harm must still be exigent."), aff'd, 739 F.3d 534 (10th Cir. 2014).

245. *Brigham City*, 547 U.S. at 403.

246. See, e.g., Warden v. Hayden, 387 U.S. 294, 298–300 (1967) (finding that the warrantless entry of premises and search for "persons and weapons" was justified to ensure that a robbery suspect was the only person on the premises and to prevent weapons from being used against police or to carry out an escape).

247. See, e.g., Schmerber v. California, 384 U.S. 757, 770–71 (1966) (explaining that, because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops" and given delays in investigation and transportation, "there was no time to seek out a magistrate and secure a warrant," so "the attempt to secure evidence" incident to arrest was appropriate).

248. See, e.g., United States v. Cortez-Moran, 17 F. App'x 539, 542 (9th Cir. 2001) ("We conclude that the Government has failed to carry its 'heavy burden' of showing 'particularized evidence' that the agents reasonably believed that the defendants presented a substantial risk of flight at the time of the arrest." (quoting United States v. Reid, 226 F.3d 1020, 1028 (9th Cir. 2000))).

249. See, e.g., Minnesota v. Olson, 495 U.S. 91, 100 (1990) (describing "risk of danger to the police or to other persons inside or outside the dwelling" (internal quotation marks omitted) (quoting State v. Olson, 436 N.W.2d 92, 97 (Minn. 1989))).

health matters that become emergencies when the person in crisis does not receive appropriate care in a timely manner. Under existing doctrine, the exigency arises when there are facts sufficient to support a finding that "the exigencies of the situation" make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.[250] At the same time, there is no way to know with certainty whether the individual will engage in acts of self-harm or harm to others. Even researchers and psychologists studying risk factors for suicide acknowledge as much.[251] The state's power to intervene to (ostensibly) prevent the harm includes the power to enter the home without a warrant.[252] Outside of the criminal arrest context, no other exigencies justify such a broad scope of state power. The unique personal interests implicated in mental health seizures make it so that courts should distinguish these kinds of emergencies from others.

b. Non-Emergencies. — Second, mental health exigencies, unlike other exigencies, might not even be actual emergencies. Indeed, any case in which an individual is seized and later released is *not* an emergency in fact, even though some courts may count it as an exigency for Fourth Amendment purposes.[253] In general, the uncritical framing of police work and police responses to mental health crises as prototypical emergencies prevents more measured assessments by courts as to whether exigencies exist in the first place. Police work in this context is often framed as involving emergencies per se—that is, split-second decisionmaking on the part of police officers.[254] This is not always an apt characterization of incidents involving people in mental crisis. Often, at the time of dispatch,

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250. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (internal quotation marks omitted) (quoting McDonald v. United States, 335 U.S. 451, 456 (1948)).

251. See Nat'l Action All. for Suicide Prevention, Recommended Standard Care for People With Suicide Risk: Making Health Care Suicide Safe, 3, https://theactionalliance.org/sites/default/files/action_alliance_recommended_standard_care_final.pdf [https://perma.cc/6N6N-7UWU] (last visited Feb. 14, 2024); see also Aubrey M. Moe, Elyse Llamocca, Heather M. Wastler, Danielle L. Steelesmith, Guy Brock, Jeffrey A. Bridge & Cynthia A. Fontanella, Risk Factors for Deliberate Self-Harm and Suicide Among Adolescents and Young Adults With First-Episode Psychosis, 48 Schizophrenia Bull. 414, 414–15 (2022); Too et al., supra note 50, at 302; Position Statement on Assessing the Risk for Violence, Am. Psychiatric Assoc. (Dec. 2017), https://www.psychiatry.org/getattachment/d8f3377d-7d67-4517-a409-8e10ce6fd7c3/Position-2012-Violence-Risk-Assessment.pdf [https://perma.cc/G3UY-MB8F] ("While psychiatrists can often identify circumstances associated with an increased likelihood of violent behavior, they cannot predict dangerousness with definitive accuracy.").

252. See Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

253. See, e.g., May v. City of Nahunta, 846 F.3d 1320, 1326–28 (11th Cir. 2017) (finding seizure justified at its inception even though plaintiff was at the hospital for only two hours before she was dismissed and informed that there was "nothing wrong with her").

254. Commonwealth v. Coughlin, 199 A.3d 401, 407 (Pa. Super. Ct. 2018) (finding that to invoke the emergency aid exception, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving").

law enforcement officers have knowledge that the person is experiencing a mental health crisis and, arguably, time to assess the situation and develop an appropriate response that can avoid warrantless searches and seizures and, importantly, uses of force.[255]

Exigency doctrine is supposed to limit the volume of warrantless searches and seizures in the mental health context.[256] Yet if circumstances giving rise to exigencies are not scrutinized, then reasonable exigencies offer no limit at all. More to the core of exigent circumstances doctrine, when courts accept as given that mental health crises are invariably going to involve split-second decisionmaking, these courts will be less likely to scrutinize whether the real exigencies do indeed exist and justify warrantless intrusions.[257] Effectively, presuming exigency is not consistent with what is required to assess reasonableness under the Fourth Amendment's totality of the circumstances analysis.[258]

Police should not be mental health first responders, but when police are dispatched, one of the cornerstones of effective, data-informed crisis response is building in *more time* to engage the person who is experiencing a mental health crisis—a point with which the International Association of Chiefs of Police (IACP) agrees.[259] In its paper, IACP argues that more time allows for greater opportunity for successful implementation of de-

255. See, e.g., Est. of Chamberlain v. City of White Plains, 960 F.3d 100, 101–02 (2d Cir. 2020); Rockwell v. Brown, 664 F.3d 985, 988–89 (5th Cir. 2011). Of course, if hours pass during the course of officer dispatch, exigent circumstances are a nonstarter, though qualified immunity may be available to defeat a claim. See, e.g., United States v. Witzlib, 796 F.3d 799, 802 (7th Cir. 2015) (rejecting exigent circumstances following a four-hour delay in commencing search); O'Brien v. City of Grand Rapids, 23 F.3d 990, 999–1000 (6th Cir. 1994) (granting qualified immunity).

256. Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011) (noting that warrantless searches and seizures "must be strictly circumscribed by the exigencies which justify [their] initiation" (internal quotation marks omitted) (quoting Mincey v. Arizona, 437 U.S. 385, 393 (1978))).

257. Professors Seth Stoughton and Brandon Garrett have made a similar argument as relates to jurisprudence on excessive force. As Garrett and Stoughton maintain, a more tactical approach to the objective reasonableness inquiry in excessive force cases would require courts to consider whether officers should have used other methods (e.g., de-escalation, nonviolent conflict resolution) in responding to the individual labeled as a suspect, in order to reduce the need to use force in the first place. Brandon Garrett & Seth Stoughton, A Tactical Fourth Amendment, 103 Va. L. Rev. 211, 228–37, 295–96 (2017).

258. Cf. Missouri v. McNeely, 569 U.S. 141, 145 (2013) (rejecting a per se exigency approach as inconsistent with "general Fourth Amendment principles, that exigency . . . must be determined case by case based on the totality of the circumstances").

259. See Int'l Ass'n of Chiefs of Police, National Consensus Policy and Discussion Paper on Use of Force 2–3 (2020), https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf [https://perma.cc/KVA5-P7NZ] (recommending de-escalation as a technique "to stabilize [potential force encounters] and *reduce the immediacy of the threat* so that more time, options, and resources can be called upon to resolve the situation without the use of force or with a reduction in the force necessary" (emphasis added)).

escalation tactics and communication strategies.[260] Importantly, building in more time will likely obviate the need for force.[261]

That does not mean that there will not be situations in which first responders are required to act quickly.[262] At the same time, it would be imprudent for courts to presume that the police response to a person in crisis always involves quick, split-second decisionmaking.[263]

c. Lack of Limits on Police Discretion. — Third, courts have applied exigent circumstances doctrine in ways that do not provide adequate limits on police discretion in cases involving mental health seizures. Scholars have rightly noted that the *Caniglia* Court's rejection of a broad community caretaking exception to the warrant requirement could work to limit police discretion in mental health crisis-related searches and seizures. In recent work, Christopher Slobogin argues that "[a]n expansive interpretation of *Caniglia v. Strom*'s rejection of a free-standing caretaker exception would help curb both police misuse of force and police use of pretexts to pursue illegitimate agendas, because it would limit police-initiated searches and seizures purporting to be for benign purposes," which "might also provide doctrinal support for the fledgling movement to de-police."[264] Furthermore, Slobogin argues, "given the potential for police misuse of force and for pretextual actions by the police, warrantless

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260. Id. at 9.

261. See id. ("[T]he goal of de-escalation is to slow down the situation so that the subject can be guided toward a course of action that will not necessitate the use of force, reduce the level of force necessary, allow time for additional personnel or resources to arrive, or all three."). Consistent with this literature, in cases that rely on exigent circumstances to justify warrantless searches and seizures, reviewing courts should assess whether—at critical decision points—police officers had the opportunity to slow down the pace of the encounter or obtain assistance from first responders and other professionals with the skills to do so. As a doctrinal matter, that would mean that law enforcement tactics that contributed to the exigent circumstance (that then is used as a basis to justify the warrantless search and seizure) weigh against a finding of exigency.

262. Respondents to one survey indicated that approximately twenty-four percent of people reporting suicide attempts indicated that they attempted suicide less than five minutes after the decision to make the attempt. Thomas R. Simon, Alan C. Swann, Kenneth E. Powell, Lloyd B. Potter, Marcie-Jo Kresnow & Patrick W. O'Carroll, Characteristics of Impulsive Suicide Attempts and Attempters, 32 Suicide & Life-Threatening Behav. 49, 52 (2001).

263. Not all situations involving people in crisis involve split-second decisionmaking. Recognizing this, amici in *Caniglia* argued that the police officers knew they lacked a basis to sustain the warrant on the grounds of exigency, which is why they argued for the caretaking exception. Brief for Amicus Curiae American Association of Suicidology Submitted in Support of Petitioner at 22–24, Caniglia v. Strom, 141 S. Ct. 1596 (2021) (No. 20-157), 2021 WL 307470.) [hereinafter Am. Ass'n of Suicidology]. Cf. City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" (quoting Warden v. Hayden, 387 U.S. 294, 298–99 (1967))).

264. Christopher Slobogin, Police as Community Caretakers: *Caniglia v. Strom*, 2020–2021 Cato Sup. Ct. Rev. 191, 216 (2021).

home entries in the absence of real exigency should never be part of policing's mission, even when a 'caretaking' goal can be articulated."[265]

Slobogin is correct: By rejecting the community caretaking exception, the *Caniglia* Court helped to reign in police officer abuses of discretion. But at the same time, given the state of the doctrine governing emergency mental health seizures, limiting warrantless exceptions to real exigencies in incidents involving people experiencing crises (or labeled as such) might not provide any real limit at all. Real exigencies involve the risk of imminent and concrete harm, but the Supreme Court has not provided much guidance as to what counts as imminent harm. Moreover, the risk of harm varies across all potential exigencies, but what level of risk is reasonable for constitutional purposes? So far, the courts have not provided a clear answer.

Courts have said that law enforcement does not have to wait until harm has materialized before they act,[266] but in the cases above, there is considerable variation with respect to how to assess exigencies in cases involving individuals in crisis. There are a few common risk factors that courts have found weigh in favor of finding exigencies, including allegations of suicidality,[267] the presence of weapons in the home,[268] bad hygiene,[269] verbal threats of self-harm,[270] and noncompliance with medication or treatment plans.[271] Yet there is little guidance as to how much weight to give these common (but not always relevant)[272] factors—and importantly, how police officers (or even clinicians) would evaluate these risk factors in their assessments of dangerousness, or what level of certainty regarding risk is sufficient to justify an exigency.[273]

Fourth, by grouping mental health emergencies with all other emergencies, courts can overlook significant reasons why police are particularly unsuited for mental health crisis response. In his *Caniglia* concurrence, Justice Kavanaugh referenced then-Professor Debra Livingston's 1998 article approvingly and echoed Chief Judge Livingston's

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265. Id. at 194.

