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THE INDEFINITE QUARANTINE: A PUBLIC HEALTH REVIEW OF CHRONIC INCONSISTENCIES IN SEXUALLY VIOLENT PREDATOR STATUTES

ISAAC D. BUCK[†]

INTRODUCTION	848
I. BUILDING THE SEXUALLY VIOLENT PREDATOR FRAMEWORK	851
A. The Road to Implementation	851
B. SVP Background and Failed Constitutional Attacks	854
II. HANDICAPPED BY LIMITATIONS.....	862
A. New Jersey: The Criminal Charge Distinction.....	863
B. Wisconsin and Virginia: Inversely Insane and Incompetent.....	865
C. California and Congress: Currently Incarcerated	869
III. QUARANTINE: AN ANALOGOUS PREVENTIVE DETENTION ..	871
IV. TOWARD A MORE CIVIL DETENTION: A PRINCIPLED APPROACH.....	876
A. Necessity	877
B. Proportionality and the Least Restrictive Alternative.....	881
C. Verifiability.....	883
D. Fairness	887
V. PROPOSED SOLUTIONS.....	890
A. Scrapping the Framework	892

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B. Incremental Improvement and Tiered Commitment.....	893
CONCLUSION.....	896

INTRODUCTION

In December 1988, Gary Minnix, a mentally disordered patient who lived in Western State Hospital, hid in a woman's apartment in southwestern suburban Tacoma, Washington.¹ Minnix was no common citizen; he had been suspected of committing as many as twenty-two rapes and had been charged with four violent rapes in one year.² He had never been convicted—nor ever been tried—because his low I.Q. led courts to find him incompetent to stand trial in all four cases, resulting in hospitalization and not incarceration.³ While on a Christmas furlough from the hospital, Minnix broke into the apartment of a 23-year-old resident of Pierce County, Washington, “removed a light bulb”, and waited.⁴ When she arrived home, he tied her up and raped her.⁵ The public reacted to the brazen attack with outrage; many wondered how someone so “dangerous” was given the opportunity to commit yet another violent sex crime. The state legislature quickly and unanimously responded.⁶ Largely due to this crime and others like it, Washington,⁷ followed by nineteen other states,⁸ implemented sexually violent predator

¹ See Barry Siegel, *Locking Up ‘Sexual Predators’*, L.A. TIMES (May 10, 1990), http://articles.latimes.com/1990-05-10/news/mn-1433_1_sexual-predator.

² See *id.*

³ See *id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See WASH. REV. CODE §§ 71.09.010–.903 (2009).

⁸ Sexually Violent Predator statutes are now on the books in twenty states: 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. See Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 215 (2011). In 2006, Congress passed the Adam Walsh Act, which established a federal SVP framework for the federal government. *Id.* at 216; see also ARIZ. REV. STAT. ANN. § 36-3707 (2009); CAL. WELF. & INST. CODE § 6600 (West 2009); FLA. STAT. § 394.910–.932 (2009); 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2009); IOWA CODE § 229A.1–.16 (2009); KAN. STAT. ANN. § 59-29a01–a23 (2008); MASS. GEN. LAWS ANN. ch. 123A, §§ 1–16 (West 2009); MINN. STAT. ANN. § 253B.01–.23 (West 2009); MO. ANN. STAT. § 632.480–.513 (West 2009); NEB. REV. STAT. § 83-174–174.03 (2007); N.H. REV. STAT. ANN. § 135-E:1–23

("SVP") statutes under which the state could commit and hold individuals like Minnix—individuals we now colloquially call "predators."⁹

It has been more than twenty-five years since Minnix's crime. And after twenty states changed their laws, forked over millions of taxpayer dollars,¹⁰ and weathered the onslaught from

(2008); N.J. STAT. ANN. §§ 30:4-27.24-.38 (West 2009); N.Y. MENTAL HYG. LAW §§ 10.01-.17 (McKinney 2009); N.D. CENT. CODE §§ 25-03.1-01-46 (2009); 42 PA. CONS. STAT. § 6401-6409 (2013); S.C. CODE ANN. §§ 44-48-10-170 (2008); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.151 (West 2009); VA. CODE ANN. §§ 37.2-900-920 (2009); WASH. REV. CODE ANN. §§ 71.09.010-.903 (West 2009); WIS. STAT. ANN. §§ 980.01-.14 (West 2009).

⁹ Branding these individuals as "predators" may be becoming unpopular. See DEIRDRE M. D'ORAZIO ET AL., THE CALIFORNIA COALITION ON SEXUAL OFFENDING, THE CALIFORNIA SEXUALLY VIOLENT PREDATOR STATUTE: HISTORY, DESCRIPTION & AREAS FOR IMPROVEMENT 56 (2009), available at <http://ccoso.org/papers/CCOSO%20SVP%20Paper.pdf> ("The goal of the SVP statute, to enhance community safety, is not optimally served through use of the emotionally charged label 'Sexually Violent Predator.' . . . The 'Sexually Violent Predator' label sends the message that those committed are more animal than human and this sub-human nature renders them incapable of change.").

¹⁰ The annual cost of SVP commitment per SVP ranges from just under \$100,000 a year to just under \$200,000 a year per SVP, depending on the state. See D'ORAZIO, *supra* note 9, at 2 (in California, the annual cost per SVP is \$166,000); Rick Brundrett, *Sex Offenders Receive Big Bills From State Mental Health Agency*, THE NERVE (Nov. 3, 2011, 8:45 AM), <http://scthenerve.wordpress.com/2011/11/03/sex-offenders-receive-big-bills-from-state-mental-health-agency/> (noting that the average yearly cost of the SVP program in South Carolina is more than \$97,000); Gary Craig, *Civil Confinement of Sex Offenders Costs State \$175,000 Apiece*, ROCHESTER DEMOCRAT AND CHRON. (Dec. 24, 2010, 2:33 PM) <http://www.democratandchronicle.com/article/20101226/NEWS01/12260311> (in New York, SVP commitment costs \$175,000 per year per detainee); Elizabeth Hillgrove, *Sexually Violent Predator Program Needs More Funds*, WATCHDOG.ORG (July 5, 2010), <http://watchdog.org/300/vashn-sexually-violent-predator-program-needs-more-funds/> (SVP program costs \$91,000 per detainee).

SVP commitment is exponentially more expensive than the average cost of housing an individual in state prison. See Solomon Moore, *Prison Spending Outpaces All But Medicaid*, N.Y. TIMES (Mar. 2, 2009), <http://www.nytimes.com/2009/03/03/us/03prison.html> (noting that a survey of 34 states found an average of \$29,000 per prisoner per year was spent); see also D'ORAZIO, *supra* note 9, at 2 (in California, it is \$43,000 annually); Brundrett, *supra* (average annual cost of housing a state prisoner in South Carolina is \$15,963).

academia,¹¹ one stark truth still exists: Under multiple states' SVP statutes' current criteria, Minnix would *not* be eligible for commitment as an SVP. Not in 1988, nor in 2014.

Seventeen years after the Supreme Court declared SVP statutes constitutional in *Kansas v. Hendricks*,¹² Gary Minnix's example demonstrates a glaring defect in the analysis applied thus far: While SVP statutes might survive due process challenges and meet the rational basis test for equal protection purposes, they are not reasonably calculated to protect the public. SVP statutes, like quarantine statutes, are public safety measures under the states' police powers, designed to employ preventive detention in appropriate cases to protect the public from harm. SVP statutes must properly balance the individual's interest in avoiding detention against the state's police power to protect the public. The evaluation of such statutes requires that the preventive detention schemes meet a four-part test: They must be necessary; the coercion they employ must be proportionate to the harm threatened and must have a least restrictive alternative component; their application must be verifiable; and they must be fair.¹³ This well established four-part standard can be used to evaluate SVP statutes where the imprecise approach of the Court has failed and can benefit both the targets of the laws and their potential victims.

To apply this novel public health review, this Article scrutinizes one aspect of SVP statutes—their “entrance criteria”—to highlight, examine, and attempt to remedy the failings of SVP statutes. This Article's analysis relies on the public health function of quarantine¹⁴ and the legal and public

¹¹ See Grant H. Morris, *The Evil That Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1205–06 n.47 (2000) (listing scholars who have criticized SVP legislation); Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1425 n.359 (2008) (noting that “many academics have argued that civil commitment statutes for sexually violent predators are unconstitutional”).

¹² 521 U.S. 346 (1997).

¹³ See *infra* Part IV.

¹⁴ To allay confusion, this Article will refer throughout to the joint enterprise of isolation and quarantine as “quarantine.” There are important features that distinguish the two, but they will not be dispositive for the instant analysis. See Leslie A. Jacobs, *Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto*, 41 L. & SOC'Y REV. 511, 521–22 (2007) (defining isolation as “the confinement of a symptomatic person,” and quarantine as “the confinement of asymptomatic persons”); Heidi L. Lambertson, *Swatting a Bug Without a Flyswatter: Minimizing*

policy analysis that has long been applied to the evaluation of states' use of this preventive detention tool. In reviewing SVP laws, the Court has gestured to quarantine as an analogous public safety tool long accepted as within states' police power.¹⁵ Neither the Court nor commentators, however, have applied to SVP laws the form of evaluative scrutiny well-established in the review of quarantine laws. Instead the review of SVP statutes has rather aridly applied constitutional analysis as though the use of state police power for preventive detention was a question of first impression. Applying public health law to SVP statutes situates them within a well-worn jurisprudential and public policy landscape, raising serious questions about the statutes' continued validity. These tools also suggest a way forward to both protect the public and to safeguard the liberty interests at stake for those subject to these laws.

This Article undertakes this public health review in five parts. Part I considers the general structure of SVP statutes, noting the reasoning behind the enactment and implementation of these statutes. Part II focuses the analysis on examples of three different types of SVP statutes' limiting criteria by considering SVP laws from New Jersey, Wisconsin, Virginia, and California. Part III compares the preventive detentions of SVP commitment and quarantine. Part IV applies quarantine principles to the SVP framework, and, after concluding that SVP statutes, as currently configured, do not sufficiently withstand this public health critique, Part V proposes solutions.

I. BUILDING THE SEXUALLY VIOLENT PREDATOR FRAMEWORK

A. *The Road to Implementation*

Although it has spread nationwide, the origins of the SVP movement can be traced to three sex crimes that occurred in the Seattle metropolitan area in the 1980s. In addition to Minnix's

the Impact of Disease Control on Individual Liberty Under the Revised International Health Regulations, 25 PENN ST. INT'L L. REV. 531, 549 (2006) (describing quarantine as the "restriction of activities or the separation of a healthy person who has been exposed to an infectious disease" and isolation as "separation of a known infected person.").

¹⁵ See *Hendricks*, 521 U.S. at 366 (upholding Kansas' SVP statute as civil in nature, and noting, "[a] State could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease").

sexual assault,¹⁶ two other crimes grabbed headlines. First, Gene Raymond Kane, an individual officials knew was dangerous and had a history of attacking women, raped and killed 29-year-old Diane Ballasiotes after she left work in downtown Seattle in the autumn of 1988.¹⁷ In May 1989, Earl K. Shriner, a mentally disabled man with a history of mental illness and sordid criminal acts, attacked 7-year-old Ryan Hade while he was riding his bike through his neighborhood.¹⁸ Shriner choked, raped, and mutilated Hade, leaving him to die.¹⁹

Following the attack on Hade, public outrage reached a boiling point. Citizens' responses were "unprecedented," as Washingtonians sought a legal solution that would keep individuals like Kane, Minnix, and Shriner off the streets.²⁰ Washington established a task force, and within months the Washington State Community Protection Act of 1990 was in draft form.²¹ During the drumbeat toward passage, the state legislature seemed focused exclusively on public safety. State congressmen argued that it was "time to address the public's concern for safety and not concern for criminal rights," and that "[t]he Constitution was never meant to coddle these people," and that even mandatory mutilation of sex offenders should be considered.²² Ida Ballasiotes, the mother of Diane, asked, "What's wrong with a holding pen [for sex offenders]?"²³

The Act unanimously passed both houses of the state legislature and was so wildly popular with the public that many "hesitated" to speak out against it.²⁴ The public fervor was undeniable: Two of the authors of the legislation expressed relief when the vote was over, having feared that the bill would grow even tougher before passage.²⁵

¹⁶ See *supra* text accompanying notes 1–6.

¹⁷ See Siegel, *supra* note 1.

¹⁸ *Id.*; see also Bryan Johnson, 'Little Tacoma Boy' Was Upbeat, Despite Horrors He Survived, KOMONEWS.COM (June 22, 2005, 10:41 PM), <http://www.komo.news.com/news/archive/4155976.html>.

¹⁹ Siegel, *supra* note 1. Hade survived the attack but died in a motorcycle accident in 2005. Johnson, *supra* note 18.

²⁰ Siegel, *supra* note 1.

²¹ WASH. REV. CODE §§ 71.09.010–.903 (2001).

²² Siegel, *supra* note 1.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

After Washington, Kansas²⁶ and other states²⁷ followed suit; each did so in the name of public safety.²⁸ Even though legislatures included an accompanying goal of treatment for sex offenders, a sample of legislative findings that accompany SVP statutes clearly shows that lawmakers supported SVPs primarily to protect the public. Statutes refer to SVPs as “extremely dangerous,”²⁹ with a high “likelihood of engaging in repeat acts of predatory sexual violence”³⁰ presenting “dangers” and “risks” to the community.³¹

A concern for public safety similarly led to passage of an SVP statute at the federal level. On July 27, 2006, President George W. Bush signed the Adam Walsh Act,³² in which Congress authorized SVP commitment for those in federal custody,

²⁶ See KAN. STAT. ANN. §§ 59-29A01-A23 (2003).

²⁷ See, e.g., FLA. STAT. §§ 394.910-932 (2009); N.J. STAT. ANN. §§ 30:4-27.24-38 (West 1999).

²⁸ See, e.g., N.J. STAT. ANN. §§ 30:4-27.25 (“Therefore, it is necessary to modify the involuntary civil commitment process in recognition of the need for commitment of those sexually violent predators who pose a danger to others should they be returned to society.”).

²⁹ FLA. STAT. § 394.910 (1999) (“The Legislature finds that a small but extremely dangerous number of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment”); WASH. REV. CODE § 71.09.010 (2001) (“The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect”); see also KAN. STAT. ANN. § 59-29a01 (2003) (noting that existing civil commitment is “inadequate to address the special needs of sexually violent predators and the risks they present to society”).

