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Missouri's SVP Law: Time for a Change?

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MISSOURI'S SVP LAW: TIME FOR A CHANGE?

INTRODUCTION

The purposes of civil commitments are incapacitation—to protect society or the patient—and treatment. The idea behind such confinements is that a patient is “sick” and dangerous, that he must be locked up to be treated, and that when he gets “well,” he will be released.

While the statutory scheme is constitutional as written, I am doubtful about its constitutionality as applied. I concur in these cases, however, because I believe we should defer the constitutional questions to another day after seeing how the “sexually violent predator” law works in practice. The practices of the state over the next few years will show whether there is a meaningful attempt to treat those previously determined to be sick and dangerous, or whether these offenders will simply be warehoused without treatment and without meaningful efforts to re-integrate them into society.

For those labeled as “sexually violent predators,” the question is whether this confinement is likely to be a life sentence, without meaningful treatment, and without an attempt to tailor the infringement on liberty to that needed to effect treatment and to protect society.

....

Most importantly, the state must show through its confinement and treatment under the statute that the statute serves a proper non-punishment purpose. A principal premise of their confinement is treatment. If an inmate is at all susceptible to treatment, the state has a duty to provide that treatment. If the state simply warehouses these men, without appropriate treatment and without a meaningful means to achieve re-integration with society—rights that are accorded to other mental patients—their constitutional rights will be violated.

... [I]f this statute is used simply to impose life sentences of confinement based upon a labeling of the inmates’ thoughts; this Court will have a constitutional duty to take another look.¹

On August 30, 1998, Governor Mel Carnahan signed a series of laws that established the Sex Offender Rehabilitation and Treatment Services, more

1. *In re Care & Treatment of Norton*, 123 S.W.3d 170, 176, 182 (Mo. 2003) (en banc) (Wolff, J., concurring).

commonly referred to as SORTS.² Missouri Governor Carnahan had pushed for the creation of such a facility throughout the 1990s, after a sex offender from St. Louis County claimed that he would molest children again after his release from prison, in order to embarrass county officials.³ SORTS is based at the Southeast Missouri Mental Health Center in Farmington, Missouri, but the number of confined individuals has grown to the point that dozens of patients are also housed at Fulton State Hospital.⁴ SORTS began confining individuals in 1999, with the number of patients currently reaching approximately 200, with somewhere around twenty patients being admitted each year.⁵ The cost of such a program is anything but cheap. SORTS costs taxpayers \$25 million per year, which comes out to more than \$300 per patient, per day.⁶ Since the program's inception, not one person has completed treatment.⁷ After seventeen years, a federal court in Missouri issued what could be a landmark decision with respect to Missouri's civil commitment process.⁸ In *Van Orden v. Schafer*, a federal judge found that the SORTS civil commitment program's confinement of individuals who no longer meet the criteria for commitment renders the Missouri program unconstitutional as applied.⁹ This Comment intends to show why such a ruling is the correct interpretation of Missouri's involuntary civil commitment process.

This Comment seeks to examine the process of committing a sexually violent predator under Missouri law as well as the legality of the confinement facility itself. Part I of this Comment will look at the legal history of involuntary civil commitment laws in the United States. Part II will discuss Missouri's Sexually Violent Predator (SVP) Law, with a special emphasis on the process of confining an individual offender. Part III will then analyze the clinical assessment of a sex offender, a topic that has caused controversy in the fields of both law and psychology. Part IV then details the inner workings of SORTS, highlighting the many problems that plague the facility and that ultimately hinder the treatment process. Part V will then look at the recent

2. *SMMHC – Sex Offender Rehabilitation and Treatment Services*, MO. DEP'T OF MENTAL HEALTH, http://dmh.mo.gov/smmhc/sorts_about.html [<http://perma.cc/9SUD-7NWJ>] (last visited Feb. 24, 2016). The law became effective on January 1, 1999. *Id.*

3. Jesse Bogan, *Is Missouri's Sex-Crime Program a Ticking Time Bomb?*, ST. LOUIS POST-DISPATCH (Jan. 17, 2014), http://www.stltoday.com/news/local/metro/is-missouri-s-sex-crime-program-a-ticking-bomb/article_005d818e-ab5a-5006-8f97-629f787ce68b.html [<http://perma.cc/KF6H-D3QX>].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *See Van Orden v. Schafer*, No. 4:09-cv-00971 AGF, 2015 WL 5315753 (E.D. Mo. Sept. 11, 2015).

9. *Id.* at *3.

decision in *Van Orden v. Schafer* and analyze why the court came to the conclusion that it did. The conclusion of this Comment will summarize the various arguments criticizing Missouri's SVP Law and suggest that the Missouri Supreme Court "take another look" at the way these laws have been applied throughout their fourteen-year history.

