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## How the Professional Judgment Standard Could Undermine the Validity of Sexually Violent Predator Laws

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## HOW THE PROFESSIONAL JUDGMENT STANDARD COULD UNDERMINE THE VALIDITY OF SEXUALLY VIOLENT PREDATOR LAWS

There is hardly anything objectionable about a statute that allows a state to convict an individual of a crime, imprison him<sup>1</sup> for a fixed term, and release him after he has served his sentence. However, many people's sense of fairness and justice would be offended by a statute that—rather than releasing him from prison at the end of his criminal sentence—allowed the state to try him civilly on essentially the same facts and involuntarily confine him for an indefinite period. Although such a procedure is generally atypical in American law, in the context of sexually violent predators,<sup>2</sup> a significant number of states have adopted just such a scheme.<sup>3</sup>

Sexually violent crimes garner a unique fear and disgust in the public's mind.<sup>4</sup> Rather than releasing this particular type of criminal back into the community, many state legislatures have found it a prudent and politically popular choice<sup>5</sup> to extend these individuals' confinement beyond their

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1. Masculine pronouns will be used throughout this Note when generically describing sexually violent predators (SVPs). Female sex offenders account for only “a very tiny proportion of the population of sex offenders.” Marnie E. Rice & Grant T. Harris, *What we Know and Don't Know About Treating Adult Sex Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS 101, 101 (Bruce J. Winick & John Q. La Fond eds., 2003). People found to be SVPs are overwhelmingly male. See Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, §1, at 1. This can make commitments for females difficult to obtain because of the lack of data regarding the likelihood of women reoffending. See Allison Retka, *I'm Going to Die Here*, MO. LAWYER'S WEEKLY, June 12, 2009, at 14.

2. See *infra* note 33.

3. See Davey & Goodnough, *supra* note 1 (observing that confining sexually violent offenders “beyond their prison terms” is a “growing national movement”); see also *infra* note 28.

4. See Davey & Goodnough, *supra* note 1 (citing “public fury over grisly sex crimes”). See generally PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998).

5. These statutes are sometimes born out of egregious crimes that receive significant media coverage, generating public outcry. See Davey & Goodnough, *supra* note 1 (stating that these programs are “[b]orn out of the anguish that followed a handful of high-profile sex crimes in the 1980s”). See generally JENKINS, *supra* note 4. This phenomenon appears to have been the genesis of the Washington state statute. In the early 1980s, Washington “reformed the state’s criminal sentencing framework” to homogenize sentencing guidelines and eliminate parole. Roxanne Lieb, *State Policy Perspectives on Sexual Predator Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, *supra* note 1, at 41, 42. In the late 1980s, a convict was released after a ten-year sentence despite serious concerns that he would reoffend. *Id.* at 43. “Two years after his release he raped[,] . . . strangled[, and disfigured] a seven-year-old boy,” leaving him to die. *Id.* “[P]ublic outcry over these crimes” led to a series of executive and legislative maneuvers, which determined that increased criminal sentences were insufficient. *Id.* Subsequent decisions culminated in the state’s sexually violent predator statute. *Id.* at 43–44. Additionally, many politicians have evidently found these laws politically attractive. See Davey & Goodnough, *supra* note 1 (noting that “the laws are proven and

criminal sentences through the use of the civil system.<sup>6</sup> The rationalization for this policy choice rests on the murky nexus between the provinces of law and psychology.<sup>7</sup> Sexually violent predators are believed to have a mental abnormality that increases their likelihood of recommitting a sexually violent crime.<sup>8</sup> Confinement, therefore, has the twin aim of protecting the public from this higher level of danger and providing treatment to the individuals to help them overcome the mental abnormality on which their confinement is based.<sup>9</sup> Under most such statutes, the individual's chances of being released from the civil commitment rest on his ability or inability to overcome his mental abnormality through treatment.<sup>10</sup>

Despite these compelling public policy concerns, such statutes have been the subject of numerous constitutional challenges and scholarly criticism.<sup>11</sup> Although litigants have tested the constitutional validity of these statutes under a variety of theories,<sup>12</sup> the crucial determination has almost invariably been whether the statute is criminal or civil.<sup>13</sup> Courts look beyond the statutory label to determine whether it is punitive in purpose or effect, which would transform the nominally civil statute into a criminal one.<sup>14</sup> In determining whether the statute is punitive in purpose or

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potent vote-getters," and that despite their lack of success, "political leaders . . . are vastly expanding such programs"). It appears that some political actors find that sexually violent predators are an ideal target for grandstanding. *See Kansas v. Hendricks*, 521 U.S. 346, 385 (1997) (citing the testimony of a Kansas task force member, "[T]his Bill may mean a life sentence for a felon that is considered a risk to women and children. SO BE IT!" (internal quotation marks omitted)).

6. *See infra* note 28.

7. For discussions of the intersection of psychology and criminal law in risk assessment, see generally R. Karl Hanson, *Who is Dangerous and When are They Safe? Risk Assessment with Sexual Offenders*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS*, *supra* note 1, at 63, and Roy B. Lacoursiere, *Evaluating Offenders Under a Sexually Violent Predator Law: The Practical Practice*, in *PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS*, *supra* note 1, at 75.

8. *See Lacoursiere, supra* note 7, at 75.

9. *See*, for example, KAN. STAT. ANN. § 59-29a01 (2005), which states:

The legislature finds that . . . sexually violent predators . . . are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality. . . . [T]he existing civil commitment procedures . . . are inadequate to address the special needs of sexually violent predators and the risks they present to society. . . . [T]he potentially long-term control, care and treatment of sexually violent predators is necessary.

*Id.* *See also* Davey & Goodnough, *supra* note 1 (describing the "dichotomy at the core of [commitment centers'] stated reason" for being detained: "to lock away dangerous men . . . but also to treat them.").

10. The efficacy of treatment, however, is the subject of ongoing debate. *See infra* note 126 and accompanying text.

11. *See infra* Parts II, III.

12. *See infra* note 55.

13. *See infra* notes 63, 79, 104 and accompanying text.

14. *See Allen v. Illinois*, 478 U.S. 364, 369 (1986).

effect, Supreme Court precedent has relied heavily upon the statutory provision of treatment.<sup>15</sup> The provision of treatment is important for the constitutional validity of the statute because its purported purpose is to protect the public while the individual is treated for his mental abnormality; the purpose cannot be to punish the individual, at least not without violating the Double Jeopardy Clause.<sup>16</sup> If the state fails to provide any treatment for the individual's mental abnormality, the prospect of recovery and release is practically impossible.<sup>17</sup> Indefinite physical confinement with practically no chance of release would certainly raise questions as to whether the statute had a punitive purpose or effect. In short, to support the constitutionality of these civil commitments, the statutory provision of treatment really ties the scheme together.

But what if a state provided insufficient or “sham treatment . . . that lasts for years, ostensibly to change someone's psychiatric diagnosis,”<sup>18</sup> with the true purpose of prolonging his confinement? Such a scenario would likely be difficult to detect, in part because of the ongoing debate as to whether these individuals are amenable to treatment at all.<sup>19</sup> When a confined individual alleges that the state has impinged on his constitutional rights, the proper guardian of his rights ought to be the federal courts rather than the state.<sup>20</sup> In the context of sexually violent

15. *See, e.g.*, *id.* at 369–70 (“We are unpersuaded by petitioner's efforts to challenge [the] conclusion [that the statute is civil]. Under the Act, the State has a statutory obligation to provide ‘care and treatment for [persons adjudged sexually dangerous] designed to effect recovery . . . .’”).

16. *See, e.g.*, *Seling v. Young*, 531 U.S. 250, 269 (2001) (Scalia, J., concurring) (“The short of the matter is that, for Double Jeopardy . . . purposes, the question of criminal penalty *vel non* depends upon the intent of the legislature . . . .”). There seems to be widespread agreement that SVPs' confinement must not be like confinement in prison. *See Allen*, 478 U.S. at 373 (“Had petitioner shown . . . that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with no need for psychiatric care, this might well be a different case.”); *Youngberg v. Romeo*, 457 U.S. 307, 321–22 (1982) (noting in the context of an involuntarily committed mentally retarded individual that “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish”); Douglas G. Smith, *The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment*, 49 B.C. L. REV. 1383, 1401 (2008) (applying *Youngberg* to the sexually violent predator context). The notion that confinement under an SVP statute must not amount to a prison-like confinement stands in stark contradiction to the realities observed at some such facilities. *See Davey & Goodnough*, *supra* note 1 (“Most of the centers tend to look and feel like prisons, with clanking double doors, guard stations, fluorescent lighting, cinder-block walls, overcrowded conditions and tall fences with razor wire around the perimeters. Bedroom doors are often locked at night, and mail is searched by the staff for pornography or retail catalogs with pictures of women or children. Most states put their centers in isolated areas. Washington State's is on an island three miles offshore in Puget Sound.”).

17. *See infra* note 44 and accompanying text.

18. Retka, *supra* note 1 (quoting Dr. Delaney Dean).

19. *See infra* note 126 and accompanying text.

20. *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 21 (1967) (“But the error from which these

predators, however, the courts have adopted the professional judgment standard, which presumes that the treatment decisions of a qualified mental health professional are valid unless they substantially depart from generally accepted norms.<sup>21</sup> Because the generally accepted norms for treating sexually violent predators are ill defined,<sup>22</sup> courts lack a principled metric with which to apply the standard. By continuing to adhere to a standard that the courts cannot apply in practice, they are abdicating their role as the protector of individual rights.

