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Recommended Citation
Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 *U. Pa. J. Const. L.* 391 (2011).

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THROWING AWAY THE KEY: HAS THE ADAM WALSH ACT LOWERED THE THRESHOLD FOR SEXUALLY VIOLENT PREDATOR COMMITMENTS TOO FAR?

Tamara Rice Lave *

Public outrage spurred passage of the first sexually violent predator law. Citizens in the state of Washington were horrified by a rash of high profile crimes by convicted sex offenders who had been released from prison.[1] After a particularly horrific attack by a mentally impaired parolee with a history of kidnapping, rape, and murder, thousands of letters flooded the governor's office demanding that something be done. In February 1990, Washington responded to the mounting pressure by passing the Community Protection Act, which authorizes the indefinite commitment of individuals determined to be sexual violent predators ("SVPs") after they have completed their maximum prison term.[2] In order to commit someone under Washington's law, the state must prove that the accused (1) has at least one prior crime of sexual violence and (2) currently suffers from a mental abnormality or personality disorder that (3) makes him likely to engage in future predatory acts of sexual violence.[3] Nineteen states and the federal government have since followed Washington's lead.[4]

These laws are motivated by a worthy goal—protecting innocent men, women, and children from menacing sex offenders. At the

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1 Barry Siegel, *Locking Up 'Sexual Predators': A Public Outcry in Washington State Targeted Repeat Violent Sex Criminals. A New Preventative Law Would Keep Them in Jail Indefinitely*, L.A. TIMES, May 10, 1990, at A1.

2 Michael G. Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response, and Social Policy in the United States and Canada*, 46 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 483, 492 (2002) (comparing the risk management model for control of sex offenders with the clinical and justice models that preceded it, and with a restorative justice alternative based on the principle of community reintegration).

3 WASH. REV. CODE ANN. § 71.09.020 (West 2008).

4 *See infra* Part IV.A.

same time, however, these laws pose a significant danger—locking away individuals for the rest of their lives who would not commit a sex offense if released. With stakes this high, accused SVPs should receive the highest procedural protections, yet the Supreme Court has ruled that they are not entitled to many of the due process rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.[5] As a result, they do not enjoy the right to competency, the right against self-incrimination, proof beyond a reasonable doubt, or trial by jury.[6]

In *United States v. Comstock*,[7] the Supreme Court upheld the Adam Walsh Child Safety and Protection Act ("Adam Walsh Act"),[8] which reduces these protections still further. The Adam Walsh Act allows a person to be committed indefinitely as a sexually violent predator[9] even if the person has never been convicted of, or even been charged with, a sex crime. This means that any person who is in federal custody faces lifetime commitment as a dangerous sex offender if the government is able to persuade a judge by clear and convincing evidence that the person has committed, or attempted to commit, a sexually violent offense or child molestation even though the person was not locked up for such an offense and a jury did not find the person had committed such a crime.[10] Clear and convincing evidence is a lesser standard than beyond a reasonable doubt, and a judge and not a jury makes the requisite factual determination. Accordingly, under the Adam Walsh Act, a person can be confined for life even though the evidence would not have supported a jury verdict of guilt.

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5 Kansas v. Hendricks, 521 U.S. 346, 356–60 (1997) (upholding a Kansas civil confinement statute that required past sexually violent behavior and a mental condition that creates a likelihood of such conduct in the future as prerequisites for incapacitation under the statute).

6 *See infra* notes 116–78 and accompanying text.

7 United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (holding that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States" (quoting U.S. CONST. art. I, § 8, cl. 18)).

8 18 U.S.C. §§ 4247, 4248(a) (2006). The Adam Walsh Act was passed by both houses of Congress and signed by the President in 2006. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901–16991 (2006)).

9 The Adam Walsh Act uses the term "sexually dangerous persons." Adam Walsh Child Protection and Safety Act of 2006, § 301(a). In the interests of consistency (and since they are defined almost identically), this Article will refer to those committed as sexually violent predators.

10 18 U.S.C. § 4248(d) (2006) (stating that "[i]f after the hearing, the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General").

Although the Court ruled that the Adam Walsh Act was constitutional, it did so on narrow grounds. It held only that Congress had not exceeded its power under the Necessary and Proper Cause[11]: "We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution."[12] This Article considers a question that the Supreme Court specifically left open in *Comstock*: Does the Adam Walsh Act violate procedural due process?

To grapple with this question, this Article first asks whether persons subject to sexually violent predator laws deserve procedural protections. Some believe that because all, or at least most, sex offenders will reoffend, it is just a waste of time and money to accord them ordinary due process rights. This Article shows that contrary to widespread belief, the rate of sex offender recidivism is actually quite small. The danger of a substantial number of unnecessary lifetime incarcerations makes it particularly important to have a sufficiently robust due process regime in place.

Part II contrasts the due process rights of sexually violent predators with those of other individuals whose mental state is at issue: the criminally insane and the mentally ill. The Article shows that for the most part, accused sexually violent predators have fewer procedural protections than these other similarly situated individuals.

Part III discusses the justifications in the three seminal Supreme Court cases for diminishing the due process protections of accused sexually violent predators: *Kansas v. Hendricks*,[13] *Kansas v. Crane*,[14] and *United States v. Comstock*.[15]

Part IV then turns to state law regarding sexually violent predators, focusing on the procedural protections guaranteed by the state SVP laws. It then compares these state law protections with the constitutional minima provided by the U.S. Supreme Court. This data, presented for the first time, provides a road map to SVP legislation that should prove of practical importance to judges and practitioners. Given the public's fear of sex offenders and politicians' interest in appearing tough on crime, one might suspect that states would have

11 *Comstock*, 130 S. Ct. at 1965.

12 *Id.*

13 Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

14 Kansas v. Crane, 534 U.S. 407, 411–15 (2002) (vacating a Kansas Supreme Court judgment that interpreted *Kansas v. Hendricks* so that the state was required to prove that the dangerous individual was *completely* unable to control his behavior to warrant confinement—a standard determined by the Court in *Crane* to be too high).

15 *See Comstock*, 130 S. Ct. 1949.

conferred only the minimum protections, but this Article shows that most states have granted more.

Part V discusses whether the Supreme Court should allow a person to be committed indefinitely as a sexually violent predator even though he has never been convicted of, or even charged with, a sex offense. This Article argues that in creating such a low threshold for commitment, the Adam Walsh Act violates procedural due process.

Finally, Part VI contends that enhanced procedural protections make sense from a public policy perspective. Thus, this Article concludes by arguing that states should not follow the Adam Walsh Act regardless of how the Court rules.

I. DO SEX OFFENDERS DESERVE PROCEDURAL PROTECTION?

The fundamental factual question that needs to be answered for a person to be committed under an SVP statute is whether he has a current mental disorder that causes him to have difficulty controlling himself such that he is at risk of committing a new sexually violent offense. The diminished due process standards afforded to accused SVPs during this process appear to derive from the belief of politicians and the general public that most, if not all, sex offenders will continue to be dangerous even after they have served their prison sentences.[16] Many believe that child molesters pose the gravest danger because, as Justice Breyer wrote, they suffer from "pedophilia—a mental abnormality that critically involves what a lay person might describe as a lack of control."[17]

If politicians and the public are correct then procedural protections for accused sexually violent predators may seem less critical. If everyone is going to reoffend, then the only kind of mistake we could ever make is a false negative—releasing someone who we think is safe but is actually still dangerous. Indeed, if a significant share, but not all, people are likely to reoffend then there is an argument for lesser due process because the expected societal cost of a false negative

16 Between April 19, 2005, and May 1, 2005, a poll sponsored by CNN/USA Today and Gallup asked respondents: "At your best guess, do you think people who commit the crime of child sexual molestation can be successfully rehabilitated to the point where they are no longer a threat to children, or not?" Twenty-seven percent of those who responded said that child molesters could be rehabilitated, whereas 65% said they could not. Tamara Rice Lave, *Inevitable Recidivism—The Origin and Centrality of an Urban Legend*, 34 INT'L J.L. & PSYCHIATRY 186, 188 (2011) (examining the conviction that sex offenders—particularly child molesters—will continue to reoffend).

17 *Crane*, 534 U.S. at 414.

outweighs the expected cost of a false positive.[18] Contrary to public opinion, however, studies show that most offenders do not continue to recidivate after being released.[19] This means that society must confront the very real problem of the false positive—locking someone away who would not otherwise reoffend.[20]

In 2003, the Department of Justice ("DOJ") released a report studying the recidivism of sex offenders released in 1994.[21] The DOJ study followed the entire population of sex offenders released from

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18 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding that courts should apply a three-part balancing test in determining whether an individual's due process rights have been violated under the U.S. Constitution, namely (1) the significance of the interest at stake, (2) the risk of a false deprivation of the interest due to the procedures used as well as an assessment of the probable value of additional procedural safeguards, and (3) the government's interest).

19 These studies have been criticized for not taking into account underreporting. *See* Jody Clay-Warner & Callie H. Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150, 150–51 (2005) (stating that despite the significance of reporting to the overall success of reforms, only limited empirical research has examined changes in rape reporting across time); Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen & Michael G. Turner, *Reporting Sexual Victimization to the Police and Others: Results From a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 7 (2003) (discussing empirical data from various studies concluding that a large proportion of victims did not report their sexual victimization to the police or other authorities); Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 162 (1987) (estimating that for every rape reported, three to ten rapes are committed but not reported); John J. Sloan III, Bonnie S. Fisher & Francis T. Cullen, *Assessing the Student Right to Know and Campus Security Act of 1990: An Analysis of the Victim Reporting Practices of College and University Students*, 43 CRIME & DELINQUENCY 148, 149 (1997) (stating that the usefulness of measuring the incidence and nature of campus crime may be limited because the Student Right to Know and Campus Security Act's reporting requirements overlook theft-related crimes and depend on victim reporting). The National Crime Victimization Survey ("NCVS")—which estimates crime victimization across the United States using a nationally representative sample of households—finds significantly higher reporting rates. MICHAEL RAND & SHANNAN CATALANO, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 219413, CRIMINAL VICTIMIZATION, 2006, at 5 (2007). The Bureau of Justice Statistics estimated that 41.4% of all forcible rapes and sexual assaults were reported to the police in 2006. *Id.* Reporting rates were similar for the three-year period studied in the 2003 Department of Justice report. For a detailed discussion of underreporting in sex crimes, see Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?* 14 NEW CRIM. L. REV. 213 (2011).

20 *See* Lave, *supra* note 19, at 266 (stating that despite the fact that the general public believes that sex offenders are incapable of controlling themselves, recidivism rates in the United States, according to studies by the Department of Justice, are actually low).

