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Jury Bias Resulting in Indefinite Commitment: Expanding Procedural Protections in SVP Civil Commitment Proceedings Under the Mathews Test

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NOTES

JURY BIAS RESULTING IN INDEFINITE COMMITMENT: EXPANDING PROCEDURAL PROTECTIONS IN SVP CIVIL COMMITMENT PROCEEDINGS UNDER THE *MATHEWS* TEST

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INTRODUCTION

For Richard Rude, prison provided the structure and guidance he needed to transform his life.[1] When Richard first arrived, he received an infraction for heroin possession.[2] But eventually, Richard, a previously nonreligious individual, began attending church;[3] he became actively involved in the prison's ministry, serving as an assistant group director and later a group leader.[4] Richard was serving a sixteen-year-and-two-month sentence for sexual assault.[5]

While incarcerated, Richard underwent sex offender treatment, attending two-hour group sessions four times a week and individual sessions twice a month.[6] His provider reported that Richard "made significant progress."[7] Richard acknowledged the causes of his behavior and addressed his previously misguided beliefs.[8] He expressed regret for his past behavior and the pain he caused to his victim.[9] Additionally, while incarcerated, Richard reconnected with his daughter, married a fellow ministry volunteer, and regained his sobriety.[10]

However, days before Richard's scheduled release from prison, the government petitioned to place him into civil commitment.[11] A jury found Richard to be a "sexually violent predator,"[12] and he was committed to the McNeil Island Special Commitment Center for

1. *See generally* Brief of Petitioner at 4-9, *In re* Rude, 2014 WL 295772 (Wash. Ct. App. 2014) (No. 69061-2-1).
2. *Id.* at 7.
3. *Id.*
4. *Id.*
5. *See In re* Rude, 2014 WL 295772, at *1 (Wash. Ct. App. Jan. 27, 2014).
6. Brief of Petitioner, *supra* note 1, at 7.
7. *Id.*
8. *Id.* at 7-8.
9. *Id.* at 8-9.
10. *Id.* at 8.
11. *See* Lynsi Burton, *MV Man to Be Kept in Prison Indefinitely for Sex Offenses*, GOSKAGIT (June 23, 2012), https://www.goskagit.com/news/local_news/mn-man-to-be-kept-in-prison-indefinitely-for-sex/article_27fb3b93-cb57-504c-a761-34a31498d188.html [https://perma.cc/R2R6-2482].
12. *In re Rude*, 2014 WL 295772, at *3.

life.[13] As of 2014, Richard was still committed,[14] and in all likelihood he will remain in the facility for the rest of his life.[15] Although Richard's clinicians and family believe that he deserves a second chance, the state denied his petition for release.[16]

Twenty states, the District of Columbia, and the federal government have enacted Sexually Violent Predator (SVP) laws that permit the civil commitment of sex offenders.[17] Under these laws, imprisoned sex offenders serving criminal sentences are transferred to treatment facilities and held indefinitely.[18] As one individual describes civil commitment, "It's worse than prison. In prison I wasn't happy, but I was content because I knew I had a release date."[19] An estimated 5,400 individuals are currently civilly committed under these laws.[20]

The cost to confine an individual under civil commitment programs is not insignificant. For example, the State of Washington pays over $185,000 per year to confine a single individual.[21] While the applicable statutes vary from state to state, four elements are generally required for commitment: (1) a past sexual offense, (2) the presence of a mental disorder or abnormality, (3) an inability to control one's sexual behavior, and (4) a risk of recidivism.[22] This

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13. *See* Burton, *supra* note 11.

14. *See* Respondent's Opening Brief at 1-2, *In re* Rude, No. 71460-1 (Wash. Ct. App. Sept. 14, 2014).

15. *See* Burton, *supra* note 11.

16. *See* Brief of Petitioner, *supra* note 1, at 8-9, 12; *In re Rude*, 2014 WL 295772, at *1.

17. *Civil Commitment*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, https://www.atsa.com/civil-commitment-2 [https://perma.cc/TJ3X-JFH7].

18. *See* James Ridgeway, *How 'Civil Commitment' Enables Indefinite Detention of Sex Offenders*, GUARDIAN (Sept. 26, 2013, 9:30 AM), https://www.theguardian.com/commentisfree/2013/sep/26/civil-commitment-sex-offenders [https://perma.cc/X9LG-ZNZP].

19. Leon Neyfakh, *"It's Worse than Prison,"* SLATE (Oct. 9, 2015, 10:52 AM), https://slate.com/news-and-politics/2015/10/civil-commitment-laws-allow-authorities-to-keep-people-locked-up-indefinitely.html [https://perma.cc/ADS7-4222].

20. George Steptoe & Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, MARSHALL PROJECT (Jan. 27, 2016, 7:15 AM), https://www.themarshallproject.org/2016/01/27/why-some-young-sex-offenders-are-held-indefinitely [https://perma.cc/XCF2-C37C].

21. *See* Emily Gillespie, *On Washington's McNeil Island, the Only Residents Are 214 Dangerous Sex Offenders*, GUARDIAN (Oct. 3, 2018, 6:00 AM), https://www.theguardian.com/us-news/2018/oct/03/dangerous-sex-offenders-mcneil-island-commitment-center [https://perma.cc/BW65-D2SF].

22. Holly A. Miller, Amy E. Amenta & Mary Alice Conroy, *Sexually Violent Predator Evaluations: Empirical Evidence, Strategies for Professionals, and Research Directions*, 29

Note argues that such laws do not adequately protect respondents' due process rights. To that end, this Note proposes a more rights-protective application of *Mathews* to expand procedural protections for respondents in SVP civil commitment proceedings and offers two additional procedures to better protect respondents' rights.

Part I begins by detailing the history and enactment of SVP laws across the United States and the subsequent constitutional challenges to such laws. Part II discusses the current process for civil commitment and the rights respondents receive at trial. Part III points to recent empirical findings that illustrate a lack of procedural protections present in these trials. Part IV explores the use of the *Mathews* test when determining the adequacy of procedural due process and analyzes state appellate courts' use of the *Mathews* test when expanding procedural protections for respondents. Part V proposes an application of *Mathews* that more robustly protects procedural due process in SVP civil commitment proceedings and offers two additional procedures for states to consider.

I. HISTORY OF SEXUALLY VIOLENT PREDATOR STATUTES

In the 1930s, states began enacting sexual psychopath laws to identify sexual offenders in need of rehabilitation and treatment.[23] However, states rarely utilized these laws for the first fifty years.[24] In 1990, the State of Washington passed the Community Protection Act[25] in response to public outrage over violent crimes committed by sexual recidivists.[26] Around the same time, some released sex offenders in Minnesota committed similarly heinous rape-murders.[27] As a result, Washington and Minnesota were the first states to implement civil commitment laws to prevent recurring sexual

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LAW & HUM. BEHAV. 29, 31 (2005).

23. Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 71 (2000). The Supreme Court upheld the constitutionality of these statutes, which provided for the separate treatment of sex offenders, in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 277 (1940).

24. *See* Brakel & Cavanaugh, *supra* note 23, at 72-74.

25. Community Protection Act, ch. 3, 1990 Wash. Sess. Laws 12.

26. *See* ERIC S. JANUS, FAILURE TO PROTECT 14-15 (2006).

27. *See id.* at 15.

offenses.[28] Proponents continue to defend SVP civil commitment laws as a means of ensuring public safety by confining sexual predators.[29] Because SVP civil commitment laws significantly deprive an individual of his or her liberty, the constitutionality of these laws has been litigated extensively.[30]

A. Civil Commitment of the Mentally Ill

Civil commitment laws for the mentally ill existed prior to the enactment of SVP laws.[31] In *O'Connor v. Donaldson*, the United States Supreme Court held that nondangerous individuals cannot be civilly committed based solely on a mental illness diagnosis.[32] In order to civilly commit an individual, a state must prove by clear and convincing evidence[33] that an individual is mentally ill and a danger to himself or others.[34] The Court later looked to these precedents when determining whether various state SVP statutes were constitutional.[35]

B. Constitutional Challenges to State SVP Statutes

The United States Supreme Court first affirmed the constitutionality of a state SVP civil commitment law in 1997 in *Kansas v. Hendricks*.[36] A jury found that Leroy Hendricks met the definition of a sexually violent predator under Kansas's Sexually Violent

28. *See id.* at 14.