Judge Wolff's concurring opinion in *In re Care & Treatment of Norton* should serve to constantly remind Missouri courts of the importance of examining the application of Missouri's SVP Law. Simply because the purpose stated in the statute renders the scheme constitutional does not mean that the same scheme automatically remains constitutional throughout its lifetime. This Comment seeks to examine the very question that Judge Wolff posed back in 2004: Has Missouri's SVP Law been constitutionally applied?

I. LEGAL BACKGROUND

A. *Constitutionality of the Civil Commitment of Sexual Offenders*

The first statute, which provided for civil commitment of sexual offenders and was upheld by the United States Supreme Court, was Chapter 369 Section 1 of the Minnesota State Code (1939).¹⁰ The Court upheld the constitutionality of this statute in the 1940 case *Minnesota ex rel. Pearson v. Probate Court*.¹¹ Charles Pearson sought a writ of prohibition ordering the probate court to "desist from proceeding against him as a 'psychopathic personality' under Chapter 369."¹² Chapter 369 made it lawful to indefinitely confine individuals who had a "habitual course of misconduct in sexual matters" and displayed an "utter lack of power to control their sexual impulses," making one "likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable [sexual] desire."¹³ This marked the first time the Supreme Court upheld a statute that provided for civil commitment.¹⁴

10. See *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 270–77 (1940). In 1939, the Minnesota legislature enacted a statute enabling involuntary civil commitment. Today, the statute allows for the involuntary hospitalization of any person that meets the statutory definition of "psychopathic personality." The statute's commitment procedure is similar to the procedures used to commit people who are considered mentally ill and dangerous (MID). However, the MID commitment statute requires a judicial determination that a person is both mentally ill and dangerous, while the Psychopathic Personality statute allows the state to hospitalize a person indefinitely, without first concluding that the person suffers from an illness known to medical science. C. Peter Erlinder, *Minnesota's Gulag: Involuntary Treatment for the "Politically Ill"*, 19 WM. MITCHELL L. REV. 99, 100 (1993).

11. Rachel Woodell Hill, *Seconds Anyone? Using the Missouri SVP Law to Punish After Time Served*, 74 MO. L. REV. 1191, 1196 (2009).

12. *Minnesota ex rel. Pearson*, 309 U.S. at 270.

13. *Id.* at 273.

14. Robert Bilbrey, *Civil Commitment of Sexually Violent Predators: A Misguided Attempt to Solve a Serious Problem*, 55 J. MO. B. 321, 322 (1999).

Pearson alleged that the statute was vague and indefinite in addition to violating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.¹⁵ However, the Supreme Court dismissed Pearson's contention that the statute was too vague or indefinite to be constitutional since the statute laid out the aforementioned distinct criteria.¹⁶ As to the due process contention, the Court found that the right to counsel, as well as the right to a hearing on the matter, was sufficient to protect any fundamental due process rights.¹⁷ Finally, and perhaps most importantly, the Court dismissed any equal protection concerns by finding that the legislature was within the bounds of the Constitution when it identified a class of individuals that posed a greater threat to society.¹⁸

B. "Non-Punitive" Involuntary Confinement: *Kansas v. Hendricks*

Leroy Hendricks was the first person that the State of Kansas attempted to commit under a law that provided for the civil commitment of sexually violent felons.¹⁹ The Kansas legislature initially passed this law in reaction to a 1993 crime in which a man who had previously been convicted of rape was again found guilty of raping and murdering a University of Kansas student.²⁰ The statute provided for a commitment hearing where the state has the burden of proving beyond a reasonable doubt²¹ that the individual "has been convicted of or charged with a sexually violent offense and . . . suffers from a *mental abnormality* or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."²²

Hendricks had been convicted of engaging in sexual activities with two thirteen-year-old boys.²³ Just before he was scheduled to be released, after serving nearly ten years in prison, the state filed a petition seeking Hendricks's civil confinement as a sexually violent predator.²⁴ During Hendricks's treatment, he admitted that he was unable to control his urge to molest children, even going so far as to state that "the only sure way he could keep from sexually abusing children in the future was 'to die.'"²⁵ Hendricks requested a jury trial, pursuant to the Kansas statute, at which a jury found

15. *Minnesota ex rel. Pearson*, 309 U.S. at 272.

16. *Id.* at 274.

17. Hill, *supra* note 11, at 1197.

18. *Minnesota ex el. Pearson*, 309 U.S. at 274–75.

19. Bilbrey, *supra* note 14, at 321.

20. *Id.* at 323.

21. *Id.* The standard of proof with respect to civil commitment hearings varies from state to state. See *infra* Part II(B) for the standard in Missouri.

