

# Respite for Tantalus: Illinois’s Sexually Violent Persons Commitment Act – Due Process in (In)Action

BRIAN E. WILSON\*

*Under current Illinois law, criminals who have been adjudicated guilty of committing certain types of sex offenses can, at any point during their incarceration, be involuntarily committed indefinitely. They are sent to the Treatment and Detention Facility in Rushville, Illinois, where they are to undergo treatment for various disorders, and are not released until the Department of Human Services determines they no longer present a danger of re-offending. While this is the intent of the law, in practice this secondary commitment is violating these offenders’ Due Process rights.*

*This Comment examines the Sexually Violent Persons Commitment Act in Illinois; it’s background, what the Act allows, and how it is operating in practice. It compares Illinois’s Act with those of other states, shows why the Act in Illinois is violating the resident’s Due Process rights, and offers some solutions for the State to apply to make the Act conform to the law so the State is no longer violating the U.S. Constitution and U.S. Supreme Court precedent.*

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*I cannot say whether things will get better if we change;  
what I can say is they must change if they are to get better.<sup>1</sup>*

- Georg C. Lichtenberg

## I. INTRODUCTION

In ancient Greek mythology, Tantalus was punished by the gods for cutting up his son Pelops, putting him in a stew, and serving it to the gods at a banquet.<sup>2</sup> In retribution, the gods sent him to Tartarus, the deepest place in the underworld, where he suffered from eternal thirst and hunger.<sup>3</sup> In Tartarus, he stood in a pool of water, but every time he bent down to slake his thirst, the water would recede.<sup>4</sup> Every time he reached for fruit from the tree overhead, wind would blow the branches away.<sup>5</sup> His name and punishment

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1. WISDOM QUOTES, <http://www.wisdomquotes.com/quote/georg-c-lichtenberg-2.html> (last visited Oct. 20, 2016).

2. A. H. PETISCUS, THE GODS OF OLYMPOS, OR MYTHOLOGY OF THE GREEKS AND ROMANS 163 (Katherine A. Raleigh trans., Paternoster Square, T. Fisher Unwin 20th ed.) (1892).

3. *Id.*

4. *Id.*

5. *Id.*

have become synonymous with enticement without gratification (to be “tantalized”).<sup>6</sup>

Much like this tragic mythological figure, those involuntarily committed under Illinois’s Sexually Violent Persons Commitment Act (hereinafter the “SVP Act” or the “Act”) always have the hope of being released from the Treatment and Detention Facility (hereinafter “TDF”) located in Rushville, Illinois, but the reality of getting conditional or complete release is something far more elusive than what is constitutionally allowed to satisfy the Due Process Clause under the Fifth and Fourteenth Amendments.<sup>7</sup> As a result, how Illinois is applying its Sexually Violent Persons Commitment Act is violating the constitutional rights of those committed under it.

In Part II, I will provide a brief background of the origins of commitment acts passed by legislatures in response to sexually violent offenders. Next, I will introduce Illinois’s Act, examine the legislative reasoning for its passing, what the Act says, and the nature of the commitment and conditional or full release under the Act. In Part IV, I will examine the language of the SVP Acts of New York, Virginia, and Wisconsin and how well they are working in terms of release and recidivism from commitment. Following this, I will examine the SVP Acts of Minnesota and Missouri, and why both of these have recently been held by federal courts as violating Due Process. In Part VI, I will show why Illinois’s SVP Act, as it has been and is being applied, also violates the Due Process rights of those committed under the Act. Next, I will address the continued need for an SVP Act in Illinois, and in Part VIII, I will offer some suggestions as to how the State can resolve the issues raised so that it is more in conformity with the Due Process rights of those committed, including mandatory conditional release after a certain age, a reemphasis on conditional release given the conditions, a reevaluation of the process of granting conditional release, offering more cost-effective solutions, and how to fix the bias of evaluations for release. I conclude this Comment, in Part IX, by reemphasizing the need for the State to address these concerns.

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6. WEBSTER’S THIRD NEW INT’L DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (Philip Babcock Grove, editor in chief and the Merriam-Webster editorial staff, Merriam-Webster Inc., Springfield Massachusetts 1993). “[T]o tease or torment by presenting something to the view and exciting desire but continually frustrating the expectations by keeping it out of reach.”

7. 725 ILL. COMP. STAT. ANN. 207/ 1-99 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

## II. AN INTRODUCTION TO SVP LAWS AND DUE PROCESS

### A. WASHINGTON STATE

Washington was the first state to pass a sexually violent persons (hereinafter “SVP”) law in 1990.<sup>8</sup> In response to public outcry from two brutally violent attacks, one by Earl K. Shriner,<sup>9</sup> and the other by Gene Raymond Kane<sup>10</sup>, the then Governor of Washington – Booth Gardner – instituted a task force to determine what changes should be made to the current commitment laws in order to prevent these types of tragedies from occurring.<sup>11</sup> The task force’s most radical and controversial recommendation was for a new commitment law that would authorize expanded authority and grant the state the needed power to commit people like Shriner and Kane past the maximum prison sentence.<sup>12</sup> Prosecutors would have the ability to initiate civil commitment proceedings “for a person whose sentence for a sexually violent offense has expired or is about to expire.”<sup>13</sup> Based on these ideas set forth by the task force, the Washington legislature unanimously passed the first SVP Act.<sup>14</sup> Many states quickly followed, including Arizona, Kansas, Wisconsin, and Illinois.<sup>15</sup>

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8. Roxanne Lieb, *Washington’s Sexually Violent Predator Law: Legislative History and Comparisons With Other States*, WASH. STATE INST. FOR PUB. POLICY (Dec. 1996), [http://www.wsipp.wa.gov/ReportFile/1244/Wsipp\\_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1244/Wsipp_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States_Full-Report.pdf).

9. In 1987, the State was unable to commit Shriner under the current laws, despite his having a long history of kidnapping and sexual assaults and being mentally challenged. *Id.* at 1. Two years after his release, he raped, strangled, and sexually mutilated a seven-year-old boy. *Id.*

10. Gene Kane, who the State also failed to commit, had been convicted of attacking two women; while on work release, he kidnapped and murdered another woman. *Id.*

11. *Id.*

12. Roxanne Lieb, *Washington’s Sexually Violent Predator Law: Legislative History and Comparisons With Other States*, WASH. STATE INST. FOR PUB. POLICY 1-2 (Dec. 1996), [http://www.wsipp.wa.gov/ReportFile/1244/Wsipp\\_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/1244/Wsipp_Washingtons-Sexually-Violent-Predator-Law-Legislative-History-and-Comparisons-With-Other-States_Full-Report.pdf).

13. *Id.* at v.

14. *Id.* at 1.

15. *A Profile of Civil Commitment Around the Country*, N.Y. TIMES (Mar. 3, 2007), [http://www.nytimes.com/imagepages/2007/03/03/us/20070304\\_CIVIL\\_GRAPHIC.html](http://www.nytimes.com/imagepages/2007/03/03/us/20070304_CIVIL_GRAPHIC.html) (Arizona passed their SVP Act in 1995; Kansas in 1994; Wisconsin in 1994; Illinois in 1997).

## B. *KANSAS V. HENDRICKS*

The first and biggest legal challenge to SVP Acts was the case of *Kansas v. Hendricks*.<sup>16</sup> Leroy Hendricks had a long history of child molestation, including against his stepchildren.<sup>17</sup> Hendricks became the first person in Kansas to be committed under their Act, and the case went to the United States Supreme Court after the Supreme Court of Kansas overturned his commitment based on a substantive Due Process issue requiring a finding of a mental illness.<sup>18</sup>

This landmark case challenged Kansas's SVP Act and the Court held that the Act did not violate Double Jeopardy or Due Process.<sup>19</sup> In a five-four decision, the Supreme Court ruled that Kansas's SVP Act was constitutional.<sup>20</sup> The Supreme Court found that Double Jeopardy was a non-issue, since the Act was civil in nature (and thus was not additional punishment). The Court also found that the Act did not violate Due Process because the Act linked past sexually violent crimes with the danger of committing future crimes due to pre-existing mental abnormality, which is consistent with previous types of commitment laws.<sup>21</sup> In its decision, the Court gave some very clear warnings on when involuntary commitment under such an Act would be considered in violation of the Constitution – such as when the institutionalization becomes punitive.<sup>22</sup> Further, the Court noted that the State “has an obligation to provide treatment” to committed persons.<sup>23</sup>

The Court stated that “freedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process Clause from arbitrary

16. *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

17. Wray Herbert, *Predicting Sexual Crime: Are the Experts Biased?*, ASS'N FOR PSYCHOLOGICAL SCI. (Feb. 22, 2013), <http://www.psychologicalscience.org/index.php/news/were-only-human/predicting-sexual-crime-are-the-experts-biased.html>.

18. *See Hendricks*, 521 U.S. at 350.

19. *Id.* Hendricks also made an *ex post facto* argument, which will not be considered here as being beyond the scope of this Note, except to state that this argument also failed.

20. *Id.* at 373.

21. *Id.* at 356-60, 361-69. Hendricks's specific argument was that the Act called for a finding of “mental abnormality,” which was statutorily different from other commitment laws that called for a finding of a “mental illness.” *Id.* at 359. An additional argument was that the term “mental abnormality” was not an accepted term in the scientific community. *Id.* at 358-59. The Supreme Court disagreed with this argument, noting that it is up the individual States on what language they are to use and how they are to define those terms. *Id.*

22. *Id.* at 363. The Court noted that the conditions are “essentially the same . . . as any involuntarily committed patient in the state mental institution” and that the person committed is not “subject to the *more* restrictive conditions placed on state prisoners” *Id.* (emphasis added). If commitment became punitive as opposed to therapeutic in nature, it would violate Double Jeopardy.