Part I of this Note will explore some common features shared by different states' statutory schemes for the involuntary commitment of sexually violent predators. Part II will analyze several Supreme Court cases that shed some light on how the treatment that is provided to sexually violent predators may affect the constitutionality of their confinement. Part III explains what is meant by "treatment" for sexually violent predators and then explores the propriety and consequences of the professional judgment standard as a method for evaluating challenges to treatment. Part IV analyzes the strengths and weaknesses of alternative options for addressing the difficulties of providing treatment. This Note concludes with a brief overview of the purpose of the statutes, the problems that have arisen that threaten to undermine such statutes, and a suggestion of how to adjust the jurisprudence to better serve principles of justice without sacrificing public safety.

#### I. THE MODERN STATUTORY SCHEME FOR THE INVOLUNTARY CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

The law has treated sexually violent criminals as a uniquely dangerous class of criminals for much of the twentieth century.<sup>23</sup> Sexual crimes, especially violent sexual crimes against women and children, are often seen as more egregious than other crimes.<sup>24</sup> Because these criminals are thought to engage in violent sexual acts compulsively,<sup>25</sup> it follows that

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petitioners suffered was a denial of rights . . . rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.' . . . With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights." (footnote omitted).

21. See *infra* notes 130–31 and accompanying text.

22. See *infra* notes 125, 139–40.

23. See generally JENKINS, *supra* note 4.

24. See *id.* at ch. 3.

25. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 360, 375 (1997) (noting an "admitted lack of volitional control" and "serious, and highly unusual inability to control his actions").

they would be less likely to be deterred by the possibility of incarceration<sup>26</sup> and more likely to reoffend upon release. To protect society from the possibility of these individuals reoffending when released from prison, states have attempted to detain them through a variety of civil commitment statutes over the past century.<sup>27</sup>

Many states now have statutory schemes that allow for the indefinite and involuntary civil commitment of people found to be sexually violent predators (SVPs).<sup>28</sup> Although there is significant variation between the state statutes,<sup>29</sup> many of them are “strikingly similar.”<sup>30</sup> These statutes<sup>31</sup> operate only after an individual has been convicted of a sexually violent

26. *Id.* at 362–63 (“[Sexually violent offenders] are, by definition, suffering from a ‘mental abnormality’ or a ‘personality disorder’ that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement.”).

27. For a thorough account of the issue of sex offenders in American law, see generally JENKINS, *supra* note 4.

28. Retka, *supra* note 1, at 14 (listing jurisdictions with SVP statutes). At the time of this writing, there are at least nineteen states that have some form of involuntary commitment for sexually violent predators. See ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (2010); CAL. WELF. & INST. CODE §§ 6601–6667 (West 2010); FLA. STAT. ANN. § 394.910–932 (West Supp. 2011); 725 ILL. COMP. STAT. 207/1–99 (2006); IOWA CODE §§ 229A.1–.16 (2006); KAN. STAT. ANN. §§ 59-29a01 to -29a21 (2005); MASS. GEN. LAWS ANN. ch. 123A, §§ 1–16 (West Supp. 2010); MINN. STAT. ANN. § 253B.001–.23 (West Supp. 2011); MO. REV. STAT. §§ 632.480–.513 (2000); N.H. REV. STAT. ANN. § 135-E:1 (2006); N.J. STAT. ANN. § 30:4-27.24 to .35 (West Supp. 2010); N.Y. MENTAL HYG. LAW § 10 (McKinney Supp. 2010); N.D. CENT. CODE § 25-03.3 (2002); 42 PA. CONS. STAT. ANN. §§ 9791–9799.9 (West Supp. 2010); S.C. CODE ANN. §§ 44-48-10 to -170 (2009); TEX. HEALTH & SAFETY CODE ANN. § 841 (West 2003); VA. CODE ANN. § 37.2-900 to -920 (West Supp. 2009); WASH. REV. CODE ANN. § 71.09.010–.903 (West 2001); WIS. STAT. ANN. § 980.01–.14 (West 1998). The federal government also has this power. See 18 U.S.C. § 4248 (2006). The validity of the federal statute was recently upheld by the Supreme Court, overruling decisions by the Fourth Circuit and district court that Congress lacked the constitutional power to enact § 4248. See *United States v. Comstock*, 130 S. Ct. 1949 (2010). Justice Thomas’s dissent, joined by Justice Scalia, argued that the statute could not be constitutional under the Necessary and Proper Clause if it could not be attributed to any of Congress’s enumerated powers. See *id.* at 1970 (Thomas, J., dissenting). The Court made clear that it was not deciding the constitutionality of the federal statute or similar state statutes on any other grounds. See *id.* at 1965 (majority opinion) (“We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.”).

29. Compare, e.g., KAN. STAT. ANN. § 59-29-a20, -a10 (asserting that the general rule is that individuals are not eligible for any less restrictive measure that would release them from the physical custody of the state, subject to some exceptions), with TEX. HEALTH & SAFETY CODE ANN. § 841.081 (West 1999) (providing for exclusively outpatient commitment).

30. *Seling v. Young*, 531 U.S. 250, 260–61 (2001) (noting that the relevant statutes in Washington and Kansas are “strikingly similar”); see also Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1204 n.45 (2000) (observing that “states typically mimic the Washington/Kansas model.”).

31. To ensure that the statutory scheme is not taken out of context, Missouri’s SVP law will be used as a representative example to illustrate the general structure of involuntary civil commitments. To the best of my knowledge, at the time of this writing Missouri’s program has never recommended a participant for release. See Retka, *supra* note 1, at 14.

offense and given a criminal sentence. Toward the end of the convict's incarceration, the state attorney general may instigate proceedings to determine whether the convict fits the statutory definition of an SVP.<sup>32</sup> The statutory definition of an SVP<sup>33</sup> generally consists of two components: a conviction for a predicate sexual crime,<sup>34</sup> and a "mental abnormality"<sup>35</sup> that increases the likelihood of reoffending<sup>36</sup> unless the person is confined to a secure facility.<sup>37</sup> This determination is made in a civil trial,<sup>38</sup> although

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32. See, e.g., MO. REV. STAT. § 632.483 (2000).

33. See, e.g., *id.* § 632.480 (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 predatory acts of sexual violence if not confined in a secure facility and who" has plead guilty or been convicted of a sexually violent offense or been previously committed under the state's previous sexual psychopath statute).

34. See, e.g., *id.* (defining sexually violent offense as "the felonies of forcible rape, rape, statutory rape in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or an attempt to commit any of the preceding crimes, or child molestation in the first or second degree, sexual abuse, sexual assault, deviate sexual assault, or the act of abuse of a child as defined").

35. See, e.g., *id.* Although the differences between a "mental abnormality" versus a "mental illness" or "mental disorder" have been the subject of significant debate, see generally Steven I. Friedland, *On Treatment, Punishment, and the Civil Commitment of Sex Offenders*, 70 U. COLO. L. REV. 73 (1999), the Supreme Court dismissed the distinction for the purposes of the law. See *infra* note 78 and accompanying text.

36. Whether a particular convict is likely to reoffend can be very difficult to predict. See generally Hanson, *supra* note 7, at 63. This can lead to expert shopping, where the opponents search for a psychologist who will testify favorably for their side, regardless of what the state's psychologists or mental health departments say. See *In re Care & Treatment of Norton*, 123 S.W.3d 170, 178 (Mo. 2003) (en banc) ("Once the state decides to proceed to commit one of these offenders, it can hardly lose. If the state psychiatrist cannot confidently state that an offender is a sexually violent predator, the state may shop around for an expert, even from another state."); see also Retka, *supra* note 1, at 15–16. In determining a particular criminal's likelihood of reoffending, psychologists often use actuarial formulas that factor in the characteristics of that criminal and his crime. See Davey & Goodnough, *supra* note 1 ("Actuarial formulas—akin to the tables used for life insurance—play a central role in deciding who is dangerous enough to be committed. They calculate someone's risk of offending again by looking at factors such as the number of prior sex offenses and the sex of the victims."). However, the actuarial formulas generally fail to account for factors that may change. See Abby Goodnough & Monica Davey, *For Sex Offenders, a Dispute Over Therapy's Benefits*, N.Y. TIMES, Mar. 6, 2007, at A1 [hereinafter Goodnough & Davey, *Therapy*] ("Most actuarial tools used to predict someone's risk of recidivism consider only unchanging factors . . . . Some scientists say that so-called dynamic factors—how much treatment an offender gets, for example, and how old he has grown—should factor heavily into actuarial risk assessment, too."). Psychologists in Canada are working on new actuarial tools aimed at being more sensitive to "dynamic variables, including substance abuse, hostility and rejection of supervision." Retka, *supra* note 1, at 16. Although the prediction tools have become "more of a science over the last decade," "[t]he results of the screening process are inconsistent." Davey & Goodnough, *supra* note 1. Furthermore, "[s]ome offenders are passed up for civil confinement, only to commit vicious crimes again; others' physical ailments alone make them unlikely repeat predators." *Id.*

37. See, e.g., IOWA CODE § 229A.2 (West Supp. 2010) ("'Sexually violent predator' means a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility."). The precise wording of the definition may vary between states, which can sometimes alter the burden of proving that a convict fits the definition.

the trial often has some modifications that are more characteristic of a criminal trial.<sup>39</sup> If the jury finds that the convict fits the statutory definition of an SVP,<sup>40</sup> he must be committed to a facility for care and treatment<sup>41</sup> until such time that it is safe to release him,<sup>42</sup> meaning until such time that he no longer fits the statutory definition of an SVP. A person committed as an SVP is given annual evaluations to decide whether he still fits the statutory definition of an SVP,<sup>43</sup> and he may also request such an evaluation at any time.<sup>44</sup> Under such schemes, an individual found to be an SVP can be involuntarily committed for treatment in a secure facility for the rest of his life after having served his criminal sentence.<sup>45</sup>

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*Compare, e.g.,* KAN. STAT. ANN. § 59-29a02 (2005) (“‘Sexually violent predator’ means any person . . . who suffers from a mental abnormality or personality disorder which makes the person *likely* to engage in repeat acts of sexual violence.” (emphasis added)), *with* MO. REV. STAT. § 632.480 (2000) (“‘Sexually violent predator’ [is] any person who suffers from a mental abnormality which makes the person *more likely than not* to engage in predatory acts of sexual violence . . .” (emphasis added)).

