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Let Them Frye: Frye Hearings for Determination of "Mental Disorders" in the Sexually Violent Persons Act

Hannah Henkel
Northwestern Pritzker School of Law

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LET THEM *FRYE*: *FRYE* HEARINGS FOR DETERMINATION OF "MENTAL DISORDERS" IN THE SEXUALLY VIOLENT PERSONS ACT

Hannah Henkel*

Specific laws aimed at the confinement of mentally disabled sexually violent persons have existed for years. Originally, these laws aimed to rehabilitate a person within a mental hospital and help him with his disorders, aiming to help him enter back into society. However, throughout the years, the laws morphed into ways to keep convicted criminals from society after their prison sentence ended for fear of potential future crimes. In Illinois, the courts find a man falls within the sexually violent persons law when he remains too dangerous to be released after his criminal confinement. A person must have a "mental disorder" to fall under this law, and questions remain on how these disorders are established. In Illinois, a psychologist often makes a "mental disorder diagnosis." This Comment argues the state should have the psychologist qualified as an expert using a Frye *hearing before the expert can classify the person with a "mental disorder" within the sexually violent persons law. This way, the person is classified using a legal classification, not just the prevailing psychological definition of the day.*

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INTRODUCTION

Innocent until proven guilty: it is a precept of the American legal system. However, for some, laws impose incarceration merely because the person has potential to commit harm based on prior acts. People's entire lives are placed under strict legal scrutiny to determine if they remain too dangerous for society. If they remain dangerous, the result is incarceration, and people remain there until they prove they are safe to return to society.

The United States has two forms of confinement: civil and criminal. Criminal confinement deals in punitive law: courts impose punishment upon guilty persons based on a specific prior act (actus reus) and a sufficient mental state (mens rea) for each element enumerated in the violation.[1] Civil confinement, however, deals in *civil remedies*; areas of the court's discretion where the punishment is not specifically punitive, but relates to court procedures and shielding people from harm.[2] While the court's use of civil

[1] People v. Karberg, 826 N.E.2d 630, 633 (Ill. App. Ct. 2d Dist. 2005).

[2] Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings

remedies is typically based in restitution, civil confinement is used as a punishment, or to proactively stop a person from doing something the court deems illegal.[3] A judge generally imposes civil confinement when the issue deals with a person 1) violating the rules of the court, 2) failing to comply with a judicial finding, or 3) remaining too dangerous for release after his or her criminal confinement.[4]

The Sexually Violent Persons Act in Illinois (hereinafter "SVPA") is within the third category of civil confinement: a person remains too dangerous to be released and return to society.[5] When the state determines a particular inmate is dangerous, the attorney general brings civil charges under the act. Typically this happens right before the inmate is released. If a jury finds the defendant guilty for uncertain future bad acts, he becomes a "post-convicted criminal."[6] Generally, the SVPA aims to prohibit a person from returning to society if he has a mental disorder and presents a high risk of recidivism due to his disability.[7] An inmate falling under the SVPA remains in custody within the Department of Human Health and Services (hereinafter "DHS") until a judge finds him safe to move into society.[8]

Although the SVPA deals in civil remedies, because the issue arises

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L.J. 1325, 1343–44 (1991).

[3] *See id.* at 1344–45.

[4] *Id.* at 1362–67.

[5] Sexually Violent Persons Commitment Act, 725 Ill. Comp. Stat. § 207/1–99 (West 1999). This is different than the "Sexually Dangerous Persons Act," where a person is charged during their criminal conviction to supplant their current prison status, not a civil sanction that comes after serving a prison sentence. 725 Ill. Comp. Stat. 205/1.01 (West 1955). Although the SVPA does not distinguish between men or women, I will use the term "he" as all cases I discuss involve men. *See generally* Ross A. Brennan, Note, *Keeping the Dangerous Behind Bars: Redefining What a Sexually Violent Person is in Illinois*, 45 Val. U. L. Rev. 551, 558–59 (2011).

[6] Term of art used by people explicating this notion of completed time and then a subsequent conviction. Within the SVPA, generally the criminal is up for release when the State's Attorney's Office files charges under the SVPA. Therefore, the person is put on a subsequent trial after their incarceration would be over, i.e. "post-conviction." Conversation with Allison Fagerman, Attn'y at Law, Attn'y for Richard Mohr, (*see infra* note 164); *In re Anderson*, 11 N.E.3d 445, 447–48 (Ill. App. Ct. 2014) (discussing persons background and prior bad acts that resulted in him being an SVP); 725 Ill. Comp. Stat. 207/9 (West 2007).

[7] 725 Ill. Comp. Stat. 207/1–99 (West 1999).

[8] *See* 725 Ill. Comp. Stat. 207/40 (West 2013). This is not the same as a criminal conviction, but a civil confinement that is the "exception to the general rule that individuals should only lose their freedom through their own actions." Lance L. Losey, Comment, *The Sexually Violent Predator Act—A Dangerous Alternative*, 8 Regent U.L. Rev. 123, 128 (1997). Because it is based on the dangerous potential future acts, it is not about their own actions but the safety of the community. *Id.* at 127.

under confinement, the courts add elements of criminality, including "proof beyond a reasonable doubt" that the person falls under the SVPA.[9] For a state inmate to fall under the Illinois SVPA, the state must charge and prove: 1) the person was convicted of a sexually violent offense; 2) the person suffers from a mental abnormality or personality disorder; and 3) the mental abnormality makes it likely he or she will commit future acts.[10] The Illinois legislature defines "mental disorder" as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."[11] Illinois's SVPA allows both the state prosecuting the person under the Act and the defense to diagnose the person with a mental disorder during the proceedings using medical experts, i.e. psychologists.[12]

This Comment addresses the issue that courts often take the psychologist's views of mental disorders as factual when the psychologist uses the Diagnostic and Statistical Manual (hereinafter "DSM"). The DSM establishes criteria to diagnose various mental illnesses; it is widely used in the mental health profession.[13] However, a psychologist's diagnosis of a "mental disorder" under the DSM fails to differentiate general mental illnesses from "mental disorders" sufficient to satisfy the second element of the SVPA. To prevent the very confusion problematic for judge and juries, this Comment uses the term "mental illness" to indicate various diagnosed disorders listed in the DSM based on a psychologist's professional evaluation. The term "mental disorder" is limited to conditions satisfying the SVPA's prong of finding a man has a "mental disorder," which has its own statutory language and legal definition.[14] Thus, while the DSM's definition of mental illness is an important part of the process of finding a mental disorder, it should not satisfy the element of "mental disorder" without any further inquiry. Such confusion can lead to men being imprisoned after their time served, regardless of if they have a legal "mental disorder" or not.

Because the courts often fail to differentiate the psychologist's subjective definition of "mental illness" from a legal "mental disorder" determination, this Comment argues courts in Illinois should have *Frye*

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[9] *See* Losey, *supra* note 8, at 143,

[10] *Id.*; *see also* In re New, 992 N.E.2d 519, 527 (Ill. App. Ct. 1st Dist. 2013).

[11] 725 Ill. Comp. Stat. 207/5(b) (West 2013).

[12] *See* 725 Ill. Comp. Stat. 207/15(f) (2014); 725 Ill. Comp. Stat. 207/25(e) (West 2011)

[13] American Psychiatric Association, *Introduction to* Diagnostic And Statistical Manual Of Mental Disorders 5 (5th ed. 2013).

[14] *See infra*, Part II.B.

hearings to ensure psychologists are experts by determining if the psychologists' diagnoses of "mental illness" under the DSM are applicable to the SVPA.[15] A *Frye* hearing looks at a psychologist's tests and diagnoses and determines that a psychologist's opinion has general acceptance within the field of psychology, qualifying the psychologist as an expert witness for testimony.[16] Under the *Frye* hearing suggestion, Illinois courts would be able to determine what constitutes a "mental disorder" under the SVPA and what falls under a mental illness with the DSM.[17]

Part I of this Comment addresses the SVPA, its implementation, its purposes and goals, and the inherent liberty issues the statute raises. It moves on to explain why a "mental disorder," as defined by the SVPA, includes various ambiguities and gives psychologists no specific direction in their diagnoses. Further, the section looks at the DSM, its use as a legal device, and problems associated with equating its definition of "mental disorder" as a legal "mental disorder" without question. The distinction is paramount due to the SVPA's definition of mental disorder being statutory language, and the DSM being a psychologist's general diagnostic tool.

Part II analyzes *Frye* hearings, directly looking at psychologists' methods and tests for determining a mental illness, including how the test affects the "mental disorder" determinations under the SVPA. The section further analyzes the movement in Illinois to use *Frye* hearings to determine if the person being charged under the SVPA has a mental disorder.

Part III analyzes current Illinois court findings on *Frye* hearings and movement in favor of allowing a hearing for expert opinions. While discussing the general overview of Illinois cases, it focuses on the current Illinois case for SVPA in the *Frye* context, *In re New*.

Lastly, in Parts IV and V, this Comment takes the preceding parts and reexamines how important true "expert testimony" is to show that an individual has a mental disorder and he is more likely than not to commit

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[15] *See generally* W. Wylie Blair, Comment, *The Illinois Sexually Dangerous Persons Act: The Civilly Committed and Their Fifth Amendment Rights, or Lack Thereof*, 29 S. Ill. U. L. J. 461, 463–64 (2005).