23. *Kansas v. Hendricks*, 521 U.S. 346, 367 (1997). (“Thus . . . the State has a statutory obligation to provide ‘care and treatment for [persons adjudged sexually dangerous] designed to effect recovery.’”) (quoting *Allen v. Illinois*, 478 U.S. 364, 369 (1986)).

governmental action . . . .”<sup>24</sup> But the Court went on to state that while liberty under the Due Process Clause is not absolute, it is required that there be a “proof of dangerousness . . . [and] proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality’” to take it away.<sup>25</sup> The Supreme Court ruled that Kansas’s Act satisfied these requirements, but if the state involuntarily commits someone, it has to be due to a mental “disorder” as well as a showing of dangerousness—without both, the state violates the Due Process Clause.<sup>26</sup>

An additional warning was given by Justice Anthony M. Kennedy in his concurring opinion, stating that:

If the object or purpose of the Kansas law had been to provide treatment but the treatment provisions were adopted as a sham or mere pretext, there would have been an indication of the forbidden purpose to punish . . . [i]f, however, civil commitment were to become a mechanism for retribution or general deterrence . . . our precedents would not suffice to validate it.<sup>27</sup>

Justice Kennedy clarified that a state seeking commitment for an SVP must thread a very small needle: it must show that the person to be committed has been convicted of a sexually violent offense, that he has a mental disorder, that he is also dangerous, and that the commitment is not meant to continue punishment for a crime. If any part of this breaks down, the State has violated the person’s Due Process rights.<sup>28</sup>

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24. *Id.* at 356 (quoting *Foucha v. Louisiana*, 504 U.S. 71 (1992)).

25. *Id.* at 358.

26. The standard was clarified in *Kansas v. Crane*, 534 U.S. 407 (2002). In this case, Justice Stephen G. Breyer stated that the showing of dangerousness must not be absolute, but rather “proof of serious difficulty in controlling [the sexually violent] behavior” in order to satisfy substantive Due Process. *Id.* at 413. This leads to the obvious conclusion that if the person’s ability to control the behavior is less than “seriously difficult,” then they cannot be committed.

27. *Hendricks*, 521 U.S. at 371-73.

28. Leroy Hendricks was eventually released in 2005, eleven years after his commitment began. See Eric Weslander, *Notorious Molester Now in Rural Lawrence*, LAWRENCE JOURNAL WORLD (June 3, 2005), [http://www2.ljworld.com/news/2005/jun/03/molester/?sexual\\_predator\\_law](http://www2.ljworld.com/news/2005/jun/03/molester/?sexual_predator_law). At the time of his release, he was over seventy years old, was confined to a wheelchair due to complications with diabetes, and had suffered a stroke. *Id.* Despite this, he was still subject to twenty-four-hour monitoring. *Id.*

### III. AN INTRODUCTION TO ILLINOIS'S SVP ACT

*The disappearance of a sense of responsibility is the most far-reaching consequence of submission to authority.*<sup>29</sup>

- Stanley Milgram

#### A. THE LEGISLATIVE HISTORY OF ILLINOIS'S SEXUALLY VIOLENT PERSONS COMMITMENT ACT

In 1997, the Illinois Senate considered adopting an SVP Act.<sup>30</sup> The sponsor of Senate Bill 6, Senator Christine Radogno, told her fellow senators that “[c]urrently civil commitment can be used as an alternative to criminal sentencing. This legislation . . . will allow for both criminal sentencing *and then* civil commitment.”<sup>31</sup> She noted that the Bill was “[an attempt] to address the fact that many sexually violent persons are extremely difficult to rehabilitate” and tend to be repeat offenders.<sup>32</sup> Senator Radogno concluded her state-

29. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 8 (Harper & Row 1974).

30. S.B. 6, 90th Ill. Gen. Assemb. Reg. Sess., Transcript of Senate Debate 30 (Mar. 18, 1997) (statement of Sen. Radogno), <http://www.ilga.gov/senate/transcripts/strans90/ST031897.pdf>.

31. *Id.* at 30 (emphasis added).

32. *Id.* The idea that “many sexually violent persons . . . tend to be repeat offenders” is not supported by the evidence. *See, e.g.*, Matthew R. Durose, Patrick A. Langan & Erica L. Schmitt, *Recidivism of Sex Offenders Released from Prison in 1994*, BUREAU OF JUSTICE STATISTICS 1 (Nov. 2003), <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf> (5.3% of offenders recidivated in the first three years of release); Joseph R. Tatar II & Anthony Streveler, *Sex Offender Recidivism after Release from Prison*, STATE OF WIS. DEP’T OF CORR. 5 (Sept. 2015), <http://doc.wi.gov/Documents/WEB/ABOUT/DATARESEARCH/NOTABLESTATISTICS/Sexual%20Offender%20Recidivism%20Report%209.22.2015%20FINAL.pdf> (showing the three-year recidivism rate at 1.5%, five-year rate at 1.7%, ten-year rate at 4.4%, and fifteen-year rate at 6.0%). A 2013 review of the recidivism risk of Florida SVPs determined the rate was 3.6%. *Van Orden v. Schafer*, 129 F. Supp. 3d 839, n. 3 (E.D. Mo. 2015); R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING & CLINICAL PSYCHOLOGY 348 (Apr. 1998) (in 61 studies that looked at the recidivism rates of 28,972 sexual offenders, it was found that the risk was 13.4% overall); R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis*, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN. 15 (2004), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2004-02-prdctrs-sxl-rcdvsm-pdtd/2004-02-prdctrs-sxl-rcdvsm-pdtd-eng.pdf> (looking at 95 studies and over 31,000 sex offenders, the rate was 13.7% for all types of offenders); Stan Orchowsky & Janice Iwama, *Improving State Criminal History Records: Recidivism of Sex Offenders Released in 2001*, JUSTICE RESEARCH & STATISTICS ASS’N 17 (Nov. 2009), <http://www.jrsa.org/projects/sex-offender-final-report.pdf> (the recidivism risk for new sex offenses were 3.4% in Alaska, 2.3% in Arizona, 3.8% in Delaware, 3.9% in Iowa, 1.8% in New Mexico, 4.0% in South Carolina, 9.0% in Tennessee, and 2.4% in

ments by asking the Senate to pass the Bill so that “[they] can continue working on this concept.”<sup>33</sup> The Bill then went to the House of Representatives, where Representative Tom Dart urged passing the Bill in order to “ensure our streets are more safe” from “people . . . we know are predators, who are going to prey on our children and on adults.”<sup>34</sup> In concluding his remarks, Representative Dart stated that “[t]his is something that is being tried in other states. It’s innovative and it is something that truly gets at the heart of the problem.”<sup>35</sup> The House unanimously passed the Bill and the two proposed amendments.<sup>36</sup>

The day the Bill unanimously passed in the Illinois Senate, the president of the Senate immediately afterwards acknowledged some sixth graders in the gallery, who were visiting on a field trip—just another mundane, ho-hum day in the State Legislature, as it decides to involuntarily commit people based on an “innovative concept.”<sup>37</sup> In 1998, Illinois’s Sexually Violent Persons Commitment Act became effective.<sup>38</sup>

## B. WHAT THE ACT DOES

The Act allows for prosecutors to petition the court to involuntarily commit a person who has committed a sexually violent offense and who suffers from a mental disorder that makes it “substantially probable” that they will “engage in acts of sexual violence.”<sup>39</sup> This allows the State to involuntarily commit someone on the basis that they will commit a *future crime after*

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Illinois). It should be noted that recidivism risk can vary on age of release and if any treatment program has been completed by the offender, and that for purposes of this Note, the percentages for sex re-offenses were used, not recidivism rates of committing general crimes.

33. S.B. 6, 90th Ill. Gen. Assemb. Reg. Sess., Transcript of Senate Debate 30 (Mar. 18, 1997) (statement of Sen. Radongo), <http://www.ilga.gov/senate/transcripts/strans90/ST031897.pdf>.

34. S.B. 6, 90th Ill. Gen. Assemb. Reg. Sess., Transcript of House Debate 167 (May 15, 1997) (statement of Rep. Dart), <http://www.ilga.gov/house/transcripts/htrans90/t051597.pdf> (Representative Dart was a former State’s Attorney and is currently the Sheriff of Cook County).

35. *Id.* at 167-68.

36. *Id.* at 166-67. The first amendment to the Bill simply created the Act, while the second amendment clarified some language to ensure the commitment proceedings were civil in nature. Other than these, there were no debates on either the House or the Senate floor regarding the Bill.

37. S.B. 6, 90th Ill. Gen. Assemb. Reg. Sess., Transcript of Senate Debate 25 (May 21, 1997) (statement of Sen. Watson), <http://www.ilga.gov/senate/transcripts/strans90/ST052197.pdf>.

38. 725 ILL. COMP. STAT. ANN. 207/1 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

39. 725 ILL. COMP. STAT. ANN. 207/5(f) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

the person has already served prison time for a sexually violent crime.<sup>40</sup> The Department of Corrections (hereinafter the “DOC”), will send to the State’s Attorney’s Office of the county where the offender was convicted notice that the offender will be considered for commitment under the Act “not later than 6 months prior to the anticipated release” from incarceration.<sup>41</sup> The State’s Attorney’s office in turn notifies the Attorney General’s office. Then, either office files a petition within three months of release from the DOC.<sup>42</sup> This petition by the State must be filed within thirty days of release from incarceration.<sup>43</sup> So, under the Act, a person can be found guilty of committing a sexually violent offense, be sentenced to ten years in prison, serve nine years and nine months of their full sentence, and then (after being found to be an SVP), be involuntarily committed to the TDF at Rushville for an indeterminate amount of time. Their release from commitment depends upon the Department of Human Services (hereinafter “DHS”), who is in charge of the program.<sup>44</sup> In order to commit a person under the Act, the State must show:

(1) The person has been convicted of a sexually violent offense;

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40. 275 ILL. COMP. STAT. ANN. 207/5(e) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.) (emphasis added). Examples of a sexually violent offense under the Act are criminal sexual assault (720 ILL. COMP. STAT. ANN. 5/11-1.20 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)), aggravated criminal sexual assault (720 ILL. COMP. STAT. ANN. 5/11-1.30 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)), predatory criminal sexual assault of a child (720 ILL. COMP. STAT. ANN. 5/11-1.40 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)), criminal sexual abuse (720 ILL. COMP. STAT. ANN. 5/11-1.50 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)), aggravated criminal sexual abuse (720 ILL. COMP. STAT. ANN. 5/11-1.60 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)), and indecent solicitation of a child (720 ILL. COMP. STAT. ANN. 5/11-6 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.)). There are many more offenses included under the Act that would qualify as a sexually violent crime. Qualifying offenses can vary widely; recently in Massachusetts, the state tried (and failed) to commit a 55-year-old man under their SVP Act for being a habitual flasher. See Andrew Crouch, *Supreme Judicial Court Rejects Civil Commitment for Exhibitionist*, BOS. SEX OFFENDER LAW REPORT (Sept. 17, 2011), <http://bostonsexoffenderlaw.com/2011/09/17/supreme-judicial-court-rejects-civil-commitment-for-exhibitionist/>.