29. *See, e.g.*, N.H. REV. STAT. ANN. § 135-E:1 (2020) (allowing for the civil commitment of sexually violent predators because "existing involuntary commitment procedures for the treatment and care of mentally ill persons are inadequate to address the risk [SVPs] pose to society"); N.J. STAT. ANN. § 30:4-27.25(c) (West 2020) (stating that sex offenders "pose a danger to others should they be returned to society").

30. *See infra* Part I.B-C.

31. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 565-66, 566 n.2 (1975).

32. *Id.* at 575.

33. Addington v. Texas, 441 U.S. 418, 425, 427, 433 (1979) (opining that the burden of proof must be greater than the preponderance of evidence standard because "the function of legal process is to minimize the risk of erroneous decisions" and the "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior").

34. *See* Foucha v. Louisiana, 504 U.S. 71, 75-76 (1992) (reiterating the *Addington* standard); Jones v. United States, 463 U.S. 354, 358-59 (1983).

35. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 357-59 (1997).

36. *Id.* at 371.

Predator Act of 1994,[37] and the trial court subsequently ordered his civil commitment.[38] Hendricks appealed, and the case was sent to the Supreme Court of Kansas.[39] Hendricks alleged, among other things, that the Kansas SVP Act (1) did not satisfy substantive due process under the Fourteenth Amendment and (2) violated the Double Jeopardy and Ex Post Facto Clauses.[40] The Kansas Supreme Court invalidated the Act, reasoning that the prerequisite finding of a mental abnormality violated substantive due process.[41]

The United States Supreme Court reversed, holding that the Act's definition of a mental abnormality satisfied substantive due process requirements.[42] The Court emphasized that the statute imposed three requirements for a respondent to be labeled a sexually violent predator.[43] The statute required the respondents display (1) sexually violent behavior, (2) a present mental abnormality that makes it difficult for the respondent to control his or her behavior, and (3) a likelihood of conducting similar behavior in the future, meaning he was considered "dangerous."[44] The Court reasoned that such a "lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishe[d]" those who should be involuntarily committed "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[45] The Court also held that because the Kansas Act was civil in nature, it did not violate the Double Jeopardy and Ex Post Facto Clauses.[46]

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37. *Id.* at 352, 355. The Act defined a sexually violent predator as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Act of May 9, 1994, ch. 316, § 2(a), 1994 Kan. Sess. Laws 1824, 1825.

38. *In re* Hendricks, 912 P.2d 129, 130 (Kan. 1996).

39. *Id.*

40. *Id.* at 133.

41. *Id.* at 138 (reasoning that prior cases concerning the civil commitment of the mentally ill required a finding of mental illness to satisfy substantive due process and that the Act's mental abnormality provision did not meet this requirement).

42. *Hendricks*, 521 U.S. at 360. The Act defined a mental abnormality as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." § 2(b), 1994 Kan. Sess. Laws at 1825.

43. *Hendricks*, 521 U.S. at 357-58.

44. *Id.* at 358.

45. *Id.* at 360.

46. Concluding that the Act was civil in nature, the Court reasoned that involuntary confinement was not punitive and that the State's intent was to provide treatment. *Id.* at 363,

The Supreme Court decided *Hendricks* while an as-applied challenge to a similar SVP statute was pending on appeal.[47] The respondent in that case challenged the Washington Community Protection Act of 1990 and similarly argued that the law as applied violated the Double Jeopardy and Ex Post Facto Clauses.[48] The Ninth Circuit held that a facially valid civil commitment statute can be deemed punitive as applied so long as the actual confinement conditions provide clear proof that the statutory scheme is punitive in effect.[49] Because the Washington Supreme Court determined that the Act was civil in a separate suit,[50] the U.S. Supreme Court reasoned that the Act could not "be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and *Ex Post Facto* Clauses."[51]

In 2002, the Supreme Court granted certiorari in *Kansas v. Crane* to clarify the requirements *Hendricks* imposed on SVP civil commitment statutes.[52] A trial court had committed Michael Crane as a sexually violent predator under the same Kansas statute at issue in *Hendricks*.[53] Crane appealed to the Supreme Court of Kansas, arguing that the trial court failed to satisfy *Hendricks*'s requirement that it find Crane unable to control his dangerous behavior before subjecting him to civil commitment.[54] The Kansas Supreme Court agreed and reversed the trial court's civil commitment order.[55]

On review, the United States Supreme Court held that the Act did not require the State to prove a respondent's "*total* or *complete*

366, 369.

47. Young v. Weston, 192 F.3d 870, 873 (9th Cir. 1999), *rev'd sub nom*. Seling v. Young, 531 U.S. 250 (2001).

48. *Id.* at 872-73.

49. *Id.* at 874. The case was remanded to the district court to determine if the conditions were in fact punitive in effect. *Id.* at 877.

50. *See In re* Young, 857 P.2d 989, 1018 (Wash. 1993).

51. *Seling*, 531 U.S. at 267. Additionally, *Hendricks* "expressly disapproved" of evaluating whether an Act was civil in nature by referencing the Act's effect on one individual. *Id.* at 262 (citing Hudson v. United States, 522 U.S. 93 (1997)). The Court further opined that an "as-applied" analysis would be an "unworkable" standard. *Id.* at 263.

52. 534 U.S. 407, 411 (2002).

53. *In re* Crane, 7 P.3d 285, 286 (Kan. 2000).

54. *Id.* at 287.

55. *Id.* at 290, 294.

lack of control" over his or her dangerous behavior.[56] However, the Court nonetheless held that to satisfy federal constitutional requirements, the state must at least show that a respondent has "serious" difficulty controlling his or her behavior.[57] The Court found this volitional element essential for the civil commitment of sexually violent predators because it distinguishes those offenders "from the dangerous but typical recidivist convicted in an ordinary criminal case" not subject to additional confinement upon release.[58] The constitutionality of SVP civil commitment laws has remained relatively undisturbed since *Crane*.

C. The Federal Statute and Recent Challenges

Though the United States Supreme Court upheld various state SVP civil commitment statutes it reviewed in 1997 and 2002, Congress did not promulgate its own SVP statute until 2006, when it enacted the Adam Walsh Child Protection and Safety Act.[59] The Act provides a comprehensive statutory scheme to regulate sex offenders released from federal confinement.[60] Section 302 of the Act allows for the civil commitment of sexually dangerous federal prisoners.[61] In *United States v. Comstock*, the Supreme Court upheld Congress's authority to enact the Act under the Necessary and Proper Clause.[62]

A more recent challenge to the constitutionality of SVP statutes occurred in 2015.[63] In *Karsjens v. Jesson*, the plaintiffs, a class of

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56. *Crane*, 534 U.S. at 411.

57. *Id.* at 412-13. The Court reasoned that the lack of control requirement need not be "absolute," as that would be an "unworkable" standard. *Id.* at 411.

58. *Id.* at 413 (first citing Kansas v. Hendricks, 521 U.S. 346, 357-58 (1997); and then citing Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992)).

59. Adam Walsh Child Protection and Safety Act of 2006 § 302, 18 U.S.C. § 4248; CHARLES DOYLE, CONG. RSCH. SERV., RS22646, ADAM WALSH CHILD PROTECTION AND SAFETY ACT: A SKETCH 3 (2007).