[16] *See* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

[17] For purposes of this Note, I am focusing specifically on Illinois law and its use of *Frye* Hearing tests. In other courts using the *Frye* Hearing, some things may hinge on the language of the statute. The Federal tests for experts is the *Daubert* standard. *See infra,* notes 95–96. *See also* Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Because there are "twilight zones" of evidence where expert testimony is actually a scientific principle or discovery instead of merely experimental, there needs to be evidential force to support admission to the court.

future acts under the SVPA. In the end, the SVPA should ensure that those who are charged under the Act are provided correct procedures. When discussing the overarching issues, I look at actuarial methods determining risk of recidivism and their required *Frye* hearings to reinforce the Comment's overall argument of implementing the hearings for expert testimony.

I. THE SEXUALLY VIOLENT PERSONS ACT: ITS IMPLEMENTATION, ITS PURPOSE, AND THE INHERENT LIBERTY ISSUES THE STATUTE RAISES

Part I deals with the SVPA and its original implementation, discussing the initial purpose of the Act to help those inflicted with a mental disease. It then looks at the changes that occurred over time, warping the intensions of the initial statute and morphing the law to protect society against potential threats. It moves forward to describe psychologists' purpose in SVPA trials, and their reliance on the DSM and issues that arise under the social document. It ends by looking at the inherent liberty issues with the developing laws created after sexually violent persons acts' renewed popularity in recent years.

A. DEVELOPMENT OF THE SEXUALLY VIOLENT PERSONS ACTS

"Special Commitment" laws first came into effect in the 1930s.[18] By the 1960s, more than twenty-five states adopted them, often terming them "sexual psychopath laws."[19] In the beginning, these laws aimed to place specific people in involuntary psychological hospitals because they were "at high risk for recidivism but at the same time good candidates for treatment."[20] Courts confined men falling under the acts into a hospital to aid them with their mental disorders.[21] However, hospital confinement began to create issues in a states because men received early release from the hospital and went back into society, lessening their criminal sentences without proper process.[22] Other states felt that the acts failed to do what they promised: to protect society from criminals and the acts only gave mental help for the

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[18] Brennan, *supra* note 5, at 556.

[19] Dangerous Sex Offenders, A Task Force Report of the American Psychiatric Association 11–12 (American Psychiatric Association ed.1999) [hereinafter "Task Force Report").

[20] *Id.* at 11.

[21] *Id.* at 11–13.

[22] *Id.* at 14–15; *citing* American Bar Association: Criminal Justice Mental Health Standards. Commentary to Standard 7–8.1, at 459.

"social misfits" who fell under the acts.[23] By 1990, "all but 12 states and the District of Columbia had repealed their sexual psychopath commitment laws."[24]

Between 1993 and 1999, state legislatures began resurrecting SVP laws after a man, Earl Shriner, raped and castrated a seven-year-old boy two years after a release from a ten-year sentence for assaulting and kidnapping two teenage girls.[25] Shriner pleaded guilty to the kidnapping years before, but he pleaded innocent to the castration of the boy.[26] The second crime led to uproar in the community.[27] Because of Shriner's release of his first crime, and subsequent criminal activity with the boy, there was a resurgence in sexually violent persons acts.[28] These new acts focused on protecting society by incarceration after time-served rather than focusing on rehabilitation of the offender during incarceration.[29] Illinois implemented similar sexually violent persons laws that provided for commitment after completion of a criminal

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[23] Task Force Report, *supra* note 19, at 14 (internal citation omitted). Originally repealed because, as the Group of the Advancement of Psychology (hereinafter "GAP") stated,

> . . . sex psychopath and sexual offender statutes can best be described as approaches that have failed. The discrepancy between the promises in sex statutes and performances have rarely been resolved. . . . The notion is naïve and confusing that a hybrid amalgam of law and psychiatry can validly label a person a '"sex psychopath'" or '"sex offender'" and then treat him in a manner consistent with a guarantee of community safety.

Id. at 14. The history of sexual psychopath laws hinged on six assumptions mentioned in the American Bar Association's commentary, specifically:

> 1) There is a specific mental disability called sexual psychopathy; 2) Persons suffering from such a disability are more likely to commit serious crimes, especially dangerous sex offenses, than normal criminals; 3) Such persons are easily identified by mental health professionals; 4) The dangerousness of these offenders can be predicted by mental health professionals; 5) Treatment is available for the condition; and 6) Large numbers of persons afflicted with the designated disabilities can be cured.

Id. at 13.

[24] *Id.* at 11.

[25] Task Force Report, *supra* note 19, at 16–18; *See* Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 New Crim. L. Rev. 213, 214 (2011) (internal citation omitted) (noting the man was a mentally retarded parolee who stated he planned to torture people, but yet could not be prevented. Lave also discusses two other cases within Washington in 1988 that helped the SVP laws resurface).

[26] *Tacoma Sex Offender Faces Latest Charges in Mutilation of Boy*, The Spokesman-Review, May 23, 1989, at B2.

[27] *Id.* ("'Sex offenders always re-offend'. . . 'We (police) were very frustrated with him because we were not able to do anything of significance.'"). The opinion finding him guilty is unpublished. State v. Shriner, 70 Wash. App. 1073 (Wash. Ct. App. 1993).

[28] Task Force Report, *supra* note 19, at 18.

[29] *Id.*

sentence.[30]

Many scholars argued these laws violated due process by keeping post-convicted criminals incarcerated when they had already served their prison time, violating their liberty interests.[31] However, these arguments failed. In *In re Young*,[32] the Washington Supreme Court ruled that such laws were constitutional.[33] The basis of the opinion hinged on the fact that sexually violent person laws only applied to inherently dangerous sex offenders with high risks of recidivism. The laws did not violate due process because the grounds narrowly applied to specific, dangerous members of society.[34] The Supreme Court of the United States further solidified the conclusion that civil commitment is constitutional.[35] In *Kansas v. Hendricks*, the Supreme Court held a state law's incarceration of a man post-time served did not violate substantive due process.[36] The Supreme Court felt there was no due process issue because "only persons found to be 'mentally ill' were legitimate subjects for commitment."[37] The Supreme Court noted that the SVP laws were important because of their goal to keep inherently dangerous people away from society.[38]

Implementation of the new sexually violent persons laws after these cases focused on the issue of recidivism and determining who would be a

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[30] *Id.* at 11–12. Illinois was not the only one, but after the incident in Washington, many states started to resurrect such statutes. *Id.*

[31] *See, e.g.*, Lave, *supra* note 25; Johnson, *infra* note 54; Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. Ill. L. Rev. 1199 (2000); Andrew D. Campbell, *Note: Kansas v. Hendricks: Absent a Clear Meaning of Punishment, States are Permitted to Violate Double Jeopardy Clause*, 30 Loy. U. Chi. L. J. 87 (1998); Eric S. Janus, *Foreshadowing the Future of Kansas v. Hendricks: Lessons from Minnesota's Sex Offender Commitment Litigation*, 92 Nw. U. L. Rev. 1279 (1998).

[32] *In re* Young, 857 P.2d 989 (Wash. 1993).

[33] *In re* Young, 857 P.2d at 1003; Task Force Report, *supra* note 19, at 19.

[34] *Id.* at 19–21 (discussing the use of mental disorder as terminology used in previous cases such as *State v. Post* and *State v. Oldakowski* (internal citation omitted)); *see also In re* Young, 857 P.2d 989, 1003 (1993).

[35] *See* Kansas v. Hendricks, 521 U.S. 346, 347 (1997).

[36] *Id.* (rejecting the argument "that by permitting [defendant's] commitment upon a finding of 'mental abnormality,' the law violated the Constitution's substantive due process. . . ."); Task Force Report, *supra* note 19, at 29.

[37] *Id.*

[38] *See, e.g., id.* Kansas v. Hendricks, 521 U.S. 346, 347 (1997); *see also* Task Force Report, *supra* note 19, at 29–30 (noting that Legislatures understood the court's focus on dangerousness and the narrowness of those who had mental disorders. They therefore shaped SVP laws to follow both *Kansas v. Hendricks* and *In re Young*, focusing the issues on elements like mental illness and the risks of society.)

danger to society.[39] Because one sexually violent crime is not more important than another violent crime,[40] the law aimed to differentiate inherently dangerous people through their mental disorder.

B. SVPA IN ILLINOIS AND USE OF MEDICAL EXPERTS

Illinois defines a "sexually violent person" as:

> [A] person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence.[41]

This means the court removes a person to DHS after finding he is an SVP through the judge or jury finding two factors.[42] First, they must find a "mental disorder."[43] Second, this mental disorder must place him at a higher risk for recidivism because he cannot control his actions in the future.[44]

Courts rely on testimony of "medical expert witnesses," often psychologists retained by both counsels, to determine if the person suffers from a mental disorder.[45] Psychologists use their own tests and assessments[46]—usually subjective tests or clinical assessments.[47] They testify under the Illinois Rules of Evidence as experts.[48] Yet psychologists go past the clinical assessments: psychologists diagnose a mental illness under the DSM with a man on trial, and determine mental illnesses using their own tool of the DSM. They then opine in court, as experts, that the person charged under the SVPA suffers a legal "mental disorder" and estimate the risk of recidivism due to this "mental disorder."[49] Courts rely on the psychologists'

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[39] *Hendricks*, 521 U.S. at 347 (1997); Task Force Report, *supra* note 19, at 29–30.

[40] *See, e.g.,* 725 Ill. Comp. Stat. 207/1–99 (1993). The only prophylactic before the trial is the right to an expert, the right to notice, and the elements that a person must fall. *Id.*

[41] 725 Ill. Comp. Stat. 207/5(f) (2013).