21 PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003) [hereinafter DOJ].

prison in fifteen states—9691 sex offenders.[22] Of these offenders, 3115 had been convicted of rape; 6576 were convicted of sexual assault; 4295 were convicted of child molestation; and 443 were convicted of statutory rape for a total of 9691 out of 272,111 prisoners released in 1994.[23] Within three years after release from prison, 5.3% or 517 of the convicted sex offenders were rearrested for a new sex crime.[24] During that same three-year period, 5.0% of convicted rapists were rearrested for a new sex crime.[25] Finally, 3.3% or 141 of the convicted child molesters were arrested for another sex crime against a child.[26]

It is important to note that researchers continued to track released offenders during the entire three-year period.[27] If, for instance, a person were rearrested for burglary and then later for rape both of these arrests would have been recorded. Thus within the entire three-year period, just 5.3% of sex offenders were rearrested for a new sex crime.[28]

It is true, however, that convicted sex offenders were significantly more likely to be arrested for a new sex crime than released offenders who had not been convicted of a sex crime. Compared to 5.3% of convicted sex offenders, only 1.3% of persons convicted for non-sex related offenses were subsequently arrested for a sex crime within three years after release.[29] Less than half of 1% of those previously convicted of a non-sex offense were rearrested for a new sex crime against a child.[30]

Not only do few sex offenders get rearrested for committing a new sex crime, but sex offenders are less likely then non-sex offenders to

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22 These states were Arizona, Maryland, North Carolina, California, Michigan, Ohio, Delaware, Minnesota, Oregon, Florida, New Jersey, Texas, Illinois, New York, and Virginia. *Id.* at 1.

23 *Id.*

24 *Id.*

25 *Id.* at 24.

26 *Id.* at 1.

27 All available studies show that recidivism rates drop each year after an offender's release: For all crimes (and almost all behaviours) the likelihood that the behavior will reappear decreases the longer the person has abstained from that behaviour. The recidivism rate within the first two years after release from prison is much higher than the recidivism rate between years 10 and 12 after release from prison.

ANDREW J.R. HARRIS & R. KARL HANSON, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION, PUBLIC SAFETY & EMERGENCY PREPAREDNESS CANADA 1 (2004). Harris and Hanson found that the rate of recidivism in the populations they studied decreased by half every five years. *Id.* at 9.

28 *Id.* at 11.

29 DOJ, *supra* note 21, at 24.

30 *Id.* at 30.

be rearrested for any crime at all. Forty-three percent of sex offenders released in 1994 were arrested for a new crime within three years.[31] In contrast, 68% of non-sex offenders released in 1994 were arrested for any new crime within three years.[32]

Other studies have come to similar conclusions. In 1998, Hanson and Bussiere did a meta-analysis of sixty-one studies from six different countries, including the United States.[33] They found that over an average follow-up time of four to five years, the sex offense recidivism rate was 13.4%.[34] In 2007, Sample and Bray used arrest data from 1990–1997 collected by the Illinois State Police.[35] They found that less than 4% of convicted child molesters were rearrested for any sex offense within one, three, and five years after release from custody.[36] They also found that about 7% of convicted rapists were rearrested for any sex offense within five years after release.[37]

Not only do most sex offenders not recidivate, but, like other types of offenders, their risk of doing so decreases as they age. In 2002, R. Karl Hanson used data from ten follow up studies of adult male sex offenders ages 18–70+ (combined sample of 4673) to study the relationship between age and sexual recidivism. He found that "[i]n the total sample, the recidivism rate declined steadily with age . . . . [and] [t]he association was linear."[38] Other researchers have reported similar results,[39] even when analyzing the age effect on a

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31 *Id.* at 2.

32 *Id.*

33 R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 350 (1998).

34 *Id.* at 357.

35 Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 88 (2006).

36 *Id.* at 95.

37 *Id.*

38 R. Karl Hanson, *Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders*, 17 J. INTERPERSONAL VIOLENCE 1046, 1053 (2002). Interestingly, Hanson found that there were differences among offender groups. *Id.* at 1054. The recidivism rate of both incest offenders and rapists declined steadily over time, and neither type of offender released after age sixty recidivated. *Id.* Although the recidivism rate of extra-familial child molesters also declined steadily with age, the drop was much less until the offender reached age forty-nine, when recidivism dropped dramatically. *Id.* Two extrafamilial child molesters released after the age of sixty recidivated. *Id.*

39 Howard E. Barbaree et al., *Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually Meaningful Components*, 36 CRIM. JUST. & BEHAV. 443, 443 (2009) ("A large body of evidence has recently accumulated indicating that recidivism in sex offenders decreases with the age of the offender at the time of his release from custody." (citations omitted)); Patrick Lussier et al., *Criminal Trajectories of Adult Sex Offenders and the Age Effect: Examining the Dynamic Aspect of Offending in Adulthood*, 20 INT'L CRIM. JUST. REV. 147, 164 (2010) (showing that "there

sample of offenders with a higher recidivism rate than the general prison population.[40]

The significance of the protective value of age in recidivating cannot be underestimated in the sexually violent predator context. Since accused SVPs must have completed their custodial sentence before the state can begin commitment proceedings, they are likely to be older and thus at lower risk of reoffending. As a result, states and the federal government may be initiating civil commitment proceedings against individuals who have simply aged out of being dangerous.

The facts are crystal clear. The DOJ study and other studies show that sex offenders have a low rate of recidivism and that they are less likely than non-sex offenders to commit additional non-sex related crimes. In addition, because accused sexually violent predators are older, their risk of reoffending has diminished. Accordingly, it is crucial to provide extensive procedural protections so as to prevent people from being locked up indefinitely—most of whom in fact pose no further threat to society. As the next Part shows, however, accused sexually violent predators enjoy reduced procedural rights.

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might be several explanations as to why older sex offenders represent a lower risk of recidivism"); Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The "Aging" Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 851 (2009) (finding that the risk of recidivism does decrease with age); Richard Wollert et al., *Recent Research (N = 9,305) Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments*, 22 SEXUAL ABUSE: J. OF RES. & TREATMENT 471, 484 (2010) (concluding that "evaluators should report recidivism estimates from age stratified tables or equivalent tables when they are assessing sexual recidivism risk, particularly when evaluating the aging sex offender").

40 In 2007, Prentky and Lee looked at the age effect on a cohort of 136 rapists and 115 child molesters who had been civilly committed to a Massachusetts prison and were then followed for twenty-five years. Robert Alan Prentky & Austin F. S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 SEXUAL ABUSE: J. OF RES. & TREATMENT, 43, 53 (2007). They found that with rapists, recidivism dropped linearly as a function of age. *Id.* With child molesters, however, they found that recidivism increased from age twenty to age forty and then declined slightly at age fifty and significantly at age sixty. *Id.* As Prentky and Lee point out, their sample is statistically small and it is comprised of offenders with a higher base rate of recidivism than drawn from the general prison population. They conclude:

> Although this latter consideration must be regarded as a limitation in terms of generalizability, it may also be seen as a strength of the study. Presumably, using a higher risk sample is a more severe test of the age-crime hypothesis, providing confirmatory support for the rapists and "amplifying" or exaggerating the quadratic blip in Hanson's (2002) data for child molesters.

Id. at 58.

II. COMPARING THE DUE PROCESS RIGHTS OF ACCUSED SVPS TO SIMILARLY SITUATED INDIVIDUALS

The sexually violent predator laws have four distinctive features. First, they are classified as civil,[41] which has broad implications for the rights that those facing commitment as SVP's enjoy. Second, commitment is almost always indeterminate; thus, a person remains a sexually violent predator unless and until he is deemed to no longer pose a threat.[42] Third, SVP commitment occurs at the back end of a penal commitment.[43] In other words, the state does not begin the process of designating someone a sexually violent predator until he is about to be released from custody. Fourth and finally, commitment is a supplement, not an alternative, to a prison sentence.[44] This Part compares the procedural rights of sexually violent predators with other individuals whose mental state is at issue: the criminally insane and the mentally ill. Despite the fact that accused sexually violent predators face greater, or at least equal, deprivations of liberty, they are afforded fewer procedural protections.

1. Comparing Sexually Violent Predator Laws with Commitment of the Criminally Insane

The factual question at a criminal insanity hearing is whether the defendant was legally insane at the time that he committed his crimes as compared with sexually violent predator hearings in which the question is whether the individual has a currently diagnosed mental disorder that causes him to be dangerous. Because a criminal insanity hearing takes place within the context of the criminal adjudicatory process, these defendants have more procedural protections than SVPs.

One notable difference between an insanity hearing and an SVP hearing is the right to competency. All criminal defendants have the right to be competent,[45] and since a criminal defendant must enter a

41 *See* Kansas v. Hendricks, 521 U.S. 346, 368–69 (1997) (stating that involuntary confinement pursuant to Kansas' Sexually Violent Predator Act is not punitive).

42 *Id.* at 363–64 ("If, at any time, the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release." (citing KAN. STAT. ANN. § 59-29a07 (1994))).

43 *Id.* at 352–53.

44 *Id.* at 352–54 (stating that an individual determined to be a sexually violent predator would be "transferred to the custody of the Secretary of Social and Rehabiliation Services . . . for 'control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large'").

45 *See* Bishop v. United States, 350 U.S. 961, 961 (1956) (per curiam) (vacating judgment and remanding the case to the district court for a hearing on the sanity of petitioner at

plea of not guilty by reason of insanity, he must be deemed competent in order to enter that plea.[46] In contrast, since sexually violent predator commitments are civil, there is no constitutional right to competency.[47]

Competency means that a defendant must understand the charges against him and be able to assist in his own defense. If it appears at any time after the commencement of prosecution and prior to sentencing that a defendant does not meet this threshold, then the court must suspend criminal proceedings and conduct a hearing either in front of a jury or on its own. At that hearing, the state is permitted to presume competency and require the defendant to prove otherwise by a preponderance of the evidence.[48] Should a judge or jury find that a defendant is not competent to stand trial, he may not be held more than the "reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[49] If it is determined that competency is not foreseeable, the state must either begin the standard civil commitment procedures or release him.[50]

The criminally insane also have the right to have jurors determine whether they were insane at the time they committed their offense,[51] as well as the right against self-incrimination at that trial. States may

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the time of his trial); *see also* Pate v. Robinson, 383 U.S. 375, 386 (1966) (holding that "Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial").

46 *See* Medina v. California, 505 U.S. 437, 449 (1992) ("[T]he entry of a plea of not guilty by reason of insanity . . . presupposes that the defendant is competent to stand trial and to enter a plea.").

47 *See* Moore v. Super. Ct., 237 P.3d 530, 547 (Cal. 2010) (holding that "due process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the SVPA").

48 *See Medina*, 505 U.S. at 452–53 (stating that there is a presumption of competence on the defendant, that the defendant bears the burden of rebutting it, and that the presumption does not violate the Due Process Clause). *But see* Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (holding that it was unconstitutional to require the defendant to prove competency by clear and convincing evidence).

49 Jackson v. Indiana, 406 U.S. 715, 738 (1972).

50 *See id.* (holding that the state must either institute customary civil commitment proceedings or release the defendant if it cannot be determined that there is a substantial probability that he will attain capacity in the foreseeable future).

51 In *Ford v. Wainright*, the Supreme Court ruled that executing the insane violates the Eighth Amendment. 477 U.S. 399, 410 (1986). Although condemned inmates have the right to a full and fair hearing on whether they are insane, the Court has never held that they have the right to a jury finding on that fact. *Id.* at 424–25 (Powell, J., concurring); *see also* Nobles v. Georgia, 168 U.S. 398, 409 (1897) (holding that a suggestion made after verdict and sentence that the defendant might be insane does not give rise to an absolute right to have the insanity issue tried before a jury).

afford SVPs these rights, but they are not required to do so under the Constitution.[52]

Although the criminally insane enjoy more procedural protections than SVPs, one notable exception regards the burden of proof. As discussed above, SVP hearings almost always occur after a person has been convicted of a crime and after he has completed his penal sentence. The burden of proof is on the prosecutor, and she must show by at least clear and convincing evidence that the individual has a current mental disorder that causes him to have difficulty controlling himself such that he poses the risk of future dangerousness.