22. Bilbrey, *supra* note 14, at 323 (emphasis added).

23. *Kansas v. Hendricks*, 521 U.S. 346, 353 (1997).

24. *Id.* at 353–54.

25. *Id.* at 355.

beyond a reasonable doubt that he was a sexually violent predator.²⁶ The Kansas Supreme Court, however, overturned Hendricks's civil commitment, finding that the statute was unconstitutional.²⁷ On review, the United States Supreme Court centered its analysis on the term "mental abnormality" to determine whether the term satisfied the due process requirements of the Constitution.²⁸ The issue at the heart of this case was whether or not the Kansas statute was essentially functioning as an *ex post facto* law, "[a] law enacted after commission of the offense and which punishes the offense by extending the term of confinement."²⁹ If the stated intention of the Kansas law, which was to provide treatment for these offenders, was merely serving as a pretext, then that would indicate that the actual purpose of the statute was to punish.³⁰

The Court ultimately concluded that the term did satisfy all due process requirements, concluding:

States have in certain narrow circumstances provided for the forcible civil detention of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. . . . We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.³¹

Justice Kennedy, in his concurring opinion, sought to warn against the dangers that exist when the civil confinement process is used in conjunction with the criminal process.³² According to Justice Kennedy, "[t]he concern . . . is whether it is the criminal system or the civil system which should make the decision in the first place. . . . [W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."³³ Justice Kennedy concluded by pointing out that the statute, as written, conforms to the Court's precedent, but if civil confinement became a "mechanism for retribution or general deterrence," then that would cease to be the case.³⁴

26. *Id.* at 354–55.

27. Bilbrey, *supra* note 14, at 323.

28. *Id.*

29. *Hendricks*, 521 U.S. at 371 (Kennedy, J., concurring).

30. *Id.*

31. *Id.* at 357.

32. *Id.* at 371–73 (Kennedy, J., concurring).

33. *Id.* at 373.

34. *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring).

II. MISSOURI'S SEXUALLY VIOLENT PREDATOR LAW

A. *The Civil Commitment Process*

In 1999, Missouri passed its very own sexually violent predator law, patterned after the Kansas statute that was the focus of the Supreme Court's analysis in *Kansas v. Hendricks*.³⁵ The civil commitment portion of this statute makes it lawful for the state to commit individuals who have been convicted of certain sexual offenses and place such individuals in a state mental health facility *after* they have served their criminal sentences.³⁶ In order to reach the determination of whether a person is a "sexually violent predator," it must be shown that he or she has a "mental abnormality."³⁷ A "mental abnormality" as defined by the Missouri state legislature is "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."³⁸

Before an individual can be confined involuntarily in Missouri, there are several procedures that must be performed in accordance with the state law.³⁹ This process begins when a prison inmate is "flagged" 360 days prior to his or her scheduled release by either the Department of Corrections or the Department of Mental Health.⁴⁰ A person is "flagged" if it is believed that he or she would be a danger to society upon release from prison, and this is communicated via a written notice to the attorney general, which includes the person's name, offense history, and any treatment either administered to or refused by the convicted sex offender.⁴¹ A multidisciplinary panel then reviews the individual's case in an effort to determine if the person qualifies to be committed as a sexually violent predator.⁴² If the multidisciplinary panel determines that the person in question meets the criteria for a sexually violent predator, then the report is sent to a prosecutor's review committee that has been appointed by the attorney general.⁴³ For the case to proceed, the

35. Bilbrey, *supra* note 14, at 321.

36. *Id.* The state mental health facility in Missouri is named SORTS and is located in Farmington, Missouri. Bogan, *supra* note 3.

37. MO. REV. STAT. § 632.480(5) (2015).

38. *Id.* § 632.480(2).

39. *Id.* § 632.483.

40. *Id.* § 632.483.1.

41. *Id.* § 632.483.2.

42. MO. REV. STAT. § 632.483.4 (2015).

43. *Id.* § 632.483.5.

The prosecutors coordinators training council established pursuant to section 56.760 shall appoint a five-member prosecutors' review committee composed of a cross section of county prosecutors from urban and rural counties. No more than three shall be from urban counties, and one member shall be the prosecuting attorney of the county in which the