[42] 725 Ill. Comp. Stat. 207/1–99 (1993).

[43] 725 Ill. Comp. Stat. 207/1–99 (1993).

[44] 725 Ill. Comp. Stat. 207/1–99 (1993).

[45] *See* 725 Ill. Comp. Stat. 207/15(f) (2014); 725 Ill. Comp. Stat. 207/25(e) (2011).

[46] Although psychiatrists may be used, they usually are not utilized due to the courts only needing a diagnosis, not a medicinal diagnosis. David Medoff, *The Scientific Basis of Psychological Testing*, 41 Fam. Ct. Rev. 199, 209 (2003) (describing the subjectivity in various psychologist testing).

[47] *See, e.g., id.*(describing the subjectivity in various psychologist testing).

[48] Ill. R. Evid. 401.

[49] *See In re* Erbe, 800 N.E.2d 137, 144 (Ill. App. Ct. 2004); Ill. R. Evid. 401 ("[I]t was 'substantially probable' that defendant would sexually reoffend with acts of violence. . . .");

finding of a mental disorder. This determination, along with the evidence brought by the prosecution about the person's actions, guides the inquiry that a man is too dangerous for society due to his condition and should be confined to the DHS for treatment.[50]

The psychologist's testimony is often pivotal to show the person charged falls under the Act not only at the beginning of a trial, but also in the trial's aftermath when a man wishes to leave the DHS facilities. Once a man falls under the SVPA, he remains in the DHS until the state can no longer show he falls under the Act.[51] After a court finds a person is sexually violent, a psychologist periodically reexamines the person to see if he is "rehabilitated" or the confined person petitions the court for conditional release showing good cause.[52] To move back into society, the court must find there is enough new evidence that he is no longer a threat.[53] Because a court found he had a mental disorder at one time, the psychologist's assessment is imperative to show the man continues to fall under the SVPA.

C. THE DSM ASSESSMENT

The Diagnostic and Statistical Manual is an important medical tool for psychologists for finding mental illnesses; however, the diagnostic tool is not aimed to be a legal device. Thus, a psychologist may conflate when a "mental disorder" means the person meets the legal definition or just meets the DSM version.[54] Such a confusion of definitions undermines the legitimacy of a court's determination under the SVPA.

When determining if a person has a mental disorder, psychologists often

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see also Ill. R. Evid. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs.").

[50] 725 Ill. Comp. Stat. 207/40(a) (2014) ("[P]erson to be committed to the custody of the Department for control, care and treatment until such time as the person is no longer a sexually violent person.").

[51] *See* 725 Ill. Comp. Stat. 207/55 (2014).

[52] *Id.* A hearing is required every twelve months or whenever the person requests. *Id.* Despite this, a full hearing is not required to study the reexamination, a court may just look at plain facts without speaking to the person and decide on those alone. *Id.*

[53] *See generally* 725 Ill. Comp. Stat. 207/55 (2014).

[54] Rebecca A. Johnson, *"Pure" Science and "Impure" Influences: The DSM at a Scientific and Social Crossroads*, 15 DePaul J. Health Care L. 147, 149 (2013).

arrive at a diagnosis based on their "clinical assessment."[55] Clinical assessments focus on the history of the person, their criminal acts, and any predispositions for less inhibited behavior to determine if the person has "specific sexual attraction to unusual behavior, nonhuman objects, or sexual activities involving nonconsent."[56]

Original arguments against using clinical assessments and allowing experts to rely on the DSM generally because of initial due process concerns have largely ended.[57] Courts often accept the psychologist's reliance on the DSM because all psychologists generally utilize such assessments and tests for their diagnosis, showing the tests are relied upon by psychologists and therefore accepted in a court setting.[58] However, this reliance by psychologists does not look at the mental disorder versus mental illness dichotomy. When clinically assessing prior acts for psychological evaluations, psychologists often use the DSM as a starting point to classify and give descriptions of psychological diagnoses and determine if there is a mental illness.[59] It is up to the court or jury to decide if this mental illness is a legally sufficient mental disorder.

A large critique of the DSM is the fact that the DSM as a societal and cultural critique, merely establishing what people see as psychopathology during their society.[60] Scholars point to the fact that disorders in the DSM change and become normal behavior in society later on.[61] Laymen do not

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[55] *See* Lave, *supra* note 25, at 231 ("In a clinical assessment, forensic psychologists and psychiatrists conduct interviews, review case files, and perform psychological testing, and then use that information as the basis for a clinical opinion of whether a person is likely to reoffend.").

[56] Task Force Report, *supra* note 19, at 53. When reviewing the different clinical assessments, interviewers look at child abuse reports, patient experiences, partial paraphilias, specific paraphilias, disorders in social inadequacy, cognitive distortions, alcoholism, and personality disorders. *Id.* at 50–53.

[57] *See generally* Melissa Hamilton, *Adjudicating Sex Crimes as Mental Disease*, 33 Pace L. Rev. 578, 590–95 (2013) (discussing how unsuccessful due process standards are often unsuccessful).

[58] *See generally id.* at 575–77 (discussing the conflation of law-psychiatry interface with relying on unscientific principles due to acceptance of the overall social science).

[59] Johnson, *supra* note 54, at 151, 155.

[60] Johnson, *supra* note 54, at 159. With various critiques on the fact that categorization does not work, there has been a higher expanse of using objective classification along with the DSM as a beginning marker. *Id.* at 162. However, this brings up critiques such as a psychologist trying to find specific issues in their objective analysis. This inculcates empirical research into a schema of predisposing factors. *Id.*

[61] *See, e.g.*, *id.* at 167–70 (discussing how the DSM expands and allows for some diagnoses to become "normal" later in life); Hamilton, *supra* note 57, at 557–58 (discussing

understand that outside forces affects the DSM, and the DSM focuses on what people view as abnormal or based on political voting on what is abnormal.[62] Because a definition of a mental illness is subject to change, the initial determination used by psychologists for mental illness may not mean a person has a mental disorder under the SVPA.

Furthermore, the psychologists' updates, changes, and additions or deletions to the DSM lead many to question the DSM's inherent legitimacy and correctness, especially considering people who discuss mental disorders view the DSM as a "proverbial bible."[63] Changes in the DSM have shifted from symptom-based diagnoses within a clinical practice to a common term for use in pharmaceutical companies, federal grants, and insurance companies.[64] The language changed to laymen's definitions that generalize the psychologist's diagnoses[65] and make mental disorders easy to find when psychologists are trying to determine a person's mental illness.

The newest version of the DSM, the DSM-V, states that it is not for legal use.[66] "In most situations, the clinical diagnosis of a DSM-V mental disorder such as intellectual disability (intellectual developmental disorder), schizophrenia, major neurocognitive disorder, gambling disorder, or pedophilic disorder does not imply that an individual with such a condition meets legal criteria for the presence of a mental disorder or a specified legal standard (e.g., for competence, criminal responsibility, or disability)."[67]

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how paraphilias and paraphilic behavior depends on what is "normal," how that changes culturally, and how it vacillates).

[62] Johnson, *supra* note 54, at 149–50, 153–54 (noting the different schools of psychiatric thought between Emil Kraepelin and Sigmund Freud and how "Adolf Meyer, a leading intellectual figure in early 20th century American psychiatry" chose the Kraepelin view to look at the patient's specific situations and made them generalizable, and discussing how there was a specific view accepted on the outset and the American system now looks purely at general diagnosis, accepting that instead of the other, more person-specific diagnosis).

[63] Johnson, *supra* note 54, at 151. Johnson discusses the fact that the APA has created a bible where the authors are seen as "gods" and there are various questions about if we have a right to question its authenticity when created by an unquestioning person. *Id.*

[64] *See* Johnson, *supra* note 54, at 158–64 (discussing broad issues with the DSM due to its outside forces).

[65] Johnson, *supra* note 54, at 152, 170–71. When looking at the SVPA, it is completely inherent on finding a psychological diagnosis, and when the psychologists have laymen's use for purposes of the act, they are not rising to the importance and implications of civil confinement but finding diagnoses based on very slimly reliable information. *Id.*

[66] DSM-V, *supra* note 13, at xxxiii.

[67] *Id.*; *see also* Johnson, *supra* note 54 at 188; *citing* Thomas Szasz, The Myth of Mental Illness (1974). ("The APA argues that this misuse/misunderstanding will occur because of the 'imperfect fit between the questions of ultimate concern to the law and the information

The DSM-V goes on to state it could be "misused or misunderstood."[68] When courts allow the use of the DSM as evidence, they rely on medical diagnoses based on the DSM variables, not on the true issue of the SVPA.[69] DSM-IV-TR and the leader of the DSM-IV taskforce explicitly warn against the use of the manual for forensic purposes, arguing that its "use in legal contexts poses significant risks that the information will be misused or misunderstood," and yet it has been cited in over 5,500 court opinions.[70] Although the creators of the DSM recognize that people outside the legal profession use the DSM, the task force stated it would not change the DSM for legal or other contexts because the goal should remain diagnosing and treating people at a psychiatric level.[71]

The DSM has large ranges of diagnoses that raises question for using it to prove "mental disorders" in the legal sense. For example, the DSM includes diagnoses of mental illness that include depression, sexually violent crimes, and chronic hair pulling.[72] These are not all mental disorders applicable to the SVPA, and yet courts often accept the expert's reliance on the DSM without a hearing or stipulation despite the over-inclusiveness of mental illnesses.[73] There is sharp contrast between pedophilia and chronic

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contained in a clinical diagnosis.' While clinicians should be interested in diagnostic categories that aid in the design of treatment options, legal professionals should be seeking a related but distinct set of information.").