41. 725 ILL. COMP. STAT. ANN. 207/9 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

42. 725 ILL. COMP. STAT. ANN. 207/15 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.). Typically, this is done by the Attorney General’s office.

43. *Id.*

44. This is one scenario. It is possible that the State can file a commitment petition at any time during the inmate’s incarceration from within ninety days of their scheduled release or, in theory, ninety days after their imprisonment begins. Typically, however, it is not until a substantial amount of time after incarceration has lapsed that the State files the petition.

(4) The person has a mental disorder.

(5) The person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence.<sup>45</sup>

C. COMMITMENT, TREATMENT, AND DISCHARGE UNDER THE ACT

*Abandon hope, all ye who enter here.*<sup>46</sup>

- Dante's Inferno

Once committed to the TDF, the SVP is to remain committed for "control, care, and treatment" until he or she is no longer found to be a sexually violent person.<sup>47</sup>

In theory, once committed under the statute, the SVP is to undergo treatment for their mental disorder(s), which typically include some sort of sexually-based disorder (such as pedophilia), as well as anti-social personality disorder along with some sort of addiction-based disorder (such as alcohol use disorder).

There are various avenues for release from the TDF. First, there is to be an annual report by DHS to the court of the SVP's current mental condition to determine if enough progress has been made to release him or her.<sup>48</sup> Additionally, the SVP can file a petition for conditional release, or the Secretary of Human Services, whose role is fulfilled by the Director of the TDF, can "authorize" the person to file a petition for conditional release if it is found that he or she is no longer an SVP.<sup>49</sup> Full release from the program requires yet another petition.<sup>50</sup> During the petition for release phase, the State has the burden to prove "by clear and convincing evidence" that the person is still an SVP; if the State is successful, the person remains committed to TDF.<sup>51</sup> The

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45. 725 ILL. COMP. STAT. ANN. 207/15(b) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

46. DANTE ALIGHIERI, THE DIVINE COMEDY 5 (Lawrence Grant White trans., Pantheon Books, Inc. 1948).

47. 725 ILL. COMP. STAT. ANN. 207/40(a) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

48. 725 ILL. COMP. STAT. ANN. 207/55(a) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

49. 725 ILL. COMP. STAT. ANN. 207/55-65 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

50. 725 ILL. COMP. STAT. ANN. 207/65 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

51. 725 ILL. COMP. STAT. ANN. 207/60(d) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

court looks at a variety of factors in determining if the resident qualifies for release; however, it is mandated by the Act that the court consider:

(1) the person will be treated by a Department approved treatment provider, (2) the treatment provider has presented a specific course of treatment and has agreed to assume responsibility for the treatment and will report progress to the Department on a regular basis, and will report violations immediately to the Department, consistent with treatment and supervision needs of the respondent, (3) housing exists that is sufficiently secure to protect the community, and the person or agency providing housing to the conditionally released person has agreed in writing to accept the person, to provide the level of security required by the court, and immediately to report to the Department if the person leaves the housing to which he or she has been assigned without authorization, (4) the person is willing to or has agreed to comply with the treatment provider, the Department, and the court, and (5) the person has agreed or is willing to agree to comply with the behavioral monitoring requirements imposed by the court and the Department.<sup>52</sup>

An SVP can petition the court for conditional release over the Director's objections.<sup>53</sup> However, if they have previously filed such a petition, which has been found to be "frivolous or that the person was still an [SVP]," then in subsequent petitions the court can deny the petition *without a hearing*, unless new facts are presented.<sup>54</sup>

Nine years after Illinois's SVP Act took effect, the state had committed 169 people, had conditionally released eighteen, and fully released two people from the program.<sup>55</sup> In 2005, the TDF had committed or detained 228 persons and conditionally released four people.<sup>56</sup> By the next year, there were 271 persons who were committed or detained and six were released. In 2007,

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52. 725 ILL. COMP. STAT. ANN. 207/60(e) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

53. 725 ILL. COMP. STAT. ANN. 207/60-65(b)(1) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

54. 725 ILL. COMP. STAT. ANN. 207/65(b)(1) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.) (emphasis added) (this condition applies only for application of full release from the program).

55. See N.Y. TIMES, *supra* note 15.

56. See N.Y. TIMES, *supra* note 15.

there were 307 committed or detained and the TDF released one.<sup>57</sup> In 2008, there were a total of 342 persons committed or detained, and the TDF released five; in 2009, 361 persons were committed or detained and three were released.<sup>58</sup> Three years later, in 2012, the TDF had 478 residents, and by the next year (2013) there were 519 residents.<sup>59</sup> As of November 2015, the TDF had 561 committed residents.<sup>60</sup> So, over a period of nine years—2006 through 2015—the number of residents at the TDF increased by 390 (roughly forty-four per year). The TDF conditionally releases about three residents per year (2005 through 2007), and in nine years (1998 through 2007) had only released twenty people. Even the Senior Deputy and Chief of Clinical Operations for DHS, in 2013, stated that they “consistently” see forty to fifty new residents per year and only “very few” people are conditionally released.<sup>61</sup> As of 2013, the TDF was set for a \$13 million expansion to increase its ability to house even more SVPs.<sup>62</sup>

In a 2013 report by Michael Bednarz, the Illinois Department of Human Services Forensic Medical Director, and Sharlene Caraway, the TDF Medical Director and Illinois Department of Human Services Associate Clinical Director of the TDF, reported the average age of the residents at the TDF to be forty-nine, with “many in their 70s and 80s.”<sup>63</sup> In addition, since 1998, thirty-two patients had died while they were either a resident of the TDF or while they were on conditional release from the program.<sup>64</sup> As of November 2015, there were 163 residents between the ages of eighteen and forty years

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57. RUSHVILLE TREATMENT AND DETENTION FACILITY, STATE OF ILL. DEP’T OF HUMAN SERVS., LIMITED SCOPE OF COMPLIANCE EXAMINATION 40 (2007), <http://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/DHS/Rushville-TDF/FY07-Rushville-TDF-Comp-full.pdf>. “Detained” is defined as “Residents who are held at the facility based on the court’s preliminary judgment until their case is heard by the court.” *Id.*

58. RUSHVILLE TREATMENT AND DETENTION FACILITY, STATE OF ILL. DEP’T OF HUMAN SERVS., LIMITED SCOPE OF COMPLIANCE EXAMINATION 31 (2009), <http://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/DHS/Rushville-TDF/FY09-DHS-Rushville-TDF-Comp-full.pdf>.

59. STATE OF ILL. DEP’T OF HUMAN SERVS., COMPLIANCE EXAMINATION AND DEPARTMENT-WIDE FINANCIAL AUDIT 58 (2011), <http://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/DHS/FY11-DHS-Fin-Comp-Full.pdf>; *see also*, STATE OF ILL. DEP’T OF HUMAN SERVS., COMPLIANCE EXAMINATION AND DEPARTMENT-WIDE FINANCIAL AUDIT 97 (2013), <http://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/DHS/FY13-DHS-Fin-Comp-Full.pdf>.

60. Response to Freedom of Information Act Request, Illinois Department of Human Services (Nov. 2015) (on file with author) [hereinafter Freedom of Information Request].

61. Jim Whitfield, *More Patients Headed to Rushville Treatment and Detention Center*, KHQA (Feb. 7, 2013, 10:43 PM), <http://khqa.com/news/local/more-patients-headed-to-rushville-treatment-and-detention-center?id=857878>.

62. *Id.* (the plan calls for an additional ninety-six beds).

63. Michael Bednarz & Sharlene Caraway, *Managing End of Life and Age-Related Health Issues in SVP Programs*, at 6, on file with author.

64. *Id.* at 11.

of age; 379 between the ages of forty-one and sixty-five; and nineteen residents between the ages of sixty-six and eighty-five.<sup>65</sup>

#### IV. SUCCESSFUL SVP PROGRAMS

##### A. THE SVP ACT AND TREATMENT IN NEW YORK

Named the “Sex Offender Management and Treatment Act,” New York enacted its program in 2007.<sup>66</sup> The State legislature recognized that there is a risk to society from some sex offenders who have mental “abnormalities” that may require specialized treatment and involuntary commitment.<sup>67</sup> When it appears to the county with jurisdiction that a sex offender will be soon released from prison, it notifies the Attorney General’s office and the Mental Health Commissioner.<sup>68</sup> They send all records to a panel of fifteen people, two of whom must be mental health professionals with experience in the “treatment, diagnosis, risk assessment, or management of sex offenders,” to look at all the information, including “medical, clinical, criminal, and institutional records,” and make a determination of whether or not the person needs to be involuntarily committed.<sup>69</sup> Once this determination is made, the panel informs the Attorney General, who then files a petition to the court to order involuntary commitment.<sup>70</sup> In addition, the Commissioner of Mental Health is to conduct an annual review to see if the resident still presents a danger, and the resident himself can file a petition for conditional release.<sup>71</sup> If it is shown that the individual still presents a danger by “clear and convincing evidence,” the commitment continues.<sup>72</sup>

Since 2007, New York has managed to conditionally discharge 125 people and completely discharge another thirty without any recidivism.<sup>73</sup>

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65. Freedom of Information Act Request, *supra* note 60.

