DUE PROCESS AND "THE WORST OF THE WORST": MENTAL COMPETENCE IN SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT PROCEEDINGS

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Sexually Violent Predator ("SVP") civil commitment statutes have been adopted by a number of states and by the federal government. The statutes provide for the indefinite post-incarceration detention of individuals whom the state determines have a strong potential for committing violent sex acts if released. Thus, when an individual convicted of a violent sex crime has finished serving his sentence for that crime, the state may retain custody over him by proving that he is an SVP. The Supreme Court has held that these statutes are constitutional and, in particular, that they satisfy substantive due process. A number of questions still remain as to what procedural protections might be constitutionally required in SVP commitments. This Note addresses one of those questions: whether or not an accused individual has a right to be determined mentally competent before the state may commit him as a sexually violent predator.

Introduction

On March 8, 2005, Los Angeles County sought to commit Ardell Moore to a secure facility for up to the remainder of his natural life.[1] Two years later, Moore's counsel petitioned the trial court to order a mental competency hearing.[2] The psychologist who evaluated Moore found that he "was unable to recall details, facts, dates and people with accuracy."[3] Moore could only "interpret[] his situation on the basis of a fixed delusional system"; he believed "that the voices . . . told him what to do."[4]

Had Moore been accused of a multiple homicide, his attorney's motion would have been granted.[5] But Los Angeles County was not charging him with a crime at all. Instead, the County was seeking to have Moore detained in a secure mental facility as "the worst of the worst": a Sexually

1. Moore v. Superior Court, 237 P.3d 530, 534 (Cal. 2010). In 2005, California law allowed Sexually Violent Predators to be committed for a two-year period although the State could seek unlimited recommittals. Id. at 534 & n.7. By the time of Moore's appeal, California law had been amended to remove the two-year limitation and allow for indefinite detention without the need for recommitment proceedings. Id.

2. Id. at 535.

3. Letter from Vianne Castellano, Licensed Psychologist, to Karen King, Deputy Pub. Defender 4 (Jan. 12, 2007) (on file with the *Columbia Law Review*) (detailing competency evaluation of Ardell Moore).

4. Id. at 3–4.

5. See Drope v. Missouri, 420 U.S. 162, 172 (1975) (holding test for mental competence is "whether [the] defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'" (quoting Dusky v. United States, 362 U.S. 402, 402 (1960))).

Violent Predator.[6] Such detentions, pursuant to the California Welfare and Institutions Code, are civil, not criminal, in nature.[7] For the California Supreme Court, this distinction was significant. On August 19, 2010, the Court found that Moore held no right to a mental competence determination before his Sexually Violent Predator commitment hearing.[8]

Sexually Violent Predator (SVP)[9] statutes are one example of the unique penalties that state and federal justice systems apply to sex offenders.[10] The statutes provide for the indefinite post-incarceration[11] detention and treatment of individuals who meet two conditions: (1) They have committed a sexually violent offense; and (2) they have a mental abnormality or condition that increases their likelihood of committing a sexually violent offense if released into society.[12] Although SVP statutes are controversial for many reasons,[13] they have withstood a variety of legal challenges.[14]

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6. "The worst of the worst" is the term used to describe Sexually Violent Predators by Riverside County, California District Attorney Rod Pacheco. Keith Matheny, Areas Fear Predators' Releases, USA Today, Mar. 4, 2010, at 3A (outlining difficulties surrounding supervised release of sexually violent predators).

7. See, e.g., *Moore*, 237 P.3d at 539 ("SVP proceedings are civil, not criminal, in nature.").

8. Id. at 547 ("[W]e conclude that due process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the [SVP Act].").

9. This Note refers to these laws as "SVP statutes" in the interests of clarity and consistency, although some states and the federal government use different terms, such as Sexually Dangerous Person (SDP). See, e.g., 18 U.S.C. § 4247(a)(5)–(6) (2006) (defining "sexually dangerous person"); Mass. Gen. Laws ch. 123A, § 1 (2010) (same).

10. For a thorough discussion of the rapid increase in both civil and criminal penalties for sex offenders, see Corey Rayburn Yung, The Emerging Criminal War on Sex Offenders, 45 Harv. C.R.-C.L. L. Rev. 435, 447–53 (2010). In addition to detention, other potential penalties for sex offenders include GPS-monitored residency restrictions and chemical castration. Id. at 448–49.

11. Most individuals are subjected to SVP commitment after serving the full sentence for the predicate sex crime of which they were convicted. See, e.g. Mass. Gen. Laws ch. 123A, § 12 (setting forth procedures for identifying and committing SVPs).

12. While SVP statutes vary in a number of ways, this formulation represents the standard two-prong test employed by states with SVP statutes. E.g., Cal. Welf. & Inst. Code § 6600(a)(1) (West 2010); Fla. Stat. § 394.912(10) (2011); Mass. Gen. Laws ch. 123A, § 1; N.Y. Mental Hyg. Law § 10.03(e) (McKinney 2011); Wis. Stat. § 980.01(7) (2009–2010). The federal SVP statute follows a similar formula. See 18 U.S.C. § 4248 (providing for commitment of sexually dangerous persons); Id. § 4247(a)(5)–(6) (defining sexually dangerous persons).

13. See, e.g., Monica Davey & Abby Goodnough, Doubts Rise as States Hold Sex Offenders After Prison, N.Y. Times, Mar. 4, 2007, at 1 (detailing problems with treatment of individuals committed as SVPs); Paul Pinkham, Who's Treating These Sex Offenders?, Fla. Times-Union, Apr. 24, 2005, at A1 (discussing Florida's failure to fund Stages III and IV of four-tiered SVP treatment program).

14. See United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (holding federal SVP statute, 18 U.S.C. § 4248, was proper exercise of congressional power under Necessary and Proper Clause); Kansas v. Hendricks, 521 U.S. 346, 356 (1997) (holding Kansas's SVP

Courts have consistently held that SVP commitments implicate serious liberty interests.[15] In particular, individuals designated as SVPs are rarely released "and placement within [SVP programs] typically amounts to a lifetime sentence."[16] The Supreme Court has long recognized that civil commitment regimes that threaten the loss of serious liberty interests must be accompanied by strong due process protections for the individuals whose commitment is sought.[17] Accordingly, states that have adopted SVP commitment statutes have generally provided for the right to an attorney, the right to expert witnesses, and the right to a trial by jury.[18]

This Note examines whether the procedural protections provided by SVP statutes are constitutionally sufficient or if due process requires that accused SVPs be afforded further rights. In particular, the Note explores whether individuals such as Ardell Moore have a right to a mental competency determination before an SVP commitment action against them may proceed. Competence is significant in this context because SVP statutes generally allow extrinsic hearsay evidence to be introduced both against and on behalf of the defendant.[19] This evidence is used as a basis for determining whether an individual has the required "mental abnormality" and can include details of the defendant's behavior while incarcerated,[20] statements made as part of a state-mandated sex offender rehabili-

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statute did not violate substantive due process rights); see also Kansas v. Crane, 534 U.S. 407, 413 (2002) (holding civil commitment under Kansas SVP statute required showing that offender lacked control over his dangerous behavior); Seling v. Young, 531 U.S. 250, 267 (2001) (holding civil commitment cannot be considered punitive as applied to individual defendant).

15. See, e.g., *Hendricks*, 521 U.S. at 372 (Kennedy, J., concurring) ("[T]he practical effect of the Kansas law may be to impose confinement for life."); Moore v. Superior Court, 237 P.3d 530, 539 (Cal. 2010) ("[B]ecause civil commitment involves a significant restraint on liberty, the defendant in an SVP proceeding is entitled to certain due process protections."); Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006) ("If committed, [the accused's] loss of liberty would be total.").

16. Yung, supra note 10, at 448.

17. See, e.g., Jones v. United States, 463 U.S. 354, 361 (1983) ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" (quoting Addington v. Texas, 441 U.S. 418, 425 (1979))).

18. E.g., Cal. Welf. & Inst. Code § 6603 (West 2010); Fla. Stat. § 394.916 (2011); Mass. Gen. Laws ch. 123A, § 14 (2010); N.Y. Mental Hyg. Law § 10.07 (McKinney 2011); Wis. Stat. § 980.03 (2009–2010).

19. See, e.g., Branch v. State (In re Commitment of Branch), 890 So. 2d 322, 324 (Fla. Dist. Ct. App. 2004) (discussing psychiatrist's admission that "he had no knowledge whether the . . . events [on which he based his diagnosis] actually occurred"); Petition for Writ of Mandate and/or Prohibition at 13–15, Moore v. Superior Court, 94 Cal. Rptr. 3d 771 (Cal. Ct. App. 2009) (No. B198550) (on file with the *Columbia Law Review*) (detailing numerous forms of extrinsic evidence allowed to be introduced by both defendant and prosecution in California SVP hearings).

20. See *Nieves*, 846 N.E.2d at 383 (detailing defendant's fifty-one disciplinary violations in prison, including "fighting, being out of place, refusing orders, and assaulting and threatening correction officers"); see also *Moore*, 237 P.3d at 533 (discussing defendant's frequent "rule violations—sometimes more than once a day").

tation program,[21] and untested hearsay evidence provided as part of a deposition.[22] An incompetent defendant may be unable to comprehend and properly contest such evidence.[23]

SVP statutes do, however, provide other procedural protections—including the right to an attorney and the right to retain experts—which some courts have found sufficiently mitigate the possibility that unchallenged hearsay evidence could undermine the rights of the accused.[24] At the very least, it is clear that the analysis of mental competence in commitment proceedings involving hearsay evidence must be substantially different from the competence analysis in commitments that rely solely on information introduced at the defendant's original criminal trial. This Note, therefore, examines the potential role of competence determinations in both hearsay and nonhearsay commitments before arguing for a single rule that provides proper procedural protections in both contexts.

Part I of this Note discusses the history of SVP statutes and the controversies surrounding them, as well as their treatment by the Supreme Court. It then explores Supreme Court jurisprudence in regards to other civil commitment regimes. Part II details the varied methodological approaches taken by the eight state courts that have considered whether SVP defendants have a due process right to a mental competence determination, with a particular emphasis on the courts that applied procedural due process analysis to the issue. Part III argues that SVP competency claims should be subject to *Mathews v. Eldridge* procedural due process analysis and then analyzes application of the *Mathews* factors.[25] Finally, this Note advocates for a bright-line rule that provides SVP defendants with competency evaluations when necessary but does not open the door to frivolous challenges based on competence.

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21. See *Branch*, 890 So. 2d at 324 (examining extrinsic evidence introduced against defendant, including statements made as part of Department of Corrections sex offender program).

22. See Camper v. State (In re Commitment of Camper), 933 So. 2d 1271, 1275 (Fla. Dist. Ct. App. 2006) (discussing hearsay evidence of sexual abuse introduced against SVP defendant).

23. For a discussion of the intertwining of mental competence and the introduction of extrinsic evidence, see infra Part III.B.

24. See infra notes 144–153 and accompanying text (discussing low risk of erroneous commitment due to "robust, adversary character" of SVP proceedings).

25. The *Mathews* test requires the court to balance three factors: the liberty interest at stake, the risk of erroneous deprivation of that interest and the probable value of additional safeguard, and the government interest. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

I. Due Process in SVP and Other Civil Commitment Regimes

SVP statutes are a relatively recent legal creation.[26] While SVP proceedings are constitutional,[27] the specific requirements of due process protection for the accused have not been fully litigated. In order to see how and why particular due process rights are implicated in SVP proceedings, it is necessary to understand the nature of, and the legislative goals behind, the various SVP statutes as well as how due process applies to civil commitment schemes generally. To this end, Section A of this Part explores the history and structure of SVP commitment procedures. Section B discusses the controversy surrounding SVP statutes while Section C briefly sketches the Supreme Court cases upholding their constitutionality. Section D then examines the due process protections afforded defendants under other civil commitment regimes as a preface to analogizing those situations to SVP proceedings.

A. *History and Structure*

Sexually Violent Predator statutes allow for the post-incarceration detention[28] of individuals the state believes have strong potential for committing future violent sex acts.[29] Washington State passed the first modern SVP statute in 1990.[30] Today, twenty states have SVP statutes.[31] In 2006, Congress passed a federal SVP statute as part of the Adam Walsh

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26. See infra Part I.A for a discussion of the history of SVP statutes.

27. See Kansas v. Hendricks, 521 U.S. 346, 371 (1997) (holding state SVP statute did not violate due process); see also United States v. Comstock, 130 S. Ct. 1949, 1954 (2010) (holding Federal Sexually Dangerous Persons Statute, 18 U.S.C. § 4248 (2006), was proper exercise of congressional power under Necessary and Proper Clause); Kansas v. Crane, 534 U.S. 407, 412–13 (2002) (holding civil commitment under Kansas SVP statute required showing that offender lacked control over his dangerous behavior); Seling v. Young, 531 U.S. 250, 267 (2001) (holding SVP commitment cannot be considered punitive "as applied" to individual defendant).

28. The one exception is Texas's SVP statute, which provides solely for an outpatient program. Tex. Health & Safety Code Ann. §§ 841.001–841.007 (West 2009). Because the liberty interests involved in an outpatient program differ significantly from those implicated by a civil detention regime, Texas's statute will be examined only tangentially by this Note.

29. See, e.g., Cal. Welf. & Inst. Code § 6600 (West 2010) ("Sexually violent predator means a person who has been convicted of a sexual offense . . . and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely he or she will engage in sexually violent criminal behavior." (internal quotation marks omitted)); Mass. Gen. Laws ch. 123A, § 1 (2010) (defining "[s]exually dangerous person" in similar fashion).