60. *See* 18 U.S.C. § 4247. Unlike state SVP civil commitment laws, the federal statute requires "serious difficulty in refraining from sexually violent conduct or child molestation if released" instead of a likelihood to commit sex offenses. *Compare id.* § 4247(a)(6), *with* Act of May 9, 1994, ch. 316, § 2(a), 1994 Kan. Sess. Laws 1824, 1825.

61. Adam Walsh Child Protection and Safety Act § 302.

62. 560 U.S. 126, 133 (2010).

63. *See* Karsjens v. Jesson, 109 F. Supp. 3d 1139, 1143 (D. Minn. 2015), *rev'd sub nom.* Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).

over seven hundred individuals civilly committed under the Minnesota Sex Offender Program, challenged the constitutionality of the program's governing statutes both as written and as applied.[64] The district court applied strict scrutiny when conducting a substantive due process analysis, reasoning that civil commitment significantly infringed on the plaintiffs' liberty.[65] By looking to ample findings of fact regarding the Minnesota Sex Offender Program,[66] the court found the statutory scheme unconstitutional because it was "not narrowly tailored" to provide treatment and had a primarily "punitive effect."[67] On appeal, the Eighth Circuit clarified that rational basis was instead the proper level of scrutiny.[68] In its analysis, the court held that Minnesota's statutory scheme was rationally related to the State's interest in protecting the public from sexually dangerous persons.[69] Although courts have repeatedly held that SVP civil commitment laws satisfy substantive due process, the scope of respondents' procedural due process protections remains largely unsettled.

II. CURRENT PROCEDURAL PROTECTIONS IN SVP CIVIL COMMITMENT PROCEEDINGS

The Fifth and Fourteenth Amendments prohibit the federal and state governments from depriving a person of life, liberty, or property without using adequate procedures.[70] At a minimum, procedural due process requires notice,[71] an opportunity to be heard[72] "at

64. *Id.* at 1143, 1145.

65. *Id.* at 1166-67.

66. *See id.* at 1145-64. The court highlighted the fact that not a single respondent had been released from two facilities since the program began in 1994. *Id.* at 1144.

67. *Id.* at 1173. "One reason why we must be so careful about civil commitment is that it can be used by the state to segregate undesirables from society by labeling them with a mental abnormality or personality disorder." *Id.* at 1143.

68. Karsjens v. Piper, 845 F.3d 394, 407-08 (8th Cir. 2017) (stating that the Supreme Court "has never declared that persons who pose a significant danger to themselves or others possess a fundamental liberty interest in freedom from physical restraint").

69. *Id.* at 409-10.

70. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 557 (4th ed. 2011).

71. *See* Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).

72. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

a meaningful time and in a meaningful manner,"[73] and a decision by a neutral decision maker.[74] Procedural due process is a flexible concept, and the necessary protections vary by context.[75] When there has been a deprivation of liberty and due process is required, courts use the *Mathews* balancing test to decide the proper procedural safeguards.[76] Sufficient procedural protections are necessary to ensure accurate fact-finding and provide fair process when significant decisions are made.[77]

The Supreme Court has held that civil commitment raises due process concerns because of the "significant deprivation of liberty" it entails.[78] Although respondents subject to civil commitment proceedings do not enjoy the same rights as those subject to criminal proceedings, states have statutorily or judicially provided many of the same procedural protections criminal defendants receive.[79]

A. Overview of the SVP Civil Commitment Proceeding

Wide variation exists among the twenty state SVP civil commitment statutes.[80] Generally, the process begins when a state attorney sees that a prisoner will soon be released from custody and then files a petition to refer the prisoner to civil commitment.[81] After a

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73. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

74. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Gibson v. Berryhill, 411 U.S. 564, 579 (1973).

75. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

76. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976); *see also Mathews Test*, CONG.GOV: CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt5_4_4_3_2_1/ [https://perma.cc/ML7F-5XSK].

77. *See Mathews*, 424 U.S. at 344.

78. Addington v. Texas, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

79. *See, e.g.*, People v. Sanders, 137 Cal. Rptr. 3d 830, 836 (Ct. App. 2012) ("[A]lthough involuntary civil commitment proceedings under the SVPA are distinct from criminal proceedings, [courts] look to the standards and precedents established in the analogous criminal context for guidance.").

80. *See* WASH. STATE INST. FOR PUB. POL'Y, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS (2005), http://www.wsipp.wa.gov/reportfile/899/wsipp_involuntary-commitment-of-sexually-violent-predators-comparing-state-laws_full-report.pdf [https://perma.cc/U8NE-DCNP]. Of interest, Pennsylvania's civil commitment law of sexually violent predators applies only to minors. *See* 42 PA. CONS. STAT. § 6401 (2020).

81. *See, e.g.*, FLA. STAT. § 394.9125 (2016).

petition is filed, most states require a hearing to determine if there is probable cause to find that the respondent (the prisoner in question) is a sexually violent predator.[82] If the court concludes that probable cause exists, a trial is held to determine whether the respondent is in fact a sexually violent predator.[83] The respondent is entitled to notice of the probable cause hearing and the trial and a right to be present at both.[84]

If the fact-finder concludes that the respondent is a sexually violent predator, the respondent is transferred to a treatment facility and is likely to spend the remainder of his or her life in confinement.[85] The respondent may periodically (most commonly once each year) petition for release.[86] To be granted release, the respondent must show a change of circumstances demonstrating that he or she is no longer a danger to the community.[87]

B. Respondents' Rights at Trial

Because these commitment proceedings are civil in nature, respondents are not constitutionally entitled to the same rights as criminal defendants—including the right to counsel.[88] Despite this, all twenty states and the federal government provide indigent respondents the right to counsel in SVP proceedings.[89] Prior to the statutory enactment of the right to counsel, state courts looked to the United States Supreme Court's decision in *Vitek v. Jones* as support for the right.[90] In *Vitek*, the appellee, a prisoner, alleged that his transfer to a mental institution violated procedural due

82. *See, e.g.*, VA. CODE ANN. § 37.2-906 (2012).

83. *See, e.g.*, *id.* § 37.2-908.

84. *See, e.g.*, *id.* § 37.2-901.

85. *See, e.g.*, *id.* § 37.2-909(A); *see also* Corey Rayburn Yung, *Civil Commitment for Sex Offenders*, 15 AM. MED. ASS'N J. ETHICS: VIRTUAL MENTOR 873, 874 (2013).

86. *See, e.g.*, VA. CODE ANN. § 37.2-911(A).

87. *See, e.g.*, *id.* § 37.2-909(A).

88. *See supra* note 79 and accompanying text.

89. *See, e.g.*, 18 U.S.C. § 4247(d); ARIZ. REV. STAT. ANN. § 36-3704(C) (2020); CAL. WELF. & INST. CODE § 6603(a) (West 2020); 725 ILL. COMP. STAT. ANN. 207/25(c)(1) (West 2011); IOWA CODE § 229A.6(1) (2020); KAN. STAT. ANN. § 59-29a06(b) (2019); *In re* Fla. Rules of Civ. Proc. for Involuntary Commitment of Sexually Violent Predators, 13 So. 3d 1025, 1026, 1030 (Fla. 2009) (adopting a rule requiring judges to appoint an attorney to represent respondents in SVP civil commitment proceedings).

90. 445 U.S. 480 (1980).

process.[91] The majority was split on whether due process afforded the appellee the right to legal counsel. Four of the five Justices held that due process entitled an indigent individual to counsel.[92] Justice Powell's concurrence, which ultimately decided the issue, held that due process required only "qualified and independent assistance."[93] The Kansas and Virginia state supreme courts relied on *Vitek* in holding that a respondent had the right to counsel.[94] After recognizing a statutory right to counsel, several state courts have subsequently held that a respondent must necessarily have the right to effective counsel,[95] because without the right, the representation would be meaningless.[96]

Similarly, no right to a jury exists in civil commitment proceedings.[97] However, a majority of states have statutorily conferred this right. Of the twenty states with SVP civil commitment statutes, all but five allow for the respondent or state attorney to demand a trial by jury.[98] Minnesota, New Jersey, North Dakota, and Pennsylvania

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91. *Id.* at 484.