266. See *Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring) (stating "officers do not need to show that the harm has already occurred or is mere moments away" because such a model would not work for cases like "a person who is currently suicidal or an elderly person who has been out of contact and may have fallen"); Brigham City v. Stuart, 547 U.S. 398, 406 (2006) ("Nothing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties . . . .").

267. See, e.g., Ziegler v. Aukerman, 512 F.3d 777, 784 (6th Cir. 2008).

268. See, e.g., Est. of Bennett v. Wainwright, 548 F.3d 155, 174 (1st Cir. 2008).

269. See, e.g., May v. City of Nahunta, 846 F.3d 1320, 1329 (11th Cir. 2017).

270. See, e.g., Mora v. City of Gaithersburg, 519 F.3d 216, 220 (4th Cir. 2008).

271. See, e.g., *Est. of Bennett*, 548 F.3d at 169 (noting noncompliance with medications).

272. See infra text accompanying notes 395–402.

273. For suggestions on how common risk factors might be weighed, see discussion in section III.A.

specific point that "'the responsibility of police officers to search for missing persons, to mediate disputes, and to aid the ill or injured has never been the subject of serious debate; nor has' the 'responsibility of police to provide services in an emergency.'"[274] "Consistent with that reality," Justice Kavanaugh reasoned, "the Court's exigency precedents . . . permit warrantless entries when police officers have an objectively reasonable basis to believe that there is a current, ongoing crisis for which it is reasonable to act now."[275] Justice Kavanaugh emphasized that the imminence of the harm was required to justify the reasonableness of the warrantless entry:

> "[O]fficers do not need to show that the harm has already occurred or is mere moments away, because knowing that will often be difficult if not impossible in cases involving, for example, a person who is currently suicidal or an elderly person who has been out of contact and may have fallen. If someone is at risk of serious harm and it is reasonable for officers to intervene now, that is enough for the officers to enter."[276]

Since now-Chief Judge Livingston's 1998 article, the police role, particularly in the realm of crisis response, has been subject to debate and has been challenged. Critics—and even law enforcement officials—maintain that police should not be involved in responding to every manner of emergency, or alleged emergency, including mental health response.[277]

Moreover, in practice, popular and professional opinions as to reasonableness have, since 1998, evolved to include an assessment as to whether law enforcement is the best, or most effective, first responder in mental health crisis situations. Nationwide police reforms reflect a shift away from police in mental health crisis responses and toward co-responder (if not alternative responder) programs in which police and behavioral health specialists or social workers are deployed to respond to individuals in crisis.[278] According to one study, co-responder programs

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274. Caniglia v. Strom, 141 S. Ct. 1596, 1604 (2021) (Kavanaugh, J., concurring) (quoting Debra Livingston, Police, Community Caretaking, and the Fourth Amendment, 1998 U. Chi. Legal F. 261, 263).

275. Id. (citing City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015); Michigan v. Fisher, 558 U.S. 45, 48–49 (2009); Brigham City v. Stuart, 547 U.S. 398, 406–07 (2006)).

276. Id.

277. See, e.g., Molly Kaplan, Why Are Police the Wrong Response to Mental Health Crises?, ACLU: At Liberty (Oct. 8 2020), https://www.aclu.org/podcast/why-are-police-wrong-response-mental-health-crises-ep-122-0 [https://perma.cc/JBY4-7LUB]; Nicholas Turner, We Need to Think Beyond Police in Mental Health Crises, Vera Inst. Just. (Apr. 6, 2022), https://www.vera.org/news/we-need-to-think-beyond-police-in-mental-health-crises [https://perma.cc/2UTN-CC2W].

278. See, e.g., Charlotte Resing, Scarlet Neath, Hilary Rau & Andrew Eslich, Ctr. for Policing Equity, Redesigning Public Safety: Mental Health Emergency Response 4, 7–8 (2023), https://policingequity.org/mental-health/69-cpe-whitepaper-mentalhealth/file

reduce use of force incidents against people in crisis.[279] Among more radical calls for change, abolitionists are advocating for a complete decoupling of police from public safety.[280]

d. Interrogating the Police Role. — Finally, mental health seizures must be distinguished from other emergencies on another ground. Mental health crises are exigencies in which, depending on the tactics deployed, police can cause the very harm that is to be avoided—physical harm to the individual or harm to others. In other words, law enforcement tactics and mere presence may escalate the situation and contribute to the conditions justifying use of deadly force. Curiously, Justice Kavanaugh's concurrence references *City and County of San Francisco v. Sheehan* as an example of an exigent circumstance and objectively reasonable basis for entering a home without a warrant—a case that went horribly wrong in violent ways. He writes: "The exigent circumstances doctrine applies. . . . After all, a suicidal individual in such a scenario could kill herself at any moment. The Fourth Amendment does not require officers to stand idly outside as the suicide takes place."[281]

It is not clear why Justice Kavanaugh cited the *Sheehan* case as an example of an incident involving an actively suicidal person, as there was no evidence that Sheehan was actively suicidal. In *Sheehan*, police officers were called to the group home where Teresa Sheehan resided to effectuate a temporary detention order after a social worker had determined that Sheehan required psychiatric evaluation and treatment.[282] According to the social worker, Sheehan had stopped taking her medication, which concerned him, so he called the police.[283] When the officers arrived at Sheehan's room, they knocked and informed Sheehan that they were there to help her.[284] When Sheehan did not respond, the officers obtained a key from the social worker and entered the room, which startled Sheehan.[285] Sheehan picked up a "kitchen knife with an approximately 5-inch blade and began approaching the officers, yelling something along the lines of 'I am going to kill you. I don't need help.'"[286] The officers retreated and left Sheehan in her room alone.[287] Fearing that Sheehan

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[https://perma.cc/W5T9-H6GR] (arguing that police should not be default responders and discussing co-responder and alternate responder programs).

279. Blais & Brisebois, supra note 66, at 1102.

280. See, e.g., Mariame Kaba, We Do This 'Til We Free Us: Abolitionist Organizing and Transforming Justice 15–17 (2021).

281. *Caniglia*, 141 S. Ct. at 1604 (Kavanaugh, J., concurring); cf. City of San Francisco v. Sheehan, 575 U.S. 600, 612 (2015) ("The Fourth Amendment standard is reasonableness, and it is reasonable for police to move quickly if delay 'would gravely endanger their lives or the lives of others.'" (quoting Warden v. Hayden, 387 U.S. 294, 298–99 (1967))).

282. *Sheehan*, 575 U.S. at 603.

283. Id.

284. Id. at 604.

285. Id.

286. Id.

287. Id.

would escape or harm herself or others, the officers reentered the room instead of waiting for backup.[288] Armed with pepper spray and their pistols, the officers sprayed Sheehan in the face. They testified that when Sheehan did not drop the knife after being pepper sprayed, they shot her multiple times.[289] Sheehan survived and later sued, alleging that the officers had used excessive force in violation of the Fourth Amendment, among other claims.[290]

Throughout his concurrence, Justice Kavanaugh at worst conflates emergencies; at best, he provides multiple examples of exigencies without distinguishing when police involvement is problematic and when it is not. In one passage, he compares an emergency involving a suicidal person with one involving a "wellness check" on an "elderly man" who is "uncharacteristically absent from Sunday church services and repeatedly fails to answer his phone throughout the day and night."[291] Such conflation is misguided and unsound. A person who is labeled suicidal will be regarded as a danger or threat[292] and likely will be responded to with violence; an elderly person missing from church will likely not be. Furthermore, to have an "objectively reasonable basis" for believing that an occupant is "seriously injured or threatened with such injury,"[293] one must be trained to assess the nature of the injury and not just the threat of injury. Locating an elderly man in his home is different from assessing the needs of a person experiencing a mental health crisis, which is a more appropriate task for medical and behavioral health professionals.

Similarly, appellate courts have, in general, failed to distinguish mental health emergencies in their assessments as to whether police officers had a reasonable basis for the warrantless search or seizure, lumping these emergencies alongside other exigencies.[294] Once in the same category as all other emergencies, courts tend to ask whether given the facts on the scene as the officer found them, there was an immediate risk of serious harm. Missing from the analysis is how to gauge imminence, which is in part a medical and mental health assessment of how likely it is that an individual threatening self-harm, or harm to others, will actually harm. Troublingly, they have assessed reasonableness in some cases without assessing whether and to what extent law enforcement relied on medical professionals' statements, observations, or opinions.[295]

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288. Id. at 604–05.

289. Id. at 605–06.

290. Id. at 606.

291. Caniglia v. Strom, 141 S. Ct. 1596, 1605 (2021) (Kavanaugh, J., concurring).

292. See supra section II.B.

293. Brigham City v. Stuart, 547 U.S. 398, 400, 403 (2006).

294. See, e.g., Johnson v. City of Memphis, 617 F.3d 864, 868 (6th Cir. 2010) (discussing emergency aid without specific reference to unique circumstances of mental health crises).

295. Compare Ewolski v. City of Brunswick, 287 F.3d 492, 515 (6th Cir. 2002) (assessing appellant's substantive due process claims that the police chief failed to properly account for medical professional statements), with Ewolski v. City of Brunswick, 287 F.3d 492, 520

Treating mental health exigencies like other emergencies weakens Fourth Amendment protections for people experiencing (or labeled as experiencing) mental health crises, precisely in the location where Fourth Amendment protections should be at their peak. The Supreme Court has recognized as much in cases involving the due process rights of individuals who are civilly committed.[296] Such a "massive curtailment of liberty"[297] does not just occur at the point of hospital admission. Forcible detentions by law enforcement—often because they look just like arrests—can be stigmatizing events, functioning as a kind of degradation ceremony.[298]

e. What is Reasonable?. — Combining different exigencies into the same broad category has produced doctrinal disarray beyond what is typically found (and criticized) in cases implicating traditional criminal law enforcement roles. In conflating exigencies, the Supreme Court has neither recognized nor specified what level of proof is necessary to find that a warrantless search or seizure is reasonable under the exigent circumstances doctrine. Professor Kit Kinports argues that the quantum of suspicion needed to justify exigent searches varies across Supreme Court opinions from probable cause to reason to believe to reasonable belief.[299] So, too, within the case law on emergency seizures for mental health evaluation, stabilization, and treatment. Among lower courts, there are numerous variations; courts have determined that anything from probable cause to reasonable belief may justify a finding of exigent circumstances.[300]

(6th Cir. 2002) (Hull, J., dissenting) (assessing the police chief's statements under the reasonableness prong of the Fourth Amendment). Such analysis can be made expressly part of the reasonableness inquiry as this Article discusses in Part III.

296. Vitek v. Jones, 445 U.S. 480, 491–92 (1980); accord Addington v. Texas, 441 U.S. 418, 425–26 (1979); see also Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016) ("[T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." (internal quotation marks omitted) (quoting Rodriguez v. City of New York, 72 F.3d 1051, 1061 (2d Cir. 1995))).

297. *Vitek*, 445 U.S. at 491–92 (internal quotation marks omitted) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)).

298. Professor Kaaryn Gustafson has described degradation ceremonies as communicative work "whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types." Kaaryn Gustafson, Degradation Ceremonies and the Criminalization of Low-Income Women, 3 U.C. Irvine L. Rev. 297, 301 (2013).

299. Kit Kinports, The Quantum of Suspicion Needed for an Exigent Circumstances Search, 52 U. Mich. J.L. Reform 615, 617–18 (2019).

300. See, e.g., Fitzgerald v. Santoro, 707 F.3d 725, 732 (7th Cir. 2013) ("Probable cause exists 'only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard . . . .'" (quoting Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992))); United States v. Porter, 594 F.3d 1251, 1258 (10th Cir. 2010) (requiring a reasonable belief in the need for medical assistance); Cloaninger ex rel. Est. of Cloaninger v. McDevitt, 555 F.3d 324, 334 (4th Cir. 2009) ("[O]fficers have probable cause to seize a person for a psychological evaluation when 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man' to believe that the person poses a danger to himself or others." (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964))); Est. of Bennett v. Wainwright, 548 F.3d

Of course, warrantless entries into homes for mental health seizures based on exigencies must be reasonable, and reasonableness is closely connected with the nature of the emergency. The more imminent the risk of harm, the more likely courts will find that law enforcement acted reasonably. The problem is that the Supreme Court has not sought to distinguish exigent circumstances from one another and has instead collapsed exigencies into the same broad category.