prosecutor's review committee must decide, by a majority vote, whether to recommend to the attorney general that the individual be committed as a sexually violent predator.⁴⁴ Upon such a finding, the attorney general may file a petition in the probate division of the circuit court in which the person was convicted.⁴⁵ It is then for the probate judge to determine whether or not there is *probable cause* sufficient to establish that this individual is a sexually violent predator.⁴⁶ If the probate judge does indeed come to such a conclusion, he then must order the person to be taken into custody and confined to a secure facility.⁴⁷ At this point, the confined individual has the right to request notice of a hearing to contest the probate judge's finding. At the hearing, the accused is entitled to "be represented by an attorney, to present evidence, to cross-examine witnesses, and to view and copy all reports that have been filed with the court."⁴⁸ Then, the court determines if there should be a full probable cause hearing on the matter. If the probate judge's probable cause finding is upheld, then the accused individual must remain in a secure facility where an exam is to be conducted within sixty days by a psychiatrist or psychologist appointed by the Department of Mental Health.⁴⁹ Within sixty days of completion of this examination, the person has the right to a trial by jury and, again, to an attorney.⁵⁰ If the fact finder determines that there is *clear and convincing evidence* that the person is a sexually violent predator, "the person shall be committed to the custody of the director of the department of mental health for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large."⁵¹

B. *Standard of Proof: Clear and Convincing Evidence*

It is well known that when someone is sentenced to life in prison, or convicted of any crime for that matter, the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt.⁵² To show that an individual is a sexually violent predator in Missouri, and thus subject to involuntary confinement, the standard of proof is a much different one: "The court or jury shall determine whether, by *clear and convincing evidence*, the

person was convicted or committed pursuant to chapter 552, if the conviction was in this state.

Id.

44. Bilbrey, *supra* note 14, at 324.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Bilbrey, *supra* note 14, at 324.

50. *Id.*

51. MO. REV. STAT. § 632.495.2 (2015).

52. *See In re Winship*, 397 U.S. 358, 364 (1970).

person is a sexually violent predator.”⁵³ In 1999, when the Missouri legislature initially implemented the statutory scheme to confine sexually violent predators, the state was required to show “beyond a reasonable doubt that the individual had previously committed sexually violent acts and possessed a mental abnormality that made him or her likely to reoffend if released.”⁵⁴ In 2006, Missouri amended its SVP Law, lowering the burden of proof to the clear and convincing evidence standard.⁵⁵ These amendments created serious constitutional concerns, calling the legality of the entire statutory scheme into question.⁵⁶ The Missouri Supreme Court was soon after faced with addressing these concerns, as it did not take long for individuals to experience the ramifications of this new standard of proof.⁵⁷ The court, in *In re Care & Treatment of Van Orden*, examined the various burdens of proof that are assigned to categories of cases.⁵⁸ Specifically, the court noted that civil cases, involving a “fundamental right or liberty,” require a standard of clear and convincing evidence to “lessen[] the risk of an erroneous decision.”⁵⁹ However, in a criminal case, the state has the burden of proving its case beyond a reasonable doubt, in order to “impose[] almost the entire risk of error on the state.”⁶⁰ It follows, logically, that more individuals will be committed using this lesser clear and convincing standard. The issue, here, is that these individuals are potentially losing their freedom, a right only formerly revoked in criminal proceedings, not in civil ones.

In *In re Care & Treatment of Van Orden*, Richard Wheeler and John Van Orden each appealed their civil commitments to the Missouri Supreme Court.⁶¹ Wheeler had a sexually violent history involving children, stemming back to 1967 when he was charged with sodomy for allegedly molesting his nine-year-old male cousin when he was twenty years of age.⁶² Wheeler had multiple convictions related to sexual abuse over the next three decades.⁶³ In 1997, he was convicted of first-degree statutory sodomy, involving a four-year-old boy and was sentenced to ten years in prison.⁶⁴ During this sentence, Wheeler

53. MO. REV. STAT. § 632.495.1 (emphasis added). If a jury does indeed determine that a person is a sexually violent predator, then that determination must be by unanimous verdict. *Id.* Any determination that an individual is a sexually violent predator may be appealed. *Id.*

54. Hill, *supra* note 11, at 1191.

55. *Id.* at 1205.

56. *Id.* at 1191.

57. *Id.*

58. *Id.* at 1206.

59. Hill, *supra* note 11, at 1206.

60. *Id.*

61. *In re Care & Treatment of Van Orden*, 271 S.W.3d 579, 581–82 (Mo. 2008) (en banc).

62. *Id.* at 582.

63. *Id.*

64. *Id.* at 582–83.

refused to submit to sex offender treatment, and, prior to his release, a psychologist for the Department of Corrections sent notice to the attorney general after determining that he may meet the criteria for a sexually violent predator.⁶⁵ After a probable cause hearing, a court ultimately determined that Wheeler met the definition of a sexually violent predator and ordered his confinement.⁶⁶