38. *See, e.g.,* MO. REV. STAT. § 632.492 (2000).

39. Such modifications include the right to counsel and the right to demand a jury trial. *See id.*; *see also* *Allen v. Illinois*, 478 U.S. 364, 371 (1986) (noting that the right to counsel and a jury trial are “procedural safeguards usually found in criminal trials”).

40. *See, e.g.,* MO. REV. STAT. § 632.495 (“The court or jury shall determine whether, by clear and convincing evidence, the person is a sexually violent predator. If such determination that the person is a sexually violent predator is made by a jury, such determination shall be by unanimous verdict of such jury.”).

41. *See, e.g.,* MO. REV. STAT. § 632.495 (“If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment . . .”). Such mandatory jury instructions have the potential to fill the jury members with sympathy for the offender, encouraging them to commit him so that he can receive the necessary treatment. Retka, *supra* note 1, at 14 (noting that the universal response from jury members was “[n]ot hatred, not anger, not vindictiveness. It was sympathy for their mental abnormality and the hope they would get the help they needed.”).

42. *See, e.g.,* MO. REV. STAT. § 632.501 (2000).

43. *Id.* § 632.498.

44. *See, e.g., id.* The apparent reasonableness of this provision is seriously undercut by the methodology that is employed by some psychologists. For example, a frequently used actuarial tool is the Static-99, a ten-item test that evaluates the offender’s likelihood of reoffense based on the offender’s past sex offenses. Retka, *supra* note 1, at 16. The problem is that the factors in the test remain static, regardless of how long an offender has been in treatment. *Id.* The possibility of being released because of a decreased likelihood of reoffending, therefore, is substantially diminished. *See id.* For more detailed analyses of risk assessment methods, see generally Gregory DeClue, *Practice Standards and Guidelines for the Evaluation, Treatment, and Management of Sexual Abusers: Bamboozle No More*, 34 J. PSYCHIATRY & L. 197, 205–06 (2006), and Hanson, *supra* note 7, at 63.

45. *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (“Notwithstanding its civil attributes, the practical effect of [sexually violent predator laws] may be to impose confinement for life. At this stage of medical knowledge, although future treatments cannot be predicted, psychiatrists or other professionals engaged in treating pedophilia may be reluctant to find measureable success in treatment even after a long period and may be unable to predict that no serious danger will come from release of the detainee.”); *see also* *Sharp v. Weston*, 233 F.3d 1166, 1172 (9th Cir. 2000) (“[A]ll too often the promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits . . .” (quoting *United States ex rel Stachulak v. Coughlin*, 520 F.2d 931, 936 (7th Cir. 1975)) (internal quotation marks omitted)).



It appears that the general effect of such statutes has been life sentences imposed on these individuals after having served their criminal sentences.<sup>46</sup> Only “a small fraction” of SVPs progress through the treatment regimes and are released from confinement.<sup>47</sup> Juries are understandably prone to label convicts as SVPs.<sup>48</sup> Furthermore, the methods that are commonly used to measure an individual’s likelihood of reoffending,<sup>49</sup> which is what his release ultimately depends on,<sup>50</sup> are largely static and therefore fail to account for how long an SVP has been in treatment.<sup>51</sup>

There is also an apparent disparity of treatment effectiveness among states that provide for civil commitment.<sup>52</sup> Although rates for successful completion of the program and release are generally low,<sup>53</sup> some states have never recommended the release of an individual following successful treatment, while others have released a disproportionate amount.<sup>54</sup> One state’s utter failure to produce a single success story, when compared to

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46. See, e.g., *Hendricks*, 521 U.S. at 372.

47. Davey & Goodnough, *supra* note 1.

Nearly 3,000 sex offenders have been committed since the first law passed in 1990. In 18 of the 19 states, about 50 have been released completely from commitment because clinicians or state-appointed evaluators deemed them ready. Some 115 other people have been sent home because of legal technicalities, court rulings, terminal illness or old age. In discharging offenders, Arizona, the remaining state, has been the exception. That state has fully discharged 81 people . . . .

*Id.* For a graphical representation of some statistics, see Davey & Goodnough, *supra* note 1.

48. See Retka, *supra* note 1, at 14; see also *In re Care & Treatment of Norton*, 123 S.W.3d 170, 178 (Mo. 2003) (en banc) (“The fact that juries regularly find convicted sex offenders to be sexually violent predators should come as no surprise. Even where there is doubt about whether the offender has a mental abnormality, what juror wants to free someone who may someday molest another child? The state is, of course, required to prove its case for commitment ‘beyond a reasonable doubt.’ But in this context, is this much of a safeguard?”). Such realities also undermine the purported value of the risk prediction tools. See Davey & Goodnough, *supra* note 1 (“Politics and emotion also factor heavily into who gets committed, with decisions made by elected judges or juries who may be more affected by the raw facts of someone’s offense history or the public spectacle over their crimes than the dry science of risk prediction.”).

49. See *supra* note 36.

50. See, e.g., MO. REV. STAT. § 632.501 (2000) (“If the director of the department of mental health determines that the person’s mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the director shall authorize the person to petition the court for release.”).

51. See *supra* note 36.

52. See Davey & Goodnough, *supra* note 1.

53. See *id.*

54. See *id.* Missouri and Arizona offer starkly contrasting stories of success. Compare Retka, *supra* note 1, at 14 (“The Missouri Department of Mental Health, which runs the facility, hasn’t recommended a single resident for release. In several other states that commit sexual predators, including Minnesota and Iowa, the same is true: After years of commitment, no resident has been released.”), with *supra* note 47 (noting that Arizona has fully discharged 81 people).

another state with a modest rate of success, leads one to ask whether there may be a problem or deficiency in the way that treatment is being administered.

## II. THE EFFECT OF TREATMENT ON THE CONSTITUTIONALITY OF THE MODERN STATUTORY SCHEME

The constitutionality of involuntary civil commitment statutes has been challenged under a number of theories, such as *ex post facto*, double jeopardy, and substantive due process.<sup>55</sup> In each of the cases that have come before the Supreme Court, the issue of treatment has been an important part of the Court's analysis of the constitutionality of the scheme.

In *Allen v. Illinois*,<sup>56</sup> Terry Allen was indicted for "the crimes of unlawful restraint and deviate sexual assault," and an accompanying petition was filed to have him declared sexually dangerous.<sup>57</sup> Allen submitted to two court-ordered psychiatric examinations in preparation for a civil trial to determine whether he fell within the statutory definition<sup>58</sup> of a sexually dangerous person.<sup>59</sup> When the State attempted to use the psychiatric examinations at trial, Allen objected, asserting his Fifth Amendment privilege against self-incrimination.<sup>60</sup> The Supreme Court of Illinois unanimously held that the privilege was inapplicable because the proceedings were civil,<sup>61</sup> stating that the statute was designed to provide "treatment, not punishment."<sup>62</sup> On appeal to the United States Supreme Court, Allen argued that the privilege was applicable because the sexually dangerous person proceedings were criminal, despite being labeled civil in

55. See *Seling v. Young*, 531 U.S. 250 (2001) (double jeopardy and *ex post facto*); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (substantive due process, double jeopardy, and *ex post facto*); see also *Allen v. Illinois*, 478 U.S. 364 (1986) (Fifth Amendment privilege).

56. 478 U.S. 364 (1986).

57. *Id.* at 365–66.

58. ILL. REV. STAT., ch. 38, ¶ 105-1.01 (1985) ("All persons suffering from a mental disorder . . . coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons."). The definition of a sexually violent person under the current Illinois statute, 725 ILL. COMP. STAT. 207/5 (2006), differs from the statute at issue in *Allen*. The differences in the statutory definitions, however, do not have an effect on the Court's analysis for the purposes of this Note.

59. *Allen*, 478 U.S. at 366.

60. *Id.* at 366.

61. See U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . .") (emphasis added).

62. *Allen*, 478 U.S. at 367 (citing *People v. Allen*, 481 N.E.2d 690, 694–95 (1985)).

the statute.<sup>63</sup> To support this claim, Allen noted that the civil proceedings could not be brought in the absence of criminal charges, that the State was required to prove at least one criminal sexual act, and that the civil proceedings had several “procedural safeguards usually found in criminal trials.”<sup>64</sup> After agreeing that the civil label alone was not dispositive,<sup>65</sup> the Court held that Allen’s arguments failed to show a punitive purpose or effect.<sup>66</sup> The Court emphasized that Illinois had statutorily obliged itself to provide treatment and had “disavowed any interest in punishment.”<sup>67</sup> The Court also asserted that “the State [had] serve[d] its purpose of *treating* rather than punishing sexually dangerous persons by committing them to an institution expressly designed to provide psychiatric care and treatment.”<sup>68</sup> The Court implicitly acknowledged its heavy reliance on the treatment provision when it noted in dicta that a different case would be presented if a committed person could show that his conditions of confinement were the same as a prisoner’s.<sup>69</sup> The four dissenting Justices argued that “[a] *goal* of treatment is not sufficient . . . to prevent a characterization of proceedings as ‘criminal.’”<sup>70</sup> The dissent reasoned that to allow a stated goal of treatment to bar a characterization of the statute as criminal would enable legislatures to circumvent sentencing limitations

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63. *Id.* at 368–69.