[68] DSM-V, *supra* note 13, at xxxiii.

[69] *See* Johnson, *supra* note 54, at 189–90. There are questions with "catch-all" categories that a person who falls into one of these does not show the actual inter-rater reliability and the actual heterogeneity of the different clinical diagnoses. *Id.* at 173. Contradictory to this, the fact that there are many issues with different pathologies finding the same mechanisms to diagnosis shows that the categories may be in silos that could be intermixed. *Id.* at 174. Because the "silos" and different categories are mixed, the changes and adjustments in the DSM often make diagnosing those who are sexually violent difficult. Maybe add cite here?

[70] Johnson, *supra* note 54, at 188 (emphasis added). Dr. Allen Frances, head of the DSM-IV task force has critiqued the proposed changes and the fact that they "did not predict the legal reverberations of [the] slight change in wording: work group members do not understand that the DSM is read differently by lawyers than by psychiatrists and other mental health practitioners." *Id.* at 190.

[71] *Id.* at 150 (*citing* DSM-V Development: Frequently Asked Questions, Am. Psychiatric Ass'n (2002), available at http://www.DSM5.org/about/Pages/faq.aspx). "[The APA] resist[s] the influence of these 'impure aims,' arguing that revisions ought to be guided by scientific concerns about the validity and *clinical utility* of the constructs rather than concerns about social service eligibility, *civil rights endangerment*, and treatment reimbursement." *Id.* at 149 (emphasis added).

[72] *Id.* at 167.

[73] *See generally* Johnson, *supra* note 54, at 168–69 (discussing that within the DSM III change there were critiques of the use of "premenstrual dysphoric disorder" from feminists

hair pulling, and a court would likely never find hair pulling as its mental disorder "hook" to rule a man falls under the SVPA.[74] However, it is not always that simple. Under the DSM, there is also a mental disorder for attraction to post-pubescent males between ages of 15–18, also known as "hebephilia" or "paraphilia not otherwise specified, attraction to post-pubescent males" (a version of PNOS, discussed below).[75] Society knows that sex with someone underage violates the law and is not accepted as a norm, but is it inherently a mental disorder to act on such feelings? Is it a mental disorder to violate a law? And who decides: courts or psychologists?

D. LIBERTY ARGUMENTS WITHIN THE SVPA

Scholars often worry about liberty issues when analyzing the SVPA, focusing on the fact that people subject to the SVPA remain in confinement "until such time as the person is no longer a sexually violent person."[76] "Under the Illinois act, a person is detained indefinitely in a prison, forced to obey prison rules and procedures and intermingling with other prisoners, even though they committed no crime."[77] In order to be released into society, the state must show the person fails to fall within the statute.[78] Although it is the state's burden, often the man must show that he has changed.[79] Because of the stigma and prejudice of a conviction under the Act, it is difficult for a person to show he is not substantially probable to commit further acts if the court has already found he is inherently dangerous.[80] In fact, in most cases,

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that it was used to marginalize and stigmatize a "normal woman" v. someone with a mentally negative behavior). Ironically, this over inclusiveness may lead to "a cart before the horse" situation, where a psychologist has specific thoughts on what he or she should be seeing and equates certain things to the DSM framework instead of objectively finding that a person may exemplify certain traits. *See, e.g.*, John Tierney, *Social Scientist Sees Bias Within*, The New York Times, Feb. 8, 2011, at D1 (discussing political biases within psychological groups and arguing biased towards republicans); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. of General Psy. 175, 176 (1998) (internal citation omitted) (discussing the fact that human understanding tries to adopt opinions that support it).

[74] DSM-V, *supra* note 13.

[75] *See infra*, Part II.B.

[76] *In re* Stanbridge, 980 N.E.2d 598, 611 (Ill. 2012) (citing 725 Ill. Comp. Stat. 207/35(f) (2008)).

[77] *See* Blair, *supra* note 15 (discussing the Sexually Dangerous Persons Act but notes the SVPA for its similar circumstances).

[78] Conversation with Allison Fagerman, *supra* note 6; *see, e.g.*, *In re Stanbridge*, 980 N.E.2d at 612. The state must show that he is still dangerous.

[79] Conversation with Allison Fagerman, *supra* note 6.

[80] *See, e.g.*, Eric S. Janus & Emily A. Polachek, *A Crooked Picture: Re-Framing the*

the risk of recidivism is much lower than initially assumed.[81]

The person can request release through specific procedures and show he no longer falls within the statute if: 1) the person has the Secretary of Human Services determine he is no longer an SVP; 2) the person is determined to no longer be an SVP by periodic examinations required under the Act;[82] or 3) a person petitions for discharge before the periodic examinations, is approved, and then found not to be a SVP.[83] A determination of complete rehabilitation must contain new facts to support a conclusion that the defendant has changed.[84] Under Illinois law, a person may request conditional release; however, all the state must show to prevent the conditional release is that the person is substantially probable to commit further acts. It needs no new evidence besides recommendations from former or current experts and the defendant's criminal record.[85]

Looking at all these issues, the SVPA's inertia in favor of continued confinement creates a significant hurdle for the inmate to clear. A man only has his former conviction and his status as a prisoner to show at trial: there is little information in such a controlled environment to determine if he will commit further acts. This reality makes a proper determination of an initial mental disorder, and not just a mental illness under the DSM, even more important.

II. THE *FRYE* STANDARD

The above section parsed out the SVPA and its use of experts, along with psychologists' reliance on the DSM as their diagnostic tool as experts. This section deals with *Frye* hearings and the issues they alleviate under the SVPA. Because of the susceptibility that people have when an expert gives an opinion, the *Frye* standard created a buffer between a person's testimony and the courtroom. This buffer allow the court to determine if the expert was using acceptable tests within his field and therefore could give an opinion. The SVPA utilizes psychologists' opinion testimony in every case, and yet courts fail to alleviate the discrepancies between a "mental illness" under the

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Problem of Child Sexual Abuse, 36 Wm. Mitchell L. Rev. 142, 144 (2009).

[81] *Id.* at 162 ("First, studies with the strongest methodology show that the recidivism rate for sex offenders is as low, and often lower, than re-offense rates for criminals convicted of non-sexual crimes.").

[82] *See* 725 Ill. Comp. Stat. 207/55 (2014).

[83] *Id.*; *In re* Stanbridge, 980 N.E.2d at 611–12.

[84] *In re* Stanbridge, 980 N.E.2d at 612.

[85] 725 Ill. Comp. Stat. 207/60(c) (2014).

DSM and a "mental disorder" under the law. In the past, the prevalence of *Frye* hearings in the SVPA ebbed and flowed, but a recent Illinois decision reinforces the protective needs of a *Frye* hearing.

A. "GENERAL ACCEPTANCE" WITHIN THE SCIENTIFIC COMMUNITY

Frye v. United States arose after the Washington D.C. Circuit Court questioned the authenticity of an expert's opinion about a lie detector test.[86] In *Frye*, the government wanted an expert to testify that a lie detector test accurately represented the defendant's guilt because the defendant failed the test.[87] Naturally, the defense objected, due to the unreliability of lie detector tests.[88] It instead wished to tender its own witness showing the lack of authenticity of a lie detector test and the court rejected the defense.[89] The circuit court held on appeal the expert testimony was invalid due to the fact that the lie detector studies used by the "experts or skilled witnesses" were unreliable and that "inexperienced persons" could form an unreliable judgment on the study.[90] It stated that a study needed validity in "science, art, or trade as to require a previous habit or experienced study in it."[91] The expert needed to show the lie detector test had previous use or reinforced studies in the profession showing reliability.[92] Due to the lack of reliability and the fact lie detectors seemed more experimental, the court found an expert opinion must gain "general acceptance in the particular field in which it belongs," before it could be used.[93]

With this case, the *Frye* standard was born, requiring an expert's opinion be based on scientific principle that is generally accepted within the expert's

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[86] An expert was brought in asserting that the "blood pressure is influenced by change in emotions of the witness, and that the systolic blood pressure rises are brought about by nervous impulses." Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* (internal citation omitted) ("the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject-matter so far partakes of a science, art, or trade as to require a previous habit or experience or study in it, in order to acquire a knowledge of it.")

[92] *Frye*, 293 F. at 1014. The court noted it was difficult to define where a "scientific principle or discovery crosses the line between the experimental and demonstrable stages. . . ." *Id.*

[93] *Id.*

field of study.[94] In 1992, the *Frye* standard was superseded by the *Daubert* standard in federal courts and some state courts; however, the general acceptance was taken in as a factor of *Daubert* among other factors to test an expert's validity.[95] Although the *Frye* standard is not used in all jurisdictions today, Illinois implements it to evaluate experts' tests and standards to determine whether they are accepted within their field.[96]

The *Frye* standard assesses whether an expert opinion is based on generally accepted principles before the court or a jury is permitted to rely on the expert's opinion.[97] The *Frye* hearing allows an expert witness to state his or her factual findings, and show the findings, along with their opinion, relying on their education and research.[98] Although the opposing side may question an expert's tests, opinions, and models, when the judge allows the expert to testify, he or she is still tendered as an expert and allowed to state various opinions on the stand.[99] Because of this, courts utilize the prophylactic *Frye* standard to protect the courtroom from incorrect testimony or science that has yet to be studied and determined authentic.[100]

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[94] *Id*.