30. 1990 Wash. Sess. Laws 19–20.

31. Those states are 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. Adam Deming, Sex Offender Civil Commitment Programs: Current Practices, Characteristics, and Resident Demographics, 36 J. Psychiatry & L. 439, 441 (2008).

Child Protection and Safety Act.[32] The federal statute was not immediately enforced, as the Bureau of Prisons and Department of Justice awaited challenges to the statute's constitutionality. In May 2010, the Supreme Court held that the federal SVP statute was a constitutional exercise of Congress's power under the Necessary and Proper Clause.[33]

As of 2006, there were 3,646 persons being held as SVPs.[34] California and Florida commit the greatest number of SVPs: As of May 2006, California was holding 614 SVPs; Florida was holding 540.[35] Of the over 3,000 individuals detained as SVPs since 1990, just fifty have been released because medical professionals deemed them mentally stable and nondangerous enough to re-enter society.[36] The low rate of rehabilitation and the fact that SVP statutes provide for commitment up to the duration of the defendant's natural life mean that individuals designated as SVPs face the substantial possibility of life in a secured facility.[37]

Although SVP commitment procedures vary from state to state, they follow a common basic pattern exhibited in California.[38] In California, an incarcerated individual is identified as a potential SVP by the Department of Corrections and Rehabilitation ("DOC").[39] DOC then determines whether the individual has committed a violent sexual offense.[40] If DOC finds that the inmate is "likely to be a sexually violent predator," then the individual is referred to the Department of Mental Health ("DMH").[41]

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32. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. III, 120 Stat. 587, 617–22.

33. United States v. Comstock, 130 S. Ct. 1949, 1954 (2010). For further discussion of *Comstock*, see infra notes 66–67 and accompanying text.

34. Deming, supra note 31, at 441. The overwhelming majority of SVPs are men. Id. at 442.

35. Id. at 441–42.

36. See Davey & Goodnough, supra note 13 (discussing issues surrounding SVP commitments in light of New York State's new SVP statute). A further sixty-eight individuals have been granted release under strict supervision. Id. Such supervision can include regular polygraph and penile plethysmograph testing, GPS tracking, and even armed guards. See Matheny, supra note 6 (detailing post-release supervision of California SVP).

37. Secure medical facilities can produce a detainment environment similar to that found in prisons. See, e.g., Jim Doyle, Mental Hospital Probe Shows Major Problems, S.F. Chron., July 28, 2005, at A1 (detailing Department of Justice's claims that California hospitals suffered from "excessive . . . patient suicides and trafficking in contraband, including illegal street drugs"). California hospitals remain under a federal consent decree as of the writing of this Note. See Lee Romney, Patient Aggression Intensifies, L.A. Times, Nov. 3, 2010, at AA1 (detailing murder of mental health worker despite standards imposed by consent decree).

38. See Cal. Welf. & Inst. Code §§ 6600–6601 (West 2010) (outlining SVP commitment procedures). For statutes that follow the same pattern, see, for example, Fla. Stat. §§ 394.921–394.931 (2011); Iowa Code § 229A.2–.6 (2011), Mass. Gen. Laws. ch. 123A, §§ 12–14 (2010); N.Y. Mental Hyg. Law § 10 (McKinney 2011); Wis. Stat. § 980 (2009–2010).

39. Cal. Welf. & Inst. Code § 6601(a)(1).

40. Id. § 6601(b).

41. Id.

The inmate is then evaluated by two psychiatric professionals.[42] The designated psychiatrists must explain that the purpose of their examination is evaluative and not focused on treatment. But "[i]t is not required that the person [being examined] appreciate or understand that information."[43] If the psychiatrists agree that the individual is an SVP, then DMH must forward a request for commitment to the county in which the individual was originally committed.[44] If the county's prosecuting officer agrees with DMH's assessment, a petition of commitment is filed with the superior court of the relevant county.[45]

Once the commitment petition is filed, the superior court judge is required to determine whether probable cause exists that the inmate is an SVP.[46] Upon such a finding, the state may initiate a commitment proceeding against the inmate. This proceeding takes the form of a trial, in which the accused individual is entitled to counsel and to psychiatrists to perform an evaluation on the individual's behalf.[47] In California, the accused may demand a jury trial,[48] and the standard of proof is beyond a reasonable doubt.[49] Other states, and the federal SVP statute, require only a bench trial and proof by clear and convincing evidence.[50]

B. *Controversy*

SVP statutes are intended to reach sexually dangerous individuals who lack an identifiable mental illness but suffer from a "mental abnor-

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42. Id. § 6601(d).

43. Id. § 6601(f).

44. Id. § 6601(e)–(i). The psychiatrists make their evaluation using "tests or instruments along with other static and dynamic risk factors." Cal. Code Regs. tit. 9, § 4005 (2010). In California, the potential for sex offender recidivism is measured by the STATIC-99 test. Cal. Penal Code § 290.04 (West 2008). STATIC-99 is the most commonly used test in SVP evaluations. R. Karl Hanson et al., Predicting Recidivism Amongst Sexual Offenders: A Multi-Site Study of Static-2002, 34 Law & Hum. Behav. 198, 198 (2010). STATIC-99 is an actuarial tool that considers ten factors, including age, cohabitation with a sexual partner of appropriate age, prior nonviolent sexual offenses, prior sex offenses, prior sentence dates, prior noncontact sexual offenses, whether sex offense victims were family members or complete strangers, and whether any victims were male. See Melissa Hamilton, Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws, 83 Temp. L. Rev. 697, 722–23 (2011). While some mental health professionals "argue that actuarial tools represent the best practice in the field," others have "argued for a ban on actuarial risk assessment as unreliable science in SVP proceedings." Id. at 725, 754.

45. Cal. Welf. & Inst. Code § 6601(i). In some states, the responsibility of prosecuting SVP commitments is given to the Attorney General's office. See, e.g., N.Y. Mental Hyg. Law § 10.06(a) (McKinney 2011).

46. Cal. Welf. & Inst. Code § 6601.5.

47. Id. § 6603(a).

48. Id.

49. Id. § 6604.

50. See, e.g., 18 U.S.C. § 4248(d) (2006); Wis. Stat. § 980.08(8)(a) (2009–2010).

mality."[51] The term "mental abnormality" is a legal term that encompasses more than diagnosable mental illnesses.[52] This differentiation is intentional: SVP statutes are specifically designed to apply to dangerous individuals who may not be held under traditional civil commitment regimes that require diagnosable mental disorders.[53]

Mental health scholars have decried the substitution of ephemeral "mental disorders" or "abnormalities" for well-understood, treatable "mental illnesses."[54] These scholars are concerned that the difficulty of defining—and therefore diagnosing—"abnormalities," such as paraphilias, places mental health professionals in the difficult position of applying legally created labels for which there are no clear scientific stan-

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51. See, e.g., 1995 Cal. Legis. Serv. 99 (West) (expressing legislative intent to protect society from "a small but extremely dangerous group of sexually violent predators that generally have personality *disorders*" (emphasis added)); Tex. Health & Safety Code Ann. § 841.001 (West 2006) ("The legislature finds that a small but extremely dangerous group of sexually violent predators . . . have a *behavioral abnormality* that is not amenable to traditional mental illness treatment." (emphasis added)).

52. "The term mental abnormality has been vaguely defined and is a legal term, not necessarily a diagnosed disorder listed in the *Diagnostic and Statistical Manual* . . . ." Holly A. Miller et al., Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions, 29 Law & Hum. Behav. 29, 36 (2005). There is, therefore, some controversy as to how medical professionals should evaluate a mental abnormality for SVP purposes. See Hamilton, supra note 44, at 754 ("The disconnect between legal language and the scientific judgments by mental health professionals does a disservice to the interests of justice . . . ."). Pedophilia is a particularly difficult abnormality to measure. Miller et al., supra, at 38–39 ("What makes the pedophilia diagnosis even more dubious for SVP evaluators is that although many sexual offenders who are petitioned for civil commitment have committed more than one sexual offense against a child . . ., the question remains whether this diagnosis represents underlying pathology or is simply a description of past behavior.").

53. Dangerous individuals with diagnosable mental illnesses have long been subject to involuntary commitment by the state. See infra notes 71–90 and accompanying text.

54. See Steven K. Erickson, The Myth of Mental Disorder: Transsubstantive Behavior and Taxometric Psychiatry, 41 Akron L. Rev. 67, 73 (2008) (arguing "the creditability of both law and psychiatry" has been harmed by adoption as "diagnosable mental illness[es]" of conditions that show "little evidence of a biological origin or effective treatment"); Robert A. Prentky et al., Sexually Violent Predators in the Courtroom: Science on Trial, 12 Psychol. Pub. Pol'y & L. 357, 360 (2006) ("Mental health experts have no legitimate expertise in defining risk thresholds or in defining the normative legal standards for a constitutionally sufficient mental disorder."); see also Charles Moser, Paraphilia: A Critique of a Confused Concept *in* New Directions in Sex Therapy: Innovations and Alternatives 91, 92–93 (Peggy J. Kleinplatz ed., 2001) ("Creation of the diagnostic category of *paraphilia*, the medicalization of nonstandard sexual behaviors, is a pseudoscientific attempt to regulate sexuality."). In addition to these concerns, SVP statutes have courted controversy on other fronts. For example, some have claimed that the SVP designation is not consistently applied to the most dangerous individuals. Some exhibitionists have been designated SVPs while some rapists have not. See Davey & Goodnough, supra note 13 (discussing inconsistent application of SVP designation). Some individuals are committed even though they are "past the age at which some scientists consider them most dangerous." Id. As of 2007, Wisconsin was holding a 102-year-old man as a sexually dangerous person. Id.

dards.[55] Moreover, the dearth of available treatment for these "abnormalities" has resulted in the rehabilitative aspect of SVP commitments for individuals with paraphilic disorders becoming "distinctly subordinate[d] to the public safety-oriented purpose of incapacitation."[56] This creates at least two undesirable results: "patently suboptimal" treatment programs and the extension of commitments due to an individual's lack of rehabilitative progress in such a program.[57] Most significantly for the purposes of this Note, *incompetent* individuals suffering from paraphilic disorders may lack the cognitive ability to respond to SVP-specific treatment at all.[58]

C. *Constitutionality*

While critics claim that detainment based on an undefined, nonbiologically based "abnormality" renders SVP proceedings de facto punitive measures imposed by the state,[59] the Supreme Court expressly rejected this argument in upholding the constitutionality of Kansas's SVP statute.[60] Moreover, the Court suggested that even a complete lack of available treatment would not necessarily mean the statute was punitive and, thus, a violation of substantive due process.[61] In sum, the Court held that SVP statutes would be deemed civil and not criminal punishments and satisfy substantive due process if certain conditions were met:

> Where the State has 'disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; provided strict procedural safeguards; directed that con-

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55. Paraphilias are very broadly defined as any sort of nonstandard sexual urge. See Moser, supra note 54, at 91–106 (decrying American Psychiatric Association's adoption of paraphilias as medical condition); see also Erickson, supra note 54, at 73 (contrasting common adoption of pedophilia as diagnosable mental disorder with "unquestionably psychotic" behavior of child murderer Andrea Yates); Prentky et al., supra note 54, at 366 (explaining continuing controversy surrounding "diagnostic validity and the operational criteria used to diagnose paraphilic disorders").

56. Prentky et al., supra note 54, at 380.

57. Id.

58. See Alan A. Abrams et al., The Case for a Threshold for Competency in Sexually Violent Predator Civil Commitment Proceedings, 28 Am. J. Forensic Psychiatry 7, 22 (2007) (asserting that "attempting to curb the compulsively lurid behaviors of an SVP that precipitate within the matrix of a florid psychosis or severe cognitive impairment would likely prove futile"). The authors argue that "enlisting [SVP] therapies in the service of individuals lacking the cognitive capacity to truly benefit from them would prove not only inefficacious but also uneconomical." Id. at 23.

59. See Davey & Goodnough, supra note 13 (discussing controversies surrounding SVP commitments); see also In re Hendricks, 912 P.2d 129, 138 (Kan. 1996) (holding civil commitment violated due process absent finding of mental illness), vacated sub. nom. Kansas v. Hendricks, 521 U.S. 346 (1997).

60. *Hendricks*, 521 U.S. at 358 (1997) (holding commitment of individual with "mental abnormality" rather than "mental illness" satisfied substantive due process).

61. Id. at 366 ("[W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available . . . ."). Even if it were available, the Court held that treatment did not have to be the State's "overriding or primary purpose." Id. at 367 (internal quotation marks omitted).

> fined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; and permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired, we cannot say that it acted with punitive intent.[62]

The Kansas statute's "strict procedural safeguards" included the placement of the burden of proof on the state, the right to a jury trial, the right to an attorney, the right to a psychiatric evaluation, and the right to retain other necessary experts.[63] The Supreme Court subsequently held, in *Kansas v. Crane*, that a state must prove an accused SVP has some inability to control his dangerous behavior, although that inability need not be total.[64] After *Hendricks* and *Crane*, state SVP statutes, as well as the federal statute, were modeled to conform to these conditions.[65]

In *United States v. Comstock*, the Supreme Court held that "five considerations, taken together" led to the conclusion that the Necessary and Proper clause granted Congress the power to enact the federal SVP statute.[66] Those considerations were:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.[67]

Thus, unless the Supreme Court chooses to revisit the issue, SVP statutes that meet the requirements of *Hendricks* and *Crane* will be deemed to not violate the substantive due process of the accused.[68] The question

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62. Id. at 368–69. It should be noted that the Court addressed the *possibility* of release without examining whether such release was actually achievable. More recent studies suggest that, for the vast majority of those designated SVPs, release is highly unlikely. See Davey & Goodnough, supra note 13 (discussing statistics that show less than two percent of committed SVPs have been released without restriction).

