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Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person Is in Illinois

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KEEPING THE DANGEROUS BEHIND BARS: REDEFINING WHAT A SEXUALLY VIOLENT PERSON IS IN ILLINOIS

I. INTRODUCTION

Imagine a man named Mr. Doe slowly driving a car down a secluded neighborhood street.[1] Mr. Doe has a checkered past. In 1990, at the age of twenty-five, he was arrested after tying his four-year-old stepson to a bed. Mr. Doe's wife got home from work at about the same time, so nothing further happened. The stepson told his mother, who did not believe him. The stepson then told a preschool teacher who alerted police. The charges were dropped, however, when Mr. Doe's wife convinced her son that he was just imagining things. Five years and a divorce later, Mr. Doe was arrested for sexually assaulting a seven-year-old boy near a local little league field. Mr. Doe snatched and undressed the boy but was caught before things went further. He was later convicted and served a fourteen-year prison sentence. Mr. Doe has been out of prison for a year.

An eight-year-old boy walks home from school. It is a beautiful day, so the boy decided to take the long way home. As the boy walks, Mr. Doe approaches him, his car creeping down the street. Mr. Doe tells the boy that his parents are looking for him and that he was expected home twenty minutes ago. Mr. Doe then offers the boy a ride home, which the boy accepts. Two hours later, the boy is dumped in a ditch. He is covered in blood, semen, dirt, and sweat. The boy has been raped. Could this terrible ordeal have been avoided?

In Illinois, the answer is maybe.[2] The Illinois Sexually Violent Persons Commitment Act ("SVPA") permits the civil commitment of sexually violent persons ("SVPs").[3] This commitment, typically imposed after the completion of a prison sentence, is allowed if the individual has

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1 This scenario, loosely based on the case of Earl Shriner that sparked the Washington sexual predator law, was created by the Notewriter to illustrate a context in which the Illinois Sexually Violent Persons Commitment Act would likely be invoked.

2 *See generally* 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008) (defining and regulating sexually dangerous persons).

3 *See id*. (allowing for the civil commitment of SVPs). When discussing the SVPA throughout this Note, the author will use two terms—"sexually violent person" and "SVP." While they refer to the same thing, the term will be spelled out as sexually violent person when referring to the specific language used in the SVPA. When referring to a sexually violent person in passing or when describing statutory procedures, the author will use SVP. For the purposes of this Note, the SVPA and similar laws in other jurisdictions will collectively be referred to as "sexual predator legislation" or "sexual predator laws." Those eligible for commitment under such laws, unless designated otherwise or referring to specific statutory language, will be referred to as "sexually violent individuals."

a *mental disorder* that makes him or her *substantially probable* to engage in sexual violence.[4] The importance of the specific language used in the SVPA cannot be overstated.[5] Potentially indefinite civil commitment depends on the specific terminology used.[6] More importantly, the constitutionality of a sexual predator law turns on its specific statutory language because there are certain constitutionally required elements of civil commitment that must be present for a sexual predator law to survive.[7] These elements are built into specific statutory terms and definitions.[8] In the SVPA's case, some of the most crucial statutory language used to define a "mental disorder" has been ignored.[9] Additionally, the SVPA's commitment standard of "substantially probable" is unique to Illinois and different from what has been constitutionally approved.[10]

The purpose of this Note is to offer a model interpretation of the SVPA's "mental disorder" definition and to suggest a change in the SVPA's "substantially probable" standard.[11] These adjustments will both increase the SVPA's applicability to sexually violent individuals and uphold the SVPA's constitutionality.[12] Part II of this Note discusses the history of the SVPA, including general background information that led to the SVPA's passing, the SVPA's key language and judicial interpretation, and other important terms and authorities.[13] Part III

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4 *Id.* at 207/5(f).

5 *See infra* notes 6–8 (explaining how indefinite civil commitment turns on specific terminology and how sexual predator laws are only constitutional if certain requirements are contained in statutory language).

6 *See, e.g.*, 725 ILL. COMP. STAT. ANN. 207/65(a)(2) (calling for a civilly committed individual's discharge petition to be denied if the state can prove the individual is still an SVP as defined in the statute).

7 *See In re* Det. of Varner, 800 N.E.2d 794, 798–99 (Ill. 2003) (stating that a sexual predator law satisfies substantive due process if it contains definitions that supply the constitutionally required elements of civil commitment).

8 *See id.* (explaining that the constitutionally required elements are built into specific statutory language and definitions).

9 *See infra* Part III.A.1 (explaining how the "emotional capacity" language in the SVPA's mental disorder definition has been ignored).

10 *See infra* notes 99–100 (discussing the various commitment standards that states use in their sexual predator laws).

11 *See infra* Part IV (proposing that the "mental disorder" definition in the SVPA be interpreted differently and that the SVPA's standard for commitment be lowered from "substantially probable" to "likely").

12 *See infra* Part IV (demonstrating that the suggested changes will maintain the SVPA's constitutionality while simultaneously increasing its applicability).

13 *See infra* Part II.A (discussing the history of sexual predator legislation and how modern sexual predator laws have emerged); *infra* Part II.B (looking at the key United States Supreme Court decisions that upheld the constitutionality of modern sexual predator laws); *infra* Part II.C.1 (defining the SVPA's key terminology); *infra* Part II.C.2

analyzes the statutory language used in the SVPA, along with its current interpretation.[14] Finally, Part IV proposes a model interpretation of the SVPA's "mental disorder" definition, and suggests a change to the SVPA's "substantially probable" standard.[15]

II. BACKGROUND

A certain group of individuals will predictably commit future acts of sexual violence.[16] If these sexually violent individuals are handled solely by the criminal justice system, many of them will serve their prison terms, re-enter society, and then prey on more innocent victims.[17] Reacting to this crack in the criminal justice system, a number of states have enacted laws allowing for the involuntary civil commitment and treatment of sexually violent persons.[18] While states use varying terms

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(covering the SVPA's approval in light of the United States Supreme Court opinions on sexual predator legislation); *infra* Part II.D.1 (summarizing the language used in other jurisdictions' sexual predator laws); *infra* Part II.D.2 (looking at dictionary definitions of terms that are found in the SVPA, as well as key mental health authorities).

14 *See infra* Part III.A.1 (looking at the key inquiry under the SVPA and explaining that this inquiry is covered by using only a portion of the current statutory language); *infra* Part III.A.2 (discussing why the mental health community's language is not decisive in determining SVPA civil commitments); *infra* Part III.B.1 (analyzing the current standard used in committing individuals pursuant to the SVPA); *infra* Part III.B.2 (explaining why the current standard cannot be broken down into precise mathematical terms).

15 *See infra* Part IV.A (stating that the emotional capacity language in the SVPA's definition of a "mental disorder" needs to be given meaning); *infra* Part IV.B (proposing that the Illinois legislature lower the SVPA's commitment standard from "substantially probable" to "likely").

16 Norm Maleng, *The Community Protection Act and the Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 821, 823 (1992); *see* 53 AM. JUR. 2D *Mentally Impaired Persons* § 125 (2006) (noting that there are certain individuals who, because of a mental condition, commit or have a propensity to commit sex offenses); *see also* Debra T. Landis, Annotation, *Standard of Proof Required Under Statute Providing for Commitment of Sexual Offenders or Sexual Psychopaths*, 96 A.L.R.3d 840, § 2 (1979) (explaining that there are individuals with psychopathic disorders which cause them to commit sex offenses).

17 Maleng, *supra* note 16, at 823.

18 *See generally* ARIZ. REV. STAT. ANN. §§ 36-3701–3717 (2009); CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 1998 & Supp. 2009); D.C. CODE §§ 22-3803–3811 (2001); FLA. STAT. ANN. §§ 394.910–.932 (West 2006 & Supp. 2009); 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008); IOWA CODE ANN. §§ 229A.1–.16 (West 2006 & Supp. 2010); KAN. STAT. ANN. §§ 59-29a01–29a22 (2005 & Supp. 2009); MASS. GEN. LAWS ANN. ch. 123A, §§ 1–16 (West 2003 & Supp. 2009); MINN. STAT. ANN. § 253B.185 (West 2007 & Supp. 2009); MO. ANN. STAT. §§ 632.480–.513 (West 2006); NEB. REV. STAT. §§ 71-1201–1226 (2009); N.H. REV. STAT. ANN. §§ 135-E:1–24 (LexisNexis Supp. 2009); N.J. STAT. ANN. §§ 30:4-27.24–.38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney Supp. 2010); N.D. CENT. CODE §§ 25-03.3-01–24 (2002); S.C. CODE ANN. §§ 44-48-10–170 (2002 & Supp. 2008); VA. CODE ANN. §§ 37.2-900–920 (2005 & Supp. 2009); WASH. REV. CODE ANN. §§ 71.09.010–.903 (West 2008 & Supp. 2010); WIS. STAT. ANN. §§ 980.01–.14 (West 2007 & Supp. 2008). The New York sexual

to label these sexually violent individuals, Illinois labels them as "sexually violent persons" and commits them pursuant to the SVPA.[19]

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predator law, passed in 2007, helps explain why sexual predator legislation is needed by stating that

> some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses. These offenders may require long-term specialized treatment modalities to address their risk to reoffend. They should receive such treatment while they are incarcerated as a result of the criminal process, and should continue to receive treatment when that incarceration comes to an end. In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.

N.Y. MENTAL HYG. LAW § 10.01(b). While there are many states with sexual predator laws, there is also some federal legislation on the topic. *See* 18 U.S.C. § 4248 (2006) (allowing for the civil commitment of sexually dangerous individuals). The Attorney General may certify that someone in federal prison is a sexually dangerous person; a hearing is then ordered. *Id.* § 4248(a). If the court finds the person is a sexually dangerous person, he is committed to the custody of the Attorney General, who releases the person to the custody of the person's home state or state where the person was tried. *Id.* § 4248(d). If the State will not take control of the person, the Attorney General places the person in a facility. *Id.* This law, enacted in 2006, recently passed constitutional scrutiny. *See* United States v. Comstock, 130 S. Ct. 1949, 1965 (2010). There is also a federal law authorizing the Attorney General to give grants to states that pass sexual predator laws. *See* 42 U.S.C. § 16971 (2006). To go along with sexual predator laws there are other methods of dealing with sex offenders and those considered sexually violent, including registration laws, community notification laws, and residency restrictions. Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 317 (2006); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1169 (1999). Chemical castration, the process of pharmacological treatment that deprives individuals of the ability to experience sexual desire and engage in sexual activity, is also used in some circumstances. John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 ST. THOMAS L.J. 559, 561 (2006). This Note will not discuss these methods further because it focuses on the statutory language found in the Illinois sexual predator law, not the merits of other systems.

[19] 725 ILL. COMP. STAT. ANN. 207/1–99. *See* ARIZ. REV. STAT. ANN. §§ 36-3701–3717 ("Sexually Violent Persons"); CAL. WELF. & INST. CODE §§ 6600–6609.3 ("Sexually Violent Predators"); D.C. CODE §§ 22-3803–3811 ("sexual psychopath[s]"); FLA. STAT. ANN. §§ 394.910–.932 ("Sexually Violent Predators"); IOWA CODE ANN. §§ 229A.1–.16 ("Sexually Violent Predators"); KAN. STAT. ANN. §§ 59-29a01–29a22 ("Sexually Violent Predators"); MASS. GEN. LAWS ANN. ch. 123A, §§ 1–16 ("Sexually Dangerous Persons"); MINN. STAT. ANN. § 253B.185 ("sexually dangerous persons or persons with a sexual psychopathic personality"); MO. ANN. STAT. §§ 632.480–.513 ("Sexually Violent Predators"); NEB. REV. STAT. §§ 71-1201–1226 ("dangerous sex offenders"); N.H. REV. STAT. ANN. §§ 135-E:1–24 ("Sexually Violent Predators"); N.J. STAT. ANN. §§ 30:4-27.24–.38 ("sexually violent predator[s]"); N.Y. MENTAL HYG. LAW §§ 10.01–.17 ("Sex Offenders Requiring Civil Commitment or Supervision"); N.D. CENT. CODE §§ 25-03.3-01–24 ("Sexually dangerous individual[s]"); S.C. CODE ANN. §§ 44-48-10–170 ("Sexually Violent Predator[s]"); VA. CODE ANN. §§ 37.2-900–920 ("Sexually Violent Predators"); WASH. REV. CODE ANN. §§ 71.09.010–

Part II discusses the history of sexual predator legislation, looking in depth at the SVPA and other key terminology used in modern sexual predator laws.[20] Specifically, Part II.A discusses the history and development of sexual predator legislation up until the SVPA was passed.[21] Part II.B discusses the United States Supreme Court's views on the civil commitment of sexually violent individuals under sexual predator laws, which are similar to the SVPA.[22] Next, Part II.C looks at the SVPA's specific statutory language as well as the Illinois courts' interpretation and approval of it.[23] Lastly, Part II.D discusses statutory definitions of other states' sexual predator laws, in addition to clinical definitions and common usage of key terminology that will be useful while examining the language of the SVPA.[24]

.903 ("sexually violent predators"); WIS. STAT. ANN. §§ 980.01–.14 ("Sexually Violent Persons"); *see also* 53 AM. JUR. 2D, *supra* note 16, § 125 ("A number of states have enacted statutes relating to sexually dangerous persons, or persons with psychopathic personality disorders, which are designed to cope with sex offenders who, because of a psychopathic condition, commit or have a tendency to commit sex offenses."); Landis, *supra* note 16, § 2 (explaining that statutes relating to sex offenders are designed to deal with problematic individuals who have a tendency to commit sex offenses). Pennsylvania also refers to certain individuals as "sexually violent predator[s]." 42 PA. CONS. STAT. ANN. § 9792 (West 2007). However, the only involuntary commitment law that Pennsylvania has pertains exclusively to children who are sexual predators. *Id.* § 6403; *see also* Heather R. Willis, Note, *Creeping by Moonlight: A Look at Civil Commitment Laws for Sexually Violent Predators Through the Lens of the Yellow Wallpaper*, 15 WM. & MARY J. WOMEN & L. 161, 172 n.100 (2008) (noting that Pennsylvania aims its sexual predator legislation exclusively at young offenders). Basically, sexually violent delinquent children can be involuntarily committed, but sexually violent predators are only subject to registration. *See* 42 PA. CONS. STAT. ANN. §§ 6402–6403, 9795.1(b)(3). While some of the definitions Pennsylvania uses are comparable to other states' sexual predator legislation, the Pennsylvania statute allowing civil commitment will not be discussed further in this Note because it is has a substantially different nature than other sexual predator legislation, that is, because it focuses only on minors. Texas also has a law referring to "sexually violent predator[s]." TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150 (West 2003 & Supp. 2008). However, because it only calls for outpatient treatment, not involuntary civil commitment, it will not be analyzed further in this Note. *See id.* § 841.081(a) (calling for outpatient treatment and supervision for those found to be sexually violent predators). There is also a federal law using the term "sexually violent predator," but it is only a registration law unrelated to civil commitment. *See* 42 U.S.C. § 14071(a)(1) (2006) (calling for the Attorney General to establish guidelines for state sex offender registration programs).

20 *See infra* Part II (discussing the development of sexual predator legislation and key terminology that allows civil commitment under these laws).

21 *See infra* Part II.A (describing the emergence of sexual predator legislation and its development throughout the twentieth century).