64. *Id.* at 370–71.

65. *Id.* at 369 (finding that the civil label could be overcome by “‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ that the proceeding be civil” (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980) (alterations in original))).

66. *See id.* at 374.

67. *Id.* at 369–70.

68. *Id.* at 373. It is worth noting, however, that the majority considered it sufficient that the institution be “expressly *designed* for psychiatric care and treatment” in spite of their acknowledgement that “the record here tells us little or nothing about the regimen at the psychiatric center . . .” *Id.* (emphasis added). This illustrates the Court’s willingness to defer to a state’s proffered purpose, however basic it may be, while reserving the question of actual application for another day.

69. *See id.* at 373–74. The Court stated:

Had petitioner shown, for example, that the confinement of such persons imposes on them a regimen which is essentially identical to that imposed upon felons with *no need for psychiatric care*, this might well be a different case. But the record here tells us little or nothing about the regimen at the psychiatric center . . . . We therefore cannot say that the conditions of petitioner’s confinement themselves amount to “punishment” and thus render “criminal” the proceedings which led to confinement.

*Id.* (emphasis added). A later Supreme Court dissenting opinion recognized the critical importance of treatment in the *Allen* Court’s decision. *See Kansas v. Hendricks*, 521 U.S. 346, 382 (1997) (“The *Allen* Court’s focus upon treatment, as a kind of touchstone helping to distinguish civil from punitive purposes, is not surprising . . . .”) (5–4 decision) (Breyer, J., dissenting).

70. *Allen*, 478 U.S. at 380 (emphasis added).

and indefinitely commit people, resulting in the “evisceration of criminal law and its accompanying protections.”<sup>71</sup>

The Supreme Court dealt with the issue of treatment in even greater depth in *Kansas v. Hendricks*.<sup>72</sup> Leroy Hendricks was a habitual child molester and the first target<sup>73</sup> of Kansas’s newly enacted Sexually Violent Predator Act.<sup>74</sup> Hendricks challenged his commitment, arguing that the Act violated substantive due process,<sup>75</sup> placed him in double jeopardy, and was an *ex post facto* law.<sup>76</sup> The Kansas Supreme Court invalidated the Act on substantive due process grounds because of the wording of the statutory definition.<sup>77</sup> The United States Supreme Court reversed, holding that the Act did not violate substantive due process.<sup>78</sup> The Court went on to hold that the Act did not place Hendricks in double jeopardy or operate as an *ex post facto* law because it was not punitive, and therefore was not criminal in nature.<sup>79</sup> To determine that the Act had no punitive purpose or effect, the Court employed the same reasoning that it did in *Allen*.<sup>80</sup> The Court then addressed Hendricks’s argument that the Act was “necessarily punitive because it fail[ed] to offer any legitimate ‘treatment.’”<sup>81</sup>

71. *Id.*

72. 521 U.S. 346 (1997).

73. *Id.* at 350.

74. See KAN. STAT. ANN. §§ 59-29a01 to -29a22 (1994) (current version at KAN. STAT. ANN. §§ 59-29a01 to -29a22 (2005)).

75. See *Hendricks*, 521 U.S. at 356, 358–59 (noting that when determining whether the “Act’s definition of ‘mental abnormality’ satisfies ‘substantive’ due process requirements,” the Court stated that “Hendricks . . . argues that our earlier cases dictate a finding of ‘mental illness’ as a prerequisite for civil commitment . . . citing *Foucha* [v. Louisiana, 504 U.S. 71 (1992)] and *Addington* [v. Texas, 441 U.S. 418 (1979)]. He then asserts that a ‘mental abnormality’ is *not* equivalent to a ‘mental illness’ because it is a term coined by the Kansas Legislature, rather than by the psychiatric community.”)

76. *Id.* at 361 (“The thrust of Hendricks’ argument is that the Act establishes criminal proceedings; hence confinement under it necessarily constitutes punishment. He contends that where, as here, newly enacted ‘punishment’ is predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence, the Constitution’s Double Jeopardy and *Ex Post Facto* Clauses are violated.”)

77. *Id.* at 350. The Kansas Supreme Court understood the relevant precedent to require a finding of a “mental illness” in order to support an involuntary civil commitment. *In re Care & Treatment of Hendricks*, 912 P.2d 129, 138 (Kan. 1996) [hereinafter *In Re Hendricks*]. Kansas’s statutory definition of an SVP, however, only required a finding of a “mental abnormality.” See KAN. STAT. ANN. § 59-29a02 (1994) (current version KAN. STAT. ANN. § 59-29a02 (2005)).

78. *Hendricks*, 521 U.S. at 356. Regarding the “mental illness” versus “mental abnormality” distinction, the Court noted that “[c]ontrary to Hendricks’ assertion, the term ‘mental illness’ is devoid of any talismanic significance,” and it had “never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes.” *Id.* at 359.

79. *Id.* at 369–71.

80. See *id.* at 361–65; *supra* notes 65–69 and accompanying text.

81. *Hendricks*, 521 U.S. at 365. At the time of Hendricks’s initial confinement, Kansas was apparently not prepared to deliver the treatment that it had obligated itself to provide in the newly enacted statute. See *infra* note 89.

Hendricks reasoned that “[w]ithout [legitimate] treatment[,] . . . confinement under the Act amount[ed] to little more than disguised punishment.”<sup>82</sup> Indeed, the Kansas Supreme Court regarded the treatment<sup>83</sup> as “somewhat disingenuous” and “incidental, at best.”<sup>84</sup> The Supreme Court read the Kansas court’s opinion to mean either that Hendricks was untreatable<sup>85</sup> or that he was treatable but no treatment was being provided.<sup>86</sup> The Supreme Court then evaluated the sufficiency of Hendricks’s treatment using an analysis under the professional judgment standard<sup>87</sup> and found that the State had “doubtless satisfied its obligation to provide available treatment.”<sup>88</sup> The Court was apparently not deterred by strong indications that Hendricks was receiving “essentially no treatment.”<sup>89</sup> Having concluded that the Act was civil, the double jeopardy and *ex post facto* claims were necessarily found to be without merit.<sup>90</sup>

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82. *Hendricks*, 521 U.S. at 365.

83. Treatment was not a defined term in the statute. *See* KAN. STAT. ANN. § 59-29a02 (1994) (the current version, at KAN. STAT. ANN. § 59-29a02 (2005), is the same in the relevant respects). Rather, the statute simply stated that “[t]he involuntary detention or commitment of persons under this act shall conform to constitutional requirements for care and treatment.” *Id.* § 59-29a09. The purpose of this provision was obviously to bolster the statute’s validity, not to provide any meaningful guidance.

84. *Hendricks*, 521 U.S. at 365 (“It is clear that the overriding concern of the legislature is to continue the segregation of sexually violent offenders from the public. Treatment with the goal of reintegrating them into society is incidental, at best. The record reflects that treatment for sexually violent predators is all but nonexistent. . . . [T]he provisions of the Act for treatment appear somewhat disingenuous.” (quoting *In re Hendricks*, 912 P.2d 129, 136 (Kan. 1996))).

85. *Id.* at 365 (“It is possible to read [the Kansas Supreme Court’s opinion] as a determination that Hendricks’ condition was *untreatable* . . .”). The Court suggested that Hendricks’s untreatability would not prevent his confinement. *See id.* at 366 (“[W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others.”).

86. *Id.* at 366–67.

87. *See id.* at 368 n.4 (“We have explained that the States enjoy wide latitude in developing treatment regimens.” (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982))). The professional judgment standard, which was established in *Youngberg*, states that treatment decisions for involuntarily committed individuals, “if made by a professional, [are] presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) (footnote omitted). The *Youngberg* Court defined a professional decision maker as “a person competent, whether by education, training or experience, to make the particular decision at issue.” *Id.* at 323 n.30.

88. *Hendricks*, 521 U.S. at 368 n.4.

89. *Id.* at 384 (Breyer, J., dissenting) (quoting Dr. Charles Befort in state habeas corpus proceeding); *see also id.* at 377–78 (“[The Kansas Supreme Court] found that Kansas did not provide Hendricks with significant treatment.”); *id.* at 384 (“The record provides support for the Kansas court’s conclusion. The court found that, as of the time of Hendricks’ commitment, the State had not funded treatment, it had not entered into treatment contracts, and it had little, if any, qualified treatment staff.”). Justice Breyer’s dissent looked further into the case to illustrate the soundness of the Kansas court’s conclusion, saying: “Indeed, were we to follow the majority’s invitation to look beyond the record in this case, . . . it would reveal that Hendricks, according to the commitment program’s

The dissenting opinion by Justice Breyer suggested that the majority had not focused on the proper question.<sup>91</sup> Justice Breyer concluded that the Act was punitive by focusing the question on whether a state violates the Due Process Clause in failing to provide available treatment to a treatable person.<sup>92</sup> Justice Breyer supported his conclusion through syllogistic reasoning: (1) “[O]ne would expect a nonpunitively motivated legislature that confines *because of* a dangerous mental abnormality to seek to help the individual himself overcome that abnormality;”<sup>93</sup> (2) Kansas did not provide significant treatment to Hendricks;<sup>94</sup> (3) as a result, the Act was punishment as to Hendricks.<sup>95</sup>

Most recently, in *Seling v. Young*, the Supreme Court rejected an as-applied challenge to Washington state’s SVP statute based on double jeopardy and *ex post facto* grounds.<sup>96</sup> Andre Brigham Young was a civilly committed rapist<sup>97</sup> who had unsuccessfully challenged his confinement through the state courts.<sup>98</sup> Young then brought a habeas action in federal

own director, was receiving ‘essentially no treatment.’” *Id.* at 384 (quoting the Testimony of Dr. Charles Befort). In the record before the Court, Dr. Befort additionally stated that “[t]he treatment that is prescribed by statute” is “still not available[,]” the “needed treatment . . . hasn’t been delivered yet,” and “Hendricks has wasted ten months” in “terms of treatment effects.” *Id.* Finally, Dr. Befort admitted he was not qualified to be SVP program director. *Id.*

90. *See id.* at 369–71 (majority opinion).