92. *Id.* at 482, 497.

93. *Id.* at 497 (Powell, J., concurring).

94. *In re* Ontiberos, 287 P.3d 855, 864 (Kan. 2012); Jenkins v. Dir. of the Va. Ctr. for Behav. Rehab., 624 S.E.2d 453, 459 (Va. 2006).

95. *See, e.g.*, Grado v. State (*In re* Grado), 559 S.W.3d 888, 896 (Mo. 2018); *In re* Care & Treatment of Chapman, 796 S.E.2d 843, 847 (S.C. 2017); *Ontiberos*, 287 P.3d at 865; *In re* Coe, 286 P.3d 29, 33 (Wash. 2012) (en banc); *Jenkins*, 624 S.E.2d at 460. The Supreme Court of Iowa adhered to the state's concession that because the Iowa statute provided the right to counsel, due process necessarily required the right to effective counsel. *In re* Crane, 704 N.W.2d 437, 438 & n.3 (Iowa 2005).

96. *See, e.g.*, *Ontiberos*, 287 P.3d at 863 ("[W]hen there is a right to counsel there is necessarily a correlative right to effective counsel—regardless of whether the right derives from a statute or the constitution.").

97. *See* United States v. Carta, 592 F.3d 34, 43 (1st Cir. 2010) ("[T]he claim to a jury trial right in civil commitments has been rejected under not only the Due Process Clause, but also the Sixth and Seventh Amendments." (citation omitted)); Poole v. Goodno, 335 F.3d 705, 710-11 (8th Cir. 2003); United States v. Sahhar, 917 F.2d 1197, 1205-06 (9th Cir. 1990).

98. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3706 (2020); CAL. WELF. & INST. CODE § 6603(a)-(b) (West 2020); 725 ILL. COMP. STAT. ANN. 207/35(c) (West 2011); KAN. STAT. ANN. § 59-29a06(d) (2019); *In re* Fla. Rules of Civ. Proc. for Involuntary Commitment of Sexually Violent Predators, 13 So. 3d 1025, 1026 (2009). In some jurisdictions, the judge may also demand a jury trial. *See, e.g.*, IOWA CODE § 229A.7(4) (2020). The federal SVP civil commitment statute, 18 U.S.C. § 4248, does not provide for a jury trial. *See* United States v. Veltman, 9 F.3d 718, 721 (8th Cir. 1993).

require a bench trial.[99] Nebraska uniquely requires that a mental health board conduct the hearing.[100]

Additionally, the burden of proof required at trial varies. The Court's holding in *Addington v. Texas* established that the state's burden to civilly commit an individual is the clear and convincing evidence standard.[101] States are currently split on the issue. Ten states use the heightened criminal standard of beyond a reasonable doubt,[102] and the remaining ten states as well as the federal government require the clear and convincing evidence standard.[103]

SVP civil commitment statutes provide respondents the right to present evidence and cross-examine witnesses in their commitment proceedings,[104] but respondents do not have a Sixth Amendment right to confrontation.[105] Furthermore, the majority of state courts have held that due process does not entitle a respondent to be deemed incompetent to stand trial in an SVP proceeding.[106] However, the Florida Second District Court of Appeal recognized a limited right to a competency determination in SVP civil commitment hearings.[107] The Florida court held that a respondent has a due process right to a competency determination "when the State intends to present hearsay evidence of alleged facts that have

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99. *See* MINN. STAT. § 253D.11(1) (2019); N.J. STAT. ANN. § 30:4-27.33 (West 1999); N.D. CENT. CODE § 25-03.3-13 (2007); 42 PA. CONS. STAT. § 6403(c)(5) (2019).

100. *See* NEB. REV. STAT. § 71-1208 (2006).

101. 441 U.S. 418, 433 (1979).

102. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3707(A); 725 ILL. COMP. STAT. ANN. 207/35(d)(1)-(2); IOWA CODE ANN. § 229A.7(5)(a); KAN. STAT. ANN. § 59-29a07(a).

103. *See, e.g.*, FLA. STAT. § 394.918(4) (2014); MINN. STAT. § 253D.07(3); MO. REV. STAT. § 632.495(1) (2009); NEB. REV. STAT. § 71-1209(1).

104. *See, e.g.*, VA. CODE ANN. § 37.2-901 (2011).

105. *See, e.g.*, State v. Stout (*In re* Det. of Stout), 150 P.3d 86, 92-93 (Wash. 2007) ("[T]he Sixth Amendment right to confrontation is available only to criminal defendants. As such, the Sixth Amendment right to confrontation is not available to an individual challenging an SVP commitment." (citations omitted)).

106. *See* Moore v. Superior Ct., 237 P.3d 530, 547 (Cal. 2010); State v. Cubbage (*In re* Det. of Cubbage), 671 N.W.2d 442, 443 (Iowa 2003); Commonwealth v. Nieves, 846 N.E.2d 379, 381 (Mass. 2006); *In re* Commitment of Fisher, 164 S.W.3d 637, 656 (Tex. 2005). The supreme courts of California and Massachusetts applied the *Mathews* test or a similar balancing test when determining if a right to competency existed. *See Moore*, 237 P.3d at 543-44; *Nieves*, 846 N.E.2d at 385. The remaining courts engaged in a partial due process analysis. *See, e.g.*, *Fisher*, 164 S.W.3d at 653-54. Iowa, as an outlier, applied a substantive due process analysis. *See Cubbage*, 671 N.W.2d at 446.

107. *See* Branch v. State (*In re* Commitment of Branch), 890 So. 2d 322, 329 (Fla. Dist. Ct. App. 2004).

neither been admitted by way of a plea nor subjected to adversarial testing at trial and so are subject to dispute and counterevidence."[108]

Several state courts have applied the right to a speedy trial in SVP civil commitment proceedings.[109] These courts held that excessive delay in civil commitment proceedings can violate a respondent's due process rights.[110]

III. EMPIRICAL FINDINGS ON SVP CIVIL COMMITMENT PROCEEDINGS

Recent studies regarding respondents and juries in SVP civil commitment proceedings raise concerns about the adequacy of the current process respondents receive. Jurors, courts, and the general public tend to dramatically overestimate a past offender's risk of reoffense.[111] In fact, even the Supreme Court has repeatedly pointed to the alleged "high rate of recidivism among convicted sex offenders"[112] and described it as "frightening."[113] Justice Kennedy estimated the rate of recidivism for sexual offenders to be as high as 80 percent.[114]

The public similarly believes convicted sex offenders have a high chance of reoffending. In one study, those surveyed believed the risk of reoffense was 74 percent on average.[115] Actual recidivism rates,

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108. *Id.*

109. *See, e.g.*, Morel v. Wilkins, 84 So. 3d 226, 246 (Fla. 2012) (assuming the respondent was entitled to the right to a speedy trial); *In re* Fowler, 784 N.W.2d 184, 189 (Iowa 2010); *In re* Ellison, 385 P.3d 15, 30 (Kan. 2016). The Supreme Court of Iowa found that Iowa's sexually violent predator statute, which required that an action for civil commitment be prosecuted within ninety days, satisfied the right to a speedy trial. *Fowler*, 784 N.W.2d at 189-90, 192. The Kansas Supreme Court applied the *Barker* test and determined that respondent's due process rights were violated by a four-year delay. *Ellison*, 385 P.3d at 22, 29-30 (citing Barker v. Wingo, 407 U.S. 514 (1972)).

110. *See, e.g.*, *Ellison*, 385 P.3d at 22.