22 *See infra* Part II.B (explaining the United States Supreme Court's position on modern sexual predator legislation).

23 *See infra* Part II.C (discussing the SVPA, its key terminology, and its acceptance by Illinois courts).

24 *See infra* Part II.D (presenting definitions and interpretations of other key terminology related to sexual predator legislation).

A. The History of Sexual Predator Legislation

Sexual predator legislation, in some form or another, dates back to the 1930s.[25] The early versions of sexual predator laws, collectively referred to as sexual psychopath laws, provided for involuntary civil commitment of sexually violent individuals instead of incarceration.[26] By the 1960s, a majority of the states and the District of Columbia had sexual psychopath laws in some form.[27] Most of these laws, however, were repealed by the 1980s.[28] The increased focus on civil rights resulted in a backlash against sexual psychopath laws, as well as lingering questions about the effectiveness of treatment programs.[29]

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[25] *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators*, 53 WASH. & LEE L. REV. 1293, 1296 (1996) (explaining that the 1930s marked the decade when state legislatures first began introducing special procedures to deal with individuals deemed to be sexually violent or dangerous); Adam D. Hirtz, Note, *Lock 'Em Up and Throw Away the Key: Supreme Court Upholds Kansas' Sexually Violent Predator Act in* Kansas v. Hendricks, 42 ST. LOUIS U. L.J. 545, 545 (1998) (noting that the mass media of the 1930s began publicizing particularly violent and brutal sexual attacks); Kelly A. McCaffrey, Comment, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 888 (1994) (discussing the fact that Michigan passed the first sexual predator law in 1937); Willis, *supra* note 19, at 171 (explaining that some states have had sex offender civil commitment laws since the 1930s and 1940s).

[26] *See* Juliet M. Dupuy, Comment, *The Evolution of Wisconsin's Sexual Predator Law*, 79 MARQ. L. REV. 873, 873 (1996) (noting that under early sexual psychopath laws, commitments were preferred over imprisonment); McCaffrey, *supra* note 25, at 888 (stating that Michigan adopted the first sexual psychopath law committing eligible individuals in lieu of prison); Willis, *supra* note 19, at 171 (explaining that sexual psychopath laws viewed commitment as an alternative to prison); Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, *available at* 2007 WLNR 4144441 (noting that sexual psychopath laws in the early twentieth century were aimed at individuals too sick for prison).

[27] *See* Cornwell, *supra* note 25, at 1297 (noting that more than half of the states and the District of Columbia had some form of sexual predator legislation in place by 1960); Willis, *supra* note 19, at 171 (stating that more than twenty-five states had sexual predator legislation by the 1960s).

[28] *See* Cornwell, *supra* note 25, at 1297 (explaining that by the end of the 1980s, more than half of the sexual predator laws which existed in the 1960s had been repealed or expired); Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws*, 69 LA. L. REV. 549, 549 (2008) (noting that sexual psychopath laws were the first batch of laws aimed at sexually violent individuals but by 1990 most of these laws had been overturned or fallen out of use); Davey & Goodnough, *supra* note 26 (stating that, by the 1980s, most sexual predator legislation had been repealed or stopped being used); *see also* D.C. CODE §§ 22-3803–3811 (West 2001) (allowing for the commitment of "sexual psychopaths").

[29] *See* Cornwell, *supra* note 25, at 1297 ("By the end of the 1980s, however, [the number of sexual predator laws] had been cut in half, principally due to concerns about civil rights and the apparent lack of success of sex offender treatment programs."); Willis, *supra* note 19, at 171 (explaining that disfavor began to develop for sexual predator laws during the

Shortly after this period of repeal, state legislatures reacted to certain highly publicized cases by crafting the new versions of sexual predator legislation that exist today.[30] The state of Washington was the first to adopt a modern sexual predator law, and it did so in reaction to a particularly brutal case involving a sex offender.[31] In May 1989, a seven-year-old boy was riding his bike through a wooded nature trail when he was approached by Earl Shriner.[32] Shriner had recently completed a ten-year prison sentence for kidnapping and sexually assaulting two teenage girls.[33] Around dusk, a couple of hours later, a local family found the boy naked and covered with mud and blood.[34] The boy had been orally and anally raped, stabbed, strangled, and castrated.[35] Initially after the attack, the boy was in shock, mumbling incoherently and unable to speak.[36] Once he regained the ability to speak, the boy identified Shriner.[37]

Modern sexual predator laws, unlike many of the older statutes, are aimed at sexually violent individuals who are nearing the end of their prison term.[38] While modern sexual predator laws are most often

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1970s mainly due to the fact that individuals treated under them never seemed to be cured).

30 *See* Cornwell, *supra* note 25, at 1298 (noting that the 1990s have witnessed a rebirth of sexual predator legislation); Lave, *supra* note 28, at 549 (explaining that modern sexual predator laws are the second wave of sexual predator legislation); Willis, *supra* note 19, at 172 (stating that Washington was the first state to draft a modern sexual predator statute and that it coined the popular phrase "sexually violent predator"); Davey & Goodnough, *supra* note 26 (explaining that the state of Washington was the first to react, passing a modern sexual predator law in 1990).

31 *See infra* notes 32–37 and accompanying text (discussing the case of Earl Shriner).

32 David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 525–26 (1992).

33 Cornwell, *supra* note 25, at 1298.

34 Boerner, *supra* note 32, at 525.

35 *Id.*

36 *Id.*

37 *Id.* Shriner was charged with attempted first degree murder, first degree rape, and first degree assault. *Id.*; *see also* Stacey Mulick, *Ceremony to Remember 20th Anniversary of "Little Tacoma Boy,"* THE NEWS TRIBUNE (Tacoma), May 20, 2009, http://www.thenewstribune.com/2009/05/20/747814/ceremony-to-remember-20th-anniversary.html. After being convicted, Shriner was sentenced to 131 years in prison. *Id.* Sadly, the boy who was the victim of the crime died in a motorcycle accident in 2005. *Id.*

38 *See* Cornwell, *supra* note 25, at 1298 (stating that the new generation of sexual predator legislation focuses on those who have been tried, convicted, sentenced, and nearing the end of their jail term); Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 OHIO ST. J. CRIM. L. 25, 27 (2008) (explaining that sexual predator laws use civil commitment to confine sexually violent individuals after the completion of a prison term); Willis, *supra* note 19, at 172 (explaining that in Washington and most other states with sexual predator legislation, a sexually violent individual only becomes eligible for involuntary civil commitment upon the expiration of his or her prison sentence).

invoked after imprisonment that stemmed from a criminal conviction, a prior conviction is not necessarily required.[39] The basic procedure for commitment under these statutes usually requires the state to petition the court for commitment as the suspected sexually violent individual nears the end of a prison term.[40] Typically, the state must prove that the individual is sexually violent and thus eligible for commitment beyond a reasonable doubt.[41] If the state meets its burden and all constitutional requirements are met, a court will commit the sexually violent individual to treatment.[42] The commitment is potentially indefinite with periodic reviews to assess whether the individual is safe enough to be released. If the individual is still dangerous, however, he or she remains confined.[43]

Sexual predator laws have two major goals: (1) to protect the public from sexually violent individuals until those individuals are rehabilitated and released, and (2) to subject sexually violent individuals to treatment so the individual might be rehabilitated and return to society.[44] In pursuing these two goals, sexual predator legislation provides "a secondary pathway for social control."[45] The civil commitment called for in sexual predator laws allows the strict standards and procedures of the criminal justice system to be

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39 *See, e.g.*, 725 ILL. COMP. STAT. ANN. 207/5(f) (West 2008) (allowing for the involuntary civil commitment of those who have been convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense, or found not guilty of a sexually violent offense by reason of insanity); *see also* Cornwell, *supra* note 25, at 1300 (noting that in certain circumstances, an individual may also be committed under some sexual predator laws when there has been no adjudication or a finding of non-responsibility by reason of mental disease or defect).

40 Cornwell, *supra* note 25, at 1300; *see infra* note 66 (giving a thorough explanation of the SVPA's procedures).

41 Cornwell, *supra* note 25, at 1300; *see also infra* note 66 (explaining the SVPA's procedural requirements).

42 *E.g.*, 725 ILL. COMP. STAT. ANN. 207/40 (stating that if the individual is found to be sexually violent, the court must order the person committed for control, care, and treatment); *see infra* Part II.B (discussing the constitutional requirement that modern sexual predator laws must satisfy); *infra* note 66 (discussing the SVPA's procedures).

43 *See* Willis, *supra* note 19, at 171 (explaining that commitment under sexual predator legislation is potentially indefinite); Davey & Goodnough, *supra* note 26 (stating that modern sexual predator laws allow for the potentially indefinite civil commitment of certain individuals; however, under most laws, courts periodically review the cases of those committed).

44 *See* 53 AM. JUR. 2D, *supra* note 16, § 125 (2006) (explaining that the purpose of sexual predator laws is to sequester sexually violent individuals from the public and to subject sexually violent individuals to treatment); Landis, *supra* note 16, § 2 (stating that the social objectives of sexual predator legislation are: (1) protecting society by containing sexually violent individuals, and (2) treating sexually violent individuals so that they might recover from their condition).

45 Janus & Bolin, *supra* note 38, at 27.

inapplicable.[46] As modern sexual predator laws have become increasingly common, the Supreme Court has been forced to address the constitutionality of this new breed of legislation.[47]

B. Establishing That Sexually Violent People Can Be Civilly Committed

In *Kansas v. Hendricks*, the Supreme Court established that states can civilly commit sexually violent individuals so long as certain procedures are followed.[48] *Hendricks* involved a challenge to the Kansas Sexually Violent Predator Act.[49] The State of Kansas appealed a Kansas Supreme

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46 *Id.* at 27, 31–32.

47 *See infra* Part II.B (discussing the case law that found involuntary commitment of sexually violent individuals constitutional).

48 *See* 521 U.S. 346, 371 (1997) (holding that the Kansas law allowing for the civil commitment of sexually violent predators did not violate due process, double jeopardy, or ex post facto principles). The *Hendricks* decision actually built on preventive detention principles laid out in *Salerno*. *See* United States v. Salerno, 481 U.S. 739, 752 (1987) (explaining that due process is not offended when the government seeks to achieve the legitimate and compelling regulatory goal of preventing future crime by detaining those it sees as dangerous). At issue in *Salerno* was the Federal Bail Reform Act of 1984. *Id.* at 741. The Act allowed a judge to refuse bail and detain individuals before trial if the judge found the individuals were dangerous to the community. *Id.* at 742. Respondents were arrested on RICO violations and, pursuant to the Act, detained while awaiting trial. *Id.* at 743. Respondents brought a due process challenge to the Act, first arguing that substantive due process was violated because the pretrial detention was impermissible punishment before trial. *Id.* at 746. The Court looked to legislative intent and found the Act to be aimed at regulation, not punishment. *Id.* at 747. The Act did not violate substantive due process because it was aimed at the legitimate regulatory goal of preventing danger to the community. *Id.* In fact, the government interest in preventing future crime was both legitimate and compelling. *Id.* at 749. The Court next disposed of the procedural due process challenge, explaining that the Act provided numerous procedural safeguards built into the detention determination. *Id.* at 751–52. Lastly, the Court rejected the respondents' argument that the Act violated the Excessive Bail Clause of the Eighth Amendment. *Id.* at 752. The Court initially noted that the Eighth Amendment does not require that bail be made available, but only serves to make sure bail is not excessive when made available. *Id.* The Court then explained that when the government's only interest is in preventing flight by the defendant, bail must be tailored to an appropriate amount to ensure that goal and no more. *Id.* at 754. However, when Congress has been clear that detention is based on an interest other than preventing flight, as with the Act in question, the Eighth Amendment does not require release on bail. *Id.* at 754–55.

49 *Hendricks*, 521 U.S. at 350. The Act established civil commitment procedures for those persons found to be sexually violent predators. *Id.* A sexually violent predator was defined in the Act as a person with "a mental abnormality or personality disorder which makes the person likely to engage in . . . sexual violence." *Id.* at 352. Kansas defined a mental abnormality as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person" to sexual violence. *Id.* The Act required notification to the local prosecutor sixty days before the anticipated release of a person who might qualify for commitment under the Act. *Id.* Within forty-five days, the prosecutor was then required to decide whether or not to file a petition seeking involuntary commitment of the person. *Id.* If the petition was filed, the court had to decide whether

Court ruling, which held that the Act violated substantive due process rights.[50] The United States Supreme Court held that substantive due process was satisfied by a finding of future dangerousness, which was then linked "to the existence of a 'mental abnormality' or 'personality disorder' that [made] it difficult, if not impossible, for the person to control his dangerous behavior."[51] Requiring a mental abnormality or

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there was probable cause to believe the person was a sexually violent predator. *Id.* If probable cause was found, the person was transferred for a mental evaluation. *Id.* Eventually a trial was held where the State was required to prove beyond a reasonable doubt that the person was a sexually violent predator. *Id.* at 352–53. If this burden was satisfied, the person was taken into custody by the Secretary of Social and Rehabilitation Services for control, care, and treatment. *Id.* at 353. The Act also had a number of procedural safeguards, such as the assistance of counsel for indigent persons, examinations by mental health professionals, the right to be present and cross-examine witnesses, the opportunity to review evidence presented by the State, annual reviews to determine whether continued detention was warranted, the possibility at any time for release if the person's condition had changed and the Secretary of Social and Rehabilitation Services believed release was appropriate, and the opportunity to petition the court at any time to challenge whether the State could still satisfy its burden of proof. *Id.*

[50] *Id.* at 356. In *Hendricks*, Hendricks was convicted of molesting two teenage boys. *Id.* at 353. Hendricks served nearly ten years in prison and was approaching release at the time Kansas petitioned the court seeking Hendricks's civil commitment pursuant to the Sexually Violent Predator Act. *Id.* at 353–54. At a jury trial to determine if Hendricks was a sexually violent predator, Hendricks's own testimony revealed that he had engaged in numerous acts of child molestation dating back to 1955. *Id.* at 354. Hendricks's acts of child molestation included the abuse of his own stepdaughter and stepson. *Id.* Furthermore, Hendricks admitted that he repeatedly sexually abused children when not confined, and that he molested children when he got stressed out. *Id.* at 355. A jury unanimously found beyond a reasonable doubt that Hendricks was a sexually violent predator. *Id.* Pursuant to the Act, Hendricks was then civilly committed. *Id.* at 355–56. Hendricks appealed, and the Kansas Supreme Court accepted his due process challenge. *Id.* at 356. The court explained that in involuntary civil commitment proceedings, substantive due process requires the state to prove by clear and convincing evidence that the individual is mentally ill and a danger to himself or others. *Id.* The court then struck down the Act's definition of "mental abnormality" and found the Act to be a violation of substantive due process. *Id.* The court did not address double jeopardy or ex post facto issues. *Id.*

[51] *Id.* at 358. The Act at issue in *Hendricks* required a finding of dangerousness to one's self or others as a prerequisite to involuntary confinement. *Id.* at 357. Commitment was only allowed under the Act after a person had been convicted of or charged with a sexually violent offense, and that person had a "mental abnormality" or "personality disorder" which made the person likely to engage in predatory sexual violence. *Id.* "The statute thus requires proof of more than a mere predisposition to violence; rather, it requires evidence of past sexually violent behavior and a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated." *Id.* at 357–58. The Court noted that a finding of dangerousness, standing alone, was not sufficient to justify indefinite involuntary commitment. *Id.* at 358. Hendricks further argued that "mental abnormality" was not equivalent to "mental illness" because the Kansas legislature, not psychiatrists, created the term. *Id.* at 358–59. The Court rejected this argument because psychiatrists themselves disagree over specific terminology and state legislatures have never been required to adopt "particular nomenclature in drafting civil commitment

personality disorder before an individual can be committed caused the number of persons who were eligible for commitment to decrease compared to those who lack volitional control, that is, those who are unable to control their behavior.[52] Furthermore, because civil commitment statutes aimed at sexually violent individuals are civil laws rather than criminal laws, double jeopardy and ex post facto challenges also failed.[53]

Just five years after *Hendricks*, the Kansas Sexually Violent Predator Act was again at issue in *Kansas v. Crane*.[54] The *Crane* Court did not overrule *Hendricks*, but instead sought to clarify its holding and elaborate on the lack-of-volitional-control requirement when civilly committing sexually violent individuals.[55] The *Crane* Court held that while a

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statutes." *Id.* at 359; *see* Carolyn B. Ramsey, *California's Sexually Violent Predator Act: The Role of Psychiatrists, Courts, and Medical Determinations in Confining Sex Offenders*, 26 HASTINGS CONST. L.Q. 469, 476 (1998) (explaining that the Court's disregard of any distinction between a "mental abnormality" and a "mental illness" revealed a distrust of medical science's terminology in the law).