³⁰ See, e.g., WASH. REV. CODE § 71.09.010 (2001).

³¹ See, e.g., KAN. STAT. ANN. § 59-29a01 (2003); N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2007) (“In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.”). The statutes also note the importance of treatment. *Id.* (“[T]he system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases, including during incarceration, civil commitment, and outpatient supervision.”); FLA. STAT. § 394.910 (“It is therefore the intent of the Legislature to create a civil commitment procedure for the long-term care and treatment of sexually violent predators.”); WASH. REV. CODE § 71.09.010 (noting that the “treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act”).

³² Press Release, Office of the Press Sec’y, President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-6.html>.

complementing the growing chorus of states nationwide. Focusing on the protective aspect of the statute and its most uncontroversial beneficiaries, Bush spoke at the Act's signing:

Protecting our children is our solemn responsibility. It's what we must do. When a child's life or innocence is taken it is a terrible loss—it's an act of unforgivable cruelty. Our society has a duty to protect our children from exploitation and danger. By enacting this law we're sending a clear message across the country: [T]hose who prey on our children will be caught, prosecuted and punished to the fullest extent of the law.³³

Notwithstanding the rhetoric, the commitment provision under the Act is not limited to offenses against children but gives the U.S. Attorney General discretion³⁴ to commence hearings following a finding of "sexually violent conduct"³⁵ or child molestation.³⁶ Many hailed the Act as an important tool in "keep[ing] our children safe."³⁷

B. SVP Background and Failed Constitutional Attacks

SVP statutes authorize the commitment of "sexually dangerous individuals"³⁸ or "sexually violent predators"³⁹ for as long as they remain a perceived threat to society.⁴⁰ To be branded such an "individual" or "predator," three entrance criteria must be met. First, the individual must be found

³³ *Id.*

³⁴ See 18 U.S.C. § 4248(a) (2012) ("[T]he Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person.").

³⁵ "Sexually violent conduct" is not defined in the statute. See *Timms v. Johns*, 700 F. Supp. 2d 764, 771–72 (E.D.N.C. 2010) (holding the Act overbroad because it did not define "sexually violent conduct"), *vacated*, 627 F.3d 525 (4th Cir. 2010).

³⁶ See 18 § U.S.C. 4247(a)(5).

³⁷ *Ensign, Reid Announce Grants for Nevada Sex Offender Tracking, Child Protection*, STATES NEWS SERVICE, Apr. 15, 2008; see also Paul J. Morrison, *Legislature Must Fix Loophole and Protect Kansas Kids*, U.S. STATES NEWS, Jan. 29, 2007 ("Congress recently passed the Adam Walsh Act, and Kansas needs to match this commitment to our children's safety.").

³⁸ See, e.g., N.D. CENT. CODE § 25–03.3–01(8) (2011).

³⁹ See, e.g., VA. CODE ANN. § 37.2–900 (2009); WASH. REV. CODE § 71.09.020(18) (2009); WIS. STAT. § 980.01(7) (2007).

⁴⁰ Even though state SVP statutes provide for review of the detention, see, e.g., KAN. STAT. ANN. § 59–29a08(a) (2010) (requiring annual review of the SVP commitment), very few individuals committed under these regimes have ever been released. See *infra* text accompanying note 65.

mentally “abnormal.”⁴¹ This condition is defined by statute, not psychiatric diagnosis.⁴² Second, the individual must be dangerous, demonstrated by serious difficulty in controlling his or her sexual urges such that he or she will be likely⁴³ to commit sexual crimes in the future.⁴⁴ Finally, individuals must initially qualify by satisfying what will be referred to as the SVP states’ “triggering behavior,” or “trigger,” which, between states, is quite divergent. This Article focuses on these divergent triggering mechanisms.

⁴¹ This is typically defined as a “mental condition that affects a person’s emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence.” *E.g.*, N.J. STAT. ANN. § 30:4–27.26 (West 1999); *see also* WIS. STAT. § 980.01(2) (2007) (using the term “mental disorder,” Wisconsin’s definition tracks New Jersey’s: “a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence”).

⁴² Professor Stephen J. Morse has criticized the hollow definition of mental abnormality. *See* Stephen J. Morse, *Preventive Confinement of Dangerous Offenders*, 32 J.L. MED. & ETHICS 56, 62 (2004).

In other words, the definition is simply a (partial) generic description of the causation of *all* behavior and it is *not* a limiting definition of abnormality. All behavior is (partially) caused by emotional and volitional abilities that have been themselves caused by congenital and acquired characteristics. The condition that makes sexual predation mentally abnormal—congenital or acquired causes of a predisposition—applies to all behavior and is thus vacuous. It certainly cannot explain why the (inevitable) presence of congenital and acquired causes of a predisposition means that the agent cannot control himself and is not responsible for action that expresses the predisposition.

Id. (emphasis added).

⁴³ Under the original version of Wisconsin’s SVP Act, an individual was eligible if he or she suffered from a disorder “that [made] it *substantially probable* that the person [would] engage in acts of sexual violence.” WIS. STAT. § 980.01(7), 93 Wis. Act 479, 1562 (1993) (emphasis added). But it now reads “likely that the person will engage in one or more acts of sexual violence.” WIS. STAT. § 980.01(7) (2007). Likely is defined as “more likely than not.” WIS. STAT. § 980.01(1m).

⁴⁴ *See Kansas v. Crane*, 534 U.S. 407, 411–12 (2002) (holding that a complete lack of control is not required, but due process requires that some lack-of-control determination must be made in order to authorize the commitment). Some state supreme courts have held that *Crane* requires an explicit finding of lack-of-control, and has mandated such a finding in its SVP hearings. *See, e.g., In re Detention of Barnes*, 658 N.W.2d 98, 101 (Iowa 2003); *Thomas v. State*, 74 S.W.3d 789, 790–92 (Mo. 2002); *In re Commitment of W.Z.*, 801 A.2d 205, 215–17, 219 (N.J. 2002).

Examples of triggering acts include being charged with a sexually violent crime,⁴⁵ being convicted of a sexually violent crime,⁴⁶ or being currently incarcerated for a sexually violent crime.⁴⁷ If all three criteria are met, under current SVP statutes, the state has an unquestionable right to detain these individuals.⁴⁸ In contrast, individuals who meet the first two requirements—those who are both mentally abnormal and dangerous, with difficulty controlling their behavior—but who fail to meet the triggering behavior criterion are *categorically excluded* from SVP commitment.

The statutes have proven unquestionably controversial,⁴⁹ as the laws oblige states to commit individuals based upon what they “might do” instead of what they “have done.”⁵⁰ SVP statutes do not share the criminal law’s primary goals of backward-looking retribution or deterrence,⁵¹ instead, forward-looking incapacitation or detainment and some measure of treatment⁵² are their aims. However, unlike traditional mental health civil commitment, which allows for the preventive detention of those

⁴⁵ See, e.g., WASH. REV. CODE § 71.09.020(18) (2009) (“‘Sexually violent predator’ means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.”).

⁴⁶ See, e.g., N.J. STAT. ANN. § 30:4–27.26.

⁴⁷ See, e.g., CAL. WELF. & INST. CODE § 6601 (West 2011).

⁴⁸ See *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (upholding the constitutionality of Kansas’s statute).

⁴⁹ See *Morris*, *supra* note 11.

⁵⁰ See Lave, *supra* note 8, at 213. For a compelling thesis on why society is becoming more comfortable with “preventive” action, and more generally, preventive detention—from sexually violent predator statutes to the detention of suspected terrorists, see Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. CRIM. L. & CRIMINOLOGY 729, 731 (2011). Margulies argues that a triumvirate of movements: (1) society’s increased desire to “purge the community of the undesirable elements by dramatically increasing the government’s power to monitor, exclude, restrain, and imprison those considered a threat,” (2) a refinement of “security” which seeks an elimination of risk, and (3) an increased call in criminal procedure for protection by the state, have resulted in increased preventive detention. *Id.* Some scholars have begun to argue for an extension of preventive detention regimes that would establish commitment without requiring a showing of mental illness. See, e.g., Adam Lamparello, *Why Wait Until the Crime Happens? Providing for the Involuntary Commitment of Dangerous Individuals Without Requiring a Showing of Mental Illness*, 41 SETON HALL L. REV. 875 (2011).

⁵¹ See generally SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 79–105 (8th ed. 2007).

⁵² See *Hendricks*, 521 U.S. at 366.

mentally ill and dangerous,⁵³ SVP commitment requires an additional “triggering behavior” finding.⁵⁴ As a result, the statutes seek to detain those who *may or will probably* commit a sexually violent act in the future, as long as they fall into a category of one of the state’s narrowed classes of individuals.

Much of this debate—played out from the classroom to the courtroom—surrounding SVP statutes has been whether the statutes *themselves* are *facially* constitutional—namely, whether they are punitive and violate the due process, double jeopardy, and *ex post facto* clauses of the Constitution.⁵⁵ Although interesting, this debate is largely settled because its line of attack has been explicitly foreclosed: The due process challenge to these SVP statutes was rejected by the Supreme Court in *Kansas v. Hendricks*, where the Court principally held that, because the statutes were civil in nature, the state’s sweeping power to detain citizens it deems potentially dangerous could not be denied.⁵⁶

Putting aside due process challenges, the easiest way to address and critique these discriminatory triggering behaviors—from a constitutional perspective—would appear to be by way of the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ However, the variety of potential challenges in this arena will also likely be met with failure.⁵⁸ Nevertheless, such an

⁵³ See *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (reading a dangerousness requirement into Wisconsin’s civil commitment statute).

⁵⁴ See *infra* Part II.

⁵⁵ See generally *Hendricks*, 521 U.S. 346 (discussing constitutional concerns in turn).

⁵⁶ See *id.*

⁵⁷ The two major U.S. Supreme Court decisions in this area—*Hendricks* and *Crane*—never once mention equal protection, but rather focus on due process, double jeopardy, and *ex post facto* challenges.

In *United States v. Comstock*, the Court decided that Congress did have the constitutional power to establish the Adam Walsh Act, the federal SVP Act, and did not address equal protection arguments. 560 U.S. 126, 133, 149–50 (2010). To this point, Justice Breyer explicitly noted, “We do not reach or decide any claim that the statute or its application denies equal protection of the laws Respondents are free to pursue those claims on remand” *Id.* at 149–50. Subsequently on remand, the Fourth Circuit held that the Act’s standard of proof for demonstrating one as “sexually dangerous” did not violate due process, but did not discuss the Act’s constitutionality under the equal protection clause. *United States v. Comstock*, 627 F.3d 513, 524–25 (4th Cir. 2010).

⁵⁸ Many state courts conclude that the state is free to only detain sexually violent predators and not other violent offenders, see, e.g., *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000), free to detain those with mental illness and not those without,

argument, first posed by Professor Grant Morris fourteen years ago,⁵⁹ seeks to demonstrate that these triggering distinctions fail equal protection review, making the entire statutory framework constitutionally infirm. Even though there has been recent movement by a court in this area,⁶⁰ improvement of the worst

see, e.g., *In re Linehan*, 557 N.W.2d 171, 186-87 (Minn. 1996), *vacated*, 522 U.S. 1011 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999), and free to subject SVPs to conditions different from those of other civilly committed persons, see *In re Detention of Samuelson*, 727 N.E.2d 228, 236 (Ill. 2000); *In re Detention of Williams*, 628 N.W.2d 447, 451-53 (Iowa 2001); *Merryfield v. State*, 241 P.3d 573, 578 (Kan. Ct. App. 2010).

⁵⁹ See Morris, *supra* note 11, at 1227.

⁶⁰ In 2011, the Eastern District of North Carolina handed down *United States v. Timms*, declaring the federal SVP statute, the Adam Walsh Act, unconstitutional because it failed rational basis review under the equal protection clause, as applied to Gerald Wayne Timms. 799 F. Supp. 2d 582, 599 (E.D.N.C. 2011) [hereinafter *Timms I*]. The court agreed with Mr. Timms' argument that the Act irrationally discriminated between those who were housed in the custody of the Bureau of Prisons at the time of SVP commitment (to whom the Act applied, including Mr. Timms), and those who were not in its custody (to whom it did not). See 18 U.S.C. § 4248(a) (2012).

Although its decision noted that the government's interest in "shielding the public from sexually dangerous individuals" was legitimate, the court found the distinction between those inside and outside federal custody was not rationally related to this purpose. *Timms I*, 799 F. Supp. 2d at 589, 591-92. The court noted that

[s]exually dangerous individuals undoubtedly exist in state custody, the custody of the United States territorial local government, and in the general public. Yet § 4248 makes no attempt to reach those individuals. This distinction makes little sense. There is no basis for believing that more sexually dangerous individuals are in federal custody than elsewhere.

Id. at 591-92. After the court concluded by noting that "[i]f the federal government does not have the power to equally apply its civil commitment scheme to everyone, then it should not civilly commit anyone." *Id.* at 591.

Six months later, the Fourth Circuit reversed in part, and gutted the equal protection holding. See *United States v. Timms*, 664 F.3d 436, 456 (4th Cir. 2012) [hereinafter *Timms II*]. Relying heavily on the presumptive validity of classifications subject to rational basis review, the court concluded that a rational basis did exist for Congress to authorize commitment only for individuals in prison custody and not those out of custody. *Id.* at 447, 449. In a striking passage, the court concluded that Congress' distinction was rational because "Congress, unlike the several states, lacks a general police power." *Id.* at 448. Concluding that "Congress may legislate incrementally," the court's holding seemed limited to Congress: "Because the scope of the federal government's authority as to civil commitment differs so significantly from a state's authority, we conclude that there is a rational basis for the distinction Congress drew." *Id.* at 448-49 (emphasis added).

At a minimum, the Fourth Circuit in *Timms II* does not answer the question as to whether a state, as opposed to Congress, could apply the same distinction. An aggressive reading implies that a similar distinction made by states would not survive constitutional review. *Id.*

effects of triggering behavior requirements through rational basis equal protection analysis still seems unlikely.⁶¹ Because constitutional arguments have repeatedly failed as a means to address apparent inconsistencies in SVP statutes, neither the time-worn due process challenge, nor the equal protection arguments, is explored further in this Article. Instead, this Article completes a review of SVP statutes based upon well-established public health laws, policies and ethics ("public health review" or "PHR").