63. *Hendricks*, 521 U.S. at 353, 368; see also Kan. Stat. Ann. § 59-29a06 (2005) (listing procedures).

64. 534 U.S. 407, 412–14 (2002).

65. See, e.g., State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 8 (Mo. Ct. App. 2003) (examining state SVP statute and finding "Missouri proceedings are similar to those of the Kansas law addressed in *Kansas v. Hendricks*").

66. 130 S. Ct. 1949, 1956 (2010).

67. Id. at 1965; see also id. at 1969 (Alito, J., concurring) (arguing statute "is a necessary and proper means of carrying into execution the enumerated powers that support the federal criminal statutes"). But see id. at 1973 (Thomas, J., dissenting) ("The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable.").

68. In *Hendricks*, the Court also held that the nonpunitive, civil nature of SVP commitments meant that they did not violate either the Double Jeopardy Clause or the Ex Post Facto Clause of the Constitution. 521 U.S. at 369. Numerous state courts have held that their SVP statutes were civil and not criminal proceedings under the *Hendricks* standard. See, e.g., In re Leon G., 59 P.3d 779, 789 (Ariz. 2002) (en banc) ("[W]e hold

remains, however, what procedural due process protections are required to ensure the constitutionality of SVP proceedings.

D. *Due Process Protections in Other Civil Commitment Regimes*

The Supreme Court has long recognized that civil commitment proceedings implicate significant liberty interests and, thus, require due process protections beyond those found in other civil adjudications.[69] Different protections may, however, be required based on the structure and purpose of the civil commitment regime under consideration.[70]

There are two prominent civil commitment regimes in American jurisprudence: mental health commitments and juvenile delinquency proceedings. While mental health commitments and juvenile proceedings call for disparate procedures and considerations, each provides fruitful analogies to the issue of competence in SVP hearings. Section D.1 discusses the basic framework of mental health commitments before focusing on the specific questions that arise around the commitment of incompetent criminal defendants. Section D.2 provides an overview of the Supreme Court's juvenile jurisprudence and then examines how lower courts approach the issue of competency in the juvenile setting.

1. *Mental Health Commitments.* —

a. *Mental Health Commitments Generally.* — Civil commitment of the mentally ill has a long history in the United States.[71] An individual may be subjected to a mental health commitment if he has a diagnosable

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Arizona's SVP act complies with . . . *Hendricks* and *Crane*."); Hubbart v. Superior Court, 969 P.2d 584, 593 (Cal. 1999) (denying due process challenge to California SVP statute based on *Hendricks* "which rejected a similar . . . challenge under a related statutory scheme"); Westerheide v. State, 831 So. 2d 93, 100 (Fla. 2002) ("Florida's [SVP statute] shares many of the hallmarks of the Kansas statute which the Supreme Court found significant in *Hendricks*."); Commonwealth v. Bruno, 735 N.E.2d 1222, 1230 (Mass. 2000) (finding Massachusetts SVP statute "contains many provisions similar to those" in Kansas statute).

69. See, e.g., Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (holding individual committed after pleading not guilty by reason of insanity could not be held once he had recovered his sanity absent full civil commitment proceeding); Jones v. United States, 463 U.S. 354, 361 (1983) ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" (quoting Addington v. Texas, 441 U.S. 418, 425 (1979))); *Addington*, 441 U.S. at 431–33 (holding due process clause was satisfied in civil commitment hearings only if standard of proof was "clear and convincing" or higher).

70. For example, the minimum required standard of proof in a mental illness civil commitment is "clear and convincing." *Addington*, 441 U.S. at 432–33. In juvenile delinquency proceedings, the required standard of proof is "beyond a reasonable doubt." In re Winship, 397 U.S. 358, 365 (1970).

71. See, e.g., In re Josiah Oakes *in* Matters of Josiah Oakes, Sen'r: Four Years Wrongfully Imprisoned in the McLean Hospital through an Illegal Guardianship 12, 13 (Boston, Published by Special Request 1850) (stating when "a person's own safety or that of others requires that he should be restrained . . . [t]he restraint can continue as long as the necessity continues"). For a thorough summary of the history of mental health commitment jurisprudence, see Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice, 2 Harv. Nat'l Security J. 85, 152–63 (2011).

mental illness and presents a danger either to himself or to others.[72] The person in question may challenge the proposed commitment in court.[73] A judge weighs the evidence presented by the state and psychiatrists who have examined the individual and then determines whether commitment is appropriate.[74] Even if the person is unsuccessful in challenging the initial commitment, the detention is authorized only so long as both the mental illness and the element of dangerousness persist.[75]

In the criminal context, individuals found either not guilty by reason of insanity or incompetent to stand trial may be subject to mental health commitments. A person found not guilty by reason of insanity is automatically eligible for a mental health commitment, as he has been determined to be mentally ill and the criminal conduct with which he has been charged satisfies the dangerousness requirement.[76] The commitment of incompetent criminal defendants, on the other hand, requires a different set of criteria.

b. *Commitment of Incompetent Criminal Defendants.* — Despite the lack of a clear definition of competency, the mental health issues that render an individual incompetent are well understood.[77] In stark contrast to SVPs, incompetent persons can often be "cured," that is, successfully restored to competence.[78] While mental health and SVP commitments call for a finding of mental illness or mental abnormality respectively, a person may be found incompetent to stand trial if he lacks the ability to comprehend the proceedings brought against him and to communicate effectively with his counsel.[79] Courts and legislatures have declined to define mental competence with greater rigor[80] or to tether incompetence

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72. Frank P. Grad, The Public Health Law Manual 109 (3d ed. 2005).

73. E.g., N.Y. Mental Hyg. Law § 9.31 (McKinney 2011) (describing patient's procedural rights after involuntary admission).

74. E.g., id.

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

76. Klein & Wittes, supra note 71, at 153.

77. See Erickson, supra note 54, at 82 ("Psychiatric and psychological scholarship is replete with empirical studies, reviews, and commentaries on the issue of competency . . . .").

78. See United States v. Grape, 509 F. Supp. 2d 484, 488 (W.D. Pa. 2007) (citing Bureau of Prisons statistics showing that, in previous year, 242 of 285 individuals committed as incompetent had been restored to competency, representing eighty-five percent success rate). The Bureau's statistics also showed "approximately a 70% success rate in restoring *involuntarily medicated* defendants to competency." Id. at 489 (emphasis added).

79. Drope v. Missouri, 420 U.S. 162, 171 (1975); see also Robert F. Schopp, Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence, 1 Psychol. Pub. Pol'y & L. 161, 170–77 (1995) (comparing well-defined concept of competence with more amorphous definitions of mental illness).

80. See, e.g., Indiana v. Edwards, 128 S. Ct. 2379, 2386 (2008) (declining to adopt "a single mental competency standard" and noting "[m]ental illness itself is not a unitary concept").

to particular forms of mental illness.[81] An individual lacking a mental illness may, therefore, still be incompetent and a mentally ill individual may be competent to stand trial.[82]

Historically, criminal defendants found incompetent to stand trial could be detained by the state until competence was restored.[83] In *Jackson v. Indiana*, however, the Supreme Court held that indefinite incompetency commitments violate due process unless the state can show that the incompetent person is a danger to himself or others.[84] Thus, under *Jackson*, an incompetent criminal defendant would be subjected to a short period of detention.[85] During that time, the person would be treated for his mental illness.[86]

Such treatment is often successful.[87] If a criminal defendant does regain competency, he is returned to the interrupted criminal proceeding.[88] If he fails to regain competency and the state can prove dangerousness, he faces indefinite commitment in a secure mental facility.[89]

Mental competence jurisprudence is helpful in considering SVP competency claims for three reasons. First, because competency is not based on the presence or absence of mental illness, an individual may be mentally ill and yet still competent to stand trial. Second, *Jackson* raises the possibility that an incompetent but dangerous person could be detained by the state indefinitely, even absent a finding that he is an SVP.[90] Third, *Jackson* makes plain that simply because a statute approves of a particular procedure does not mean that the procedure is necessarily constitutional. This final notion is further supported by the Supreme Court's juvenile jurisprudence.

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81. See Richard J. Bonnie, The Competence of Criminal Defendants: Beyond *Dusky* & *Drope*, 47 U. Miami L. Rev. 539, 548–50 (1993) (decrying lack of structure in incompetence analysis).

82. See generally Bonnie, supra note 81, at 561–70 (outlining two-step approach for assessing competence).

83. See Jackson v. Indiana, 406 U.S. 715, 715 (1972) (discussing Indiana statute permitting detention of criminal incompetent "'until sane'"); Estate of Hofferber v. Hofferber, 616 P.2d 836, 839 (Cal. 1980) (describing similar California statute).

84. See *Jackson*, 406 U.S. at 732 (identifying mental incompetence *combined with* dangerousness as requisite condition for indefinite commitment).

85. The Supreme Court did not define the precise length of time an individual could be held while trying to attain competence. See id. at 731 (holding only that indefinite commitment was unconstitutional without element of dangerousness).

86. See, e.g., Cal. Penal Code § 1370(a)(1)(B)(i) (West 2011).

87. See supra note 78 (discussing high rates of competency restoration).

88. See, e.g., Cal. Penal Code § 1370(a)(1)(B) ("If the defendant is found mentally incompetent, the trial or judgment shall be suspended until the person becomes mentally competent.").

89. See Estate of Hofferber v. Hofferber, 616 P.2d 836, 841 (Cal. 1980) (discussing procedures associated with *Jackson*-style detainment).

90. For a discussion of this possibility, see infra Part III.B.1.

2. *Juvenile Delinquency Proceedings.* —

a. *General Procedural Safeguards in Juvenile Proceedings.* — While juvenile proceedings are technically civil, juvenile defendants are in court without their consent and a guilty finding can result in long-term detention. Early juvenile proceedings lacked the sort of due process safeguards provided in adult criminal trials.[91] The Supreme Court's decision in *In re Gault* changed this, holding that fundamental fairness and due process mandate that juveniles have the right to be notified of the charges against them, the right to an attorney, the right of confrontation and cross-examination, and the privilege against self-incrimination.[92] While subsequent juvenile cases established further due process requirements—for example, the required standard of proof in a juvenile proceeding was held to be beyond a reasonable doubt[93]—the Court stated that juveniles were *not* guaranteed every protection afforded adult criminal defendants.[94] The Court made this explicit in *McKeiver v. Pennsylvania,* when it held that juveniles were not guaranteed the right to a trial by jury.[95] In doing so, the Court pointed to the specialized nature of juvenile justice and, in particular, the intent to create in juvenile hearings a nonadversarial "intimate, informal protective proceeding."[96]

In re Gault and the subsequent juvenile cases are important to an analysis of due process protections in SVP hearings because they demonstrate that even where a civil commitment statute contains no enumerated protections, a court is still required to examine the proceeding to determine whether further due process safeguards are required. The Supreme Court's juvenile jurisprudence is also significant in that it is indicative of the manner in which the Court will approach due process issues in civil commitment proceedings. While the Court's due process inquiry in juvenile cases is guided by fundamental fairness,[97] which is

91. See Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C. L. Rev. 1083, 1100 (1991) ("Some states deliberately eliminated the usual procedural formalities of criminal adjudication from juvenile court.").

92. 387 U.S. 1, 30–57 (1967).

93. In re Winship, 397 U.S. 358 (1970); see also Schall v. Martin, 467 U.S. 253 (1984) (authorizing pretrial detention of juveniles); Breed v. Jones, 421 U.S. 519 (1975) (holding juveniles may not be subject to double jeopardy).

94. See *Winship*, 397 U.S. at 359 ("[T]he Fourteenth Amendment does not require that the hearing . . . conform with all the requirements of a criminal trial . . . .").

95. 403 U.S. 528, 545 (1971) (plurality opinion).

96. Id. The Court acknowledged that such proceedings were more an ideal than a reality but was "reluctant to disallow the States to experiment further" in hopes of achieving that ideal. Id. at 547. See infra Part III.B.2 for a discussion of whether SVP proceedings have a similar specialized nature that requires limiting certain procedural due process protections.

97. See *McKeiver*, 403 U.S. at 543 (plurality opinion) ("[T]he applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness.").

achieved by balancing the various interests at stake,[98] state courts have not always followed this approach in evaluating SVP competency claims. Finally, at a more specific level, the treatment of competency claims in juvenile proceedings may be instructive in considering the parameters necessary for determining whether a right to a mental competence hearing is mandated for SVP defendants.

b. *Mental Incompetence in Juvenile Proceedings.* — The Supreme Court has not considered the issue of whether an incompetent juvenile may be subjected to a delinquency proceeding. *In re Gault*, however, held that juveniles had the right to an attorney.[99] This is significant in that the leading Supreme Court cases on competency state that the proper test for mental competence is "'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'"[100] and whether he is able "to assist in preparing his defense."[101] It might be inferred, then, that in order to take advantage of the right to counsel guaranteed by *Gault*, a juvenile accused must be competent. Indeed, this logic has been followed by many of the courts that have held that juveniles have a due process right to mental competence before adjudication.[102]

While the state and federal statutes all guarantee an accused SVP the right to counsel, courts that have considered whether there is a right to a competency determination in SVP proceedings have declined to follow

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98. See *Schall*, 467 U.S. at 263–81 (applying *Mathews* balancing test in holding that pretrial detention of juveniles does not violate due process); Parham v. J.R., 442 U.S. 584 (1979) (applying *Mathews* balancing to issue of due process rights of minor children subjected to parent-initiated state civil commitment).