52 *Hendricks*, 521 U.S. at 358–60.

53 *Id.* at 361–71. As an initial matter, the Court looked to statutory construction; the legislature's placement of the Act in the probate code, not the criminal code, suggested that the legislature viewed this as a civil law. *Id.* at 361. Additionally, the legislature described the Act as creating *civil* commitment procedures. *Id.* The Court further reasoned that the Act was civil in nature because it did not implicate either of the primary objectives of criminal punishment: retribution or deterrence. *Id.* at 361–62. The Act at issue in *Hendricks* did not make criminal conviction a prerequisite for civil commitment; persons absolved of criminal responsibility could qualify for commitment under the Act. *Id.* at 362. Since criminal responsibility was not required, the State was not seeking retribution for past misconduct. *Id.* Furthermore, no finding of scienter was required to qualify for commitment under the Act. *Id.* Deterrence was also not an objective because persons who qualify for commitment under the Act cannot exercise control over their behavior; thus, the threat of confinement is unlikely to deter them. *Id.* at 362–63. Since the Act was civil in nature, the Double Jeopardy Clause, which prohibits being punished twice for the same offense, was not offended. *Id.* at 369. "The *Ex Post Facto* Clause, which 'forbids the application of any new punitive measure to a crime already consummated,'" was also not offended because it pertains exclusively to penal statutes. *Id.* at 370 (quoting Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 505 (1995)). Furthermore, the Act makes an evaluation based on current mental condition, not past conduct. *Id.* at 371. Past conduct is only used for evidentiary purposes. *Id.* The dissenting opinion pointed out that the Act did not put an emphasis on treatment. *Id.* at 396 (Breyer, J., dissenting). Without an emphasis on treatment, the Act could not be considered civil; thus, the Act, through involuntary commitment, amounted to punishment. *Id.*; *see* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (explaining that a state's punitive interest allows it to imprison criminals for the purposes of deterrence and retribution); *see also* Janus & Bolin, *supra* note 38, at 25 (explaining that in order to be constitutional, sexual predator laws must be regulatory or non-punitive).

54 *See* Kansas v. Crane, 534 U.S. 407, 409 (2002) (reconsidering the statute initially addressed in *Hendricks*).

55 *Id.* at 411–12; *see also* People v. Masterson, 798 N.E.2d 735, 746 (Ill. 2003) (noting that nothing in the *Crane* majority alters or overrules the principles announced in *Hendricks*). The Kansas Supreme Court narrowly interpreted *Hendricks* as requiring the State to always

complete or total lack-of-volitional-control finding is not necessary for civil commitment, some lack-of-volitional-control determination must be made.[56] The Court reasoned that an absolutist approach that requires a complete lack-of-volitional-control determination is unworkable.[57]

It is worth noting that the Kansas Supreme Court made a distinction between "emotional capacity" and "volitional capacity" when

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prove a complete inability to control behavior as a prerequisite to civilly commit a sexually violent predator. *Crane*, 534 U.S. at 411. The State challenged this interpretation as being too rigid. *Id.*

[56] *Crane*, 534 U.S. at 411–13. The Court averred that most severely ill people, even those considered psychopaths, have some ability to control their behavior. *Id.* at 412. Requiring an absolute lack-of-volitional-control finding, therefore, "would risk barring the civil commitment of highly dangerous persons suffering severe mental abnormalities." *Id.* However, the Constitution does not permit commitment without any lack-of-volitional-control determination. *Id.* "[T]here must be proof of serious difficulty in controlling behavior. And this . . . must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 413. The Court recognized that this interpretation of *Hendricks* does not give a precise constitutional standard in regards to civil commitment; however, the Court concluded by noting that the Constitution's human liberty protections in regards to mental illness and the law are not best enforced through bright-line rules. *Id.*; *see also* Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (explaining that psychiatry is not an exact science and psychiatrists oftentimes disagree on what constitutes mental illness).

[57] *Crane*, 534 U.S. at 411. The additional requirement that the Court formulated, the lack-of-volitional-control determination, was strongly criticized by the dissent. *Id.* at 422–23 (Scalia, J., dissenting). Justice Scalia voiced his disapproval by stating the following:

> I not only disagree with the Court's gutting of our holding in *Hendricks*; I also doubt the desirability, and indeed even the coherence, of the new constitutional test which (on the basis of no analysis except a misreading of *Hendricks*) it substitutes. Under our holding in *Hendricks*, a jury in an SVPA commitment case would be required to find, beyond a reasonable doubt, (1) that the person previously convicted of one of the enumerated sexual offenses is suffering from a mental abnormality or personality disorder, and (2) that this condition renders him likely to commit future acts of sexual violence. Both of these findings are coherent, and (with the assistance of expert testimony) well within the capacity of a normal jury. Today's opinion says that the Constitution requires the addition of a third finding: (3) that the subject suffers from an inability to control behavior—not utter inability, and not even inability in a particular constant degree, but rather inability in a degree that will vary "in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself."
>
> This formulation of the new requirement certainly displays an elegant subtlety of mind. Unfortunately, it gives trial courts, in future cases under the many commitment statutes similar to Kansas's SVPA, *not a clue* as to how they are supposed to charge the jury!

Id. (citations omitted).

interpreting a mental abnormality and had its analysis struck down.[58] The *Crane* Court, however, did not hold that "emotional capacity" and "volitional capacity" are the same for the purposes of civil commitment.[59] On the contrary, the Court did not even consider the "emotional capacity" language because the "volitional capacity" inquiry was enough to uphold the Act.[60] In fact, neither the *Hendricks* nor *Crane* Courts considered what exactly the "emotional capacity" language, so often found in sexual predator legislation, means.[61] Having looked at the key decisions establishing sexual predator laws as constitutional, the SVPA and its specific language can now be discussed.[62]

C. The Illinois Sexually Violent Persons Commitment Act

States use varying terminology to label the class of individuals regulated by their sexual predator laws.[63] Illinois refers to these

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58 *See id.* at 415 (majority opinion) (vacating the Kansas Supreme Court's judgment which interpreted the Kansas Sexually Violent Predator Act); *infra* note 86 (explaining that the Kansas Supreme Court believed "emotional" and "volitional" actually referred to separate capacities).

59 *See Crane*, 534 U.S. at 411–13 (holding that while a complete or total lack-of-volitional-control finding is not necessary for civil commitment, some lack-of-volitional-control determination must be made).

60 *See id.* at 413 (explaining that, in order to civilly commit someone under the Kansas Sexually Violent Predator Act, there must be proof that the individual has serious difficulty in controlling his or her behavior). However, the Court further explained that its decision did not address whether civil commitment based solely on a mental abnormality involving the "emotional capacity" would be constitutional. *Id.* at 415.

61 *See id.* (noting that the "emotional capacity" language was not considered in *Hendricks*, nor is it considered in the present case). The *Crane* Court further explained that

> [r]egardless, *Hendricks* must be read in context. The Court did not draw a clear distinction between the purely "emotional" sexually related mental abnormality and the "volitional." Here, as in other areas of psychiatry, there may be "considerable overlap between a . . . defective understanding or appreciation and . . . [an] ability to control . . . behavior." Nor, when considering civil commitment, have we ordinarily distinguished for constitutional purposes among volitional, emotional, and cognitive impairments. The Court in *Hendricks* had no occasion to consider whether confinement based solely on "emotional" abnormality would be constitutional, and we likewise have no occasion to do so in the present case.

Id. (citations omitted).

62 *See infra* Part II.C (discussing the enactment, key terminology, and judicial approval of the SVPA).

63 *See supra* note 19 (elaborating on the varying terminology states use to describe a sex offender subject to civil commitment; this terminology includes phrases such as: sexual psychopath, sexually violent person, sexually violent predator, sexually dangerous person, person with a sexual psychopathic personality, dangerous sex offender, sex offender requiring civil commitment or supervision, and sexually dangerous individual).

individuals as sexually violent persons, and they are regulated by the SVPA.[64] The SVPA became effective on January 1, 1998.[65] The SVPA permits the commitment of sexually violent individuals provided that the state follows certain procedures.[66] The SVPA can best be understood

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[64] 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008). Closely related to the SVPA is another Illinois law entitled the Sexually Dangerous Persons Act ("SDPA"). *Id*. at 205/1.01–12. The SDPA can be applied to individuals who have never faced a trial for a sex offense. People v. Winterhalter, 730 N.E.2d 1158, 1162 (Ill. App. Ct. 2000). The SDPA can be applied to individuals so long as the state can convince the trier of fact beyond a reasonable doubt that the person has criminal propensities to the commission of sex offenses. People v. Masterson, 798 N.E.2d 735, 743 (Ill. 2003). The SVPA, however, only applies to individuals who have "been convicted, adjudicated delinquent, or found not guilty by reason of insanity, of a sexually violent offense." *Winterhalter*, 730 N.E.2d at 1162. Also "[u]nlike the SVPA, the SDPA does not *specifically* address the probability or likelihood that the subject of the proceeding will engage in sexual offenses in the future." *Masterson*, 798 N.E.2d at 743; *see also* 725 ILL. COMP. STAT. ANN. 207/5(f) (using a "substantially probable" standard). This Note will focus on the SVPA for two major reasons: (1) the SVPA is most similar to sex offender civil commitment laws in other jurisdictions, thus allowing for better comparisons, and (2) this Note is a critique of existing statutory language, not language that is yet to be written or which has been purposefully omitted. The SVPA also relieves some of the strain already felt on underfunded Illinois prisons. *See, e.g.*, Monique Garcia, *Quinn to Release 1,000 Inmates from Prison in Cost-Cutting Move*, CHI. TRIB., (Sept. 18, 2009, 5:38 PM), http://newsblogs.chicagotribune.com/clout_st/2009/09/quinn-to-release-1000-inmates-from-prison-in-costcuttingmove.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+chicagotribune%2Fcloutstreet+(Chicago+Tribune%3A+Clout+Street) (discussing a recent attempt at saving money in Illinois by releasing prisoners early and laying off prison workers); Josh Stockinger, *Future Uncertain for Aging St. Charles Youth Prison*, DAILY HERALD (Chi.), Nov. 29, 2009, http://www.dailyherald.com/story/?id=340307 (discussing the funding issues in Illinois prisons).

[65] Sexually Violent Persons Commitment Act, Pub. Act 90-40 (1997) (codified as amended at 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008)).

[66] *See generally* 725 ILL. COMP. STAT. ANN. 207/1–99 (stating all of the procedures and requirements necessary for commitment as an SVP). Under the SVPA, the State's Attorney in the appropriate county is given written notification of the suspected SVP's release date from incarceration. *Id*. at 207/9. Notification is to be given at least six months prior to the anticipated release date by the Illinois Department of Corrections or the Department of Juvenile Justice; the notification explains that the person will be considered for commitment under the SVPA. *Id*. Three months prior to the person's release or discharge, if the person is found to be subject to commitment, the appropriate agency shall inform the State's Attorney and the Attorney General of the person's name, offense history, mental condition, treatment, and numerous other pieces of information. *Id*. at 207/10(b)–(c). Based on the report, the Attorney General, at the request of the agency with jurisdiction, the applicable State's Attorney, or both working jointly, may then file a petition with the circuit court alleging that the person is an SVP. *Id*. at 207/15(a)(1)–(3). The petition has to be filed not more than ninety days before the person's anticipated release. *Id.* at 207/15(b-6). The proceedings under the SVPA are civil in nature. *Id.* at 207/20. Upon filing of the petition, the court reviews the petition to determine if there is probable cause that the person is an SVP. *Id.* at 207/30(a). If probable cause is found, the person is taken into custody and transferred to an appropriate facility for an evaluation. *Id.* at 207/30(c). If probable cause is not found, the petition is dismissed. *Id.* No later than 120 days after the

by looking at its key terminology and the approval of this terminology in light of *Hendricks* and *Crane*.[67]

1. The SVPA's Key Terminology and Definitions

The SVPA defines a sexually violent person as a person who suffers from a mental disorder that makes the person substantially probable to engage in sexual violence.[68] Thus, the meaning of the term "sexually

probable cause hearing is held, a trial is conducted to determine if the person is an SVP. *Id.* at 207/35(a). Upon request, the trial may be by a jury; otherwise, it is a bench trial. *Id.* at 207/35(c). The petitioner, that is, the state, has the burden of proving the allegations in the petition beyond a reasonable doubt. *Id.* at 207/35(d)(1). If the court or jury determines beyond a reasonable doubt that the person is an SVP, the person shall be committed. *Id.* at 207/35(f). If the court or jury is not satisfied beyond a reasonable doubt, the petition is dismissed and the person is released. *Id*. The terms of the commitment are decided by the court, and these terms can be for either institutional care at a secure facility or conditional release. *Id.* at 207/40(b)(1)–(2). If institutional care at a secure facility is ordered, the Department of Human Services places the SVP at a facility provided by the Department of Corrections. *Id.* at 207/50(a). The Department of Human Services must submit a written report to the court within six months of the initial commitment, and at least once every twelve months thereafter. *Id.* at 207/55(a). The report is on the SVP's mental condition and whether the SVP has made enough progress to be conditionally released or discharged. *Id*. An SVP who has been institutionalized for care at a secure facility may petition the court for conditional release. *Id.* at 207/60(a). The petition can be filed if at least six months have passed since the initial commitment, the denial of the most recent release petition, or the revocation of the most recent order for conditional release. *Id*. The director of the facility where the SVP is being treated may petition for conditional release at any time. *Id*. An SVP may also petition the court for a complete discharge. *Id.* at 207/65(b)(1). Furthermore, if the Secretary of Human Services determines at any time that the SVP is no longer sexually violent, the Secretary of Human Services shall authorize a petition for discharge. *Id.* at 207/65(a)(1). The State's Attorney or Attorney General, whoever filed the original petition, shall represent the state in challenging the SVP's petition for conditional release or discharge. *Id.* at 207/60(b), 207/65(a)(2). In response to petitions for conditional release or discharge, the state has the burden of proving by clear and convincing evidence that the SVP is still sexually violent. *Id*. at 207/60(d), 207/65(a)(2). If the state fails to meet its burden of proof, the person shall be released. *Id*. at 207/65(a)(3). *See generally In re* Det. of Lieberman, 929 N.E.2d 616, 618–31 (Ill. App. Ct. 2010) (discussing the procedures of the SVPA and the discretion of the trial court in SVP determinations). There is currently a proposed amendment that would give authority to the Department of Healthcare and Family Services, rather than the Department of Human Services. *See* H.R. 5303, 2009 Leg., 96th Gen. Assemb., Reg. Sess. (Ill. 2010).