111. *See, e.g.*, Marcus T. Boccaccini, Darrel B. Turner, Daniel C. Murrie, Craig E. Henderson & Caroline Chevalier, *Do Scores from Risk Measures Matter to Jurors?*, 19 PSYCH. PUB. POL'Y & L. 259, 268 (2013).

112. Smith v. Doe, 538 U.S. 84, 103 (2003).

113. McKune v. Lile, 536 U.S. 24, 33-34 (2002).

114. *Id.* at 33 (citing NAT'L INST. OF CORR., U.S. DEP'T OF JUST., A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER, at xiii (1988)).

115. Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137, 144, 149 (2007). Questionnaires were given to 193 residents of Melbourne,

however, are significantly lower.[116] A 2019 study by the United States Department of Justice (DOJ) found that in the nine years following release, only 7.7 percent of convicted sex offenders were subsequently arrested for a sex crime.[117] An earlier 2003 study by the DOJ found that just 5.3 percent of sex offenders were subsequently arrested for a new sex crime within three years of release.[118] The study further demonstrated that sex offenders were among the least likely to be rearrested for the same crime.[119]

Moreover, several studies have demonstrated jury bias against SVPs in civil commitment trials. In one study, Nicholas Scurich and Daniel Krauss presented 199 jury-eligible citizens with the facts of a civil commitment proceeding.[120] The study varied the amount of information presented and asked (1) whether the participant would commit the respondent and (2) what percent likelihood the participant believed the individual would recidivate.[121] Three out of four mock jurors voted to civilly commit the respondent before any evidence was presented.[122] These mock jurors believed that the respondent had a 59 percent chance of recidivating "based solely on the fact [that] he was referred for a commitment proceeding."[123] In other words, typical jurors display a distinct propensity to commit an individual referred for civil commitment proceedings even before a state has met its burden of proof.[124]

Furthermore, even when provided with a computed percentage reflecting a respondent's risk of recidivism, jurors tend to

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Florida. *Id.*

116. *See, e.g.*, MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., NCJ 251773, RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005-14), at 1 (2019). The study tracked prisoners released in 2005. *Id.* Of the released prisoners who were initially convicted of sexual assault or rape, 7.7 percent of them were subsequently arrested for sexual assault or rape within nine years of release. *Id.* at 5.

117. *Id.* at 5.

118. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., NCJ 198281, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 24 (2003).

119. *See id.* at 34.

120. Nicholas Scurich & Daniel A. Krauss, *The Presumption of Dangerousness in Sexually Violent Predator Commitment Proceedings*, 13 LAW, PROBABILITY & RISK 91, 94 (2014).

121. *Id.*

122. *Id.* at 99.

123. *Id.* ("Jurors' high estimates of recidivism coupled with their low implicit threshold for commitment carries the implication that the majority of SVP respondents are foredoomed once the decision to pursue commitment is made by the district attorney.").

124. *See id.* at 100.

overestimate the risk. Marcus Boccaccini and others surveyed jurors at the end of twenty-six SVP civil commitment proceedings that took place in Montgomery County, Texas.[125] Twenty-five of the proceedings resulted in the respondent's commitment.[126] One ended with a hung jury, but the respondent was subsequently committed after a new trial.[127] At these trials, a psychologist or psychiatrist testified as to the respondent's estimated risk of reoffense, which was calculated using industry-accepted actuarial risk assessment instruments.[128] These instruments, such as the Static-99 test, take into account a number of risk factors such as the age of the respondent, prior offenses, and the victim's sex.[129] The researchers found that jurors' perceptions of a respondent's risk of recidivism were not influenced by differing risk scores.[130]

In order to meet the definition of a sexually violent predator under a SVP statute, jurisdictions require a finding that the respondent is likely to reoffend.[131] However, the majority of jurisdictions do not quantify how high this risk of reoffense must be to warrant commitment, leaving the task to judges or jurors.[132] Thus, if the fact-finder believes a 0.01 percent risk constitutes a sufficient likelihood to reoffend, a respondent may be committed. One study polled 153 jurors who had rendered decisions in SVP civil commitment proceedings in Texas,[133] one of the many states that does not identify a specific threshold for the prerequisite "likely to reoffend"

125. Boccaccini et al., *supra* note 111, at 261.

126. *Id.*

127. *Id.*

128. *See id.*

129. *See, e.g.*, *id.*; *Static-99/Static-99R*, STATIC-99, http://www.static99.org [https://perma.cc/UU9J-RZJF].

130. Boccaccini et al., *supra* note 111, at 268.

131. *See, e.g.*, VA. CODE ANN. § 37.2-900 (2020).

132. *See, e.g.*, Jefferson C. Knighton, Daniel C. Murrie, Marcus T. Boccaccini & Darrel B. Turner, *How Likely Is "Likely to Reoffend" in Sex Offender Civil Commitment Trials?*, 38 LAW & HUM. BEHAV. 293, 297-98 (2014).

133. *See id.* at 298-99. The questionnaire asked, "If there was a 1% chance that an offender would commit a new sex crime, would you say that he was likely to commit a new sex crime?" *Id.* at 299. The questions subsequently asked about higher rates and participants could answer "yes" or "no." *Id.*

element.[134] In total, 53.6 percent of the jurors considered a 1 percent risk of reoffense as sufficient to commit a respondent.[135]

Judges, on the other hand, appear to be more flexible regarding judgment of a respondent's risk of reoffense. One study questioned twenty-six judges to determine what degree of risk for reoffense justifies commitment.[136] Unlike the jurors in the previous study, only 11.5 percent of these judges would civilly commit a respondent with a 1 percent risk of committing a violent act.[137] About 73 percent would commit a respondent with a 26 percent risk, and all of the judges studied would commit a respondent with a 56 percent or greater risk of recidivism.[138]

These empirical studies raise significant concerns as to whether respondents currently receive adequate and fair process. SVP civil commitment proceedings warrant heightened procedural protections because they impose severe limitations on respondents' liberties. As explained below, the *Mathews* test provides the proper analysis for expanding the scope of protections.

IV. THE *MATHEWS* TEST

The Supreme Court in *Mathews v. Eldridge* outlined a three-factor balancing test to determine which procedures are required to satisfy due process.[139] In *Mathews*, the appellee alleged that he had not received adequate process when his Social Security disability benefits were terminated because he was not provided an evidentiary hearing.[140] To determine the required procedural protections, the Court weighed (1) the private interest affected by government action, (2) "the risk of an erroneous deprivation of such interest" and the probable value of any additional or substitute procedural requirements, and (3) the government's interest and any burden

134. *See id.* at 298.

135. *Id.* at 300. Of the jurors, 81.7 percent considered a 15 percent chance of recidivism sufficient, and 97.4 percent considered a 25 percent chance sufficient. *Id.*

136. John Monahan & Eric Silver, *Judicial Decision Thresholds for Violence Risk Management*, 2 INT'L J. FORENSIC MENTAL HEALTH 1, 2-3 (2003).

137. *Id.* at 2-4.

138. *Id.*

139. 424 U.S. 319, 334-35 (1976) (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1973)).

140. *See id.* at 323.

imposed by additional procedural requirements.[141] Upon balancing these three factors, the Court concluded that the lack of an evidentiary hearing prior to the termination did not violate procedural due process.[142]

Although *Mathews* addressed the proper scope of procedural due process in an administrative proceeding, the Court later held that *Mathews* is the "general approach for testing challenged state procedures under a due process claim."[143] The Court has continued to apply the *Mathews* test to a variety of contexts.[144]

The Court's use of the *Mathews* test in subsequent cases has helped clarify the weight of each factor. As to the first factor, the more important the Court deems the private interest at stake, the greater the need for protection.[145] Turning to the second factor, the more likely the additional procedure will lead to accurate fact-finding, the more likely the Court will expand procedural protections.[146] As to the last factor, if the additional procedure requires great government expense, the Court is less likely to expand procedural protections.[147] These factors should not be considered based on the specific facts a petitioner alleges but instead by looking at how the system generally operates.[148]

Under the *Mathews* test, courts have significant discretion when evaluating and balancing these competing interests. How a court characterizes the private interest at stake and the risk of error determines whether a petitioner's challenge will succeed.[149] Justice Rehnquist, in a dissenting opinion, described the test as "simply an ad hoc weighing which depends to a great extent upon how the

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141. *Id.* at 335.