In general, SVP statutes are unique in that they provide for detention of individuals who have served, and often finished, criminal sentences; specifically, this feature has caused scholars to question their validity and fairness.⁶² Although the Supreme Court has concluded that SVP commitment does not constitute

⁶¹ Courts hold that a state's disparate treatment of various groups eligible for SVP commitment meets the rational basis test. See *Timms II*, 664 F.3d 436, 449 (holding that the Adam Walsh Act's distinction between those in custody and those outside of custody was rational and did not violate equal protection); *In re Commitment of Bushong*, 815 N.E.2d 103, 111 (Ill. App. Ct. 2004) ("[T]he legislature could have rationally determined that persons who have already been adjudicated sexually violent beyond a reasonable doubt pose a greater risk to society than those whose sexual dangerousness has not been established in a prior criminal proceeding."); *State v. Talikka*, 469 N.E.2d 888, 890 (Ohio Ct. App. 1983) (rational basis exists for forcing those committed after being acquitted by reason of insanity to pay for treatment services, while exempting those incompetent to stand trial or convicted); *Enis v. Dep't of Health & Soc. Servs.*, 962 F.Supp. 1192, 1202 (Wis. App. Ct. 1996) (rejecting an equal protection argument where those civilly committed were provided a guardian to assist in determining whether they are competent to refuse treatment but those found not guilty by reason of insanity were not, largely because the two groups of individuals were not "similarly situated" and even if they were, "a good reason exist[ed] for treating them differently" because "a guardian is helpful in determining a ward's true wishes" but not an individual found not guilty by reason of insanity). But see *Bernstein v. Pataki*, 233 F. App'x 21, 26 (2d Cir. 2007) (striking down disparate treatment between those acquitted by reason of insanity and those incompetent to stand trial after applying intermediate scrutiny).

⁶² See Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1054 (2002).

In the case of Leroy Hendricks, for example, the criminal justice system blamed and punished him for yielding to his allegedly uncontrollable urges; the sexual predator commitment system in effect excused him, found him non-responsible, because it committed him on the ground that he could not control precisely the same urges and related conduct that led to the ten-year prison sentence for sexual molestation that preceded his commitment. But how could it be fair to hold responsible and punish an agent for yielding to urges that are impossible or supremely difficult to control?

Id.

lifelong confinement,⁶³ release of an SVP is a rare occurrence: Of the 4,500⁶⁴ that had been detained nationwide as of August of 2007, 494 had *ever* been released—constituting about eleven percent.⁶⁵

This result can be attributed to two powerful factors. First, release of SVPs into the community is undeniably politically unpopular.⁶⁶ The public's strong reaction is undoubtedly stoked by the increased publicity that now accompanies an SVP's release thanks to community notification laws.⁶⁷ Further inflaming the public's fear of these individuals, SVPs are commonly colloquially referred to as the "worst of the worst"⁶⁸

⁶³ See *Kansas v. Hendricks*, 521 U.S. 346, 363, 364 (1997) ("Hendricks focuses on his confinement's potentially indefinite duration as evidence of the State's punitive intent. That focus, however, is misplaced. Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment . . . Furthermore, commitment under the Act is only *potentially* indefinite.").

⁶⁴ See WASH. STATE INST. FOR PUB. POL'Y, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED (August 2007) [hereinafter COMPARISON], available at <http://www.wsipp.wa.gov/rptfiles/07-08-1101.pdf>.

⁶⁵ See *id.*

⁶⁶ See Lisa Kavanaugh, *Massachusetts's Sexually Dangerous Persons Legislation: Can Juries Make a Bad Law Better?*, 35 HARV. C.R.-C.L. L. REV. 509, 516 (2000) (calling the "decision to release a sex offender" "politically unpopular"); see also Keith Matheny, *Releases of Sexually Violent Predators Anger Local Areas*, USA TODAY, Mar. 4, 2010, http://usatoday30.usatoday.com/news/nation/2010-03-03-predator-housing_N.htm. As of spring 2010, only nineteen men had "ever been granted conditional release" from California's SVP framework. *Id.* Mention of the newly-released SVP Steven Willett was highly controversial in the small town of Desert Center, California. *Id.* ("At the Desert Center Café, less than a half-mile from Willett's home, bring up his name and the outrage rises in waitress and nearby resident Cheryl Magsam's voice."); see also Kelly Wheeler, *Two Sexually Violent Predators Ordered Released to Home Near Jacumba*, CITY NEWS SERVICE, June 20, 2008 (residents living in a small town where an SVP was ordered released called decision to release "disgusting" and a small group of citizens told the judge "that they didn't want the sexually violent predators living . . . one mile from their small town"); *Classification of Sex Offenders: Frequently Asked Questions*, WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, http://www.sheriffalerts.com/cap_safety_1.php?office=54528 (last visited Mar. 27, 2014) ("People respond in many different ways to receiving a sex offender notification. It is normal to feel upset, angry, and worried about a sex offender living in your community.").

⁶⁷ See Tamara Rice Lave, *Thinking Critically About How To Address Violence Against Women*, 65 U. MIAMI L. REV. 923, 932 (2011) (noting that community notification laws, which require "that the public be notified of an offender's presence in the neighborhood[,] . . . exist in every state across the country").

⁶⁸ See Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550, 573 (2004) (sex offenders are "styled as 'the worst of the worst' as a consequence . . . of

and untreatable.⁶⁹ In addition to the negative public reaction, a second powerful reason is the statutes' reliance on the inherent uncertainty of prediction; this leads courts and judges to simply "punt" and conclude that an SVP is not ready for release.⁷⁰ The personal cost of making a mistake is simply too much to bear. One scholar writes:

[O]nce individuals are labeled sexually violent predators and committed as a result, they will realize that their ultimate release is extremely unlikely. Release will be difficult as a result of the program staff's inevitable disinclination to predict nonrecidivism, given the general difficulties of making predictions in this area, as well as the high costs to the clinical evaluator of false-negative predictions and the low cost of making false-positive ones.⁷¹

This framework is further driven by the persistent but highly questionable assumption that those committed as SVPs are unusually likely to recidivate.⁷² As a result, even with procedural protections,⁷³ the built-in disincentives for release make it particularly rare.⁷⁴

their sex offense"); John Q. LaFond, *Outpatient Commitment's Next Frontier: Sexual Predators*, 9 PSYCHOL. PUB. POLY & L. 159, 179–80 (2003) ("[T]hese individuals have been so demonized by terms like 'sexually violent predators' and 'the worst of the worst.'").

⁶⁹ See *Kansas v. Hendricks*, 521 U.S. 346, 365–66 (1997) (accepting the fact that Hendricks was untreatable and noting that "we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others"). However, the success of sex offender treatment remains unclear. See Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POLY 1, 6 (2007), available at <http://ccoso.org/library%20articles/PublicPerceptions%20ASAP%207.pdf> (noting that studies have concluded that recidivism rates of those treated and untreated are undifferentiated, but that "contemporary cognitive-behavior treatment" has been noticeably successful).

⁷⁰ See Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POLY & L. 505, 543–44 (1998).

⁷¹ *Id.*

⁷² See Levenson, *supra* note 69, at 6 ("[S]everal studies by both the U.S. and Canadian governments . . . found sex offense recidivism rates to be much lower than commonly believed."). A Department of Justice study concluded that 5.3 percent of sex offenders recidivated within three years of their release. *Id.* "Even over longer follow-up periods of 15 years, researchers have established that the large majority (76%) of sexual offenders were not rearrested for new sex crimes." *Id.*

⁷³ See Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold For Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 402–03 (2011) (noting that the SVP statutes provide similar protections to traditional mental illness civil commitment). The procedural protections credited by the Supreme Court in *Hendricks* included annual judicial

II. HANDICAPPED BY LIMITATIONS

If SVP statutes were created to address public safety concerns and prevent public safety threats, their implementation has been clouded by practical concerns related to their application. Namely, if the state intends to detain those deemed most imminently "sexually dangerous," then it is rather unremarkable to say that the tangential questions of whether the individual (1) has been previously convicted or not for his or her antisocial acts, (2) was irrational at the time he or she committed a sexual act or at trial, or (3) lives in a prison or under a bridge,⁷⁵ should not be determinative in deciding whether the individual can be held by the state as an SVP. But they are.

As mentioned above, these statutes allow for commitment where three showings are made: mental abnormality, lack of control such that one is likely to be dangerous, and a triggering mechanism, which varies by state. What follows is an analysis and review of SVP statutes' third required finding—the triggering behavior requirement. This requirement drastically limits the number of people subject to SVP commitment, but its limitations may or may not have anything to do with the individual's likelihood of committing a sexually violent crime in the near future. As a result, the SVP statutes' triggers loosen the tight bond between dangerousness and detention, opening the statutes up for a substantial PHR critique. This is demonstrated

proceedings to recommit the individuals detained under the SVP as well as the reasonable doubt standard that is applied to SVP hearings. *Hendricks*, 521 U.S. at 364.

⁷⁴ See Cynthia A. King, *Fighting the Devil We Don't Know: Kansas v. Hendricks, A Case Study Exploring the Civilization of Criminal Punishment and Its Ineffectiveness in Preventing Child Sexual Abuse*, 40 WM. & MARY L. REV. 1427, 1465 n.240 (1999) ("Health care professionals acknowledge that individuals incarcerated under a sexual violent predator law are unlikely to be released, despite the state's argument that sexually violent predators would be granted periodic review and potential release . . ." (citations omitted)).

⁷⁵ Many states desire to keep these individuals far away from the rest of society and have passed residency requirements for sex offenders. Perhaps nowhere has this been more severe than Florida, where many former sex offenders have a particularly limited area in which they can live. This has resulted in "sex offender colonies," most notably in Miami under the Mary Tuttle Causeway Bridge, where former sex offenders live. See John Zarrella & Patrick Oppmann, *Florida Housing Sex Offenders Under Bridge*, CNN.COM (Apr. 5, 2007), <http://www.cnn.com/2007/LAW/04/05/bridge.sex.offenders/>.

by the different types of triggering behaviors required in (1) New Jersey, (2) Wisconsin and Virginia, and (3) California and the federal Adam Walsh Act.

A. *New Jersey: The Criminal Charge Distinction*

New Jersey's triggering behavior is comparatively broad. Those eligible for SVP commitment in the state must belong to one of four groups: those who have (1) "been convicted," (2) "adjudicated delinquent," (3) "found not guilty by reason of insanity," or (4) "been charged with a sexually violent offense but found to be incompetent to stand trial."⁷⁶ In seeking to commit an individual as an SVP who has been found incompetent to stand trial, the state has established further procedures in which the accused is factually tried—without a jury—in order to "determine whether the person did commit the act charged."⁷⁷ If the court finds that the incompetent individual committed the act charged, the person may be held as an SVP.⁷⁸ Overall, New Jersey subjects more classes of individuals to SVP commitment than many other states, but it still exempts a number of individuals from its scope.

For example, one could easily imagine the mentally abnormal and dangerous individual who, in addition to being previously found neither insane nor incompetent, has also never been previously convicted of bad acts. Consider the individual with antisocial personality disorder⁷⁹ who has been charged with sex crimes on two different occasions but has never been found guilty. Perhaps the juries in both cases may have believed the individual was more likely than not guilty but never felt comfortable finding beyond a reasonable doubt because the state's proof did not meet the beyond a reasonable doubt standard—perhaps by lab errors or a careful offender, no DNA evidence was ever found at the scene.⁸⁰ Because the individual

⁷⁶ N.J. STAT. ANN. § 30:4-27.26 (West 1999).

⁷⁷ *Id.* § 30:4-27.33.

⁷⁸ *Id.*

⁷⁹ Antisocial personality disorder is characterized by a lack of concern regarding society's rules, violations of the rights of others, lack of regard for the truth, and unlawful behavior, among other characteristics. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 702-03 (Am. Psychiatric Ass'n, 4th ed. 2000).

⁸⁰ Granted, criminal law theorists may have difficulty with this characterization and would likely classify this point as a critique of the "beyond a reasonable doubt" standard. But the point here is simpler. If state legislatures' goals prioritize

has never been convicted, he or she cannot be detained as a New Jersey SVP. Perhaps to combat this issue, some states—such as Washington—allow for the branding of such an individual as an SVP by only requiring a criminal charge.⁸¹

But this too is imperfect. Imagine the individual who is readying to commit a first sexual offense. A concerned parent or friend notices increasingly risky behavior and is convinced that harm is imminent. Traditional mental health civil commitment—allowing the commitment of individuals found mentally ill and dangerous—would be unavailable for an individual who is currently dangerous, but not diagnosed with any mental disorder.⁸² Also unavailable—because of the criminal disposition requirement—is New Jersey's SVP commitment. As a result, New Jersey has established a system in which the community must wait for a first criminal offense before commitment; noncriminal overt acts strongly indicative of imminent harm are not enough to get the individual committed as an SVP.⁸³

Or, perhaps most disturbingly realistic, imagine the individual who is able to evade detection from authorities and is able to abuse multiple children over a period of several years. Because the person has never been formally charged or convicted, abusive acts continue unabated. Again, in New Jersey, this individual would never be contemplated by the SVP scheme because the antisocial acts do not qualify as triggering behavior.⁸⁴

New Jersey's statute, when viewed in light of a potential alternative—that the fact-finder could simply take a prior criminal conviction into account when deciding whether or not the individual is imminently sexually dangerous—is too limiting. Creating such a distinction allows for the wildly disparate

prevention and not punishment, why link the civil SVP statute to the criminal law standard that limits the state's punitive power?

⁸¹ See, e.g., WASH. REV. CODE § 71.09.020 (2009) (defining a "sexually violent predator" as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility" (emphasis added)).

⁸² Under traditional civil commitment, the individual must be mentally disordered and dangerous. See *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 & 1096 (E.D. Wis. 1972) *vacated*, 421 U.S. 957 (1975).

⁸³ See N.J. STAT. ANN. § 30:4-27.26 (West 1999).