[67] *See infra* Part II.C.1 (looking at the SVPA's statutory language); *infra* Part II.C.2 (discussing the SVPA's treatment, as well as approval, by the Illinois Supreme Court).

[68] 725 ILL. COMP. STAT. ANN. 207/5(f). The precise definition offered in the SVPA is that a sexually violent person is

> a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder

violent person" depends on the meanings of "mental disorder" and "substantially probable."[69] The term "mental disorder" is defined as a condition affecting the "emotional or volitional capacity" that predisposes an individual to sexual violence.[70] The Illinois Supreme Court has refused to rely solely on medical science when interpreting the definition of mental disorder.[71]

The SVPA does not provide a definition of "substantially probable."[72] As a result, Illinois courts have been forced to interpret what this means.[73] Through such analysis, courts defined "substantially probable" as meaning "much more likely than not."[74] While crafting a definition of "substantially probable," Illinois courts have made it clear that the definition cannot be broken down into a mathematical

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> that makes it substantially probable that the person will engage in acts of sexual violence.

Id. When originally passed, the definition provided that a sexually violent person could have "been found not guilty of or not responsible for a sexually violent offense by reason of insanity, mental disease or mental defect." Pub. Act 90-40 (1997). The current definition, however, was drafted eight months after the SVPA went into effect. Pub. Act 90-793 (1998).

69 725 ILL. COMP. STAT. ANN. 207/5(f).

70 *Id.* at 207/5(b). The SVPA fully defines a mental disorder as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *Id.*

71 *See infra* Part III.A.2 (explaining why the mental health community's definition of a mental disorder is not the determining factor in SVPA civil commitments).

72 *See* 725 ILL. COMP. STAT. ANN. 207/5 (omitting a definition of "substantially probable").

73 *See In re* Det. of Hayes, 747 N.E.2d 444, 452–54 (Ill. App. Ct. 2001) (discussing what "substantially probable" means and how it compares to the standard upheld in *Hendricks*); *In re* Det. of Bailey, 740 N.E.2d 1146, 1155–57 (Ill. App. Ct. 2000) (assessing what "substantially probable" means in light of its interpretation by courts in other states); *In re* Det. of Walker, 731 N.E.2d 994, 1002 (Ill. App. Ct. 2000) (discussing what "substantially probable" means and whether it can be broken down into a mathematical formula).

74 *See Hayes*, 747 N.E.2d at 453 (defining "substantially probable" as meaning "much more likely than not"); *Bailey*, 740 N.E.2d at 1156–57 (explaining that "substantially probable" means "much more likely than not," a definition already formulated and accepted in Wisconsin). In *Bailey*, the court relied on a Wisconsin case, *In re Commitment of Curiel*, 597 N.W.2d 697 (Wis. 2000), in defining the term "substantially probable." *Bailey*, 740 N.E.2d at 1156. The *Curiel* court equated the term "substantial probability" to substantially probable, finding no difference between the two terms. *Id.* "Substantially" means considerable in importance, value, degree, amount, or extent; furthermore, the term "much" can commonly convey the same meaning as "substantially." *Id.* "Probable" can be defined as having "more evidence for than against." *Id.* Since dictionary meanings can be looked to in the absence of a statutory definition, the *Bailey* court concluded that "substantially probable" is defined as "much more likely than not." *Id.* at 1157.

standard.[75] The specific language and definitions discussed above provide the framework for the SVPA's constitutional analysis.[76]

2. The SVPA's Approval After *Hendricks* and *Crane*

In 2001, the SVPA was challenged in light of *Hendricks*.[77] The Illinois Supreme Court upheld the SVPA, reasoning that the SVPA, much like the Kansas law found constitutional in *Hendricks*, requires a finding of a mental disorder that affects an individual's ability to control his or her behavior.[78] The major focus in the SVPA is whether an individual can control his or her sexually violent acts.[79] The two terms used in defining a mental disorder, "emotional" and "volitional," are adjectives ensuring that those meant to be covered by the statute are included under its language.[80] After meeting constitutional scrutiny initially, the SVPA was again challenged after the *Crane* decision.[81] The Illinois Supreme Court,

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75 *See Hayes*, 747 N.E.2d at 453 (stating that "substantially probable" cannot be broken down into percentages); *Walker*, 731 N.E.2d at 1002 (rejecting the idea that "substantially probable" can be reduced to a percentage).

76 *See infra* Part II.C.2 (discussing the SVPA's approval in light of *Hendricks* and *Crane*).

77 *In re* Det. of Varner, 759 N.E.2d 560, 563 (Ill. 2001). *Varner* involved a substantive due process challenge to the SVPA based on the Supreme Court's ruling in *Hendricks*. *Id.* The petitioner's argument was that his commitment under the SVPA could not be reconciled "with the principles of substantive due process because it occurred without a specific finding by the jury that he lacked volitional control over his sexually violent criminal behavior." *Id.* The petitioner further claimed that his commitment was only constitutional if he lacked volitional control over his sexually violent conduct. *Id.*

78 *Id.* at 564. The jury's determination that petitioner was an SVP necessarily required a finding that he suffered from a mental disorder. *Id.* The pre-commitment finding of a mental disorder, appropriately defined in the SVPA, was sufficient to "narrow[] the class of persons eligible for confinement to those who are unable to control their dangerousness." *Id.* (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997)).

79 *Id.* at 565.

80 *Id.* The *Varner* court further explained that

> the terms "emotional" and "volitional" are merely adjectives used to describe the reasons an individual might lack the capacity to control his behavior. Medical science's understanding of mental pathology is imperfect and evolving, and the legislature used these terms simply to insure that everyone who is unable to control his or her sexually violent behavior is covered by the law, whatever the precise reason for that lack of control might be.

Id.

81 *In re* Det. of Varner, 800 N.E.2d 794, 796–97 (Ill. 2003). The case involved the same petitioner and the same substantive due process challenge as the earlier *Varner* decision, 759 N.E.2d 560 (Ill. 2001). *Id.* at 795. However, the United States Supreme Court vacated the earlier decision and remanded the case to the Illinois Supreme Court for further consideration in light of *Crane*. *Id.*

relying heavily on its previous opinion, once again upheld the SVPA.[82] The court rejected the petitioner's claim that *Crane* required a specific lack-of-volitional-control determination.[83] So long as the SVPA contains specific definitions that encompass the constitutional elements of civil commitment, substantive due process is satisfied.[84]

The Illinois Supreme Court decisions after *Hendricks* and *Crane* elaborated on the "mental disorder" language and rejected the position that "emotional" and "volitional" refer to separate capacities.[85] The Kansas Supreme Court, in its interpretation of a "mental abnormality," believed that the two words "emotional" and "volitional" actually referred to separate capacities.[86] In assessing the "emotional or volitional

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[82] *Id.* at 799; *see also In re* Det. of Isbell, 777 N.E.2d 994, 998–99 (Ill. App. Ct. 2002) (giving a thorough discussion of the SVPA's *Varner* approval in light of *Crane*).

[83] *Varner*, 800 N.E.2d at 798. The Court reasoned that, because the *Crane* Court upheld the commitment in *Hendricks*, *Crane* does not require a specific determination by the fact finder in every case that a person cannot control his or her behavior. *Id.* The Court went on to further state the following:

> As we recently observed in *Masterson*: "Clearly the justices of the *Crane* majority did not believe their decision called into question the continued viability of *Hendricks*. Nothing said in the majority opinion *explicitly* repudiates or alters principles espoused in *Hendricks*." We acknowledge that *Masterson* involved the constitutionality of a commitment under the Sexually Dangerous Persons Act. Nevertheless, our decision included a thorough analysis of the Act at issue in this case, *i.e.*, the Sexually Violent Persons Commitment Act . . . . For this reason, our analysis of the Act in *Masterson* provides substantial guidance in this case.
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> In *Masterson*, we noted that several state courts have held that their sexually violent offender statutes conformed to *Hendricks* and *Crane* where those statutes, like our Act, require proof of the commission of a prior offense, and include specific definitions of "mental abnormality" or "mental disorder," as well as a defined burden regarding the likelihood of future offenses. Those statutes, as with our Act, contain definitions that supply the constitutionally required elements for civil commitment. A fact finder properly instructed with definitions of these and other pertinent statutory terms need not receive additional separate instruction on lack of control.

Id. at 798–99 (citations omitted); *see also* People v. Masterson, 798 N.E.2d 735, 748 (Ill. 2003) (looking to the SVPA to shape the ,ourt's analysis of the Sexually Dangerous Persons Act because the two statutes are "governed by one spirit and a single policy").

[84] *See Varner*, 800 N.E.2d at 798–99 (explaining that substantive due process is satisfied with carefully crafted definitions).

[85] *See infra* notes 86–88 (discussing the Kansas Supreme Court's view that "emotional" and "volitional" refer to separate capacities and why Illinois has rejected this).

[86] *Varner*, 800 N.E.2d at 797. The Kansas Supreme Court's interpretation of "emotional or volitional capacity" was twofold: (1) by including the term "volitional," the legislature was addressing a condition which prevented an individual from controlling his or her behavior; and (2) by including "emotional," the Court believed the legislature must have intended to include an additional circumstance unrelated to an inability to control one's

capacity" language, however, Illinois has rejected this distinction and emphasized that the most important element is whether the person is able to control his or her behavior.[87] The Illinois Supreme Court has taken the position that the Illinois legislature, in drafting the SVPA, simply wanted to make its language as inclusive as possible.[88] While the above-mentioned Illinois Supreme Court decisions provide substantial guidance on the SVPA's interpretation, it is also useful to look at and compare the language offered in similar sexual predator laws and other authorities.[89]

D. Language and Key Definitions in Other Jurisdictions

Illinois is not the only state that has a sexual predator law.[90] Indeed, the SVPA is shaped by the same overarching principles that guide all sexual predator legislation.[91] To fully understand the SVPA's language, it is helpful to look at definitions offered in similar laws as well as other authorities.[92] The definitions offered by other states' sexual predator laws are discussed below, followed by the language of the Diagnostic and Statistical Manual of Mental Disorders ("DSM") and common dictionary definitions.[93]

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behavior. *Id.* Through this interpretation, the Kansas court did not believe the statute met the *Hendricks* standard of only applying to persons who cannot control their dangerous behavior. *Id.*

87 *See id.* (reasoning that the Illinois legislature did not use the terms "emotional" and "volitional" as a way to differentiate between individuals who can control their sexually violent behavior and those who cannot). The terms "emotional" and "volitional" merely describe the reasons someone might be unable to control his or her behavior. *Id.*

88 *See id.* (rejecting the Kansas interpretation of "emotional or volitional capacity" and reasoning that the Illinois legislature simply wanted to ensure that everyone who is unable to control his or her sexually violent behavior is covered by the SVPA); *supra* note 87 (discussing the Illinois Supreme Court's explanation of why "emotional" and "volitional" do not refer to separate capacities).

89 *See infra* Part II.D (discussing the language of other jurisdictions' sexual predator laws and other definitions of key terminology).

90 *See supra* note 18 (listing the states that have sexual predator laws).

91 *See supra* notes 38–46 and accompanying text (discussing the guiding principles and goals of sexual predator legislation).

92 *E.g.*, *In re* Det. of Varner, 800 N.E.2d 794, 796–99 (Ill. 2003) (comparing the SVPA to the Kansas Sexually Violent Predator Act); *see also In re* Det. of Bailey, 740 N.E.2d 1146, 1155–57 (Ill. App. Ct. 2000) (looking to a Wisconsin law and dictionary definitions in order to interpret what "substantially probable" meant).

93 *See infra* Part II.D.1 (discussing the statutory language that states other than Illinois use in their sexual predator laws); *infra* Part II.D.2 (looking at numerous other definitions found in medical diagnostic manuals and dictionaries).

1. The Language Found in Other Sexual Predator Laws

The SVPA uses the terms "mental disorder" and "substantially probable" to compose its sexually violent person definition.[94] Thus, someone is an SVP if he or she has a mental disorder that makes him or her substantially probable to engage in sexual violence.[95] The structure of the SVPA's sexually violent person definition mirrors other states' definitions; however, there are variations among the terms used.[96] In regard to the SVPA's mental disorder language, a few states, like Illinois, use the term "mental disorder."[97] Most states, however, use a combination of "mental abnormality" and "personality disorder."[98] In regard to the SVPA's "substantially probable" language, most states

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94 *See supra* note 68 (explaining how Illinois defines an SVP).

95 *See supra* note 68 (illustrating that the two terms mental disorder and substantially probable define an SVP under the SVPA).

96 *See infra* notes 97–100 (discussing the definitions that other states use in their sexual predator laws and comparing the most common terminology found in those definitions).

97 *See* ARIZ. REV. STAT. ANN. § 36-3701(7)(b) (2009) (using the term "mental disorder" in defining a sexually violent person); CAL. WELF. & INST. CODE § 6600(a)(1) (West 1998 & Supp. 2009) (using the term "mental disorder" in defining a sexually violent predator); WIS. STAT. ANN. § 980.01(7) (West Supp. 2008) (using the term "mental disorder" to define a sexually violent person).