91. *Id.* at 378 (Breyer, J., dissenting) (“This case does not require us to consider whether the Due Process Clause *always* requires treatment—whether, for example, it would forbid civil confinement of an *untreatable* mentally ill, dangerous person. . . . Rather, the basic substantive due process treatment question is whether that Clause requires Kansas to provide treatment that it concedes is potentially available to a person whom it concedes is treatable.”).

92. *See id.* at 378–79

93. *Id.* at 382.

94. *See supra* note 89.

95. *Id.* at 395. The dissent seems to be arguing for an as-applied analysis under substantive due process for individuals challenging the legitimacy of their confinement because of a lack of sufficient treatment. *See id.* at 393 (noting that if the Court relied on the state court as it had in *Allen*, it “would mean the Act as applied to *Leroy Hendricks* (as opposed to others who may have received treatment or who were sentenced after the effective date of the Act) is punitive”); *id.* at 395 (“I have pointed to those features of the Act itself, in the context of this litigation, that lead me to conclude, in light of our precedent, that the added confinement the Act imposes upon Hendricks is basically punitive. This analysis, rooted in the facts surrounding Kansas’ failure to treat Hendricks, cannot answer the question whether the Kansas Act, as it now stands, and in light of its current implementation, is punitive toward people other than he.”). For a discussion about as-applied challenges to SVP statutes, see generally Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 OHIO ST. J. CRIM. L. 25 (2008).

96. *Seling v. Young*, 531 U.S. 250, 263 (2001). Young’s argument was essentially that “the conditions of his confinement at the Center [were] too restrictive, that the conditions [were] incompatible with treatment, and that the system [was] designed to result in indefinite confinement.” *Id.* at 262.

97. *Id.* at 255.

98. *Id.* at 258.

court,<sup>99</sup> which eventually<sup>100</sup> resulted in the Ninth Circuit agreeing that “actual conditions of confinement could divest a facially valid statute of its civil label upon a showing by the clearest proof that the statutory scheme is punitive in effect.”<sup>101</sup> Young alleged that the conditions of confinement were incompatible with treatment and afforded no possibility of being released.<sup>102</sup> The Supreme Court recognized the seriousness of Young’s allegations,<sup>103</sup> but ultimately refused to question the Washington Supreme Court’s conclusion that the statute was facially civil.<sup>104</sup> The Supreme Court noted that an as-applied challenge on double jeopardy and *ex post facto* grounds was “unworkable” because “[s]uch an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme’s validity.”<sup>105</sup> Furthermore, the Court felt that Young’s as-applied challenge represented an attempted “end run around” the state supreme court’s ruling that the statute was civil.<sup>106</sup>

For the purposes of this Note, the most interesting discussion in *Seling* happened in dicta. The majority noted that the case did not allow the Court to consider whether and to what extent the Court might “look to actual

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99. *Id.*

100. “The District Court granted the writ, concluding that the Act violated substantive due process, that the Act was criminal rather than civil, and that it violated the double jeopardy and *ex post facto* guarantees of the Constitution.” *Id.* While the appeal of that decision was pending, *Hendricks* was decided and Young’s case was remanded “for reconsideration in light of *Hendricks*.” *Id.* The district court denied the writ on remand. *Id.* On appeal to the Ninth Circuit, the dismissal of Young’s due process claims were affirmed, but the double jeopardy and *ex post facto* claims were found to survive despite the civil label of the statute. *Id.* at 258–59.

101. *Id.* at 259. Describing the Ninth Circuit’s decision, the Supreme Court summarized that “[t]he ‘linchpin’ of Young’s claims, the [Ninth Circuit] reasoned, was whether the Act was punitive ‘as applied’ to Young.” *Id.*

102. *Id.* at 260 (“Young also contended that conditions at the Center were incompatible with the Act’s treatment purpose. . . . The Center still lacked certified sex offender treatment providers. Finally, there was no possibility of release. A court-appointed resident advocate and psychologist concluded in his final report that because the Center had not fundamentally changed over so many years, he had come to suspect that the Center was designed and managed to punish and confine individuals for life without any hope of release to a less restrictive setting.”).

103. *Id.* at 263 (“[W]e do not deny that some of [Young’s] allegations are serious.”).

104. *See id.* (“[W]e evaluate [Young’s] allegations as presented in a double jeopardy and *ex post facto* challenge under the assumption that the Act is civil.”).

105. *Id.* The Court’s reasoning was that the conditions were not a fixed event, but rather something that may change over time. *Id.* The Court asserted that these changes could affect the evaluation of the statute’s criminal versus civil nature, and therefore a definitive answer could not be reached by looking at the statute’s application. *Id.* No cases were cited in support of this reasoning. *See id.*

106. *Id.* at 263–64 (“Permitting respondent’s as-applied challenge would invite an end run around the Washington Supreme Court’s decision that the Act is civil in circumstances where a direct attack on that decision is not before this Court.”).

conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil in nature.”<sup>107</sup> Justice Scalia wrote his concurrence specifically “to dissociate [himself] from any implication that this reserved point may be an open question.”<sup>108</sup> Justice Scalia expressed his view that a facially civil statute may not be invalidated because of harsh implementation that would render it criminal “for Double Jeopardy and *Ex Post Facto* Clause purposes” because “the question of criminal penalty . . . depends upon the intent of the legislature.”<sup>109</sup> Justice Scalia’s reasoning seems to be that the Double Jeopardy and *Ex Post Facto* Clauses are designed to protect citizens from improper legislative intent, rather than improper executive implementation. Justice Scalia’s concurrence went on, however, to suggest that a due process challenge could establish a facially civil statute as criminal if “harsh executive implementation . . . contradict[ed] the statute’s civil character,” and state courts had “authoritatively interpret[ed] the state statute as permitting impositions that are indeed punitive.”<sup>110</sup> Justice Scalia apparently suggests, therefore, that SVPs may be able to launch a challenge under the Due Process Clause if the implementation contradicts the statutory purpose. As one commentator has noted, “[d]espite the outcome . . . most members of the Court appeared to assume—or at least leave open the possibility—that evidence of a statutory scheme’s implementation might dislodge early ‘facial’ findings of proper statutory purpose.”<sup>111</sup>

Although the Supreme Court has rejected challenges to SVP statutes to date,<sup>112</sup> a careful reading of the Court’s precedent reveals at least two ways that such statutes might be invalidated based in large part on a showing of inadequate treatment. The first way would be if the Supreme Court were faced with the determination of whether the statute is criminal or civil in

107. *Id.* at 266. The Supreme Court did not have an occasion to determine the statute’s civil or criminal nature in the first instance because the Washington Supreme Court had already done so. *See id.* at 265. Justice Stevens made clear in his dissent that he did not find that reasoning persuasive. *See id.* at 277 (Stevens, J., dissenting) (“If conditions of confinement are such that a detainee has been punished twice in violation of the Double Jeopardy Clause, it is irrelevant that the scheme has been previously labeled as civil without full knowledge of the effects of the statute.”). The Court also “did not decide whether a different legal theory, substantive due process, would provide redress in an ‘as applied’ context.” Eric S. Janus, *Treatment and the Civil Commitment of Sex Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS, *supra* note 1, at 126.

108. *Young*, 531 U.S. at 267 (Scalia, J., concurring).

109. *Id.* at 269 (emphasis added).

110. *Id.* at 269–70; *see also* Janus & Bolin, *supra* note 95, at 40–41.

111. Janus & Bolin, *supra* note 95, at 39.

112. *See Young*, 531 U.S. at 250; *Kansas v. Hendricks*, 521 U.S. 346 (1997).



the first instance.<sup>113</sup> The Court might look to the actual conditions of confinement in deciding whether the civil label would be accepted.<sup>114</sup> If the Court were to conclude that the SVPs were being confined under conditions that were essentially the same as prisoners who have no right to treatment, then the Act could be divested of its civil nature, found to be criminal,<sup>115</sup> and therefore violative of the Double Jeopardy and *Ex Post Facto* Clauses.<sup>116</sup> The other way that inadequate treatment might lead to invalidation of a statute would be if harsh executive implementation resulted in punitive conditions and was supported in the state courts.<sup>117</sup> This would reveal the criminal effect, or perhaps even the original purpose, of the statute.<sup>118</sup> This approach would have invalidation implications as a substantive due process challenge.<sup>119</sup>

Based on the aforementioned Supreme Court precedent and the statutorily imposed obligations,<sup>120</sup> it seems that there is a qualified right to reasonable treatment for involuntarily civilly committed sexually violent predators.<sup>121</sup> Furthermore, it appears that the constitutional validity of such statutes can be critically affected by the presence or absence of treatment.<sup>122</sup> But establishing that some right to treatment exists does not answer the equally daunting question of implementation.

### III. PROVIDING TREATMENT

#### A. *What is Treatment?*

This area of psychological treatment suffers from a relative lack of data,<sup>123</sup> research,<sup>124</sup> and professional consensus.<sup>125</sup> Important questions

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113. See *Young*, 531 U.S. at 266–67.