⁸⁴ See *id.*

treatment of two seemingly similar classes of individuals: imminently sexually dangerous people who have been convicted and imminently sexually dangerous people who have not been convicted.⁸⁵ This is particularly odd considering the unequivocal language of a New Jersey state court that upheld the quarantine of a homeless individual with tuberculosis.⁸⁶ In the clear words of that court, “[d]angerous conduct is not the same as criminal conduct.”⁸⁷

B. Wisconsin and Virginia: Inversely Insane and Incompetent

Wisconsin and Virginia carve out certain individuals from SVP eligibility that New Jersey includes. In Wisconsin, those who have been (1) “convicted of a sexually violent offense,” (2) “adjudicated delinquent for a sexually violent offense,” or (3) “found not guilty of or not responsible for⁸⁸ a sexually violent offense by reason of insanity or mental disease, defect, or illness” are subject to the SVP statute.⁸⁹ In Virginia, those “convicted of a sexually violent offense” and those “charged with a sexually violent offense and . . . unrestorably incompetent to stand trial” are subject to SVP commitment.⁹⁰

⁸⁵ See Michael Louis Corrado, *Punishment and the Wild Beast of Prey: The Problem of Preventive Detention*, 86 J. CRIM. L. & CRIMINOLOGY 778, 805 (1996) (noting that “there is no good explanation of why the presumption of harmlessness may not be defeated by evidence of dangerousness without evidence of a prior crime”).

⁸⁶ *City of Newark v. J.S.*, 652 A.2d 265, 278 (N.J. Super. Ct. Law Div. 1993).

⁸⁷ *Id.* at 275.

⁸⁸ See WIS. STAT. § 971.15(1) (1993) (“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.”). As such, the Wisconsin insanity defense standard recognizes the volitional excuse. Ironically, however, the Wisconsin SVP statute requires the same finding, providing a situation in which a finding of lack of control—which is required in order to commit an individual under the Wisconsin SVP statute—would serve to excuse the same individual from criminal punishment. See Jeremy T. Price, *Reconciling Morality and Moral Responsibility in the Law: A Due Process Challenge to the Inconsistent Mental Responsibility Standards at Play in Criminal Insanity Defenses and Sexually Violent Predator Civil Commitment Hearings*, 32 HASTINGS CONST. L.Q. 987, 1001 (2005).

⁸⁹ See WIS. STAT. § 980.01(7) (2007). SVP statutes in California, Florida, Missouri, and Texas also do not reach those found incompetent to stand trial. See CAL. WELF. & INST. CODE § 6600 (West 2006); FLA. STAT. § 394.912 (2008); MO. ANN. STAT. § 632.480 (West 2001); TEX. HEALTH & SAFETY CODE ANN. § 841.003 (West 1999).

⁹⁰ VA. CODE ANN. § 37.2-900 (2009).

As a result, in Wisconsin, those found incompetent to stand trial⁹¹ are not included in the statutory definition of those eligible for SVP commitment.⁹² In Virginia, the opposite is true: Those found not guilty by reason of insanity are excluded, but those found incompetent to stand trial are included in the state's SVP scheme.⁹³

By dividing these two groups of individuals, both state legislatures seem to be indicating that the *time* at which the individual experiences a mental deficit is determinative when analyzing who is likely to commit sex crimes in the future.⁹⁴ In Wisconsin, the individual who, at the *time of trial*, is unable to understand the charges against him or her or to assist in his or her own defense⁹⁵ is exempted from the state's SVP statute, while the individual who, at the *time of the offense*, "lacked substantial capacity . . . to appreciate the wrongfulness of his or her conduct" is subject to potential SVP commitment.⁹⁶ Put differently, an individual who commits a sexual crime with the full knowledge

⁹¹ See WIS. STAT. § 971.13(1) ("No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures.").

⁹² See *id.* § 980.01(7) ("Sexually violent person" means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.).

⁹³ See VA. CODE ANN. § 37.2-900 ("Sexually violent predator" means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial pursuant to § 19.2-169.3; and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.).

⁹⁴ Those who claim that they are incompetent to stand trial must demonstrate *at the time of trial* that they are experiencing a deficit. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (noting that the "test must be whether he has sufficient *present* ability to consult" (emphasis added)); see also *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (noting that the mentally incompetent defendant cannot be tried because he is, in effect, "afforded no opportunity to defend himself"). Acquittal by reason of insanity, however, clearly excuses the defendant where a deficit occurs at the *time of committing the crime*. See *Ake v. Oklahoma*, 470 U.S. 68, 86 (1985) (after raising insanity defense, psychiatric evaluation would be undertaken to determine "petitioner's mental state at the time of the offense" (emphasis added)).

⁹⁵ This is the incompetence standard in Wisconsin. See *supra* note 91 and accompanying text.

⁹⁶ The focus here is on the cognitive prong of Wisconsin's insanity defense. See *supra* note 88 and accompanying text.

and appreciation of what he or she is doing but becomes incompetent prior to trial cannot be committed as an SVP. Meanwhile, the individual who does not know or appreciate what he or she is doing at the time of the offense but is competent to stand trial can be so committed. This confusion is compounded by the fact that Wisconsin allows SVP commitment of individuals who are convicted of sexually violent offenses and have completed their sentences, even if the individual is incompetent at the time of the SVP commitment hearing.⁹⁷

But in Virginia, the opposite situation exists.⁹⁸ Those found not guilty by reason of insanity are not eligible for SVP commitment, while those found incompetent to stand trial are.⁹⁹ So in Virginia, the individual who does not know the nature and quality of his or her action—or does not know the action is wrong¹⁰⁰—when the individual is committing a sexually violent offense, a rape¹⁰¹ for example, is not eligible for commitment as an SVP. The individual who commits the rape fully understanding his or her actions but who does not understand the resulting criminal charges or who is unable to assist counsel at trial is eligible for SVP commitment.¹⁰²

⁹⁷ See *In re Commitment of Luttrell*, 754 N.W.2d 249, 252–53 (Wis. Ct. App. 2008) (holding that sex offender does not have a due process right to a competency hearing prior to an SVP commitment hearing).

⁹⁸ See VA. CODE ANN. § 19.2-169.3(A) (2009) (“[I]f the court finds that the defendant is incompetent and is likely to remain so for the foreseeable future and the defendant has been charged with a sexually violent offense, as defined in § 37.2-900, he shall be reviewed for commitment pursuant to Chapter 9 (§ 37.2-900 et seq.) of Title 37.2.”).

⁹⁹ See *id.* § 19.2-169.1 (defining competency as a determination that the defendant “lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense”).

¹⁰⁰ Virginia recognizes two tests for insanity, the first being the *M’Naghten* test for insanity. See *Morgan v. Commonwealth*, 646 S.E.2d 899, 902 (Va. Ct. App. 2007). Under this test,

it must be clearly prove[n] that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

Price v. Commonwealth, 323 S.E.2d 106, 109 (Va. 1984) (citations and quotations omitted).

¹⁰¹ See VA. CODE ANN. § 37.2-900 (2009); § 18.2-61 (2006).

¹⁰² See *id.* § 37.2-900.

Even more bizarre, in addition to applying the *M'Naghten* test¹⁰³ for the insanity defense, Virginia allows the irresistible impulse test.¹⁰⁴ A defendant seeking an insanity acquittal based on this test must show that the individual's "mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act."¹⁰⁵ This undoubtedly creates a situation in which those defendants who show difficulty in controlling their behavior, such that they are likely to engage in dangerous sexual behavior in the future, should be found not guilty by reason of insanity of the sex crime charged. And, as a result of Virginia's current framework, these individuals—arguably the most "deserving" of SVP branding—would be wholly exempt from SVP commitment because Virginia's SVP statute does not reach insanity acquittees.¹⁰⁶

The two states' findings—determining eligibility based upon the *timing* of the break—are curious conclusions. Both states fail to provide any evidence in the introductory or legislative statement sections of their SVP statutes that one of the groups is inherently more dangerous than the other in order to justify the differential treatment. Without evidence to the contrary, the timing of the individual's rationality deficit seems serendipitous, not dangerousness-determinative. This key difference between the SVP statutes in Wisconsin and Virginia indicates a lack of clarity and consensus, which makes defending either state's decision difficult.

Nevertheless, Wisconsin's triggering distinction—allowing those acquitted by reason of insanity to qualify for SVP commitment while excluding those found incompetent to stand trial—could be arguably supported by Supreme Court

¹⁰³ The *M'Naghten* test has been adopted by a "majority of jurisdictions" in the United States. *In re Manuel L.*, 865 P.2d 718, 726 (Cal. 1994). It provides an insanity defense when "the defendant is unable to understand the nature and quality of his act or unable to distinguish between right and wrong with respect to it that he cannot be held responsible." *State v. Myers*, 290 N.W.2d 660, 662 (Neb. 1980) (Krivosh, J., concurring) (citations omitted); see *Nolan v. State*, 61 So. 3d 887, 895 (Miss. 2011) (defining the test as requiring a defendant to be "laboring under such defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing or (2) if he did know it, that he did not know that what he was doing was wrong." (citations omitted)).

¹⁰⁴ See *Morgan*, 646 S.E.2d at 902.

¹⁰⁵ See *id.* (quotation marks omitted).

¹⁰⁶ See VA. CODE ANN. § 37.2-900.

jurisprudence.¹⁰⁷ Those incompetent to stand trial have not yet been convicted of any sexually violent offense, while those who have been judged not guilty by reason of insanity—while technically not a conviction—have been judged to have met all the *prima facie* elements of a crime but are not subject to criminal punishment because of a defect of reason¹⁰⁸ or an inability to control one's actions¹⁰⁹ at the time of its commission. But whether the Supreme Court has found that those acquitted by reason of insanity are dangerous¹¹⁰ or not, it still does not explain why that group of individuals—and not those found incompetent to stand trial—is eligible for Wisconsin's SVP statute. This is especially true given the explicit requirement that the state must find—as a separate, standalone requirement from the triggering behavior requirement—that the individual has difficulty in controlling his or her behavior such that he or she is likely to be dangerous in the future.¹¹¹

C. *California and Congress: Currently Incarcerated*

In California, in order to trigger the SVP commitment statute, the individual must be “in custody under the jurisdiction of the Department of Corrections and Rehabilitation” at the time commitment is sought.¹¹² This means that in California, “[a] petition may be filed . . . if the individual was in custody pursuant to his or her determinate prison term, parole revocation term, or a hold placed pursuant to Section 6601.3.”¹¹³ Individuals who have committed multiple sexually violent crimes, but who are not currently in custody, are not covered by the statute. In 2008, the Supreme Court of California specifically addressed its

¹⁰⁷ See *Jones v. United States*, 463 U.S. 354, 366 (1983) (holding not guilty by reason of insanity verdict can automatically result in civil commitment, finding of dangerousness, and mental illness can be assumed); see also *Foucha v. Louisiana*, 504 U.S. 71, 76–78 (1992) (finding that an individual found not guilty by reason of insanity, who has overcome mental illness, must be released).

¹⁰⁸ Both Wisconsin and Virginia recognize the insanity defense based upon a cognitive deficit. See *supra* text accompanying notes 88, 100.

¹⁰⁹ Virginia recognizes the irresistible impulse test as part of its insanity standard. See *supra* text accompanying note 100.

¹¹⁰ See *supra* text accompanying note 107.

¹¹¹ WIS. STAT. § 980.01(7) (2011).

¹¹² See CAL. WELF. & INST. CODE § 6601(a)(1) (West 2012).

¹¹³ *Id.* § 6601 (a)(2). Section 6601.3 provides that the individual can be held after being referred to the State Department of Mental Health “for no more than 45 days beyond the person’s scheduled release date for full evaluation.” § 6601.3(a).

state's limitation on SVP commitment.¹¹⁴ Concluding that California's incarceration or non-incarceration triggering distinction was rational for purposes of the equal protection clause, the court noted:

[T]he Legislature could legitimately conclude in the context of the SVP Act that any felonious criminal conduct would warrant a finding of greater danger and a separate classification. Individuals in prison with felony convictions have yet to demonstrate their capacity or willingness to keep their conduct within the bounds of the law and to break old criminal habits, and the Legislature could legitimately conclude that such felons who have prior sexually violent offenses represent a particular danger to society that justifies a separate system of civil commitment.¹¹⁵

Notwithstanding the court's decision, California's triggering distinction remains dubious. Not only does the state insert an unnecessary distinction between two *especially* similarly-situated groups, but an argument could be made that the statute seeks to detain the wrong group of the two. Would it not make more sense for California to detain—or at least scrutinize more closely—those individuals who are living in society *now*? Couple this with California's well-documented problem of overcrowding in prisons and recent mandatory prison cuts,¹¹⁶ and one is left to wonder if current inmates are the most deserving of SVP commitment.

Mirroring California, the same limitation exists to narrow those subject to federal commitment under the Adam Walsh Act. Under the Act, Congress has authorized commitment for those deemed "sexually dangerous,"¹¹⁷ but only if they have: (1) been

¹¹⁴ *In re Smith*, 178 P.3d 446, 447–48 (Cal. 2008).

¹¹⁵ *Id.* at 483.

¹¹⁶ *See Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (holding California's prisoner overcrowding violated Eighth Amendment and ordering prison population reductions); *see also* Adam Liptak, *Justices, 5–4, Tell California to Cut Prisoner Population*, N.Y. TIMES, May 23, 2011, <http://www.nytimes.com/2011/05/24/us/24/scotus.html?pagewanted=all> (noting that California must reduce its prison population from over 140,000 to 110,000 in two years).

¹¹⁷ A sexually dangerous person is a "person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." 18 U.S.C. § 4247(a)(5) (2012). "Sexually dangerous to others" is further defined to mean "that the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." *Id.* § 4247(a)(6).

convicted and are in the custody of the Bureau of Prisons, (2) been found incompetent and are committed to the custody of the Attorney General, or (3) had all criminal charges against them dismissed “solely for reasons relating to the mental condition of the person.”¹¹⁸ This “location” distinction has become the determinative factor in recent federal litigation, with a federal court holding that the application of the Adam Walsh Act to only those currently incarcerated, and not to others who could be dangerous, violated equal protection.¹¹⁹

III. QUARANTINE: AN ANALOGOUS PREVENTIVE DETENTION

States are allowed to preventively detain their citizens¹²⁰—or require protective action¹²¹—in the name of public safety. In *Kansas v. Hendricks*, the Supreme Court noted that states have the right to forcibly detain those who “pose a danger to the public health and safety.”¹²² To demonstrate this point, Justice Thomas used the analogue of compulsory quarantine and isolation law—the right of states to detain those believed exposed to, or diagnosed with, contagious diseases—to show that a state *can* involuntarily confine those without demonstrating a punitive purpose.¹²³ By invoking the law of quarantine, Justice Thomas invites a review of SVP statutes and their disparate triggering behavior requirements. This Part takes up the invitation for such a PHR.