98 *See* FLA. STAT. ANN. § 394.912(10)(b) (West 2006 & Supp. 2009) (using the phrase "mental abnormality or personality disorder" to define a sexually violent predator); IOWA CODE ANN. § 229A.2(11) (West Supp. 2009) (using the term "mental abnormality" to define a sexually violent predator); KAN. STAT. ANN. § 59-29a02(a) (Supp. 2008) (defining a sexually violent predator as someone with a "mental abnormality or personality disorder"); MASS. GEN. LAWS ANN. ch. 123A, § 1 (West 2003 & Supp. 2009) (using the terms "mental abnormality" and "personality disorder" in the definition of a sexually dangerous person); MO. ANN. STAT. § 632.480(5) (West 2006) (using the term "mental abnormality" to define a sexually violent predator); NEB. REV. STAT. § 83-174.01(1) (2008) (referring to dangerous sex offenders as individuals with a "mental illness" or "personality disorder"); N.H. REV. STAT. ANN. § 135-E:2(XII)(b) (LexisNexis Supp. 2008) (using the phrase "mental abnormality or personality disorder" to define a sexually violent predator); N.J. STAT. ANN. § 30:4-27.26 (West 2008) (defining a sexually violent predator as someone with a "mental abnormality or personality disorder"); N.Y. MENTAL HYG. LAW § 10.03(e) (McKinney Supp. 2009) (stating that a dangerous sex offender requiring confinement is someone who suffers from a "mental abnormality"); S.C. CODE ANN. § 44-48-30(1)(b) (2002 & Supp. 2008) (using the phrase "mental abnormality or personality disorder" to define a sexually violent predator); VA. CODE ANN. § 37.2-900 (2005 & Supp. 2009) (requiring a "mental abnormality" or "personality disorder" to be considered a sexually violent predator); WASH. REV. CODE ANN. § 71.09.020(18) (West 2008 & Supp. 2010) (defining a sexually violent predator as someone with a "mental abnormality or personality disorder"); *see also* N.D. CENT. CODE § 25-03.3-01(8) (2002) (stating that a sexually dangerous individual is someone with a "personality disorder, or other mental disorder or dysfunction").

choose to apply the "likely" standard.[99] However, Missouri is unique because it uses a "more likely than not" standard.[100]

In many circumstances, the sexual predator laws in other jurisdictions also provide definitions of key terminology.[101] For instance, many sexual predator laws define a "mental abnormality" or "mental disorder," whichever term is used, as a mental condition that affects the emotional or volitional capacity of a person and predisposes that person to sexual violence.[102] While most states use "emotional or volitional

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[99] *See* ARIZ. REV. STAT. ANN. § 36-3701(7)(b) (using "likely" as the standard in defining a sexually violent person); CAL. WELF. & INST. CODE § 6600(a)(1) (stating that a sexually violent predator is someone "likely [to] engage in sexually violent criminal behavior"); D.C. CODE § 22-3803(1) (West 2001) (explaining that a sexual psychopath is someone "likely" to attack others); FLA. STAT. ANN. § 394.912(10)(b) (defining a sexually violent predator as someone "likely" to engage in sexual violence); IOWA CODE ANN. § 229A.2(11) (finding a sexually violent predator to be someone who is "likely" to engage in sexual violence); KAN. STAT. ANN. § 59-29a02(a) (defining a sexually violent predator as someone "likely" to engage in sexual violence); MASS. GEN. LAWS ANN. ch. 123A, § 1 (stating that a sexually dangerous person is someone "likely" to attack or inflict injury because of uncontrollable desires); NEB. REV. STAT. § 83-174.01(1) (defining a dangerous sex offender as someone "likely" to engage in repeat acts of sexual violence); N.H. REV. STAT. ANN. § 135-E:2(XII)(b) (stating that a sexually violent predator is someone who is "likely" to be sexually violent); N.J. STAT. ANN. § 30:4-27.26 (defining a sexually violent predator as someone "likely" to engage in sexual violence); N.Y. MENTAL HYG. LAW § 10.03(e) (stating that a dangerous sex offender requiring confinement is someone "likely" to be a danger to others and commit sex offenses); N.D. CENT. CODE § 25-03.3-01(8) (explaining that a sexually dangerous individual is someone "likely" to engage in sexually predatory conduct); S.C. CODE ANN. § 44-48-30(1)(b) (finding a sexually violent predator to be someone who is "likely" to engage in sexual violence); VA. CODE ANN. § 37.2-900 (defining a sexually violent predator as someone "likely" to engage in sexual violence); WASH. REV. CODE ANN. § 71.09.020(18) (stating that a sexually violent predator is someone who is "likely" to be sexually violent); WIS. STAT. ANN. § 980.01(7) (defining a sexually violent person as someone "likely" to engage in one or more acts of sexual violence).

[100] *See* MO. ANN. STAT. § 632.480(5) (defining a sexually violent predator as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in . . . sexual violence").

[101] *See infra* notes 102–05 (discussing the definitions that some states provide for key terms in their sexual predator laws).

[102] *See* CAL. WELF. & INST. CODE § 6600(c) (defining a diagnosed mental disorder as a congenital or acquired condition that affects the "emotional or volitional capacity" of an individual and predisposes that person to sexual violence); FLA. STAT. ANN. § 394.912(5) (stating that a mental abnormality is a mental condition affecting an individual's "emotional or volitional capacity" that predisposes that individual to sexual violence); IOWA CODE ANN. § 229A.2(5) (explaining that a mental abnormality is a condition affecting the "emotional or volitional capacity" of a person and predisposing that person to sexually violent acts); KAN. STAT. ANN. § 59-29a02(b) (defining a mental abnormality as a congenital or acquired condition that affects the "emotional or volitional capacity" of an individual in a manner which predisposes that person to sexual violence); MO. ANN. STAT. § 632.480(2) (explaining that a mental abnormality is a condition that affects the "emotional or volitional capacity" of an individual which predisposes that person to sexually violent acts); N.H. REV. STAT. ANN. § 135-E:2(VII) (noting that a mental abnormality is a mental condition

capacity" in their definitions, "cognitive" is also used occasionally.[103] Some states also define what it means to be "likely" to commit sexually violent acts.[104] For example, the "likely" standard has been defined as meaning more likely than not.[105] While statutory definitions offer courts

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affecting an individual's "emotional or volitional capacity" in such a manner that it predisposes that person to sexual violence); S.C. CODE ANN. § 44-48-30(3) (stating that a mental abnormality is a mental condition that affects an individual's "emotional or volitional capacity" which predisposes that individual to sexual violence); VA. CODE ANN. § 37.2-900 (defining both mental abnormality and personality disorder as conditions affecting a person's "emotional or volitional capacity" that make the person likely to be sexually violent); WASH. REV. CODE ANN. § 71.09.020(8) (explaining that a mental abnormality is a condition affecting an individual's "emotional or volitional capacity" that predisposes the individual to sexual violence); WIS. STAT. ANN. § 980.01(2) (defining a mental disorder as a condition that affects the "emotional or volitional capacity" of an individual in such a manner that it predisposes the individual to sexual violence). With the exception of Virginia and Washington, the states that use "personality disorder" in their sexual predator laws do not define it. *See* FLA. STAT. ANN. § 394.912 (including no definition of "personality disorder"); KAN. STAT. ANN. § 59-29a02 (omitting a definition of "personality disorder"); N.H. REV. STAT. ANN. § 135-E:2 (leaving out a statutory definition of "personality disorder"); N.J. STAT. ANN. § 30:4-27.26 (including no definition of "personality disorder"); S.C. CODE ANN. § 44-48-30 (omitting a definition of "personality disorder"); *see also* VA. CODE ANN. § 37.2-900 (including a definition of "personality disorder" within a definition of "mental abnormality"); WASH. REV. CODE ANN. § 71.09.020(9) (defining "personality disorder"). For the purposes of this Note, it makes no difference because the Illinois law does not use the term "personality disorder." Likewise, the Illinois sexual violent predator law omits any reference to a personality disorder. *See* 725 ILL. COMP. STAT. ANN. 207/5 (West 2008). When defining a mental disorder or mental abnormality, the "emotional or volitional capacity" language is standard in sexual predator laws because the Kansas sexual predator law that was twice upheld by the United States Supreme Court contains "emotional or volitional capacity" in its definition of a mental abnormality. *See supra* Part II.B (discussing *Hendricks* and *Crane*, cases which upheld the Kansas Sexually Violent Predator Act).

[103] *See* N.J. STAT. ANN. § 30:4-27.26 (using the phrase "emotional, cognitive or volitional capacity" in defining a mental abnormality); N.Y. MENTAL HYG. LAW § 10.03(i) (stating that a mental abnormality can affect the "emotional, cognitive, or volitional capacity of a person").

[104] *See infra* note 105 (discussing the definitions that some states provide for the "likely" standard in their sexual predator laws).

[105] *See* IOWA CODE ANN. § 229A.2(4) (defining "[l]ikely to engage in predatory acts of sexual violence" as meaning that a person more likely than not will be sexually violent); WASH. REV. CODE ANN. § 71.09.020(7) (stating that "[l]ikely to engage in predatory acts of sexual violence if not confined in a secure facility" means the person more probably than not will be sexually violent if released from detention); WIS. STAT. ANN. § 980.01(1m) (defining "likely" as "more likely than not"). Although not the standard, Wisconsin defines "substantially probable" as "much more likely than not." *Id*. § 980.01(9). An alternative definition to the "likely" standard that some states use is that "likely" means the individual's propensity towards sexual violence is of such a degree that the individual is a threat to the health and safety of others. *See* FLA. STAT. ANN. § 394.912(4) (stating that "[l]ikely to engage in acts of sexual violence" means the individual's propensities towards sexual violence are such that the individual is a menace to the health and safety of others); KAN. STAT. ANN. § 59-29a02(c) (defining "[l]ikely to engage in repeat acts of sexual

the most guidance for analyzing sexual predator laws, it is also useful to look at the definitions found in mental health manuals and dictionaries in order to fully understand key terminology.[106]

2. The DSM and Other Key Definitions

The DSM is a diagnostic tool designed to aid those in the mental health community in identifying and treating mental conditions, disorders, and abnormalities.[107] The DSM explains that a mental disorder is conceptualized as a behavioral or psychological syndrome or pattern that is associated with distress, disability, or a significantly increased risk of suffering death, pain, disability, or loss of freedom.[108] The syndrome or pattern cannot merely be an expected and socially accepted response to a certain event.[109] The DSM qualifies its

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violence" as meaning the person's propensities towards sexually violent acts are of such a degree that the person is a menace to the health and safety of others); NEB. REV. STAT. § 83-174.01(2) (saying that "[l]ikely to engage in repeat acts of sexual violence" means a person's propensity to commit sex offenses is of such a degree that he is a menace to the health and safety of others); N.H. REV. STAT. ANN. § 135-E:2(VI) (explaining that "[l]ikely to engage in acts of sexual violence" means that the person's propensity to commit sexually violent acts is of such a degree that the person has serious difficulty controlling behavior and is a danger to others); N.J. STAT. ANN. § 30:4-27.26 (stating that "[l]ikely to engage in acts of sexual violence" means the individual's propensities towards sexually violent acts are of such a degree that the individual is a threat to the health and safety of others); S.C. CODE ANN. § 44-48-30(9) (defining "[l]ikely to engage in acts of sexual violence" as meaning the person's propensities towards sexual violence are of such a degree that the person is a menace to others' health and safety).

106 *See infra* Part II.D.2 (discussing the language of the Diagnostic and Statistical Manual of Mental Disorders as well as common dictionary definitions).

107 AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxiii–xxiv (4th ed., Text Revision 2000) [hereinafter DSM]; *see* Cornwell, *supra* note 25, at 1321 (explaining that the DSM is a diagnostic system used to aid clinicians in identifying and treating mental health impairments). The most recent edition of the DSM is referred to as the DSM-IV because it is the fourth edition of the manual. John Cloud, *Redefining Crazy: Researchers Revise the DSM*, TIME (March 11, 2009), http://www.time.com/time/health/article/0,8599,1884092,00.html. The DSM-IV was originally published in 1994. *Id.* The fifth edition, to be referred to as the DSM-V, is set for publication in 2012. *Id.*

108 DSM, *supra* note 107, at xxxi. The full conceptualization of a mental disorder is a

> clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

Id.

109 *Id.* The DSM refers to the death of a loved one as an example of an event which gives rise to an expected and socially accepted response. *Id.* The DSM goes on to further explain the following:

conceptualization by noting that there is an inherent difficulty in defining the term "mental disorder" because there is much of the physical in mental disorders and vice versa; thus, the term "mental disorder" implies a distinction where oftentimes a distinction does not exist.[110] Additionally, the DSM acknowledges that the term "mental disorder" lacks a consistent operational definition.[111]

Despite its focus on diagnosing mental disorders, the United States Supreme Court has explained that medical science, and therefore the DSM, does not play a role in whether sexually violent individuals can be civilly committed.[112] In fact, the *Hendricks* Court acknowledged that legislatures typically have the responsibility of defining medical terms with legal significance.[113] However, given the fact that experts often look to the DSM for guidance when making SVPA civil commitment determinations, its language and concepts are helpful for analysis purposes.[114]

> Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious, or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual.

Id.

110 *Id.* at xxx.

111 *Id.*

112 *See* Kansas v. Crane, 534 U.S. 407, 413 (2002) (explaining psychiatry informs but does not control legal determinations); Kansas v. Hendricks, 521 U.S. 346, 358–59 (1997) (rejecting the idea that psychiatrists and the medical community must agree on certain terminology and concepts before civilly committing sexually violent individuals). The *Hendricks* Court was faced with an argument that the term "mental abnormality," which the Kansas legislature used in the Sexually Violent Predator Act, was not a valid term for the purposes of civil commitment. *Id*. at 358–59. Hendricks argued that "mental illness" needed to be used instead because it was accepted by the psychiatric community. *Id.* The Court rejected this, reasoning that courts and the medical community have disagreed frequently on what constitutes mental illness and that a variety of terms have been used to describe individuals subject to civil commitment. *Id.* at 359. Furthermore, the Court upheld the Kansas Act despite no reference to the DSM in any of the statutory definitions. *Id.* at 360; *see also* KAN. STAT. ANN. § 59-29a02(a) (Supp. 2008) (making no reference to the DSM in any of the statutory definitions).

113 *Hendricks*, 521 U.S. at 359.

114 *See* People v. Masterson, 798 N.E.2d 735, 740–41 (Ill. 2003) (discussing the SDPA, closely related to the SVPA, and involving a court determination based on an expert's DSM diagnosis and the respondent's past sexual misconduct that the respondent was sexually dangerous); *In re* Det. of Lieberman, 884 N.E.2d 160, 176–77 (Ill. App. Ct. 2007) (involving state experts who used the DSM for their evaluations, but did not base their diagnosis solely on the DSM's criteria).

It is also helpful to consider dictionary definitions when trying to ascertain the meaning of statutory language.[115] "Substantially" means ample or considerable in amount or quantity.[116] "Substantially" is also defined as real in worth or value.[117] "Probable" means having "more evidence for than against."[118] Due to their prominence in the SVPA's construction and interpretation, "emotional" and "volitional" are also worth defining.[119] "Emotional" is defined as prone to emotion, with "emotion" being defined as "a state of feeling."[120] "Volitional" refers to the ability to make a choice or determination.[121]

Dictionary definitions are useful for interpreting some of the statutory language found in modern sexual predator laws.[122] Courts only look to dictionaries, however, when the statutory language leaves gaps to be filled.[123] The mental health community offers a conceptualization of one of the key terms, mental disorder, but acknowledges that a precise definition is difficult to compose.[124] These authorities, along with judicial interpretations and comparable laws in

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115 *E.g.*, *In re* Det. of Bailey, 740 N.E.2d 1146, 1157 (Ill. App. Ct. 2000) (explaining that when a statute does not define a term, courts may look to dictionary definitions in order to derive the term's plain and ordinary meaning).

116 WEBSTER'S II NEW COLLEGE DICTIONARY 1126 (2005) [hereinafter WEBSTER'S II NEW COLLEGE].

117 *Id.*

118 *Bailey*, 740 N.E.2d at 1156 (quoting BLACK'S LAW DICTIONARY 1201 (6th ed. 1990)). Another offered definition for "probable" is "evidence that inclines the mind to belief but leaves some room for doubt." WEBSTER'S UNIVERSAL COLLEGE DICTIONARY 629–30 (1997); *see also* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 989 (11th ed. 2003) [hereinafter MERRIAM-WEBSTER'S] (defining "probable" as "supported by evidence strong enough to establish presumption but not proof" as well as "likely to be or become true or real").

119 *See* 725 ILL. COMP. STAT. ANN. 207/5(b) (West 2008) (using the phrase "emotional or volitional capacity" in defining mental disorder).

120 MERRIAM-WEBSTER'S, *supra* note 118, at 408. "Emotional incapacity" can be defined for legal purposes as the "inability to control one's emotions or express appropriate emotions because of a mental disorder." BLACK'S LAW DICTIONARY 601 (9th ed. 2009) [hereinafter BLACK'S].