142. *Id.* at 349.

143. Parham v. J.R., 442 U.S. 584, 599-600 (1979).

144. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 781 (2008) (applying *Mathews* to determine the scope of protections in habeas corpus proceedings); Hamdi v. Rumsfeld, 542 U.S. 507, 528-33 (2004) (applying *Mathews* to the detention of enemy combatants).

145. CHEMERINSKY, *supra* note 70, at 594.

146. *Id.*

147. *Id.*

148. Mathews v. Eldridge, 424 U.S. 319, 344 (1976) ("[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.").

149. *See supra* notes 145-48.

Court subjectively views the underlying interests at stake."[150] State appellate courts have looked to the *Mathews* test for guidance when determining the adequacy of procedural due process in SVP civil commitment proceedings.

A. State Appellate Courts' Mathews *Analysis*

In the past decade, significant litigation has ensued attempting to discern the scope of procedural protections a respondent is entitled to in SVP civil commitment proceedings. State appellate courts have repeatedly held that the *Mathews* test is appropriate when analyzing the adequacy of procedural due process in SVP civil commitment proceedings.[151]

1. Characterizing the Private Interest

To begin the analysis, courts first characterize the private interest at stake. Many state appellate courts characterize the private interest in civil commitment proceedings as the respondent's potential loss of liberty.[152] The Iowa Supreme Court asserted that the respondent "has a private interest in his own personal liberty,"[153] and the Massachusetts Supreme Judicial Court stated that, if confined, a respondent's "loss of liberty would be total."[154] These courts further emphasized that commitment under SVP statutes is for an indefinite period.[155]

A few courts, including the New Hampshire and California supreme courts, have expanded the private interest at stake to include the stigmatization of being labeled a sexually violent predator.[156]

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150. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 562 (1985) (Rehnquist, J., dissenting).

151. *See, e.g.*, State v. Stout (*In re* Det. of Stout), 150 P.3d 86, 95 (Wash. 2007) (en banc) (asserting that the *Mathews* balancing test "is the appropriate test to use in determining what process is due in a given context, particularly where civil commitments are concerned").

152. *See, e.g.*, *In re* Morgan, 330 P.3d 774, 779 (Wash. 2014) (en banc).

153. *In re* Anderson, 895 N.W.2d 131, 149 (Iowa 2017).

154. Commonwealth v. Nieves, 846 N.E.2d 379, 385 (Mass. 2006).

155. *See, e.g.*, *id.*

156. *See, e.g.*, People v. Otto, 26 P.3d 1061, 1067 (Cal. 2001); State v. Ploof, 34 A.3d 563, 571 (N.H. 2011) (describing the private interest as the "loss of liberty and social stigmatization" (quoting *In re* Richard A., 771 A.2d 572, 576 (2001))).

The California Supreme Court also included a respondent's bodily autonomy interest because the respondent will be subject to unwanted medical treatment if confined.[157] These state appellate courts place great weight on a respondent's liberty interest.[158] The Washington Supreme Court opined that "[t]he first ... factor weighs in [respondent's] favor" and that a respondent "has a significant interest in his physical liberty."[159] Courts have emphasized that although the proceeding is classified as civil, this classification does not lessen the importance of the interest.[160]

2. The Risk of Error

Under the *Mathews* test's second prong, state appellate courts analyze the potential for erroneous commitment under current SVP statutes. Courts have taken two distinct approaches when analyzing the risk of error.

Courts that refrain from expanding procedural protections analyze the risk of error under the state's current statutory procedure. These courts point to other procedural safeguards present in their respective state's civil commitment statutes—such as the right to counsel, the right to cross-examine adverse witnesses, and the right to a jury (if provided)—to conclude that the risk of error is minimal.[161] Courts often recite a lengthy list of statutorily enacted protections before concluding that no substantial risk of error

157. *Otto*, 26 P.3d at 1067 (describing the private interests as "the significant limitations on [respondent's] liberty, the stigma of being classified as a sexually violent predator, and subjection to unwanted treatment").

158. *See, e.g.*, People v. Allen, 187 P.3d 1018, 1033 (Cal. 2008) ("[T]he first factor weighs heavily in favor of providing all reasonable procedures to prevent the erroneous deprivation of liberty interests.").

159. *In re* Morgan, 330 P.3d 774, 779 (Wash. 2014).

160. *See, e.g.*, *Allen*, 187 P.3d at 1032 ("The circumstance that a commitment is civil rather than criminal scarcely mitigates the severity of the restraint upon the [respondent's] liberty." (citing Conservatorship of Roulet, 23 Cal. 3d 219, 223-27 (1979))); *Ploof*, 34 A.3d at 571 (asserting that the private interests "are substantial and parallel those at risk in the criminal context" (quoting *In re Richard A.*, 771 A.2d at 576)).

161. *See, e.g.*, *Ploof*, 34 A.3d at 575 (detailing the procedural safeguards provided in the New Hampshire SVP civil commitment statute); *Morgan*, 330 P.3d at 779 ("Robust statutory guaranties in [the Washington statute] provide substantial protection against an erroneous deprivation of liberty.").

exists.[162] These courts do not adequately consider the risk of error alleged by the respondent, as such a notion is quickly cast aside.[163] This approach fails to consider that although a statutory procedure may provide a number of protections for respondents, it may still be deficient, thus warranting heightened protections.

In contrast, state appellate courts that have expanded procedural protections under the *Mathews* test analyze the risk of error in the absence of the proposed procedure.[164] Unlike the previous approach, these courts refrain from looking solely to the adequacy of current statutory requirements when determining if additional process is necessary.[165] The inquiry instead considers whether the alleged deficient procedure creates a risk of error.[166] Such courts discuss the probable value of any additional or substitute procedural requirements.[167]

Courts that use the second approach acknowledge that current SVP statutes provide significant procedural protections. They use such protections as evidence to support the first *Mathews* factor—the respondent's interest in the proceeding, as opposed to minimizing the second.[168] The Supreme Court of Kansas held that "the various protections and provisions benefiting a person subject to these proceedings that are provided by the [statute] certainly imply that the legislature perceived a person's substantial stake in the process and its outcomes."[169]

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162. *See, e.g.*, *Ploof*, 34 A.3d at 575.

163. *See, e.g.*, *id.*

164. *Allen*, 187 P.3d at 1033 ("[W]e consider the risk, in the absence of a right to testify, of an erroneous finding that the [respondent] is a sexually violent predator and the probable value, in reducing this risk, of allowing him or her to testify over the objection of counsel."); *In re* Young, 857 P.2d 989, 1011 (Wash. 1993) (en banc) ("Absent an opportunity to appear and respond to the petition for commitment, we believe that the risk of wrongful detention is too great.").

165. The Washington Supreme Court did not address the already-present procedural safeguards when determining whether additional process should be provided. *Young*, 857 P.2d at 1010-12.

166. *See Allen*, 187 P.3d at 1011.

167. *See, e.g.*, *Young*, 857 P.2d at 1011.

168. *See, e.g.*, *In re* Ontiberos, 287 P.3d 855, 865 (Kan. 2012).