John Van Orden first pled guilty to sexual misconduct, at the age of twenty-five, for sexual contact with his sixteen-year-old niece.⁶⁷ Five years later, Van Orden was convicted of first-degree sexual abuse for a crime that involved his five-year-old daughter.⁶⁸ In 1998, he was sentenced to seven years in prison after being convicted of first-degree child molestation for the abuse of a four-year-old female.⁶⁹ After completing the first two phases of sex offender treatment, Van Orden was released on parole in 2004.⁷⁰ After violating the conditions of his parole twice, he was transferred to the Fulton Reception and Diagnostic Center.⁷¹ One month later, the Department of Corrections sent written notice to the attorney general that Van Orden may meet the definition of a sexually violent predator.⁷² A jury trial was held in May of 2007, and Van Orden objected to the burden of proof, maintaining that “clear and convincing evidence” should be defined to the jury.⁷³ Van Orden argued that the jury instructions should include certain additional language to aid the jury in assessing whether the state’s burden had been met.⁷⁴ The trial court overruled the objection, and the jury found that Van Orden was a sexually violent predator, after which confinement was ordered.⁷⁵

65. *Id.* at 583.

66. *In re Care & Treatment of Van Orden*, 271 S.W.3d at 583.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *In re Care & Treatment of Van Orden*, 271 S.W.3d at 583.

72. *Id.*

73. *Id.* at 583–84.

74. *Id.* at 584. Van Orden submitted the following specific instructions to be submitted to the jury:

Clear and convincing evidence means that you are clearly convinced of the affirmative of the proposition to be proved. This does not mean that there may not be contrary evidence . . . For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and your mind is left with unabiding conviction that the evidence is true.

Id.

75. *Id.* at 584. At trial, the state produced a psychologist who diagnosed Van Orden with pedophilia and an anti-personality disorder. The psychologist further testified that, in his opinion, Van Orden was more likely than not to reoffend if he was not committed. The witness based his assessment of Van Orden on the results of the Static-99 actuarial test, which measures the likelihood of reoffending, and on his own assessment of Van Orden. *Id.* at 583–84.

Both Wheeler and Van Orden argued that Section 632.495 under Missouri law was unconstitutional in that it violated due process by not requiring the state to prove an individual was a sexually violent predator beyond a reasonable doubt.⁷⁶ The court's analysis distinguished the civil confinement category of cases from criminal cases, citing the United States Supreme Court's decision in *Addington v. Texas*.⁷⁷ In *Addington*, the Supreme Court found that "proof beyond a reasonable doubt was not constitutionally required because the state was not exercising its power in a punitive sense and the continuing opportunities for review minimized the risk of error."⁷⁸ Ultimately, however, the Supreme Court in *Addington* "found that the precise burden, whether clear and convincing evidence or beyond a reasonable doubt, was a matter of state law."⁷⁹ "Whether a beyond a reasonable doubt or clear and convincing evidence burden of proof is utilized to commit sexually violent predators is a matter of legislative prerogative."⁸⁰ The Missouri Supreme Court reasoned that proceedings such as the one before them concerning Wheeler and Van Orden were civil ones, even though they involved a liberty interest.⁸¹ It was the court's view that the state civil commitment statute served the purpose of both protecting society from possible violent predators, while also providing individuals with necessary treatment.⁸² The court cited several "safeguards" included within the statute that guarded against "erroneous commitment," such as the requirement that the person have previously committed a sexual offense, and that the person have the right to a probable cause hearing and the right to a trial by jury.⁸³ Finally, the court distinguished sexually violent predator cases from criminal proceedings by pointing out under the statute that "if commitment is ordered, the term of commitment is not indefinite."⁸⁴ The court's final rationale for upholding this clear and convincing evidence

76. *In re Care & Treatment of Van Orden*, 271 S.W.3d at 584–85.

77. *Id.* at 585; *Addington v. Texas*, 441 U.S. 418 (1979).

78. *Id.*

79. *Id.*

80. *Id.* (internal citation omitted).

81. *In re Care & Treatment of Van Orden*, 271 S.W.3d at 585.

82. *Id.*

83. *Id.*

84. *Id.* at 586. The Court referenced the statute in supporting its holding:

[I]f commitment is ordered, the term of commitment is not indefinite. A person committed as a sexually violent predator receives an annual review to determine if the person's mental abnormality has so changed that commitment is no longer necessary. The court reviews this report, and even if release is not recommended, the person may file a petition for release with the court at any time.