99. 387 U.S. 1, 34–42 (1967).

100. Dusky v. United States, 362 U.S. 402, 402 (1960) (quoting Memorandum for the United States at 11, *Dusky*, 362 U.S. 402 (No. 540)).

101. Drope v. Missouri, 420 U.S. 162, 171–72 (1975).

102. See State ex. rel Dandoy v. Superior Court, 619 P.2d 12, 15 (Ariz. 1980) ("[T]he right to assistance of counsel would be meaningless if the juvenile, through mental illness, was unable to understand the charges or assist in her own defense."); James H. v. Superior Court, 143 Cal. Rptr. 398, 400 (Cal. Ct. App. 1978) ("Due process demands that a person constitutionally entitled to the right to effective counsel be afforded a hearing as to his competency to cooperate with that counsel."); In re W.A.F., 573 A.2d 1264, 1267 (D.C. 1990) (stating juvenile's attorney and guardian ad litem "are limited in their ability to prepare a defense by the juvenile's knowledge, understanding, and ability to reconstruct and communicate the facts"); cf. In re the Welfare of S.W.T., 277 N.W.2d 507, 511 (Minn. 1979) ("[W]e regard the right not to be tried or convicted while incompetent to be a fundamental right, even in the context of a juvenile delinquency adjudicatory proceeding."). Although other courts have taken different approaches to this issue, they have all found that juveniles have a right to a mental competence determination before adjudication. See Joseph B. Sanborn, Jr., Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence, 99 J. Crim. L. & Criminology 135, 138 (2009) ("All appellate courts in recent times have held that youths have to be competent in order to face an adjudicatory hearing in the juvenile system.").

this line of reasoning.[103] A number of factors have likely led courts away from this logic, many of which are tied to the specific nature of SVP commitment hearings. Part II considers these factors in light of the state court decisions regarding claims of mental competence in SVP proceedings.

II. SVP Competency Claims in State Courts

Of the twenty states with Sexually Violent Predators statutes, eight have faced legal challenges claiming a right to a competency hearing before SVP adjudication. Although seven states have held that an accused SVP does not have a due process right to be determined mentally competent,[104] one—Florida—has recognized a limited right to a competency determination.[105] Further, while the majority of state courts have reached congruent outcomes, their methodologies have diverged significantly.[106] Thus, there is no consensus on either the proper methodology to apply to an SVP competency claim or whether SVPs hold such a right. Part II.A examines the various approaches taken by state courts in addressing the competency question. Part II.B then discusses the analysis and divergent conclusions of the three courts that considered competency of SVP defendants a procedural due process issue.

A. *State Court Approaches to SVP Competency Claims*

The eight state courts that have considered SVP competency claims have taken a variety of methodological approaches in reaching their decisions. Section A.1 examines courts that framed the issue as one of statutory interpretation.[107] Section A.2 discusses the lone court to apply sub-

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103. In fact, the California Supreme Court held that the existence of a right to counsel was a factor weighing *against* a right to competency. Moore v. Superior Court, 237 P.3d 530, 543 (Cal. 2010). But see id. at 550 (Moreno, J., dissenting) (relying on *James H. v. Superior Court*, 143 Cal. Rptr. 398, in drawing analogy between right to competence in juvenile proceedings and right to competence in SVP adjudications).

104. *Moore*, 237 P.3d at 547; State v. Cubbage (In re Det. of Cubbage), 671 N.W.2d 442, 443 (Iowa 2003); Commonwealth v. Nieves, 846 N.E.2d 379, 381 (Mass. 2006); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 11 (Mo. Ct. App. 2003); In re Commitment of Fisher, 164 S.W.3d 637, 656 (Tex. 2005); State v. Ransleben, 144 P.3d 397, 398 (Wash. Ct. App. 2006); State v. Luttrell (In re Commitment of Luttrell), 754 N.W.2d 249, 253 (Wis. Ct. App. 2008).

105. Branch v. State (In re Commitment of Branch), 890 So. 2d 322, 323 (Fla. Dist. Ct. App. 2004).

106. It should be noted that some of the state court decisions do not specify whether they are applying the state or Federal Constitution. Unless specifically indicated otherwise, this Note assumes the courts were applying the Federal Constitution. Cf. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (holding Supreme Court has right to review state court decisions unless explicitly grounded in state laws).

107. This is the approach taken by the majority of state courts. See *Kinder*, 129 S.W.3d at 9–10 (relying on civil nature of statute in finding no right to competency determination); *Fisher*, 164 S.W.3d at 656 (same); *Ransleben*, 144 P.3d at 398 (same); *Luttrell*, 754 N.W.2d at 252 (same).

stantive due process,[108] while Section A.3 focuses on the courts that undertook procedural due process analysis.[109]

1. *Decisions Based on the Civil Nature of SVP Proceedings.* — Courts in Missouri,[110] Texas,[111] Washington,[112] and Wisconsin[113] have relied on the civil nature of SVP hearings and the line of cases in which the Supreme Court has held that defendants in civil commitment proceedings are not guaranteed all the rights of defendants in criminal trials.[114] Although the particular decisions can be differentiated, the courts in three of these four cases followed similar analytical steps.[115] These three cases are exemplified by *State ex rel. Nixon v. Kinder,* in which the Missouri Court of Appeals began its analysis by noting that the SVP statute at issue

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108. The Iowa Supreme Court is the sole court to have considered the substantive due process issue. See *Cubbage*, 671 N.W.2d at 448 (finding right to competency in civil commitments was not fundamental and applying rational basis test to SVP statute).

109. See *Moore*, 237 P.3d at 543–47 (applying *Mathews* factors in denying right to SVP competency determination); *Branch*, 890 So. 2d at 326–29 (considering procedural due process rights in finding right to competency determination in certain situations); *Nieves*, 846 N.E.2d at 385–87 (applying *Mathews* and denying procedural due process right to competency determination).

110. *Kinder*, 129 S.W.3d at 9–10.

111. *Fisher*, 164 S.W.3d at 656. As discussed supra note 28, Texas's SVP statute mandates outpatient treatment, not detention. While an outpatient program implicates markedly different liberty interests than a commitment regime, the Texas Supreme Court did not focus on this difference in reaching its decision. See *Fisher*, 164 S.W.3d at 653–54 (denying right to competency hearing based on civil nature of SVP proceeding).

112. *Ransleben*, 144 P.3d at 398.

113. State v. Luttrell (In re Commitment of Luttrell), 754 N.W.2d 249, 251–53 (Wis. Ct. App. 2008).

114. See, e.g., Addington v. Texas, 441 U.S. 418, 433 (1979) (holding standard of proof in civil commitment proceedings must be "clear and convincing" or higher); McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (plurality opinion) (finding no right to jury trial in juvenile proceedings).

115. Washington did not take a similar approach. The Washington Court of Appeals in *State v. Ransleben* simply held that an accused SVP had no right to a competency determination because the SVP statute specifically allowed for the commitment of a person who had been found incompetent to stand trial in a criminal proceeding. *Ransleben*, 144 P.3d at 399–400; see also Wash. Rev. Code § 71.09.060(2) (2010) (allowing for SVP commitment of individuals incompetent to stand trial who were about to be released). The since-repealed section of the Washington Code relating to incompetent criminal defendants provided for release, but also provided for the continued mental health commitment of an individual deemed a "substantial danger." Id. § 10.77.090(4) (repealed 2007); cf. Allison v. Patterson (In re Det. of Patterson), 579 P.2d 1335, 1340 (Wash. 1978) (en banc) (applying § 10.77.090 and holding dangerousness required for civil commitment is not limited to physical danger). Neither the court in *Ransleben* nor the statute itself explained how an individual no longer deemed dangerous pursuant to § 10.77.090(4) and thus eligible for release could nonetheless be "predispose[d] . . . to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others" as required by Washington's SVP statute. Wash. Rev. Code. § 71.09.020(8).

was civil in nature under *Kansas v. Hendricks*.[116] The court then examined Missouri's mental competence statute[117] and held that, on its face, it only applied to criminal defendants.[118] The court found that the Missouri SVP statute, while it included a number of due process protections, did not guarantee a competency determination.[119] The absence of any competency language was, in the court's view, significant and demonstrative of legislative intent.[120] Finally, the court concluded that the protections already guaranteed by the SVP statute satisfied due process.[121]

It is unclear precisely why the Missouri, Texas, Washington, and Wisconsin courts declined to engage in a full due process analysis.[122] What is apparent is that they did not fully investigate the possibility that a due process right to mental competency exists in SVP proceedings. Section A.2 considers the framing of this right as one of substantive due process. Section A.3 explores the procedural due process approach.

2. State v. Cubbage *and the Substantive Due Process Argument.* — Alone amongst the state courts to have considered competency in SVP proceedings, the Iowa Supreme Court identified the issue as a question of substantive, rather than procedural, due process.[123] The court followed "[a] familiar jurisprudential process" and asked first if the individual right involved was fundamental.[124] After finding that the right involved was the "right to be competent during . . . SVPA proceedings" the court held that such a right was not fundamental.[125] The court reasoned that this holding was "confirmed by the fact that the Supreme Court has not recog-

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116. State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 8 (Mo. Ct. App. 2003) ("The characteristics of the Missouri proceedings are similar to those of the Kansas law addressed in *Kansas v. Hendricks*.").

117. Mo. Rev. Stat. § 552.020(1) (2010).

118. *Kinder*, 129 S.W.3d at 8; see also *Lutrell*, 754 N.W.2d at 251 (holding statutory right to competency determinations was "on [its] face" not available in civil commitment proceedings).

119. *Kinder*, 129 S.W.3d at 10.

120. Id. at 10–11 (stating allowing competency determinations "would thwart the proper exercise of legislative authority"); see also In re Commitment of Fisher, 164 S.W.3d 637, 653 (Tex. 2005) (stating allowing "an SVP who may be incompetent to stand trial on criminal charges" to be civilly committed as SVP "comports with legislative intent").

121. *Kinder*, 129 S.W.3d at 10–11 (listing "[r]ights enjoyed by a suspected predator [which] satisfy[] due process").

122. One possible motivation is political. Popular attitudes condemning sex offenders have grown increasingly harsh in the past decade. See Yung, supra note 10, at 447–49 (discussing "amalgam of [state] laws that have increasingly punished certain sex-related crimes and drastically increased post-incarceration regulation of sex-offenders"). Although such considerations are beyond the scope of this Note, it is conceivable that popular sentiment has an effect: In states that allow for judicial "retention" votes, it can be improvident to appear soft on crime. See generally Robert L. Brown, Selection of Judges, 64 Ark. L. Rev. 71, 72 (2011) (discussing defeats of judges considered "soft" on death penalty).

123. State v. Cubbage (In re Det. of Cubbage), 671 N.W.2d 442 (Iowa 2003).

124. Id. at 446.

125. Id. at 447.

nized a fundamental right to competency in the civil commitment context."[126] The court then applied rational basis review and held that Iowa's SVP statute was rationally related to "'the State's purpose of protecting society.'"[127]

The Iowa court appears to have taken this approach largely because Cubbage only claimed a substantive due process right.[128] This decision may well have been a strategic one on the part of Cubbage's attorneys.[129] While it is possible to frame a competency claim as either a substantive or procedural due process concern, the traditional approach is to treat claims for a competency *determination* as procedural.[130] The next section will examine the decisions of the three state courts which adhered to this traditional approach.

3. *Decisions Based on Procedural Due Process.* — The Supreme Courts of California and Massachusetts and the Florida District Court of Appeal framed the competency issue as a procedural due process question governed by *Mathews v. Eldridge*.[131] This approach comports with Supreme Court precedent treating competency evaluation claims as procedural issues.[132] Moreover, it recognizes that not every necessary procedural safe-

126. Id. A discussion of whether the absence of a Supreme Court decision on an issue of due process constitutes "confirmation" that no such right exists is beyond the scope of this Note.

127. Id. at 448 (quoting In re Det. of Garren, 620 N.W.2d 275, 285 (Iowa 2000)).

128. Appellant's Brief and Argument and Request for Oral Argument at 5–6, *Cubbage*, 671 N.W.2d 442 (No. 02-0850), 2003 WL 24888788, at *5–*6; see also *Cubbage*, 671 N.W.2d at 445 ("[Cubbage] believes this right [to be competent] is grounded in the substantive due process guarantees of both the state and federal constitutions.").

129. It is possible that a procedural due process argument could have resulted in a decision similar to that of the Florida District Court of Appeal in Branch v. State (In re Commitment of Branch), 890 So. 2d 322 (Fla. Dist. Ct. App. 2004). Unlike the defendant in *Branch*, Cubbage had been previously convicted of four sexually violent offenses, including multiple sexual offenses with a child. See *Cubbage*, 671 N.W.2d at 443 (detailing prior offenses). The State was seeking to commit Cubbage based *solely* on the facts of those cases. Id. at 443–44. Thus, unlike in *Branch*, Cubbage may have needed a finding that competence was a fundamental, substantive right. See infra Part II.B (discussing procedural distinctions in *Branch* court's decision); see also *Branch*, 890 So. 2d at 328–29 (discussing differences between *Cubbage* and *Branch* cases).