169. *Id.*

3. The Government's Interest and Burden

Under the third prong of the *Mathews* test, state appellate courts have uniformly articulated the government's interest as protecting the public from violent sex offenders and providing treatment for these individuals.[170] Courts expanding procedural protections have held that the government's interest in confining violent sex offenders is furthered by providing procedural protections that ensure reliable outcomes at trial.[171] In other words, the government has an interest in confining only those individuals who actually pose a threat to others.[172] Additionally, when considering the financial and administrative burdens of additional procedures, courts expanding procedural protections argue that the first and the second *Mathews* factors outweigh any additional cost.[173] These courts therefore seek to minimize any additional administrative costs.

V. EXPANDING PROCEDURAL PROTECTIONS IN SVP CIVIL COMMITMENT PROCEEDINGS

As previously detailed, jurors do not act as neutral decision makers in SVP civil commitment trials.[174] As a result, current procedures must be expanded to ensure that respondents' significant liberty interests are adequately protected. This Part proposes an application of *Mathews* that more robustly protects procedural due process in SVP civil commitment proceedings and offers two additional protections for respondents.

A. Characterizing the Private Interest

In future litigation over the adequacy of process in SVP civil commitment proceedings, the private interests at issue should be framed as (1) the respondent's physical liberty, (2) the potential

170. *See, e.g.*, *In re* Morgan, 330 P.3d 774, 780 (Wash. 2014) (en banc).

171. *See, e.g.*, *Allen*, 187 P.3d at 1035 ("[T]he recognition of a right to testify over the objection of counsel may serve the government's interest in securing an accurate factual determination concerning the defendant's status as a sexually violent predator.").

172. *See id.*

173. *See, e.g.*, *id.*

174. *See supra* Part III.

stigmatization resulting from the classification as an SVP, and (3) the respondent's autonomy interest opposing forced treatment.

The liberty interest at stake in SVP civil commitment proceedings is enormous. Ample findings repeatedly demonstrate that most respondents are confined for the remainder of their lives.[175] In essence, civil confinement under current SVP laws operates as a life sentence.[176] Although the proceeding is civil in nature, this classification does not detract from the respondent's loss of liberty.[177] Accordingly, a respondent's liberty interest closely mirrors that of a criminal defendant.

If a respondent is committed to a treatment facility, the conditions and restrictions are similar to that of incarceration. As with imprisonment, an individual is unable to leave the premises, the premises is under high security, and the individual is confined in close quarters.[178] The United States Supreme Court has even acknowledged that civil commitment implicates a significant deprivation of liberty.[179]

In order to strengthen the first *Mathews* factor, one should list the respondent's interest against stigmatization and interest in his or her bodily autonomy. As to the stigmatization of the SVP classification, the analysis should consider how such a label marks the individual as immoral and fuels public animosity towards convicted sex offenders.[180] Turning to the respondent's interest against forced treatment, one must look to ethical principles of autonomy that advocate respect for an individual's choice.[181] After discussing these three private interests, one should conclude that the private interests at stake—most notably the respondent's liberty interest—weigh heavily in the respondent's favor.

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175. *See, e.g.*, Ridgeway, *supra* note 18.

176. *See id.*

177. *See, e.g.*, *Allen*, 187 P.3d at 1032; State v. Ploof, 34 A.3d 563, 571 (N.H. 2011).

178. *See* Neyfakh, *supra* note 19.

179. Jones v. United States, 463 U.S. 354, 361 (1983) ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty.'" (quoting Addington v. Texas, 441 U.S. 418, 425 (1979))).

180. *See* People v. Otto, 26 P.3d 1061, 1067 (Cal. 2001).

181. *See id.*

B. The Risk of Error

Proceeding to the second *Mathews* factor, the analysis should consider the scope of existing procedural protections provided by the current SVP statute. Such courts may discuss the statutory right to counsel[182] or, if adopted by the jurisdiction, the heightened burden of proof in SVP proceedings.[183] The existence of current procedural protections arguably provides evidence of a respondent's interest in the proceeding.[184] In other words, current protections acknowledge a respondent's significant liberty interest at stake. However, the analysis must not end there. The analysis should further consider the risk of error currently present in SVP commitment proceedings.[185]

Direct findings of error are not necessary if one can articulate the probability of error resulting from current procedures. Although respondents receive certain procedural protections under current SVP laws, there exists a significant risk of error in jurisdictions conducting jury trials.[186] Specifically, jurors demonstrate a propensity to conclude that a respondent is a sexually violent predator before any evidence is presented at trial.[187] These jurors reason that a respondent is likely to recidivate because he or she has been referred to SVP proceedings.[188] Yet this belief runs counter to the very core of the justice system—the presumption of innocence. The state bears the burden to prove, in these commitment proceedings, the respondent is a sexually violent predator.[189] However, these studies show that jurors are likely to commit an individual regardless of whether the state has established its burden of proof.[190]

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182. *See, e.g.*, VA. CODE ANN. § 37.2-901(2) (2011).

183. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3707(A) (2020) (adopting the beyond a reasonable doubt standard).

184. *See In re* Ontiberos, 287 P.3d 855, 865 (Kan. 2012).

185. *See In re* Young, 857 P.2d 989, 1011 (Wash. 1993).

186. *See supra* Part III.

187. Scurich & Krauss, *supra* note 120, at 99.

188. *Id.* (describing jurors' belief that the respondent had a 59 percent chance of recidivating because he or she was referred to commitment proceedings).

189. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3707(A) (2020).

190. *See supra* Part III.

During these jury trials, jurors tend to rely heavily on the underlying offense.[191] Additionally, jurors' aversion to and fear of sex offenders likely contribute to high commitment rates.[192] Such findings raise serious concerns of whether respondents are truly receiving a fair and impartial jury. Under the current system, jury bias likely results in the commitment of individuals who do not satisfy the prerequisite elements of the sexually violent predator classification.[193]

Because of the respondent's significant interests in the proceeding—most notably, his or her liberty interest—it is imperative that only those individuals who pose an imminent threat to society are confined.[194] A respondent's 1 percent likelihood of reoffending does not justify the severe deprivation of liberty that is indefinite commitment.[195] Jurors do not adequately weigh the risk of reoffense against the respondent's liberty interest.[196] Accordingly, additional procedures are warranted to ensure respondents receive a fair trial.

1. Mandatory Bench Trials

This Note proposes mandatory bench trials as an additional procedure. This proposal would not violate constitutional requirements, as no right to a jury exists for civil commitment proceedings.[197] Minnesota, New Jersey, North Dakota, and Pennsylvania already statutorily permit or mandate the use of bench trials in SVP proceedings.[198] Requiring a judge (instead of a jury) to find that

191. 2 DAVID L. FAIGMAN, EDWARD K. CHENG, JENNIFER L. MNOOKIN, ERIN E. MURPHY, JOSEPH SANDERS & CHRISTOPHER SLOBOGIN, MODERN SCIENTIFIC EVIDENCE 229 n.19 (2019-2020 ed.) ("We suspect that, in fact, only one criterion is doing all the work in these cases, and that is prior conviction of sexual offense. If so, this raises substantial constitutional concerns.").

192. *See* Levenson et al., *supra* note 115, at 139, 155.

193. *See supra* Part III.

194. *See supra* notes 175-77 and accompanying text.

195. *See, e.g.*, Knighton et al., *supra* note 132, at 301.

196. *See id.*

197. *See* United States v. Carta, 592 F.3d 34, 43 (1st Cir. 2010) (first citing United States v. Sahhar, 917 F.2d 1197, 1206-07 (9th Cir. 1990); then citing Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1256 (10th Cir. 2008); and then citing Poole v. Goodno, 335 F.3d 705, 710-11 (8th Cir. 2003)).