In contrast, insanity is usually an affirmative defense at trial. Although the Supreme Court has never held that defendants have the right to the insanity defense,[53] most states allow it.[54] The Supreme Court has ruled that it does not violate due process for the defendant to have to prove his insanity beyond a reasonable doubt.[55] Most states set the burden of proof at a preponderance of the evidence, and only Arizona requires that the defendant prove that he was insane by clear and convincing evidence.[56]

Commitment for both is indefinite. If a person is found not guilty by reason of insanity, he can be committed to a locked mental hospital until he can show that he is either no longer mentally ill or dangerous.[57] The Supreme Court has held that he may be committed for a period that exceeds the maximum sentence associated with the underlying charges.[58] Similarly, a person adjudicated to be an SVP can be held until he is determined to no longer have a currently diagnosed mental disorder that causes him to be dangerous.

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52 *See* Allen v. Illinois, 478 U.S. 364, 375 (1986) (holding that commitment proceedings under Illinois's Sexually Dangerous Persons Act were civil and not criminal and thus the right against self incrimination did not apply).

53 Clark v. Arizona, 548 U.S. 735, 752 n.20 (2006).

54 *See* Elizabeth Aileen Smith, *Did They Forget to Zero the Scales?: To Ease Jury Deliberations, the Supreme Court Cuts Protection for the Mentally Ill in* Clark v. Arizona, 26 L. & INEQUALITY J. 203, 209 (2008) (stating that four states have eliminated the insanity defense altogether).

55 Leland v. Oregon, 343 U.S. 790, 799 (1952).

56 Four states do not allow the insanity defense. Smith, *supra* note 54, at 209.

57 *See* Jones v. United States, 463 U.S. 354, 361 (1983) ("Congress has determined that a criminal defendant found not guilty by reason of insanity in the District of Columbia should be committed indefinitely to a mental institution for treatment and the protection of society.").

58 *Id.* at 369–70.

2. *Comparing Sexually Violent Predator Laws with Commitment of the Mentally Ill*

The sexually violent predator laws were *specifically* enacted to allow the state to commit repeat sex offenders who did not fall under the existing civil commitment laws because they were not mentally ill.[59] When Washington crafted the first SVP law, it created a new standard of mental defect—that of a "mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence . . . ."[60] Other states would soon follow Washington's lead, including Kansas, whose sexually violent predator statute was upheld by the U.S. Supreme Court in *Kansas v. Hendricks*.[61]

Both the National Mental Health Association and the Washington State Psychiatric Association were deeply concerned by this newly defined quasi-mental illness, and they wrote amicus briefs in *Hendricks* urging the Court to overturn the Kansas statute on the grounds that it would confine individuals who were not mentally ill. The Washington State Psychiatric Association pointed out the dangers of using such an ambiguous term: "Because 'mental abnormality' has no recognized clinical meaning, there is no way to assure it will be applied so that only persons who are mentally ill are subject to civil commitment."[62] As noted below, however, the Supreme Court held that committing someone with a "mental abnormality" does not violate the person's due process rights.[63]

Although the sexually violent predator laws have a more expansive definition of mental illness than the laws governing civil commitment of the mentally ill, they offer similar procedural protections. Both have the right to written notice and an adversary hearing before an independent decisionmaker.[64] At that hearing, they have the right to "qualified and independent assistance."[65] In addition, both require that the state prove by a minimum standard of clear and convincing evidence that the person being committed is both mentally ill and dangerous.[66] In meeting this burden, the state must show that the

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59 *See* Kansas v. Hendricks, 521 U.S. 346, 351 (1997) ("[T]he legislature determined that existing civil commitment procedures were inadequate to confront the risks presented by 'sexually violent predators.'").

60 WASH. REV. CODE § 71.09.020 (18) (2008).

61 *Id.* at 371.

62 Brief for Washington State Pyschiatric Association as Amicus Curiae Supporting Respondent, *Hendricks*, 521 U.S. 346 (No. 95-1649), 1996 WL 468611 at *14.

63 *Hendricks*, 521 U.S. at 360.

64 Vitek v. Jones, 445 U.S. 480 (1980).

65 *Id.* at 500.

66 Addington v. Texas, 441 U.S. 418, 433 (1979).

person's mental illness causes the person to be dangerous.[67] In *Kansas v. Crane*,[68] the Supreme Court held that in order to commit someone as a sexually violent predator, the state must show that the person's "mental abnormality" or "personality disorder" makes it "diffi- "difficult, if not impossible for the [dangerous] person to control his dangerous behavior."[69] With regards to civil commitments of the mentally ill, the states have differed as to what must be shown in order to prove dangerousness. Some states, like Virginia, Georgia, Montana, Hawaii, and Ohio require that the state prove that the individual poses an "imminent danger" to himself or others.[70] Most states, however, use a lesser standard, that of: "substantial likelihood" or "significant risk."[71]

Once the state has proved that a person is mentally ill and dangerous or a sexually violent predator, he can be committed indefinitely. Once that person is determined to no longer be mentally ill or dangerous or to have a diagnosed mental disorder, he must be released.[72]

III. CHALLENGES TO THE SEXUALLY VIOLENT PREDATOR LAWS

The previous Part showed that a person in an SVP proceeding enjoys less procedural protection than persons facing commitment for being criminally insane or mentally ill. This Part explores the Supreme Court's justifications for affording less protection in the context of sexually violent predator commitments.

A. Kansas v. Hendricks

The first challenge to the sexually violent predator laws reached the Supreme Court in *Kansas v. Hendricks*.[73] Leroy Hendricks was an admitted pedophile whose record of child molestation convictions

67 Foucha v. Louisiana, 504 U.S. 71, 73 (1992).

68 534 U.S. 407 (2002).

69 *Id.* at 410 (citing Kansas v. Hendricks, 521 U.S. 346, 358 (1997)).

70 Alison Pfeffer, Note, *"Imminent Danger" and Inconsistency: The Need for National Reform of the "Imminent Danger" Standard for Involuntary Civil Commitment in the Wake of the Virginia Tech Tragedy*, 30 CARDOZO L. REV. 277, 279 (2008).

71 *Id.*

72 *See Foucha*, 504 U.S. at 83 (holding that the state cannot continue to civilly commit someone who may be dangerous but is not mentally ill); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (holding that the state cannot continue to civilly commit someone who is mentally ill but not dangerous).

73 521 U.S. 346 (1997).

stretched out over twenty-nine years.[74] In 1994, a Kansas jury found that Leroy Hendricks was a sexually violent predator—meaning that he had a "mental abnormality" or "personality disorder" that made it likely that he would engage in "predatory acts of sexual violence."[75] As a result of this finding, Hendricks was committed indefinitely to a locked facility.[76]

Hendricks appealed the finding to the Kansas Supreme Court, arguing that the Kansas Sexually Violent Predator Act violated the U.S. Constitution's "substantive" Due Process, Double Jeopardy, and Ex Post Facto Clauses.[77] The Kansas Supreme Court addressed only Hendricks' due process claim and overturned the conviction on the ground that "mental abnormality" as defined by the Act did not meet the standards for mental illness as set out by the U.S. Supreme Court in cases governing civil commitment.[78] The state of Kansas appealed to the U.S. Supreme Court, which narrowly overturned the Kansas Supreme Court. Justice Thomas wrote the majority opinion.

The majority began its analysis by noting that in narrow circumstances "an individual's constitutionally protected liberty interest in avoiding physical restraint may be overridden even in the civil context."[79] Specifically, society may restrain dangerous individuals who cannot control themselves in the name of public safety.[80] A finding of future dangerousness, alone, would be insufficient to justify involuntary commitment. Civil commitment statutes have been sustained, "when they have coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[81] In addition, the statutes must also meet "proper procedur(al) and evidentiary standards."[82]

The Court held that the Kansas Sexually Violent Predator Act did meet these standards. In his majority opinion, Justice Thomas emphasized the fact that in order to be committed, a person must have either (1) been charged with a sexually violent offense but found incompetent to stand trial, or (2) been convicted of a sexually violent offense, or (3) been found not guilty by reason of insanity, or due to a mental disease or defect, of a sexually violent offense. The statute

74 *Id.* at 353–56.
75 *Id.* at 352, 356.
76 *Id.* at 350.
77 *Id.* at 356.
78 *Id.*
79 *Id.*
80 *Id.* at 357.
81 *Id.* at 358.
82 *Id.* at 357.

requires proof of more than a mere predisposition to violence; rather "[i]t requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[83]

The Court further held that the Act passed constitutional muster even though it used the term "mental abnormality" instead of mental illness. In so doing, the Court ignored the amicus briefs written by the National Mental Health Association and the Washington State Psychiatric Association in which they urged the Court to overturn the Kansas statute on the grounds that it would confine individuals who were not mentally ill. The National Mental Health Association wrote, "The term 'mental illness' is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to mental illness."[84]

The Washington State Psychiatric Association made a similar argument. It first pointed out that "being a sex offender does not, in itself, imply a mental disorder or mental illness."[85] It then critiqued the statute's requirement that an individual have a "mental abnormality" on the grounds that the term is not clinically meaningful and is in disuse.

In contrast, the Association for the Treatment of Sexual Abusers submitted an amicus brief arguing that the term "mental abnormality" did have a specific meaning to mental health professionals.[86]

Neither the National Mental Health Association nor the Washington State Psychiatric Association persuaded Justice Thomas. He wrote, "Contrary to Hendricks' assertion, the term 'mental illness' is devoid of any talismanic significance. Not only do 'psychiatrists disagree widely and frequently on what constitutes mental illness,' but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement."[87] Since the Court has "traditionally left to legislators the task of defining terms of a medical nature that have legal significance,"[88] it was acceptable for the Kansas legislature to use the standard of "mental ab-

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83 *Id.*

84 Brief for the National Mental Health Association as Amicus Curiae Supporting Respondent, *Hendricks*, 521 U.S. 346 (No. 95-1649), 1996 WL 471077 at *7.

85 Brief for Washington State Pyschiatric Association as Amicus Curiae Supporting Respondent, *Hendricks*, 521 U.S. 346 (No. 95-1649), 1996 WL 468611 at *7–8.

86 Brief for Association of the Treatment of Sexual Abusers as Amicus Curiae Washington Supporting Petitioner, *Hendricks*, 521 U.S. 346 (No. 95-1649), 1996 WL 471027 at *3.

87 *Hendricks*, 521 U.S. at 359 (citations omitted).

88 *Id.*

normality." The Court then considered Hendricks' claim that the Act violated the Constitution's ban on double jeopardy and ex post facto laws by creating a new law that punished him for past conduct for which he had already been convicted and served time.[89] The analysis hinged on whether the Act was civil or criminal. The Court noted—and took deference to—the stated intent of the Kansas legislature that the Act was civil. It then discussed the two goals of punishment: retribution and deterrence. With regards to retribution, the Court held that the Act was not retributive because the prior criminal conduct was admitted not to "affix culpability" but instead to show that a "mental abnormality" existed in order to prove that the individual still posed a risk.[90] The Court found that the Act was not aimed at deterrence because individuals were unlikely to be deterred (due to the very nature of their mental disorder).[91]

Holding that the SVP law was civil and not criminal has had a profound effect on the procedural protections afforded to accused sexually violent predators. Even though most SVPs face indefinite commitment to a locked facility, they do not have the same rights as someone charged with committing a misdemeanor. Part IV will discuss these reduced protections in more detail.