¹¹⁸ *Id.* § 4248(a).

¹¹⁹ This decision was subsequently vacated. *See supra* text accompanying note 60.

¹²⁰ *See Minnesota ex rel. Pearson v. Probate Court of Ramsey Cnty.*, 309 U.S. 270, 275–76 (1940) (upholding state power to commit those with psychopathic personalities who are unable to control their sexual impulses).

¹²¹ *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (upholding state’s requirement that citizens receive smallpox vaccination).

¹²² 521 U.S. 346, 357 (1997) (“Accordingly, States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety It thus cannot be said that the involuntary civil confinement of a limited subclass of dangerous persons is contrary to our understanding of ordered liberty.”).

¹²³ *See id.* at 366. Justice Thomas cites to *Compagnie Francaise de Navigation a Vapeur v. La. Bd. Of Health*, 186 U.S. 380 (1902), which upholds a quarantine order of a French ship as a constitutional exercise of state public health power.

Methodologically, this PHR is apt because focus has returned to the ethics and regulation of quarantine.¹²⁴ In the wake of the terrorist attacks of September 11, the Model State Emergency Health Powers Act¹²⁵ and the Turning Point Model State Public Health Act¹²⁶ were published. Both documents attempt to provide guidance for future quarantine situations.¹²⁷ Further, following the Severe Acute Respiratory Syndrome ("SARS") outbreak in Toronto in 2003, bioethicists developed ten values to govern future quarantine implementations, including a wide range of protections and principles.¹²⁸

Through these and other sources, public health thinkers have developed ethical considerations that serve to guide the emergency regime of quarantine going forward. And from compulsory vaccination of health care workers in the wake of the supposed smallpox threat in 2005,¹²⁹ to the first compulsory quarantine ordered by the CDC in nearly forty years, to Atlanta attorney Andrew Speaker in 2007,¹³⁰ real-life public health

¹²⁴ The law of quarantine has been the subject of renewed interest in the United States, especially following the September 11, 2001 attacks and the SARS outbreak in 2003. See David Claborn & Bernard McCarthy, *Incarceration and Isolation of the Innocent for Reasons of Public Health*, 11 J. INST. JUST. & INT'L STUD. 75, 83 (2011) (describing the September 11, 2001 terrorist attacks, as "[prompting] the federal government to assess its vulnerabilities in a number of areas, including the threat posed by infectious diseases," and the outbreak of Severe Acute Respiratory Syndrome ("SARS") as "[a]ccelerating the policy interests in this area"). These events led to the development of the 2002 National Strategy for Homeland Security, the Model State Emergency Health Powers Act, a national strategy for pandemic influenza, and statutory remedies to ease the implementation of potential quarantines. *Id.*

¹²⁵ MODEL STATE EMERGENCY HEALTH POWERS ACT pmbl. (Ctrs. L. & Pub. Health at Georgetown & Johns Hopkins U. 2001) [hereinafter MSEHPA], available at <http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf>.

¹²⁶ TURNING POINT MODEL STATE PUB. HEALTH ACT art. IV (Turning Point Pub. Health Statute Modernization Collaborative 2003) [hereinafter TURNING POINT], available at http://www.hss.state.ak.us/dph/improving/turningpoint/PDFs/MSPHA_web.pdf.

¹²⁷ See MSEHPA § 101; TURNING POINT § 5-108.

¹²⁸ See Peter A. Singer et al., *Ethics and SARS: Lessons from Toronto*, 327 BRIT. MED. J. 1342, 1342 (2003).

¹²⁹ See Thomas May et al., *The Smallpox Vaccination of Health Care Workers: Professional Obligations and Defense Against Bioterrorism*, HASTINGS CTR. REP., Sept.-Oct. 2003, at 26 (arguing that health care workers did not have a professional or ethical obligation to expose themselves to a smallpox vaccination as mandated by President George W. Bush's smallpox policy to vaccinate approximately 500,000 health care workers in the name of bioterrorism defense).

¹³⁰ See Gregory P. Campbell, Comment, *The Global H1N1 Pandemic, Quarantine Law, and the Due Process Conflict*, 12 SAN DIEGO INT'L L.J. 497, 511

events continue to provide case studies ripe for discussion. To complete an application of quarantine principles to SVP statutes' distinct triggering behavior requirements, this Part will first show why the analogy between the two civil structures is appropriate.

There are many different conditions that can justify "long term preventive detention,"¹³¹ but the preventive detentions that quarantine individuals and commit SVPs are particularly similar.¹³² Reflecting the same legislative intent seen in SVP statutes, quarantines incapacitate potentially dangerous individuals with the paramount goal of preventing harm to the community. Both schemes require an abnormality—one physiological, one behavioral—and both seek to detain individuals regardless of whether they are blameworthy—that is, they are "non-punitive."¹³³ Quarantine and SVP commitment also allow for incapacitation for as long as the threat continues. Both may offer treatment, if such is available. Both also rely

(2011) (presenting the quarantine saga of Andrew Speaker, an attorney from Atlanta, who in March 2007, contracted drug-resistant tuberculosis and ignored a warning from public health officials not to travel, instead attending his wedding in Greece and honeymoon in Italy). After Speaker was found in Italy, the CDC "informed him that he could not return to the United States and should be quarantined immediately." *Id.* But Speaker ignored the directive, flew to North America, and rented a car to return to the United States. *Id.* at 511–12. His story generated attention revolving around the proper response to a quarantine order.

¹³¹ See Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity*, 48 SAN DIEGO L. REV. 1229, 1236–37 (2011) (listing eleven different conditions "in which people can sometimes justifiably be preventively detained," including "being a material witness for a trial," "being a prisoner of war," and "having the intention to inflict serious harm upon oneself").

¹³² Cf. George Annas, *Control of Tuberculosis: The Law and the Public's Health*, 328 NEW ENG. J. MED. 585, 586 (1993) ("The closest legal analogy [to medically-related commitment] is provided by court cases that have reviewed the constitutionality of state statutes permitting the involuntary commitment of mental patients on the basis that they have a disease that causes them to be dangerous.").

¹³³ See *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) ("This is a legitimate nonpunitive governmental objective and has been historically so regarded."); Corrado, *supra* note 85, at 812 ("The similarity between preventive detention and quarantine is that in both cases we confine people on the basis of dangerousness in the absence of fault."); Wendy E. Parmet, *Dangerous Perspectives: The Perils of Individualizing Public Health Problems*, 30 J. LEGAL MED. 83, 93 (2009) (In public health emergencies, "[t]he perception that someone's disease creates a great risk to others, however, does not logically imply that he or she should be viewed as morally culpable."). Some, however, may quibble with this characterization of SVPs as lacking moral culpability—an argument that has been echoed in the public health realm. See *id.* ("[A]lmost invariably our culture tends to perceive so-called dangerous patients as not only epidemiologically but morally responsible for disease.").

upon a prediction of forward-looking behavior: In the quarantine context, public health officials must make decisions while cognizant of the future likelihood of a devastating outbreak, whereas, in the SVP context, state officials must decide who should be detained based upon a level of risk of sexual misconduct. Above all, both seek to maneuver the often uncomfortable tension between personal liberty and preventing societal harm.

However, it must be recognized that the analogy between the quarantine and SVP frameworks is not flawless. Most salient is the difference in the specific *means of causing harm*: In order for the individual with a communicable disease to expose society to risk, no intent is required to complete the risky act,¹³⁴ nor, generally, is any further *conduct* required at all.¹³⁵ Indeed, all the contagious individual has to do is walk down the street—depending, of course, on the mode of transmission of the infectious agent.¹³⁶ Conversely, in the SVP context, individuals have to act to bring about the harm.¹³⁷ As a result, different from the infected individual, the SVP does not immediately constitute an imminent public threat.¹³⁸

Related to this point, the outward markers of dangerousness in the two regimes are vastly different. In the SVP context, it is difficult to determine just who may be the most likely to commit a future act, whereas in quarantine, public health officials can rely upon the manifestation of physical symptoms as indicators of an individual's potential dangerousness. Although some have argued that this fact of SVP commitment—along with the degree

¹³⁴ See Walen, *supra* note 131, at 1259–60.

¹³⁵ See CHRIS SLOBOGIN, *MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY* 120 (2006).

¹³⁶ *Id.*

¹³⁷ See Walen, *supra* note 131, at 1259 (noting that the analogy between “people like Hendricks” and quarantine detention “would be fitting if (1) they really could not avoid acting on their urge to molest children when they got it, and (2) they could not tell when the urge was coming on so as to put themselves in a position where others could prevent them from acting on it”). Walen argues that where SVPs can sense the urge rising and can resist it for long enough to get out of an enticing situation, the quarantine analogy breaks down. *Id.* at 1260. But for the purpose here, building a better SVP framework, the degree to which the individual SVP can or cannot control him or herself in preventing harm does not make the principles that govern quarantine inapplicable.

¹³⁸ See SLOBOGIN, *supra* note 135.

and type of harm the SVP would cause if released—provides special moral cover to SVP detention schemes,¹³⁹ it does not lessen the importance of having defensible entrance criteria.

A second difference focuses on the amount of liberty deprivation each detention scheme authorizes. Quarantines are typically short,¹⁴⁰ temporarily depriving individuals of liberty and quickly restoring it when the public health emergency subsides. The adverse is true for SVP statutes: Incentives could lead to a longer, potentially lifelong SVP commitment.¹⁴¹ Based upon this difference, it would appear that the SVP context is deserving of stricter, time-tested principles more protective of individual liberties.

Finally, a third difference exists concerning the number of individuals likely subjected to the two different detention schemes. As currently configured, few Americans can be subjected to SVP commitment.¹⁴² Conversely, mass quarantines can sweep large numbers of individuals into confinement during public health emergencies.¹⁴³ This difference highlights the importance of principled rules for quarantine—with the potential that many citizens could be impacted. Nevertheless, it does not provide a reason for why these principles should not also apply to SVP detention as well.

¹³⁹ See, e.g., Alexander Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 753 (1992) (“A mistaken decision to confine, however painful to the offender involved, is, in my view, simply not morally equivalent to a mistaken decision to release. There is a significant difference between the two. One is much less harmful than the other.”).

¹⁴⁰ See Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871, 921 (2011) (“[Q]uarantines involve a short-term deprivation of liberty.”).

¹⁴¹ See Winick, *supra* note 70, at 543–44.

¹⁴² See *Comparison*, *supra* note 64.

¹⁴³ During the 2003 SARS outbreaks, Toronto quarantined 30,000 people, Beijing quarantined about 30,000, and about 131,000 were quarantined in Taiwan. See Martin Cetron & Pattie Simone, *Battling 21st-Century Scourges with a 14th-Century Toolbox*, 10 EMERGING INFECTIOUS DISEASES J. 2053, 2053 (2004), available at <http://wwwnc.cdc.gov/eid/content/10/11/pdfs/v10-n11.pdf>.

IV. TOWARD A MORE CIVIL DETENTION: A PRINCIPLED APPROACH

Both types of preventive commitment analyzed here rely on a health-related marker¹⁴⁴—mental abnormality or contagious disease—as well as a likelihood of dangerousness.¹⁴⁵ However, SVP statutes diverge from the reasoned approach of public health quarantine: SVP statutes require a third showing—some sort of triggering behavior—before allowing commitment.¹⁴⁶ This showing becomes puzzling when one examines the overwhelming reason why legislatures established this framework: preventing future societal harm.

Generally, a number of ethical values governing quarantine could be employed for this PHR. Those include: (1) reciprocity, which seeks to prevent economic penalties and to ensure adequate care for those affected;¹⁴⁷ (2) solidarity, which “calls for collaborative approaches that set aside traditional values of self-interest or territoriality among health care professionals, services, or institutions”;¹⁴⁸ and (3) trust, which constitutes “an essential component of the relationships” between those health care providers and officials and the subjects of a quarantine.¹⁴⁹ But the ethical values do not necessarily speak to whether the different triggers in the SVP framework are justifiable. As a result, I will apply a subset of principles that typically apply to quarantine implementation—both in the United States and internationally—and are particularly applicable to SVP detention.

¹⁴⁴ Some would disagree that “mental abnormality” has anything to do with mental illness diagnosis. See Morse, *supra* note 42.

¹⁴⁵ See, e.g., *City of Newark v. J.S.*, 652 A.2d 265, 275 (N.J. Super. Ct. Law Div. 1993) (noting quarantine cannot be based upon “illness alone,” but that “a court must find that the risk of infliction of serious bodily injury upon another is probable in the reasonably foreseeable future”).

¹⁴⁶ See *id.*

¹⁴⁷ See UNIV. TORONTO JOINT CTR. FOR BIOETHICS PANDEMIC INFLUENZA WORKING GRP., STAND ON GUARD FOR THEE: ETHICAL CONSIDERATIONS IN PREPAREDNESS PLANNING FOR PANDEMIC INFLUENZA 13 (2005), [hereinafter STAND ON GUARD], available at http://www.jointcentreforbioethics.ca/people/documents/upshur_stand_guard.pdf.

¹⁴⁸ *Id.* at 7.

¹⁴⁹ *Id.* at 7–8.

Four interrelated principles govern quarantine implementation and help to illuminate this PHR,¹⁵⁰ and all four demonstrate the inadequacies of the current SVP regimes' trigger requirements. The first, necessity, focuses on whether a sufficiently high level of risk exists, limiting quarantines to only the most serious public health threats.¹⁵¹ The second, proportionality, ensures that a state's response is evenhanded in application.¹⁵² The third principle, verifiability, asks whether the detention scheme has a science-based, defensible standard for determining who should be eligible for commitment.¹⁵³ Finally, fairness examines whether the system equally distributes burdens and benefits between those similarly-situated.¹⁵⁴ An introduction and application of each to the SVP framework follows.

A. Necessity

In her piece, *J.S. Mill and the American Law of Quarantine*,¹⁵⁵ Professor Wendy Parmet lays out the often minimal requirements American courts impose on quarantine schemes; the most important for the instant analysis is the requirement of necessity. Quarantines must be necessary—that is, the public health emergency must be sufficiently serious to justify state intervention.¹⁵⁶ As Parmet says, “the restriction of

¹⁵⁰ See PUBLIC HEALTH LAW & ETHICS: A READER 147 (Lawrence O. Gostin ed., 2010) (recognizing, from *Jacobson v. Massachusetts*, four constitutional standards for a compulsory public health act: necessity, reasonable means, proportionality, and harm avoidance); see also Lawrence O. Gostin, *When Terrorism Threatens Health: How Far Are Limitations on Human Rights Justified*, 31 J.L. MED. & ETHICS 524, 526 (2003) (“[Offering] four familiar principles as a basis for the appropriate exercise of public health powers, consistent with human rights norms: necessity, effective means, proportionality, and fairness.”).