66. N.Y. MENTAL HYG. LAW §§ 10.01-.17 (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

67. N.Y. MENTAL HYG. LAW § 10.01 (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

68. N.Y. MENTAL HYG. LAW § 10.05(b) (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

69. N.Y. MENTAL HYG. LAW §§ 10.05(a), (d) (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

70. N.Y. MENTAL HYG. LAW § 10.06(a) (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

71. N.Y. MENTAL HYG. LAW §§ 10.03(b), 10.09(b), 10.09(f) (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

72. N.Y. MENTAL HYG. LAW § 10.09(h) (McKinney’s, Westlaw through L.2016, chapters 1 to 396).

73. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

## B. THE SVP ACT AND TREATMENT IN VIRGINIA

Virginia enacted its SVP law in 1999.<sup>74</sup> Under their Act, there is a Commitment Review Committee (hereinafter “CRC”), who reports to the Director of the DOC. The CRC evaluates and makes recommendations for involuntary commitment.<sup>75</sup> The committee is comprised of seven people; three full-time DOC employees, three full-time employees of the Department of Behavioral Health and Developmental Services (hereinafter “DBHDS”), at least one of whom “shall be a psychiatrist or psychologist . . . who is skilled in the diagnosis and risk assessment of sex offenders and knowledgeable about the treatment of sex offenders;” and either an assistant or deputy general from the Attorney General’s office.<sup>76</sup> The Director of the DOC conducts monthly reviews of all prisoners who have been convicted of a sexually violent offense, that are set to be released within ten months, and who have been tested and received a certain score on an actuarial test which helps determine the prisoner’s recidivism risk.<sup>77</sup> The Director notifies the CRC, who has an independent expert complete a further analysis of the prisoner.<sup>78</sup> Once this analysis is done, the independent examiner can make the recommendation of commitment, conditional release, or discharge from the DOC.<sup>79</sup> At this point a trial will occur, and if the person is found to be an SVP by clear and convincing evidence, they are handed over to the DBHDS for treatment.<sup>80</sup>

Once committed, the state reviews the resident’s mental health status annually for the first five years, then biannually afterwards.<sup>81</sup> An evaluation is done with recommendations to assist the court in its ruling, and the resident

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74. 1999 Va. Adv. Legis. Serv. 946 (LexisNexis). 1999 Va. ALS 946, 1999 Va. Acts 946, 1999 Va. Ch. 946, 1999 Va. SB 845.

75. VA. CODE ANN. § 37.2-902(a) (West, Westlaw through the end of the 2016 Reg. Sess.).

76. VA. CODE ANN. § 37.2-902(b) (West, Westlaw through the end of the 2016 Reg. Sess.).

77. VA. CODE ANN. § 37.2-903 (West, Westlaw through the end of the 2016 Reg. Sess.). The most commonly used tests for assessment of sex offender risk are the STATIC-99, STATIC-99R, and the STATIC-2002R. The STATIC-99 and STATIC-99R are outdated, but are still widely used. *See, e.g.*, STATIC99, <http://www.static99.org/> (last visited Dec. 14, 2016) (“[The] Static-99/R is the most widely used sex offender risk assessment instrument in the world”).

78. This analysis includes a personal interview, a mental health exam, and a review of all documents by a licensed psychiatrist or psychologist who is not a member of the CRC, and is skilled in sex offender assessments and treatments under VA. CODE ANN. § 37.2-904(b) (West, Westlaw through the end of the 2016 Reg. Sess.).

79. VA. CODE ANN. § 37.2-904(c), (d) (West, Westlaw through the end of the 2016 Reg. Sess.).

80. VA. CODE ANN. § 37.2-908(a), (d) (West, Westlaw through the end of the 2016 Reg. Sess.).

81. VA. CODE ANN. § 37.2-910(a) (West, Westlaw through the end of the 2016 Reg. Sess.).

may be conditionally released based on the court's decision.<sup>82</sup> Either the Commissioner of the DBHDS can petition the court for conditional or complete release from the program, or the resident himself can make the petition once a year.<sup>83</sup> To be conditionally released, the court must find that:

(i) [The resident] does not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need secure inpatient treatment; (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the respondent, if conditionally released, would comply with the conditions specified; and (iv) conditional release will not present an undue risk to public safety.<sup>84</sup>

The court makes this determination based on numerous factors, including the age of the resident, whether he can be effectively monitored to prevent recidivism, if it is reasonably certain he will comply with the release conditions, and if he will not cause "an undue risk to public safety."<sup>85</sup>

Since 1999, Virginia has conditionally released more than one hundred residents after an average commitment time of fifty-four months.<sup>86</sup>

### C. THE SVP ACT AND TREATMENT IN WISCONSIN

In Wisconsin, the agency in charge of the inmate notifies the district attorney as well as the Department of Justice of the qualified prisoner's impending release.<sup>87</sup> At trial, the State must prove beyond a reasonable doubt that the individual is an SVP.<sup>88</sup> Individuals are then placed into the hands of DHS in a secure mental health facility.<sup>89</sup> Wisconsin is unique among the other states examined herein, as by statute the resident is allowed off the

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82. VA. CODE ANN. § 37.2-910(b)-(d) (West, Westlaw through the end of the 2016 Reg. Sess.).

83. VA. CODE ANN. § 37.2-911(a) (West, Westlaw through the end of the 2016 Reg. Sess.) (there is no required judicial review if the resident files the petition).

84. VA. CODE ANN. § 37.2-912(a) (West, Westlaw through the end of the 2016 Reg. Sess.).

85. *Id.*

86. *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 856 (E.D. Mo. 2015).

87. WIS. STAT. ANN. § 980.015 (West, Westlaw through 2015 Act 392, published April 27, 2016) (the notification is within ninety days of the person's discharge).

88. WIS. STAT. ANN. § 980.05(3)(a) (West, Westlaw through 2015 Act 392, published April 27, 2016).

89. WIS. STAT. ANN. § 980.06-980.065 (West, Westlaw through 2015 Act 392, published April 27, 2016).

grounds of the facility, as long as they are under escort—no other state examined for this Note provides such a privilege by *statute*.<sup>90</sup> As with other states, an annual report and review is conducted by the treatment facility and the court.<sup>91</sup> Once committed, the resident may petition for release from the program every twelve months, and can be released if the court finds that:

1. The person is making significant progress in treatment and the person's progress can be sustained while on supervised release.
2. It is substantially probable that the person will not engage in an act of sexual violence while on supervised release.
3. Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available.
4. The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department.
5. A reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release.<sup>92</sup>

In addition, DHS may file an updated record at any time with the court, and the court may also order a re-evaluation at any time.<sup>93</sup>

Since 1994, Wisconsin has conditionally released roughly 150 residents from their SVP program.<sup>94</sup>

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90. WIS. STAT. ANN. § 980.067 (West, Westlaw through 2015 Act 392, published April 27, 2016) (emphasis added).

91. WIS. STAT. ANN. § 980.07(1) (West, Westlaw through 2015 Act 392, published April 27, 2016).

92. WIS. STAT. ANN. § 980.08(1), (4)(cg) (West, Westlaw through 2015 Act 392, published April 27, 2016).

93. WIS. STAT. ANN. § 980.07(3), (7) (West, Westlaw through 2015 Act 392, published April 27, 2016).

94. *See Van Orden v. Schafer*, 129 F. Supp. 3d 839, 856 (E.D. Mo. 2015); *see also Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

So, states can have SVP laws, even ones with very similar language to Illinois's Act, provide meaningful treatment to those committed, and successfully release them back into society.<sup>95</sup> We will now examine some states where, while this has been the intention, in practice they fall far short.

## V. UNSUCCESSFUL SVP PROGRAMS

*The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.*<sup>96</sup>

- Thomas Jefferson

### A. THE SVP ACT AND TREATMENT IN MINNESOTA

Recently, a U.S. District Court judge ruled that Minnesota's SVP Act was unconstitutional.<sup>97</sup> Under Minnesota's SVP Act, a petition is filed with the court to have the offender committed.<sup>98</sup> Once it is determined by "clear and convincing evidence" that the person is a sexually dangerous person, they are committed for an "indeterminate period of time."<sup>99</sup> To be committed to the Minnesota Sexual Offender Program (hereinafter "MSOP"), it must be shown that the person "(1) has engaged in a course of harmful sexual conduct . . . (2) has manifested a sexual, personality, or other mental disorder . . . and (3) as a result, is likely to engage in acts of harmful sexual conduct."<sup>100</sup> A petition for release from the MSOP may be brought by either the resident or the director, and it goes before a special review board.<sup>101</sup> They in turn give their recommendation to the court, which makes the final determination of a

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95. Additionally, as of 2006, Arizona had released sixty-nine persons conditionally and a further eighty-one completely since it enacted its program in 1995, and had only seventy-one residents in their SVP program at that time. *See* N.Y. TIMES, *supra* note 15.

96. Thomas Jefferson, *Letter to The Republican Citizens of Washington County, Maryland, Assembled at Hagerstown on the 6th Instant*, in 8 THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 165 (H.A. Washington ed., Cambridge Univ. Press ed. 2011).

97. *See* Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

98. MINN. STAT. ANN. § 253D.07 (West, Westlaw through the end of the 2016 Reg. Sess.).

99. *Id.*

100. MINN. STAT. ANN. § 253D.02 (West, Westlaw through the end of the 2016 Reg. Sess.).

101. MINN. STAT. ANN. § 253D.27 (West, Westlaw through the end of the 2016 Reg. Sess.).

reduction in custody.<sup>102</sup> By statute, anyone can oppose the petition.<sup>103</sup> The court bases its determination on the recommendation of the special review board to determine whether the person's mental status still requires commitment, and whether discharge will provide adequate safeguards to the public as well as helping the offender be successful.<sup>104</sup> In early challenges to Minnesota's SVP Act, attorneys for the State told the courts at the time that the "MSOP was an approximately thirty-two-month program for 'model patients.'"<sup>105</sup> Since 1994, Minnesota had committed just over seven hundred people to the MSOP, had never fully discharged anyone from the program, and conditionally discharged three.<sup>106</sup>

The residents in MSOP brought a class action suit against the Sex Offender Rehabilitation and Treatment Services, stating that Minnesota's SVP Act is unconstitutional as written and as applied.<sup>107</sup> The judge in this case stated that in order to comply with the very narrow standard outlined in *Kansas v. Hendricks*, the Act must "ensure that individuals are committed no longer than necessary to serve the state's . . . interests."<sup>108</sup> The judge also held that

[c]onfinement under civil commitment at the MSOP is constitutional only if the state determines and confirms that the basis for commitment still exists . . . It is constitutionally mandated that only individuals who constitute a 'real, continuing, and serious danger to society' may continue to be civilly committed to the MSOP.<sup>109</sup>

He went on to note that "[t]he purpose for which an individual is civilly committed to the MSOP is to provide treatment to and protect the public from individuals who are both mentally ill and pose a substantial danger to the public as a result of that mental illness,"<sup>110</sup> and that the State "has failed to demonstrate that . . . [Minnesota's SVP Act] is narrowly tailored to achieve its compelling interests."<sup>111</sup> The judge found that the Act violated this strict

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102. MINN. STAT. ANN. § 253D.28 (West, Westlaw through the end of the 2016 Reg. Sess.).

103. *Id.*

104. MINN. STAT. ANN. § 253D.30 (West, Westlaw through the end of the 2016 Reg. Sess.).

105. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147 (D. Minn. 2015).

106. *Id.* at 1144, 1147.