[95] Factors included various areas such as scientific technique, if it had been tested, subject to peer review, published, the theory or test's potential rate of error, and general acceptance. *Id.* The *Daubert* standard was thought to be an easier, liberal movement. *See* Joseph G. Feehan, *Life After Daubert and Kumho Tire: An Update on Admissibility of Expert Testimony*, 88 Ill. B.J. 134, 138 (2000). However, in implementations courts have become very conservative in what *Daubert* experts can place into the courtroom for expert testimony. *Contra* Cassandra H. Welch, Note, *Flexible Standards, Deferential Review: Daubert's Legacy of Confusion*, 29 Harv. J.L. & Pub. Pol'y 1085, 1086 (2006).

[96] The standard used in federal courts and numerous jurisdictions is the *Daubert* Standard. Daubert put the federal test on expert's testimony. This test found that Federal Rule of Evidence 702 provided that the person must testify 1) scientific knowledge that 2) will assist the trier of fact to understand or determine a fact in issue, and to find this there must be "a preliminary assessment of whether the reasoning or methodology underling the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589–93 (1993). The courts trusted federal judges to possess capacity to look at this review, and there was no test but different factors that could be used. *Id.* at 593.

[97] *See* Paul C. Giannelli, *"Junk Science": The Criminal Cases*, 84 J. Crim. L. & Criminology 105, 106 (1993).

[98] *See In re* Detention of New, 21 N.E.3d 406, 412 (Ill. 2014) ("[T]he test serves to prevent the jury from simply adopting the judgment of an expert because of the natural inclination of the jury to equate science with truth and, therefore, accord undue significance to any evidence labeled scientific.") (citing People v. McKown, 875 N.E.2d 1029, 1034 (Ill. 2007)).

[99] Ill. R. Evid. 702.

[100] *See* Giannelli, *supra* note 97, at 107 ("[M]"ere 'assistance' to the jury is the touchstone of admissibility under Rule 702.").

B. *FRYE* HEARINGS AND THE SVPA

The DSM has inherent dangers in the courtroom. To view the use of the DSM as a legal tool to determine a mental disorder, one can look to the main diagnosis used more often than not by psychologists for the SVPA: determination of a paraphilia, an all-encompassing diagnosis that affects how many men are found with a "mental disorder."[101] Within the DSM, there is a general diagnosis of paraphilia, and the general diagnosis has various sub-categories, including categories for rape, pedophilia, hebephilia, and other sexual disorders.[102] To rise to the level of sexual paraphilia, a person must have "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors" and act on them.[103] A paraphilia generally describes these various sexual illnesses, which become a "paraphilic disorder" when they cause distress for a set amount of time.[104] Some paraphilias are unquestionably mental disorders under the SVPA when dealing with repeat offenders; i.e., pedophilia or rape ("non-consent"), and some paraphilias have their own subcategory, i.e. sexual sadism disorder and sexual masochism disorder that are arguably mental disorders.[105] Yet there are other unspecified diagnoses, a residual category called "paraphilia not otherwise specified" (hereinafter "PNOS"), which are subject to interpretation.[106]

PNOS is a "catch-all" that implements many different mental illnesses pursuant to the DSM, and various defendants argue that it is not a mental disorder for purposes of the SVPA.[107] However, the courts usually find this diagnosis falls within the Act because there is widespread acceptance that paraphilia is a mental disorder and the men who have it have life-long deviant sexual behavior.[108]

As stated above, the court allows an expert to testify on just the mental state, and psychologists often say the person has a mental disorder without stipulating that a mental illness under the DSM may not rise to the level of a mental disorder required for civil confinement under the SVPA. However, if the jury only hears that the psychologist found a "mental disorder" and not other discussion, it potentially convolutes the issue and the outcome. The

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101 *See* DSM-V, *supra* note 13, at 302.89.
102 *See id.*
103 Hamilton, *supra* note 57.
104 *Id.*
105 *Id.*
106 *See id.*
107 *See generally In re* Detention of Melcher, 2 N.E.3d 1181, 1192 (Ill. App. Ct. 2013).
108 Hamilton, *supra* note 57, at 549.

vague terminology an expert may use allows them to say "mental disorder" when they really mean "mental illness," but the judge and jury may not recognize the difference between the opinion and the judgment of a legal "mental disorder," implying the statutory structure is vague.

Due to the subjectivity of diagnoses such as "paraphilia not otherwise specified," there is a mental illness diagnosed, but not a mental disorder. To find a mental disorder through a psychologist's opinion and testimony on the person's diagnosis for paraphilia, courts have found that a mental disorder diagnosis based on sexual violence is largely scientific and based on reliable tests and examinations.[109] However, the tests and examinations psychologists use often determine how much of the psychologist's opinion is based in scientific findings and how much is subjective.[110]

As an example of where findings may be subjective, psychologists often use "paraphilia" as a way to determine sexual paraphilic disorders. However, to exemplify for courts these may be mental disorders for the Act, psychologists bolster paraphilia's severity by finding other mental illnesses, such as alcoholism.[111] These extra findings not only convolute whether a person has a mental disorder or not, but also give the jury and the judge character traits that are unseemly and may be inherently prejudicial.[112] Judges and juries may have difficulty understanding a legal "mental disorder" and harm the freedom of the man on trial.

The psychologist's finding and exams use the DSM to diagnose a mental illness, not for purposes of finding a legal mental disorder.[113] To find paraphilia, a psychologist first should show that it is a "mental disorder" for purposes of the Act. Something as subjective as a psychological evaluation needs to be analyzed to show a general acceptance in the field for the process and diagnoses, especially in consideration of issues of civil confinement of post-confinement criminals.[114]

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[109] *See id.*

[110] *See In re* Detention of Melcher, 2 N.E.3d at 1191.

[111] *See infra* Part III.A.

[112] *See generally* Ill. R. Evid. 403.

[113] The DSM uses the term "mental disorder," but stipulates: "[a]s a result, it is important to note that the definition of mental disorder included in DSM-V was developed to meet the needs of clinicians, public health professionals, and research investigators rather than all of the technical needs of the courts and legal professionals." I am using "mental illness" as the standard for the DSM for difference of "technical needs" in the court. DSM-V, *supra* note 13, at xxxiii.

[114] *See* Giannelli, *supra* note 97, at 114 ("APA's best estimate is that two out of three predictions of long-term future violence made by psychiatrists are wrong.") (internal citation

III. *FRYE* IN ILLINOIS

Several courts recently examined if an expert's opinion needs a *Frye* hearing when establishing a man's "mental disorder."[115] An Illinois court recently found a *Frye* hearing necessary to determine whether an expert's opinion on a diagnosis was "new or novel" to establish a "mental disorder" generally accepted in the medical field of psychologists.[116] After this, other Illinois courts began analyzing whether *Frye* hearings are appropriate to test psychologists' expert opinions.[117] Although the courts initially began to implement the *Frye* hearing with psychologist expert's diagnoses, courts have begun to "cabin" these results, stating the "judicial landscape","" i.e. years of trials showing general acceptance, shows psychologists generally accept the questioned diagnoses.[118]

A. THE NEW PRECEDENT WITH *IN RE NEW*

Within the case *In re New*, New argued his diagnoses was not generally accepted with the psychological field as a "mental disorder."[119] New had multiple convictions for criminal sexual acts with minors.[120] The attorney general charged him under the SVPA before his release, and evidence showed that he requested placement with a young inmate he once coached and was attracted to.[121] The court ruled the defendant had a paraphilia under the category of attraction to post-pubescent children, along with issues of

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omitted). The psychiatrist in the case mentioned found that the defendant had a 100% chance of recidivism without meeting him, and the court found this was enough to commit him in a criminal case. *Id.* Giannelli found this "shocks the conscience." *Id.*

[115] *In re* Detention of New, 992 N.E.2d 519, 531 (Ill. App. Ct. 2013). Appellate courts in Illinois review *de novo* for legal determinations in the SVPA appeals, so appellate courts can look not only at the record from the prior trial, but at other legal and scientific sources outside the record, opinions, or jurisdictions. *In re* Commitment of Simons, 821 N.E.2d 1184, 1189 (Ill. 2004).. Therefore, appellate courts review expert witnesses and examine the psychologist's tests, facts, and diagnoses. *In re* Detention of New, 992 N.E.2d at 527 (citing *In re* Commitment of Simons, 821 N.E.2d at 1184.

[116] *In re* Detention of New, 992 N.E.2d at 528-29.

[117] *In re* Stanbridge, 980 N.E.2d at 598; *In re* Anderson, 11 N.E.3d 445 (Ill. App. Ct. 2014); *In re* Detention of Melcher; 2 N.E.3d 1181 (Ill. App. Ct. 2013).

[118] *See In re* Detention of Melcher; 2 N.E.3d 1181, 1195 (Ill. App. Ct. 2013).

[119] *In re* Detention of New, 992 N.E.2d 519 (Ill. App. Ct. 2013).

[120] *In re* Detention of New, 992 N.E.2d at 521-22. There were various ages, but New always claimed he thought they looked older. *Id.* There was only one count that asserted it was non-consensual when he fondled genitals of a "young looking" prison inmate he requested to be placed with, but New later claimed it was consensual. *Id.* at 522.