130. See Walton v. Angelone, 321 F.3d 442, 459–60 (4th Cir. 2003) (comparing procedural and substantive due process approaches to competency claims).

131. Although the Florida court cited *Mathews v. Eldridge*, it did not explicitly apply the traditional *Mathews* balancing test. Instead, the court relied on previous Florida state court precedent in arriving at its decision. See *Branch,* 890 So. 2d at 326 ("We are guided in our analysis by three Florida cases which, taken together, establish that Branch had a due process right to be competent . . . .").

132. See Parham v. J.R., 442 U.S. 584, 599–603 (1979) (applying *Mathews* balancing test to issue of due process rights of minor children subjected to parent-initiated state civil commitment); Pate v. Robinson, 383 U.S. 375, 378 (1966) (holding "state *procedures* must be adequate to protect" right to be competent (emphasis added)); Bishop v. United States, 350 U.S. 961, 961 (1956) (per curiam) (requiring district court to hold competency hearing for defendant previously found competent).

guard is embodied in a given statute and that, even in a civil proceeding, certain procedural protections are constitutionally required.

While all three courts framed the issue in a similar manner, they reached different outcomes: Both state supreme courts found that there was no right to competency determinations in SVP proceedings,[133] while Florida recognized a right to competency in certain situations.[134] Part II.B examines the due process analysis that led to these disparate holdings.

B. *Procedural Due Process Analysis in State Courts*

The Massachusetts and California Supreme Courts and the Florida District Court of Appeal all identified SVP competency claims as implicating procedural due process issues governed by the Supreme Court's decision in *Mathews v. Eldridge*.[135] The well-established *Mathews* test requires courts to balance: (1) the liberty interest at stake; (2) the risk of erroneous deprivation of that interest and the probable value of any additional safeguards; and (3) the government's interest, including financial and administrative burdens.[136] The Massachusetts and California Supreme Courts produced similar analyses of the *Mathews* factors in holding that there was no procedural due process right to a competency determination in SVP proceedings.[137] The Florida court, however, found a limited right to a competency determination for accused SVPs. Specifically, the court held that an accused SVP:

> has a due process right to challenge the factual assertions contained in the police reports and other documents that underlie an expert's opinion when those factual assertions have neither been admitted through a plea nor tested at trial. It follows that in order to meaningfully exercise that due process right, [an

133. Moore v. Superior Court, 237 P.3d 530, 547 (Cal. 2010) ("[D]ue process does not require mental competence on the part of someone undergoing a commitment or recommitment trial under the SVPA."); Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006) ("We see no reason why the public interest in committing sexually dangerous persons to the care of the treatment center must be thwarted by the fact that one who is sexually dangerous also happens to be incompetent.").

134. See *Branch*, 890 So. 2d at 329 (holding accused SVPs have right to competency determination in some situations).

135. 424 U.S. 319 (1976). As discussed supra note 131, the Florida court cited *Mathews* as controlling precedent, but did not explicitly apply the three-factor test.

136. *Mathews*, 424 U.S. at 335. California actually applies a slightly more specific test for SVP commitment hearings. In addition to the three *Mathews* considerations, California courts consider "'the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official.'" People v. Allen, 187 P.3d 1018, 1036 (Cal. 2008) (quoting People v. Otto, 26 P.3d 1061, 1067 (Cal. 2001)). Although the California Supreme Court recognized this issue weighed in the defendant's favor, it still held there was no due process right to a competency determination. *Moore*, 237 P.3d at 544. Because this Note is concerned with the issue of competence in SVP hearings across all states and under 18 U.S.C. § 4248, this fourth factor will not be considered as a separate issue.

137. *Moore*, 237 P.3d at 547; *Nieves*, 846 N.E.2d at 389–90.

> SVP] respondent must be competent so that he or she may both testify on his or her own behalf and assist counsel in challenging the alleged facts. Otherwise, the due process right is simply illusory. . . . [I]t is an incompetent respondent's inability to assist counsel in challenging the facts contained in those hearsay statements that violates due process.[138]

Subsequently, the same court extended the *Branch* rule to cover "not only . . . untested hearsay evidence . . . but also . . . testimony at trial concerning untested factual allegations."[139]

In order to understand how the courts produced these disparate holdings, this section examines their analysis of each of the *Mathews* factors. Section B.1 discusses the liberty interest identified by the courts. Section B.2 explores the different approaches taken by the courts in determining the risk of erroneous deprivation of that interest. Finally, Section B.3 discusses the importance of the government interest in forming the courts' decisions.

1. *The Liberty Interest at Stake.* — Both the California and Massachusetts Supreme Courts defined the liberty interest at stake as potential lifelong detention and recognized the seriousness of such a deprivation of freedom.[140] Although the Florida court did not specifically address the liberty interest, one of the cases upon which it relied in forming its decision defined the SVP's interest as the complete loss of liberty.[141] This framing is reasonable on its face: There is no question that SVP civil commitment constitutes a complete loss of liberty, and the statistics regarding SVPs eventually released into society make clear the possibility of lifelong commitment is very real.[142] Moreover, this approach comports with the broad manner in which the Supreme Court has defined personal liberty interests in other procedural due process cases.[143] When the interest is defined this way, it is clear that the liberty interest at stake is considerable and should weigh heavily in favor of the accused SVP seeking a competency determination.

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138. *Branch*, 890 So. 2d at 327.

139. Camper v. State (In re Commitment of Camper), 933 So. 2d 1271, 1275 (Fla. Dist. Ct. App. 2006).

140. See *Nieves*, 846 N.E.2d at 385 ("If committed, [the accused's] loss of liberty would be total."). The California court pointed to an earlier SVP case which defined the interests at stake as "'the significant limitations on [the defendant's] liberty, the stigma of being classified as [a sexually violent predator], and subjection to unwanted treatment.'" *Allen*, 187 P.3d at 1032 (quoting *Otto*, 26 P.3d at 1067).

141. See *Branch*, 890 So. 2d at 327 (discussing Jenkins v. State, 803 So. 2d 783, 785 (Fla. Dist. Ct. App. 2001) ("Jenkins is entitled to a due process hearing before he can be deprived of his liberty.")).

142. See supra note 16 and accompanying text (discussing rarity of return to society of those designated as SVPs).

143. For example, in *Hamdi v. Rumsfeld*, the Court defined the liberty interest at stake as "the interest in being free from physical detention by one's own government" rather than an individual's interest in knowing the charges against him. 542 U.S. 507, 529–31 (2004).

2. *The Risk of Erroneous Deprivation.* — This element provides the clearest dividing line between the approach taken by the Florida District Court of Appeal[144] and the holdings of the California and Massachusetts Supreme Courts.[145] The two state supreme courts held that the risk of erroneous conviction in any circumstance was relatively low; the Florida court found that there was a significant risk of deprivation in SVP proceedings involving hearsay evidence.

a. *California, Massachusetts, and the Low Risk of Erroneous Deprivation.* — The California and Massachusetts Supreme Courts both found that there was little risk of erroneous deprivation of an accused SVP's liberty interest simply because that individual might be mentally incompetent.[146] In doing so, the courts focused on the "robust, adversary character" of SVP proceedings.[147] Interestingly, the procedural protections in California and Massachusetts are more robust than in federal SVP proceedings: Unlike the federal statute, both state statutes require a jury trial with a unanimous verdict and set the standard of proof as beyond a reasonable doubt.[148] But these factors do not, alone, remove the need for competence. Federal law requires that an individual be competent before standing trial in a criminal proceeding at the same time it secures the criminal defendant the right to a jury trial and the beyond a reasonable doubt standard.[149] Recognizing this, the state supreme courts focused on

144. *Branch*, 890 So. 2d at 329 (noting potential risks involved when "the State intends to present hearsay evidence" in SVP commitment proceeding).

145. Moore v. Superior Court, 237 P.3d 530, 544 (Cal. 2010); *Nieves*, 846 N.E.2d at 385.

146. See *Moore*, 237 P.3d at 544 ("[W]e cannot say that the risk-of-error factor weighs heavily toward finding the claimed due process right."); *Nieves*, 846 N.E.2d at 385 (arguing nature of SVP proceedings "minimizes the risk of the erroneous commitment of a person who is not sexually dangerous").

147. *Nieves*, 846 N.E.2d at 385; see also *Moore*, 237 P.3d at 543 (discussing "numerous procedural safeguards available to prevent an erroneous commitment in *any* SVP case, regardless of the contribution the particular defendant is willing or able to make"). The court in *Moore* also found that the risk of erroneous deprivation would be "mitigate[d]" by the fact that, *after* being committed, an SVP was guaranteed an annual mental evaluation. *Moore,* 237 P.3d at 544. Of course, such post-commitment review emphatically does *not* reduce the risk of erroneous deprivation of liberty—it simply reduces the risk of a *long-term* deprivation. Therefore, this argument will not be addressed in the body of this Note.

148. Compare Cal. Welf. & Inst. Code § 6604 (West 2010) ("The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator."), and Mass. Gen. Laws ch. 123A, § 14(d) (2010) ("If . . . the jury finds unanimously and beyond a reasonable doubt that the person . . . is [an SVP], such person shall be committed . . . ."), with 18 U.S.C. § 4248(d) (2006) ("If . . . the court finds by clear and convincing evidence that the person is [an SVP], the court shall commit the person . . . .").

149. See Bishop v. United States, 350 U.S. 961, 961 (1956) (per curiam) (vacating and remanding with instructions for lower court to determine criminal defendant's sanity). While the heightened standard of proof may well lower the risk of an erroneous commitment, it also arguably moves the California and Massachusetts SVP proceedings closer to being full-blown criminal proceedings where competency is a constitutional right. On the other hand, neither the presence of the jury nor the heightened standard violate

an SVP's statutory right to retain an attorney and psychiatric experts.[150] From the perspective of the courts, the presence of the attorney and the attorney's ability to take advantage of various due process protections on the defendant's behalf greatly reduced, if not entirely eliminated, the risk of an erroneous conviction. The California Supreme Court relied on prior precedent in stating "such 'mandatory representation,' coupled with expert assistance, 'generally is beneficial' to the defense."[151] In reaching this decision, the California court quoted its previous decision out of context. The original quote stated that representation by counsel is "generally . . . beneficial *in assisting a defendant in telling his or her story*."[152] The Florida District Court of Appeal, in contrast, recognized that an incompetent SVP defendant is unable to tell his story *at all* and so expressly rejected the argument that legal representation obviated the need for mental competence.[153]

b. *Florida and the Risk of Erroneous Deprivation in Certain Circumstances.* — The availability of legal counsel and psychiatric evaluations alone did not satisfy due process in the view of the Florida District Court of Appeal in large part because of the potential significance of extrinsic, hearsay evidence in SVP trials.[154] The court found troubling the fact that the

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the conditions, set forth in *Hendricks*, that separate a civil commitment proceeding from a criminal trial. See Kansas v. Hendricks, 521 U.S. 346, 368–69 (1997) (discussing elements making SVP statute civil in nature). The Massachusetts Supreme Judicial Court omitted any discussion of the reasonable doubt standard in its opinion, perhaps realizing the odd dichotomy of claiming it as a sufficient protection in SVP proceedings but not in criminal trials. See *Nieves*, 846 N.E.2d at 385 (discussing "robust, adversary character" of SVP hearings without mentioning standard of proof).

150. See *Moore*, 237 P.3d at 543 (pointing out defendant's "'right to retain experts or professional persons to perform an examination' on his behalf" (quoting Cal. Welf. & Inst. Code § 6603(a))).

151. *Moore*, 237 P.3d at 543 (quoting People v. Allen, 187 P.3d 1018, 1036 (Cal. 2008)); see also *Nieves,* 846 N.E.2d at 386 ("We think the rights granted by [the SVP statute] may generally be exercised by counsel where the defendant is incompetent to do so.").

152. *Allen*, 187 P.3d at 1036 (emphasis added). As with the California court, the Massachusetts Supreme Judicial Court in *Nieves* relied on its own precedent. The court cited a footnote from its decision in *In re Rohrer*, a 1967 suit challenging an indefinite insanity commitment conducted without notice. In re Rohrer, 230 N.E.2d 915, 915–16 (Mass. 1967). The court quoted the *Rohrer* footnote as stating: "Where, because of the condition of the [incompetent] person[,] . . . notice and hearing would not be effective [because the defendant is incompetent], . . . the requirements of due process may be satisfied by the appointment of counsel . . . to act for the . . . person." *Nieves,* 846 N.E.2d at 385 (alterations and omissions in original) (quoting *Rohrer*, 230 N.E.2d at 919 n.5). The court failed to address the significant difference between an insanity commitment and an SVP commitment.

153. See Branch v. State (In re Commitment of Branch), 890 So. 2d 322, 327 (Fla. Dist. Ct. App. 2004) (dismissing argument that "the presence of a guardian ad litem coupled with an attorney somehow afforded Branch due process").

154. See *Branch*, 890 So. 2d at 324 (describing extrinsic evidence used in defendant's SVP evaluation). For a discussion of the types of extrinsic evidence introduced at SVP trials, see supra notes 19–22 and accompanying text.