Id. (internal citations omitted).

threshold, and the statutory scheme as a whole, is one that rings hollow today.⁸⁵

III. CLINICAL ASSESSMENT WITHIN THE SVP PROCESS

A. Standard for “Mental Illness”

The requisite mental condition to be used in making an SVP determination differs throughout several states.⁸⁶ The various mental conditions have been classified as such: (1) mental disorder; (2) mental abnormality; (3) mental abnormality or personality disorder; and, (4) idiosyncratic definitions.⁸⁷ As mentioned in Part II, Missouri courts use “mental abnormality” as the standard when making SVP determinations.⁸⁸ There are several issues with the use of the “mental abnormality” standard, as has been pointed out by psychiatric professionals.⁸⁹ In the psychiatric field, mental illness is typically based upon a DSM-IV diagnosis, which uses structured interviews to come to a medical conclusion.⁹⁰ In contrast to this somewhat “bright-line” standard provided by the DSM-IV, “mental abnormality” is an ambiguous term that “lacks any diagnostic precision.”⁹¹ In *Kansas v. Hendricks*, the Court stated it was leaving it up to the individual states to define such medical terms that have legal significance.⁹² However, the Court added that the mental condition must cause the individual to have difficulty controlling his or her behavior.⁹³

As a result of the Supreme Court’s decision in *Hendricks*, the clinical condition actually causing a loss of “volitional impairment” is essential to SVP statutes.⁹⁴ Thus, the use of an ambiguous term such as “mental abnormality” creates a problem that is two-fold. First, those assessing individuals during the

85. To see how the standard for committing a sexual predator compares to committing an individual with other mental health issues, see *infra* note 90.

86. See Richard Rogers & Rebecca L. Jackson, *Sexually Violent Predators: The Risky Enterprise of Risk Assessment*, 33 J. AM. ACAD. PSYCHIATRY & L. 523, 524 (2005).

87. *Id.*

88. MO. REV. STAT. § 632.480(2) (2015).

89. See Rogers & Jackson, *supra* note 86, at 524.

90. *Id.* Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, more commonly known as DSM-IV, is a manual published by the American Psychiatric Association and covers all mental health disorders. The manual also lists known causes of these disorders along with suggested treatment approaches. Christopher L. Heffner, *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV)*, ALLPSYCH.COM, <http://allpsych.com/disorders/dsm/> [<http://perma.cc/4AUG-LG37>] (last visited Feb. 29, 2016). “This book is typically considered the ‘bible’ for any professional who makes psychiatric diagnoses in the United States.” *Id.*

91. Rogers & Jackson, *supra* note 86, at 524.

92. *Id.*

93. *Id.*

94. *Id.* at 525.

civil commitment process must develop consistently reliable methods to determine what qualifies a person as having a “mental abnormality” without having an idea as to the term’s true psychiatric definition.⁹⁵ Second, these mental health professionals must also be able to accurately determine when such a “mental abnormality” is actually causing volitional impairment.⁹⁶ This is such a difficult task that the American Bar Association (ABA) considers it nearly impossible.⁹⁷ In fact, the ABA has been persistent in supporting the elimination of the volitional impairment requirement since “there is still no accurate scientific basis for measuring one’s capacity for self-control or for calibrating the impairment of such capacity.”⁹⁸

B. *Treatment Enigma*

The treatment process that the state requires offenders to go through could certainly be considered counterintuitive. From one perspective, completion of statutorily required treatment should allow patients to be released, while also significantly improving their mental health.⁹⁹ On the other hand, as this section will show, certain aspects of required treatment can have serious legal consequences for the offender.¹⁰⁰ Furthermore, since statistically there is very little chance of a patient being released, especially in Missouri, there is very little incentive for an individual to attempt to complete a treatment process with such little perceived benefit.¹⁰¹

1. Legal Consequences for Offenders

Documents generated during treatment can be used in court in an effort to lengthen the confinement of the participating patient.¹⁰² According to the SORTS website, their treatment practices mandate an offender, among other things, admit he or she is a sex offender in need of treatment, disclose prior offenses, and discuss past unhealthy relationships.¹⁰³ Moreover, the Missouri statute grants the court the authority to order the offender be subject to certain

95. *Id.*

96. Rogers & Jackson, *supra* note 86, at 525.

97. *Id.*

98. *Id.*

99. Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2118 (2010).

100. *Id.*

101. See Bogan, *supra* note 3. “‘No one has ever graduated from [SORTS] and somewhere down the line, we have to do that or our treatment processes become a sham,’ Keith Schafer, the leader of the Department of Mental Health, wrote in an email in 2009.” *Id.*

102. Anita Schlank & Rick Harry, *The Treatment of the Civilly Committed Sex Offender in Minnesota: A Review of the Past Ten Years*, 29 WM. MITCHELL L. REV. 1221, 1223–24 (2003).

103. *Program Structure*, MO. DEP’T OF MENTAL HEALTH, http://dmh.mo.gov/smmhc/sorts_programs.html [<http://perma.cc/5VLH-BFDH>] (last visited Feb. 4, 2016).

conditions “as deemed necessary,” including “[submitting] to a polygraph, plethysmograph, or other electronic or behavioral monitoring or assessment;” and “[authorizing] the department of mental health to access and obtain copies of confidential records pertaining to evaluation, counseling, treatment, and other such records and provide the consent necessary for the release of any such records.”¹⁰⁴ Thus, anything that a patient admits to having done, during any and all phases of the treatment process, is discoverable.