121 BLACK'S, *supra* note 120, at 1710. An additional definition of "volition" describes it as "the power of choosing" and makes a cross-reference to "will." MERRIAM-WEBSTER'S, *supra* note 118, at 1401.

122 *See supra* notes 117–21 (discussing the common usage definitions found in dictionaries).

123 *See In re* Det. of Bailey, 740 N.E.2d 1146, 1156 (Ill. App. Ct. 2000) (analyzing the dictionary meaning of "substantially probable" in order to apply the standard absent a statutory definition).

124 *See supra* notes 108–11 and accompanying text (offering a conceptualization of mental disorder, but also explaining the difficulties in precisely defining the term).

other jurisdictions, help establish a foundation for analyzing the precise language in the SVPA.[125]

III. ANALYSIS

The SVPA and the language it uses are constitutional.[126] This language defines a sexually violent person as an individual who suffers from a mental disorder that makes it substantially probable that the individual will commit sexual violence.[127] Although the SVPA survives constitutional scrutiny, it does not automatically mean that the SVPA is perfectly constructed.[128] Controversy surrounds the two terms used to define a sexually violent person: mental disorder and substantially probable.[129] Because these two terms are capable of taking away an individual's freedom indefinitely, an extended analysis is worthwhile.[130]

This Part first analyzes the meaning of the SVPA's mental disorder language.[131] Specifically, it addresses certain language used in the mental disorder definition as well as medical science's role in defining a mental disorder.[132] Next, this Part turns to the substantially probable standard used in the SVPA.[133] It analyzes this standard in comparison to the constitutionally approved "likely" standard, and also addresses the

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125 *See infra* Part III (analyzing the SVPA's terminology in light of statutory language, judicial interpretation, and various other authorities).

126 *See supra* Part II.C.2 (discussing the SVPA's approval in light of both *Hendricks* and *Crane*).

127 *See supra* note 68 (discussing the SVPA's definition of a sexually violent person).

128 *See infra* Part III.A (analyzing the problems posed by the mental disorder language of the SVPA); *infra* Part III.B (analyzing the problematic "substantially probable" standard the SVPA employs).

129 *See In re* Det. of Varner, 800 N.E.2d 794, 797 (Ill. 2003) (analyzing the mental disorder language of the SVPA); *In re* Det. of Isbell, 777 N.E.2d 994, 998–99 (Ill. App. Ct. 2002) (addressing a challenge to the mental disorder definition used in the SVPA); *In re* Det. of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (addressing the respondent's argument that "substantially probable" can be reduced to mathematical terms); *In re* Det. of Bailey, 740 N.E.2d 1146, 1155–57 (Ill. App. Ct. 2000) (involving an argument that "substantially probable" is unconstitutionally vague); *In re* Det. of Walker, 731 N.E.2d 994, 1002 (Ill. App. Ct. 2000) (discussing whether or not "substantially probable" is definable in percentages).

130 *See infra* Part III.A (analyzing the mental disorder definition and interpretation in the SVPA); *infra* Part III.B (analyzing the "substantially probable" standard used in the SVPA).

131 *See infra* Part III.A (discussing the interpretation of the mental disorder language in the SVPA).

132 *See infra* Part III.A.1 (critiquing the interpretation of the "emotional or volitional capacity" language in the SVPA's mental disorder definition); *infra* Part III.A.2 (explaining why the DSM cannot be wholly determinative when it comes to assessing whether an individual has a mental disorder).

133 *See infra* Part III.B (analyzing the "substantially probable" standard that the SVPA uses).

argument that "substantially probable" can be reduced to a specific percentage.[134]

A. Mental Disorder and Its Meaning in the SVPA

The SVPA defines the term "mental disorder" as a condition affecting the "emotional or volitional capacity" that predisposes a person to sexual violence.[135] Courts have accepted this definition despite its reference to an unknown "emotional capacity" and despite the fact that it does not rely on the medical science community's understanding of what constitutes a mental disorder.[136] This Part addresses those issues in turn.[137] Part III.A.1 discusses the key inquiry under the SVPA and critiques how that inquiry ignores certain statutory language.[138] Part III.A.2 then explains how the refusal to mix medical and legal terminology when defining a mental disorder is actually one of the SVPA's strengths.[139]

1. The Key Inquiry and How "Emotional Capacity" Has Been Ignored

The Illinois Supreme Court has rejected the idea that "emotional" and "volitional" refer to separate capacities. Instead, the court has taken the position that the Illinois legislature simply wanted to make its language as inclusive as possible.[140] The view that "emotional" and "volitional" do not refer to separate capacities is problematic for the SVPA.[141] As an initial matter, the current interpretation of "emotional or volitional capacity" does not give accord to the plain and ordinary

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134 *See infra* Part III.B.1 (comparing "substantially probable" to the "likely" standard upheld in *Hendricks*); *infra* Part III.B.2 (analyzing whether "substantially probable" can be defined in mathematical terms).

135 725 ILL. COMP. STAT. ANN. 207/5(b) (West 2008); *see also supra* note 70 (giving the SVPA's full definition of mental disorder).

136 *See* 725 ILL. COMP. STAT. ANN. 207/5(b) (omitting any reference to the DSM when defining a mental disorder); *infra* notes 140–50 (discussing the interpretation of "emotional capacity" and how it has not yet been determined to what that capacity refers).

137 *See infra* Part III.A.1 (discussing the "emotional capacity" language and how it has been ignored); *infra* Part III.A.2 (analyzing the reasons for not relying on medical science when defining "mental defects" in the law).

138 *See infra* Part III.A.1 (analyzing the "volitional capacity" language and explaining how it has dominated the statutory interpretation of a mental disorder under the SVPA).

139 *See infra* Part III.A.2 (discussing why the DSM cannot provide the SVPA's mental disorder definition).

140 *See supra* Part II.C.2 (discussing the *Varner* position that the Illinois legislature did not use the terms "emotional" and "volitional" as a way to differentiate between individuals who are capable of controlling their sexually violent behavior and those who are not).

141 *See infra* notes 142–52 and accompanying text (explaining why "emotional" and "volitional" should be interpreted as separate capacities).

meaning of the language.[142] Legislatures choose specific terminology for a reason and each term is supposed to be given equal weight.[143] Illinois courts, however, have rendered the "emotional capacity" language meaningless by including it in the "volitional capacity" inquiry.[144]

While Illinois courts have acknowledged that the "inability to control sexually violent behavior is a *sine qua non*" under the SVPA, they have overlooked the fact that this indispensible condition is completely covered by the "volitional capacity" language.[145] "Volitional capacity," when interpreted according to its plain dictionary definition, means the capacity to choose or act according to one's will.[146] When substituted into the definition of mental disorder, this interpretation covers the key inquiry under the SVPA: whether an individual can control his or her sexually violent acts.[147] Thus, Illinois courts have rendered "emotional

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142 *See In re* Det. of Varner, 800 N.E.2d 794, 797 (Ill. 2003) (taking the position that the Illinois legislature did not intend emotional or volitional capacity to refer to separate capacities, thereby rendering the emotional capacity language meaningless and focusing on the lack-of-control determination).

143 *See In re* Det. of Bailey, 740 N.E.2d 1146, 1156–57 (Ill. App. Ct. 2000) (acknowledging that the best evidence of a legislature's intent is the language itself, and that statutory language must interpreted according to its plain and ordinary meaning). *See generally In re* Det. of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (explaining that statutes must be interpreted so as to give effect to the legislature's intent and to avoid constitutional difficulties and inconvenience).

144 *See Varner*, 800 N.E.2d at 797 (concluding that "emotional capacity" is just an additional term used in assessing whether an individual can control his or her sexually violent behavior).

145 *See id*. (explaining that the key condition which must be present to civilly commit pursuant to the SVPA is an inability to control sexually violent acts); *supra* note 121 and accompanying text (defining volitional as the ability to make a choice or determination); *see also* Kansas v. Crane, 534 U.S. 407, 414 (2002) (explaining that *Hendricks*, the case establishing that sexually violent individuals could be civilly committed, limited its discussion to volitional disabilities).

146 *See supra* note 121 (giving a definition of "volitional" as the ability to choose or act according to one's will).

147 *See supra* note 79–80 and accompanying text (discussing the major inquiry when civilly committing individuals pursuant to the SVPA). When the dictionary definition of "volitional capacity" is substituted into the SVPA's mental disorder language, the definition of a mental disorder becomes the following: a congenital or acquired condition affecting the capacity to choose or act according to one's will, which predisposes a person to engage in sexual violence. *See supra* note 70 (discussing the actual statutory definition of a mental disorder). This definition, which completely disregards any "emotional capacity" language, almost mirrors the current interpretation of the SVPA's mental disorder definition, which actually includes the term "emotional capacity." *See Varner*, 800 N.E.2d at 797 (discussing the "emotional capacity" and "volitional capacity" language in light of the SVPA's key inquiry).

capacity" ambiguous and meaningless through their current interpretation.[148]

An additional problem with drawing no distinction between "emotional" and "volitional" capacities is that it actually serves to limit the SVPA's application.[149] It is well recognized by the judiciary that medical science terms are constantly changing.[150] Illinois courts have prevented themselves from applying "emotional capacity" to an additional mental health condition, which may not have even been articulated yet, by taking the position that "emotional" and "volitional" refer to the same capacity. The "volitional" language clearly covers the main inquiry: whether an individual can control his or her behavior.[151] Thus, Illinois could have relied on the "volitional capacity" in making its *Crane* and *Hendricks* analyses, while reserving the "emotional capacity" for a future mental health condition.[152] This would have not only left the Illinois courts some flexibility but also reserved a separate capacity that could be applied to SVPs in the future.

As illustrated above, the precise language used helps determine whether or not someone qualifies for commitment under the SVPA.[153] The mental disorder language is particularly important because it encompasses the primary inquiry for purposes of civil commitment.[154] Although the presence of a mental disorder plays a prominent role in determining whether someone will be committed pursuant to the SVPA, the case law clearly states that the mental health community's language is not controlling when determining if someone has a mental disorder.[155]

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148 *See supra* notes 142–47 (explaining that the Illinois interpretation of mental disorder has rendered the "emotional capacity" language in the mental disorder definition meaningless).

149 *See infra* notes 150–52 and accompanying text (explaining that Illinois's interpretation of mental disorder actually limits the SVPA's applicability to sexually violent individuals).

150 *See, e.g.*, *Crane*, 534 U.S. at 413 (explaining that the field of mental health is continually advancing); *Varner*, 800 N.E.2d at 797 (noting that medical science's understanding of mental conditions is constantly evolving).

151 *See supra* note 147 (explaining that the main inquiry under the SVPA is covered by the "volitional capacity" language in the statutory definition of a mental disorder).

152 *See supra* Part II.C.2 (discussing the Illinois Supreme Court's view of the SVPA in light of both *Hendricks* and *Crane*).

153 *See supra* notes 135–52 and accompanying text (illustrating the importance of the language used in the SVPA).

154 *See supra* notes 140–47 (discussing the primary inquiry under the SVPA).

155 *See infra* Part III.A.2 (analyzing the reasons why medical terminology is not controlling in the context of the SVPA).

2. The DSM and Why It Does Not Play a Role in SVPA Civil Commitments

Illinois has correctly taken the position that medical science terminology is not controlling in the context of SVPA civil commitments.[156] The DSM cannot be relied on in committing SVPs because important distinctions exist between clinical and legal viewpoints on mental abnormalities, disorders, and diseases.[157] A clinical diagnosis under the DSM, standing alone, does not translate into a specified legal standard.[158] In fact, the DSM acknowledges that simply diagnosing a mental disorder does not necessarily imply that an individual can or cannot control behaviors associated with the disorder.[159] Given that the SVPA currently requires a lack-of-volitional-control over sexually violent behavior, the DSM simply acts as a brick in

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156 *See In re* Det. of Varner, 800 N.E.2d 794, 797 (Ill. 2003) (explaining that because medical science's understanding of mental health is constantly evolving, the Illinois legislature used the terms "emotional" and "volitional" in the mental disorder definition "simply to insure that everyone who is unable to control his or her sexually violent behavior is covered by the [SVPA]"); *In re* Det. of Lieberman, 929 N.E.2d 616, 632 (Ill. App. Ct. 2010). The respondent

> cites to no authority in which a court has found that due process is violated when a person is committed under a sexually violent person statute based upon a mental disorder that is not specifically listed in the DSM. Indeed, the [SVPA] does not require that there be a consensus among mental health professionals regarding a diagnosis or that the diagnosis be listed specifically in the DSM in order for that particular diagnosis to support a sexually violent person finding.

Id.

157 Cornwell, *supra* note 25, at 1320–21. Legal definitions of mental abnormalities are not based exclusively on therapy and treatment. *Id.* at 1321. Legal definitions must take into account other concerns, such as moral responsibility, safety, and due process. *Id.* "[A]ttempting to graft one system completely onto the other" cannot be done. *Id*. Furthermore, the DSM has gone through numerous revisions and versions, adding certain conditions and subtracting others; were the DSM relied on to commit sexually violent individuals, someone may be considered sexually violent one day and found safe the next. *Id.* at 1321–22; *see also* DSM, *supra* note 107, at xxiii (explaining that the DSM is intended to be a helpful tool for practicing mental health professionals; furthermore, the DSM is aimed at clinicians and relies on extensive empirical data).

158 *See* DSM, *supra* note 107, at xxxiii. There is an imperfect fit between questions of law and questions of clinical diagnosis. *Id.* Typically, the clinical diagnosis of a mental disorder is not enough to establish a mental disorder, disease, or defect for the purposes of the law. *Id.* The diagnosis of a legal standard related to mental health, for example competence or criminal responsibility, usually requires additional information beyond that which is required to make a clinical diagnosis. *Id.*

159 *See id.* ("[T]he fact that an individual's presentation meets the criteria for a DSM-IV diagnosis does not carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder.").

the wall of evidence required to commit an SVP.[160] Accordingly, the SVPA's current use of the DSM as a helpful guide, but not a controlling factor, is one of the SVPA's strengths.[161] While useful for diagnostic purposes, the DSM is not mentioned in the SVPA's definition of a mental disorder.[162] The Illinois legislature, nonetheless, saw fit to draft a definition of the term.[163] The SVPA, however, does not define "substantially probable," leaving Illinois courts to fill in the gaps that the legislature left behind.[164]

B. The "Substantially Probable" Standard and the Role of Math in Civil Commitment

The "substantially probable" language serves as the standard of whether an individual can be civilly committed within the SVPA's definition of a sexually violent person.[165] Given the lack of a statutory definition, Illinois courts have been forced to interpret and define what "substantially probable" means.[166] Through such analysis, courts have defined "substantially probable" to mean "much more likely than not."[167] Part III.B.1 compares the substantially probable standard to the "likely" standard that was upheld in *Hendricks* and *Crane*, and it explains

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160 *See* People v. Masterson, 798 N.E.2d 735, 740–41 (Ill. 2003) (dealing with the SDPA, closely related to the SVPA, and involving a determination by the court based on an expert's DSM diagnosis and the respondent's past sexual misconduct that the respondent was a sexually dangerous person); *In re* Det. of Lieberman, 884 N.E.2d 160, 176–77 (Ill. App. Ct. 2007) (involving state experts who used the DSM for some of their evaluations but did not base their recommendation solely on the DSM diagnosis). In *Masterson*, the sexually dangerous person determination was actually reversed and remanded in order to ensure compliance with the newly announced *Crane* standard; however, the evidence at the initial commitment hearing was sufficient to comply with the *Hendricks* standard. *Masterson*, 798 N.E.2d at 749; *see also* DSM, *supra* note 107, at xxxiii (noting that the DSM is probably best reserved in the legal context for assisting decision makers in their determinations).