State's expert determined Branch had a mental abnormality based on extrinsic evidence supplied by the State, even though the expert "admitted that he had no knowledge as to whether the . . . events actually occurred . . . [and] was simply taking the reports of that behavior at face value."[155] The court held that Branch's due process rights had been impinged because, while hearsay evidence is admissible in a Florida SVP proceeding, Branch "had no ability to defend himself because he was incapable of assisting [his attorney] in disputing these factual allegations."[156]

The Florida court recognized that there are situations in which an accused SVP's competence would be far less significant, namely, in cases in which the state relied solely on evidence from that individual's prior trial or trials in making an SVP determination.[157] The logic of the court's reasoning is straightforward. In such cases, the accused has already had an opportunity to challenge the evidence at his first trial where, by definition, he was competent. This approach also comports with Supreme Court precedent upholding the admissibility of prior testimony in the criminal context.[158] Thus, in SVP proceedings that do not involve extrinsic hearsay evidence, the risk of erroneous deprivation of liberty is significantly lower than in cases in which hearsay forms all or part of the basis for establishing the mental abnormality element.

3. *The Government Interest.* — For both the California and Massachusetts Supreme Courts, the government interest was the dispositive factor in determining that there was no due process right to a competency determination in SVP proceedings.[159] The Florida District Court of

155. *Branch*, 890 So. 2d at 324.

156. Id. at 325.

157. See id. at 329 ("[SVP] respondents have a due process right to be competent only when the State intends to present hearsay evidence of alleged facts that have neither been admitted by way of a plea nor subjected to adversarial testing at trial and so are subject to dispute and counterevidence.").

158. See United States v. Salerno, 505 U.S. 317, 320 (1992) (holding grand jury testimony admissible so long as party against whom it is offered "had a 'similar motive to develop testimony by direct, cross or redirect examination'" (quoting Fed. R. Evid. 804(b)(1)(B))); California v. Green, 399 U.S. 149, 165 (1970) (holding preliminary hearing testimony admissible at trial because it was "given under circumstances closely approximating those that surround the typical trial"); Pointer v. Texas, 380 U.S. 400, 407 (1965) (holding prior statement would have been admissible had it "been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine"). But see Richard O. Lempert, Samuel R. Gross & James S. Liebman, A Modern Approach To Evidence: Text, Problems, Transcripts and Cases 640–47 (3d ed. 2000) (arguing case for allowing testimony from an earlier trial is "often less compelling in practice . . . than in theory").

159. See Moore v. Superior Court, 237 P.3d 530, 544 (Cal. 2010) (holding government interests "weigh heavily, and in fact dispositively, against recognition of a due process right of this kind"); Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006) ("[T]he defendant's interest must . . . yield to the Commonwealth's paramount interest in protecting its citizens.").

Appeal, on the other hand, did not address the government interest at all.[160]

Both state supreme courts held that the primary government interest at stake was protecting the public from SVPs.[161] There is no doubt that this is a legitimate government interest: If released into society, most SVPs would present a significant danger to the public.[162] Thus, under the reasoning in *Moore v. Superior Court* and *Commonwealth v. Nieves*, the other *Mathews* factors are subordinated to this strong government interest.

Despite the courts' powerful language, it is not at all clear that an accused SVP found incompetent *would* be released. In fact, Ardell Moore asserted that, if he were found incompetent, he could still be permanently detained under California's version of the rule from *Jackson v. Indiana* if he failed to regain competency and the state could show that he was a danger to himself or others.[163] In the case of accused SVPs, it is

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160. The court did point out that "it is the State's trial strategy that will determine whether [an SVP] respondent must be competent." *Branch*, 890 So. 2d at 329. For a full discussion of how the *Branch* decision might impact prosecution strategy, see infra Part III.B.3 (analyzing government interests implicated in SVP proceedings, including policy goals and administrative burdens).

161. See *Moore*, 237 P.3d at 544 ("Chief among [the governmental interests] is the 'strong interest in protecting the public from sexually violent predators, and in providing treatment to these individuals.'" (quoting People v. Allen, 187 P.3d 1018, 1035 (Cal. 2008))); *Nieves*, 846 N.E.2d at 385 (discussing government's "paramount interest in protecting its citizens" from SVPs). The California court also expressed concern that finding a procedural due process right to competency determinations in SVP proceedings would lead to claims from "anyone and everyone" accused of being an SVP. *Moore,* 237 P.3d at 544. This fear rested on the assumption "that significant potential overlap exists between those mental disorders that qualify someone as an SVP . . . and those that produce an inability to comprehend the proceedings or assist in one's defense." Id.

Finally, the California Supreme Court also raised the issue of the safety of mental health workers and other patients if incompetent SVPs were sent to "places not designed and staffed to deal with the peculiar risks [SVPs] pose." Id. at 546. It should be noted that, if the State of California possesses such an interest, it has only developed recently. Until 2005, California SVPs were sent to a large, multipurpose institution: Atascadero State Mental Hospital. Cal. Dep't of Mental Health, Coalinga State Hospital: The Department of Mental Health Is Proud to Welcome Its Newest Addition . . ., http://www.dmh.ca.gov/services_and_programs/state_hospitals/coalinga/default.asp (on file with the *Columbia Law Review*) (last visited Feb. 11, 2012).

162. An example of the dangerousness exhibited by the type of individuals designated as SVPs is Ricardo Nieves. In 1993, Nieves raped a woman on a public street. *Nieves*, 846 N.E.2d at 383. He was released three years later and, within seventy-two hours, he had forcibly dragged a woman from her car and attempted to rape her. Id. While incarcerated, Mr. Nieves expressed sexual fantasies about female staff members, was twice caught hiding under the beds of female patients at the state hospital, and committed fifty-one other disciplinary violations, including assaulting corrections officers. Id.

163. See Reply to Real Party in Interest's Response to Petition for Writ of Mandate and/or Prohibition at 6–10, Moore v. Superior Court, 94 Cal. Rptr. 3d 771 (Cal. Ct. App. 2009) (No. B198550) (on file with the *Columbia Law Review*) (arguing for *Jackson*-style detainment of incompetent SVPs). In California, indefinite detentions are referred to as Murphy Conservatorships. As under *Jackson*, an incompetent criminal defendant in California may be detained indefinitely upon a showing of dangerousness. See Estate of

difficult to see how these individuals might be eligible for SVP commitment—which requires both that they have committed a sexually violent crime and have a mental abnormality which predisposes them to commit future violent sexual acts—and yet not be considered "dangerous."[164] Still, the California Supreme Court stated, over a vociferous dissent, that an incompetent SVP *could not* be subjected to a *Jackson*-style detainment because there was no existing statutory scheme providing specifically for SVPs.[165] The validity of this assertion and other aspects of the state courts' approaches to SVP competency claims are examined in Part III.

III. Analyzing Competency Claims in SVP Proceedings

The eight state courts to consider whether an accused SVP has a right to a competency determination have applied different methodologies to the issue,[166] and one court—Florida—has reached a different outcome.[167] Part III.A analyzes the various state court approaches before arguing that SVP competency claims should be governed by the *Mathews v. Eldridge* balancing test. Part III.B applies the *Mathews* test to the question of whether SVPs hold a procedural due process right to a competency determination. Extrapolating from this, Part III.B argues that SVP competency claims should be governed by the rule of *Branch v. State*.

A. *The Optimal Methodology for Evaluating SVP Competency Claims*

Competency claims by SVPs should properly be considered procedural due process issues, governed by *Mathews v. Eldridge*. This is the approach taken by courts in California, Massachusetts, and Florida, and it is the approach that comports with judicial precedent and best serves the purpose of constitutional due process. Courts that relied on the civil nature of SVP statutes or conducted a substantive due process analysis failed to fully evaluate the accused SVPs' constitutional rights.

Analysis that relies on the civil nature of SVP proceedings does not comport with Supreme Court precedent. The Court has never held that

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Hofferber v. Hofferber, 616 P.2d 836, 844–46 (Cal. 1980) (citing *Jackson* and holding that long-term Murphy detentions require showing of dangerousness). For a full discussion of the *Jackson* holding, see supra notes 83–90 and accompanying text.

164. Moore, for example, has been convicted of forcible oral copulation against a sixteen-year-old as well as the kidnapping, beating, forced oral copulation, sodomy, and rape of a twenty-six-year-old complete stranger. See *Moore*, 237 P.3d at 532–33 (detailing previous convictions for sexually violent crimes); see also supra note 129 (detailing crimes of SVP William Cubbage); supra note 162 (discussing crimes of SVP Ricardo Nieves).

165. See *Moore*, 237 P.3d at 546 ("[W]e would have no relevant template if we allowed SVP defendants to avoid trial while incompetent."). The Missouri Court of Appeals came to a similar conclusion. See State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. Ct. App. 2003) (arguing that applying *Jackson*-style detainment to SVPs would "thwart the proper exercise of legislative authority").

166. See supra Part II.A for a full discussion of these methodologies.

167. See supra Part II.B for a discussion of the decisions by the Florida District Court of Appeal in *Branch v. State* and *Camper v. State*.

the mere presence or absence of a right in a civil commitment statute either guarantees or denies that right.[168] To this end, the Supreme Court has employed various tests in order to determine if constitutional protection was merited despite the language of a given statute.[169] This approach has been extended to civil commitment proceedings, including mental illness commitments[170] and juvenile delinquency hearings.[171] More significantly, it buttresses the very purpose of constitutional due process protection: the preservation of certain rights that may not be denied individuals no matter the intent of the legislature or the will of electorate.

The substantive due process analysis undertaken by the Iowa Supreme Court in *State v. Cubbage* also fails to follow judicial precedent. A claim that an individual is due a competency evaluation is traditionally considered procedural.[172] Further, the substantive right to competency has never been extended to civil commitment proceedings.[173] There are at least two good reasons for this. First, a holding that there is a fundamental right to be competent in all civil commitment proceedings would produce the absurd result that commitments for mental illness would be impossible to carry out. Many mental illness commitments occur *because* the individual is not competent to stand trial in a criminal prosecution.

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168. See, e.g., Kansas v. Crane, 534 U.S. 407, 412–14 (2002) (holding SVP commitment requires state to show SVP lacks some ability to control dangerous behavior, despite lack of such requirement in state statute); Jackson v. Indiana, 406 U.S. 715, 732–39 (1972) (holding indefinite detention of incompetent criminal defendant required showing of dangerousness, despite statutory language to contrary). For a full discussion of *Jackson*, see supra notes 83–90 and accompanying text.

169. For questions of substantive due process, the Court has traditionally asked whether the right claimed was "fundamental" and then applied varying levels of scrutiny to the law being challenged. See, e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking down anti-sodomy law); see also 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 15.7 (4th ed. 2007) (discussing fundamental rights recognized by Supreme Court). For procedural due process issues, the Court has balanced the various competing interests at stake, as elucidated in the *Mathews v. Eldridge* balancing test. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (holding there is no due process right to hearing prior to termination of disability benefits); see also 1 Charles H. Koch, Jr., Administrative Law and Practice § 2.24 (3d ed. 2010) (examining modern applications of *Mathews* balancing); cf. Jenny S. Martinez, Process and Substance in the "War on Terror," 108 Colum. L. Rev. 1013, 1019–27 (2008) (outlining arguments over "the relationship between substance and procedure").

170. See Addington v. Texas, 441 U.S. 418, 433 (1979) (holding due process is satisfied in civil commitment hearings only if standard of proof was "clear and convincing" or higher); see also supra notes 79–85 and accompanying text (discussing Supreme Court jurisprudence with regards to commitment of criminal incompetents).

171. See supra notes 91–98 and accompanying text (discussing Supreme Court's juvenile delinquency jurisprudence).

172. See Walton v. Angelone, 321 F.3d 442, 459–60 (4th Cir. 2003) (discussing traditional application of procedural and substantive due process analysis to competency claims).

173. State v. Cubbage (In re Det. of Cubbage), 671 N.W.2d 442, 447 (Iowa 2003) (noting "the Supreme Court has not recognized a fundamental right to competency in the civil commitment context").

To require competence in order to commit an individual whose commitment is sought precisely because of their incompetence defies logic. Second, even if a substantive fundamental right to competency were limited solely to SVP commitments, courts might still be exposed to competence claims from "anyone and everyone"[174] accused of being an SVP.[175]

Unlike the "civil nature of the proceeding" or substantive due process approaches, applying procedural due process analysis to SVP competence claims is in line with judicial precedent: The Supreme Court has consistently used procedural due process analysis to determine competency questions and due process claims in other civil commitment regimes.[176] Moreover, procedural due process analysis allows for a full determination of whether an individual holds certain rights, even if those rights are denied him by statute.[177] For these reasons, procedural due process analysis, and application of the *Mathews* balancing test, is the optimal methodology for determining whether SVPs hold a due process right to a mental competency determination.

B. Mathews v. Eldridge *Analysis*

This section examines each of the *Mathews* factors—the liberty interest at stake, the risk of erroneous deprivation of that liberty interest and the probable value that a mental competency determination would have in preventing that error, and the government interest—and uses the analysis of the Massachusetts, California, and Florida courts as a basis for discussion. The section concludes by arguing that a rule based on *Branch v. State* provides the best balance of the various competing interests at stake.