The reasonableness of law enforcement response depends not just on the imminence of the concrete harm (that purportedly requires an immediate response) but whether the particular emergency was responded to in a reasonable way. A reasonable response includes both the manner of the search and seizure and the scope. Though courts have acknowledged that the manner of the search or seizure matters in reasonableness analyses, comparatively few scrutinize police tactics to assess whether they align with leading guidance on mental health crisis response. Police are regarded as appropriate responders to mental health emergencies with little inquiry into the amount or quality of their training.[301] Though a reasonableness analysis could incorporate questions as to the police role, existing doctrine does not include much analysis as to the appropriateness of police serving in this role at all.[302] By collapsing exigencies into one large category, courts are prevented from meaningfully assessing the reasonableness of searches and seizures for emergency holds.

D. *Are Police Reasonable Mental Health First Responders?*

Under the "emergency aid" exception, "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[303] Such exigencies justify a warrantless search because of the "need to assist persons who are seriously injured or threatened with such injury,"[304] and the "'need to protect or preserve life or avoid serious injury is justification for what

155, 169 (1st Cir. 2008) ("Such circumstances exist, for example, where law enforcement officers enter a home without a warrant under a reasonable belief that doing so is necessary to render emergency assistance to a person inside."); Monday v. Oullette, 118 F.3d 1099, 1103 (6th Cir. 1997) (finding both probable cause and a reasonable belief that the plaintiff needed psychiatric treatment sufficiently satisfied Fourth Amendment and state statutory requirements).

301. See Hutcheson v. Dallas County, 994 F.3d 477, 483 (5th Cir. 2021) (concluding that mere existence of training protocol was sufficient to show that police officers were equipped to deal with individuals with psychiatric disabilities).

302. Cf. Barry Friedman, Disaggregating the Police Function, 169 U. Pa. L. Rev. 925, 939–48 (2021) (discussing the police role in responding to chronic social problems and finding that officers are trained "primarily on how to use force" and little "in the categories of mediation and social work").

303. Kentucky v. King, 563 U.S. 452, 460 (2011) (internal quotation marks omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

304. *Brigham City*, 547 U.S. at 403.

would be otherwise illegal absent an exigency or emergency.'"[305] Officers do not need to actually believe that there was an emergency, but the test is instead whether a reasonable officer would have believed there was an actual emergency.[306] Police officers must have an objectively reasonable basis to believe that there is a real threat of harm (to the individual and to others) and that the intrusion is reasonably necessary to alleviate the threat.

The government has the burden to establish that the defendant required emergency aid and that the warrantless entry into the defendant's home pursuant to the emergency circumstances exception to the warrant requirement was justified.[307] Though the government has the burden, courts might not scrutinize the government's proffered justifications for warrantless searches under the emergency aid exception.[308] Furthermore, and more to one of the central claims in this Article, courts do not distinguish emergency aid related to mental health from other traditional emergencies.[309] Again, this is not surprising because the doctrinal test itself does not distinguish traditional emergencies from other emergencies.

The emergency aid exception to the warrant requirement frames police as reasonable and capable mental health first responders. But absent from the balance are the serious harms that interventions by the police can and do cause. When it comes to mental health crisis response, police are very often not qualified to provide the necessary emergency aid—namely, therapeutic interventions necessary for de-escalation.[310] Indeed, as numerous cases demonstrate, the presence of police might

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305. Id. (quoting Mincey v. Arizona, 437 U.S. 385, 392 (1978)).

306. See Michigan v. Fisher, 558 U.S. 45, 47 (2009) (stating that a law enforcement officer only needs an objectively reasonable basis for believing that a person needs immediate aid to search a home without a warrant).

307. State v. Samuolis, 278 A.3d 1027, 1035 (Conn. 2022).

308. See, e.g., Johnson v. City of Memphis, 617 F.3d 864, 868 (6th Cir. 2010) (stating that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury . . . [n]or do officers need to wait for a potentially dangerous situation to escalate into public violence" in order to invoke the emergency aid exception (quoting Michigan v. Fisher, 558 U.S. 45, 49 (2009)). Here, scrutiny could take the form of scrutinizing facts that provide the basis for the government's claim of the need for emergency aid. See, e.g., French v. City of Cortez, 361 F. Supp. 3d 1011, 1024 n.9 (D. Colo. 2019) (enumerating the contested government facts justifying emergency aid that the judge "rejected for the purposes of summary judgment").

309. See supra section II.C.

310. See José M. Viruet, How Can I Use De-Escalation Techniques to Manage a Person in a Mental Health Crisis?, SMI Adviser (Jan. 11, 2022), https://smiadviser.org/knowledge_post/how-can-i-use-de-escalation-techniques-to-manage-a-person-in-a-mental-health-crisis [https://perma.cc/7JYG-AKES] (discussing several therapeutic interventions and de-escalation techniques).

actually increase (rather than prevent) the risk of physical harm to the individual.[311]

Are police officers reasonable first responders as a constitutional matter? The heart of the inquiry is often whether officers had an objectively reasonable basis for believing that there was a need to render emergency aid to an injured party or to protect a person from imminent injury.[312] But that inquiry is unduly narrow, and it neglects the reasonableness of the decision to dispatch the officer in the first place. The assessment does not evaluate whether the need to render emergency aid necessitated *police* response. Of course, a nonpolice response will not be available in jurisdictions that lack alternative response or community responder programs. But if 911 dispatch answers the call within jurisdictions where there are programs requiring nonpolice response, the current legal test does not require that courts take these diversion programs into account. Of course, the Fourth Amendment as a constitutional floor cannot compel jurisdictions to create alternatives to police first responders. But, as to the constitutional assessment of reasonableness, that question should at least include inquiry into whether reasonable alternatives (where they exist) were available. After all, it would not be reasonable to dispatch only police in a jurisdiction that has an available alternative response.

Police are often presumed to be appropriate first responders without much consideration as to whether police have the qualifications and training to perform crisis response functions effectively.[313] Some might contend that providing police with training will improve outcomes—for example, reduce uses of force or reduce arrests—in mental health crisis response. Crisis intervention trainings provide law enforcement with training on communicating with individuals in crisis and de-escalation tactics.[314] The "Memphis model" is the most well-known Crisis

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311. See, e.g., Ayobami Laniyonu & Phillip Atiba Goff, Measuring Disparities in Police Use of Force and Injury Among Persons With Serious Mental Illness, 21 BMC Psychiatry 1, 7 (2021) ("The present study provides evidence that [persons with serious mental illness] are significantly overrepresented in police use of force and suspect injury events."); see also Hyun-Jin Jun, Jordan E. DeVylder & Lisa Fedina, Police Violence Among Adults Diagnosed With Mental Disorders, 45 Health Soc. Work 81, 81–89 (2020) (finding higher rates of police victimization for adults with psychiatric disabilities, even when controlling for higher criminal involvement).

312. See Sutterfield v. City of Milwaukee, 751 F.3d 542, 558 (7th Cir. 2014) (describing the test for the emergency aid exception to the warrant requirement).

313. See supra section II.A. Critically, though, this Article does not suggest that police would be appropriate first responders even with training, due to their role misalignment.

314. See Crisis Intervention Team (CIT) Programs, Nat'l All. on Mental Illness, https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-(CIT)-Programs [https://perma.cc/J9Y5-55VS] (last visited Mar. 9, 2024) (discussing the benefits of Crisis Intervention Team Programs in improving officer knowledge about mental illness and reducing injuries during officer encounters, including by eighty percent in one city).

Intervention Training (CIT) training model.[315] Despite its popularity in police reform circles, there is no conclusive evidence that crisis intervention programs are effective in reducing arrests or reducing police uses of force.[316] Though there is some evidence that these trainings improve police attitudes, it should be relevant to our analysis that the metrics that matter most—at least if the goal truly is to reduce harm to people in crisis—are not being met.[317]

Reporting from the *Marshall Project* indicates that police receive limited first aid training, typically in their first year: "Of the 50 departments we contacted, 37 said they provide first aid training to recruits, but only 20 among them said they offer refresher courses, and only 14 departments require officers to attend them."[318] The report documented cases where officers were sued for failing to administer lifesaving care to gunshot victims and for refusing to administer CPR to a child.[319] Police officers in these cases defended their actions by stating either that they lacked the training or that calling 911 constituted adequate medical assistance and they were not required to do anything more.[320] This failure to render aid has led states to pass "duty to aid" laws requiring law enforcement to render medical assistance consistent with their training or to call for medical assistance.[321]

Up until now, this Article has surfaced two main problems with collapsing mental health exigencies into all other exigencies: (1) that mental health exigencies are often not exigencies in fact, and though exigent circumstances and emergency aid doctrines do not require that police accurately predict exigencies in any event, courts do not even attempt to establish some threshold for what risk factors support a finding of imminent harm justifying such exigencies, and (2) that police are not qualified in providing emergency aid and therefore should not be presumed to be reasonable first responders for constitutional purposes. But there is also a third problem that arises from this conflating of emergencies: When courts, under current Fourth Amendment doctrine, collapse exigencies, police who lack expertise for handling mental health

315. See Michael S. Rogers, Dale E. McNiel & Renée L. Binder, Effectiveness of Police Crisis Intervention Training Programs, 47 J. Am. Acad. Psychiatry L. 414, 415–16 (describing the Memphis CIT model).

316. Sema A. Taheri, Do Crisis Intervention Teams Reduce Arrests and Improve Officer Safety? A Systematic Review and Meta-Analysis, 27 Crim. Just. Pol'y Rev. 76, 90 (2016) ("At this time, however, there appears to be some evidence that CIT have no effect on outcomes of arrest, nor on officer use of force, with the overall findings being mixed.").

317. See Rogers et al., supra note 315, at 417.

318. Taylor Elizabeth Eldridge, Cops Could Use First Aid to Save Lives. Many Never Try., Marshall Project (Dec. 15, 2020), https://www.themarshallproject.org/2020/12/15/cops-could-use-first-aid-to-save-lives-many-never-try [https://perma.cc/L679-LGUR].

319. Id.

320. Id.

321. See, e.g., 720 Ill. Comp. Stat. Ann. 5/7-15 (West 2024).

exigencies are treated as de facto experts. The breadth of discretion afforded to police under the permissive objective reasonableness standard, exigent circumstances, emergency aid, special needs doctrines, and the fluid, unbounded, and fact-driven nature of probable cause make it so that the question of whether a search or seizure is reasonable is rarely a rigorous inquiry. This is, in large part, the problem with treating all emergencies alike: It obscures the line between police expertise, behavioral health expertise, and individual expertise—and privileges police expertise above all other forms.

In short, even while recognizing that police are not mental health experts, current Fourth Amendment doctrine still privileges police expertise. This paradoxical relationship might be because courts defer to the police in promoting public safety when responding to people in mental crisis (or labeled as such), though as this Article has described, this account of public safety is exclusionary because it fails to consider the harms police pose to individuals in crisis. The paradoxical relationship could also be because police are serving a role the behavioral health system is not yet equipped to fill. Yet while this view is consistent with the practical reality, constitutional rules and standards that do little to cabin police discretion but nonetheless promote deference to the police foreclose pathways for contesting police dispatch in mental health seizures, even if and when jurisdictions adequately fund behavioral resources.

Even while accepting that police are not medical experts, courts find it reasonable that police perform medical functions, which is true with respect to providing emergency aid after physical injury and also with respect to mental health first aid. Yet police providing medical functions should also raise constitutional concern.[322] Take de-escalation tactics: While de-escalation tactics are often referred to as policing tactics, they are also therapeutic techniques informed by medical practices.[323] Framed in this way, they are like medical techniques—drawing blood or checking temperatures—requiring not medical instruments and devices measuring bodily fluids or physical states but rather medical techniques that measure

322. Of course, as discussed supra section I.A, in many jurisdictions relatives, neighbors, and friends are given no options but to call the police when someone is experiencing mental crises. That police are the sole responders available in mental health crises in many jurisdictions does not dispositively resolve whether it is reasonable for police to perform mental health searches and seizures as a constitutional matter. Acting as though the Fourth Amendment should be applied to mental health searches and seizures in the same way it applies in criminal law enforcement contexts simply because the police perform the role given ongoing failures to invest in a robust behavioral health system imports the constraints of political economy on the realm of constitutional law—an approach better aligned with legal realism than originalist or textualist approaches. See Thomas Y. Davies, The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine, 100 J. Crim. L. & Criminology 933, 1036 (2010) (tracking a throughline of legal realism in Fourth Amendment search and seizure doctrine).