B. Kansas v. Crane

In *Kansas v. Crane* the Court clarified what it had meant in *Hendricks* when it said that the "mental abnormality" or "personality disorder" must make it "difficult if not impossible for the person to control his behavior."[92] Michael Crane, also a convicted sex offender, appealed his commitment as a sexually violent predator. The Kansas Supreme Court overturned the commitment on the grounds that the federal Constitution, as interpreted in *Hendricks*, required that the defendant be unable to control his dangerous behavior, but no such finding had been made at trial.[93] The state of Kansas appealed, arguing that the Kansas Supreme Court had interpreted the holding in *Hendricks* too restrictively.[94] In a 7-2 decision, the Court agreed and vacated the Kansas Supreme Court's judgment.

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89 *Id.* at 361.
90 *Id.* at 362.
91 *Id.* at 362–63.
92 *Id.* at 358 (citing KAN. STAT. ANN. § 59-20a02(b) (1994)).
93 Kansas v. Crane, 534 U.S. 407, 411 (2002).
94 *Id.* at 409.

Despite the fact that the *Hendricks* opinion had specifically described the Kansas law as being akin to laws that provided for the "forcible civil detainment of people who are unable to control their behavior,"[95] the Court now held that the state did *not* need to prove an inability to control. Yet the Court did not adopt Kansas's position that a person could be committed as a sexually violent predator "without *any* lack of control determination."[96] Instead, the Court held that the standard was "proof of serious difficulty in controlling behavior."[97] The Court noted that a large population of the prison population is mentally ill. To ensure that the confinement remains civil and not criminal, the Court stated that the sexually violent predator must be distinguishable from other sex offenders: "The severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary case."[98]

C. United States v. Comstock

In *United States v. Comstock*,[99] the Supreme Court upheld the Adam Walsh Act, which eroded these procedural protections even further. In 2006, the government instituted proceedings in district court to commit Comstock and four other respondents as sexually dangerous persons under the Adam Walsh Child Protection and Safety Act. The respondents moved to dismiss on constitutional grounds. They argued that the Act was criminal and not civil and thus violated double jeopardy, the Ex Post Facto Clause, and the Sixth and Eighth Amendments. They argued further that the Act denied them substantive due process and equal protection under the law. They also claimed that setting the burden of proof at clear and convincing evidence violated their procedural due process rights. Finally, they argued that in passing the statute, Congress had exceeded its power under the Necessary and Proper Clause, Article 1, Section 8 of the U.S. Constitution.

The district court granted the motion to dismiss on grounds that the Constitution required the standard of proof beyond a reasonable

95 *Hendricks*, 521 U.S. at 357.

96 *Crane*, 534 U.S. at 412 (emphasis in original).

97 *Id.* at 413.

98 *Id.*

99 United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

doubt and that the Act exceeded congressional power.[100] On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on grounds that the law exceeded Congress's powers under Article 1, Section 8 of the Constitution.[101] The Fourth Circuit did not decide the standard of proof question; nor did it consider any of the other constitutional arguments raised below.

By a 7-2 decision, the Supreme Court reversed the Fourth Circuit and held that the Adam Walsh Act did not exceed Congressional power.[102] In its decision, the majority did not address the most troubling part of the law—that people can be indefinitely committed to a locked facility as sexually dangerous persons even though they were never convicted of, or even charged with, a sex crime. This significant deprivation of procedural rights did not even warrant a footnote in the majority opinion.

The Adam Walsh Act significantly expands who may be civilly committed under federal law and goes well beyond the law in almost every state. Currently, every SVP state except New York and North Dakota follows Kansas and requires that a person have been first convicted or found not guilty by reason of insanity of a sexually violent offense. Some states allow commitment proceedings against someone who was deemed incompetent to stand trial but only after the judge first conducts a hearing in which the prosecutor must prove the defendant's guilt beyond a reasonable doubt. In stark contrast, the Adam Walsh Act only requires that the government prove by clear and convincing evidence that the accused sexually violent predator committed a sexually violent offense or child molestation.[103]

This diminished procedural protection did not escape the notice of all judges. In ruling the law unconstitutional, the Fourth Circuit specifically noted how much "more narrowly drawn" the state statutes were than the federal one.[104] Indeed, in his dissent, Justice Thomas was extremely critical of this aspect of the statute:

> [T]he statute's definition of a "sexually dangerous person" contains no element relating to the subject's crime. It thus does not require a federal court to find any connection between the reasons supporting civil commitment and the enumerated power with which that persons' criminal conduct interfered. As a consequence, § 4248 allows a court to civilly commit an individual without finding that he was ever charged with or

100 United States v. Comstock, 551 F.3d 274, 275 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949 (2010).

101 *Id.* at 284.

102 *Comstock*, 130 S. Ct. at 1956, 1965.

103 18 U.S.C. § 4248d (2006).

104 *Comstock*, 551 F.3d at 277 n.2.

convicted of a federal crime involving sexual violence. That possibility is not merely hypothetical: The Government concedes that nearly 20% of individuals against whom § 4248 proceedings have been brought fit this description.[105]

IV. SEXUALLY VIOLENT PREDATOR LAWS ACROSS THE COUNTRY

As described above, the U.S. Supreme Court has upheld the right of states to lock up people indefinitely with minimal procedural protections. In discussing how the Supreme Court should respond to a future procedural due process challenge of the Adam Walsh Act, it is helpful to first gain an understanding of sexually violent predator legislation across the country. This Part will begin by discussing the defining features of sexually violent predator laws. It will then offer a state-by-state look at the number, type, and cost of SVP commitments. Subsequently, it will describe the procedural protections afforded by each state.

A. The Proliferation of Sexually Violent Predator Laws Across the United States

Currently, twenty states and the federal government have enacted laws calling for the involuntary civil commitment of sexually violent predators.[106] These states include: Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin.[107] By the summer of 2008, states had committed more than 3718 individuals as sexually violent predators.[108]

1. Date of SVP Passage, Length/Type of Commitment and Number of People Committed

There is little variation in terms of the length and type of commitment mandated under the nation's sexually violent predator laws.

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105 *Comstock*, 130 S. Ct. at 1977 (citations omitted).

106 18 U.S.C. § 4248 (2006); Michael Cooper, *Senate Passes Bill to Detain Sex Offenders After Prison*, N.Y. TIMES, Mar. 6, 2007, at B3 (recounting New York's passage of a law calling for involuntary civil commitment of sexually violent predators); Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at A1 (listing all twenty states that have enacted such laws except New York).

107 Davey & Goodnough, *supra* note 106 (listing all of the above states except New York because it had not yet passed its sexually violent predator law).

108 *See* Table 2.

In almost all states, and in the federal system, commitment as a sexually violent predator means an indeterminate commitment to a locked mental hospital.[109]

There are some exceptions. North Dakota specifically states that a sexually violent predator should be placed in the least restrictive available treatment facility or program necessary to achieve the goals of the statute.[110] Virginia also provides for less restrictive alternatives to involuntary, secure, inpatient treatment.[111] Also of note, New Hampshire orders that sexually violent predators be committed to a secure psychiatric unit, but the order of commitment is only valid for five years.[112] Texas is unique in that it only provides for outpatient treatment; however it requires that the person reside in a Texas residential facility.[113] If the person subsequently violates any terms of his release, he may be prosecuted and sent into custody.[114]

In 2008, I wrote to each of the states that had passed sexually violent predator legislation and asked for data regarding commitments in their state. Specifically, I requested information on the number of commitments, the number in the process of being committed, the number released, the types of offenses those committed had been convicted of, and a breakdown of SVPs by race, gender, and age. I received data from all of the states except Florida and Nebraska. I received incomplete data from Massachusetts. For these three states I used data that was published in a 2007 *New York Times* article.[115] Since that data was collected in 2006, and since the laws are still in effect, I am assuming that these states had more committed SVP's in 2008 than they did in 2006.

Table 2 shows that few people committed as SVPs have ever been released. For instance, by 2008, California had committed 808 people as sexually violent predators; yet over that same thirteen-year period, just twenty-four people were released. The fact that just 3%

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109 18 U.S.C. § 4248(d) (2006); ARIZ. REV. STAT. ANN. § 36-3707(B)(1) (2009); CAL. WELF. & INST. CODE § 6604 (West 2009); FLA. STAT. ANN. § 394.917(2) (West 2006); 725 ILL. COMP. STAT. ANN. 207/40(a) (West 2008); IOWA CODE ANN. § 229A.7(5) (West 2006); KAN. STAT. ANN. § 59-29a07(a) (2005); MASS. GEN. LAWS ch. 123A, § 14(d) (LexisNexis 2003); MINN. STAT. § 253B.185(1) (2008); MO. ANN. STAT. § 632.495 (West 2006); NEB. REV. STAT. § 71-1209(4) (2008); N.J. STAT. ANN. § 30:4-27.32(a) (West 2009); N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2011); S.C. CODE ANN. § 44-48-100(A) (2008); WASH. REV. CODE ANN. § 71.09.060(1) (West 2008); WIS. STAT. § 980.06 (2008).

110 N.D. CENT. CODE § 25-03.3-13 (2008).

111 VA. CODE. ANN. § 37.2-908(E) (2009).

112 N.H. REV. STAT. ANN. § 135-E:11 (LexisNexis 2008).

113 TEX. HEALTH & SAFETY CODE ANN. § 841.081(a) (West 2009).

114 TEX. HEALTH & SAFETY CODE ANN. § 841.085 (West 2009).

115 Davey & Goodnough, *supra* note 106, at A1.

of SVPs have been released is important because it shows that the deprivation of liberty under the sexually violent predator laws is significant. Recent history suggests that once a person is committed as an SVP, it is unlikely that he will ever be released.

2. *SVP Laws Across the Country: Procedural Protections*

In 1997, the U.S. Supreme Court held that sexually violent predator commitments are civil and not criminal.[116] This ruling meant that accused sexually violent predators are not entitled to the same panoply of procedural protections that criminal defendants possess.[117] Yet as this Part will show, most states provide accused sexually violent predators with more rights than the constitutional minimum.

Although the government is not constitutionally required to provide counsel to indigent SVPs,[118] all states and the federal government do so.[119] Guaranteeing SVPs counsel is important because "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[120]

One of the most significant differences between states regarding the protections provided to accused SVPs is the right to a jury trial. The Sixth Amendment guarantees that "(i)n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."[121] The Supreme Court has held that the right to jury trial attaches when a criminal defendant is facing more than six months in

116 Kansas v. Hendricks, 521 U.S. 346 (1997).

117 Although the Court in *Hendricks* did not lay out which procedural protections are due to accused individuals in SVP cases, it is possible to figure them out by looking at other Supreme Court cases. Table 2 of this Article includes an entry for *Hendricks* along with the implied protections.