161 *See supra* notes 157–60 (explaining why the DSM is incompatible with the SVPA's standards and language).

162 *See* 725 ILL. COMP. STAT. ANN. 207/5(b) (West 2008) (omitting any reference to the DSM when defining a mental disorder).

163 *See id*. (defining mental disorder).

164 *See id*. at 207/5 (failing to define "substantially probable" despite using it to define a sexually violent person); *infra* Part III.B (analyzing the judicial interpretation of the SVPA's "substantially probable" language).

165 *See id*. at 207/5(f) (explaining that in order to be an SVP, and thus subject to commitment under the SVPA, an individual must have "a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence").

166 *See supra* notes 72–75 (discussing the statutory construction surrounding the "substantially probable" language and how "substantially probable" has been defined and interpreted).

167 *See supra* note 74 (explaining that Illinois courts have found "substantially probable" to mean "much more likely than not").

that the SVPA's standard is needlessly high.[168] Finally, Part III.B.2 explains that Illinois courts have correctly refused to assign a specific number to the "substantially probable" standard.[169]

1. "Substantially Probable" as a Needlessly High Standard

The substantially probable standard that the SVPA uses is problematic for Illinois because it is needlessly higher than the standard approved in *Hendricks* and *Crane*.[170] The Kansas law upheld in both *Hendricks* and *Crane* stated that a person could be civilly committed if that person was "likely" to engage in repeat acts of sexual violence.[171] The SVPA does not use "likely" as the standard but instead opts for substantially probable.[172] Illinois courts have found that substantially probable is higher than or equal to the standard upheld in *Hendricks* and *Crane*, and they base their decision on the meaning of substantially probable, which is defined as "much more likely than not."[173]

By looking at the plain construction of the phrases, it would appear that the SVPA's standard of "substantially probable" is clearly higher than the "likely" standard approved in *Hendricks* and *Crane*.[174] Whereas the *Hendricks* and *Crane* standard is "likely," the SVPA standard adds "much more" and "than not" to the standard.[175] The Kansas law at issue

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168 *See infra* Part III.B.1 (comparing the "substantially probable" standard to the "likely" standard and arguing that the "substantially probable" standard is higher than is constitutionally required).

169 *See infra* Part III.B.2 (analyzing whether "substantially probable" can be reduced to a specific percentage).

170 *See supra* Part II.B (discussing *Hendricks* and *Crane*, United States Supreme Court cases that upheld a Kansas sexual predator law that allows for civil commitment of an individual who is "likely" to engage in sexual violence); *infra* notes 171–84 (illustrating that the SVPA's substantially probable standard is higher than the "likely" standard found constitutionally permissible in *Hendricks* and *Crane*).

171 *See supra* note 49 (explaining the standards at issue with the Kansas sexual predator law and when civil commitment was allowed under it); *supra* note 99 (noting that the Kansas law, like many other sexual predator laws, uses a "likely" standard); *see also In re* Det. of Varner, 800 N.E.2d 794, 796–99 (Ill. 2003) (offering a thorough discussion of the *Hendricks* and *Crane* decisions).

172 *See supra* note 68 (giving the definition of sexually violent person, which states that an individual may be civilly committed if he is substantially probable to be sexually violent).

173 *See In re* Det. of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (explaining that the definition of "substantially probable" as "much more likely than not" satisfies the standards set forth in *Hendricks*).

174 *See infra* notes 175–79 (analyzing the respective standards and discussing how "substantially probable" has been interpreted as a higher standard than "likely").

175 *See supra* note 74 (discussing the Illinois definition of "substantially probable"); *supra* note 49 (explaining that the Kansas law allows a sexually violent predator to be committed if he is "likely" to be sexually violent); *supra* note 99 (stating that the Kansas Sexually Violent Predator Act uses a "likely" standard).

in *Hendricks* and *Crane* offers a definition of "[l]ikely to engage in repeat acts of sexual violence," but it does not offer a clear definition of the "likely" term in particular.[176] Meanwhile other states, modeling their statutory language and "likely" standard on the Kansas Sexually Violent Predator Act, clearly define "likely" as meaning "more likely than not."[177] Thus, the SVPA standard of substantially probable adds the word "much" and thereby requires a higher probability of sexual violence than the "likely" standard approved in *Hendricks*.[178] Accordingly, fact finders in civil commitment cases under the SVPA must be convinced the individual is much more, not just more, likely than not to be sexually violent.[179]

The concept that "substantially probable" is a higher standard than "likely" is further supported by looking at dictionary definitions, which is what Illinois courts did when they formulated their definition of substantially probable.[180] "Substantially" means considerable in amount, value, or quantity.[181] "Probable" can be defined as having more evidence for than against.[182] When combined, a "substantially probable" standard based solely on dictionary definitions would require having

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176 *See* KAN. STAT. ANN. §§ 59-29a02(c) (2005 & Supp. 2009) (defining "likely" as "mean[ing] the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others"); *supra* note 105 (explaining the Kansas sexual predator law).

177 *See supra* note 105 (noting that Iowa and Wisconsin have defined "likely" as meaning "more likely than not," while Washington has defined "likely" as "more probably than not"). In fact, Missouri actually uses the language "more likely than not" in its definition of a "sexually violent predator;" by doing so, it subtracts the step of using a "likely" standard and defining that term separately. *See* MO. ANN. STAT. § 632.480(5) (West 2006) (explaining that a sexually violent predator is an individual who is "more likely than not" to engage in sexual violence).

178 *Compare supra* note 74 (discussing the judicially established definition of "substantially probable," which is defined as "much more likely than not"), *with supra* note 100 (explaining that Missouri uses the language "more likely than not" in its sexually violent predator definition, thereby cutting out the added step of using a "likely" standard and defining it separately), *and supra* note 105 (discussing the states which define the "likely" standard as meaning "more likely than not").

179 *See supra* note 178 (comparing the various standards used and looking at the additional language in the "substantially probable" definition, which serves to raise its standard when compared to "likely").

180 *See In re* Det. of Bailey, 740 N.E.2d 1146, 1156–57 (Ill. App. Ct. 2000) (looking to a Wisconsin interpretation of "substantially probable," which relied on dictionary definitions in formulating its definition); *infra* notes 181–83 and accompanying text (analyzing what "substantially probable" means in light of dictionary definitions).

181 *See supra* notes 116–17 and accompanying text (discussing the various dictionary definitions of "substantially").

182 *See supra* note 118 (discussing the definition or "probable").

considerably more evidence for than against.[183] When compared to the "likely" definition of "more likely than not," the dictionary definition of "substantially probable" clearly requires a higher likelihood of sexual violence.[184]

The higher standard that the SVPA uses poses problems for Illinois and its enforcement of the SVPA. By employing a higher standard than is necessary, the SVPA needlessly limits itself. A lower standard has been constitutionally accepted, but the SVPA does not employ that standard.[185] Thus, the SVPA does not reach individuals who are civilly committed pursuant to sexual predator laws in other states. The higher standard found in the SVPA allows sexually violent individuals to go free in Illinois while those same individuals might be subject to potentially indefinite civil commitment in other states.

Due to the lack of a statutory definition, Illinois courts were forced to define "substantially probable"; they concluded that it means "much more likely than not."[186] However, questions can still surround statutory language and subject it to challenge even with judicially created definitions in place.[187] An additional issue related to the "substantially probable" standard is whether or not it can be reduced to a percentage.[188]

2. "Substantially Probable" and Why It Cannot Be Reduced to a Number

Illinois courts have defined "substantially probable" as meaning "much more likely than not."[189] Illinois courts, however, have refused to

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183 *See supra* notes 181–82 and accompanying text (defining what "substantially" and "probable" mean).

184 *Compare supra* note 105 (explaining that "likely" has been defined as meaning "more likely than not"), *with supra* note 183 and accompanying text (discussing what a "substantially probable" definition would look like based solely on dictionary meanings).

185 *See supra* Part II.B (discussing the constitutional standards that due process requires in regards to civil commitment); *supra* Part II.C.1 (discussing the SVPA and the language it uses).

186 *See* 725 ILL. COMP. STAT. ANN. 207/5 (West 2008) (omitting a definition of "substantially probable").

187 *See In re* Det. of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (analyzing and rejecting an argument that *Hendricks* established a mathematical standard for due process to be satisfied); *In re* Det. of Walker, 731 N.E.2d 994, 1002 (Ill. App. Ct. 2000) (involving an argument by the respondent that "substantially probable" could be reduced a mathematical formula).

188 *See infra* Part III.B.2 (analyzing whether "substantially probable" can be reduced to a mathematical formula).

189 *See supra* note 74 (discussing the Illinois courts' definition of "substantially probable" as "much more likely than not").

assign a specific number to the definition of "substantially probable."[190] Despite the fact that *Hendricks* upheld a "likely" standard, definable as "more likely than not," Illinois has not found that a particular mathematical standard satisfies due process.[191] The judiciary's refusal to assign a specific number to "substantially probable" is one of the SVPA's strengths.[192]

Although experts are sometimes willing to testify that a potential SVP has a specific percentage chance of engaging in sexual violence, there is no reason for the Illinois courts to handcuff enforcement of the SVPA by assigning a specific number to one of the SVPA's key inquiries.[193] Requiring that "substantially probable" be defined in mathematical terms would ask for precision in an imprecise field.[194] Even the *Crane* Court acknowledged that mathematical precision is not always possible when it comes to lack-of-control determinations.[195] Additionally, experts called who give such mathematical probabilities would oftentimes disagree about whether an individual even has a mental disorder, as well as what percent chance that the individual will commit another offense if a mental disorder is found.[196] Lastly, given the

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190 *See Hayes*, 747 N.E.2d at 453 (explaining that the Supreme Court in *Hendricks* did not establish a mathematical standard which allows for the commitment of SVPs); *Walker*, 731 N.E.2d at 1002 (rejecting the idea that "substantially probable" under the SVPA can be reduced to a percentage).

191 *See Hayes*, 747 N.E.2d at 453 (rejecting the idea that *Hendricks* established a due process standard in mathematical terms). The *Hayes* court elaborated on the idea of a mathematical standard by stating that

> [r]espondent argues that under *Hendricks* a person may be committed as a sexually violent person only if she or he is more likely than not to commit an act of sexual violence in the future. Recast in mathematical terms, respondent's argument requires a probability of reoffense greater than .5 or 50%. We do not believe that the Supreme Court identified a mathematical standard when it held that the "likely" standard used in the Kansas legislation complied with due process. The question of substantial probability under the Act cannot be reduced to mere percentages.

Id. (citing *Walker*, 731 N.E.2d at 994).

192 *See infra* notes 193–97 and accompanying text (discussing why the reduction of "substantially probable" to a mathematical formula would only serve to limit the SVPA and restrict its application to SVPs).

193 *See Walker*, 731 N.E.2d at 1002 (mentioning that the respondent offered two expert opinions, each of which gave a specific percent chance of the respondent reoffending over the next ten years); *supra* Part II.B (discussing the Kansas sexual predator law that was found to be constitutional despite using only a "likely" standard).

194 *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 81 (1985) (stating that psychiatry is not an exact science).

195 Kansas v. Crane, 534 U.S. 407, 413 (2002).

196 *E.g.*, *Walker*, 731 N.E.2d at 1002 (involving experts who disagreed over the alleged SVP's recidivism rate, one expert placing the chance of reoffending at thirty-seven percent

Supreme Court's omission of any mathematical formula or specific numerical requirement in order to civilly commit sexually violent individuals, requiring that experts predict a certain percent chance of reoffending before commitment would only serve to limit enforcement of the SVPA.[197]

Having looked at the SVPA's sexually violent person definition, certain strengths and weaknesses are present.[198] While the SVPA does not make the mistake of relying solely on the DSM for its mental disorder determinations, certain key language is ignored by the courts.[199] The "substantially probable" language, while not reducible to a mathematical formula, limits the SVPA's applicability through a needlessly high standard.[200] Although currently constitutional, the SVPA could broaden its applicability to reach more potential SVPs while retaining its constitutionality through some careful adjustments to the statutory language.[201]

IV. CONTRIBUTION

The meaning of the term "sexually violent person" turns on what the terms "mental disorder" and "substantially probable" mean.[202] Courts have only focused on mental disorders based on "volitional capacity"

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while the other found this chance to be only twenty-two percent); *see also* Kansas v. Hendricks, 521 U.S. 346, 359 (1997) (noting that psychiatrists oftentimes disagree on what constitutes a mental illness); *In re* Det. of Bailey, 740 N.E.2d 1146, 1155 (Ill. App. Ct. 2000) (stating that the fields of psychiatry and psychology are riddled with disagreement over what constitutes a mental disorder).

197 *See Crane*, 534 U.S. at 411–15 (discussing the requirements for constitutional civil commitment, but not establishing a precise mathematical standard); *Hendricks*, 521 U.S. at 356–71 (omitting discussion of any specific mathematical requirement in order to civilly commit a sexually violent individual); *In re* Det. of Hayes, 747 N.E.2d 444, 453 (Ill. App. Ct. 2001) (noting that the United States Supreme Court did not establish a mathematical standard while twice upholding the "likely" standard in the Kansas Sexually Violent Predator Act).

198 *See supra* Part III (analyzing the SVPA's sexually violent person definition while focusing on the mental disorder and substantially probable language).

199 *See supra* Part III.A.1 (analyzing the language currently being ignored in the SVPA's mental disorder definition); *supra* Part III.A.2 (discussing why the DSM is not a good fit in the context of the law).

200 *See supra* Part III.B.1 (stating that "substantially probable" is actually a higher standard than the "likely" standard approved by the United States Supreme Court); *supra* Part III.B.2 (discussing why "substantially probable" cannot be reduced to a specific percentage).

201 *See infra* Part IV (discussing the improvements that can be made to the SVPA's language which will increase its applicability to potential SVPs while maintaining its constitutionality).

202 *See* 725 ILL. COMP. STAT. ANN. 207/5(f) (West 2008) (defining sexually violent person).

when determining whether to civilly commit SVPs.[203] Additionally, the "substantially probable" standard is actually higher than what was approved in *Hendricks* and *Crane*.[204] This Part first proposes that "emotional capacity" be given meaning separate from "volitional capacity."[205] This Part then suggests that the Illinois legislature change the SVPA's language and lower the "substantially probable" standard to "likely."[206]

A. Making "Emotional Capacity" Mean Something

Illinois should be creative with the *Hendricks* and *Crane* opinions and give meaning to the SVPA's "emotional capacity" language.[207] If the "emotional capacity" language is given meaning, more SVPs could be covered under the SVPA and the community would be safer.[208] Given the fact that "emotional incapacity" can be defined as the inability to control emotions, it follows that "emotional capacity" means the ability to control one's emotions.[209] Emotion refers to a state of feeling.[210] Illinois should take these definitions and apply them to SVPA civil commitments.[211]

One approach is to argue that someone is an SVP if he feels there is nothing wrong with his inappropriate urges or behaviors. Thus, if someone feels that sexual acts with children are acceptable behaviors and he has no control over that feeling, that person would qualify as an SVP. This preemptive approach would look at how an individual feels, hopefully, before a sexually violent act takes place. Another option is to allege that someone is an SVP if he is unable to control the way he feels after a sexual assault. If, for example, an individual feels no remorse and has no control over his inability to feel remorse, that individual would qualify as an SVP.