107. *Id.* at 1144.

108. *Id.* at 1168.

109. *Id.* at 1170 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997)).

110. *See Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1168 (D. Minn. 2015).

111. *Id.*

standard for a number of reasons, one of which was because residents remain committed even though they have “completed treatment, can no longer benefit from treatment, or have reduced their risk below the . . . standard.”<sup>112</sup> Another reason the SVP Act was unconstitutional was that:

[A]lthough treatment is made available, there is no meaningful relationship between the treatment program at the MSOP and discharge from custody. Progression through the phases of treatment at the MSOP has been so slow, for so many years, that treatment has never been a way out of confinement for committed individuals . . . The treatment program has been plagued by a lack of funding, staff shortages, and periodic alterations in the treatment program . . . The overall failure of the treatment program over so many years is evidence of the punitive effect and application of [commitment].<sup>113</sup>

Lastly, the judge also noted that the Act was not narrowly tailored enough because the statute did not “require the state to take any affirmative action, such as petition for reduction of custody, on behalf of individuals who no longer satisfy the criteria for continued commitment.”<sup>114</sup> This results in a “fatal flaw” and a “punitive effect . . . contrary to civil commitment.”<sup>115</sup> Nor did the statute give any judicial bypass mechanism in the event of an emergency or a way for a resident to obtain release in a reasonable time period; not even a habeas corpus petition was considered fast enough in the judge’s opinion.<sup>116</sup>

Minnesota must now make “substantial changes” to their SVP program.<sup>117</sup> The state must conduct a re-evaluation of all residents and see who qualifies for conditional release, and place remaining residents into the proper treatment phase.<sup>118</sup> This will surely cost the state a vast sum now that

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112. *Id.* at 1171.

113. *Id.* at 1172.

114. *Id.* at 1169.

115. *See Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1169 (D. Minn. 2015) (citing *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997)). There were additional reasons the court found, but those reasons will not be explored in this Note.

116. *Id.* at 1168.

117. *Id.* at 1176.

118. *Id.* at 1176-78.

they have been ordered by a judge to do what they should have been doing all along.<sup>119</sup>

## B. THE SVP ACT AND TREATMENT IN MISSOURI

Missouri has experienced some similar issues as Minnesota with their SVP Act, as a federal judge has declared that Missouri's SVP Act violated the Due Process Clause. The "overwhelming evidence at trial" showed that Missouri's Sex Offender Rehabilitation and Treatment Services (hereinafter "MO SORTS") "suffers from systemic failures regarding risk assessment and release that have resulted in the continued confinement of individuals who no longer meet the criteria for commitment."<sup>120</sup>

Under the Missouri SVP Act, notice is given to the Attorney General's office by the DOC 360 days prior to the offender's release.<sup>121</sup> A multidisciplinary team, consisting of "at least one member from the [DOC] and the Department of Mental Health," along with five others, evaluate whether or not the individual meets the definition of an SVP.<sup>122</sup> (The definition of an SVP under Missouri's Act is "any person who suffers from a mental abnormality which makes [them] more likely than not to engage in predatory acts of sexual violence if not confined" and who has been found guilty of a sexually violent offense).<sup>123</sup> This committee then submits a report to the Attorney General's office, which then files a petition to the court to have the person committed.<sup>124</sup> If found to be an SVP, the person is then transferred to the custody of the Department of Mental Health (hereinafter "DMH") for commitment for their "control, care, and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large."<sup>125</sup>

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119. *See id.* at 1174. The judge in this case was U.S. District Judge Donovan W. Frank, a former Minnesota District judge and Assistant County Attorney. He recognized in his opinion his obligation to the rights and safety of the citizens of the State, but that he also had to weigh the interests of justice because "Due Process forecloses the substitution of preventative detention schemes for the criminal justice system, and the judiciary has a constitutional duty to intervene before civil commitment becomes the norm" (quoting *In re Linehan*, 557 N.W.2d 171, 181 (Minn. 1996)).

120. *See Van Orden v. Schafer*, 129 F. Supp. 3d 839, 844 (E.D. Mo. 2015).

121. MO. ANN. STAT. § 632.483(1) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

122. MO. ANN. STAT. § 632.483(4) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

123. MO. ANN. STAT. § 632.480(5) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

124. MO. ANN. STAT. § 632.486 (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

125. MO. ANN. STAT. § 632.495(2) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

An annual review is performed, at which time either the Director or the resident may petition the court for conditional release.<sup>126</sup> If the petition had been initiated by the resident over the Director's objections and he or she was not released, subsequent petitions by the resident may be denied without review unless new facts are presented to justify a change in status.<sup>127</sup> The Act provides twenty-one conditions that the offender must comply with, including submitting to a plethysmograph, GPS electronic monitoring, paying fees for that monitoring, and to comply with "any other conditions . . . in the best interest of the person and society."<sup>128</sup>

The Missouri SVP Act was found to be unconstitutional, both facially and substantively. The Missouri court held this way in part because there were internal emails of MO SORTS presented from 2009 that identified fifteen of the residents who could be conditionally released from the program due to their age (they were over sixty-five), progress in the treatment program, and their infirm state, yet their lower recidivism risk was not noted in their annual reviews, and they remained at MO SORTS.<sup>129</sup> Additionally, the Director of the DMH had not authorized one MO SORTS resident to petition for conditional release since the Act was passed sixteen years earlier.<sup>130</sup> In fact, MO SORTS had not conditionally released anyone from the program since it was enacted.<sup>131</sup> The court went on to note that the lack of MO SORTS to release anyone from the program had resulted in pervasive hopelessness among both residents and staff, which is "counter-therapeutic and impedes the treatment progress of . . . residents."<sup>132</sup>

Even the program coordinator at one of the MO SORTS facilities admitted, "the 'logical conclusion' is that treatment is a 'sham.'"<sup>133</sup> The court

126. MO. ANN. STAT. § 632.498(1), (2) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

127. MO. ANN. STAT. § 632.504 (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.).

128. MO. ANN. STAT. § 632.505(3), (13), (14), (18), (21) (West, Westlaw through the end of the 2016 Reg. Sess. and Veto Sess. of the 98th Gen. Assemb.). A penis plethysmograph, or PPG, is an electronic device placed on the genitalia. The offender is then shown various provocative photographs, and the machine attempts to monitor any type of arousal response. This test, which seems on its face to be a lot like medieval quackery or a sophisticated torture device, has been shown to be easily defeated. A Florida SVP stated he passed the test by reading the labels of cleaning supply products on the shelf while it was being administered. See, Abby Goodnough & Monica Davey, *For Sex Offenders, a Dispute Over Therapy's Benefits*, N.Y. TIMES (Mar. 6, 2007), [www.nytimes.com/2007/03/06/us/06civil.html?page-wanted=all](http://www.nytimes.com/2007/03/06/us/06civil.html?page-wanted=all).

129. See *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 853-54 (E.D. Mo. 2015).

130. *Id.* at 854.

131. *Id.* at 856. Two residents were conditionally released from MO SORTS, but they were released with no involvement or help by MO SORTS or the DMH. *Id.*

132. *Id.* at 859.

133. See *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 859 (E.D. Mo. 2015).

found that there are “deficiencies in risk assessment, procedures for release, and community reintegration” at MO SORTS.<sup>134</sup> The court noted that while residents “may not have a constitutional right to treatment, they do have a constitutional right to avoid undue confinement.”<sup>135</sup> The judge concluded that the “risk assessment and release procedures . . . are wholly deficient” due to refusing to recommend for release those who no longer meet the dangerous requirement.<sup>136</sup> Specifically, he found that not properly implementing community reintegration requirements for the residents violated the resident’s rights under the Due Process Clause (remarking here that this stated goal is “observed in theory but not in practice”<sup>137</sup> and that “while the treatment program itself is not a sham, the release portion of the program is.”<sup>138</sup>). In addition, the judge stated that the release procedures, which were not being followed with what was outlined by the Act or the Due Process Clause, MO SORTS instituted a release procedure that is “futile in practice.”<sup>139</sup>

These reasons led the court to rule that “the director’s failure to comply with the SVP Act has resulted in the continued confinement of persons who no longer meet the criteria for commitment, and amounts to unconstitutional punishment.”<sup>140</sup> Of special note is the judge stating that:

The Court believes that Plaintiffs’ [the residents] rights to a system that includes proper risk assessment and release are rights protected by the constitutional guarantee of liberty, not merely state law. But even if these rights were grounded solely in state law, as Defendants appear to argue, the Court would find that Defendants’ nearly complete failure to protect them . . . is so arbitrary as to shock the conscience. The Constitution does not allow Defendants to impose lifetime detention on individuals who have completed their prison sentences and who no longer pose a danger to the public, no matter how heinous their past conduct. ‘[M]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.’ Nor may

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134. *Id.* at 862.

135. *Id.* at 867.

136. *Id.* at 867.

137. *Id.* at 868.

138. *See Van Orden v. Schafer*, 129 F. Supp. 3d 839, 868 (E.D. Mo. 2015).

139. *Id.* at 869.

140. *Id.*

the [MO] SORTS residents' liberty interests be ignored because it is politically expedient to do so.<sup>141</sup>

Missouri now faces a similar situation to Minnesota, and after spending taxpayer money to defend an Act that has now been found to be unconstitutional, must pick up the pieces and comply with the court ordered remedies.<sup>142</sup>

## VI. HOW ILLINOIS'S SVP ACT VIOLATES DUE PROCESS

*There is no tyranny more cruel than that which is perpetrated under [the shield] of the laws and in the name of justice.*<sup>143</sup>

- Charles de Montesquieu

### A. EVALUATIONS AND PETITIONS FOR CONDITIONAL RELEASE

At the annual review, an evaluator determines if the resident's status has changed and then files a report, which is then given to both the DHS and the court.<sup>144</sup> If the evaluator recommends conditional release, then the Director must file with the court "his or her intention whether or not to petition for conditional release on the committed person's behalf."<sup>145</sup> So, the evaluator for the TDF can recommend release, and the Director can still try to fight and keep the person committed at the TDF.<sup>146</sup> That is a rather sweeping power of control over someone's liberty that is placed in the hands of a private entity, especially considering that, without the approval of the Director, the chances of obtaining conditional release are greatly reduced. This seems an awful lot like Missouri, where the judge in that case found the treatment program

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141. See *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 869-870 (E.D. Mo. 2015) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975)).