118 Vitek v. Jones, 445 U.S. 480, 500 (1980).

119 18 U.S.C. § 4247(d) (2006); ARIZ. REV. STAT. § 36-3704(C) (2008); CAL. WELF. & INST. CODE § 6603(a) (West 2011); FLA. STAT. § 394.916(3) (2011); 725 ILL. COMP. STAT. 207/25(c)(1) (2008); IOWA CODE § 229A.6(1) (2011); KAN. STAT. ANN. § 59-29a06(b) (2006); MASS. GEN. LAWS ch. 123A, § 13(c) (2011); MINN. STAT. § 253B.07(2)(c)(2010); MO. REV. STAT. § 632.492 (2011); NEB. REV. STAT. § 71.945 (2011); N.H. REV. STAT. ANN. 135-E:11(III) (2008); N.J. STAT. ANN. § 30:4-27.31(a) (2008); N.Y. MENTAL HYG. LAW § 10.06(c) (McKinney 2011); N.D. CENT. CODE § 25-03.3-09(3) (2011); 42 PA. CONS. STAT. § 9795.4(e)(2) (2011); S.C. CODE ANN. § 44-48-90(B) (2010); TEX. HEALTH & SAFETY CODE ANN. § 841.005 (2011); VA. CODE ANN. § 37.2-901 (2011); WASH. REV. CODE § 71.09.050(1) (2011); WIS. STAT. § 980.03(2)(a) (2011); *see also* People v. Fraser, 138 Cal. App. 4th 1430 (2006) (holding that person did not have the right to self-representation in a recommitment proceeding under the Sixth Amendment).

120 Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

121 U.S. CONST. amend. VI.

jail.[122] Because SVP commitments are classified as civil, the Sixth Amendment right does not apply, which means that individuals facing indefinite lifetime commitment have less protection than those facing 181 days in jail. Most states do give accused sexually violent persons the right to a jury trial,[123] but as Table 4 below shows, they differ on how many jurors are required to render a verdict.[124] Only five states and the federal government[125] do not guarantee this right: Minnesota,[126] Nebraska,[127] New Jersey,[128] North Dakota,[129] and Pennsylvania.[130]

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122 *See* United States v. Nachtigal, 507 U.S. 1, 3 (1993) (per curiam) ("[I]n order to determine whether the Sixth Amendment right to a jury trial attaches to a particular offense, the court must examine objective indications of the seriousness with which society regards the offense. The best indicator of society's views is the maximum penalty set by the legislature. While the word 'penalty' refers both to the term of imprisonment and other statutory penalties, . . . primary emphasis . . . must be placed on the maximum authorized period of incarceration. . . . [O]ffenses for which the maximum period of incarceration is six months or less are presumptively 'petty.'" (citations omitted) (internal quotation marks omitted)).

123 ARIZ. REV. STAT. ANN. § 36-3707(A) (2009); CAL. WELF. & INST. CODE § 6603(a) (West 2009); FLA. STAT. ANN. § 394.917(1) (West 2006); 725 ILL. COMP. STAT. ANN. 207/40(a) (2008); IOWA CODE ANN. § 229A.7(4) (West 2000); KAN. STAT. ANN. § 59-29a06(c) (2005); MASS. GEN. LAWS ch. 123A, § 14(a) (LexisNexis 2003); MO. ANN. STAT. § 632.492 (West 2006); N.H. REV. STAT. ANN. § 135-E:11 (LexisNexis 2008); N.Y. MENTAL HYG LAW. § 10.07(a) (McKinney 2011); S.C. CODE ANN. § 44-48-100(A) (2008); TEX. HEALTH & SAFETY CODE ANN. § 841.062(a) (West 2009); VA. CODE. ANN. § 37.2-908(B) (2009); VA. CODE. ANN. § 37.2-908(C) (2009); WASH. REV. CODE ANN. § 71.09.060(1) (West 2008); WIS. STAT. § 980.06 (2008).

124 IOWA CONST. art. I, § 9 (permitting fewer than twelve jurors to render a verdict); CAL. WELF. & INST. CODE § 6603(c)(2)(f) (West 2009) (requiring a unanimous verdict); FLA. STAT. ANN. § 69.071 (West 2004); 725 ILL. COMP. STAT. ANN. 207/25(d) (2008) (requiring a unanimous verdict); IOWA CODE ANN. § 229A.7(5) (West 2000) (requiring a unanimous verdict); KAN. STAT. ANN. § 59-29a06(d) (2005) (requiring twelve jurors unless the parties and court agree to fewer); KAN. STAT. ANN. § 59-29a07(a) (2005) (requiring a unanimous verdict); MASS. GEN. LAWS ch. 123A, § 14(d) (LexisNexis 2003) (requiring a unanimous verdict); MO. ANN. STAT. § 632.495(1) (West 2006) (requiring a unanimous verdict); N.H. REV. STAT. ANN. § 135-E:11(I) (LexisNexis 2008) (requiring a unanimous verdict); S.C. CODE ANN. § 44-48-100(A) (2008) (requiring a unanimous verdict); TEX. HEALTH & SAFETY CODE ANN. § 841.062(b) (West 2009) (requiring a unanimous verdict); VA. CODE. ANN. § 37.2-908(B) (2009) (requiring a unanimous verdict); WASH. REV. CODE ANN. § 71.09.060(1) (West 2008) (requiring a unanimous verdict); WIS. STAT. § 980.05(2), (2)(b) (2010) (requiring twelve jurors unless the parties agree otherwise); *see also* State v. Denman, 626 N.W.2d 296, 297 (Wis. Ct. App. 2001) (holding that a unanimous verdict is required but not that the defendant be made aware of that fact); Romley v. Superior Court, 7 P.3d 970, 972 (Ariz. Ct. App. 2000) (holding that out of eight jurors, six must concur to render a verdict).

125 18 U.S.C. § 4248(a), (d) (2006).

126 MINN. STAT. § 253B.185(1) (2008); *In re* Civil Commitment of Thompson, No. 76-PR-06-990, 2007 Minn. Ct. App. LEXIS 1190, at *1, *13 (Dec. 11, 2007) (holding that the Minnesota State Constitution does not mandate a jury trial in civil commitment proceedings).

New York, in contrast, gives the defendant a right to a hybrid jury/bench trial. The person has the right to have a jury make the initial finding that he is a "detained sex offender who suffers from a mental abnormality."[131] If the jury so unanimously finds,[132] then it is the judge who must decide whether the person is a "dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision."[133]

Standard of proof is another area of variance. According to the U.S. Supreme Court, the burden of proof that the state must meet is "clear and convincing evidence," not the more stringent standard of "beyond a reasonable doubt."[134] Despite the fact that states are not required to demand this higher burden, nine states do: Arizona,[135] California,[136] Illinois,[137] Iowa,[138] Kansas,[139] Massachusetts,[140] South Carolina,[141] Texas,[142] Washington,[143] and Wisconsin.[144] In contrast, ten states and the federal government set the burden of proof at clear and convincing evidence.[145]

In addition, because the commitments are civil and not criminal, respondents do not have a federal constitutional right to competency. Arizona,[146] Iowa,[147] Kansas,[148] Massachusetts,[149] Missouri,[150] South

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127 In Nebraska, the district court reviews the findings of a mental health board. NEB. REV. STAT. § 71-1208 (2008).

128 N.J. STAT. ANN. § 30:4-27.31 (West 2009).

129 State v. Anderson, 730 N.W.2d 570, 571 (N.D. 2007).

130 42 PA. CONS. STAT. § 9795.4(e)(2) (West 2007).

131 N.Y. MENTAL HYG. § 10.07(d) (McKinney 2011).

132 *Id.*

133 N.Y. MENTAL HYG. § 10.07(f) (McKinney 2011).

134 Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

135 ARIZ. REV. STAT. ANN. § 36-3707(A) (2009).

136 CAL. WELF. & INST. CODE § 6604 (West 2009).

137 725 ILL. COMP. STAT. 207/35(d)(2) (West 2008).

138 IOWA CODE ANN. § 229A.7(5) (West 2008).

139 KAN. STAT. ANN. § 59-29a07(a) (2008).

140 MASS. ANN. LAWS ch. 123A, § 14(d) (LexisNexis 2003).

141 S.C. CODE ANN. § 44-48-100(A) (2008).

142 TEX. HEALTH & SAFETY CODE ANN. § 841.062(a) (West 2008).

143 WASH. REV. CODE ANN. § 71.09.060(1) (West 2008).

144 WIS. STAT. ANN. § 980.05(3)(a) (West 2008).

145 18 U.S.C. § 4248(d) (2006); FLA. STAT. ANN. § 394.917(1) (West 2009); MO. ANN. STAT. § 632.495 (West 2011); NEB. REV. STAT. § 71-1209(1) (2008); N.H. REV. STAT. ANN. § 135-E:11(1) (LexisNexis 2008); N.J. STAT. ANN. § 30:4-27.32(a) (West 2009); N.Y. MENTAL HYG. § 10.07(d) (McKinney 2011); N.D. CENT. CODE § 25-03.3-13 (2007); 42 PA. CONS. STAT. § 9795.4(e)(3) (2007); VA. CODE ANN. § 37.2-908(C) (2009); *In re* Linehan, 557 N.W.2d 171, 179 (Minn. 1996), *vacated* Linehan v. Minnesota, 522 U.S. 1011 (1997).

146 ARIZ. REV. STAT. ANN. § 36-3707(D) (2009).

147 IOWA CODE § 229A.7(1) (West 2009).

148 KAN. STAT. ANN. § 59-29a07(g) (2008).

Carolina,[151] Texas,[152] Virginia,[153] Washington,[154] and Wisconsin[155] have all held that individuals do not have the right to be competent at their sexually violent predator trial. In August 2010, the California Supreme Court ruled that due process does not require that a person be mentally competent when undergoing a commitment or recommitment trial as a sexually violent predator.[156] New Hampshire allows a limited right to competency.[157]

Nor do those accused of being a sexually violent predator enjoy the right against self-incrimination.[158] Some states like Arizona,[159] California,[160] and Missouri[161] allow the prosecution to call the individual to the stand against his will. Other states like Kansas,[162] New Jersey,[163] Pennsylvania,[164] and Texas[165] allow the person to be compelled to undergo a state psychological or psychiatric exam. Florida,[166] Massachu-

149 Commonwealth v. Nieves, 846 N.E.2d 379, 385–86 (Mass. 2006).

150 State *ex rel.* Nixon v. Kinder, 129 S.W.3d 5, 8–11 (Mo. Ct. App. 2003).

151 *See* S.C. CODE ANN. § 44-48-100(B) (2008). If a person is deemed incompetent, the judge will hold a hearing in which they will decide if the state can prove the person's guilt beyond a reasonable doubt. If so, civil commitment can proceed. *Id.*

152 *In re* Commitment of Fisher, 164 S.W.3d 637, 653–54 (Tex. 2005).

153 VA. CODE ANN. § 37.2-905 (2005).

154 WASH. REV. CODE. ANN. § 71.09.060(2) (West 2008). Washington has a similar procedure to South Carolina. *See supra* note 151 and accompanying text.

155 State v. Luttrell (*In re* Commitment of Luttrell), 754 N.W.2d 249, 252 (Wis. Ct. App. 2008).

156 Moore v. Super. Ct., 237 P.3d 530, 544 (Cal. 2010).

157 *See* N.H. REV. STAT. ANN. § 135-E:5(1), (2) (LexisNexis 2008). If a person is charged with a sexually violent offense but deemed incompetent for trial, he is held for ninety days. *Id.* If he remains incompetent to stand trial, a judge will determine whether he committed the crime beyond a reasonable doubt. *Id.* If so, commitment may proceed. *Id.*

158 *Allen v. Illinois* held that the privilege against self-incrimination did not apply in sexually dangerous person proceedings because they were "essentially civil in nature." 478 U.S. 364, 367, 375 (1986). The goal of the statute was "treatment, not punishment." *Id.*

159 *See* State *ex rel.* Romley v. Sheldon, 7 P.3d 118, 120–21 (Ariz. Ct. App. 2000) (holding that a person charged with a sexually violent offense "may not assert the privilege against self-incrimination as a reason to refuse to attend a deposition").