114. See *id.*

115. See *Allen v. Illinois*, 478 U.S. 364, 373–74 (1986).

116. See *Young*, 531 U.S. at 266.

117. See *id.* at 269–70 (Scalia, J., concurring).

118. See *Janus & Bolin*, *supra* note 95, at 41 (“It is not clear, nor may it ultimately matter, whether the post-enactment actions of the state *changed* the law’s character, or merely revealed its (pre-existing) true character. The important point here is that . . . the purpose might be revealed by post-enactment implementation.”).

119. See *id.*

120. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 367 (1997). With varying degrees of specificity, all SVP statutes oblige the state to provide treatment. See *supra* note 28.

121. *Janus*, *supra* note 107, at 125–26.

122. See *id.* at 120 (“Arguments about the nature and efficacy of sex offender treatment are central to the constitutional debates about sex offender commitment statutes . . .”).

123. See Goodnough & Davey, *Therapy*, *supra* note 36 (“[S]ex offenders present major challenges as research subjects. There are far fewer convicted sex offenders than most other kinds of criminals, so sample groups are unreliably small. And sex offenders tend to be so secretive that ‘it’s really hard to

remain largely unsettled. If sexually violent predators are treatable,<sup>126</sup> what are the most effective treatments?<sup>127</sup> Can treatment give SVPs a reasonable chance of being rehabilitated and released? What methods of treatment are available? Are there generally accepted standards or guidelines for treating this class of offenders? Given the presently amorphous definition of treatment for SVPs, it is only logical that they have attempted to demarcate the contours of their right to treatment through litigation.

## B. Challenging the Adequacy of Treatment

### 1. The Professional Judgment Standard

When challenging the sufficiency of treatment, litigants are faced with the serious challenge of overcoming the professional judgment standard as articulated in *Youngberg v. Romeo*.<sup>128</sup> Under this standard, treatment decisions for involuntarily committed individuals, “if made by a professional, [are] presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from

get information from them that you can have confidence in,” said Ted Shaw, a forensic psychologist in Gainesville, Fla., who has treated offenders since 1982.”).

124. See DeClue, *supra* note 44, at 203–04 (“There is currently some difference of opinion about what to make of recent studies that do show differences in detected recidivism between treated sex offenders and untreated controls, because those studies all have significant design limitations.”); Goodnough & Davey, *Therapy*, *supra* note 36 (“It has never been regarded as a legitimate and recognized topic for research by psychologists,” said Robert A. Prentky, director of research at the Justice Research Institute in Boston. “There is a very strong undercurrent of disrespect for this area of research and perhaps even skepticism, frankly.”).

125. See DeClue, *supra* note 44, at 203–04 (“In sum, there is considerable controversy over whether and to what extent sex-offender treatment reduces sexual recidivism. A corollary is that if sex-offender treatment does work, we do not know which treatment techniques or methods work best.”); Janus, *supra* note 107, at 121 (“Currently, there is no consensus about the efficacy of sex offender treatment . . .”).

126. Whether sex offenders are treatable at all is a subject of ongoing debate. See, e.g., DeClue, *supra* note 44, at 203–04 (noting disagreement between “‘the agnostic view’ that ‘simply put, the effectiveness of adult sex offender treatment has yet to be demonstrated’ and the ‘cautiously optimistic view’ that ‘the balance of available evidence suggests that current treatments reduce recidivism, but that firm conclusions await more and better research’” (quoting J.Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 80 (2005))). Furthermore, some SVPs evidently do not think highly of the effectiveness of treatment. See Davey & Goodnough, *Therapy*, *supra* note 36 (“‘Most of those guys, they are just faking it to make it,’ [a convicted rapist who completed treatment and was released a year ago] said. ‘They’re just waiting to get released so they can go right back to what they were doing.’”). The litigant in *Hendricks* poignantly commented that “treatment is bull—.” *Kansas v. Hendricks*, 521 U.S. 346, 355 (1997).

127. For an overview of common treatments, see Rice & Harris, *supra* note 1, at 101 (discussing nonbehavioral psychotherapy, castration and pharmacological treatments, and behavioral and cognitive-behavioral treatments). See also *supra* note 125.

128. 457 U.S. 307 (1982).

accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.”<sup>129</sup> This standard gives an extraordinary amount of deference to a qualified professional’s treatment decisions<sup>130</sup> unless the decision is a major break with the norm.

The professional judgment standard is designed to give state administrators “wide latitude” in deciding how to implement treatment in their facilities.<sup>131</sup> The deference afforded to administrators through this standard prevents the courts from interfering with state-run facilities<sup>132</sup> that the judiciary is ill equipped to question. Unless the qualified professional’s treatment decision is a wild departure from general practice, the courts must abide.

## 2. *The Problems of Applying the Professional Judgment Standard to the Context of Sexually Violent Predator Treatment Programs*

The professional judgment standard is anchored in the idea that the courts will not interfere with a qualified professional’s treatment decision unless there is a substantial departure from the accepted norms.<sup>133</sup> The courts are directed to use the accepted norms of the profession to evaluate a given decision.<sup>134</sup>

There is not, however, a generally accepted practice or standard when it comes to the treatment of SVPs.<sup>135</sup> One commentator noted that “[t]here is not enough current scientific evidence about the efficacy of sex-offender treatments to warrant strict confidence in any set of treatment guidelines.”<sup>136</sup> There is a healthy and ongoing debate as to whether they are treatable at all,<sup>137</sup> which treatments work,<sup>138</sup> and which standards should be used for treatment and ethical conduct.<sup>139</sup> The Association for

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129. *Id.* at 323 (footnote omitted).

130. See Susan Stefan, *Leaving Civil Rights to the “Experts”: From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 646 (1992).

131. *Hendricks*, 521 U.S. at 368 n.4 (“We have explained that the States enjoy wide latitude in developing treatment regimens.” (citing *Youngberg*, 457 U.S. at 317)).

132. See *Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000) (noting that deference under the professional judgment standard in *Youngberg* is meant to “minimize the interference by the federal judiciary with the internal operations of state institutions . . .”).

133. See *supra* note 129 and accompanying text.

134. See *supra* note 129 and accompanying text.

135. See DeClue, *supra* note 44, at 207.

136. *Id.*

137. See *supra* note 126 and accompanying text.

138. See *supra* note 127 and accompanying text.

139. See DeClue, *supra* note 44, at 207 (critiquing the Association for the Treatment of Sexual

the Treatment of Sexual Abusers (ATSA) is the only organization that can arguably be said to have set standards and guidelines, but the validity of ATSA's suggestions has received serious criticism and is not representative of a professional consensus.<sup>140</sup> Furthermore, ATSA's guidelines instruct its members to follow the standards unless, in their professional judgment, they feel that they should deviate.<sup>141</sup> For the purpose of evaluating a treatment decision under the professional judgment standard, ATSA is therefore circular.<sup>142</sup>

The professional judgment standard is currently impossible to apply with any modicum of confidence. In the absence of an egregious or absurdly erroneous treatment decision,<sup>143</sup> it is difficult to imagine how a court could find that a treatment decision would fail under the standard. Without a baseline from which to measure a treatment decision's deviation, courts are unable to determine whether the challenged treatment is within the accepted standards or is instead a substantial deviation; because the decision is presumed valid, the default result will be judicial abdication of a principled review.

Abusers' 2005 Practice Standards and Guidelines and finding that "[t]here is not enough current scientific evidence about the efficacy of sex-offender treatments to warrant strict confidence in any set of treatment guidelines . . .").

140. Compare Jill Levenson & David D'Amora, Commentary, *An Ethical Paradigm for Sex Offender Treatment: Response to Glaser*, 6 W. CRIMINOLOGY REV. 145, 148–49 (2005) (defending, *inter alia*, the ATSA's Practice Standards and Guidelines and arguing that sex offender treatment can comport with ethical standards of treatment), with Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOLOGY REV. 143 (2003) (criticizing the ATSA Practice Standard Guidelines and arguing that many sex offender treatment programs are antithetical to traditional mental health ethics).

141. See DeClue, *supra* note 44, at 199 ("ATSA recognizes that members must exercise their professional judgment when interpreting and applying the ATSA Guidelines . . .") (quoting ATSA Practice Standards and Guidelines).

142. See *id.* If the guidance set forth in ATSA was the standard for dealing with sexually violent predators, then the professional judgment standard would be practically impossible to apply. Even treatment decisions that substantially departed from accepted professional judgment, practice, or standards would be permitted if the departure was made according to one's professional judgment. The end result would be a lack of meaningful constraint or review of treatment decisions.

143. As a hypothetical example, allowing participants in a sex offender treatment program unfettered access to pornographic materials would likely be considered an egregious treatment decision. However, a similar decision, such as allowing unfettered access to retail catalogs that have pictures of women and children, would most likely be considered a valid treatment decision that is well within the bounds of reason. The difference between pornography and retail catalogs changes the legal analysis, but the materials could be practically interchangeable in the eyes of a sex offender. This somewhat trivial example illustrates the zone of discretion in which poor (or possibly nefarious) treatment decisions can be excused from judicial oversight.

### 3. *The Consequences of Applying the Professional Judgment Standard to the Context of Sexually Violent Predator Treatment Programs*

By continuing to use the professional judgment standard in a context where there is no accepted standard for treatment,<sup>144</sup> the courts have “transfer[red] the safeguarding of constitutional rights from the courts to mental health professionals.”<sup>145</sup> Courts abandon their obligation to apply the law in a principled manner when they persist in using a standard that fails to provide a reliable metric. This creates a very broad, perhaps effectively limitless, zone of discretion where administrators could be providing treatment in a way that would pass judicial scrutiny, but that is designed specifically to never result in the rehabilitation and release of SVPs. Treatment decisions could be effectively immunized from judicial review as long as they provide any treatment, even if it is only ostensibly provided.<sup>146</sup> Administrators only need to show that some treatment exists in order for an SVP’s challenge to fail.<sup>147</sup>

But by turning a deaf ear to grievances about the sufficiency of treatment, courts could unwittingly be opening the door to a general invalidation of a state’s statutory scheme. By insulating treatment programs from review, the professional judgment standard enables potentially unchecked implementation and punitive conditions of

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144. See *supra* notes 135–42 and accompanying text.