323. See Viruet, supra note 310 (describing how to use de-escalation techniques in a therapeutic setting).

physical, affective, emotional, and mental responses to calibrate therapeutic interventions accordingly. And though the medical technique is not used to search for evidence of an alleged criminal act within the body, the stated purpose of the medical technique is to avoid or prevent a whole range of undesirable responses—whether violence or physical, mental, and emotional stressors—and ensure the removal of the person from the home and into (albeit, forced) treatment if the requirement of imminent harm to self or others is satisfied.

Yet framing de-escalation tactics in this way presents a conundrum and a constitutional problem: At least in *Schmerber v. California*, the Supreme Court recognized that police lack medical expertise sufficient to perform certain medical techniques. Indeed, the Court said that "if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment," then such a search might raise serious constitutional questions.[324] Given that, is it constitutionally reasonable for police to perform wellness checks and engage in de-escalation tactics, which can be thought of as medical techniques? Taking seriously what Justice Brennan wrote in *Schmerber* would suggest the answer is no.[325]

E. *State Civil Commitment Laws and the Problems With Probable Cause for Psychiatric Seizures*

State laws govern whether officers have the authority to detain an individual for emergency evaluation, observation, and treatment. When state civil commitment laws are the basis for the emergency search or mental health seizure, probable cause is required for police to justify the intrusion based on state law criteria for emergency civil commitment. The majority of circuit courts have held that a seizure for emergency mental health evaluation is reasonable when supported by probable cause that the person is experiencing mental distress and is dangerous.[326] If an officer

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324. Schmerber v. California, 384 U.S. 757, 771–72 (1966).

325. See id. (implying that it would not be reasonable for police to perform medical techniques).

326. See, e.g., Graham v. Barnette, 5 F.4th 872, 884–86 (8th Cir. 2021) (concluding that officers can make a "mental-health arrest" based on "probable cause of dangerousness"); Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016) ("To handcuff and detain, even briefly, a person for mental-health reasons, an officer must have 'probable cause to believe that the person presented a risk of harm to [her]self of others." (alteration in original) (quoting Kerman v. City of New York, 261 F.3d 229, 237 (2d Cir. 2001))); Cantrell v. City of Murphy, 666 F.3d 911, 923 (5th Cir. 2012) ("[P]robable cause exists where the facts and circumstances within the officer's knowledge at the time of the seizure are sufficient for a reasonable person to conclude that an individual is mentally ill and poses a substantial risk of serious harm."); Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011) ("When an officer stops an individual to ascertain that person's mental state . . . , the Fourth Amendment requires the officer to have probable cause to believe the person is dangerous either to himself or to others."); Cloaninger ex rel. Est. of Cloaninger v. McDevitt, 555 F.3d 324, 334 (4th Cir. 2009) (holding that officers can only detain a person for mental health

exceeds their authority under state law and lacks a legal basis for detaining a person for emergency evaluation, aggrieved plaintiffs may allege a Fourth Amendment claim.[327] Reviewing courts then assess whether officers had probable cause that the criteria under the state statute had been satisfied.[328]

There are no clear guidelines for assessing probable cause for emergency seizures.[329] Requirements for probable cause vary widely across circuits.[330] Courts draw from criminal law in setting standards for what constitutes probable cause.[331] While in the criminal law context probable cause requires that an officer conclude that there is "substantial chance of criminal activity,"[332] in the mental health context, probable cause exists when an officer "believe[s] the individual is a danger to herself or others" and when "there is a substantial risk of serious physical harm to herself or

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evaluation when they have probable cause to believe that the person is dangerous); Meyer v. Bd. of Cnty. Comm'rs, 482 F.3d 1232, 1239 (10th Cir. 2007) (finding that detention required "probable cause to believe—that is a reasonable perception of a probability or substantial chance—that [the detainee] posed a danger to herself or others"); Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (requiring probable cause that a person has a "dangerous mental condition"); Ahern v. O'Donnell, 109 F.3d 809, 817 (1st Cir. 1997) ("Fourth Amendment standards require a showing of probable cause; that is, circumstances warranting a reasonable belief that the person to be seized does (as outlined in the statute) have a mental health condition threatening serious harm to himself or others."); Maag v. Wessler, 960 F.2d 773, 775–76 (9th Cir. 1991) (per curiam) (finding that officers were justified in detaining a person who they thought to "be a danger to himself or others" under a state law allowing the detention of "seriously mentally ill" persons (internal quotation marks omitted) (quoting Mont. Code Ann. § 53-21-129 (West 1991) (amended 2013))); see also Cole v. Town of Morristown, 627 F. App'x 102, 106–07 (3d Cir. 2015) ("[I]t is not unreasonable to temporarily detain an individual who is dangerous to herself or others."); In re Barnard, 455 F.2d 1370, 1373–74 (D.C. Cir. 1971) (describing the standard for a court to order involuntary commitment as "probable cause to believe the patient is mentally ill and, as a result thereof, is likely to injure himself or others").

327. See, e.g., *Cantrell*, 666 F.3d at 922.

328. See id. at 923.

329. Gooden v. Howard County, 954 F.2d 960, 968 (4th Cir. 1992) (reversing the district court's order denying qualified immunity because "[t]he lack of clarity in the law governing seizures for psychological evaluations is striking when compared to the standards detailed in other Fourth Amendment contexts, where probable cause to suspect criminal misconduct has been painstakingly defined").

330. See, e.g., Guan v. City of New York, 37 F.4th 797, 805 (2d Cir. 2022) ("[F]or a mental health arrest, police officers must have 'reasonable grounds for believing that the person seized is dangerous to herself or others.'" (quoting Anthony v. City of New York, 339 F.3d 129, 137 (2d Cir. 2003))); *Graham*, 5 F.4th at 886 ("Officers have probable cause to arrest a person for a mental-health evaluation when 'the facts and circumstances within . . . the officers' knowledge . . . are sufficient . . . to warrant a man of reasonable caution' to believe that the person poses an emergent danger to himself or others." (alterations in original) (quoting Baribeau v. City of Minneapolis, 596 F.3d 465, 474 (8th Cir. 2010))).

331. See, e.g., S.P. v. City of Takoma Park, 134 F.3d 260, 272 (4th Cir. 1998).

332. Washington v. Howard, 25 F.4th 891, 898–99 (11th Cir. 2022) (quoting Wesby v. District of Columbia, 138 S. Ct. 577, 588 (2018)).

others."[333] Probable cause includes facts about the person's physical appearance, including dress and hygiene, along with past conduct, like how the person is behaving leading up to and during the point when police officers arrive at the scene and whether they are complying with medication regimens.[334] Taken together, these factors go to whether police had probable cause of dangerousness (harm to self or others) or disability sufficient to justify emergency holds under state civil commitment laws.

Uncritical applications of criminal law standards to emergency mental health searches and seizures have undermined legal protections for people experiencing (or labeled as experiencing) mental health crises. Courts have conflated probable cause of alleged criminal conduct with probable cause justifying emergency seizures for the purposes of mental health evaluation and have largely relied on definitions, albeit imprecise ones, of criminal law probable cause.[335] Courts have deferred to police recountings of facts related to probable cause determinations without interrogating how such deference may further insulate police bias against disabled people from judicial scrutiny.[336] Fundamentally, courts by and large do not appreciate that the nature of the probable cause inquiry in criminal law cases is markedly different from that in mental health searches and seizures. The paragraphs that follow discuss each of these points.

Courts have treated probable cause standards for criminal conduct and mental health seizures as one and the same.[337] For example, in one

333. *Guan*, 37 F.4th at 807; see also *Graham*, 5 F.4th at 886 (articulating a similar standard based on the officer's reasonable belief that a person is dangerous); Fitzgerald v. Santoro, 707 F.3d 725, 732 (7th Cir. 2013) (explaining that under Illinois statute, "[p]robable cause exists 'only if there are reasonable grounds for believing that the person seized is subject to seizure under the governing legal standard'" (quoting Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992))).

334. See, e.g., People v. Triplett, 192 Cal. Rptr. 537, 537 (Ct. App. 1983) (finding probable cause where person was tearful, intoxicated, and displayed "obvious physical signs of a recent suicide attempt"); DelCastillo v. City of San Francisco, No. CV 08-3020, WL 1838939, at *7 (N.D. Cal. 2010) (considering plaintiff's appearance, statements, response to officers orders, and general behavior relevant to the probable cause analysis).

335. Pino v. Higgs, 75 F.3d 1461, 1467–68 (10th Cir. 1996) ("Because similar underlying interests arise in the context of a detention for an emergency health evaluation, several courts have applied an analogous 'probable cause' doctrine in determining the validity of the government's seizure of a person for mental health reasons." (citations omitted)).

336. In fact, inquiry into the officer's subjective bias is not appropriate under Fourth Amendment analysis under *Whren*. See Whren v. United States, 517 U.S. 806, 810–13 (1996) ("Subjective intentions [of individual officers] play no role in ordinary, probable-cause Fourth Amendment analysis.").

337. See, e.g., Guan v. City of New York, 18 Civ. 2417, 2020 WL 6365201, at *4 (S.D.N.Y. Oct. 29, 2020), aff'd on other grounds, 37 F.4th 797 (2d Cir. 2022) ("The probable cause analysis for a mental health seizure may differ from trespassing or disorderly conduct, but so long as probable cause existed for the Officer Defendants to seize and detain Plaintiff for any reason, that is sufficient to defeat Plaintiff's claim of false arrest.").

case, the Second Circuit "conclude[d] that the district court erred in holding that probable cause for a trespass arrest obviated the need for probable cause for a mental health arrest."[338] Kaibin Guan's autistic son was removed from her home when she was not there and taken to a hospital for a psychiatric evaluation. Guan was distraught and feared for her son's safety.[339] She went to the hospital and, according to hospital staff and police, behaved disruptively and was asked to leave.[340] Guan left but returned and was arrested for criminal trespass.[341] She sued alleging false arrest.[342] In holding that the district court erred in its analysis, the Second Circuit stated that "[t]he constitutional protections against an unreasonable arrest 'adhere[] whether the seizure is for purposes of law enforcement or due to an individual's mental illness.' But a different probable cause analysis applies to each type of arrest."[343] The Second Circuit nonetheless determined that officers were entitled to qualified immunity because, at the time that officers arrested Guan, it was not clearly established that they were required to have probable cause for the emergency psychiatric evaluation, even if they had probable cause to arrest her for trespass.[344]

Aside from conflating probable cause for criminal arrest with probable cause for mental health seizures, courts are not defining probable cause with sufficient clarity. Tolerance of fluid, capacious standards for probable cause in the criminal law enforcement context (which facilitates deference to law enforcement) does not make much sense in the context of psychiatric crises. For example, consider what the Supreme Court said in *Ornelas v. United States* of reasonable suspicion and probable cause: "They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act.' . . . *They are . . . fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed.*"[345] Yet the concerns in *Ornelas* do not apply to mental health seizures and such fluid conceptions of probable cause do not fit this context. Accurate assessments as to mental health are clinical determinations rather than common sense determinations and police should not be entrusted to make these

338. *Guan*, 37 F.4th at 807.

339. Id. at 801.

340. Id. at 801–02.

341. Id. at 802–03.

342. Id. at 803.

343. Id. at 805 (second alteration in original) (quoting Myers v. Patterson, 819 F.3d 625, 632 (2d Cir. 2016)); see also id. at 807–09 ("Probable cause to arrest for a criminal violation such as trespass is not a sufficient basis to arrest an individual for an emergency mental health evaluation."). In effect, the Second Circuit's holding can be taken to mean that pretextual arrests are not permissible in cases involving mental health seizures.