160 *See* People v. Leonard, 78 Cal. App. 4th 776, 792 (2000) (holding that the constitutional right to remain silent did not apply to persons charged with sexually violent offenses).

161 Bernat v. State, 194 S.W.3d 863, 870 (Mo. 2006) (holding that the state has a "compelling interest in ensuring that the jury or judge makes a reliable determination of whether the person sought to be committed is an SVP," while other persons, in contrast, subject to civil commitment in Missouri do have the right against self-incrimination).

162 KAN. STAT. ANN. § 59-29a08(c) (2006).

163 N.J. STAT. ANN. § 30:4-27.28(b) (West 2009).

164 Commonwealth v. Howe, 842 A.2d 436, 445 (Pa. Super. Ct. 2004).

165 TEX. HEALTH & SAFETY CODE ANN. § 841.061(f) (West 2008).

166 FLA. R. CIV. P. 1.360(a)(1)(A).

setts,[167] and New Hampshire[168] allow individuals to refuse a state exam; however, the price of refusal is that their own experts can be prohibited from testifying. In New York, upon request, the court will instruct the jurors if the individual refused to be examined by a state psychologist.[169] Illinois,[170] Iowa,[171] Virginia,[172] and Wisconsin[173] stand out in giving accused sexually violent predators the right to remain silent.

Despite these differences, there are two important similarities among sexually violent predator states that serve to limit the number of people who can be committed. First, all states except New York[174] and North Dakota[175] require that the person have been convicted of at least one sexually violent offense or have been charged with a sexually violent offense but found incompetent or not guilty by reason of insanity, mental disease, or mental defect.[176] In addition, the states

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167 Commonwealth v. Connors, 447 Mass. 313, 319 (2006) (holding that the defendant could not selectively invoke the privilege to refuse to speak with qualified psychiatric examiners).

168 N.H. REV. STAT. ANN. § 135-E:9(IV) (Lexis Nexis 2008).

169 N.Y. MENTAL HYG. § 10.07(d) (McKinney 2011).

170 725 ILL. COMP. STAT. ANN. 207/25(c)(2) (West 2008).

171 IOWA CODE § 229A.7(1) (2008).

172 VA. CODE ANN. § 37.2-901 (2005).

173 State v. Harrell (*In re* Commitment of Harrell), 747 N.W.2d 770, 778 (Wis. Ct. App. 2008).

174 The New York statute states:

> The respondent's commission of a *sex* offense shall be deemed established and shall not be relitigated at the trial, whenever it is shown that: (i) the respondent stands convicted of such offense; or (ii) the respondent previously has been found not responsible by reason of mental disease or defect for the commission of such offense or for an act or acts constituting such offense. Whenever the petition alleges the respondent's commission of a designated felony prior to the effective date of this article, the issue of whether such offense was sexually motivated shall be determined by the jury.

N.Y. MENTAL HYG. § 10.07(c) (McKinney 2011) (emphasis added); *see also* State v. Andre L., 924 N.Y.S.2d 467, 469 (N.Y. App. Div. 2011) (affirming the trial court's finding that an offender's first degree robbery conviction was sexually motivated and dangerous enough to require confinement because he suffered from a mental abnormality based on evidence "[he] left his home dressed in women's undergarments with the intention of exposing himself, and the robbery was an additional element that was part of the thrill involving sexual arousal").

175 North Dakota does not explicitly require a charge or conviction but instead requires that the sexually violent person is "an individual who is shown to have engaged in sexually predatory conduct." N.D. CENT. CODE § 25-03.3-01 (2008).

176 ARIZ. REV. STAT. ANN. § 36-3702 (2009); CAL. WELF. & INST. CODE § 6600(a)(1) (West Supp. 2009); FLA. STAT. ANN. § 394.912(10)(a) (West Supp. 2009); 725 ILL. COMP. STAT. ANN. 207/15(3)(b)(1) (West Supp. 2008) (Illinois also allows a finding of delinquency for a sexually violent offense); IOWA CODE ANN. § 229A.2(11), 229A.7 (West Supp. 2009) (in Iowa, before a person who was found incompetent or not guilty by reason of insanity can be committed as a sexually violent predator, the court must first find beyond a reasonable doubt that he committed the underlying sexually violent offense); KAN. STAT. ANN. § 59-29a07(g) (2008) (in Kansas, before a person who was found incompetent can

and federal government closely follow the Supreme Court language in *Hendricks* and *Crane*,[177] in that they require the person to have a current mental disorder or abnormality that causes him to have serious difficulty controlling himself such that he poses the risk of committing future acts of sexual violence.[178]

3. Discussion

As this Part has shown, most states offer more than the minimum constitutional protections required by the U.S. Supreme Court. The majority of states (fifteen of twenty) offer accused sexually violent predators more procedural protections than required by the Supreme Court. Indeed, of the twelve states that passed sexually violent predator laws after *Hendricks*, nine give accused SVPs the right to a jury trial, and of these, four set the standard of proof at beyond a reasonable doubt.

These results may seem surprising in light of the fact that sex crimes evoke such serious passions, and politicians are eager to show

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be committed as a sexually violent predator, the court must find beyond a reasonable doubt that he committed the underlying sexually violent offense); MASS. ANN. LAWS ch. 123A § 1 (LexisNexis 2003); MINN. STAT. § 253B.02(18c)(a)(1) (2009) (Minnesota requires that the person have "engaged in a course of harmful sexual conduct"); MO. ANN. STAT. § 632.480(5) (West 2006); NEB. REV. STAT. § 83-174.01(1) (2008); N.H. REV. STAT. ANN. § 135-E:2(XII) (LexisNexis Supp. 2008); N.J. STAT. ANN. § 30:4-27.26(b) (West 2008); 42 PA. CONS. STAT. ANN. § 9792 (West 2007); S.C. CODE ANN. § 44-48-30(1)(a) (Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. § 841.003 (West 2009); VA. CODE ANN. § 37.2-900 (2009); WASH. REV. CODE § 71.09.020(18) (2010); WIS. STAT. § 980.01(7) (2011).

177 534 U.S. 407 (2002). In *Crane*, the U.S. Supreme Court clarified what the state had to prove in terms of a sexually violent predator's ability to control himself. *Id.* at 413. "[W]e recognize that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior." *Id.*

178 CAL. WELF. & INST. CODE § 6600 (a)(1) (West Supp. 2009); FLA. STAT. ANN. § 394.912(10)(b) (West Supp. 2009); 725 ILL. COMP. STAT. ANN. 207/15(3)(C)(5) (West Supp. 2008) (note Illinois' formulation: "The person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence"); IOWA CODE ANN. § 229A.2 (West Supp. 2009); MASS. ANN. LAWS ch. 123A § 1 (LexisNexis 2003); MINN. STAT. § 253B.02(18c) (2009); MO. ANN. STAT. § 632.480(5) (West 2006); NEB. REV. STAT. § 83-174.01 (2008); N.H. REV. STAT. ANN. § 135-E:2(XII) (LexisNexis Supp. 2008); N.J. STAT. ANN. § 30:4-27.26 (West 2008); N.Y. MENTAL HYG. LAW § 10.07(f) (McKinney 2011); 42 PA. CONS. STAT. ANN. § 9792 (West 2007); S.C. CODE ANN. § 44-48-30 (Supp. 2008); TEX. HEALTH & SAFETY CODE ANN. § 841.003 (West 2009) (Texas uses the language "suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence"); VA. CODE ANN. § 37.2-900 (2009); WASH. REV. CODE 71.09.020(18) (2010); WIS. STAT. § 980.01(7) (2009 Supp. 2011); 18 U.S.C. § 4247 (5),(6) (LexisNexis 2008); State v. Ehrlich *(In re* Leon G.), 59 P.3d 779, 787 (Ariz. 2002).

that they are tough on criminals.[179] Yet as the next Part will discuss, affording extra procedural protections to accused sexually violent predators makes sense from a constitutional and public policy perspective.

V. DOES THE ADAM WALSH ACT VIOLATE PROCEDURAL DUE PROCESS?

In *United States v. Comstock*, the Supreme Court upheld the Adam Walsh Act on narrow constitutional grounds. Although Comstock et al. argued at the lower court level that the Act violated their rights to procedural and substantive due process as well as equal protection under the law, the Court of Appeals for the Fourth Circuit did not consider these arguments but instead upheld the dismissal on grounds that the law exceeded Congress's powers under Article 1, Section 8 of the Constitution.[180] In its decision, the Supreme Court held only that Congress had not exceeded its power under the Necessary and Proper Clause. It specifically left open the other constitutional claims.[181]

In determining whether federal inmates may even raise a procedural due process violation, they must first establish that a constitutionally protected interest is at stake. The Fourteenth Amendment to the U.S. Constitution protects persons against deprivations of life, liberty, or property. In this instance, inmates face lifetime incarceration in a locked mental hospital, and the Court has held that there is a liberty interest in avoiding involuntary psychiatric treatment and transfer to a mental institution.[182]

A. The Significance of State Protections

In determining whether the Adam Walsh Act violates inmates' procedural due process rights under the Fourteenth Amendment to the U.S. Constitution, it makes sense to begin by comparing the fed-

179 *See, e.g.*, KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997) (arguing that the root of tough anti-crime policies in the United States was political and not, as is popularly believed, due to an increase in the incidence of crime); *see also* BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS 148–50 (1999) (noting that in his reelection campaign, President Clinton signed a bill "demonstrating his opposition both to drug abuse and acquaintance rape").

180 United States v. Comstock, 551 F.3d 274, 284–85 (4th Cir. 2009), *rev'd*, 130 S. Ct. 1949.

181 United States v. Comstock, 130 S. Ct. 1949, 1965 (2010).

182 Vitek v. Jones, 445 U.S. 480, 493–94 (1980).

eral law with state protections. In questions of substantive due process, the Court often looks both historically and contemporaneously across states. For instance, the Court looked to state legislation in deciding that there was a national consensus against execution for rape of an adult woman,[183] rape of a child,[184] execution of the insane,[185] execution of fifteen,[186] sixteen, and seventeen year old juveniles,[187] and execution of the "mentally retarded."[188] Similarly, in *Lawrence v. Texas*, the Court looked to evolving standards of private, consensual sexual conduct as evidenced by laws across the country to strike down the anti-sodomy law previously upheld in *Bowers v. Hardwick* as a violation of a constitutionally protected liberty.[189]

Just as there are evolving standards in the substantive due process context, so are there evolving standards in the procedural context. In *Medina v. California*, Justice O'Connor cited Justice Frankfurter's concurring opinion in *Griffin v. Illinois* for the proposition that

> [t]he concept of due process is, "perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society. But neither the unfolding content of 'due process' nor the particularized safeguards of the Bill of Rights disregard procedural ways that reflect a national historic policy."[190]

If the Court looks at state practices across the country, it will see that almost all relevant states grant more procedural rights to SVPs than the federal government grants them under the Adam Walsh Act. Indeed, out of all twenty SVP states, only North Dakota allows a person to be committed as an SVP who has never been convicted of, or charged with, a sex crime. Such a consensus certainly reflects the kind of national historic policy that the Court should not ignore.