198. *See* MINN. STAT. § 253D.11(1) (2019); N.J. STAT. ANN. § 30:4-27.33(a) (West 2020); N.D. CENT. CODE § 25-03.3-13 (2019); 42 PA. CONS. STAT. § 6403(c)(5) (2019).

a respondent is a sexually violent predator would reduce the rate of erroneous commitments. As previously mentioned, empirical research shows that judges are better able to identify when a respondent's particular risk of recidivism actually warrants commitment.[199] Although jurors exhibit significant prejudice against respondents in commitment proceedings, judges appear to exhibit a greater degree of impartiality.[200]

A significantly lower percentage of judges, as compared to jurors, would commit a respondent with a 1 percent chance of recidivism.[201] Thus, judges appear to more adequately weigh what risk of recidivism warrants depriving a respondent of his or her physical freedom. Additionally, because a judge will preside over numerous SVP proceedings and hear experts testify to differing Static-99 scores, judges can better assess what scores warrant commitment.

But because respondents currently enjoy a statutory right to a jury trial in most jurisdictions,[202] this Note offers a second procedure to ensure respondents maintain this right.

2. Respondent's Unilateral Right to Request—or Waive—a Jury Trial

The second procedure would provide the respondent a unilateral right to request a jury trial. Currently, ten states permit the State, the respondent, or the judge to request a jury trial.[203] Four states permit the State or the respondent to request a jury trial.[204] This proposal maintains the respondent's right to elect a jury trial if the respondent believes a jury trial would be in his or her best interest.

Nonetheless, courts should also allow respondents to waive their right to a jury trial if they so wish. As the Ohio Supreme Court noted, if a respondent deems a jury trial to be "a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it?"[205] Subjecting respondents to jury trials

199. *See* Monahan & Silver, *supra* note 136, at 4.
200. *See id.*
201. *Compare id.*, *with* Knighton et al., *supra* note 132, at 300.
202. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3706 (2020).
203. *See, e.g.*, WASH. REV. CODE § 71.09.050(3) (2012).
204. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3706.
205. Hoffman v. State, 120 N.E. 234, 236 (Ohio 1918).

against their wishes is significantly troubling.[206] The government's insistence on a trial by jury would deprive the respondent of an impartial fact-finder because of the inherent bias in the current jury trial system.[207] And, as mentioned above, conducting SVP commitment proceedings by bench trials would likely reduce the risk of erroneous commitment.[208]

C. The Government's Interest and Burden

Addressing the third *Mathews* factor, one must concede that the government has an interest in public safety and in treating dangerous individuals.[209] However, one must also emphasize that the government has an interest in committing only those individuals who truly are, in fact, a danger to society. By framing the proposed protection as aiding the truth-finding process, the proposed procedure will reduce the rate of erroneous commitment.

As mentioned above, the two alternate procedures proposed—mandated bench trials and providing the respondent the unilateral right to a jury trial—ensure an accurate proceeding.[210] Thus, the procedures further the government's interest by confining only those individuals who actually pose a threat to the community. This leaves the government with solely an interest in limiting economic expenses.

Addressing the financial and administrative burden that these proposals impose on the government, it should be noted that the additional cost of the proposed procedures is likely minimal. Conducting SVP proceedings by bench trial would not pose a substantial financial or administrative burden on the government. To the contrary, the procedure is likely cost-effective. Jury trials are typically longer proceedings, and states regularly compensate jurors for their time in court.[211] Substituting jury trials with bench trials

206. *See id.*

207. *See supra* Part III (describing jurors' propensity to convict respondents in SVP civil commitment proceedings).

208. *See supra* Part V.B.1.

209. *See In re* Morgan, 330 P.3d 774, 780 (Wash. 2014) (en banc).

210. *See supra* Part V.B.

211. *See, e.g.*, VA. CODE ANN. § 17.1-618 (1998) (compensating jurors thirty dollars a day for appearing in court).

would thus decrease costs. Regarding administration, judges are already present during jury trials for the commitment of sexually violent predators, so this would not increase judges' dockets.[212]

Even if the proposed procedures do generate additional costs, because a respondent's liberty interest is of such great significance and the risk of error is high, the first two factors outweigh any additional cost.[213] Therefore, additional administrative costs are warranted to ensure the respondent is given fair process.

VI. LIKELY COUNTERARGUMENTS

This Note has proposed two solutions to address jury bias in SVP civil commitment proceedings, but there are pertinent counterarguments. Those in favor of maintaining jury trials in SVP proceedings argue that jurors are better equipped to determine what degree of potential harm justifies confining an individual.[214] Specifically, because jurors reflect community values, their proponents argue that they are the proper arbiters of SVP civil commitment proceedings.[215]

However, as detailed above, jurors' animosity toward sex offenders prohibits them from forming an impartial decision.[216] Further, judges are able to reflect community values when determining if a respondent's risk of reoffense warrants commitment while remaining an impartial decision maker.[217] Additionally, judges are not insulated from public opinion; judicial retention elections[218]

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212. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3706 (2020).

213. *See* People v. Allen, 187 P.3d 1018, 1035 (Cal. 2008) (recognizing respondents' right to testify at SVP civil commitment proceedings because the importance of a reliable outcome at trial outweighs any fiscal or administrative concerns).

214. *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972) ("[T]he jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.").

215. *See id.*

216. *See supra* Part III.

217. *See* Monahan & Silver, *supra* note 136, at 4 (observing that judges recognized when individuals might be a danger to others and were willing to civilly commit them for that reason).

218. *See* Brandice Canes-Wrone, Tom S. Clark & Jee-Kwang Park, *Judicial Independence and Retention Elections*, 28 J.L. ECON. & ORG. 211, 228 (2012).

and potential media coverage[219] may encourage judges to act in accordance with public opinion. Thus, judges are able to reflect community values in SVP commitment proceedings while, at the same time, adequately weighing a respondent's liberty interest against the community's interest in public safety.

Additionally, some could argue that current voir dire practices are sufficient to identify bias among potential jurors. However, significant literature on juror research demonstrates that jurors are hesitant to disclose their true beliefs during voir dire.[220] Further complicating matters, individuals have difficulty detecting their own implicit biases.[221] Thus, current voir dire practices do not adequately account for jury bias.

This Note acknowledges the sensitivity concerning convicted sex offenders. Some may argue that procedural protections should not be expanded for sex offenders because they are an undeserving class. However, the United States Supreme Court has emphatically stated that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[222] Although respondents' underlying crimes are reprehensible, civil commitment constitutes a severe deprivation of liberty that warrants adequate procedural protections.[223] These respondents have successfully served their prison sentences, and civil commitment should not be used as a means of punishment.

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219. Claire S.H. Lim, James M. Snyder, Jr. & David Strömberg, *Measuring Media Influence on U.S. State Courts* 26 (Soc'y for Econ. Dynamics, Meeting Paper No. 1193, 2010), https://economicdynamics.org/meetpapers/2010/paper_1193.pdf [https://perma.cc/ERG9-8XXD] (finding that media coverage affects how elected state trial court judges sentence defendants in cases involving serious violent crimes).

220. *See, e.g.*, BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE 39 (2017) (describing how "a fair number of prospective jurors conceal or distort their true beliefs").

221. *Id.* at 44.

222. O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975) (first citing Cohen v. California, 403 U.S. 15, 24-26 (1971); then citing Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971); then citing Street v. New York, 394 U.S. 576, 592 (1969); and then citing U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)).

223. *See supra* Part V.A (describing respondent's liberty interest at stake).

CONCLUSION

Civil commitment under SVP laws involves a severe restriction of a respondent's liberty, as he or she faces commitment for an indefinite time period.[224] Current procedural protections should be expanded to help ensure that those individuals committed under SVP laws do, in fact, pose a danger to the community. Significant litigation has occurred in state appellate courts attempting to decipher the proper scope of procedural protections.[225] These state appellate courts diverge in their application of the *Mathews* test. This Note (1) proposes a more rights-protective application of *Mathews* to expand procedural protections for respondents in SVP civil commitment proceedings and (2) offers two additional procedures to better protect due process rights. Although sex offenders constitute an unpopular class, these individuals still deserve adequate process.

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224. *See supra* notes 18-20 and accompanying text.

225. *See supra* Part IV.

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