344. Id. at 809.

345. Ornelas v. United States, 517 U.S. 690, 695 (1996) (emphasis added) (citations omitted) (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)).

assessments. Indeed, consistent with the Fourth Amendment's balancing test, to justify such an intrusion (warrantless search and then seizure), the government interest must be strong. Here, the strength of the government's interest is only as strong as the accuracy of its assessment of probable cause of imminent harm or dangerousness. Fluid and capacious definitions of probable cause are inappropriate in cases involving mental health seizures because whether such searches are reasonable should be linked to whether the warrantless seizure was both appropriate and accurate. If anything, the *Ornelas* Court's own statement invites new formulations for probable cause attuned to the "particular context" of mental health seizures.

Probable cause is a notoriously capacious standard.[346] Once it's asserted, courts are reluctant to second-guess determinations by law enforcement. For example, in *May v. City of Nahunta*, the Eleventh Circuit found that an officer had arguable probable cause to seize May, the plaintiff, for a psychiatric hold when two EMTs reported to the officer that May was "'a little combative to herself' and was upset . . . [and] clasping her fists and 'vigorously . . . scruffing and hitting herself in the head,'" and that the officer's "own observations corroborated these statements, as he testified that May's hair was 'all over her head in disarray.'"[347] The Eleventh Circuit found that this evidence established that the officer could "reasonably have believed that May posed a danger to herself."[348] May was eventually released from the hospital about two hours later and reported that a nurse informed her that there was "nothing wrong with her."[349] In affirming the district court's grant of summary judgment, the Eleventh Circuit stressed that "in view of the chilling effect that a contrary ruling may have in this context, we are reluctant to second guess an officer's decision on these facts to transport a person to the hospital to evaluate possible mental-health concerns."[350] Yet, as this Article argues, in cases involving mental health seizures, such second-guessing by courts is appropriate.

Judicial deference to probable cause determinations by law enforcement is inappropriate in cases involving mental health searches and seizures. As in criminal law enforcement cases, capacious legal standards like probable cause, coupled with the constitutional irrelevance of an officer's subjective motivations under *Whren*,[351] serve to mask the role of bias in assessments of dangerousness or grave disability in legal determinations for psychiatric holds. For example, in *Myers v. Patterson*, a

346. See Andrew Manuel Crespo, Probable Cause Pluralism, 129 Yale L.J. 1276, 1280–82 (2020) (describing problems with "an infinitely malleable approach to probable cause").

347. May v. City of Nahunta, 846 F.3d 1320, 1329 (11th Cir. 2017) (second alteration in original).

348. Id.

349. Id. at 1326.

350. Id. at 1329.

351. Whren v. United States, 517 U.S. 806, 810–13 (1996); see also supra note 336.

police officer detained a mother after a Child Protective Services caseworker perceived her to be "'annoyed,' 'very uncooperative,' and 'irrational,'" and perceived her child to be "'fearful' of talking to the caseworker."[352] Officers ultimately detained the mother, Julia Johnson, for emergency involuntary psychiatric observation.[353] While she was under observation, mental health professionals diagnosed Johnson with delusional disorder and paranoid schizophrenia, and she disclosed a prior suicide attempt.[354] Mental health professionals determined that she posed a risk of danger to herself and others "based on her suicide attempt and her paranoia, guardedness, and suspiciousness."[355]

For some, the outcome of the incident (i.e., the plaintiff's detention) suggests the presence of probable cause and that the officers got it right. Yet the Second Circuit's statement regarding this outcome is instructive: "[H]owever prescient the officer's instincts may have been, we cannot grant immunity for decisions merely because *ex post* they seem to have been good ones, any more than we could hold officers liable for decisions that seemed reasonable when made but subsequently turned out to be wrong."[356]

As *Myers* illustrates, in cases involving unspecified mental distress practically any behavior that appears to be abnormal can form the basis for probable cause required to satisfy extant standards under existing state civil commitment laws governing emergency holds. The cases in this area of law reflect a wide array of behaviors, appearances, statements, speech patterns, and other subjective factors observed by officers that were determined to be reasonable under the Fourth Amendment because the officer had probable cause, or reasonable basis, that the individual posed a danger.[357]

No state regime requires officers to identify a set of behaviors that automatically amount to probable cause of imminent danger or grave disability, and so, in this context, probable cause assessments tend to function as a more flexible approach.[358] For instance, as the Sixth Circuit put it, probable cause in cases involving mental health seizures "requires

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352. Myers v. Patterson, 819 F.3d 625, 630 (2d Cir. 2016).

353. Id. at 635.

354. Id.

355. Id.

356. Id. at 636.

357. See, e.g., Sutterfield v. City of Milwaukee, 751 F.3d 542, 545–47 (7th Cir. 2014) (finding officers acted reasonably when an individual stated, "I guess I'll go home and blow my brains out," and nine hours had passed between notification of threat and warrantless entry); Johnson v. City of Memphis, 617 F.3d 864, 869–70 (6th Cir. 2010) (holding warrantless entry was justified when officers responded to an emergency hang-up phone call, the emergency dispatcher's return call was unanswered, the front door to the residence was open, and officers announced their presence and received no response).

358. Cf. Florida v. Harris, 568 U.S. 237, 244 (2013) ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.").

only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior," which could mean probable cause may be satisfied when officers have a reasonable belief that the person is dangerous.[359] Yet this formulation does not recognize how notions of reasonableness in the mental health seizures context differ from the criminal law context: Dangerousness is a clinical assessment under civil commitment laws. Whether an officer's belief is reasonable depends on whether the individual poses a danger to themselves and others—an assessment that properly includes clinical determinations as recognized by most civil commitment laws. Danger in the mental health seizure context is connected to the individual's mental state and incorporates an awareness of how that state relates to risk factors for harm to others or self-harm. The hybrid nature of this assessment is not at all captured by existing probable cause definitions. The capacious (if not vague) standards allow for bias and arbitrariness to seep into probable cause and undermine its supposed function in narrowing police discretion.[360] Deference to police undermines the ability of courts to scrutinize probable cause assessments to ensure that myths, misconceptions, biases, and stereotypes about people experiencing mental crises did not cloud officers' judgements as to necessity of involuntary commitment. In light of the biases that individuals (including law enforcement) have towards people with psychiatric disabilities (e.g., that they are prone to dangerousness) courts must scrutinize facts underlying probable cause of dangerousness.[361]

Finally, mental health probable cause is not the same kind of *inquiry* as probable cause in the criminal law enforcement context, even though

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359. Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (quoting Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983)); see also Roberts v. Spielman, 643 F.3d 899, 905 (11th Cir. 2011). Probability language shows up in the statutory text of civil commitment laws. See, e.g., Wis. Stat. Ann. § 51.15 (1) (ar) (2024) (authorizing detention where there is "[a] substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm").

360. For the ways bias seeps into probable cause determinations, see, e.g., Paul Butler, The White Fourth Amendment, 43 Tex. Tech L. Rev. 245, 250 (2010) ("[T]he Fourth Amendment allows police officers to stop and arrest every black man on the street or in their vehicle and refuse to stop any whites, provided that the officer has probable cause of some violation, no matter how minor."); Robert J. Smith, Justin D. Levinson & Zoë Robinson, Implicit White Favoritism in the Criminal Justice System, 66 Ala. L. Rev. 871, 910 (2015) ("Though the *Garner* Court narrowed the scope of the permissible use of deadly force considerably, the 'probable cause to believe that the suspect poses a significant threat of death or serious physical injury' standard leaves a lot of room for officer discretion. Implicit racial bias thrives under such circumstances." (footnote omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 3 (1985))); Simon Stern, Constructive Knowledge, Probable Cause, and Administrative Decisionmaking, 82 Notre Dame L. Rev. 1085, 1121 (2007) (explaining the risks of confirmation bias in law enforcement searches).

361. See supra notes 160–166 and accompanying text.

courts treat it as such.[362] Mental health probable cause includes the individual's likelihood of engaging in any potential activity that poses a risk of imminent harm to the person or another. It can include an assessment as to whether an individual is currently (or at some point in the immediate future will be) unable to meet their basic needs. Law enforcement and medical professionals may be called on to assess whether the criteria for involuntary commitment have been satisfied in order to effectuate the mental health seizure, which brings in two different sets of professional norms for evaluating risk of harm, danger, or mental disability. By contrast, probable cause in the criminal law enforcement context is pegged to the specific alleged offense (or group of possible offenses), an enterprise (given existing social arrangements) currently delegated to law enforcement authorities. These nuances are hardly captured in existing probable cause standards governing mental health seizures.

F. *Special Needs Searches*

Special needs searches are suspicionless searches aimed at furthering some government interest "other than crime detection."[363] Drug testing programs[364] and sobriety check points[365] are examples of special needs searches. Involuntary civil commitment procedures should not be characterized as special needs searches justifying warrantless intrusions into the home for the reasons that follow.

In *McCabe v. Life-Line Ambulance Services*, the First Circuit considered whether the City of Lynn's policy that permitted forcible, warrantless entries of private residences to enforce psychiatric holds under the state's civil commitment law violated the Fourth Amendment.[366] Ruchla Zinger

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362. See, e.g., Gooden v. Howard County, 954 F.2d 960, 968–69 (4th Cir. 1992) ("Certainly the concept of 'dangerousness' which calls on lay police to make a psychological judgment is far more elusive than the question of whether there is probable cause to believe someone has in fact committed a crime."); Initial Brief of Petitioner-Appellant at 27, United States v. Hollingsworth, No. 22-11250 (11th Cir. 2023), 2022 WL 3225134 ("In the mental health context, '[v]ague notions about what a person might do—for example, a belief about some likelihood that without treatment a person might cause some type of harm at some point—does not meet this standard." (alteration in original) (quoting Khoury v. Miami-Dade Cnty. Sch. Bd., 4 F.4th 1118, 1126 (11th Cir. 2021))).

363. Chandler v. Miller, 520 U.S. 305, 314 (1997); see also Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449–50 (1990) ("[W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (alteration in original) (internal quotation marks omitted) (quoting Treasury Emps. v. Von Raab, 489 U.S. 656, 665–66 (1989))).

364. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 633–34 (1989) (holding that mandatory drug and alcohol testing were reasonable under the Fourth Amendment).

365. *Sitz*, 496 U.S. at 447 (holding that sobriety checkpoint did not violate the Fourth Amendment).

366. 77 F.3d 540, 542–43 (1st Cir. 1996).

died of cardiorespiratory arrest while resisting officers who had forcibly entered her home without a warrant in order to transport her to the local hospital for emergency psychiatric evaluation and treatment.[367] The First Circuit concluded that the City's policy governing emergency holds fell squarely within the special needs search category.[368] After applying the balancing test articulated by the Supreme Court in *T.L.O.*, as between the important government interest on the one hand and the intrusion to the individual's Fourth Amendment rights on the other hand, the *McCabe* court determined that Lynn's policy of permitting warrantless searches was constitutional.[369]

According to the *McCabe* court, the relevant procedures under state civil commitment laws might be found to comply with the Fourth Amendment when these procedures are part of furthering an important regulatory or administrative purpose.[370] The court noted that "[t]he City policy, as evidenced by the actual conduct of its police officers, falls squarely within a recognized class of *systemic* 'special need' searches which are conducted without warrants in furtherance of important administrative purposes."[371] After "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," the Court found the warrantless entry to be reasonable under the Fourth Amendment.[372]

There are serious drawbacks to assessing the reasonableness of a particular mental health-related search under the special needs exception to the warrant requirement.[373] To begin with, Fourth Amendment doctrine governing administrative searches remains woefully in disarray and fails to adequately constrain executive discretion and arbitrary exercises of state power.[374] Professor Eve Primus has argued that courts have improperly conflated legal standards for "dragnet searches" with subpopulation searches.[375] As Primus maintains, after the Supreme Court

367. Id. at 542. The Amended Complaint alleged the lack of any exigent circumstances to justify the warrantless entry at the time the police forced their way into Zinger's home, so the exigent circumstances exception to the warrant requirement did not come into play. Id. at 543.

368. Id. at 546.

369. Id. at 545–47.

370. Id. at 545; see also Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment))).

371. McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 546 (1996) (footnote omitted).

372. Id. at 546–47 (alteration in original) (internal quotation marks omitted) (quoting O'Connor v. Ortega, 480 U.S. 709, 719 (1987)).

373. The First Circuit is not alone in classifying psychiatric holds as special needs searches. See Doby v. DeCrescenzo, 171 F.3d 858, 871 (3d Cir. 1999).