142. *Id.* at 870-71. As of this writing, those remedies have yet to be determined.

143. CHARLES DE SECONDAT & BARON DE MONTESQUIEU, *CONSIDERATIONS ON THE CAUSES OF THE GRANDEUR AND DECADENCE OF THE ROMANS: A NEW TRANSLATION* 279 (Jehu Baker trans., D. Appleton & Co. 1889) ("There is no tyranny more cruel than that which is perpetrated under color of the laws and in the name of justice – when, so to speak, one is drawn down and drowned by means of the very plank which should have borne him up and saved his life.").

144. 725 ILL. COMP. STAT. ANN. 207/55 (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

145. 725 ILL. COMP. STAT. ANN. 207/60(a) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

146. *Id.* Currently, treatment services are being provided by Liberty Healthcare Corporation. See, e.g., job posting from August 20th located at <https://www.linkedin.com/jobs/view/194276949> (last visited Oct. 29, 2016).

“wholly deficient” in part due to the Director refusing to recommend residents for conditional release when they are no longer dangerous.<sup>147</sup> The possibility certainly exists that such an abuse can occur since the Director, *by statute*, can deny a person’s ability to be conditionally released despite an evaluator recommending them to be; there is the potential for continued commitment even though there has been a showing that the resident no longer meets the criteria.<sup>148</sup> This dangerous line was easily crossed in Missouri, in violation of the Due Process Clause.

#### B. THE NUMBERS OF RESIDENTS RELEASED DO NOT HOLD UP

In comparison to Illinois, by 2007 Arizona had committed seventy-one people since 1995, conditionally released sixty-nine, and fully released eighty-one.<sup>149</sup> California (since 1995) had committed 443 persons, conditionally released three people, and had fully released fifty-nine.<sup>150</sup> Wisconsin, since they enacted their SVP Act in 1994, had committed 283 people, conditionally released 17 and fully discharged 26.<sup>151</sup> Does this mean offenders are harder to treat in Illinois compared to other states? Why are other states able to have treatment programs that are actually treating their SVPs and Illinois is unable to do so? Admittedly, Illinois has released more residents (twenty-eight in eleven years),<sup>152</sup> than Minnesota (three in twenty years)<sup>153</sup> and Missouri (zero in sixteen years),<sup>154</sup> but the numbers are nowhere the same as Arizona (150 in eleven years),<sup>155</sup> New York (155 in eight years),<sup>156</sup> Virginia (over 100 in sixteen years),<sup>157</sup> or Wisconsin (150 in twenty-one years).<sup>158</sup> In the same amount of time (eleven years), Arizona managed to release over ten times the number of SVP’s from commitment than Illinois, with a 2.3% recidivism rate, which is only one-tenth of a percent lower than that of Illinois.<sup>159</sup> Having a terrible treatment program, regardless of the reason (such as lack of funding or a high turnaround for personnel),<sup>160</sup> is not a good enough

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147. See *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 856 (E.D. Mo. 2015).

148. 725 ILL. COMP. STAT. ANN. 207/60(a) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.) (emphasis added).

149. See N.Y. TIMES, *supra* note 15.

150. See N.Y. TIMES, *supra* note 15.

151. See N.Y. TIMES, *supra* note 15.

152. See N.Y. TIMES, *supra* note 15; RUSHVILLE TREATMENT AND DETENTION FACILITY, *supra* note 56; STATE OF ILL. DEP’T OF HUMAN SERVS., *supra* note 57.

153. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1147-48 (D. Minn. 2015).

154. See *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 856 (E.D. Mo. 2015).

155. See N.Y. TIMES, *supra* note 15.

156. See *Karsjens*, 109 F. Supp. 3d at 1147.

157. See *Van Orden*, 129 F. Supp. 3d at 856.

158. See *id.*

159. See *Orchowsky & Iwama*, *supra* note 32.

160. See *Karsjens*, 109 F. Supp. 3d at 1158.

excuse to be allowed to tear up the Constitution and deprive a person, *any person*, of their freedom of liberty.<sup>161</sup>

In addition, the TDF currently has nineteen residents over the age of sixty-six, and 379 more residents between the ages of forty-one and sixty-five.<sup>162</sup> This will be examined in greater detail later in this Note,<sup>163</sup> but it is enough to say at this point that the recidivism risk drops gradually as the offender ages, to the point of zero risk at age sixty.<sup>164</sup>

### C. ILLINOIS'S SVP ACT DOES NOT PROVIDE THE STATE OR THE COURTS ANY RECOURSE FOR REDUCING COMMITMENT

Just as in Minnesota, Illinois's SVP Act does not give the state any definite option to petition the court to reduce or modify the commitment conditions of the residents. Nor is any resolution given to the judiciary. In Minnesota, this finding led the court to declare that the Act was not narrowly tailored enough under strict scrutiny and was unconstitutional, as the "statute's failure to require the state to petition for individuals who no longer pose a danger to the public and no longer need inpatient treatment and supervision for a sexual disorder."<sup>165</sup> In addition, the court found that the failure of the Minnesota Act to give the courts a timely avenue or to provide an alternative mechanism likewise violated Due Process.<sup>166</sup> This is particularly pressing, as DNA exonerations happen with increasing frequency.

Suppose, for example, a person is convicted of a sexually violent offense, and they are duly sent to prison, spend their time behind bars, and then are committed under the Act. After ten years in prison and another five years at the TDF, the State's Attorney's office learns, through a confession by another individual and DNA evidence, that someone else was the one who committed the offense, not the resident currently in TDF. It is certain the State will prosecute the true offender, but the State now has *no* avenue by statute to release the resident in the TDF, nor is there anything that allows a court on their own initiative to issue a release from commitment.

In such a scenario, the committed individual would have to first get a new hearing (if possible), have his conviction vacated, and then be successful in his own petition to the court for his release from the clutches of the TDF

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161. *Van Orden*, 129 F. Supp. 3d at 850-51 (citing *Strutton v. Meade*, No. 4:05CV02022 ERW, 2010 U.S. Dist. LEXIS 31944 (E.D. Mo. Mar. 31, 2010)).

162. Freedom of Information Act Request, *supra* note 60.

163. See discussion *infra* Part VIII, Section A of this Note.

164. See *infra* notes 181-82.

165. *Karsjens*, 109 F. Supp. 3d at 1169.

166. *Id.* at 1169-70.

– all while he is involuntarily committed at the TDF. There would be no reason for the state to fight the petition for release in such a scenario, but there is nothing by statute that *compels* them to do so.<sup>167</sup> If they have not been found guilty of committing a sexually violent offense, the Due Process Clause mandates that they can no longer be involuntarily committed.

Currently, the best the statute can provide in such a situation is that “[a] person may petition the committing court for discharge from custody or supervision without the [Director’s] approval.”<sup>168</sup> Despite being vague, the word “may” does not mandate such a petition, which is what was stated in the ruling in *Karsjens v. Jesson*.<sup>169</sup>

The way the State of Illinois is implementing its SVP Act is almost identical to Minnesota and Missouri. All three states have residents who must have completed treatment to the point that they no longer present a danger to society. All three states have residents who are close to or over the age of sixty, they all have a treatment program that is, as applied, “a sham,” as other State programs can release ten times as many as Illinois with a low rate of recidivism (Arizona, New York, Virginia, and Wisconsin). Minnesota and Illinois both lack a statutory avenue of redress for either the state or the judiciary, and all three states are not fully utilizing conditional release or other less restrictive options for those residents who are no longer dangerous. Despite this almost identical implementation between Minnesota and Missouri, all the states examined have similar scientific numbers that show the recidivism rate is generally low to begin with and decreases as the resident gets older and/or receives treatment.<sup>170</sup>

## VII. WHERE DOES ILLINOIS GO FROM HERE?

*All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.*<sup>171</sup>

- Thomas Jefferson

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167. In a change to the Illinois Supreme Court Rules of Professional Conduct Article VIII, Rule 3.8, effective Jan. 1st 2016, prosecutors “shall seek to remedy the conviction” when there is new evidence that the person was wrongfully convicted. ILL. SUP. CT. RULES OF PROF’L CONDUCT art. VIII, r. 3.8 (2016).

168. 725 ILL. COMP. STAT. ANN. 207/65(B)(1) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.) (this would be for full release, not conditional release).

169. *Karsjens*, 109 F. Supp. 3d at 1169-70.

170. See *infra* notes 181-82.

171. THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 298 (Adrienne Koch & William Peden eds., Random House Publisher, Inc. 1944).

### A. TANTALUS, REVISITED

I began this Note with the story of Tantalus, who was eternally punished by the gods. While those committed under Illinois's SVP Act may seem to some to deserve eternal punishment, the State does not get to play Zeus, the supreme lord, in this story, controlling human life and destiny with no one to challenge his decisions.<sup>172</sup> The State also does not get to release the Erinyes from the underworld to take divine justice and avenge horrible wrongs.<sup>173</sup> No state gets a free pass to crush a person's constitutional rights simply because the person has committed some disgusting act—such retribution is better left to totalitarian regimes, or, perhaps, to gods long since faded from memory.

To be involuntarily committed to the TDF at Rushville requires three things: that the person has been convicted of a sexually violent offense, that they have a mental disorder, and that their mental disorder makes them a danger to others because they are likely to re-offend and commit more sexually violent crimes.<sup>174</sup> The removal of any *one* of these three requirements means the State no longer has any right to involuntarily commit someone, and continued commitment would violate a person's Due Process right to be free from discretionary action by the government. “[W]ith these statutory and constitutional requirements, when the standard for discharge is satisfied, the state has *no authority* to continue detaining the confined individual . . . .”<sup>175</sup>

### B. THE EVIL THAT MEN DO

There is no question that those who are involuntarily committed have been found guilty of serious, offensive crimes. They have done horrible and repugnant things. Mr. Hendricks, for example, had been convicted of molesting little children, one as young as seven years old.<sup>176</sup> He even stated at one point that the only time he didn't molest children was when he was incarcerated, and that he would probably never stop until he died.<sup>177</sup> There is, right now, a resident in the TDF who was convicted of molesting two eight-year-

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172. A. H. PETISCUS, *THE GODS OF OLYMPOS: OR MYTHOLOGY OF THE GREEKS AND ROMANS* 19-21 (Katherine A. Raleigh trans., Paternoster Square, T. Fisher Unwin 20th ed. 2014) (1892).

173. *Id.* at 167-68 (the Erinyes were avenging goddesses sent to punish and torment people who had committed great evils, from whom no one could escape).