1. *The Liberty Interest at Stake.* — The Supreme Courts of California and Massachusetts defined the liberty interest at stake in SVP competency claims as a complete loss of personal liberty.[178] It is, however, possible to define the interest more restrictively. While it is unlikely a court would choose this approach,[179] examining the full import of a more nuanced

174. Moore v. Superior Court, 237 P.3d 530, 544 (Cal. 2010).

175. Holding that there is a fundamental right to competence in SVP proceedings would prevent application of the Florida court's holding in *Branch v. State*, an approach that could stem the feared flood of competence claims while still maintaining due process protections for certain individuals. Such a holding would allow an individual like William Cubbage—whose numerous previous crimes obviate the need for extrinsic evidence at his SVP hearing—to nevertheless demand a competency determination. See supra note 129 (discussing lack of necessity for extrinsic evidence due to number and nature of Cubbage's previous crimes).

176. See supra Part I.D (discussing Supreme Court civil commitment jurisprudence).

177. This comports with Supreme Court precedent in dealing with many types of issues, including detention of incompetent criminal defendants and juvenile commitment proceedings. See supra notes 83–98 and accompanying text (discussing Supreme Court decisions requiring due process protections despite statutory language to the contrary).

178. See Part II.B.1 for a full discussion of liberty interest as defined by the Massachusetts and California courts.

179. See supra note 143 and accompanying text (discussing Supreme Court's broad definition of liberty interests).

definition of the liberty interest is instructive both for illuminating a number of ancillary interests at stake in SVP competency questions and for deconstructing the precise procedures that would occur if an SVP were, hypothetically, found incompetent.

The argument for a more restrictive definition of the liberty interest at stake is that if an SVP defendant were found incompetent, he would likely not be released but, rather, indefinitely detained in a *Jackson*-style commitment.[180] If that is the case, it is possible to frame the liberty interest at stake not as the difference between SVP commitment and complete freedom but rather as the difference between SVP commitment and competency commitment.

There are two potential outcomes of a competency commitment: a determination that the individual is unlikely to regain competency and remains dangerous, resulting in an indefinite *Jackson* commitment, or a restoration of the individual's competency followed by a return to the postponed SVP proceeding. In the first instance, in which the defendant is committed indefinitely, it is hard to see precisely how his liberty interest might be different than if he were committed as an SVP. In either case, the individual would be held in a state-run, secure mental facility.[181] Moreover, the potential for treatment and rehabilitation is similarly low in either case. While an individual subject to a *Jackson* commitment has already been determined to be unlikely to regain competence, an individual designated as an SVP has been determined to suffer from a mental abnormality that mental health professionals generally do not believe treatable.[182] Thus, although there are obviously differences between the two situations,[183] on a broad level, the liberty interests implicated are quite similar.

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180. For a discussion of *Jackson* commitments, see supra notes 83–90 and accompanying text. The California Supreme Court rejected the idea that an incompetent SVP would be subjected to a *Jackson*-style commitment. See supra notes 163–165 and accompanying text. The validity of that rejection is discussed infra, Part III.B.3.a.

181. In some states, such as Washington and California, SVPs are sent to a mental health center constructed specifically to hold violent sex offenders and pedophiles. See, e.g., Tracy Johnson, Predator Center Progress Touted, Seattle Post-Intelligencer, Sept. 19, 2006 at B1 (discussing "prisonlike" environment of SVP commitment center); Lee Romney, Coalinga State Hospital Is Sitting Nearly Empty, L.A. Times, Mar. 5, 2006, at A1 (discussing problems surrounding California prison created to house sex predators). There is not, however, a clear method by which to measure how differences in these institutions might affect an individual's liberty interest simply based on their physical location or facilities.

182. See supra notes 53–58 and accompanying text (discussing lack of treatment options for SVPs).

183. For example, an individual achieves competency by psychiatric evaluation. While psychiatric evaluation is also involved in determining if an SVP no longer suffers a mental abnormality, SVPs are often also subjected to polygraph and penile plethysmograph testing. See Anita Schlank & Rick Harry, The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years, 29 Wm. Mitchell L. Rev. 1221, 1226–27 ("Only through constant observation, and with the assistance of polygraph examinations and measures of disordered sexual arousal/interest, such as a penile

There are, however, significant differences between an initial incompetence commitment and an SVP commitment. On one hand, SVP treatment programs are "largely unproven" to aid in an individual's rehabilitation.[184] On the other hand, the medical plans associated with competence commitments have consistently restored competency to a significant percentage of individuals.[185] Moreover, "there is no way to compel patients to participate" in SVP treatment programs, and many choose to opt out.[186] An incompetent defendant, however, may be compelled to accept treatment, including medication, under certain circumstances.[187] Thus, an SVP defendant deemed incompetent stands a reasonable chance of both receiving treatment and of being restored to competency.

The restoration of a defendant's competency has implications beyond his ability to understand the SVP proceedings to which he will be subjected. SVP commitments implicate a serious liberty interest, and as such, the statutes guarantee the accused certain due process rights, such as the right to an attorney and the right to a jury trial.[188] A competent defendant will be able to take advantage of these procedural protections. In particular, the competent defendant will be able to consult with his attorney and contest the evidence arrayed against him, including extrinsic evidence relating to his previous offenses or his time in prison.[189] The narrowly framed liberty interest at stake may therefore be defined as the opportunity to receive treatment and be restored to competence in order to fully employ the available procedural safeguards and, theoretically at least, lessen the chances of a potential lifelong commitment. While this liberty interest may not be as clear, or compelling, as the broader interest in freedom from restraint, it is nevertheless significant and should weigh

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plethysmograph . . . can the staff be assured that the patients have progressed to a point where they can be gradually re-integrated into the community."). Penile plethysmograph testing requires the placement of "'a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses.'" United States v. Weber, 451 F.3d 552, 554 (9th Cir. 2006) (quoting Jason R. Odeshoo, Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders, 14 Temp. Pol. & Civ. Rts. L. Rev. 1, 2 (2004)). Although beyond the scope of this Note, penile plethysmography implicates liberty interests of its own. See id. at 562–64 (discussing liberty interest in not being forced to disrobe and submit to test as element of supervised release).

184. Davey & Goodnough, supra note 13, at 20.

185. See supra note 78 (discussing statistics showing many incompetent criminal defendants may be rehabilitated).

186. Davey & Goodnough, supra note 13, at 20.

187. See Sell v. United States, 539 U.S. 166, 169 (2003) (holding criminal defendant may be administered medication against his will in order to restore competence so as to stand trial, so long as certain conditions are met).

188. See supra note 18 (providing examples of SVP statutes providing these basic protections).

189. For a discussion of the types of extrinsic evidence introduced in SVP proceedings, see supra notes 19–22 and accompanying text.

heavily in favor of the defendant seeking a competency determination prior to an SVP proceeding.

2. *The Risk of Erroneous Deprivation and the Probable Value of a Competency Determination.* — The Florida District Court of Appeal's decision in *Branch v. State* may be differentiated from the decisions of the California and Massachusetts Supreme Courts most clearly on the issue of the risk of erroneous deprivation of an SVP's liberty interest. The Florida court found that there was a significant risk of error in cases in which extrinsic, hearsay evidence was introduced against the defendant.[190] The two state supreme courts, however, held that there was little risk of erroneous deprivation due, in large part, to the statutory guarantee of attorney representation.[191]

On its face, this argument presents a logical inconsistency. In a criminal proceeding, the very test of competence set forth by the Supreme Court is whether the defendant's "mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel*, and to *assist in preparing his defense*."[192] Thus, to hold that an individual need not be competent because he has been afforded a lawyer undermines the legal definition of competence.

One possible explanation, although not specifically raised by the California or Massachusetts courts, is that the evidence required for an SVP commitment is such that an individual's lack of competence would have little effect on the outcome of the proceeding.[193] SVP statutes gen-

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190. See supra Part II.B.2.b (discussing Florida District Court of Appeal's analysis of risk factor).

191. See supra Part II.B.2.a (discussing approach of California and Massachusetts courts to weighing risk factor).

192. Drope v. Missouri, 420 U.S. 162, 171 (1975) (emphasis added); see also Dusky v. United States, 362 U.S. 402, 402 (1960) (holding test of whether defendant is competent to stand trial "'must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'"(quoting Memorandum for the United States at 11, *Dusky*, 362 U.S. 402 (No. 540)).

193. This argument is similar to the Supreme Court's stance in *McKeiver v. Pennsylvania*—that the particular nature of the civil commitment scheme in question argued against a claimed procedure. For a discussion of *McKeiver*, see supra notes 95–97 and accompanying text. Another possible explanation is that the courts relied on the fact that SVP hearings are civil proceedings. See Moore v. Superior Court, 237 P.3d 530, 539 (Cal. 2010) ("It is well settled that rights available in criminal trials do not necessarily apply in civil commitment proceedings."). The civil nature of SVP commitments is, of course, the issue many courts have focused on in denying accused SVPs rights constitutionally due to the criminally accused. See supra Part II.A.1 (discussing court decisions differentiating SVP hearings from criminal trials on basis of their civil nature). There does not, however, appear to be a clear link between the civil nature of SVP hearings and the concept that a lawyer may fully represent an incompetent defendant. The Massachusetts court, for example, asserted that the "choices provided a defendant [in an SVP proceeding] are quintessentially the types of choices that attorneys regularly make with respect to their competent clients," including filing motions to dismiss and continue and requesting psychiatric evaluation. Commonwealth v. Nieves, 846 N.E.2d 379, 386 (Mass. 2006). The

erally require that the individual the state seeks to commit (1) has committed a sexually violent crime and (2) is afflicted with a mental abnormality such that the individual is a risk to commit future violent sexual crimes should he be returned to society.[194] The first element is proven simply by the fact of the previous crime. The second element relies heavily on psychiatric evaluation of the individual, and the individual is allowed to retain his own expert to conduct such an evaluation.[195] It might be argued that even a competent defendant could not effectively challenge either element. In many cases, however, the psychiatric evaluations are based on extrinsic evidence, such as the individual's behavior in prison[196] or even records from the individual's participation in psychiatric programs while incarcerated.[197] A competent defendant could dispute this evidence and, thus, challenge the validity of the psychiatric assessment.

The Florida District Court of Appeal's holding in *Branch* accounts for the divergent due process implications created by SVP proceedings that do or do not include extrinsic evidence. The *Branch* rule also works to prevent erroneous deprivation by incentivizing prosecutors to designate as SVPs only those individuals whose behavior during the commission of prior violent sex crimes was such that it created a basis for a finding of a sexually violent mental abnormality. Thus, the controversy surrounding the SVP designation of less dangerous individuals, such as exhibitionists, and the nondesignation of some rapists would be ameliorated.[198]

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court failed to explain how this situation was any different from a criminal trial in which a defendant is due a competency determination before a prosecution may proceed or, for that matter, from a juvenile civil commitment proceeding. See supra note 102 (listing cases finding right to juvenile competency based on juvenile's right to an attorney). The Massachusetts court also argued that there are safeguards in place to prevent attorney misconduct. *Nieves*, 846 N.E.2d at 386. Again, however, this element is not differentiated from criminal proceedings.

194. See supra note 12 and accompanying text (discussing general requirement for commitment under SVP statutes).

195. See *Moore*, 237 P.3d at 543 (pointing out defendant's "'right to retain experts or professional persons to perform an examination' on his behalf." (quoting Cal. Welf. & Inst. Code § 6603(a) (West 2010))).

196. See, e.g., id. at 533 (recounting defendant's behavior while incarcerated, including "exposing his penis and masturbating in the presence of female staff . . . [and] numerous other rule violations, including possessing makeshift weapons, destroying state property, assaulting an inmate, resisting staff, and refusing to provide required DNA samples"); see also supra notes 19–22 and accompanying text (describing uses of extrinsic evidence in SVP proceedings).

197. See Branch v. State (In re Commitment of Branch), 890 So. 2d 322, 324 (Fla. Dist. Ct. App. 2004) (describing extrinsic evidence used in psychiatric evaluation including "records from [defendant's] participation in a Department of Corrections' (DOC) sex offender program, during which [defendant] allegedly admitted to having sexual fantasies involving coercion or force").

198. See supra notes 55–57 and accompanying text (discussing commitment of less dangerous individuals).

Florida's approach does, however, raise the issue of the probable value of requiring competency determinations in SVP proceedings before hearsay evidence may be introduced. In *Mathews v. Eldridge*, the Supreme Court stated: "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[199] The Court in *Mathews* held that an individual was not constitutionally guaranteed a hearing before termination of his disability benefits in part because termination was based on "'routine, standard, and unbiased medical reports by physician specialists' concerning a subject whom they have personally examined."[200] While the Court acknowledged that instances might arise in which the "credibility and veracity" of such reports could be challenged, it held that these were likely to be rare occasions.[201]

An individual SVP defendant was, by definition, competent at the time of his original conviction for perpetrating a sexually violent crime. Thus, he would have to show that he became incompetent during his incarceration in order to raise the issue at an SVP proceeding.[202] Under the *Branch* holding, then, only an accused SVP who could show he had become incompetent during incarceration *and* against whom the State sought to introduce hearsay evidence could claim incompetency. Although there are no specific data on the number of SVPs who became mentally incompetent while incarcerated or on the number convicted using extrinsic hearsay evidence, it is quite possible that the combination of both factors is rare.[203]

It would, however, be a mistake to draw a strong analogy between the disputed procedures in *Mathews* and the issue of SVP competency. First, the *Mathews* Court relied heavily on the fact that individuals denied disability benefits could challenge that denial after the benefits had been discontinued.[204] Here, once an individual has been designated an SVP, the issue of competence is no longer material to his situation.[205] Second, given the controversy amongst mental health professionals surrounding "mental abnormality" determinations, SVP psychiatric examinations are neither routine nor standard.[206] Third, and most significantly, while the

199. 424 U.S. 319, 344 (1976).