[121] *Id.*

non-consent.[122] The state psychiatrists took the diagnoses of paraphilia for post-pubescent children and the issues of non-consent as a conjunctive issue, rising to paraphilic disorder and mental disorder.[123]

In *New*, three psychologists assessed the defendant; however,[124] the difference between the state's two psychologists and the defendant's psychologist was the fact that defendant's psychologist argued the PNOS, sexual attraction to sexually immature adolescents, was not a pathology, or as stated in this Comment, a "mental disorder."[125] As stated in Part II.B, the categorization of paraphilia in the DSM has eight specific sub-categories for paraphilias and one residual category.[126] The defendant used a psychologist's determination that, although the action was illegal, it is "normal for adults to be sexually attracted to other adults and also to sexually immature adults."[127] Because it appeared "normal," the defendant argued they needed a *Frye* hearing to establish if the tests and analysis of the psychologists' findings actually rose to a "mental disorder."

The Illinois Appellate Court found that a *Frye* hearing was necessary because PNOS and its various subcategories were not "generally accepted in the community."[128] The court wanted to see if PNOS was valid for a sexually

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[122] *Id.* at 519–521.

[123] *In re* Detention of New, 992 N.E.2d at 525.

[124] *Id.* at 522. Drs. Fogel and Brucker testified for the state and Dr. Witherspoon testified for New. Dr. Fogel found New to be subject to PNOS, attraction to early pubescent males (11 to 14 years of age) and antisocial personality order using both the Static 99 and the Hare Psychopathy Checklist Revised (both found to be high level of mental illness and potential for recidivism). *Id.* at 523–25. Dr. Brucker examined as a licensed clinical psychologist found 5 different mental disorders: PNOS, sexually attracted to adolescent males, nonexclusive type, and two through four with alcohol dependence or physiological dependence in a controlled environment, cannabis dependence and cocaine abuse. *Id.* at 525. He administered the Minnesota Mutiphasic personality Inventory II (MPPI-II); the Millon Clinical Multiaxial Inventory III (MCMI-III); and the Mutliphasic Sex Inventory III. *Id.* He found that there was a high risk of reoffending for future acts. *Id.* at 526. Dr. Witherspoon was a licensed psychologist and expert in forensic psychology with the MCMI-III, the MnSOST, and various tests, and found under these there was no mental disorder accepted in the field for the purposes of the act. *Id.* Further, he tested him for risk assessment under the Sexual Violent Risk 20 (SVR 20) and the Static 2002R saying that they were more accurate. *Id.* He did not find New in a high risk of re-offending category. *Id.* at 527.

[125] *Id.* at 526 ("Witherspoon said that New's history of sexual offenses did not indicate he had a mental disorder because ''it's normal for adults to be sexually attracted to other adults and also to sexually immature adolescents,' and while illegal to act on those feelings, it is not considered a pathology.").

[126] DSM-V, *supra* note 13; *see supra* Part II.B.

[127] *In re* Detention of New, 992 N.E.2d. at 526

[128] *Id.* at 527.

violent person under a "mental disorder" in the legal sense, not only the psychological sense.[129] *New* determined that PNOS was "new or novel" in part due to the psychologist's use of it generally, along with other "mental illnesses" such as alcoholism.[130] The psychologist had found a mental disorder because the PNOS was reinforced by New's alcoholism to show he could not control his impulses for sexual needs of underage teenagers, and the court questioned if this was a valid assessment.[131]

The court focused on the differences in opinion and assessment of the three psychologists,[132] and because of their variation, the determination that the general psychological community accepted PNOS as a mental disorder lessened in its validity.[133] *In re New* exemplifies courts' newfound scrutiny of whether a psychologist's diagnosis of a mental illness under the DSM actually rises to the level of a legally sufficient mental disorder.[134]

B. CARVING A NEW *IN RE NEW*

In *In re New*, the court found the psychologists' views as expert witnesses relied on a "new or novel concept" in diagnosing someone with PNOS. However, numerous courts within Illinois have pushed back on this decision, finding some PNOS determinations are generally accepted ,[135] holding that inclusion of a version of PNOS in previous versions of the DSM showed general acceptance by the psychological community,[136] or reasoning that a subset of acceptance in the psychological community indicated acceptance.[137]

Although *In re New* established new ways to discuss PNOS under the SVPA, many subsequent questions sought to limits the decision.[138]

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[129] *Id.*

[130] *Id.* at 529.

[131] *Id.* at 528.

[132] *Id.* at 529.

[133] *In re* New, 992 N.E.2d. 519, 531 (Ill. App. 2013).

[134] *See id.*; *see also In re* Stanbridge, 980 N.E.2d at 598 (Ill. 2013); *In re* Anderson, 11 N.E.3d 445 (Ill. App. Ct. 2014).

[135] *In re* Stanbridge, 980 N.E.2d at 598 (Ill. 2013); *In re* Anderson, 11 N.E.3d 445 (Ill. App. Ct. 2014).

[136] *In re* Melcher, 2 N.E.3d 1181, 1195 (Ill. App. Ct. 2013).

[137] *See, e.g.*, *In re* Fields, 10 N.E.3d 832 (Ill. 2014); *In re* Hayes, 8 N.E.3d 650 (Ill. App. Ct. 2013).

[138] *See, e.g.*, *In re* Melcher. 2 N.E.3d 1181, 1195 (Ill. App. Ct 1st Dist. 2013); *In re* Fields, 10 N.E.3d 832 (Ill. 2014); *In re* Hayes, 8 N.E.3d 650 (Ill. App. Ct. 2013); *In re* Stanbridge, 980 N.E.2d 598 (Ill. 2013).

Subsequent cases often cabin the case to allow *Frye* hearings only in cases involving the specific diagnosis used in *In re New*: PNOS attraction to post-pubescent males.[139] Courts often refuse to take PNOS's other categories as new or novel mental conditions, hinging on the fact that PNOS was a new diagnosis in recent DSM versions.[140] Because courts have accepted psychologists' diagnoses and the reliance on other paraphilias (i.e. sadism, rape, etc.), courts fail to distinguish between these viable paraphilias that rise to mental disorder and the mental illnesses under the general PNOS standard.[141]

In *In re Stanbridge*, two defendants were charged under the SVPA, and the attorney general relied on expert testimony regarding diagnoses of "paraphilia, not otherwise specified, sexually attracted to nonconsenting persons," i.e., showing both men had convictions for rape and were diagnosed with having an attraction to nonconsensual sex.[142] The Supreme Court of Illinois upheld the lower court's finding that the expert could testify the person had a compulsion and an attraction to rape under its subsection of PNOS, and the jury could use this as sufficient to find a "mental disorder."[143] In rendering the decision, the court did not touch on *In re New* in the *Frye* context, focusing instead on the issues of probable cause in the trial and if there was enough evidence for an SVPA finding.[144]

The court's holding in *In re Stanbridge* addresses the issue with PNOS: PNOS includes diagnoses like the urge to rape, something that is strongly associated with a mental disorder.[145] Because rape is involved with PNOS but does not involve the residual "catch-all" category, courts are often uncertain where to draw the lines in the different subcategories of PNOS: what is a mental disorder and what is merely mental illness.[146]

Courts permit diagnoses like inability to control a need to rape to justify

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[139] *See, e.g.*, *In re* Stanbridge, 980 N.E.2d at 605; *In re* Melcher, 2 N.E.3d at 1195.

[140] *See, e.g.*, *In re* Melcher. 2 N.E.3d at 1195; *In re* Fields, 10 N.E.3d 832 (Ill. 2014); *In re* Hayes, 8 N.E.3d 650 (Ill. App. Ct. 2013); *In re* Stanbridge, 980 N.E.2d 598 (Ill. 2013).

[141] *See, e.g., In re* Melcher. 2 N.E.3d 1181, 1195 (Ill. App. Ct. 1st Dist. 2013).

[142] *In re* Stanbridge, 980 N.E.2d at 602, 605.

[143] *Id.* at 619.

[144] *Id.*

[145] DSM-V, *supra* note 13.

[146] *See In re* Stanbridge, 980 N.E.2d at 606 ("DSM specifically identifies nine common paraphilic conditions and lists the diagnostic criteria for each condition. In addition, the DSM includes a residual category of 'paraphilia not otherwise specified' for paraphilias that do not meet the criteria for any of the nine specifically listed categories. That residual section provides a *nonexhaustive list of examples that fall under this catch-all NOS category*." (emphasis added)).

a general acceptance of all psychological diagnoses that fall under the PNOS "mental illness" scheme. In *In re Melcher*, the court found a consensus in judicial thought in Illinois and other states that PNOS was generally accepted within the psychological community.[147] The *Melcher* court found no need for a *Frye* hearing because of the expansive acceptance of the PNOS diagnoses preceding *In re New*, an acceptance they termed as the "judicial landscape".[148]

In *In re Melcher*, the defendant argued that an expert's opinion that Melcher had PNOS required a *Frye* hearing because the specific diagnosis of "PNOS nonconsent" (what was previously used to diagnose rape) was removed from the two newest versions of the DSM.[149] The court found the DSM-IV, the APA, and the general psychology community accepted "PNOS nonconsent" because the paraphilia section contained a description of nonconsent.[150] The court read "nonconsenting person" in a general description of the new version of paraphilias, so it applied the diagnosis as if the DSM had not changed and accepted it as a mental illness.[151] The "judicial landscape" argument looked at all other courts that had not questioned such diagnoses and found, based on the lack of question, there was no reason to go further in its analysis for *Frye* hearings.[152]

This finding is inconsistent with the legal definition of mental disorder, for rape has always been unquestionably a mental disorder if the person cannot control it.[153] Further, the court could have ignored *In re New* due to a case like *In re Stanbridge* that hinted rape was an unquestionable mental disorder. However, the court dangerously implemented a "judicial landscape" argument: that as long as there had been acceptance by the courts, it was acceptable to implement the expert's testimony.[154] The judicial landscape approach ignored the reasons for *Frye* hearings introduced in *In re New* and the core argument of this Comment: the DSM discusses mental illnesses; it is not a bright line rule for "mental disorders" under the SVPA.[155]

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[147] *In re* Melcher. 2 N.E.3d 1181, 1195 (Ill. App. Ct. 1st Dist. 2013) (looking at former precedent within the courts).