174. 725 ILL. COMP. STAT. ANN. 207/15(b) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

175. *Karsjens v. Jesson*, 109 F. Supp. 3d 1139, 1170 (D. Minn. 2015) (emphasis added).

176. *Kansas v. Hendricks*, 521 U.S. 346, 353-54 (1997).

177. *Id.* at 355.

old girls.<sup>178</sup> Another was convicted of aggravated sexual assault of a minor when he raped his six-year-old niece.<sup>179</sup> These people are what the rest of us would call; a monster or a boogeyman. They are the source of a terrific amount of fear in society, and are easily heaped with scorn, derision, and hatred, especially those who have committed offenses against a child. To find any sort of sympathy for these devils is a monumental task. Yet, if there is no harm presented, then the offender is reduced to a boogeyman, and the boogeyman is not real. It can be very easy to lock these people up, throw away the key, and forget about them. To defend the reprehensible and do what is right is what separates a civil society from tyranny, and “[i]njustice anywhere is a threat to justice everywhere.”<sup>180</sup>

### VIII. SO WHAT DOES ILLINOIS DO?

There is little doubt these people pose a risk to society and that they need to receive treatment in a controlled environment before they can be re-integrated back into society. But Illinois is not providing this in a manner that is in conformity with the Due Process Clause. So how do we fix Illinois’s SVP Program so that it conforms to the Constitution and does not violate a resident’s Due Process rights? How do we prevent a fate similar to that of Minnesota and Missouri from crashing down on Illinois?

#### A. RELEASE FOR THOSE COMMITTED ONCE THEY REACH SIXTY YEARS OF AGE

A substantial number of studies have been done that suggest that the recidivism risk for sex offenders, regardless of the type of offense they have committed, is very low after the age of sixty.<sup>181</sup> The one study I have found

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178. I cannot name this person due to confidentiality reasons involving my experience as an Illinois Supreme Court Rule 711 intern at the Public Defender’s Office in DeKalb County, Illinois.

179. *Id.*

180. Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail*, UNIV. OF PENN., [https://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (last visited Oct. 29, 2016).

181. See generally, R. Karl Hanson, *Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters*, DEP’T. OF THE SOLIC. GEN. CAN. 9 (2001), <https://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/sxl-redvsm-cmprsn/sxl-redvsm-cmprsn-eng.pdf> [hereinafter *Age and Sexual Recidivism*] (“There were very few recidivists among the sexual offenders released after age 60 (. . . 3.8%).”). These were all intra-familial molesters; “None of the [extra-familial molesters] or rapists who were over 60 at the time of release recidivated.” *Id.* See also David Thornton, *Age and Sexual Recidivism: A Variable Connection*, 18 SEXUAL ABUSE: J. RES. & TREATMENT 123, 133 (2006) (“For these already highly repetitive sexual offenders the effect of age is best characterized as involving an initial very high sexual recidivism rate for those released between 18 and 25, a substantial reduction in this rate (from about

that shows there may be a risk after sixty has some real issues, namely that the sample size was painfully small (265 total subjects), and even then the risk it presented after the age of sixty was very low (0% for rapists and just over 16.5% for child molesters).<sup>182</sup> If the science is to be believed at the beginning of the process—involuntarily committing these people—then it should also be equally believed at the end of the process when it comes to release. The State should, at the very least, conditionally release any resident at the TDF who is over this defining age. In addition, releasing these aging residents of the TDF would help alleviate some of the substantial costs involved in committing them.<sup>183</sup> In 2015, there were at least nineteen residents over the age of sixty-five who should qualify for conditional release due to the lower, if not non-existent, recidivism risk associated with age.<sup>184</sup> If they no longer present a danger to society due to their age, the Due Process Clause mandates that they cannot continue to be involuntarily committed and should be released.

Likewise, those residents that have become so infirm that the risk of recidivism has become small (like Mr. Hendricks, confined to a wheelchair) could also be conditionally released.<sup>185</sup> If they no longer present a danger to

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80% to just under 50%) for offenders released after that age, with no subsequent decline in sexual recidivism until the age of 60 when the rate again falls by about 40 percentage points.”). This would give a recidivism risk after sixty of less than 10%. See R. Karl Hanson, *The Validity of Static-99 with Older Sexual Offenders*, PUB. SAFETY AND EMERGENCY PREPAREDNESS CANADA (2005) (“The 5 year recidivism rates of offenders over 60 was only 2% . . . .”); R. Karl Hanson, *Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders*, 17 J. INTERPERSONAL VIOLENCE 1046, 1054 (2002) (“There were very few recidivists among the sexual offenders released after age 60 (5 of 131 or 3.8%). The older-than-60 recidivists included two extra-familial child molesters (2 of 45 or 4.4%) and three unclassified offenders (3 of 37 or 8.1%). None of the incest offenders . . . or rapists . . . released after age 60 recidivated.”).

182. Robert Alan Prentky & Austin F. S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 SPRINGER SCI. & BUS. MEDIA, LLC PG (2007). It should be noted that the risk of recidivism in this study grouped all child molesters into one class, while most studies differentiate between extra-familial molesters and intra-familial molesters. So, for this study, there is no way of determining what the re-offense rate is between these two groups, but other studies that separate child molesters into the separate groupings show that intra-familial molesters typically have a much lower recidivism risk than extra-familial molesters. See *supra* note 32. In comparing the sample size of this study to those mentioned in notes 32 and 181, the study done by R. Karl Hanson (*Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters*) had a sample size of 4,673; the study by David Thornton (*Age and Sexual Recidivism: A Variable Connection*) had a sample size of 752; the second study by R. Karl Hanson (*The Validity of Static-99 With Older Sexual Offenders*) had a sample size of 3,425; and the third study by R. Karl Hanson (*Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders*) had a sample size of 4,673. See *supra* notes 32, 181.

183. See *infra* Part VIII, Section D of this Note.

184. See Freedom of Information Act Request, *supra* note 60.

185. See *supra* note 28.

society due to an infirmity, Due Process requires that they cannot continue to be involuntarily committed and they should be released.

## B. RE-EMPHASIS ON CONDITIONAL RELEASE

A resident of TDF who qualifies for conditional release faces some incredible challenges, but it would be hard to argue that they are not very well controlled. They must comply with fifty-seven conditions at all times, and a violation of any one will result in the revocation of their conditional release and land them back in the TDF.<sup>186</sup> Some of these conditions make sense, such as registering as a sex offender, having a twenty-four hour GPS tracking device placed on them,<sup>187</sup> the continuation of treatment and therapy,<sup>188</sup> and the total prohibition for them to possess pornography.<sup>189</sup> Some of the conditions are somewhat understandable, but difficult just the same, such as being unable to purchase pay-per-view movies (regardless of their rating or content),<sup>190</sup> not being allowed to possess a smart phone,<sup>191</sup> or being unable to have internet access.<sup>192</sup> Still others are almost unbearably harsh, when one truly thinks about them, such as the ban from joining any health or fitness clubs (including the YMCA),<sup>193</sup> owning a pet,<sup>194</sup> or making *any* purchases without prior approval from either the Case Management Team (those in charge of monitoring SVPs on release) or the Director, and after a purchase has been made they must turn in their receipts.<sup>195</sup> Even guests to their home must be pre-approved by their Case Management Team.<sup>196</sup> The number and nature of at least some of these conditions appear to be far more punitive than therapeutic, which would violate the Due Process Clause.

Illinois needs to re-evaluate committed residents to see if they meet the qualifications for conditional release—surely there must be some who have completed a substantial part of the treatment program that can function within society and be effectively controlled and present a low risk of re-offending.<sup>197</sup>

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186. Freedom of Information Act Request, *supra* note 60.

187. Freedom of Information Act Request, *supra* note 60, at No. 56.

188. Freedom of Information Act Request, *supra* note 60, at No. 6.

189. Freedom of Information Act Request, *supra* note 60, at No. 20.

190. Freedom of Information Act Request, *supra* note 60, at No. 42.

191. Freedom of Information Act Request *supra* note 60, at No. 26.

192. Freedom of Information Act Request, *supra* note 60, at No. 33.

193. Freedom of Information Act Request, *supra* note 60, at No. 46.

194. Freedom of Information Act Request, *supra* note 60, at No. 45.

195. Freedom of Information Act Request, *supra* note 60, at No. 54.

196. *See* Freedom of Information Act Request, *supra* note 60, at No. 50.

197. *See, e.g.,* *People v. Moore*, 2016 IL App (5th) 150213-U (Ill. App. Ct. 5th Dist. 2016). (Larry Paul Moore was incarcerated from 1977 until 2011, whereupon he was found to be a SVP and then sent to the TDF at Rushville, where he remains. While it could be argued that he has not yet received an adequate amount of treatment to be conditionally released, he has been in prison or committed for the last thirty-nine years. If he was eighteen when he went

Or at the very least, these residents should qualify for continued treatment at a less secure and restrictive facility, something that does not exist in Illinois. If they no longer present a danger to society due to the conditions of their release and from completing a large portion of the treatment program, Due Process dictates that they cannot continue to be involuntarily committed, and that they should be released.

### C. RE-EVALUATE THE PROCEDURES FOR GRANTING CONDITIONAL RELEASE

There needs to be an avenue for the State to petition the court for a person's release, as well as for the courts to act on their own initiative. As it stands right now, this is left up to DHS or the resident themselves, but the State has *no* recourse in the statute. In addition, the Director should be removed from the decision process. This goes back to an earlier point regarding the Director's ability to block those residents who have been recommended for conditional release. The Director can effectively stop the conditional release of residents when they have been found to satisfy the requirements for release, and this is potentially a huge problem that could very well violate a resident's Due Process rights.<sup>198</sup> When one is talking about a program that is run by a private entity and has an annual budget in the tens of millions, there can be little motivation to see residents leave the program.<sup>199</sup>

Further, the statistics presented do not make a convincing argument that Illinois is not committing people past the time that they need to be in order to protect society, not in light of the recidivism risks and success rates of other states with similar Acts.<sup>200</sup> The fact that a recent independent study found that Illinois's recidivism rate was as low as 2.4% should demand that the process of determining conditional release be heavily scrutinized in the face of so few residents being released.<sup>201</sup> If they no longer present a danger to society due to their low risk of recidivism, then in light of the conditions of their release, the State can hardly be justified in continued commitment. Due Process would then warrant their release from commitment.