Prosecutors are certainly aware of such statutory requirements, and, in fact, many prosecuting attorneys have a practice of obtaining treatment data that would otherwise be private as part of the pre-petition review to determine whether to continue confinement.¹⁰⁵ As a result, defense attorneys have advised offenders that it may be better not to participate in treatment, as they may actually increase their chances of being released since nonparticipation may be viewed more favorably than “failing” the treatment process.¹⁰⁶ Offenders have even been quoted as saying they refused treatment because “their attorney advise[d] them not to,” and “if they enroll, their written treatment assignments, assessments and progress notes will be subpoenaed by courts and used to prove they continue to need inpatient detainment and treatment.”¹⁰⁷

2. Where Is the Incentive?

In addition to the potentially devastating legal consequences that an offender may experience because of documents generated during treatment, there is also very little upside to be gained by actually participating. There are currently nearly 200 patients confined within the SORTS treatment facilities.¹⁰⁸ Since the program began in 1999, no one has completed treatment and been granted an unconditional release.¹⁰⁹ SORTS asserts that the sex offender treatment program that takes place at their facilities consists of four phases: (1) pre-engagement/engagement, (2) cognitive restructuring, (3) emotional integration, and (4) community reintegration.¹¹⁰ According to the

104. MO. REV. STAT. § 632.505.3 (2015).

105. Eric S. Janus, *Minnesota's Sex Offender Commitment Program: Would an Empirically-Based Prevention Policy Be More Effective?*, 29 WM. MITCHELL L. REV. 1083, 1125 (2003).

106. Deirdre M. D'Orazio et al., *The California Sexually Violent Predator Statute: History, Description & Areas for Improvement*, CAL. COALITION ON SEXUAL OFFENDING 27 (Jan. 2009), <http://ccoso.org/sites/default/files/CCOSO%20SVP%20Paper.pdf> [<http://perma.cc/U5Y9-ZWU8>].

107. *Id.*

108. Bogan, *supra* note 3.

109. *Id.*

110. *Sex Offender Rehabilitation and Treatment Services*, UMSL, <http://www.umsl.edu/slpic/Adjunct%20Rotation%20Sites/Sex%20Offender%20Rehabilitation%20and%20Treatment%20Services.html> [<http://perma.cc/FG7S-ZAZS>] (last visited Mar. 1, 2016).

SORTS website, the community reintegration phase is “still under construction.”¹¹¹ The legal consequences of participation combined with the, perhaps, impossibility of completing treatment has caused a certain group of SORTS patients to indeed refuse to partake.¹¹² According to one such patient, taking part in treatment “would be like admitting he needs therapy.”¹¹³

111. *Id.* The following descriptions of each of the four phases in the SORTS program were taken from an internship posting on the University of Missouri-St. Louis website:

- Pre-Engagement/Engagement: “These residents are typically either new to SORTS treatment or have not yet demonstrated a relatively consistent commitment to change. Target topics for this Phase include learning to respond appropriately to rules and authority, admitting one is a sex offender in need of treatment, learning the basics of SORTS treatment, and making healthier leisure choices.”
- Cognitive Restructuring: “Residents at this stage of treatment are considered to have met the expectations of the Pre-Engagement/Engagement Phase, including commitment to change. Target issues for this Phase include increasing awareness of the thoughts/feelings/behavior process and thinking patterns, disclosing offenses and developing personal offending cycles, and beginning to address the emotional states associated with their offending and other unhelpful behaviors.”
- Emotional Integration: “This Phase of treatment focuses on addressing the elements that we believe lead to long-term change—making substantive changes in leisure activities and attitudes toward same, accepting and learning appropriate coping strategies for all emotional states, and dismantling unhelpful core beliefs. This Phase also expects residents to discuss past unhealthy relationships and begin to learn and practice developing appropriately intimate relationships with staff and peers.”
- Community Reintegration: “This Phase is still ‘under construction,’ but as the name suggests, will focus on mastering the skills needed for a return to the community through gradually decreasing levels of supervision and restriction. Planned activities of this phase also include college courses, finding meaningful work and housing outside the facility, family therapy, development of relapse prevention plans, and developing support networks.”

Id.

112. Jesse Bogan, *Violent Sex Predators Locked Away, but Not in Prison*, ST. LOUIS POST-DISPATCH (Sept. 1, 2013), http://www.stltoday.com/news/local/crime-and-courts/violent-sex-predators-locked-away-but-not-in-prison/article_5246e072-8a64-5f41-83f7-6f4fa3ce0cc1.html [<http://perma.cc/7JWQ-7XYZ>].