Furthermore, paying attention to what the states are doing in the SVP context avoids the sorts of federalism concerns that exist in the Eighth Amendment context.[191] In striking down the Adam Walsh Act,

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183 Coker v. Georgia, 433 U.S. 584, 592 (1977).

184 Kennedy v. Louisiana, 554 U.S. 407, 421, 469 (2008).

185 Ford v. Wainwright, 477 U.S. 399, 408–10 (1986).

186 Thompson v. Oklahoma, 487 U.S. 815, 826–29, 838 (1988).

187 Roper v. Simmons, 543 U.S. 551, 574–75 (2005).

188 Atkins v. Virginia, 536 U.S. 304, 321 (2002).

189 Lawrence v. Texas, 539 U.S. 558, 573 (2003); Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

190 Medina v. California, 505 U.S. 437, 454 (1992) (O'Connor, J., concurring) (citing Griffin v. Illinois, 351 U.S. 12, 20–21 (1956)).

191 *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1133 (2006) ("[B]y incorporating the counting and characterizing of state legislation into Eighth Amendment jurisprudence, the Supreme Court has lumbered that jurisprudence with all of the prob-

the Court would actually be deferring to the states instead of supplanting them. As the Court states in *Medina v. California*, "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."[192] Of course, as the Court held in *Hendricks*, SVP commitments are not actually classified as criminal.[193] But still, in deciding whether to uphold outlier legislation like the Adam Walsh Act, the Court should pay attention to the consensus that exists across SVP states regarding procedural protections afforded to SVPs.

B. Applying the Mathews v. Eldridge *Balancing Test*

In *Hamdi v. Rumsfeld*[194] and *Wilkinson v. Austin*,[195] the Court used the balancing test from *Mathews v. Eldridge*[196] to assess whether the state had afforded sufficient procedural due process under the Constitution to protect a defendant's liberty. These decisions are significant because they clearly show that the balancing test has replaced the more nebulous standards of due process that were used previously.[197] Thus, this Article will apply the *Eldridge* balancing test in determining whether the Adam Walsh Act violates procedural due process.

Eldridge dictates that in determining the requirements of due process in a particular circumstance, three factors must be considered:

> the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[198]

Without question, the private interest at stake is significant. The Adam Walsh Act allows the federal government to deprive people of

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lems associated with the 'indeterminacy of levels of generality' that plague other areas of constitutional law.").

192 *Medina*, 505 U.S. at 445–46.

193 Kansas v. Hendricks, 521 U.S. 346 (1997).

194 542 U.S. 507, 531 (2004).

195 545 U.S. 209, 224–25 (2005).

196 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

197 *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 226 (1976) ("The touchstone of due process is protection of the individual against arbitrary action of government." (citations omitted) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974))).

198 *Eldridge*, 424 U.S. at 335.

their freedom indefinitely. Indeed, history has shown that once a person is committed as a sexually violent predator, it's unlikely that he will ever be released.[199] In *Foucha v. Louisiana*, the Court confirmed the significance of incarceration: "Freedom from bodily restraint has always been at the core of liberty protected by the Due Process Clause from arbitrary governmental action."[200]

Next, the courts must assess the risk of an erroneous deprivation of liberty due to the procedures used, and the probable value of additional safeguards. As discussed above, sex offenders have a very low rate of recidivism.[201] Just 5.3% of sex offenders were rearrested for a new sex crime within three years of release from prison.[202] In addition, because accused SVPs are older, they are likely to be at even lower risk of reoffending.[203] Thus, even with ordinary due process protections in place, a significant danger exists that the government will lock someone away who would not reoffend if released. Eliminating the requirement that a person have actually been convicted of, or at least charged with, a sex crime only increases the risk of false positives.

Last, courts need to consider the governmental interest at stake and the burdens of additional protections. Without a doubt, the government has an important interest in protecting the safety of men, women, and children against predatory sex offenders. Yet the weight of that interest is directly related to the risk posed: the greater the danger, the greater the governmental interest. Not only are sex offenders unlikely to recidivate, but the overall incidence of sex crimes has been dropping for the past two decades.

According to the Uniform Crime Reports,[204] the number of forcible rapes known to the police reached its peak in 1992.[205] From 1993

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199 *See supra* Table 2.

200 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

201 *See supra* notes 19–37 and accompanying text.

202 DOJ, *supra* note 21, at 24.

203 *See supra* notes 38–39 and accompanying text.

204 The FBI began compiling the Uniform Crime Reports in 1930 from law enforcement agencies across the country. Marvin E. Wolfgang, *Uniform Crime Reports: A Critical Appraisal*, 111 U. PA. L. REV. 708, 710 (1963). Although participation has increased dramatically since 1930, it is purely voluntary, and as a result some agencies do not provide data. *Uniform Crime Reports: A Word About UCR Data*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/word (last visited Nov. 22, 2011).

205 *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 2009, at tbl.1 (2010), *available at* http://www2.fbi.gov/ucr/cius2009/data/table_01.html (showing the number of forcible rapes between 1990 and 2009 and showing that there were 109,062 forcible rapes in 1992).

through 2010, the number of forcible rapes known to police has continued to decrease with few exceptions.[206] The rate of forcible rapes per 100,000 persons in the U.S. has also consistently dropped, from a high of 42.8 in 1992 to 28.7 in 2009.[207]

In addition, the number of substantiated cases of child sexual abuse has been steadily decreasing during this same time period.[208] The National Child Abuse and Neglect Data System ("NCANDS") aggregates and publishes statistics from child protection agencies across the country, including all fifty states, the District of Columbia, and Puerto Rico.[209] It has been collecting, analyzing, and publishing a report on this data for the past 20 years.[210] Researchers analyzed the NCANDS data and found that sexual abuse of children has dropped 58% from 1992 to 2008.[211]

Considering all three parts of the *Eldridge* test—the significant liberty interests at stake, the elevated risk that a person may be committed erroneously due to the procedures used, and the important governmental interest—it seems clear that the expansive commitment criteria in the Adam Walsh Act violate the due process rights of accused sexually violent predators. Consequently, states should not follow in the federal government's footsteps.

If the Court allows the government to commit individuals as sexually violent predators who have never been charged with a sex crime, the Court—whether intentionally or not—creates an incentive for the government to circumvent Sixth Amendment protections. Currently, in eighteen of the twenty SVP states, the *only* way that a person can be committed as an SVP is if he is either convicted, or found not guilty by reason of insanity, of a qualifying sex offense. Additionally, in these states, a person may be committed as an SVP if

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206 *Id.*; *see also* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, PRELIMINARY ANNUAL UNIFORM CRIME REPORT, JANUARY–DECEMBER 2010, at tbl.3, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/preliminary-annual-ucr-jan-dec-2010/data-tables/table-3 (showing the number of forcible rapes in 2010); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, at tbl.310, *available at* http://www.census.gov/compendia/statab/2011/tables/11s0310.pdf (showing that the forcible rape rate, per 100,000 population, was 36.8 in 1980, 41.1 in 1990, 37.1 in 1995, 32.0 in 2000, 33.1 in 2002, 32.3 in 2004, 31.8 in 2005, 31.0 in 2006, and 30.0 in 2007).

207 FED. BUREAU OF INVESTIGATION, *supra* note 205.

208 David Finkelhor & Lisa M. Jones, *Explanations for the Decline in Child Sexual Abuse Cases*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Washington, D.C.), Jan. 2004, at 1.

209 U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2009, at ii (2010).

210 *Id.*

211 DAVID FINKELHOR, LISA JONES & ANNE SHATTUCK, UNIV. OF N.H. CRIMES AGAINST CHILDREN RESEARCH CENTER, UPDATED TRENDS IN CHILD MALTREATMENT, 2008, at 1–2.

a judge finds that he committed a qualifying sex offense for which he was charged but was later deemed incompetent to stand trial. The Adam Walsh Act affords none of these procedural protections. The Act empowers the federal government to avoid the time and monetary cost of trial as well as the risk of a defendant being found not guilty. For a prosecutor intent on locking someone up forever as an SVP, it is far cheaper and easier to go through civil commitment proceedings than the criminal process. The Supreme Court should not uphold rules that create incentives for undermining constitutional rights.

VI. PUBLIC POLICY CONCERNS

Even if the Supreme Court holds that the Adam Walsh Act does not violate procedural due process, states must still decide whether they should lower the threshold for commitment under the sexually violent predator laws. After all, the Supreme Court merely sets the floor for constitutional protections; states may always guarantee more. This Part argues that enhanced procedural protection makes sense from a public policy perspective.

Implementing the sexually violent predator laws as currently written demands enormous resources, and changing the laws to increase commitments would only end up costing the state more. When there were just sixteen SVP states, funding was estimated to be somewhere in the range of $225 million to $321 million per year.[212] As the number of commitments increases, so will the costs. In the budget year 2005–2006, California allocated $64 million to cover all SVP related costs. This was a cost of $150,000 per committed SVP, and this did not include courtroom or attorney costs.[213] This figure is pretty stan-

212 ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 62 (2006) (citing WASH. STATE INST. FOR PUB. POLICY, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS 1 (2005); TERRENCE W. CAMPBELL, ASSESSING SEX OFFENDERS: PROBLEMS AND PITTFALLS 6 (2004)).

213 DEIDRE M. D'ORAZIO, STEVEN ARKOWITZ, JAY ADAMS & WESLEY MARAM, THE CALIFORNIA SEXUALLY VIOLENT PREDATOR STATUTE: HISTORY, DESCRIPTION & AREAS FOR IMPROVEMENT (2009), *available at* http://ccoso.org/papers/CCOSO%20SVP%20Paper.pdf. For the first eight years after California's SVP law was passed, SVPs were housed at Atascadero State Hospital. *Id.* at 19. In 2005, the state completed Coalinga State Hospital, which was specifically built to house SVPs. *Id.* As of September 2011, Coalinga housed more than nine hundred sex offenders. Ryan Gabrielson, *Sex Offenders at State Hospital Protest "Violent Predator" Designation*, CALIFORNIA WATCH (Sept. 21, 2011), http://californiawatch.org/dailyreport/sex-offenders-state-hospital-protest-violent-predator-designation-12692.

dard.[214] Legal fees add significantly more. Not only are there attorney fees, but there are also expert fees and the costs of trial and appeal. In Washington State, the legal fees per offender added up to $60,000 per year.[215]

In order to pay these costs, some states have taken measures like reducing the number of probation officers and cutting funds to domestic violence and sexual violence prevention programs.[216] Others have cut funding to sex offender treatment programs that have been shown to reduce recidivism by as much as 30% to 40%.[217] In addition, these laws force states to divert funds from addressing the lion's share of sex crimes, which are perpetrated by family and friends.

In a world of limited resources, states spend hundreds of millions of dollars locking up individuals for crimes that they might commit instead of spending money solving crimes that have already happened. This irony is especially poignant with regards to the thousands of rape kits that languish in police departments across the country. According to a 2009 Human Rights Watch report, in Los Angeles alone at the time, there were at least 12,669 untested sexual assault kits (known as rape kits).[218] In order to test these kits, Los Angeles would need to hire additional staff in their DNA laboratory at a cost of approximately $1.6 million a year.[219] Although the Los Angeles Police Department has made some progress in reducing the number of unanalyzed kits, the California budget crisis has led to mandatory work furloughs that have slowed down these efforts.[220]

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214 *See* ROXANNE LIEB & SCOTT MATSON, WASH. STATE INST. FOR PUB. POL'Y, SEXUAL PREDATOR COMMITMENT LAWS IN THE UNITED STATES: 1998 UPDATE, at 11 (1998) (stating that some of the estimated combined annual housing and treatment costs per individual were $97,000 for Florida, $80,000 for Kansas, $110,000 for Minnesota, $85,000 for New Jersey, $100,000 for North Dakota, $70,000 for Washington, and $82,125 for Wisconsin).