¹⁵¹ See PUBLIC HEALTH LAW & ETHICS, *supra* note 150.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See generally Wendy E. Parmet, *J.S. Mill and the American Law of Quarantine*, 1 PUB. HEALTH ETHICS 210 (2008) (arguing, ultimately, that America's modern quarantine law does not sufficiently track John Stuart Mill's harm principle).

¹⁵⁶ See, e.g., Lawrence O. Gostin & David P. Fidler, *Biosecurity Under the Rule of Law*, 38 CASE W. RES. J. INT'L L. 437, 461–62 (2007) (noting that “isolation and quarantine may only be used pursuant to a court order based on evidence that the intervention will prevent transmission of an infectious disease [and] is necessary to protect the community's health By requiring justificatory evidence at every step, the rule of law ensures that government will have the power to protect the

an individual's bodily liberty in the name of public health is legitimate only when it is *necessary for* and capable of preventing the spread of disease.¹⁵⁷ Courts,¹⁵⁸ legislatures,¹⁵⁹ and scholars¹⁶⁰ recognize the fact that quarantine must be "absolutely necessary"¹⁶¹ to be ethically and legally employed. If a public health threat does not require quarantine to protect the public's health, it must be avoided.

Within this context, an analysis of the necessity of the SVP superstructure can split one of two ways. First, on a general level, there is no denying that for some individuals like Gary Minnix and Leroy Hendricks, SVP detention is necessary to keep them from committing harm.¹⁶² However, for the rest subject to this detention, data do not conclusively support the proposition

community's health, but that this power is used only where necessary to reduce a serious health threat.").

¹⁵⁷ Parmet, *supra* note 155, at 213 (emphasis added); *see also* Gostin & Fidler, *supra* note 156, at 461 ("Abrogation of individual rights and liberties can only be justified if the intervention is necessary and effective to achieve an important objective.").

¹⁵⁸ *See, e.g.,* Carrie Lacey, *Abuse of Quarantine Authority: The Case for a Federal Approach to Infectious Disease Containment*, 24 J. LEGAL MED. 199, 209 (2003) (citing *City of N.Y. v. Antoinette R.*, 165 Misc. 2d 1014, 1019–20, 630 N.Y.S.2d 1008, 1011 (Sup. Ct. Queens Cnty. 1995); *City of New York v. Doe*, 205 A.D.2d 469, 470, 614 N.Y.S.2d 8, 8 (1st Dep't 1994)) ("The public health official must show quarantine is necessary. . ."); *see also* Kathleen C. Chen, *Pennsylvania's Bioterrorism Act: Better Prevention from Better Preparation*, 15 TEMP. POL. & CIV. RTS. L. REV. 165, 180 (2005) (citations omitted) ("The government must demonstrate that the quarantine is necessary to serve a compelling purpose, and that any official acts will serve that compelling government purpose.").

¹⁵⁹ *See* Gostin & Fidler, *supra* note 156, at 461–62.

¹⁶⁰ *See* Lawrence O. Gostin, *The Model State Emergency Health Powers Act: Public Health and Civil Liberties in a Time of Terrorism*, 13 HEALTH MATRIX 3, 12, 21 (2003) (noting that "[e]arly detection could save many lives by triggering an effective containment strategy such as vaccination, treatment and, *if necessary*, isolation or quarantine" and that "individuals who refused to comply with public health orders would, *if necessary to protect the public's health*, be subject to isolation or quarantine" (emphasis added)).

¹⁶¹ John D. Blum & Norchaya Talib, *Balancing Individual Rights Versus Collective Good in Public Health Enforcement*, 25 MED. & L. 273, 277 (2006) ("A noted group of legal scholars and ethicists have developed several guiding principles to underpin laws concerning quarantine and isolation . . . abiding by the rule of law and application of such measures only when absolutely *necessary*." (emphasis added)).

¹⁶² *See* *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997) ("Hendricks admitted that he had repeatedly abused children whenever he was not confined . . . Although Hendricks recognized that his behavior harms children, and he hoped he would not sexually molest children again, he stated that the only sure way he could keep from sexually abusing children in the future was 'to die.'").

that sexual offenders are particularly more likely to recidivate than other offenders.¹⁶³ This is compounded by the fact that, statistically, a large chunk of America's citizens are not likely to be victims of sexually violent crime in their lifetimes.¹⁶⁴ Putting aside the most imminently dangerous individuals, these two facts provide clear challenges to a finding that these statutes are necessary to prevent substantial societal harm¹⁶⁵ under a PHR.

Nevertheless, the fact that twenty states¹⁶⁶ have now implemented an SVP statute indicates that, over the last twenty-four years, an increasing number of states have found the problem of sexually violent crimes to be such a threat as to require a state response. It also indicates that most states have either reached the opposite conclusion or have simply not recognized the harm. No matter the reason, the fact that the majority of states have not implemented SVP statutes nationwide indicates that the risk level presented by SVPs may not be deserving of a "crisis" status in those states, and that its "solution" may not be called "necessary."

Second, one can also examine the necessity of the triggering mechanisms' distinctions. As the balance of this Article illustrates, even those states that do have SVP regimes cannot agree on the same entrance criteria. The heterogeneity among states that have passed SVP statutes further indicates a *lack of emergency*—or at least confused thinking about the nature of the danger. States that have implemented SVP statutes cannot agree upon entrance criteria, showing that there is no clear definition of *what the harm is* or *who is responsible for it*. If there was a clear definition, the entrance criteria governing SVP commitment would likely be more uniform. Among the states with SVP statutes, no justification is provided as to why certain groups are wholly exempted from the reach of detention.

¹⁶³ See Levenson, *supra* note 69, at 6.

¹⁶⁴ According to the U.S. Department of Justice, in 2009, 0.5 per 1000 people were victims of rape or sexual assault. See Jennifer L. Truman & Michael R. Rand, *National Crime Victimization Survey: Criminal Victimization, 2009*, BUREAU OF JUSTICE STATISTICS 1 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv09.pdf>.

¹⁶⁵ See LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 60–61 (2008) (presenting the difference between lay and expert perceptions of risk and noting that "[t]he public's perception of risk is influenced by its salience. The more media draws attention to statistically low risks, the more the public becomes concerned.").

¹⁶⁶ See *supra* text accompanying note 8.

A traditional public health example provides a worthwhile hypothetical. Fearing an outbreak of a particularly virulent new sexually transmitted disease, and after noticing a handful of citizens exhibiting symptoms, one state quarantines those who engage in risky sexual behavior, defined as having unprotected sexual relations with more than twenty-five people over the last four years. During the same timeframe, another state commits those who have engaged in risky sexual behavior, using the same definition, but only those who live near, within two miles of, a red-light district—defined as housing a certain number of escorts per square mile. Another state implements a detention regime, but seeks to detain only those who have had certain sexually transmitted diseases in the past. Three more states implement no quarantine.

In this scenario, could a state conclude that the virulent, new sexually transmitted disease strain is a public health emergency necessitating an overarching framework to catch and detain those who may pose the most risk? How can one state declare a public health emergency requiring potentially lifelong commitment and defend that scheme by characterizing it as addressing a public health emergency, when that state's neighbor across the river not only chooses against building a similar commitment framework, but also does not even recognize that a public health emergency exists?

This is the current situation created by the states' divergent triggering requirements. Because of these distinctions, the exact parameters of the "public health emergency" are not congruent from state to state. Indeed, the failure of states to homogeneously identify *who* is the cause of the unacceptable societal risk presents problems for the necessity analysis. Within those states that have determined that a public safety emergency exists, and whose legislatures have established an SVP framework, there are major inconsistencies, as shown above. Can New Jersey argue that a public safety emergency exists, necessitating the construction of an SVP framework, to respond to a risk created solely by those convicted of sexually violent offenses, and not, say, by individuals who have committed sexually violent acts but never been convicted? Can California defend the argument that those living *within* its own prisons—an odd boundary itself—are responsible for its public safety

emergency? Because of the lack of uniformity in this area, it is difficult to argue that the threat from SVPs is a sufficient public emergency such that detention is “absolutely necessary.”

B. Proportionality and the Least Restrictive Alternative

If necessity demands that the risk be sufficient to justify intervention, proportionality ensures a reasoned intervention. Proportionality requires that quarantines be “limited to the actual level of risk to community”¹⁶⁷ and have their “benefits . . . balanced against the negative features and effects.”¹⁶⁸ Another way courts¹⁶⁹ and the model acts refer to proportionality is by way of the “least restrictive alternative” doctrine.¹⁷⁰ This serves to limit state interventions to “require the least invasive intervention that will achieve the objective.”¹⁷¹ Indeed, specifically in the quarantine context, courts have applied a least restrictive alternative analysis, requiring the state to demonstrate that the confinement is proportional in light of the risk presented.¹⁷² This could include an analysis of “the place of confinement as well as the fact of confinement.”¹⁷³

¹⁶⁷ Martin Cetron & Julius Landwirth, *Public Health and Ethical Considerations in Planning for Quarantine*, 78 YALE J. BIOLOGY & MED. 325, 329 (2005) (citing *Stand on Guard*, *supra* note 147).

¹⁶⁸ See PUBLIC HEALTH LAW & ETHICS, *supra* note 150, at 72.

¹⁶⁹ Parmet, *supra* note 155, at 213 (“[C]ourts and commentators have used the constitutional law phrase ‘least restrictive alternative’ to express the idea . . . that quarantine is justified only when there is no other intervention available to prevent the spread of disease that would be less restrictive of liberty.”).

¹⁷⁰ See, e.g., TURNING POINT, *supra* note 126, § 5-108(b)(1) (“Isolation and quarantine must be by the least restrictive means necessary to prevent the spread of a contagious or possibly contagious disease to others”); MSEHPA, *supra* note 125, § 604(b)(1) (using the same language as the TURNING POINT Model Act).

¹⁷¹ Lawrence O. Gostin et al., *Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats*, 290 JAMA 3229, 3232 (2003).

¹⁷² See *City of New York v. Antoinette R.*, 165 Misc. 2d. 1014, 1015–18, 630 N.Y.S.2d 1008, 1009–11 (Sup. Ct. Queens Cnty. 1995) (noting that for quarantine of someone with active tuberculosis, the state statute requires “an appraisal of the risk posed to others and a review of less restrictive alternatives which were attempted or considered”); *City of New York v. Doe*, 205 A.D.2d 469, 470, 614 N.Y.S.2d 8 (1st Dep’t 1994) (ordering detention where respondent was unable to comply with medication under less restrictive alternatives); *City of Newark v. J.S.*, 652 A.2d 265, 278 (N.J. Super. Ct. Law Div. 1993) (upholding quarantine where patient presented risk to others and hospital confinement was least restrictive mode presented).

¹⁷³ *In re Washington*, 735 N.W.2d 111, 125 (Wis. 2007) (examining detention order of individual with tuberculosis and reviewing Wisconsin quarantine statute,

As Lawrence Gostin argues, public health officials should consider the invasiveness, frequency and scope, and duration of the detention in order to determine whether the intrusion constitutes the least restrictive alternative.¹⁷⁴ In this analysis, the invasiveness and duration of detention for many SVPs is particularly restrictive. For those institutionalized, liberty is restricted; the ability to work, socialize, and move freely is strictly inhibited. The duration of the detention, as aforementioned, can be lifelong.¹⁷⁵

Further, state officials must make a risk assessment on "a case-by-case basis" where "[i]ndividualized risk assessments" are made, "avoid[ing] decisions made under a blanket rule or generalization about a class of persons."¹⁷⁶ Wholly excluding large groups of citizens from SVP statutes' reach, while automatically subjecting others, does not provide a case-by-case risk assessment. To be sure, others would argue that the risk analysis is encapsulated in the "likely to be dangerous" prong of SVP commitment, but an individual could be found "likely to be dangerous" and yet still be excluded from SVP commitment if he or she fails to meet one of the triggering requirements.

The sexually transmitted disease hypothetical mentioned above provides additional guidance here. Imagine that, even though individuals have a 0.05% annual chance of contracting the contagious sexually transmitted disease,¹⁷⁷ fear of the new sexually transmitted disease leads one state to detain those who engage in risky sexual behavior, using the same definition as presented above. A different state detains those who have engaged in risky sexual behavior but only those who live near a red-light district, a third state detains those who have had a certain sexually transmitted disease in the past, and three other states implement no detention scheme. Imagine also that because the sexually transmitted disease's incubation period is

ultimately concluding that committing the individual in a jail was not an abuse of discretion).

¹⁷⁴ GOSTIN, *supra* note 165, at 68.

¹⁷⁵ See *supra* text accompanying note 63–65.

¹⁷⁶ GOSTIN, *supra* note 165, at 57; see also *City of Newark*, 652 A.2d at 274 ("The best way to guard against such risk is to demand an individualized, fact-specific determination as to the person under consideration.").

¹⁷⁷ See *Truman & Rand*, *supra* note 164.

two years, the states that impose commitment do so for two years. During these two years, *all* individuals falling under the statutes' ambit are held in a prison.¹⁷⁸

This hypothetical scheme would most easily be attacked because of its lack of proportionality. Putting aside the fact that the states exempt different individuals from the quarantine—and some states do not even order any quarantine—the length of time and conditions that individuals are subject to would likely be decried, especially in light of the low risk of transmission the disease presents. Most importantly, both the detention type and length under SVP statutes are bluntly applied, without consulting potential alternatives to lifelong, coercive detention for *each* individual within the statute's reach. This lack of proportionality would be further exacerbated by the inconsistent application of standards among states. If this type of detention would lack proportionality sufficient for quarantine, it also lacks it for SVP detention under a PHR.