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203 *See supra* Part III.A.1 (critiquing how the SVPA's "emotional capacity" language has been ignored).

204 *See supra* Part III.B.1 (comparing "substantially probable" to "likely" in the context of sexual predator legislation).

205 *See infra* Part IV.A (suggesting that "emotional capacity" be given meaning).

206 *See infra* Part IV.B (explaining why the SVPA should utilize a "likely" standard instead of "substantially probable").

207 *See infra* notes 208–11 and accompanying text (explaining why Illinois should give meaning to the "emotional capacity" language found in the SVPA).

208 *See infra* notes 209–11 and accompanying text (offering a meaning for the "emotional capacity" language contained in the SVPA).

209 *See supra* note 120 (giving the definition of "emotional incapacity").

210 *See supra* text accompanying note 120 (defining "emotional").

211 *See infra* note 212 and accompanying text (explaining how "emotional capacity" could be given meaning).

Under either approach to the new interpretation, the individual feels he is doing or has done nothing wrong. Obviously there will be some overlap. If, for example, an alleged SVP is getting out of prison for sexually assaulting a minor, the state could argue that the individual felt his past act was not wrong and continues to feel that future acts of sexual violence would not be wrong. If the individual has no control over these feelings, he would qualify as an SVP.

This new interpretation would open the doors to civil commitments of a new class of SVPs: individuals unable to control how they feel. Persons eligible for commitment under the SVPA would no longer be limited only to those unable to control how they behave.[212] Thus, it would broaden the SVPA's reach and keep more dangerous people off the streets. This broader interpretation of the SVPA, however, would likely spark a constitutional challenge. The United States Supreme Court has yet to decide a sexual predator case involving commitment based solely on an individual's emotional capacity.[213] Even if challenged, this new interpretation by Illinois could withstand constitutional scrutiny.[214]

As an initial matter, the civil nature of the statute would not change.[215] Retribution, one of the principal aims of criminal punishment, would not be accomplished.[216] Even by giving "emotional capacity" meaning, the SVPA would still not require criminal responsibility. As a result, Illinois would not be seeking retribution for past misconduct.[217] Deterrence, another goal of criminal punishment, would also not be accomplished.[218] A person newly determined to be an SVP based on his emotional capacity would be unable to control how he feels, and it is

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212 *See supra* notes 207–11 and accompanying text (demonstrating that a new type of SVP would emerge if the Illinois courts would interpret "emotional capacity" and "volitional capacity" as separate capacities).

213 *See supra* notes 60–61 and accompanying text (stating that neither the *Hendricks* nor *Crane* opinions considered whether a civil commitment pursuant to a sexual predator law based solely on an individual's emotional capacity was constitutional).

214 *See infra* notes 215–25 and accompanying text (demonstrating how the new interpretation of the SVPA could withstand constitutional scrutiny).

215 *See infra* notes 216–19 (illustrating that the SVPA would remain a civil statute even if "emotional capacity" were given meaning).

216 *See supra* note 53 (explaining that the *Hendricks* opinion focused on retribution as one of the primary purposes of criminal punishment).

217 *See supra* note 53 (noting that according to *Hendricks*, the Kansas Sexually Violent Predator Act did not require criminal responsibility, thus it was not seeking retribution for past misdeeds); *supra* note 68 (giving the SVPA's definition of a sexually violent person and showing that a prior criminal conviction is not required for commitment).

218 *See supra* note 53 (summarizing the *Hendricks* position that deterrence joins retribution as one of the two primary aims of criminal punishment).

difficult to deter someone who has no control.[219] In addition, double jeopardy and ex post facto challenges would fail because the SVPA would remain civil in nature.[220] All of the procedures of the SVPA would stay the same, so procedural due process would also be satisfied.[221]

A substantive due process challenge would have more merit but would also fail.[222] The class of individuals covered by the SVPA would remain sufficiently narrow to satisfy *Hendricks*.[223] The class would consist of individuals with a mental disorder that makes those individuals unable to control how they feel before or after a sexually violent act. This mental disorder would have to be such that the individual is substantially probable to be sexually violent. The *Crane* opinion looked at a commitment based on the volitional capacity and decided that there must be an inability to control behavior.[224] Under the new interpretation of the SVPA, with a commitment based on the emotional capacity, an inability to control feelings would be required. Thus, the *Crane* concern over some type of lack-of-control determination would be satisfied.[225]

The Illinois Supreme Court's interpretation of the SVPA's language would be problematic for this new type of SVP but could also be

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219 *See supra* note 53 (restating the *Hendricks* reasoning that individuals without control are unlikely to be deterred by the threat of confinement).

220 *See supra* note 53 and accompanying text (describing the *Hendricks* analysis of double jeopardy and ex post facto challenges to the Kansas Sexually Violent Predator Act). According to the *Hendricks* Court, the Double Jeopardy Clause only applies to criminal punishment and the ex post facto clause pertains exclusively to penal statutes. Kansas v. Hendricks, 521 U.S. 346, 370 (1997).

221 *See* 725 ILL. COMP. STAT. ANN. 207/1–99 (West 2008) (stating the procedures of the SVPA); *see also supra* note 66 (summarizing the procedural requirements of the SVPA); *supra* Part II.C.2 (offering history of the SVPA's approval in light of constitutional challenges).

222 *See infra* notes 223–25 (stating why the new interpretation of the SVPA's language would satisfy substantive due process).

223 *See supra* notes 51–52 and accompanying text (explaining that the Court in *Hendricks* viewed the language in the Kansas law as constitutional because it narrowed the class of persons eligible for commitment to those who lacked volitional control).

224 *See supra* note 56 (discussing the *Crane* conclusion that there must be some determination that the alleged sexually violent individual has serious difficulty controlling behavior); *supra* notes 60–61 (stating that neither *Hendricks* nor *Crane* discussed the significance of emotional capacity but were instead concerned with commitments based on an individual's volitional capacity).

225 *See supra* note 56 and accompanying text (describing the *Crane* requirement of a lack-of-control determination).

overcome.[226] In *Varner*, the Illinois Supreme Court stated that the Illinois legislature did not intend for "emotional" and "volitional" to differentiate between those capable of controlling sexually violent behavior and those not capable of controlling sexually violent behavior.[227] This interpretation of the SVPA could easily be overcome by a legislative statement saying otherwise. The Illinois legislature could simply amend the SVPA to include some clarification that emotional and volitional do, in fact, refer to separate capacities. It also could broaden the SVPA's applicability by giving meaning to the "emotional capacity" language that it chose to write. Although a new interpretation of existing language is one way to broaden the SVPA's applicability, a slight change of the commitment standard is another way the SVPA could reach more dangerous individuals.[228]

B. Lowering the "Substantially Probable" Standard

The Illinois legislature should lower the "substantially probable" standard to the "likely" standard upheld in *Hendricks* and *Crane*.[229] The adjusted version of the SVPA should define a sexually violent person as follows:

> A person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it *likely* that the person will engage in acts of sexual violence.[230]

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226 *See infra* notes 227–28 and accompanying text (illustrating how the *Varner* determination that "emotional" capacity and "volitional" capacity both refer to the same capacity can be overcome by the Illinois legislature).

227 *See supra* note 86 (noting that the *Varner* court did not believe that emotional and volitional referred to separate capacities); *supra* note 88 (analyzing the Illinois Supreme Court's opinion that the Illinois legislature did not use the terms "emotional" and "volitional" as a way of differentiating between those capable of controlling behavior and those not capable of controlling behavior).

228 *See infra* Part IV.B (suggesting the "substantially probable" standard be lowered to "likely").

229 *See supra* Part II.B (discussing *Kansas v. Hendricks* and *Kansas v. Crane*, the two United States Supreme Court cases establishing the constitutionality of modern sexual predator laws); *supra* Part III.B.1 (analyzing the "likely" standard that was upheld in both *Hendricks* and *Crane*).

230 *See supra* note 68 (giving the SVPA's definition of a sexually violent person). The italicized language is the Notewriter's original contribution.

The constitutional requirements can be satisfied by using a "likely" standard. The SVPA calls for an unnecessarily high standard by opting to use "substantially probable" in its definition of a sexually violent person.[231] Thus, the SVPA limits itself because it uses a higher standard than is required. If the "likely" standard is used instead of the "substantially probable" standard, then more SVPs could be found and committed.

An obvious challenge to this change is that Illinois should not lower its standard but instead should leave the "substantially probable" language in place to protect the civil liberties of alleged SVPs. The United States Supreme Court, however, has ruled that using a "likely" standard is enough to protect civil liberties.[232] Thus, changing the standard would, according to our highest court, not infringe on constitutionally protected civil liberties. If Illinois insists on being a champion of civil liberties, it can do so in areas of law that do not involve potential life-altering tragedies. For example, prisoners could be given voting rights or a public speaking forum. A child should not be raped and murdered simply because Illinois wants to have the sexual predator law most friendly to civil liberty.

Those against changing the standard could also argue that Illinois should not simply fall in line with other states and that it should instead be given a right to experiment. After all, the beauty of the federalist system is that different sovereigns can draft laws as they choose. Public safety, however, should not be trumped by Illinois's desire to experiment. The current standard is unnecessarily high, and it follows that some dangerous individuals are not committed under the SVPA regime when they would be committed under sexual predator laws in other states.

Another challenge to lowering the commitment standard is that Illinois would face funding problems. Illinois, however, is currently the only state that uses "substantially probable" as the standard.[233] Numerous other states use "likely" or some variation as their standard and those states manage to successfully implement their sexual predator laws.[234] If Illinois uses a higher standard than necessary as a means to avoid the funding required for more civil commitments, Illinois is taking

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231 *See supra* Part III.B.1 (explaining that the SVPA's "substantially probable" language is actually a higher standard than is constitutionally required).

232 *See supra* Part II.B (discussing the key cases in establishing that sexual predator laws are constitutional, both of which involved a law using a "likely" standard).

233 *See supra* notes 99–100 and accompanying text (describing the commitment standards found in other statutes, none of which are "substantially probable").

234 *See supra* notes 99–100 (listing the states that use "likely" as their standard and explaining that Missouri actually uses "more likely than not" as its standard).

the position that saving money is more important than public safety. Illinois would also be effectively acknowledging that committing sexually violent individuals is not as high a priority in Illinois as it is in other states.

Additionally, the funding issue is present with whatever type of SVP control system is used. Sexual predator laws developed because communities were not satisfied with simply requiring sex offenders to register.[235] State legislatures felt more control was needed because some individuals will continue to be sexually violent.[236] Outpatient therapy is one option.[237] Proponents could argue that this alleviates some of the burden on the state; however, the relief is small. States are still responsible for supplying intensive treatment, therapy, food, facilities, and staff during the day. Consequently, the issue becomes what to do with sexually violent individuals at night.

If the state is not providing a place for these individuals to live, they must live elsewhere. With therapy during the day, these individuals would be forced to work at night in order to pay for living expenses. To say the least, an employer would be hesitant about hiring someone who is currently undergoing full-time therapy for a mental disorder that makes him sexually violent. If the state were to provide job placement programs and some type of economic incentive for employers to hire SVPs, it would be an additional burden on the state. Even if an SVP could somehow find work without state placement or incentive programs, there would be no time to sleep or do the day-to-day tasks that independent living requires.

The other option is keeping these individuals in prison through longer sentences or habitual-offender statutes. Prisons, however, face underfunding and overpopulation problems in their own right.[238] While civil commitment programs do cost more than prison terms, the added cost is counter-balanced by the fact that commitment programs, theoretically, do not last as long because the individuals are treated and cured.[239] An additional problem with a longer prison term is that, unless

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235 *See supra* notes 30–46 and accompanying text (covering the development of sexual predator laws in the 1990s).

236 *See supra* note 16 (averring the fact that some individuals will predictably commit future acts of sexual violence).

237 *See* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150 (West 2003 & Supp. 2008) (calling for outpatient treatment under a sexual predator law).

238 *See* Stockinger, *supra* note 64 (discussing the funding issues in Illinois prisons); Garcia, *supra* note 64 (explaining that Illinois is cutting the prison budget by releasing inmates and laying off prison workers).

239 *See* Davey & Goodnough, *supra* note 26 (stating that civil commitment programs cost an average of four times as much as keeping sexual predators in prison); *supra* note 44 (explaining that modern sexual predator laws aim to treat individuals so they can be

it is life without parole, it ends without treatment.[240] Thus, SVPs will at some point get out of prison and be put back on the streets with the same mental disorder that they had when the prison term began. In fact, the Washington law that started the wave of modern sexual predator legislation was a reaction to a crime committed by a man who had recently completed his prison sentence and been released.[241] The SVPA is one of the modern sexual predator laws passed in reaction to a broken system of dealing with sex offenders, and the SVPA could be improved through a lower commitment standard.[242]

V. CONCLUSION

The SVPA is a successful law as it is currently written. It has survived constitutional scrutiny and has been enforced countless times for well over a decade. Laws must evolve, however, to ensure continuing success and the SVPA needs an adjustment for 2011 and beyond. The adjustments proposed in Part IV are ways that the SVPA could be improved. The change from "substantially probable" to "likely" would alter the SVPA's language to a standard that the Illinois judiciary has acknowledged as being lower than what is currently in place.[243] If Illinois were to implement this change, it would be following in the footsteps of other states that have already done so. Furthermore, Illinois would have the opportunity to become a leader in sexual predator legislation if it gave meaning to the "emotional capacity" language. By defining "emotional capacity" and committing SVPs pursuant to a mental disorder based on this capacity, Illinois could create a new type of SVP.

Thinking back to the story involving Mr. Doe, let us assume that Mr. Doe has complete control of his behavior.[244] Mr. Doe knows what he is doing and when he is doing it. He chose to abduct the boy who was walking home. Mr. Doe, however, made this choice because he does not feel there is anything wrong with sexually abusing children. He did not

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rehabilitated and be released); *supra* note 66 (discussing the procedures of the SVPA, including a provision allowing for release upon no longer being sexually violent).

240 Adding treatment to a prison term would create the same funding issues raised by opponents of sexual predator laws and would simply be a different way of doing what sexual predator laws already do.

241 *See supra* notes 32–37 and accompanying text (discussing the case of Earl Shriner).

242 *See supra* notes 30–46 (discussing the development of modern sexual predator legislation).

243 *See supra* note 173 and accompanying text (explaining that the standard provided in the SVPA's current language is at least as high, if not higher, than the standard approved in *Hendricks*).

244 *See supra* Part I (discussing a hypothetical case involving a man named Mr. Doe).

feel there was anything wrong with tying up his stepson, nor did he feel he behaved badly when snatching the little-leaguer. Mr. Doe cannot control why he feels this way; he simply does. Under the new interpretation of the SVPA, Mr. Doe could have been found to have a mental disorder. With the "substantially probable" standard lowered to "likely," civilly committing Mr. Doe would have been that much easier. Without this interpretation and adjustment, however, Mr. Doe served his time and walked out of prison only to rape the eight-year-old boy walking home.

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