145. *Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000) (“Appellants appear to suggest that because, in their capacities as mental health professionals, they believe they have complied with the legal requirements of the . . . Constitution in providing adequate mental health treatment, their decisions are beyond review. The district court correctly recognized that accepting such an argument would transfer the safeguarding of constitutional rights from the courts to mental health professionals. Conditions of confinement would be above judicial scrutiny and would depend on who happened to be in charge of a particular program.”). The Ninth Circuit was specifically evaluating the administrators’ claim that they deserved deference under the professional judgment standard as to their opinion that they were complying with a previously imposed injunction to improve the conditions and treatment at the Washington State facility. Despite the Ninth Circuit’s strong tone in *Sharp*, the injunction was later resolved despite the State’s “continued failure to provide constitutionally adequate treatment.” See *Smith*, *supra* note 16, at 1421. In dissolving the injunction, the court bemoaned that “[t]his case has been troublesome to the Court in that there seems to be no right answer, and no good fix for the situation that these plaintiffs face . . . .” Order Granting Motion to Dissolve Injunction, *Turay v. Richards*, No. C91-0664RSM, 2007 WL 983132, at \*5 (W.D. Wash. Mar. 23, 2007).

146. Critics have called some treatment regimens “sham treatment . . . that lasts for years, ostensibly to change someone’s psychiatric diagnosis.” *Retka*, *supra* note 1, at 15 (quoting Dr. Delaney Dean).

147. This was precisely the level of scrutiny that the Court applied in *Hendricks*. *Kansas v. Hendricks*, 521 U.S. 346, 368 nn.4–5 (1997) (reasoning that “Kansas ha[d] doubtless satisfied its obligation to provide available treatment” because “the trial court, over admittedly conflicting testimony, ruled: ‘[T]he allegation that no treatment is being provided to any of the petitioners or other persons committed to the program designated as a sexual predator treatment program is not true. I find that they are receiving treatment.’”).

confinement.<sup>148</sup> The professional judgment standard has the potential to facilitate the exact situation in which the Supreme Court has indicated a statute might be invalidated.<sup>149</sup> For the purposes of protecting society from the release of dangerous SVPs, it seems that the professional judgment standard may represent a large risk, rather than a useful protection from litigation. Because the professional judgment standard has the potential to shield questionable treatment decisions from the light of judicial scrutiny, continued use of the standard could produce the type of “harsh executive implementation” that Justice Scalia has suggested might lead to the invalidation of the statute under the Due Process Clause.<sup>150</sup> The long-term implications of the standard, therefore, may be in significant tension with its goals. To put it bluntly, by continuing to use the professional judgment standard, the courts might unwittingly be giving the state administrators just enough rope to hang themselves.

#### IV. SOME POSSIBLE SOLUTIONS TO THE PROBLEMS OF IMPLEMENTING TREATMENT

When exploring strategies to address the difficulties associated with providing treatment to SVPs, a basic question is whether the solution will operate to avoid treatment or to improve it.

##### A. *Resolve Treatment Problems by Avoiding the Treatment Requirement*

Due to the many difficulties of providing treatment to sexually violent predators, one strategy might be simply to eliminate the statutory provision for treatment. The Court has strongly suggested that a state might, under certain circumstances, have the ability to confine dangerous individuals without treatment.<sup>151</sup> It seems that the right to treatment stems

148. The logic used in the Ninth Circuit’s reasoning in *Sharp v. Weston* illustrates this problem well. The court was admonishing the state administrators for invoking the professional judgment standard to buttress the validity of his opinion that the state had complied with an injunction. The Ninth Circuit’s logic, however, applies with equal strength to the proposition that the professional judgment standard should never be used when an involuntarily committed individual challenges the constitutionality of his treatment. See *Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000); *supra* note 145.

149. See *supra* notes 112–32 and accompanying text.

150. See *supra* notes 5, 117–19 and accompanying text.

151. See, e.g., *Hendricks*, 521 U.S. at 366: (“[W]e have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a ‘punitive’ purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease.”).

primarily from the enabling statute.<sup>152</sup> Some have argued, however, that confinement may generate a qualified right to reasonable treatment as a matter of federal constitutional law.<sup>153</sup> This would most likely require a legislative finding that this type of offender is untreatable.<sup>154</sup> This strategy carries potential risks. It is unclear whether a legislature would find that these individuals are categorically untreatable,<sup>155</sup> given the modest success of treatment in some schemes<sup>156</sup> and the stance of professional organizations that at least certain aspects of the mental abnormality are treatable.<sup>157</sup> Furthermore, by eliminating the treatment requirement, the state would essentially be confining individuals based solely on a suspect prediction about future dangerousness.<sup>158</sup> Because the courts have relied heavily on the treatment provision as evidence that the statute is not improperly punitive,<sup>159</sup> eliminating the treatment provision altogether would remove a keystone of the courts' past reasoning. For these reasons, eliminating the treatment provision from the statute is too blunt, unpredictable, and potentially destabilizing to warrant serious consideration.

Another strategy for avoiding the treatment requirement would be to substantially increase the criminal sentences for certain sexual offenses that are viewed as most egregious and indicative of future dangerousness.<sup>160</sup> This would result in the long-term confinement of these

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152. *See id.* at 367 (“[C]ritical language in the Act itself demonstrates that the Secretary . . . has an obligation to provide treatment to individuals like Hendricks.”); *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (“Under the Act, the State has a *statutory* obligation to provide ‘care and treatment . . . .’” (emphasis added)).

153. *See Janus, supra* note 107, at 126 (observing that Supreme Court precedent, when read together, could be interpreted to require some level of treatment). The argument for a right to treatment is even stronger in light of the indefinite nature of confinement under these statutes.

154. A finding of untreatability, or at least a finding that currently available treatments do not reduce recidivism, would be within the bounds of the available scholarly research. *See DeClue, supra* note 44, at 204 (summarizing the ambit of professional opinions, ranging from opinions that treatment enjoys modest (7%) reductions in recidivism rates to opinions that the evidence does not show a reduction in recidivism). At the time of this writing, no legislative finding of untreatability could be found.

155. The statute at issue in *Hendricks* noted that “sexually violent predators generally have anti-social personality features which are unamenable to existing mental illness treatment modalities . . . .” KAN. STAT. ANN. § 59-29a01 (1994). Similar language can be found in other states’ statutes. *See Morris, supra* note 30, at 1204 (observing that “states typically mimic the Washington/Kansas model.”). The legislatures stop short, however, of finding that SVPs are absolutely untreatable.

156. *See supra* note 47.

157. *See, e.g., Hendricks*, 521 U.S. at 388 (“Kansas, and supporting *amici* [from the ATSA and APA], argue that pedophilia is treatable.”).

158. *See supra* note 36.

159. *See supra* note 69 and accompanying text.

160. This fairly obvious alternative has been previously suggested by other commentators. *See, e.g., Smith, supra* note 16, at 1426.

dangerous individuals without the concurrent obligation to provide them with treatment. Indeed, the intense wrangling over whether such schemes are truly civil has led some to question whether these individuals are more appropriately dealt with in the criminal system.<sup>161</sup> Handling these individuals through the criminal system is even more attractive in light of the cost savings to the state that would accrue if the civil commitment scheme were abandoned.<sup>162</sup> Not only is it generally cheaper to keep these individuals in prison,<sup>163</sup> but the higher costs associated with confinement in a facility for treatment are increasing.<sup>164</sup> Some have argued that a cost-benefit perspective of this problem suggests a “powerful argument” in favor of increased criminal sentences.<sup>165</sup> One potential drawback to this proposition is that it could only be applied prospectively;<sup>166</sup> the individuals that are already confined under the civil commitment scheme would either need to be treated (with the aforementioned difficulties of implementation) or possibly released. Furthermore, “stringent mandatory minimum sentences” could increase the difficulty of obtaining convictions.<sup>167</sup> Perhaps most troubling, though, would be prosecutors’ decreased amount of “discretion to seek just sentences based on the individual facts and circumstances of each case.”<sup>168</sup> More broadly, increasing the criminal sentence will only defer the question of what to do with these criminals when their sentences are over. Because such a draconian solution would, at the very least, carry a significant risk of imposing unduly harsh sentences on some individuals, a less heavy-handed approach is preferable.

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161. *See id.* at 1426 n.360.

162. *See id.* at 1426 n.361.

163. On average, it is about four times more expensive to keep an individual in sex-offender treatment than prison. Davey & Goodnough, *supra* note 1 (describing average cost of \$100,000 for treatment versus \$26,000 for prison). In 2007, states spent about \$450 million on such programs. *Id.*

164. *See, e.g.,* Retka, *supra* note 1, at 1 (graphing the increasing costs of Missouri’s program from \$3.9 million per year to \$11.3 million per year over a six-year period).

165. *See* Smith, *supra* note 16, at 1427–28 (footnotes omitted) (“[T]here exists a powerful argument that the costs of civil commitment outweigh the costs associated with increased criminal penalties for sexually violent crimes. Because the state’s motivation appears to be incapacitation and further punishment, simply increasing criminal penalties would be preferable to enacting civil commitment schemes. Civil commitment programs inevitably become the subject of extensive litigation, as states are reluctant to provide adequate treatment programs that provide a pathway to eventual release.”).