200. Id. (citation omitted) (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).

201. Id.

202. See Moore v. Superior Court, 237 P.3d 530, 548 (Cal. 2010) (Moreno, J., dissenting) ("[O]nly those defendants who could demonstrate that they had become incompetent while serving their sentences could assert a competency claim.").

203. See id. (arguing that, because all accused SVPs had been competent at time of their convictions, "[f]ew individuals would be deemed incompetent to undergo [SVP] trials").

204. *Mathews*, 424 U.S. at 333–34.

205. See supra notes 38–50 and accompanying text (describing general SVP commitment procedures).

206. See supra notes 51–58 and accompanying text (describing controversy surrounding application of term "mental abnormality" in SVP proceedings).

loss of disability benefits can be highly impactful, SVP commitments implicate the fundamental constitutional right to be free from physical detention by the state. Because a major focus of the legal system must be to prevent erroneous decisions of any sort,[207] the level of regularity necessary to rise above "rare" and trigger a due process protection in an SVP proceeding should be significantly lower than is necessary in a disability benefits hearing.

When an incompetent individual is designated an SVP based, in whole or in part, on hearsay evidence that he is unable to contest or assist his lawyer to contest, it is clear that a risk of erroneous deprivation of liberty exists. It needs to be acknowledged, though, that such cases will likely be rare. Thus, while this factor weighs in favor of finding a right to a competency determination before an SVP proceeding, it can, potentially, be overcome by a showing of strong governmental interests.

3. *The Government Interest.* — The government interest, as defined by the California and Massachusetts Supreme Courts, was the overwhelming factor in determining that there was no due process right to a competency determination in SVP proceedings.[208] It is not clear, however, that either court properly identified the actual government interests at stake. Both courts focused primarily on the government's interest in public safety, but other interests are implicated as well, including policy goals and potential administrative burdens.

a. *Public Protection.* — For both the California and Massachusetts Supreme Courts, the major government interest at stake was the interest in protecting the public from SVPs.[209] Public protection is clearly a powerful interest that is furthered by the availability of SVP commitments. But both state supreme courts assumed that, by allowing competency determinations for accused SVPs, the entirety of this interest would be jeopardized because an accused SVP found incompetent would have to be freed. This assumption is dubious. Given the degree of public attention devoted to sexual predators,[210] it is unlikely that, given a choice, a court would turn an accused SVP free. In *Moore v. Superior Court*, the California Supreme Court implied that it could not subject an SVP to an indefinite incompetence detainment because there was no statutory scheme provid-

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207. See Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[A] primary function of legal process is to minimize the risk of erroneous decisions.").

208. See *Moore*, 237 P.3d at 544 (holding government interests "weigh heavily, and in fact dispositively, against recognition of a due process right of this kind"); Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006) ("[T]he defendant's interest must . . . yield to the Commonwealth's paramount interest in protecting its citizens.").

209. See *Moore*, 237 P.3d at 544 ("Chief among [the governmental interests] is the 'strong interest in protecting the public from sexually violent predators, and in providing treatment to these individuals.'" (quoting People v. Allen, 187 P.3d 1018, 1035 (Cal. 2008))); *Nieves*, 846 N.E.2d at 385 (discussing government's "paramount interest in protecting its citizens" from SVPs).

210. See Yung, supra note 10, at 448–50 (discussing increasingly vitriolic public attitudes towards sex offenders).

ing specifically for incompetent SVPs.[211] This argument is, however, problematic. To begin, as Judge Carlos Moreno stated in his dissent: "If a court cannot remedy a due process violation, then judicial power is for naught. It is well-established that courts possess an inherent power to adopt procedures which promote due process rights in the face of statutory silence."[212] The long history of Supreme Court cases dealing with due process rights in juvenile delinquency hearings supports this statement.[213] Early juvenile delinquency schemes contained few of the due process rights present in adult criminal proceedings.[214] Had the silence of those juvenile statutes been dispositive, modern juvenile hearings would not include protections such as the right to counsel and the privilege against self-incrimination.[215] Thus, it does not appear that the California court's concern has a strong foundation, and it is therefore unlikely that allowing a competency determination prior to an SVP proceeding would significantly impair the government's interest in protecting the public at large.

b. *Public Policy.* — While the California and Massachusetts courts focused heavily on the government's interest in committing sexually dangerous individuals, they did not examine the possibility that denying competency determinations to accused SVPs might actually undermine the stated purpose of the SVP statutes the government wished to protect. Specifically, allowing the commitment, as SVPs, of incompetent individuals calls into question whether the SVP statutes had even the "ancillary pur-

211. See supra notes 163–165 and accompanying text (discussing *Moore* analysis of potential for indefinite detention of incompetent SVPs).

212. *Moore*, 237 P.3d at 549 (Moreno, J., dissenting).

213. For a discussion of Supreme Court juvenile jurisprudence, see supra Part I.D.2.a.

214. See supra notes 91–92 and accompanying text (discussing lack of due process rights in early juvenile delinquency schemes).

215. See supra notes 91–96 and accompanying text (discussing development of Supreme Court's juvenile delinquency jurisprudence). Even if we accept that an incompetent SVP could, like an incompetent criminal defendant, be subjected to an indefinite *Jackson* commitment, not every accused SVP will necessarily meet the dangerousness requirement for such a commitment. This possibility does not, however, significantly undermine the government's interest in protecting the public. First, most accused SVPs are, in fact, extremely dangerous, so this situation is likely to be rare. See supra note 164 (discussing dangerousness of accused SVPs). Second, both an indefinite *Jackson* commitment and an SVP commitment require the state to prove current dangerousness. In both instances, dangerousness is determined through consideration of various factors, including psychiatric evaluations and the nature and severity of the underlying crime. Compare supra notes 38–50 and accompanying text (detailing SVP commitment procedures), with Cal. Penal Code § 1370(c)(2) (West 2011) (outlining indefinite competence commitment procedures), and Cal. Welf. & Inst. Code § 5008(h)(B) (West 2010) (listing requirements for indefinite incompetence detention). It is therefore highly unlikely that an individual found nondangerous in a *Jackson* evaluation would have been found dangerous in an SVP evaluation.

pose"[216] of providing treatment because some psychiatrists doubt whether an incompetent can take advantage of SVP treatment at all.[217]

In *Kansas v. Hendricks*, the Supreme Court stated that treatment of sexual predators did not have to be the "overriding" or "primary" purpose of the SVP statute in order to make the statute nonpunitive.[218] The Court did find that the fact "that treatment, if possible, is at least an ancillary goal of the Act . . . easily satisfies any test for determining that the Act is not punitive."[219] If, however, a government seeks SVP commitments of individuals who cannot be treated because they are incompetent and not because of any inability to treat SVPs generally, it casts doubt onto that government's disavowal of punitive intent. After all, incompetence can, in many instances, be treated.[220] If returning an incompetent individual to competence can better position him to take advantage of SVP treatment, then a government with the ancillary purpose of treatment would want that individual's competence restored, so long as doing so did not damage the primary interest of protecting the public from sexually dangerous persons.

c. *Financial and Administrative Burdens.* — The clearest financial and administrative burden created by allowing competency determinations prior to SVP commitments would, of course, be the competency hearings themselves.[221] Competency evaluations take up a significant amount of a court's time, and they impose a financial burden in both court costs and psychiatric evaluation fees.[222]

There is, however, some question as to just how many competency claims a court might face from accused SVPs. SVPs must have a mental abnormality that predisposes them to commit violent sexual acts. Incompetent individuals must have a mental illness that renders them unable to understand the proceedings against them or to assist their attorney. There does not appear to be any sound reason to presume—as the

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216. Kansas v. Hendricks, 521 U.S. 346, 367 (1997).

217. See Abrams et al., supra note 58, at 21–23 (discussing reasons incompetent individuals are not amenable to SVP treatment).

218. *Hendricks*, 521 U.S. at 367.

219. Id. at 368 & n.5.

220. See supra note 78 (discussing statistics showing many incompetent criminal defendants are successfully returned to competence with treatment).

221. In *Moore*, the California Supreme Court raised numerous other potential administrative burdens, all of which were focused on the lack of a statutory scheme determining placement of incompetent accused SVPs. See supra note 161 and accompanying text (detailing Court's concerns). However, these issues are relatively minor and, indeed, surmountable. See supra notes 212–215 and accompanying text (discussing how courts may supply due process protection in face of statutory silence).

222. See Gianni Pirelli et al., A Meta-Analytic Review of Competency to Stand Trial Research, 17 Psychol. Pub. Pol'y & L. 1, 2–3 (2011) (discussing costs of competency determinations in criminal proceedings).

California Supreme Court did in *Moore*[223]—that the majority of individuals with sexually deviant mental abnormalities would be unable to comprehend the proceedings against them.[224] Moreover, as discussed in Part III.B.2, because accused SVPs were, by definition, competent at the time of their original conviction, some judges have argued that the number of SVP able to claim incompetence will almost certainly be small.[225] Therefore, the administrative and financial burdens that a right to a competency determination in SVP proceedings would place on the government, while potentially substantial, would not be overwhelming.

A close evaluation of the *Mathews v. Eldridge* factors leads to the conclusion that individuals in SVP hearings have a due process right to competency determinations. The liberty interest, whether defined broadly or narrowly, is extremely significant as it implicates the possibility of an individual's detention for the remainder of his natural life. There is a very real risk of erroneous deprivation of that liberty interest, at least in instances where extrinsic hearsay evidence is used against the accused. Finally, despite claims to the contrary, the government interest implicated in allowing competency determinations in these situations simply is not very strong: It is not, as courts and prosecutors would have it, an interest in protecting the public from sexually violent individuals. The largest government interest affected would be the time and money required to provide competency determinations, and that should not be enough of a concern to overcome the serious liberty interests at stake for the accused.

The optimal expression of the due process right to a competency determination in SVP proceedings is the one elucidated in *Branch v. State*.[226] Adoption of the *Branch* rule would protect the small number of accused SVPs who might, if restored to competency, be able to challenge extrinsic evidence introduced against them. At the same time, applying *Branch* would reduce any concern that a flood of competency claims could bring SVP commitment schemes to a grinding halt. Moreover, by lowering the potential number of competency claims, it would reduce the likely financial and administrative burden on the government. Finally, it might have the ancillary benefit of ensuring that the state only seeks to

223. See supra note 161 (discussing California Supreme Court's fear that finding due process right to competency determinations in SVP proceedings would result in claims from "anyone and everyone").

224. Moore v. Superior Court, 237 P.3d 530, 551 (Cal. 2010) (Moreno, J., dissenting) ("An individual can be a pedophile or a rapist and thus suffer a mental disorder for purposes of the [SVP statute] while remaining perfectly competent to understand the nature of, and participate in, an [SVP] proceeding. Accordingly, I reject as unsupported the assertion by the majority that substantial overlap exists . . . .").

225. See id. at 548 (arguing that because all accused SVPs had been competent at time of conviction "[f]ew individuals would be deemed incompetent to undergo [SVP] trials").

226. See supra note 138 and accompanying text (detailing holding of *Branch v. State*).

commit "the worst of the worst"[227] as SVPs. For these reasons, adoption of the *Branch* rule is the soundest approach to protecting the due process rights of accused SVPs, while ensuring that the government's interest in proceeding with SVP commitments of highly dangerous sex offenders remains intact.

Conclusion

In considering the issue of competency determinations in SVP proceedings, the *Branch* standard provides the optimal balance between individual rights and government interests: It protects incompetent individuals from being committed without a meaningful opportunity to challenge extrinsic evidence introduced against them, while allowing the government to continue to pursue its important interest in having certain particularly dangerous individuals civilly committed as SVPs. The *Branch* rule is, however, more than a simple "balance" under the *Mathews* test. Adopting *Branch* would allow courts to maintain the basic notions of fairness and justice upon which our legal system is founded.

Putting aside for a moment the discrepancy between a punitive criminal scheme and a nonpunitive civil scheme, the fact is that in SVP proceedings the government is seeking to detain individuals like Ardell Moore for an amount of time likely to be that individual's natural life. There is little question that Mr. Moore and other accused SVPs are sexually dangerous persons,[228] and the state clearly has a strong interest in protecting the public from the threat posed by these individuals. But if a central tenet of our legal system is that we must strive to prevent erroneous decisions,[229] that goal should apply to all individuals, even those society abhors. Preventing competency determinations in SVP proceedings undermines fundamental notions of fairness and justice, such as the right to assist one's attorney in an effort to stave off physical detention by the state. While it is clear that public sentiment runs particularly strongly against any sort of protection for sex offenders,[230] that should not be reason enough to discard long-held beliefs about what constitutes fairness in the face of state-sought physical detention. Permitting Ardell Moore a competency determination would not expose the public to any greater risk than allowing a competency determination for a mass murderer. Moreover, finding a due process right to competency determinations in

227. Matheny, supra note 6.

228. See supra notes 129, 162, 164 (detailing crimes of William Cubbage, Ricardo Nieves, and Ardell Moore).

229. See Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[A] primary function of legal process is to minimize the risk of erroneous decisions.").

230. See generally Yung, supra note 10, at 444–46, 459–72 (arguing that "war" against sex offenders, like "War on Drugs," has moved outside standard rules and protections that govern justice system).

SVP proceedings would not constitute a victory for Mr. Moore or others considered "the worst of the worst." It would, however, be a victory for an open, fair, and just American legal system.