374. Primus, supra note 49, at 257–59.

375. Id. at 276.

added “special subpopulations searches” to the category of administrative searches, the Court declined to examine whether statutory or regulatory regimes limited executive discretion—a focus of the Court’s examination of the constitutionality of dragnet searches in earlier cases.[376] Because searches of special subpopulation members required executive discretion (determining who to search and when), it conflicted with the dragnet category of searches in which the broad exercise of executive discretion for suspicionless searches was discouraged and actively curtailed.[377] The result, according to Primus, is that Fourth Amendment protections governing administrative searches were severely weakened, undermining the central goal of the Fourth Amendment—constraining arbitrary exercises of executive power.[378]

Searches incident to mental health seizures might, at first glance, appear to be administrative searches of special subpopulations.[379] But the entanglement that Primus describes should caution against uncritically lumping these searches into the administrative search category where the permissive special needs test now controls.

Searches incident to emergency seizures for mental health evaluation should not be classified doctrinally as administrative searches for three main reasons. First, these searches are not of “subpopulations” that have a reduced expectation of privacy.[380] Special subpopulations—schoolchildren, government employees, parolees, probationers[381]—occupy spaces, perform functions, or possess a legal status that the Supreme Court has determined justifies a reduced expectation of privacy. But individuals in crisis (or labeled in crisis) are usually within a private dwelling or group home, not at roving checkpoints, schools, or automobiles—sites that the Supreme Court has held give rise to a lesser expectation of privacy.[382] Emergency seizures often involve warrantless

376. Id. at 278–79.

377. Id.

378. Id. at 277.

379. See, e.g., McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 546–47 (1st Cir. 1996) (“‘Special need’ searches are . . . conducted without warrants in furtherance of important administrative purposes.”).

380. Primus, supra note 49, at 271–72.

381. Id. at 270–71. For examples of Supreme Court decisions finding a reduced expectation of privacy, see Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 371 (2009) (schoolchildren); Samson v. California, 547 U.S. 709, 725 (2006) (parolees); Griffin v. Wisconsin, 483 U.S. 868, 879 (1987) (probationers); O’Connor v. Ortega, 480 U.S. 709, 725 (1987) (government employees); New Jersey v. T.L.O., 325 U.S. 325, 340 (1985) (schools).

382. See e.g., *T.L.O.*, 469 U.S. at 338–40; United States v. Brignoni-Ponce, 422 U.S. 873, 880–83 (1975) (reasonable suspicion required for police stop not probable cause); Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

entry into homes (including group homes), sites that the Supreme Court has held warrant particularly heightened constitutional protections.[383]

Second, given the conflation of mental disabilities with notions of criminality and dangerousness within society, courts should not regard searches incident to emergency seizures as divorced from "the normal need of law enforcement."[384] Though the government may establish a special need other than crime detection, the risk of criminalization remains ever present in mental health crisis response. It is, in other words, not always clear that the search is taking place "beyond the normal need for law enforcement."[385] The criminalization of disability makes the point: If officers arrive and the individual in crisis refuses treatment, is armed with (or believed to be armed with) a weapon, or threatens use of a weapon, not only are officers permitted under the Constitution to use force (or even deadly force) but they are also permitted to charge the individual with any number of crimes—like simple assault or assault with a deadly weapon—even if they engage in behaviors caused by their mental disabilities. In an overcriminalized society, an individual posing an immediate danger to themselves or others is likely breaking any number of criminal laws; the decision whether to arrest in that context is up to the officer. In fact, it's more likely that the officer will have probable cause of criminal conduct than probable cause that one of the criteria in the civil commitment statutes is satisfied.[386] Given that, the entanglement between criminal law enforcement functions and non-law enforcement functions suggests the inappropriateness of classifying warrantless entries into homes for psychiatric holds as special needs searches. Doing so would authorize a vast expansion of state power into the homes of people experiencing mental crises.

Finally, the special needs balancing test in practice weighs heavily in favor of the government's interest in performing wellness checks or effectuating psychiatric holds pursuant to court orders. Commentators have determined that this standard amounts to something like rational

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383. Minnesota v. Carter, 525 U.S. 83, 100 (1998) (Kennedy, J., concurring); see also Wilson v. Layne, 526 U.S. 603, 609–10 (1999); Payton v. New York, 445 U.S. 573, 596 (1980).

384. See *Griffin*, 483 U.S. at 873 (internal quotation marks omitted) (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)); see also supra section II.B.

385. *Griffin*, 483 U.S. at 873 (quoting *T.L.O.*, 469 U.S. at 351). Previous sections argued that many mental health searches and seizures do not take place pursuant to traditional criminal law enforcement purposes. See supra sections II.C–.D. This should not be taken to contradict that claim. That these searches and seizures are outside traditional law enforcement functions does not mean that mental health-related behaviors cannot be identified as violative of criminal laws. That is the risk of criminalization of disability.

386. See, e.g., Risdon N. Slate, Deinstitutionalization, Criminalization of Mental Illness, and the Principle of Therapeutic Jurisprudence, 26 S. Cal. Interdisc. L.J. 341, 348–49 (2017) ("Police may also find it more expedient to use the criminal justice process over that of civil commitment.").

basis review.[387] That standard is particularly inappropriate when dealing with individuals with psychiatric disabilities, a long-subordinated and stigmatized group within American society.[388] Given the long history of discrimination against people with psychiatric disabilities, such a low level of scrutiny will fail to adequately smoke out impermissible privacy intrusions and violations against this group. To take the rational basis review analogue one step further, it would be as though the particular privacy intrusions and invasions inflicted upon disabled people—part of the collective security interests and rights of the "people" that the Fourth Amendment aims to protect—would not count as privacy intrusions so long as the state framed the intrusion as part of a broader program of effectuating psychiatric holds. In this way, adopting the special needs test diminishes the significance of clear privacy interests; by framing the particular intrusion as programmatic, the analysis diminishes the import of that individual's interest even while purporting to recognize it. This special needs analysis fails to scrutinize how even framing crisis response as a *program* (a collective set of government interests in response to what is frequently framed as a threat to public safety) to respond to individuals in crisis, or labeled in crisis, may by its very nature ignore, erase, or devalue the individual rights at stake.[389]

Notably, other justifications—namely parens patriae and the state's police power itself—offer ready mechanisms for both elevating the public safety rationale and devaluing the individual rights at stake. Justifying these searches under the special needs exception to the warrant requirement might reinforce inaccurate assumptions and stereotypes about people dealing with mental crises. At one point, the *McCabe* court references the legitimacy of the parens patriae and police power to buttress the state's legitimacy in averting the potential consequences of a "mentally ill subject" causing death or serious bodily injury.[390] Perhaps unsurprisingly then the Court determined that the standard of imminent danger was

387. See, e.g., Primus, supra note 49, at 256–57 ("This reasonableness balancing—which scholars often describe as a form of rational basis review—is very deferential to the government, and the resulting searches are almost always deemed reasonable." (footnotes omitted)); see also Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 Wm. & Mary L. Rev. 197, 199–200 (1993); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 855 (1994); cf. Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. Rev. 1, 68, 106–07 (1991) [hereinafter Slobogin, World Without a Fourth Amendment] (arguing in favor of a "reconceptualization" of search and seizure law toward a "proportionality principle").

388. See Samuel R. Bagenstos, Subordination, Stigma, and "Disability", 86 Va. L. Rev. 397, 419–20 (2000) (citing 42 U.S.C. § 12101 (1994)).

389. This is likely due to the fact that the framing of crisis response as a public safety program will largely justify the role for police in the first place. McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 552–53 (1st Cir. 1996).

390. Id. at 547.

"sufficiently clear and reasonably reliable" particularly given the difficulties predicting human behavior.[391]

Pegging the vast scope of state power that parens patriae and the police power confers to states to the "potential consequences" of an individual experiencing (or believed to be experiencing) mental crisis seems misplaced in Fourth Amendment analysis in which the concern is *constraining* executive power. Indeed, the breadth of state power that undergirds parens patriae and police power calls for a more robust and probing Fourth Amendment analysis, particularly given the potential for abuse and mistreatment against disabled people—a long-oppressed and targeted minority group.

III. NEW STANDARDS FOR ASSESSING THE CONSTITUTIONALITY OF PSYCHIATRIC HOLDS

Proper accounting of the rights at stake for people experiencing crises (or labeled as experiencing crises) shifts the balancing under the Fourth Amendment's reasonableness test. Removing individuals from their homes for emergency evaluation and treatment is an invasive, intimate intrusion that risks violating the personal security and bodily autonomy of people experiencing crises.[392] By strengthening legal protections, the goal is not to make it more difficult for individuals in crisis to access treatment. But access to mental treatment should not come at the expense of (or diminution of) constitutional rights.

Of course, ex ante and ex post review are necessary to regulate searches and seizures.[393] Existing civil commitment laws governing emergency holds could be modified to regulate police conduct by requiring court orders before performing all holds. But, at least as current Fourth Amendment doctrine goes, the very existence of mental health exigencies would obviate any justification for seeking a court order in the first place. Given that, this Part addresses what substantive rules should

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391. Id. at 548.

392. While this Article surfaces doctrinal rules and standards that undermine Fourth Amendment protections for people experiencing crises in the home, many of the concerns discussed in the Article apply to unsheltered communities residing in public spaces across the country. Future research might aim to examine Fourth Amendment doctrine as applied to individuals in crisis and residing in public spaces. Moreover, strengthening legal protections for people experiencing mental crises in their homes should also not be taken to mean that individuals who are unsheltered receive less protection. Indeed, several have argued that the values and principles undergirding the Fourth Amendment make it so it can be interpreted to cover temporary shelters. See, e.g., Gregory Townsend, Cardboard Castles: The Fourth Amendment's Protection of the Homeless's Makeshift Shelters in Public Areas, 35 Cal. W. L. Rev. 223, 224 (1999); Lindsay J. Gus, Comment, The Forgotten Residents: Defining the Fourth Amendment "House" to the Detriment of the Homeless, 2016 U. Chi. Legal F. 769, 771; see also Slobogin, Poverty Exception, supra note 196, at 399–406 (discussing implicit exceptions to warrant requirement for low-income people).

393. Slobogin, World Without a Fourth Amendment, supra note 387, at 8.

guide courts assessing whether mental health searches and seizures are reasonable under the Fourth Amendment.

A. *Reasonable Exigencies*

For mental health seizures, what exigencies satisfy the legal standard of reasonableness under the Fourth Amendment? Of course, facts will vary. But frameworks can structure the analysis, provide for flexibility under the reasonableness standard, and also cabin police discretion in constitutionally appropriate ways. This section proposes a few steps courts could take to clarify doctrinal rules and standards.

At common law, warrantless seizures in public were justified by immediate dangerousness,[394] but there is less evidence as to what was required to search and seize an individual in the home. Under the totality of the circumstances analysis, courts should establish what risk factors would suffice such that officers' reasonable beliefs of their presence indicated an immediate danger are constitutionally reasonable.[395] Currently, common risk factors that tend to weigh in favor of finding exigent circumstances—whether recent statements as to suicidality, weapons possession, access weapons in the home, bad hygiene, verbal threats, and noncompliance with medication or treatment plans—are all taken as relevant to the exigency inquiry.[396] Under current case law, the presence of one or more of these factors satisfies the legal showing requiring that officers have a reasonable belief that an individual needed emergency aid.[397] Yet, though these risk factors are relevant to assessing whether exigent circumstances justify the warrantless search or seizure, not all the factors point to the necessity for emergency aid or exigent circumstances more broadly. Stated differently, not all the factors (e.g., bad hygiene, verbal threats, noncompliance with medication) should weigh equally because it is not reasonable to infer exigency or an immediate need for emergency aid (given, again, immediate danger) from each of these factors.