[148] *Id.*

[149] *See In re* Melcher, 2 N.E.3d at 1193.

[150] *Id.* at 1194.

[151] *Id.* at 1195.

[152] *Id.*

[153] *See* supra notes 5–8 & accompanying text. Not all men who do a subsequent crime have a mental disorder—it depends on his control of the mental illness. *Id.*

[154] *Melcher*, 2 N.E.3d at 1195.

[155] *Contra In re* Hayes, 8 N.E.3d 650, 655–56 (Ill. App. Ct. 2013).

The fact that the Supreme Court and the appellate courts in Illinois analyzed the DSM at all shows the danger of using psychiatric decisions versus legal definition. Using the DSM as a legal determination of mental disorders is extremely problematic considering due process and judicial process. The judiciary is charged to make sure that the court makes decisions applying fact to law. If a descriptive tool with no legal justification is used as a legal authority, people now are in custody who are not legally SVPs. The potential for erroneous findings with the DSM and the issue of fairness became extremely apparent in *In re Walker*, where the court found that it was sufficient to find that a subset of experts reasonably relied on the method implemented by the psychologists to diagnose the defendant under the DSM.[156]

The *Walker* court held *In re New* was wrong because it assumed a "majority" of psychologists needed to accept the diagnoses before it became accurate.[157] The acceptance of a "majority decision" stood on outdated law based on federal circuit cases.[158] Further, the case law relied on a case before *In re New*. However, the court still found PNOS applicable because a subset of courts allowed the finding in expert testimony.[159]

Courts have made the DSM determinations arbitrary, accepting the DSM as a proverbial bible and yet ignoring the standards the DSM implemented in analyzing a person. The DSM has standards for how old a person has to be for a mental illness to instill in them and certain lengths of time an illness needs to be ongoing before it is onset. Courts convoluted these requirements of the DSM, finding that the age prescribed under the DSM for mental disorders to begin is not as important as the mental disorders themselves.[160]

In *In re Fields*, the Supreme Court of Illinois addressed whether the defendant could be diagnoses with paraphilic disorder despite not reaching the age criteria for such a diagnosis under the DSM; the court found it could

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[156] *In re* Walker, 19 N.E.3d 205, 226 (Ill. App. Ct. 2d Dist. 2014); *see also In re* Melcher, 2 N.E.3d 1181, 1195 (Ill. App. Ct. 1st Dist. 2013).

[157] *In re* Walker, 19 N.E.3d at 227.

[158] *Id.* at 226.

[159] *Id.*

[160] *See In re* Anderson, 11 N.E.3d 445 (Ill. App. Ct. 2014) (affirming trial court finding Anderson was an SVP for purposes of the act because his consensual and nonconsensual relationships with boys between the ages of 15–18 when only had one relationship with a child that did not rise to the level of pedophilia when he was much younger under the influence of drugs).

overlook such age requirements.[161] The defendant charged under the SVPA in *In re Fields* argued that he was only fifteen years and eight months old during his first incident of paraphilic disorder and the DSM specifically states mental illness can only be established at age sixteen.[162] The court found that the DSM also states onsets can begin earlier, so the court ignored the sixteen-age mark.[163] The court failed to differentiate that onset signs do not signify an actual mental disorder or even a mental illness. Because the court relied on the expert testimony regarding "mental disorder" using the DSM, it would logically follow that a person would fall within the DSM age ranges. The age limit shows a bright line rule for courts to follow, so it begs the question why criteria for diagnoses were ignored. *In re Fields* shows the importance the court places on DSM rules when the rules do not work against a defendant.

How to determine whether a particular medical condition is "new or novel" for the *Frye* hearing in the SVPA today is unclear after cases like *In re Melcher*, *In re Walker*, and *In re Fields*. The "judicial landscape" blanket acceptance of the psychologist's view using DSM convolutes how a person can prove he does not have a mental disorder.[164] They ignore the real issue: whether a psychologist's diagnosis of a mental illness under the DSM rises to the level of a mental disorder.

C. THE NEW *IN RE NEW*

Although the "judicial landscape" argument is beneficial to those opposing *Frye*, the Supreme Court of Illinois recently upheld the ruling of *In re New* in 2014.[165] The Supreme Court of Illinois focused on the term of hebephilia used by the psychologists in *In re New*, i.e. attraction to adolescent males,[166] and held this was not a generally accepted term within the psychological field.[167] To do this, the court noted that "a particular diagnosis may be so devoid of content, or so near-universal in its rejection by mental

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[161] *In re* Fields, 10 N.E.3d 832, 840–41 (Ill. 2014).

[162] *Id.* at 833*, see also* DSM-V, *supra* note 13.

[163] *Id. at* 838, 840.

[164] *See* Brief of Petitioner-Appellant at 10–11, *In re* Mohr, No. 2013 MR 59 (3d Dist. Ill. 2014); *rev'd for Frye hearing*. Alison Fagermen argues that hebaphilia are different things and psychologists cannot find a similar mental disorder with the different linguistics. Ms. Fagerman moves on to argue that federal courts do not recognize hebaphilia and NOS was never meant to be a mental disorder. *Id.*

[165] *Id.*; *see also* 21 N.E.3d 406, 412 (Ill. 2014) (noting that mental diagnoses and syndromes are subject to the *Frye* hearing).

[166] *Id.* at 407.

[167] *Id.* at 414.

health professionals, that a court's reliance on it to satisfy the 'mental disorder' prong of the statutory requirements for commitment would violate due process."[168]

The court in *In re New* focused on the fact that in *Kansas v. Hendricks*, the U.S. Supreme Court found it important to "distinguish[] between the dangerous sexual offender subject to civil commitment, and other dangerous, but typical, recidivists, who are more properly dealt with through the criminal system."[169] The Illinois Supreme Court noted that *Hendricks* only held that the statute did not violate due process because the person had a "serious mental disorder."[170] To uphold the expert's opinion in the case, civil confinement needed to be "recognized by the mental health community."[171] Conditions unsupported by science "should be excluded from consideration by the trier of fact."[172] Because the condition did not seem supported, the Supreme Court found "[the] psychologist's mental disorders [were] relevant to [the] Frye standard."[173]

The Illinois Supreme Court in *In re New* looked only at hebephilia, but it noted that diagnoses not generally accepted in the community need more evidence that they gained general acceptance.[174] The court focused on the fact that DSM expansion needed studies and research to show "[statistical] reliability, and a full and open debate about its conceptual validity."[175]

The Illinois Supreme Court's decision in *In re New* aims to expand the use of *Frye* and demonstrates that psychologists' diagnoses should sometimes be "excluded from consideration by the trier of fact."[176] The Illinois Supreme Court's decision held that the DSM often changes and evolves, so a *Frye* hearing is necessary for determining if the terms and studies are still accepted within the community.[177] In *In re New*, the Supreme Court of Illinois noted that the psychologist's ultimate conclusion is not the focus of a *Frye* hearing, but "the scientific principle, test, or technique used

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[168] *In re* New, 21 N.E.3d 406, 412 (2014) (emphasis added); *quoting* McGee v. Bartow, 593 F.3d 556, 577 (7th Cir. 2010).

[169] *Id.* at 412.

[170] *Id.* at 413 (internal citation omitted).

[171] *Id*.

[172] *Id.*

[173] *Id.*

[174] *Id.* at 417.

[175] *In re* New, 21 N.E.3d at 413 (internal citation omitted).

[176] 21 N.E.3d. at 413.

[177] *In re* New, 21 N.E.3d at 417 (*citing In re* Melcher, 2 N.E.3d 1181, 1195 (Ill. App. Ct. 2013); *In re* Hayes, 8 N.E.3d 650, 657 (Ill. App. Ct. 2014).

to generate that conclusion."[178] This reading should be expanded, for the DSM needs to be tested with *Frye* not only when the DSM gets rid of a diagnoses, but also to analyze a "mental disorder." *In re New* shows that the DSM does have updates and changes, and therefore should be tested in a more general manner.

In re New reinforces that the DSM's definition of "mental disorder" is not important, but the tests and theories that define people with the "mental disorder" under the SVPA are. Because the DSM changes, the mental disorders and illnesses tests in it should be studied and explicated to reinforce the due process and validity of the reliance on the different findings. It should not merely be that because the person has a diagnosis of PNOS under the DSM, it is a "catch-all" for the SVPA.

IV. THE IMPORTANCE OF *FRYE* IN ACTUARIAL RISK ASSESSMENT TESTS

The state must prove not only that a person has a mental disorder, but also that he is a danger for recidivism and likely will commit further acts. Psychologists implement actuarial assessments to test future recidivism that are subject to *Frye* hearings even though they are more scientific and objective. [179] To diagnose someone with a risk of recidivism, many psychiatrists implement actuarial assessments to try to assure accuracy, admissibility, and accountability.[180]

To view the risk assessments, psychologists rely on for their expert testimonies, courts often allow evaluations based on Actuarial Risk Assessment tests (hereinafter "ARAs").[181] Courts allow psychologists to use these tests to reinforce their clinical opinions. Experts rely on these to

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[178] *In re* New, 21 N.E.3d at 412 (citation omitted).