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to prison in 1977, he would be fifty-seven now. The State has had almost four decades to rehabilitate him, and he is approaching age sixty).

198. 725 ILL. COMP. STAT. ANN. 207/60(a) (West, Westlaw through P.A. 99-904 of the 2016 Reg. Sess.).

199. Currently, the Clinical Director at the TDF is Dr. Shan Jumper, Ph.D. *Leadership Board*, SOCCPN, <http://soccpn.org/leadership-board/> (last visited Nov. 11, 2016).

200. See *supra* Section VI, Part B.

201. Orchowsky & Iwama, *supra* note 32.

#### D. A RE-EVALUATION OF THE COST

The cost of involuntarily committing a person at the TDF is roughly \$53,000.00 per year.<sup>202</sup> The cost of incarceration in prison per inmate is \$31,286.00 annually.<sup>203</sup> Commitment is a big expense for a state that couldn't even pay its own lottery winners,<sup>204</sup> much less continues to have on-going budget problems that have resulted in the state's credit rating being listed at just barely above "junk status."<sup>205</sup> Taxpayers in Illinois are paying a high price for such a poor return on investment; from a strict business standpoint, they must pay an additional \$2.3 million to commit forty-four new residents a year while only subtracting \$158,847 for the three that are annually released, and they are still paying in part for those since there are costs involved for continued treatment and monitoring. Some inmates in prison can earn a GED or college-level degree, receive counseling for substance abuse, obtain job training, receive anger management classes, and even take parenting classes while incarcerated. With the cost differential so disproportionate, the State could reduce this cost by beginning treatment for these offenders while they are still in prison.<sup>206</sup> This would have the added effect of possibly releasing them from the TDF earlier, if not getting them to the point of not needing to be committed at all, going straight from prison to conditional release and avoiding Due Process issues altogether. Instead of throwing money at the problem for expansion, the State would be better served by using those funds to improve the quality of the treatment residents receive and starting treatment while they were in prison. That way, there would be no need for

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202. See STATE OF ILL. DEP'T OF HUMAN SERVS., COMPLIANCE EXAMINATION AND DEPARTMENT-WIDE FINANCIAL AUDIT 97 (2013), <http://www.auditor.illinois.gov/Audit-Reports/Compliance-Agency-List/DHS/FY13-DHS-Fin-Comp-Full.pdf> (the expenditures for FY 2013, as determined by the State's Auditor General's Office, were \$27,480,687).

203. *Prison Overcrowding Threatens Public Safety and State Budgets*, AM. LEGISLATIVE EXCH. COUNCIL (2015), <https://www.alec.org/article/prison-overcrowding-threatens-public-safety-state-budgets/>.

204. Aamer Madhani, *Illinois Gives Lottery Winners IOUs*, USA TODAY (Oct. 15, 2015, 8:48 AM), <http://www.usatoday.com/story/news/2015/10/14/cash-strapped-illinois-gives-iou-to-lottery-winners/73960268/>.

205. Tom Schuba, *Moody's Downgrades Illinois' Credit Rating Amid Budget Crisis*, NBC CHIC. (June 9, 2016, 12:36 PM), <http://www.nbcchicago.com/blogs/ward-room/Moodys-Downgrades-Illinois-Credit-Rating-Amid-Budget-Crisis-382378591.html>; Heather Gillers, *S&P Downgrades Illinois, Fitch Puts Ratings on Negative Watch*, WALL ST. J. (June 9, 2016, 5:12 PM), <http://www.wsj.com/articles/s-p-downgrades-illinois-fitch-puts-ratings-on-negative-watch-1465505931>.

206. These are some of the services that an inmate can receive at the Sheridan Correctional Facility. This comes partly from personal knowledge that I gained while performing my duties as a Supreme Court Rule 711 intern for the Public Defender's Office in DeKalb County, Illinois. Information can also be obtained from the Sheridan Correctional Facility website. See SHERIDAN CORR. CENTER, ILL. DEP'T OF CORRS., <http://www.illinois.gov/idoc/facilities/pages/sheridancorrectionalcenter.aspx> (last updated July 1, 2015).

expansion if the treatment program was more in line with states that have successful programs, such as Arizona, New York, Virginia, and Wisconsin.<sup>207</sup> If their mental disorder has been treated enough so they no longer present a danger to society, they cannot continue to be involuntarily committed under the Due Process Clause.

#### E. REMOVE THE BIAS OF THE EVALUATIONS

The DHS hands the offenders off to the TDF, which in turn contracts the running of the facility and treatment to a private company.<sup>208</sup> A private company has little, if any, motivation to implement a successful treatment program—the more residents, the more money thrown their way.<sup>209</sup> One can hardly imagine that the annual reviews and recommendations to the court by the TDF are unbiased.<sup>210</sup> Just as in New York or Virginia, where a committee evaluates the offender to determine the need for commitment, the State should have an independent psychiatrist or psychologist (or even a board or committee) make the annual evaluation and the court should base their determination on this one expert evaluation (along with the totality of the circumstances, which would include a report from TDF).<sup>211</sup> This would eliminate the “battle of the experts” who are motivated to spin their testimony and reports for their own benefit. It would also put at least one portion of the hearing in the hands of an unencumbered, objective outsider, thus helping to avoid continued commitment for those who no longer present a danger and violating the resident’s Due Process rights.<sup>212</sup>

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207. See *supra* Part IV.

208. Currently, this contract is being fulfilled by Liberty Healthcare Corporation. *Sex Offender Management & Treatment*, LIBERTY HEALTHCARE CORP., <http://www.libertyhealthcare.com/programs/for-government-or-public-sector/sex-offender-management-and-treatment/> (last visited Oct. 29, 2016).

209. See Whitfield, *supra* note 61.

210. I have witnessed this bias while interning for the Public Defender’s Office of DeKalb County, Illinois. A report generated by the State’s expert quoted from a study the recidivism risk percentages for rapists (17.1%) and extra-familial molesters (19.7%) while omitting the risk percentage for the offender in the case, who was an intra-familial molester (8.4%). See *Age and Sexual Recidivism*, *supra* note 181. One can only assume that the reason for this discrepancy was because the percentages given in the study for rapists and extra-familial molesters was higher than that for intra-familial molesters and made for a better argument to keep the resident committed.

211. This was suggested in *Karsjens v. Jesson*, where the judge said that [citing a report of the treatment facility by the Office of the Legislative Auditor for the State] “The OLA Report found that requiring an independent review body would shelter the MSOP from making unpopular decisions and would ensure that decisions on reduction in custody petitions are based on risk.” 109 F. Supp. 3d 1139, 1160 (D. Minn. 2015).

212. This may help put an end to the not uncommon practice of the State having a “revolving door” of experts testifying. I have personally witnessed this on two separate occasions during the time I spent as a 711 licensed law student at the DeKalb Public Defender’s

In addition, there are clear indications that the recidivism risk for offenders to commit further sex-based crimes is generally very low, depending on factors such as age at release and whether they received treatment.<sup>213</sup>

If they no longer present a danger to society or they have been successfully treated for a mental disorder, they can no longer be involuntarily committed under the Due Process Clause, and they should be released.<sup>214</sup>

## IX. CONCLUSION

*Throughout history, it has been the inaction of those who could have acted, the indifference of those who should have known better, the silence of the voice of justice when it mattered most, that has made it possible for evil to triumph.*<sup>215</sup>

- Haile Selassie

Even the gods fall; Zeus, Tantalus, Tartarus, and the Erinyes have all faded into distant memory, studied by scholars only interested in a bygone age. It is time the State of Illinois reevaluate their SVP program and institute changes so as to not violate the Due Process rights of residents at the TDF, before the State, too, falls and is forced to change by the judicial system.

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Office. The State hires an expert to evaluate and declare an inmate as a SVP, but the expert determines the inmate does not qualify to be committed. The State, then fires that expert and hires a new one who determines the inmate *does* qualify for commitment under the Act. While the State is within their rights to do this, this “expert shopping” seems, on its face, to present some issues that may very well cross the border into the realm of punitive action. When you only use the science that you *like*, it looks a lot more like vengeance than seeking meaningful treatment.

213. *See supra* notes 32, 181.

214. This may also help to alleviate what could be termed as “Willie Horton Syndrome.” William “Willie” Horton was allowed a weekend furlough through a program while then-governor of Massachusetts, Michael Dukakis, was in office. *See* Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>. At the time, he was serving a life sentence without the possibility of parole after being convicted of participating in the stabbing death of a robbery victim. *Id.* He never returned from his furlough, was recaptured after ten months on the run, and was convicted of raping a woman twice and savagely beating and stabbing her fiancé while he was out. *Id.* Although he did not institute the furlough program, this event essentially killed former Governor Dukakis’s run for President. *Id.* A judge would understandably be very reluctant to release a convicted sex offender that has also been committed for a mental disorder in fear of the possible political ramifications if they re-offend. *Id.* I am in no way suggesting that this is prevalent amongst judges or is a major contributing factor in their decision making. However, it is a *possible* factor, which, if relied upon too heavily, could result in a resident being committed past the time they should be released, thus violating their Due Process rights.

215. HAILE SELASSIE, SIMPSON’S CONTEMPORARY QUOTATIONS (Houghton Mifflin Company 1988).

I offer this Note as an opportunity for the state to rectify some of these issues before a suit is filed and a federal judge strikes down the Act altogether, costing Illinois huge amounts of money and time in defending it, and then even more vast sums being forced to fix it. The similarities between Minnesota, Missouri, and Illinois are too close in substance, and the differences between New York, Virginia, and Wisconsin are too vast in comparison that Illinois's SVP Act will likely not survive a Due Process attack. If the goal is treatment and reintegration, Illinois's Act will fall. If the goal is continued punishment, Illinois's Act will also fall. The State needs to remedy the situation to avoid any legal issues and subjecting the citizens of Illinois to spend money that isn't there on litigation, reevaluation of the residents, and being forced to come up with an alternative plan all to try and continue to commit people who no longer deserve to spend time in Tartarus.

*A nation's success or failure in achieving democracy is judged in part by how well it responds to those at the bottom, and the margins, of the social order.*<sup>216</sup>

- Justice Sandra Day O'Connor

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216. Justice Sandra Day O'Connor, *The Third Annual William French Smith Memorial Lecture: A Conversation with Retired Justice Sandra Day O'Connor*, 37 PEPP. L. REV. 63, 65 (2009).