C. Verifiability

Before a particular quarantine will be upheld, it must be shown to be scientifically effective and verifiable. To “guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science,” public health authorities’ decisions “must be based upon the latest knowledge of epidemiology, virology, bacteriology, and public health.”¹⁷⁹ As an initial matter, the criteria used by many states to determine who is likely to be dangerous in the future have recently been cast in tremendous

¹⁷⁸ In New Jersey, SVP detainees were held in county correctional facilities from 2001 to 2009. See Jerry McCrea, *N.J. Appeals Court Orders State To Move Sexually Violent Predators from Hudson Facility*, NEWARK STAR-LEDGER, May 18, 2009, http://www.nj.com/news/index.ssf/2009/05/nj_appeals_court_orders_state.html; Sharon Adarlo, *Avenel Waiting for ‘Temporary’ Prison to Close*, NEWARK STAR-LEDGER, May 18, 2009, http://blog.nj.com/ledgerarchives/2007/07/avenel_waiting_for_temporary_p.html. In South Carolina, SVPs have been housed in a South Carolina Department of Corrections unit formerly used to house Death Row inmates. See Brundrett, *supra* note 10.

Conversely, jails and prisons are categorically inappropriate for quarantine. See Gostin et al., *supra* note 171, at 3234 (“Since isolation and quarantine are designed to promote well-being and not to punish the individual, public health authorities have the obligation to provide quarters that are decent and not degrading. Jails and prisons are unacceptable settings for confinement.”).

¹⁷⁹ *City of Newark*, 652 A.2d at 274.

doubt.¹⁸⁰ Putting aside the striking issue of whether current procedures are good enough at predicting which individuals are likely to be dangerous, the key determination in the instant analysis is whether the distinct triggers, and the differential treatment of whole groups of individuals resulting in coercive detention, can be scientifically defended and verified.¹⁸¹

The Model State Emergency Health Powers Act mentions this tenet in its preamble and legislative findings sections: "Emergency powers must be grounded in a thorough scientific understanding of public health threats and disease transmission."¹⁸² The Turning Point agrees: "Whenever possible, a state or local public health agency shall exercise its authorities or powers through procedures, practices, or programs that are based on modern, scientifically-sound principles and evidence."¹⁸³ Basing a public health quarantine on sound science is not a controversial concept; the American Medical Association has noted that "[t]he medical profession . . . must take an active role in ensuring that those interventions are based on science."¹⁸⁴

¹⁸⁰ See Frederick E. Vars, *Rethinking the Indefinite Detention of Sex Offenders*, 44 CONN. L. REV. 161, 166 (2011) (arguing that since we cannot predict future dangerousness—and the current criteria used to determine who should be committed as SVPs under the Static-99 test is imprecise and error-prone—that standards should be improved, existing standards should be lowered, or SVP commitment should be abandoned).

¹⁸¹ See Daniel S. Reich, *Modernizing Local Responses to Public Health Emergencies: Bioterrorism, Epidemics, and the Model State Emergency Health Powers Act*, 19 J. CONTEMP. HEALTH L. & POL'Y 379, 409 (2003) ("Once again, when implementing measures as coercive as quarantine, it is important that the criteria for determining to whom it applies must be based on scientific facts.").

¹⁸² MSEHPA, *supra* note 125, pmbl.

¹⁸³ TURNING POINT, *supra* note 126, § 5-101(b)(2).

¹⁸⁴ AM. MED. ASS'N CODE OF MED. ETHICS, OPINION 2.25: THE USE OF QUARANTINE AND ISOLATION AS PUBLIC HEALTH INTERVENTIONS (2006), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion225.page>.

Other entities, from state supreme courts¹⁸⁵ to Department of Health and Human Services' agency statements,¹⁸⁶ rely on this requirement in the context of quarantine.

In the courts, the requirement of scientific soundness is perhaps best illustrated by a seminal quarantine case heard by the Northern District of California over 100 years ago.¹⁸⁷ Less than three weeks after it had enjoined enforcement of a resolution passed by the San Francisco board of health requiring any "Chinese or Asiatic person" who attempted to leave the city to be inoculated against the bubonic plague,¹⁸⁸ the court heard *Jew Ho v. Williamson*,¹⁸⁹ which involved the same discrimination against those of Chinese descent in San Francisco. As a response to the previous court decision,¹⁹⁰ the city board of health had established a quarantine of a twelve-block area where those of Chinese descent lived—the "Chinese Quarter"¹⁹¹—after reports of nine deaths due to bubonic plague.¹⁹² Jew Ho, a grocer, challenged the resolution, arguing that the quarantine was enforced only against those of Chinese descent and not against

¹⁸⁵ See *State ex rel. McBride v. Superior Court for King Cnty.*, 174 P. 973, 978–79 (Wash. 1918) (noting that "inasmuch as the whole matter of quarantine must rest ultimately in the judgment of medical men, it could avoid the danger of partisan opinion and fix the seat of that judgment in men of its own choosing, or to be chosen in a way provided, and who being bound by oath to perform a public duty, and having a due sense of responsibility presumably would discharge their office with justice and fidelity").

¹⁸⁶ Control of Communicable Diseases, 70 Fed. Reg. 71,892-01, 71,895, 2005 WL 3171577 (Nov. 30, 2005) (to be codified at 42 CFR pts. 70 & 71) ("The quarantine officer's reasonable belief would be informed by objective scientific evidence such as clinical criteria indicative of one of the specified quarantinable diseases Provisionally quarantined individuals are provided with a written order in support of the agency's determination at the time that provisional quarantine commences or as soon thereafter as the circumstances reasonably permit.").

¹⁸⁷ See *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900).

¹⁸⁸ See *Wong Wai v. Williamson*, 103 F. 1 (N.D. Cal. 1900). Holding it a "wrongful and oppressive interference with their personal liberty" and a violation of equal protection of the laws, the court enjoined enforcement of the resolution, noting that measures of this sort that "have[] a uniform operation" and are "reasonably adapted to the purpose of protecting the health and preserving the welfare of the inhabitants of a city" easily pass constitutional muster, but that applying the regulation only to those of Chinese descent in the city was unreasonably discriminatory, causing "great and irreparable loss and injury." *Id.* at 3–6.

¹⁸⁹ 103 F. 10.

¹⁹⁰ See Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53, 70–71 (1985).

¹⁹¹ *Wong Wai*, 103 F. at 6.

¹⁹² *Jew Ho*, 103 F. at 11–13.

citizens of other races living within the quarantined district.¹⁹³ Further, he argued, city officials did not quarantine the houses where purported plague victims lived,¹⁹⁴ nor did they restrict intercommunication within the district,¹⁹⁵ which allowed for the easy spread of germs. The court struck down the quarantine order, finding it in violation of equal protection.¹⁹⁶

Even though the case stands for the oft-cited proposition that quarantines heavily reliant on racial discrimination will violate the equal protection clause, what the court says in addition to its headline holding is more important for this analysis. The court concluded that the quarantine violated the clause "not only because it was clearly applied in a discriminatory fashion, but also because its scale was not reasonably related to the goal of preventing plague as judged by normal medical standards,"¹⁹⁷ with the court noting that, following the description of the quarantine enforcement, the "danger of the spread of disease would not diminish."¹⁹⁸

Here, SVP statutes' verifiability is challenged by its trigger distinctions. While Wisconsin can brand those found not guilty by reason of insanity, but not those found incompetent to stand trial, as SVPs, the state seems to be concluding that those found not guilty by reason of insanity, as a group, are more likely to reoffend if released than those found incompetent to stand trial. Virginia reaches the exact opposite conclusion. But neither conclusion is sustainable under a public health analysis because neither conclusion is verifiable. Neither state presents data, or any statement, as to why one group instead of the other is more dangerous and deserving of detention. Further, the fact that the two states exempt opposite groups from their SVP statute indicates that the distinction cannot be defended, because at least one of the states would undeniably be unable to scientifically verify their results.

¹⁹³ *Id.* at 13. On Mr. Ho's street alone, two other houses within the boundaries were excluded from the quarantine, "although the Chinese similarly situated [were] included." *Id.* at 23.

¹⁹⁴ *Id.* at 13.

¹⁹⁵ *Id.* at 22.

¹⁹⁶ *Id.* at 23-27.

¹⁹⁷ Scott Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479, 487 (1985).

¹⁹⁸ *Jew Ho*, 103 F. 10 at 21.

In the quarantine context, it is easy to imagine a scenario in which a minor distinction could defensibly serve as the basis for commitment, even among those similarly situated in society, *because the commitment is based on scientific evidence*. One can imagine quarantining individuals who live in a particular neighborhood, or on a particular street, because of their proximity to those infected, while leaving their neighbors on the next block untouched. In this scenario, this fact rationally and verifiably distinguishes between two groups of individuals based upon proximity to the cause of harm—erecting a defensible border to preventive detention. The SVP regime lacks this.

D. Fairness

Systems that are neither adequately verifiable nor necessary also fail to meet the sometimes overlapping and simple principle of fairness. Fairness is a critical component of any ethical quarantine:

In the midst of a pandemic, when guidance will be incomplete, consequences uncertain, and information constantly changing, and where hour-by-hour decisions involve life and death, fairness is crucial. Experience shows that there is often disagreement on what principles should be used to make fair allocation decisions. This means that decision makers may have also to rely on a fair process to establish the legitimacy of priority setting decisions.¹⁹⁹

In addition to fair decision-making procedures, the resources and burdens must be fairly distributed.²⁰⁰ In particular, “[p]ublic health programs are objectionable when they burden a particular segment of the population”²⁰¹ and “should elaborate the specific rights that people possess, set science-based standards and *fair procedures* for public health measures, and require states to actively prevent stigma and discrimination.”²⁰²

¹⁹⁹ *Stand on Guard*, *supra* note 147, at 16.

²⁰⁰ Nathan A. Bostick, et al., *Ethical Obligations of Physicians Participating in Public Health Quarantine and Isolation Measures*, 123 PUB. HEALTH REP. 3, 5 (2008), available at <http://www.publichealthreports.org/issueopen.cfm?articleID=1966> (“To ensure fairness, public health measures must be implemented in a manner that ensures the equitable distribution of associated benefits and burdens.”).

²⁰¹ *Id.*

²⁰² Lawrence O. Gostin, *International Infectious Disease Law: Revision of the World Health Organization's International Health Regulations*, 291 JAMA 2623, 2626 (2004) (emphasis added), available at <http://141.161.16.100/faculty/gostin/>

Fairness focuses on an intervention's target population—which often “[creates] a class of people to which the policy applies.”²⁰³ Gostin argues that this can present a situation in which the group created is either overinclusive or underinclusive.²⁰⁴ Underinclusive policies “reach[] some but not all persons it ought to reach,” while a policy becomes overinclusive “if it extends to more people than necessary to achieve its purposes.”²⁰⁵ This concept is also echoed by the court in *Jew Ho v. Williamson*.²⁰⁶ There, the quarantine did not *feel* right; it overburdened San Francisco's Chinese community while leaving others in the city unaffected.²⁰⁷ The SVP framework examined here is both overinclusive and underinclusive—creating classes of individuals subject to commitment while wholly exempting others without reason.

The most obvious breaches of fairness in the SVP commitment context include the trigger distinctions made by Wisconsin and Virginia. First, in addition to being indefensible and unverifiable from a scientific perspective, the disparate treatment of those found incompetent to stand trial and those found not guilty by reason of insanity seems particularly unjust: Using the time *when* the break from rationality occurred oversimplifies the calculation of an individual's future likelihood of dangerousness. To be exposed to potentially lifelong commitment—without scientific justification—that turns on such a serendipitous occurrence is clearly and fundamentally unfair.

documents/InternationalInfectiousDiseases.pdf (arguing the draft revised International Health Regulations should be structured to reflect fair public health procedures).

²⁰³ GOSTIN, *supra* note 165, at 69; see also James G. Hodge, Jr., *Bioterrorism Law and Policy: Critical Choices in Public Health*, 30 J.L. MED. & ETHICS 254, 259 (2002) (“Interventions that confine individuals must be well-targeted to accomplishing public health objectives. Thus, interventions that are over- or underinclusive may be constitutionally impermissible if they deprive individuals of liberty or equal protection without justification.”); Ben Horowitz, Comment, *A Shot in the Arm: What a Modern Approach to Jacobson v. Massachusetts Means for Mandatory Vaccinations During a Public Health Emergency*, 60 AM. U. L. REV. 1715, 1731 (2011) (noting that a vaccination mandate must avoid “underinclusiveness and overinclusiveness issues”).

²⁰⁴ GOSTIN, *supra* note 165, at 69.

²⁰⁵ *Id.*

²⁰⁶ 103 F. 10, 20–21 (N.D. Cal. 1900).

²⁰⁷ *Id.* at 13.

The California distinction also fails to meet the fairness standard. If the goal of the SVP statutes is to prevent future sexually violent offenses by detaining those most likely to commit those offenses in the future, then wholly excluding anyone not currently incarcerated from the state's SVP commitment scheme is misguided. The relatively innocuous and unimportant fact of *when* the individual was convicted of his or her sexually violent crime—those more recently convicted are much more represented in the state's SVP regime—may have very little to do with how dangerous the individual will be in the future.²⁰⁸ Fairness is not satisfied by ease of application. Even if California can prove that those who are currently in custody may be more dangerous than those meeting all other criteria but who are not in custody—perhaps because their crimes were either more recent or more severe—the fact that so many dangerous sexual offenders are exempt from the scheme may make its application unfair on an individual level.

Worse, California's Supreme Court justifies this exclusion by finding that those in prison "have yet to demonstrate their capacity or willingness to keep their conduct within the bounds of the law and to break old criminal habits."²⁰⁹ But this statement is not a reason to limit the California SVP statute to those currently incarcerated; instead, it is the *result* of California's decision to limit SVP commitment to those in jail. It is undisputed that those who are incarcerated have not proven themselves "willing" to keep their conduct within the bounds of the law: how could they? The state waits to see if released individuals—both those individuals released in the years preceding the SVP passage and those released perhaps due to recent well-documented overcrowding problems—have adequately broken "old criminal habits."

The California distinction in the SVP context could be analogized to a hypothetical quarantine situation to further prove the point. In a scenario resembling California's SVP triggering distinction, imagine California's public health officials being faced with a potentially devastating pandemic of smallpox.

²⁰⁸ The average sentence of sex offenders in California is 45.1 months. See Jason Peckenpaugh, Controlling Sex Offender Reentry: Jessica's Law Measures in California 11 (Jan. 27, 2006), available at http://www.law.stanford.edu/sites/default/files/child-page/266901/doc/slspublic/JPeckenpaugh_06.pdf.

²⁰⁹ *In re Smith*, 178 P.3d 446, 483 (Cal. 2008).