Whether a search or seizure is reasonable should turn on the presence of specific risk factors for physical harm to self or others, and the nexus between the specific risk factor and its risk of imminent danger should determine its weight in the totality of the circumstances analysis. With respect to harm to self, risk factors like weapons possession (whether, for example, within reach or within possession), accompanied by clear statements evincing a clear intention to inflict immediate harm, a plan to engage in harm, and access to the means to harm, should weigh in favor of finding exigent circumstances—all factors that indicate risk of

394. See supra note 234 and accompanying text.

395. Samson v. California, 547 U.S. 843, 848 (2006).

396. See notes 267–271 and accompanying text.

397. See, e.g., Ziegler v. Aukerman, 512 F. 3d 777, 786 (6th Cir. 2008) (upholding a warrantless search based only on a finding of suicide risk).

suicidality in social science literature.[398] When possible, these risk factors should be assessed alongside and corroborated by credible statements or documentation by medical professionals[399] and any statements of the individual, including any prior statements made in a psychiatric advance directive regarding specific interventions during mental crises.[400] Bad hygiene, verbal threats, and noncompliance with medication on their own should not weigh in favor of finding exigency.

Beyond this, the *absence* of relevant exigencies should also be assessed. For instance, in *French v. City of Cortez*, the district court found that "under the facts presented by the [plaintiffs], the officers did not have an objectively reasonable basis to believe there was an immediate need to protect the lives and safety of those inside the home and [that] the scope of their search was unreasonable."[401] In reaching its conclusion, the court did not just take as given what defendants argued were the facts that, taken together, amounted to exigent circumstances. Rather, the court looked to what "circumstances the officers did not encounter": (1) reports of an ongoing or completed crime; (2) noises suggesting that there was an altercation within the house or that someone was being injured; (3) signs that [the individual] had injured his parents or that he was armed.[402] The district court then balanced the absent circumstances against the circumstances that the Supreme Court approved of in *Brigham City*.[403] Similarly, courts can ensure that the immediacy requirement underlying the exigent circumstances doctrine is met for mental health searches and seizures not only by examining facts that point to the presence of emergencies but also by identifying facts that are not present but that should be present if there were indeed an emergency.

Of course, the harm need not materialize before assistance may be provided, but immediate action does not require immediate *police* action. In the mental health context, courts must scrutinize whether immediate

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398. See, e.g., Matthew Miller, Steven J. Lippmann, Deborah Azrael & David Hemenway, Household Firearm Ownership and Rates of Suicide Across The 50 United States, 62 J. Trauma: Injury, Infection & Critical Care 1029, 1031 (2007); see also Risk Factors, Protective Factors, and Warning Signs, Am. Found. for Suicide Prevention, https://afsp.org/risk-factors-protective-factors-and-warning-signs/ [https://perma.cc/AT4Z-CSA3] (last visited Mar. 28, 2024).

399. Chathas v. Smith, 884 F.2d 980, 987 (7th Cir. 1989) (holding that an officer's decision to detain an individual was reasonable when based upon information provided by doctor rather than the officer's own observations).

400. Resources for (Un)learning, Project Lets, https://projectlets.org/resources [https://perma.cc/48RV-APQN] (last visited Feb. 15, 2024). By including the views of medical professionals, this Article does not seek to privilege those views over the lived experiences and expertise of individuals with psychiatric disabilities experiencing mental crisis. Cf. Ben-Moshe, Decarcerating Disability, supra note 94, at 73–86 (discussing factors that led to the "breaking down of the monopoly of medical expertise" in movements led by, alongside, and on behalf of people with intellectual and developmental disabilities).

401. French v. City of Cortez, 361 F. Supp. 3d 1011, 1031 (D. Colo. 2019).

402. Id. at 1029.

403. See id. at 1029–30; see also Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

law enforcement action is necessary in that particular jurisdiction, taking into account existing resources (whether alternative, co-response, or community response models). Only then should the police response be assessed as constitutionally reasonable or not.

Finally, when police have information about the individual's mental health and potential need for purportedly immediate access to mental health treatment, a more appropriate test attuned to the constitutional rights at stake would be a standard that aligns reasonableness with professional standards of care. Thus, to satisfy the state's burden, the government should provide specific and articulable facts that include information from medical or mental health professionals, when available, to demonstrate that law enforcement relied on this information and performed the search and seizure in a manner that was consistent with, or did not at least conflict with, information from these mental health professionals.

B. *Police Are Not Reasonable First Responders*

When is it constitutionally reasonable for police to render emergency aid to persons under a less permissive, more rigorous reasonableness test? This Article proposes the following test: It is presumptively unreasonable for police, as non-mental health experts, to be involved in mental health crisis response. Consistent with its burden, the government must rebut this presumption of unreasonableness by establishing that (1) it was necessary (and therefore reasonable) to dispatch police in response to a person suspected of experiencing a mental health crisis, and (2) the police, or mental health professionals,[404] performed the dispatch in a reasonable manner.[405] In assessing the reasonableness of the officers' actions, courts should first consider whether the decision to dispatch law enforcement (as opposed to mental health professionals) was reasonable in the first place *before* assessing whether the officer had an objectively reasonable basis for the warrantless entry of the home. Stated differently, as a threshold matter the government has the burden to establish that law enforcement dispatch was necessary before establishing a justification—whether exigency or emergency aid—for a warrantless mental health search or seizure. Building necessity into the reasonableness test furthers the objectives of constitutional reasonableness[406] by considering the existing resources and alternative responder programs within the jurisdiction with respect to mental health crisis response.

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404. See Shawn E. Fields, The Fourth Amendment Without Police, 90 U. Chi. L. Rev. 1023, 1056–61 (2023).

405. Cf. Schmerber v. California, 384 U.S. 757, 771 (1966) (discussing reasonableness in events surrounding an arrest).

406. See Slobogin, World Without a Fourth Amendment, supra note 387, at 6 (explaining that the state's interest in "avoiding unnecessary searches and seizures" overlaps with citizens' interests in related constitutional liberties, including privacy and autonomy).

In the vast majority of jurisdictions, the fact is that police remain involved in transporting individuals for emergency evaluation, stabilization, and treatment. Courts, in assessing whether officers acted reasonably, must both recognize this reality while meaningfully applying the "objectively reasonable officer" standard. Police officers are not mental health professionals and, because of this, some might argue that they cannot be held to that higher standard.[407] After all, the reasonable officer standard as it now stands in Fourth Amendment jurisprudence is focused on what a reasonable police officer would do, not what a reasonable mental health professional would do. While the reasonable police officer standard might not be the same standard as the mental health professional, the standard (if it is to operate as a constraint on law enforcement discretion at all) should incorporate professional norms and current standards that govern mental health crisis response. At the very least, that would build in a set of measurable, concrete standards from which to assess an officer's conduct.

The reality—one not often recognized in Fourth Amendment doctrine—is that police are not reasonable first responders in cases involving harm to self or inability to care, or even cases in which the person appears to pose a danger to others. Nonetheless, as this Article has shown, courts have for too long presumed that police are reasonable first responders, even when research acknowledges that police lack expertise in responding to mental health emergencies. There is little empirical evidence to demonstrate that CIT training would turn police into reasonable first responders. Law enforcement departments across the country have enacted policies requiring de-escalation and training, and some report a reduction in uses of force, detention, and arrests as a result of such reforms.[408] Yet, as I have argued elsewhere, "these reforms do not go far enough in disrupting the pathways to police violence . . . because of the risks that armed officers will respond with potentially lethal force during the encounter."[409] This risk remains even in cases where law

407. See Caniglia v. Strom, 953 F.3d 112, 129 n.8 (1st Cir. 2020) ("That an expert psychologist might have reached a different conclusion about the plaintiff's condition than a police officer without such training does not render the officers' determination objectively unreasonable.").

408. See, e.g., Seattle Police Dep't, Seattle Police Department Manual § 8.100 (2021), https://public.powerdms.com/Sea4550/tree/documents/2042943 [https://perma.cc/NBY8-Z9EN] (offering broad guidelines for de-escalating situations); Robin S. Engel, Nicholas Corsaro, Gabrielle T. Isaza & Hannah D. McManus, Assessing the Impact of De-Escalation Training on Police Behavior: Reducing Police Use of Force in the Louisville, KY Metro Police Department, 21 Criminology & Pub. Pol'y 199, 216–17 (2022); Paras V. Shah, Note, A Use of Deadly Force: People With Mental Health Conditions and Encounters With Law Enforcement, 32 Harv. Hum. Rts. J. 207, 218 (2019); Claire Trageser, Experts, Activists Say San Diego's New Police De-Escalation Policy May Not Change Much, KPBS (June 26, 2020), https://www.kpbs.org/news/public-safety/2020/06/26/san-diegos-new-police-de-escalation-policy [https://perma.cc/BF42-MFL3].

409. Morgan, Policing Under Disability Law, supra note 155, at 1467–68.

enforcement is dispatched to perform what might be classified "care" related functions, like performing welfare checks. The extent of violence against individuals in crisis and the tragic loss of life should disrupt any notions that police are suited to these mental health-related caretaking functions.

Nationwide, the existence of alternative or community responder programs explicitly contests the role of police as necessary first responders for mental health crisis response.[410] A number of jurisdictions are pursuing plans to decouple police from crisis response through the implementation of the 988 crisis lifeline.[411] Community groups have developed diversionary programs that do not involve law enforcement in responding to mental crisis calls[412] but instead involve private responses led by local and, in some cases, peer groups.[413] Mobile crisis units that do not rely on police as first responders have proven successful. One crisis intervention specialist with the CAHOOTS program in Eugene, Oregon explained that out of approximately 24,000 calls for crisis assistance, police were called in only about 150 cases. CAHOOTS's approach has been celebrated as a leading model for crisis response.[414]

When courts critically engage with the question of whether police are reasonable first responders, they can better assess and align Fourth Amendment values with practical realities on the ground. Fourth Amendment values that promote privacy and security by narrowing the discretion of law enforcement can be furthered by approaches that

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410. For a list of alternative response programs, see 988 Crisis Response State Legislation Map, Nat'l All. on Mental Illness, https://reimaginecrisis.org/map/ [https://perma.cc/J9S7-24NK] (last visited Feb. 28, 2024).

411. Substance Abuse and Mental Health Servs. Admin., 988 Frequently Asked Questions, https://www.samhsa.gov/find-help/988/faqs [https://perma.cc/ZK3Y-BH75] (last visited Feb. 28, 2024).

412. See Mayor Bill de Blasio, Transcript: Mayor de Blasio Appears Live on Inside City Hall, NYC.gov (Oct. 21, 2019), https://www.nyc.gov/office-of-the-mayor/news/499-19/transcript-mayor-de-blasio-appears-live-inside-city-hall [https://perma.cc/AQG3-GKP2].

413. See Jackson Beck, Melissa Reuland & Leah Pope, Behavioral Health Crisis Alternatives: Shifting From Police to Community Responses, Vera Inst. of Just. (Nov. 2020), https://www.vera.org/behavioral-health-crisis-alternatives [https://perma.cc/4AQR-9DLW]; Us Protecting Us, https://www.facebook.com/usprotectingus/ [https://perma.cc/R835-YP66] (last visited Feb. 28, 2024) ("Us Protecting Us is a group of people with and without disabilities dedicated to building a world without the threat of policing. Together, we are educating and training ourselves to handle crises without police and building power amongst ourselves."); Ellen Meny, CAHOOTS an Alternative to Traditional Police, Ambulance Response, KVAL (Feb. 5, 2016), https://kval.com/news/local/theres-a-growing-awareness-that-alternatives-to-law-enforcement-are-needed [https://perma.cc/N29S-WCJY].