215 *Id.*

216 *See* JANUS, *supra* note 212, at 115. Janus writes that in 2004, California "spent more than $78 million to lock up 535 predators, while providing no substantial sex offender treatment for the seventeen thousand sex offenders in its prisons." *Id.* Janus also writes that in 2004 Minnesota spent $26 million to lock up 235 predators. *Id.* That same year, pecuniary problems forced the state to propose cutting 137 of its 778 police officers and to actually eliminate one hundred probation officers' positions despite rising caseloads, and it cut its funding for domestic violence and sexual violence prevention programs by $3.6 million per year. *Id.*

217 *Id.* at 115, 126 (describing lack of funding for sex offender treatment programs in California and Massachusetts).

218 HUMAN RIGHTS WATCH, TESTING JUSTICE: THE RAPE KIT BACKLOG IN LOS ANGELES CITY AND COUNTY 1 (2009).

219 *Id.* at 32–33.

220 Joel Rubin, *LAPD Cuts Backlog of Untested DNA Cases in Half*, L.A. NOW BLOG (Oct. 5, 2009, 1:44 PM), http://latimesblogs.latimes.com/lanow/2009/10/lapd-cuts-backlog-of-untested-dna-cases-in-half-.html.

Consequently, thousands of rapists are walking the streets, potentially stalking new victims.

CONCLUSION

In twenty states across the country and in federal prisons, individuals are being kept in custody past their scheduled release date because they have been adjudicated to be sexually violent predators. Deeming these laws civil instead of criminal significantly reduces the constitutionally required procedural protections. Although accused sexually violent predators are facing lifetime incarceration, they do not have the right to competency, the right to a jury trial, the right against self-incrimination, or the right to have their status proved beyond a reasonable doubt.

The Adam Walsh Act reduces these protections still further by allowing a person to be committed indefinitely as a sexually violent predator who has never been convicted of, or even charged with, a sex offense. Although the Supreme Court upheld the Adam Walsh Act in *United States v. Comstock*, it did so on limited grounds. Indeed, the Court specifically noted that other grounds for challenging the law—such as whether it violates due process—have not been adjudicated.

In light of this, the Court can expect another challenge to the Adam Walsh Act in the not-so-distant future. This Article has argued that the Adam Walsh Act violates procedural due process and should not be upheld. Should the Court decide that it does not violate due process to commit people indefinitely with such a low threshold of proof, this Article has argued that states should not follow suit. It simply does not make sense from a public policy perspective due to the likely error rate and the expense.

If states want to protect men, women, and children from dangerous sex offenders, they should direct the money that might be spent incarcerating persons unlikely to reoffend in ways that have been proven successful at reducing sex crimes. And, at least as importantly, states should make sure that there are sufficient funds to solve sex crimes that have already occurred. We live in a world of limited resources, and it is critical that we allocate them using reason and not fear.

TABLE 1

COMPARISON OF SEXUALLY VIOLENT PREDATOR COMMITMENT VS. COMMITMENT OF THE CRIMINALLY INSANE AND THE MENTALLY ILL

	Sexually Violent Predator	Criminally Insane	Mentally Ill
Right to Jury Trial	No	Yes	No
Timing of Hearing	After finding of guilt and after criminal sentence has been completed	Varies by state. Some states have a bifurcated trial in which jury must first come to a finding of guilt before they decide whether the defendant was insane at the commission of the crime.	Unrelated to finding of guilt
Right to Competency	No	Yes	No
Right against Self-Incrimination	No	Yes	No
Who Has Burden of Proof?	Prosecutor	Either side, but insanity is usually an affirmative defense thus giving defendant the burden of proof	Prosecutor
Standard of Proof	Minimum standard is clear and convincing evidence.	The state may require that the defendant prove his insanity beyond a reasonable doubt.	Minimum standard is clear and convincing evidence
Relevant Temporal Moment	Defendant's current mental state	Defendant's mental state at the time of the crime	Defendant's current mental state
Is Mental State Only Issue?	No. District Attorney must prove that present mental disorder makes it difficult for defendant to control himself such that he poses the risk of committing a new sexually violent offense.	Yes	No. State must prove that person is mentally ill and dangerous.
Duration of Commitment	Indefinite	Indefinite	Indefinite

TABLE 2

SEXUAL VIOLENT PREDATOR STATUTES ACROSS THE COUNTRY BY DATE OF PASSAGE—TYPE OF COMMITMENT, NUMBER OF PEOPLE COMMITTED/RELEASED AND TOTAL BUDGET

State	Year of Passage	Length/Type of Commitment	# of People Committed as of Summer 2008	# of People Ever Released	Total Civil Commitment Budget (Millions)
WA	1990	Indeterminate Placement in a secure facility operated by the department of social and health services for control, care and treatment	213	Unknown	$38.6
KS	1994	Indeterminate Kept in a secure facility	216	13	$10.9
MN	1994	Indeterminate Secure treatment facility unless person proves by clear and convincing evidence that a less restrictive treatment facility is consistent with his treatment needs and safety of the public	516	0	$54.9
WI	1994	Indeterminate "Committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person"	352	36	$34.7
AZ	1995	Indeterminate Licensed facility by state hospital	58	114	$11.3
CA	1995	Indeterminate Locked state run hospital	808	24	$147.3
IL	1997	Indeterminate Order of commitment to a secure facility or conditional release	224 (206 in house, 18 on conditional release)	18	$25.8
ND	1997	Indeterminate Least restrictive but appropriate treatment facility possible	58	0	$5.4
In *Kansas v Hendricks* 521 U.S. 346 (1997), the U.S. Supreme Court narrowly held that Kansas's sexually violent predator law was constitutional.					
FL	1998	Indeterminate Secure state-run facility	240	7	$23.3
IA	1998	Indeterminate Confined to a state facility designed to confine, but not necessarily treat, SVP	75	14	$5.0

TABLE 2 (CONT'D)

SEXUAL VIOLENT PREDATOR STATUTES ACROSS THE COUNTRY BY DATE OF PASSAGE—TYPE OF COMMITMENT, NUMBER OF PEOPLE COMMITTED/RELEASED AND TOTAL BUDGET

State	Year of Passage	Length/Type of Commitment	# of People Committed as of Summer 2008	# of People Ever Released	Total Civil Commitment Budget (Millions)
NJ	1998	Indefinite Facility designed for custody, care, and treatment	340	24	$21.9
SC	1998	Indeterminate Committed to custody of Department of Mental Health for control, care and treatment	94	Unknown	$2.9
MA	1999	Indeterminate Committed to a treatment center	105	4	$30.7
MO	1999	Indeterminate Committed to the custody of the Director of the Department of Mental Health for control, care and treatment	110	0	$9.8
TX	1999	Outpatient	99 (50 in prison awaiting release and 49 in half way houses or jail for violation of civil commitment)	Outpatient	$0.9
VA	1999	Indeterminate Less restrictive alternatives to involuntary secure inpatient treatment are possible if they have been investigated and deemed suitable.	138	Unknown	$8.1
In *Kansas v Crane* 534 U.S. 407 (2002), the U.S. Supreme Court clarified that in order to be committed as a sexually violent predator, there must be "proof of serious difficulty in controlling behavior."					
PA	2003	Lifetime registration with the police, verify their residence on a quarterly basis and attend monthly counseling sessions.	20	0	$1.8
NE	2006	Indeterminate "State must prove by clear and convincing evidence that...neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the Board are available or would suffice to prevent the harm."	10	0	$13.5

TABLE 3

PROCEDURAL RIGHTS AT SEXUALLY VIOLENT PREDATOR COMMITMENT HEARINGS (ORGANIZED BY YEAR OF SVP LEGISLATION)

Year	State	Right to Counsel	Right to be Competent at Trial	Right to Jury Trial	Standard of Proof	Number on Jury Needed to Commit	Fifth Amendment Right
1990	WA	Yes	No	Yes	Reasonable doubt	Unanimous	Statute does not specify
1994	KS	Yes	No	Yes	Reasonable doubt	12 of 12	No. Can be ordered to submit to psychiatric evaluation by state
1994	MN	Yes	Statute does not specify	No	Clear and convincing	N/A	Not specified in statute
1994	WI	Yes	No	Yes	Reasonable doubt	12 out of 12	Yes
1995	AZ	Yes	No	Yes	Reasonable doubt	6 of 8	Cannot assert privilege as reason to refuse to be deposed by the state
1995	CA	Yes	No	Yes	Reasonable doubt	12 of 12	No. Can be called to the stand by the prosecution
1997	IL	Yes	Statute does not specify	Yes	Reasonable doubt	Unanimous	Yes
1997	ND	Yes	Statute does not specify	No	Clear and convincing	N/A	Statute does not specify
Kansas v Hendricks (1997)	N/A	Yes	No	No	Clear and convincing	N/A	No
1998	FL		Yes	Yes	Clear and convincing	6 of 6	No
1998	IA		No	Yes	Reasonable doubt	12, Unanimous	Yes
1998	NJ		Statute does not specify	No	Clear and convincing	N/A	Can be ordered to submit to a psychiatric exam
1998	SC		No	Yes	Reasonable doubt	Unanimous	Statute does not specify
1999	MA		No	Yes	Reasonable doubt	Unanimous	If present evidence of own examiner cannot invoke privilege to preclude evaluation and testimony by state examiner
1999	MO		No	Yes	Clear and convincing	Unanimous	No
1999	TX		No	Yes	Reasonable doubt	Unanimous	Person may be ordered to submit to all expert exams. If he does not, (1) his failure to participate may be used as evidence against him at trial; (2) he may be prohibited from offering his own expert testimony; and (3) he may be subject to contempt proceedings.

TABLE 3 (CONT'D)

PROCEDURAL RIGHTS AT SEXUALLY VIOLENT PREDATOR COMMITMENT HEARINGS (ORGANIZED BY YEAR OF SVP LEGISLATION)

Year	State	Right to Counsel	Right to be Competent at Trial	Right to Jury Trial	Standard of Proof	Number on Jury Needed to Commit	Fifth Amendment Right
1999	VA		Statute does not specify	Yes	Clear and convincing	7 of 7	Statute does not specify
2003	PA		Statute does not specify	No	Clear and convincing	N/A	Def. can be ordered to undergo sexually violent predator assessment
2006	NE		Statute does not specify	No	Clear and convincing	N/A	Statute does not specify
2006	NH	Yes	Limited	Yes	Clear and convincing	Unanimous	"If the person refuses to submit to an examination by the state's expert the court shall prohibit the person's mental health experts from testifying concerning any mental health tests, evaluations, or examinations of the person."
2006	USA	Yes	Statute does not specify	No	Clear and convincing	N/A	Statute does not specify
2007	NY	Yes	Statute does not specify	Yes	Clear and convincing	Unanimous	If respondent refuses psychiatric exam, jurors shall be instructed of such if requested.