In order to address the public health concern, the state's public health officials order the quarantine of individuals likely to transmit smallpox—but only those who have tested positive for smallpox who are currently hospitalized. The public health officials would argue that those who are hospitalized and shown to have the disease have not proven that they can safely be let out of the hospital.

Of course, these individuals have been proven to have the disease—and likely contracted it recently. In this regard, they would resemble SVPs in California who have been convicted of a sexually violent offense and are currently incarcerated. But in the face of public safety concerns, is this fair? Should not others, who have yet to arrive at the hospital, but who are developing symptoms, also be scrutinized? Notice that this is true even if those currently hospitalized can be shown to be especially contagious. Under a PHR, the fact that the state has declared that SVPs have created an emergency, and then responds by wholly exempting a large number of potentially detainable individuals from its ambit, makes California's SVP triggering behavior look like nothing more than the state's attempt to lengthen the prison sentences of those recently convicted.

V. PROPOSED SOLUTIONS

The preceding PHR calls into question the validity of current SVP statutes. In particular, the "trigger mechanisms" fail to comply with public health's requirements for preventive detention. Therefore, SVP statutes must be reworked to allow them to function consistently with the four-part test described above. One method would be to allow preventive detention of *all* individuals who are "mentally abnormal" and who cannot control their behavior such that they are likely to be dangerous.

Although this is theoretically satisfying and would quell the concerns raised by this PHR, it would likely prove unpopular and unworkable in practice because of societal fear of over-commitment,²¹⁰ which has also been referred to as the "Minority Report"²¹¹ concern.²¹² This idea serves to counsel against large-

²¹⁰ Interestingly, and the topic of further study, that conclusion is uncomfortable in this context; meanwhile, quarantine—a civil detention scheme that theoretically can apply to *everyone*—does not seem to evoke the same fear.

²¹¹ See MINORITY REPORT (20th Century Fox 2002).

scale pre-crime commitment—a concern which would be exacerbated by universal application of SVP statutes based upon the two remaining criteria. This concern may be best characterized by Justice Charles K. Wiggins of the Washington Supreme Court, in a dissent in *In re Detention of Danforth*—a case in which the Washington Supreme Court upheld the SVP commitment of Robert Danforth, a “64-year-old, mildly retarded blind man.”²¹³

We recognize that there is a risk that Danforth might perpetrate a sexually violent crime. But Danforth is not alone in presenting such a risk. We cannot lock up every person who presents a risk of future violent crime. Indeed, we recoil from the thought of confining innocent men and women simply because a knowledgeable objective observer is reasonably apprehensive that man or woman will commit a crime We should assist Danforth’s efforts to control his urges instead of imprisoning him.²¹⁴

In addition to its controversial personal effect on a large number of individuals, such a system would require more resources, more attention, and more standards. If every citizen was eligible for SVP commitment, courts would have to develop

²¹² See *Oregon v. R.D.G.*, 66 P.3d 560, 569 (Or. Ct. App. 2003) (Wollheim, J., concurring) (“In a recent movie, *Minority Report*, Washington, D.C. residents could be convicted for *pre-crimes* they were about to commit As a society that values freedom, we must avoid preventive detention and avoid imprisoning individuals for their beliefs.”) (emphasis in original); *In re Detention of Danforth*, 264 P.3d 783, 800 (Wash. 2011) (Wiggins, J., dissenting) (“Fortunately, we will never have PreCrime police so long as our courts require the State to confine state action to due process of law, requiring a present showing of dangerousness before a suspect can be civilly committed for crimes not yet committed.”); see also Suzanne L. Nelson, Note, *The Expansion of New Jersey’s DNA Database Statute: The Inclusion of All Convicted Felons*, 29 SETON HALL LEGIS. J. 221, 246 (2004) (arguing that New Jersey should not expand its DNA database to include arrestees because “[a]ny further expansion will begin to implicate the ‘Minority Report’ scenario”).

²¹³ *Danforth*, 264 P.3d at 794 (Wiggins, J., dissenting). Mr. Danforth had previously been convicted of sex offenses against children, including indecent liberties and rape. *Id.* at 786. Danforth made repeated attempts to get himself civilly committed to a psychiatric facility. *Id.* at 794–95. After being “verbally harassed two to three times a month” in which “people would threaten to burn his house down,” his house “was pelted with raw eggs and someone placed a bag containing feces on his doorstep, lit the bag on fire, knocked on his door, and ran away.” *Id.* at 795. He then visited the sheriff’s office to try and stop the harassment, during which he told detectives that he “feared that he was going to re-offend” and that he was “fighting his best to not re-offend.” *Id.* As a result, the state of Washington sought to have him detained as an SVP.

²¹⁴ *Id.* at 800.

standards to determine how individuals would be committed, to evaluate the merit of the petition, and to govern the growing numbers of detained individuals. Given a state's limited resources, this is not likely to be a viable solution to the concerns presented in this review. Plus, it seems viscerally unpalatable; states seem to be willing to go relatively far in this area but not *that far*.

Nevertheless, the application of public health principles to the SVP regime—and its inconsistent triggers—clearly demonstrates that the framework, as currently assembled, cannot stand untouched. As the “universal application” solution is obviously not available, it appears that two solutions remain in which (1) the SVP framework would be scrapped, or (2) the SVP framework would be changed incrementally to incorporate the concerns raised by this review. Both potential solutions are addressed below.

A. *Scrapping the Framework*

First, one could apply the rationale observed in a recent federal court case addressing the triggers under the equal protection clause.²¹⁵ This decision found that if the federal government, under the Adam Walsh Act, could not rationally and fairly apply this detention to everyone, then it should not be allowed to apply it to anyone.²¹⁶ On a related point, the argument could also note that the threat provided by SVPs has not been recognized by a majority of states, and as such, the threat is not sufficient to support a public health detention regime.

Under the principles raised in this analysis, this approach provides the cleanest theoretical solution. If a detention scheme cannot demonstrate necessity, proportionality, verifiability, and fairness, then it should be eliminated. Surely if a quarantine failed to take the four principles into consideration, it would be invalidated. A SVP statute failing to meet those same standards should meet the same fate.

²¹⁵ See *Timms I*, 799 F. Supp. 2d 582, 591 (E.D.N.C. 2011).

²¹⁶ See *id.*

To make up for the potential vacuum created by eliminating the entire SVP enterprise, states could seek to place longer prison sentences for sexually violent offenses in its place.²¹⁷ This would be an acceptable development; if the state were to decide to treat this harm strictly through criminal punitive channels, none of the civil concerns presented here would apply. It would still allow the state to incapacitate individuals it thought were the most dangerous among us and do it at a much lower cost than SVP commitment.²¹⁸ Finally, for those diagnosed with a mental disorder, traditional mental health civil commitment would continue to be available as an alternative.

B. Incremental Improvement and Tiered Commitment

Besides eliminating SVP statutes, to adequately implement changes that would address problems raised by this analysis, states could “expand” and “contract” their SVP commitment schemes. First, the state would expand its SVP framework so it would apply across the current, poorly-supported discontinuous classes of sex offenders, thereby addressing a problem currently experienced in SVP commitment: inexplicable eligibility for some and exclusion for other similarly-situated individuals. The future framework would also be contracted, applying only to those within this broader class of candidates who would be most likely to threaten harm by ratcheting up the state’s required showing. In addition to a simultaneous expansion and contraction, procedural protections would be tweaked to better align the SVP framework with principles consulted in this PHR.

Specifically, in order to fill the gaps in New Jersey, Wisconsin, Virginia, and California, SVP statutes would first have to apply to a wider range of individuals. New Jersey would need to apply its statute to those who have not been convicted nor ever charged; Wisconsin would have to extend its coverage to those found incompetent to stand trial; Virginia’s statute would be widened to apply to those acquitted by reason of insanity; and California would have to eliminate its “current custody” requirement.

²¹⁷ This suggestion has been made recently in the context of the Adam Walsh Act. See Ryan K. Melcher, *There Ain’t No End for the “Wicked”*: Implications of and Recommendations for § 4248 of the Adam Walsh Act After *United States v. Comstock*, 97 IOWA L. REV. 629, 661 (2012).

²¹⁸ See *supra* text accompanying note 10.

After eliminating the distinctions and applying the statutes to all individuals, states could rework their statutes to place individuals into three different groups. The group that would be least likely to commit sexually violent acts could be made up by those who either have (1) never been charged with, or (2) been factually acquitted of—not including those acquitted by reason of insanity—a sexually violent offense (“Tier 1”). Those in the intermediate level would feature those (1) convicted of, (2) found not guilty—by reason of insanity—of, or (3) incompetent to stand trial for *one* sexually violent offense (“Tier 2”). Finally, those most likely to be sexually dangerous could consist of those (1) convicted of, (2) found not guilty by reason of insanity of, or (3) incompetent to stand trial for *multiple* sexually violent offenses (“Tier 3”). Tier 3 would include individuals like Gary Minnix.²¹⁹

This tiered system would differentiate individuals by levels of risk. As a result, the resulting commitment scheme would be fairer and more proportional in application. Under this scheme, the state would apply comparatively more coercive detention to those more dangerous and less coercive detention to those less dangerous. Instead of the current result, where all individuals meeting the standards are branded SVPs and face indefinite detention, under this new narrowly-tailored framework, quarantine’s least restrictive alternative principle would likely be satisfied.

For example, within this new framework, the state’s level of coercion would track the individual’s risk level. Tier 1 individuals would not be automatically committed to a state facility. Instead, non-institutional constraints, such as ankle bracelets or intensive parole supervision, should be used. For those in Tier 2, non-institutional constraints should be an option, but not necessarily a presumption. Instead, individuals could be offered limited release for strictly monitored periods; upon an additional showing that the individual poses a low risk to the public, these individuals could also potentially take up heavily-monitored residence outside of the institution. Finally, for those in Tier 3, concerns for public safety would weigh especially heavily. Thus, Tier 3 detention may closely resemble current SVP detention.

²¹⁹ See *supra* text accompanying notes 1–6.

Once the individuals are committed as either Tier 1, 2, or 3 SVPs, the state could then tailor treatment regimens to the applicable group. The tiers would not be static: States could implement a system in which individuals initially committed as Tier 3 individuals could progress to achieve Tier 2 status, with the same movement available for those in Tier 2 seeking Tier 1 status.

Procedurally, the state could make additional changes to achieve more verifiable and fair detention standards. First, a state could force the fact-finder to find both criteria—mental abnormality and lack of control making the individual dangerous—beyond a reasonable doubt.²²⁰ Second, instead of an annual commitment period, the state could apply a much shorter review period—perhaps in three- or six-month increments. As in the quarantine context, it is vital for the state to accurately know—based upon accurate current conditions—who is the most likely to be dangerous, in order to justify continued detention, and complete this review every twelve months. This twelve-month interval, although held constitutional in *Hendricks*,²²¹ may not be enough for the state to be sufficiently aware of the threat posed by an SVP.

²²⁰ Although not a major focus of this Article, the states examined in this analysis apply different standards before branding an individual an SVP. Wisconsin and California require findings beyond a reasonable doubt. See *Cooley v. Superior Court*, 57 P.3d 654, 663 (Cal. 2002) (“The civil commitment can only commence if, after a trial, either a judge or a unanimous jury finds beyond a reasonable doubt that the person is an SVP.”); *In re Williams*, 637 N.W.2d 791, 796 (Wis. Ct. App. 2001) (applying beyond a reasonable doubt standard for SVP commitment). New Jersey and Virginia apply a clear and convincing evidence standard. See N.J. STAT. ANN. § 30:4-27.32(a) (1999) (“If the court finds by clear and convincing evidence that the person needs continued involuntary commitment as a sexually violent predator, it shall issue an order authorizing the involuntary commitment of the person.”); VA. CODE ANN. § 37.2-908(c) (2009) (“The court or jury shall determine whether, by clear and convincing evidence, the respondent is a sexually violent predator.”); VA. CODE ANN. § 37.2-910(c) (2011) (“The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by clear and convincing evidence that the respondent remains a sexually violent predator.”); *In re Commitment of J.M.B.*, 964 A.2d 752, 757 (N.J. 2009) (“[T]he State must demonstrate by clear and convincing evidence that the individual poses a threat to the health and safety of others if he or she were found . . . to have serious difficulty in controlling his or her harmful behavior such that it is highly likely that the individual will not control his or her sexually violent behavior and will reoffend.” (internal quotation marks omitted)).

²²¹ See *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997) (noting that the commitment court’s obligation of annual review was one of the “number of . . . procedural safeguards” secured by the Kansas SVP statute).

Finally, in addition to a jury or judge making a finding that the individual should be committed—or recommitted—as an SVP, a panel of three *anonymous* mental health professionals could also serve as decision-makers. Under this scheme, SVP commitment—under any of the three tiers—would *only* result with both the court's positive verdict *and* the positive decision of a majority of the panel of mental health professionals. As seen in the quarantine context, medical personnel—public health officials, physicians, and ethicists—make decisions governing the parameters of state intervention. Likewise, in this health-based preventive commitment scheme, the state should allow the professionals to decide as well, rather than judges or juries alone. Besides further injecting verifiability into the scheme, this change seeks to change the current incentive that exists for courts to recommit individuals even when they may not be the most deserving of it.²²²

CONCLUSION

Now more than a decade and a half after *Kansas v. Hendricks*, the SVP framework is still laden with disparate entrance criteria that inhibit and prevent the full goals of SVP statutes from being realized. These distinctions open the doors to a PHR based upon ethics and principles borrowed from quarantine—focused on necessity, proportionality, verifiability, and fairness. To be sure, both SVP commitment and involuntary quarantine seek to address public health and safety “emergencies” by allowing for the detention of society's most dangerous individuals in an effort to prevent harm. Given the similarities between the two schemes, an application of public health principles to SVP statutes would be expected to prove unremarkable.

But after performing this analysis, contrary to Justice Thomas' suggestion in *Kansas v. Hendricks*, the SVP statutes' limiting criteria do not survive a PHR; they do not conform to ethical and policy standards that govern and guide quarantine implementation. This conclusion forces states to choose between one of two courses of action. Either state legislatures should eliminate the statutes entirely or should push for incremental changes that would ensure that individuals affected by SVP

²²² See Winick, *supra* note 70, at 543–44.

detention are governed by a scheme that meets public health standards. Unfortunately, however, as it currently stands, the SVP framework is nothing more than an unprincipled indefinite quarantine for the so-called dangerous.