414. See, e.g., Ben Adam Climer & Brenton Gicker, CAHOOTS: A Model for Prehospital Mental Health Crisis Intervention, Psychiatric Times (Jan. 29, 2021), https://www.psychiatrictimes.com/view/cahoots-model-prehospital-mental-health-crisis-intervention [https://perma.cc/S9PL-LV2L] (noting that the CAHOOTS program has quadrupled in size over the past decade and expanded its geographic reach).

recognize that reasonableness in the context of mental health exigencies should be informed by professional standards of care governing mental health crisis response. Stated differently, professional standards of care governing mental health crisis response align with Fourth Amendment values—they need only be incorporated into doctrinal analysis. Professional standards of care governing mental health crisis response emphasize the importance of, and aim to promote, privacy and personal autonomy. That these standards reflect these values can be seen through empirical research and guidelines that aim to reduce reliance on forcible care as a pathway to mental health treatment and services.[415] Studies have shown that voluntary care, which does not rely on coercive pathways to mental health care, produces better mental health outcomes (e.g., continued involvement in treatment) over time.[416] By inquiring into whether police are reasonable first responders, advocates can present, and courts can review, arguments that surface whether coercive police responses that undermine patient privacy and security are constitutionally

415. See, e.g., Penelope Weller, Therapeutic Jurisprudence and Procedural Justice in Mental Health Practice: Responding to 'Vulnerability' Without Coercion, *in* Critical Perspectives on Coercive Interventions 212, 212–24 (Claire Spivakovsky, Kate Seear & Adrian Carter, eds., 2018) (describing lack of empirical evidence supporting forced treatment); Jennifer Zervakis, Karen M. Stechuchak, Maren K. Olsen, Jeffrey W. Swanson, Eugene Z. Oddone, Morris Weinberger, Elena R. Bryce, Marian I. Butterfield, Marvin S. Swartz & Jennifer L. Strauss, Previous Involuntary Commitment Is Associated With Current Perceptions of Coercion in Voluntarily Hospitalized Patients, 6 Int'l J. Forensic Mental Health 105, 110–11 (2007) (finding that patients experience trauma by forcible treatment, which adversely affects future engagement with voluntary mental healthcare); Forced Treatment, Bazelon Ctr. for Mental Health L., https://www.bazelon.org/our-work/mental-health-systems/forced-treatment [https://perma.cc/86FL-J2HB] (last visited Feb. 28, 2024) ("Forced treatment—including forced hospitalization, forced medication, restraint and seclusion, and stripping—is only appropriate in the rare circumstance when there is a serious and immediate safety threat."); Involuntary Mental Health Treatment, Mental Health Am., https://mhanational.org/issues/involuntary-mental-health-treatment [https://perma.cc/LA2A-SYX8] (last visited Feb. 28, 2024) (describing involuntary treatment as a "last resort").

416. See, e.g., Joshua T. Jordan & Dale E. McNiel, Perceived Coercion During Admission Into Psychiatric Hospitalization Increases Risk of Suicide Attempts After Discharge, 50 Suicide & Life-Threatening Behav. 180, 181 (2019) (explaining that people who are involuntarily committed are more likely to attempt suicide during hospitalization than those receiving treatment voluntarily); Damian Smith, Eric Roche, Kieran O'Loughlin, Daria Brennan, Kevin Madigan, John Lyne, Larkin Feeney & Brian O'Donoghue, Satisfaction With Services Following Voluntary and Involuntary Admission, 23 J. Mental Health 38, 38 (2014) ("Inpatient treatment negatively impacts upon ratings of satisfaction, especially if on an involuntary basis . . . . These service users are also more likely to experience greater levels of perceived and physical coercion during the process of their admission . . . ." (citation omitted)); Sarah Woodward, Katherine Berry & Sandra Bucci, A Systematic Review of Factors Associated With Service User Satisfaction With Psychiatric Inpatient Services, 92 J. Psychiatric Rsch. 81, 91 (2017) ("Coercion was shown to be negatively associated with satisfaction, while voluntary admission was positively associated with satisfaction. Satisfaction was reported to be higher on open than closed wards, possibly due to the restrictions placed on freedom on closed wards.").

unreasonable. Such an inquiry adds another layer to the reasonableness analysis, and in a manner that aligns with core Fourth Amendment values.

C. *Right-Sizing Probable Cause*

Probable cause requires "that it be reasonable for any particular officer to conclude that there is a substantial chance of criminal activity" based on the totality of the circumstances.[417] This standard does not fit neatly into the mental health seizures context. Still, courts have imported probable cause definitions into this context, contributing to doctrinal disarray. This section aims to clarify how to think about probable cause in the context of mental health seizures.

Probable cause assessments in criminal law cases should be distinguished from probable cause assessments for mental health seizures.[418] Importantly, there must be a basis for determining whether police have enough evidence to satisfy state-law-based criteria in involuntary commitment laws. Probable cause for mental health seizures should mean more than a "probability or substantial chance" that a person will harm themselves;[419] it should be a meaningful standard from which to assess the reasonableness of warrantless searches and seizures under Fourth Amendment. For the purposes of mental health seizures, probable cause of dangerousness should be considered as more of an explanatory standard than a probabilistic one.[420]

This section proposes three guidelines to cabin police discretion and to clarify probable cause standards governing emergency holds: (1) probable cause for alleged criminal acts should be distinguishable from probable cause assessments for emergency holds; (2) the reasonable officer's belief as to the sufficiency of probable cause must be based on information obtained from a credible medical professional, solicited

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417. Washington v. Howard, 25 F.4th 891, 899 (11th Cir. 2022).

418. Past and present social stereotypes about "mental illness" do tend to conflate mental crisis and mental disability more broadly with notions of criminality. See, e.g., Morgan, Disability's Fourth Amendment, supra note 213, at 528; Morgan, Policing Under Disability Law, supra note 155, at 1413; see also Camille A. Nelson, Racializing Disability, Disabling Race: Policing Race and Mental Status, 15 Berkeley J. Crim. L. 1, 18–20 (2010) (noting "the conflation of madness with criminality" and frequent police "stereotyping of the mentally ill as violent").

419. Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997) (internal quotation marks omitted) (quoting Illinois v. Gates, 462 U.S. 213, 245 n.13 (1983)).

420. For example, Professor Kiel Brennan-Marquez has argued that "[f]or probable cause to be satisfied, an inference of wrongdoing must be *plausible*—the police must be able to explain why observed facts give rise to the inference. And judges must have an opportunity to scrutinize that explanation." Kiel Brennan-Marquez, "Plausible Cause": Explanatory Standards in the Age of Powerful Machines, 70 Vand. L. Rev. 1249, 1253 (2017) (footnote omitted); see also id. at 1265–73 (describing Supreme Court cases endorsing the plausible cause and explanatory view of the Fourth Amendment); Maclin, supra note 387, at 202 ("At a minimum, the Fourth Amendment commands compelling reasons, or at least a substantial justification, before a warrantless search or seizure is declared reasonable.").

through witness reports, or secondhand information; and (3) when reviewing probable cause, courts must incorporate and take seriously the views of the individual as to the need for emergency treatment.

As to the first guideline, facts supporting probable cause of a crime should not form the basis for probable cause of dangerousness or any of the criteria for emergency civil commitment. These two standards are legally separate determinations and should not be conflated. When feasible, credible information from medical professionals must factor into probable cause assessments. In particular, courts should look to professional standards of care for guidance as to what factors indicate an immediate risk of self-harm when individuals are alleged to pose an imminent danger to themselves. Furthermore, police are not mental health experts and their interpretations of the facts in mental health crisis situations should not receive deference, even if they receive deference in criminal law enforcement functions as scholars have noted and criticized.[421] Under existing case law, courts defer to police given their purported expertise, training, and know-how with respect to criminal law enforcement.[422] But this deference is not warranted in an area in which officers, even with training, lack expertise. Finally, probable cause of dangerousness or grave disability should, where possible, include the views of the individual, including any statements that might weigh against emergency civil commitment and statements regarding how to implement a psychiatric advance directive if the person does experience mental crisis.

As with my proposal under exigent circumstances, innocent and innocuous variables (general appearance and affective behaviors) should matter less in the totality of the circumstances analysis—in other words, courts should give them less weight. Such an inquiry recognizes that, as a Fourth Amendment matter, warrantless seizures were justified at common law only when the individual was deemed to pose an imminent danger. Because biases against disabled people can seep into police judgments like probable cause, reviewing courts should scrutinize probable cause assessments so to prevent probable cause from becoming a vehicle for laundering and legitimizing police work that incorporates potential (explicit and implicit) biases against disabled people.

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421. Anna Lvovsky, Rethinking Police Expertise, 131 Yale L.J. 475, 488 (2021) (explaining that lower and state courts "extended [a] deferential posture to a range of other investigative judgments, from the assessment of exigent circumstances (which must yield to the perspective of 'experienced officer[s]') to the risk of danger justifying a frisk" (second alteration in original) (footnote omitted) (quoting Chamberlain v. City of White Plains, 986 F. Supp. 2d 363, 381 (S.D.N.Y. 2013))); see also Benjamin Levin, Criminal Justice Expertise, 90 Fordham L. Rev. 2777, 2782–83 (2022) (discussing "three different conceptions of expertise that are reflected in contemporary debate").

422. Anna Lvovsky, The Judicial Presumption of Police Expertise, 130 Harv. L. Rev. 1995, 1997–99 (2017) (describing deference to police expertise involving probable cause and criminal investigations).

Finally, courts should scrutinize any and all facts supporting probable cause.[423] Probable cause should be based on current information, not just past information, to ensure that individuals are evaluated based on current conduct, not prior risks alone, which would obviate the need for the emergency seizure in the first place.[424] For instance, the Second Circuit, in an opinion by Judge Calabresi, remanded a finding of probable cause and reevaluation of qualified immunity when the record contained only "terse notes of the CPS caseworkers" that "lack[ed] indicia of, or specific observations substantiating, Johnson's 'dangerousness,'" and which did not "show that [the officer] reasonably relied on communications from [the case worker] or others in making the seizure," and in which "there [was] no statement by Patterson in the record."[425] The district court in that case found that "defendant did not provide evidence that either [officer] Patterson or [case worker] Weitzman witnessed [plaintiff] Johnson 'threaten her own life'" or that Johnson "'manifested homicidal or other violent behavior placing' [the child] at risk of serious physical harm," a reference to New York state law governing the involuntary commitment of a parent.[426] Like *Myers*, these proposals build in greater scrutiny in cases where an officer initiates an emergency hold while helping to reduce the risk of criminalizing individuals in mental crisis, particularly when law enforcement is dispatched and later tasked with assessing dangerousness. Ultimately, these proposals make it so law enforcement is required to produce more information—and high-quality information—before performing warrantless seizures for emergency treatment and evaluation.

CONCLUSION

Existing Fourth Amendment jurisprudence treats emergency searches and seizures for the purpose of mental health evaluation like criminal law enforcement seizures. This Article argues against such approaches. Psychiatric holds are different from other exigent circumstances that involve emergency aid, and legal standards and doctrines that govern in criminal procedure cases—whether probable cause or special needs—do not fit neatly into the mental health context. Applying criminal law enforcement standards to the mental health context also works to diminish Fourth Amendment legal protections for people in crisis and disabled people. A critical disability analysis of Fourth Amendment doctrine in this area provides a framework to question, as a

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423. See, e.g., Myers v. Patterson, 819 F.3d 625, 628 (2d Cir. 2016) (vacating the district court's grant of qualified immunity and remanding to the district court for an elaboration as to the basis for probable cause).

424. See Am. Ass'n of Suicidology, supra note 263, at 17–18 (noting that officers "relied solely upon what happened the day before when demanding a psychiatric evaluation and confiscating Edward's guns").

425. *Myers*, 819 F.3d at 628.

426. Id. at 631.

constitutional matter, the reasonableness of police response in the first place.

Removing law enforcement from mental crisis response will not eliminate punitive responses to individuals in crisis. Hospitals and behavioral health providers as a whole are themselves punitive, as scholars have shown in recent work.[427] Policing and surveillance systems are integrated into hospitals, altering the scope of rights in this sphere, particularly for individuals suspected and convicted of criminal activity.[428] Ensuring that individuals' Fourth Amendment rights are protected will require tackling the punitive reach of behavioral health systems from the homes of people experiencing crisis and into hospitals and clinics where they access treatment. Beyond this, substantial investments in behavioral health systems—both chronic care and crisis care services—are necessary to address the structural deficiencies that make police the primary mental health responders in the vast majority of jurisdictions today.

427. See Interrupting Criminalization, The Beyond Do No Harm Principles 15 https://static1.squarespace.com/static/5ee39ec764dbd7179cf1243c/t/6361cb40ed7e991b1f1092e7/1667353416900/IC+BDNH+PDF_Final.pdf [https://perma.cc/666J-R88P] (last visited Feb. 28, 2024).

428. See Sunita Patel, Embedded Healthcare Policing, 69 UCLA L. Rev. 808, 811–13 (2022) ("[Hospitals] are quintessential care institutions, but even they have become policed spaces."); Ji Seon Song, Patient or Prisoner, 92 Geo. Wash. L. Rev. 1, 48–49 (2024) (describing a case in which a prison warden removed a patient from life support against the wishes of the patient's mother).