166. The government cannot increase the penalty for a crime after the criminal act has been committed. To do so would violate the *Ex Post Facto* Clause. The increased sentences could only be applied to future offenders.

167. *See* Smith, *supra* note 16, at 1428.

168. *Id.*



*B. Abandon the Professional Judgment Standard for Evaluations of Treatment*

The validity of sexually violent predator commitment statutes could be strengthened by abandoning the highly deferential professional judgment standard for evaluating challenges to treatment decisions. Allowing SVPs to challenge their treatment has the obvious potential to invite increases in litigation, but providing a meaningful way to contest treatment decisions would also undermine constitutional attacks on the statute based upon a theory of harsh implementation or punitive conditions.<sup>169</sup> The ability to have the courts engage in a meaningful inquiry into the treatment on which SVPs' confinement is largely based detracts from the potential argument that treatment is being unlawfully withheld.

Abandoning the professional judgment standard would also promote the release of individuals who may have been erroneously confined under the statute.<sup>170</sup> It is likely that at least some of the individuals confined under these schemes do not actually fit the statutory definition because the predictions about future dangerousness during the commitment proceedings are not very reliable,<sup>171</sup> states can engage in expert shopping to obtain a commitment,<sup>172</sup> and juries are understandably prone to commit.<sup>173</sup> The professional judgment standard is currently a major impediment to receiving more treatment or establishing that the conditions of confinement are incompatible with a state's goal of treatment. If it were removed, then perhaps some individuals at the margins could be rehabilitated and released.

For individuals who clearly fall within the statutory definition, it is unlikely that providing them with a way to obtain more treatment or more therapeutic conditions would result in their release. Even in the more successful state treatment programs, the number of individuals who complete treatment and are released from confinement is fairly low.<sup>174</sup> Furthermore, it is far from clear that SVPs are a homogenous group who are all amenable to treatment.<sup>175</sup> Providing additional treatment to

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169. See *supra* notes 117–19.

170. See *supra* notes 36, 48 and accompanying text; see also Davey & Goodnough, *supra* note 1 (“Sex offenders selected for commitment are not always the most violent.”).

171. See *supra* notes 36, 48.

172. See *supra* note 36.

173. See *supra* note 48.

174. Davey & Goodnough, *supra* note 1 (“[O]nly a small fraction of committed offenders have ever completed treatment to the point where they could be released free and clear.”).

175. See Davey & Goodnough, *supra* note 1 (“‘The population that is being detained is a very, very mixed group,’ said Richard Wollert, a psychologist in Portland, Ore., who evaluates civilly

individuals for whom no effective treatment is currently available would present a very low risk of releasing dangerous individuals, but it would add to the moral<sup>176</sup> and constitutional validity of the statute. Some may feel that providing more treatment to SVPs (many of whom may be effectively untreatable)<sup>177</sup> is a costly<sup>178</sup> and futile endeavor. Because it is difficult to predict who is amenable to treatment,<sup>179</sup> providing uniformly mediocre treatment to all SVPs is unfair to those SVPs who might have a chance at release if they were given adequate treatment. In short, if legislatures wish to further the laudable goal of public safety through indefinite civil commitments, then quality treatment for all SVPs may be the cost.

In lieu of the professional judgment standard, which presumes the validity of administrators' decisions while largely ignoring the overall conditions, courts might adopt a multi-factor test that considers the factual conditions of the challenged confinement. Rather than looking only to whether the decision substantially departs from general practice,<sup>180</sup> a multi-factor test would allow the court to view the treatment decisions as they relate to the scheme as a whole. Such a test would suggest that when courts are evaluating the treatment decisions of administrators of involuntary civil commitment programs, courts may consider such factors as the treatment program's effectiveness relative to similar states' programs, whether the chosen treatment decisions are supported by research, whether there has been a history of abuse or improper implementation of the scheme in that state, the variety of treatment options made available at the facility, and the guidelines or standards of reputable professional organizations. These factors, which were extrapolated from some of the perceived problems in the relevant Supreme Court cases, are meant to serve as a starting point for further consideration, not as an exhaustive list.

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committed offenders.”). Compare *Kansas v. Hendricks*, 521 U.S. 346, 388 (“Kansas, and supporting amici [from the ATSA and APA], argue that pedophilia is treatable.”), with *DeClue*, *supra* note 44, at 204 (“The situation is even worse with respect to rapists in particular. There is simply no convincing evidence that treatment has ever caused rapists to desist or even to reduce their offending behavior.”) (citing M.L. LALUMIÈRE ET AL., *THE CAUSES OF RAPE: UNDERSTANDING INDIVIDUAL DIFFERENCES IN MALE PROPENSITY FOR SEXUAL AGGRESSION* 188 (2005))).

176. For a moral argument in favor of treatment, see Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET. SOUND L. REV. 709 (1992).

177. See *supra* note 36.

178. See *supra* notes 163, 164.

179. See *supra* note 175 and accompanying text.

180. See *supra* notes 135–42 and accompanying text.

The advantages of a multi-factor test over the professional judgment standard are evident through the analysis of a hypothetical example. Suppose a habitual sex offender, John, was found to be a sexually violent predator and civilly committed to a state facility for care and treatment. Suppose also that the statute under which John was committed does not provide any useful guidance as to what treatment he is entitled to receive. The facility that John was committed to operates in the following way: (1) biweekly group therapy is the only form of treatment offered, (2) none of the facility's SVPs have ever successfully completed the program and been released, and (3) the facility conducts regular strip searches of all SVPs. Suppose further that available research suggests that group therapy is significantly more effective when coupled with other forms of treatment, similar programs in other states occasionally release individuals following completion of their programs, and the Hypothetical Psychologists Association (HPA) generally regards the use of strip searches for sexual offenders as counterproductive to treatment goals.

If John were to challenge the adequacy of the treatment at his facility, the court would be very likely to find that the treatment decisions are valid under the professional judgment standard. In applying the professional judgment standard, the court would first ask if the treatment decision was made by a professional, and then ask if it was a "substantial departure from accepted professional judgment, practice, or standards."<sup>181</sup> Because the standard presumes the validity of the treatment decision, it is John's burden to show a substantial departure from the norms. It would be difficult for John to even show what the accepted practice or standard is,<sup>182</sup> let alone establish that biweekly group therapy sessions are a substantial departure from it. It appears highly likely that the presumed validity would remain undisturbed and the court would find John's challenge unpersuasive.

John would have a much better chance of success if the court evaluated his challenge under a multi-factor test, such as the one previously suggested. Under a multi-factor test, the court would consider that the treatment program has never successfully treated and released an individual, although some similar states' programs have experienced some success. The court would also consider research that suggests that group therapy alone is significantly less effective than when it is combined with other types of therapy. Any history of abuse at the facility, such as

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181. *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

182. *See supra* notes 135–42.

noncompliance with injunctions, would also be a valid consideration. The singular nature of treatment options, especially if other treatments were available and feasible, would influence the court's determination. Finally, the court could weigh the administrators' decision to conduct regular strip searches against the HPA's general admonishment of this practice for sex offenders. Under this approach, John would enjoy a substantially better chance of successfully challenging the sufficiency of his treatment. At the very least, his substantive complaints about the treatment would be heard and evaluated rather than silenced by a presumption of validity. Furthermore, the multi-factor approach places the protection of John's rights in the able hands of the court, rather than abdicating this complex determination to the administrators of the facility. Although a state administrator may be an expert for the purposes of prescribing a treatment regimen, the proper expert for determining whether that treatment lives up to statutory and constitutional obligations is the court, not a state administrator.<sup>183</sup> Adopting a different standard for evaluating SVPs' challenges to the sufficiency of their treatment, therefore, is a desirable solution that deserves further consideration.

#### V. CONCLUSION

Sexually violent predator statutes serve the important function of protecting society from a class of highly dangerous individuals. These statutes occupy a tenuous constitutional position because they impose additional confinement after a convict's criminal sentence has been served. Critical to the constitutional validity of these statutes is the provision of treatment. As a matter of statute—and perhaps as a matter of federal constitutional law as well—SVPs have a right to treatment. But, in the relatively new and uncertain field of sexually violent predators, it is difficult to ascertain what is specifically included in this right to treatment. *Hendricks* vividly illustrated that the courts will afford state administrators a large degree of deference regarding treatment decisions under the

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183. This is precisely the logic that the Ninth Circuit used in determining that state administrators could not invoke the professional judgment standard as to whether or not they were complying with an injunction. *See Sharp v. Weston*, 233 F.3d 1166, 1171 (9th Cir. 2000) (“Appellants appear to suggest that because, in their capacities as mental health professionals, they believe they have complied with the legal requirements of the Turay Injunction and the Constitution in providing adequate mental health treatment, their decisions are beyond review. The district court correctly recognized that accepting such an argument would transfer the safeguarding of constitutional rights from the courts to mental health professionals.”).

professional judgment standard, even in the face of evidence that “essentially no treatment” is being provided.<sup>184</sup>

Although conventional wisdom would say that the statutory scheme is being protected by judicial deference, a closer look at the possible theories with which a litigant might challenge the statute reveals that the professional judgment standard could facilitate total invalidation of the statutory scheme. By allowing questionable treatment decisions to continue, the courts could be enabling the type of conditions or harsh implementation that members of the Supreme Court have suggested might lead to a finding that the statute is punitive and therefore invalid.<sup>185</sup> In light of this dangerous possibility, it is an attractive option to abandon the professional judgment standard in favor of a multi-factor test that could curtail harsh implementation before it leads to an invalidation of the entire statutory scheme.

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184. *See supra* note 89.

185. *See supra* notes 117–19 and accompanying text.

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