[179] *See People v. Taylor*, 830 N.E.2d 855, 857 (Ill. App. Ct. 2005); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 AM. CRIM. L. REV. 1443, 1455 (2003).

[180] *See generally* Janus & Prentky, *supra* note 179, at 1495–96. This is to make sure there is risk assessment in recidivism. *Id.* However, the actual studies and different aspects are fairly subjective to what the psychiatrist wishes to put in as a factor. *Id.* at 1485. It mixes empirical data such as age, weight, along with the psychiatrists view on the person's mental state, home life, and their level of manipulation. *Id.* at 1455. These subjective thoughts mixed with empirical data show that the risk assessment is not perfect for finding out a person is not able to maintain life in society. *Id.*

[181] These tests include those implemented into the *In re New* case. Tests take "empirically derived 'mechanical' rules for combining information to produce a quantitative estimate of risk." Janus & Prentky, *supra* note 179, at 1444. ARAs are used "using statistical analyses of groups of individuals . . . with known outcomes during a "follow period." *Id.* at 1453. The "predictor variables" help differentiate people in danger of reoffending. *Id.*

determine whether recidivism is more likely than not, but these tests have their own risks.[182] The ARAs were developed in the 1970s, extremely recent to be fully accurate within the field, and courts have only relied on them in the past two decades for opinions.[183]

Scholars argue that ARAs are better than clinical assessments by psychologists because of their measurable factors which are more reliable than a subjective test influenced by psychologist biases.[184] Courts in Illinois often ultimately allow ARAs after a *Frye* hearing because the evidence is "transpar[ent]" and "demystify[ing]".[185] ARAs are more quantifiable and therefore more reliable because they are based on statistics and numerical factors.[186] Psychologists use numerous ARAs in the recidivism, actuarial context; however, the Illinois courts have found each falls within the need for a *Frye* hearing due to their changes and updates and a psychologist's choice on what factors affect recidivism.[187] Because a clinical assessment is even more dispositive and based on a psychologist's biases, thought process, and reliance on DSM as a mental disorder device, the subjective tests for mental disorders should rise to the level for the recidivism tests. One *Frye* hearing should follow another.

V. NEW NEEDS FOR *FRYE*

Evidence at trial should make "any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[188] Under the current regime, a court allows a psychologist's expert opinion, the psychologist says he diagnosed the

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[182] *Id.* The largest tests used in Illinois include Re risk assessment, the static 99-R, and the static 2002. The tests are argued against as outdated, historically used upon with questionable reliability. Some doctors also use Stable 2007, the pcl-r, the mats-1 to assess risk of recidivism. With each test the psychologist gets to use his own preference for which test exemplifies the answer he wishes. The numerous tests and numerous conclusions accepted in courts without the *Frye* test shows that people are not being found on the larger scale for purposes of the SVPA.

[183] *Id.* at 1453. Tests developed in a "'second generation' of empirical research on risk assessment" due to worries on clinical reliability. *Id.*

[184] Janus & Prentky, *supra* note 179, at 1453.

[185] *Id.* at 1450, 1452.

[186] *Id.* at 1464–65. (Describing the measurability, the empirical basis, and the precision that comes with the adequacy of measuring different issues. Further, goes to the authenticity and the transparency instead of clinical risk assessment).

[187] *See People v. Taylor*, 830 N.E.2d 855, 857 (Ill. App. Ct. 2005); Janus & Prentky, *supra* note 179, at 1455.

[188] Ill. R. Evid. 401.

defendant under the DSM with a mental illness and it is a mental disorder, and the court often accepts it and moves on to the ARAs. Psychologists use both the ARAs and the clinical assessments to demonstrate that a person should remain in confinement under the SVPA; however, various clinical studies show jury members are less attentive to ARAs than to clinical assessments.[189] Thus, the jury gives the most weight to the evidence that is less objective and which has not been vetted by a judge for methodological integrity. This situation reinforces the need for a *Frye* hearing for diagnoses of mental illness under the DSM to ensure that the court keeps out any unreliable evidence that biases the jury. Prophylactic material ensures a person's due process is protected before information reaches the jury.[190]

Because the SVPA deals with men who will be placed into indefinite civil confinement, it is especially important to keep due process checks in place. Due process requires that the proper court processes and rules are followed and—in the end—accurately find whether a man is more likely than not to have a mental disorder. This helps the overall goal of the SVP: to make sure those who cannot control their mental disorder can remain behind bars. If the due process checks are not in place, the overall goal is thwarted and instead men are placed in long-term confinement who are not intended to fall under the statute and its purposes.

Once a person goes to trial, society's prejudices come in, for an SVPA due to a man's convictions of rape, attraction to younger children, child pornography, etc.[191] These charges are inherently seen as evil in society, and there is a large chance he is judged based on these prior acts instead of his mental disorder.[192] A prophylactic tool such as a *Frye* hearing allows a judge to examine the psychologist's test, and stop bad testimony from unjustly affecting a person's trial.

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[189] *See generally* Nicholas Scurich and Daniel Krauss, *The Effects of Adjusted Actuarial Risk Assessment on Mock-Jurors' Decisions in a Sexual Predator Commitment Proceeding*, 53 Jurimetrics J. 395 (2013). This document discussed the facts of jury matters and found that a jury was more likely to convict if they had little information about the person's mental issues **or** if there was a clinical assessment, but less likely to convict if there was an assessment of low mental disorder or recidivism.

[190] *See, e.g.*, *In re* Fields, 10 N.E.3d 832 (Ill. 2014); *In re* Hayes, 8 N.E.3d 650 (Ill. App. Ct. 2014); *In re* Melcher, 2 N.E.3d 1181, 1195 (Ill. App. Ct. 2013).

[191] *See* Lave, *supra* note 25, at 216; *quoting* Bernard E. Harcourt, Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age 32 (University of Chicago Press 2008) (noting the clinical diagnosis "accentua[tes] the prejudices and biases that are built into the criminal code").

[192] *See, e.g.* Janus & Polachek, *supra* note 80, at 154, 155–164 (discussing the disconnect between preconceived notions of sexual offenders and the reality of sexually violent persons).

The *Frye* hearing provides necessary prophylactics to ensure that a diagnosis is based on accepted scientific principles before the court makes a finding that a person is an SVP. It examines if the expert uses proper classification, ensures due process within the courts, and ensures a good diagnosis for purposes of the Act, in particular distinguishing between mental illnesses and mental disorders. Under the proposed new model, psychologists can still use the DSM for its purpose of diagnosing a mental illness, and use circumstances and proper tests to suggest this rises to the level of mental disorder.

In addition, studies have shown that psychologists' focus on alcoholism, antisocial disorder, and other mental disorders has little to do with a man's mental disorder.[193] Therefore, when these different disorders are used, the court or jury may mistakenly assume a man's deviant behavior to be something that makes him inherently sexually dangerous.[194] Clinical assessments linked to specific assessments, not subjective testimony, often fare better in predicting a man's likelihood for recidivism or what issues he may have.[195] A *Frye* hearing can stop clinical assessments from delving too deeply into prejudicial information, and instead look to whether the person does or does not fall under the mental disorder requirement of the SVPA.

Courts and juries should accept the American Psychiatric Association's (hereinafter "APA") understanding of the DSM: the APA does not wish to help the court with "impure aims" of judging someone based on social delinquencies.[196] The APA only uses the DSM as a diagnostic tool for mental illness within the field.[197] Courts should recognize psychologists are medical experts who use the DSM as a starting point to determine whether a person has a mental illness, not whether he has a legally defined "mental disorder."

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[193] *In re* New, 992 N.E.2d 519, 526 (Ill. App. Ct. 2013). *See generally* Lave, *supra* note 25, at 231 ("[F]actors that would seem to be intuitively linked to risk, are not. For example, denial of the charges and low treatment motivation were not linked to recidivism. Nor were general psychological problems, alcohol abuse, or childhood sexual abuse a predictor for reoffending. Facts related to the crime like low victim empathy and degree of sexual contact were also unassociated with recidivism."

[194] *Id.* at 257 (""According to a task force of the American Psychiatric Association, 'Only the paraphilic diagnoses focus directly on psychopathological features of deviant sexual behavior, but these conditions appear to be absent in most offenders. In contrast, a significant number of sex offenders may have substance abuse or personality disorder diagnoses, but these conditions usually have little explanatory connection to the offender's sexual behavior." (*citing* Task Force Report, *supra* note 19, at 9).

[195] *Id.* at 230-32.

[196] *See* DSM-V Development: Frequently Asked Questions, *supra* note 13, at 71.

[197] *See id.*

CONCLUSION

Civil confinement is a dangerous sword. It allows men to be incarcerated after they have served their punishment. Because it is a sword, courts should ensure that there are procedural protections at every level of the incarceration. The person is kept in DHS until new evidence shows he is safe for society.[198] Due to this high threshold, there should be some type of procedure to make sure they are protected through due process. Although the subject deals with criminals who are seen as the lowest in society, we should not use this as a justification to punish them more. Courts need prophylactic measures to ensure justice, reliability, and accuracy. With the *Frye* hearing, the original purpose of the SVPA is reinforced.

[198] *See supra* Section I.D.