113. *Id.* The patient referred to is Lester Bradley, the subject of a detailed article in the St. Louis Post-Dispatch. Bradley does not take part in treatment, claiming that he has paid his debt to society by already having served fifteen years in prison. Bradley was confined after violating his parole when babysitting his girlfriend’s ten-year-old daughter. According to a polygraph test, as well as the girl’s mother, Bradley did not abuse the ten-year-old, but his parole was revoked nonetheless. A multidisciplinary team of state mental health professionals unanimously agreed that Bradley should not be committed. Additionally, a forensic psychologist working in the Department of Mental Health, the department that operates SORTS, determined that Bradley did not meet the criteria of a sexually violent predator. However, the ultimate decision of whether to involuntarily confine Bradley fell to the jury, which determined that he did in fact possess the requisite “mental abnormality.” Bradley has been confined to the SORTS facility since February of 2013. *Id.*

C. Annual Reviews

SORTS-employed psychologists perform the annual reviews of the residents.¹¹⁴ Each SORTS facility—the Southeast Missouri Mental Health Center and the Fulton State Hospital—is assigned one annual reviewer; thus, the psychologist conducting these reviews is not part of each resident's treatment team.¹¹⁵ SORTS psychologists use the Static-99R to assess the risk of each individual.¹¹⁶ Generally, this is a tool that measures static factors unchangeable in nature, such as an individual's prior sexual offenses.¹¹⁷ These annual reviews are submitted to the courts and include the psychologists' professional opinions regarding the mental conditions of the SORTS residents.¹¹⁸ The annual reviewers also make recommendations concerning whether the residents continue to meet the requisite statutory criteria for civil commitment.¹¹⁹

After evidence was presented at trial in *Van Orden v. Schafer*, the judge noted the importance of these annual reviews.¹²⁰ Specifically, that it is practically impossible for a SORTS resident to successfully petition for release without a review recommending such a release.¹²¹ Furthermore, SORTS reviewers receive no legal training in understanding or applying the SVP Act's criteria for release.¹²² At trial, the defendant's own expert stated that the annual reviewers did not know how to apply the statutory criteria for risk assessment.¹²³ Moreover, the evidence at trial also showed that the annual reviews failed to include certain relevant information, such as the opinions of the SORTS treatment providers—who actually are on that particular resident's treatment team—regarding a resident's lowered risk and potential for release.¹²⁴ Therefore, as shown in the *Van Orden v. Schafer* trial, the annual review process—which is of vital importance should a resident seek a conditional release—has several very concerning flaws.

114. *Van Orden v. Schafer*, No. 4:09-cv-00971 AGF, 2015 WL 5315753, at *11 (E.D. Mo. Sept. 11, 2015).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Van Orden*, 2015 WL 5315753, at *11.

120. *Id.* at *12.

121. *Id.* at *11.

122. *Id.* at *12.

123. *Id.*

124. *Van Orden*, 2015 WL 5315753, at *12.

IV. SORTS

A. Does SORTS “Answer to No One”?

Many internal documents have been made available to the public for the first time during discovery in *Van Orden v. Schafer*, including an e-mail from the director of the Missouri Department of Mental Health in 2009 that read, “No one has ever graduated from [SORTS] and somewhere down the line, we have to do that or our treatment process becomes a sham.”¹²⁵ The Department of Mental Health released a statement in 2014, claiming that three residents had been granted conditional release since 2009.¹²⁶ However, those three individuals were neither allowed to travel far from the SORTS facility nor were they generally permitted to leave the facility overnight.¹²⁷

SORTS categorizes each resident pursuant to one of four risk levels: “High Risk,” “Moderate Risk,” “Low Risk,” and “No Apparent Risk.”¹²⁸ As of 2013, nearly half of the residents housed at the Farmington facility were considered “No Apparent Risk.”¹²⁹ What makes the fact that Missouri has failed to release even one single patient since 1999 even more concerning than it already is on its face is that all of the nearly 200 residents are locked up in the maximum security facilities in Farmington and Fulton, when such security is unnecessary for many of the individuals.¹³⁰ Although issues pertaining to the involuntary civil commitment of sex offenders are hardly unique to Missouri, every other state that has a facility similar to SORTS has been more successful with respect to rehabilitation and release.¹³¹ Specifically, there are seven other states that have a similar statutory confinement scheme for sex offenders.¹³² The facilities in all seven, as of 2005, have released at least one patient, with Illinois, Washington, and Wisconsin releasing no fewer than fifteen patients.¹³³

In the complaint filed on behalf of the plaintiffs in *Van Orden v. Schafer*, it is alleged that the patients who are categorized as being of “No Apparent Risk”

125. Bogan, *supra* note 3.

126. *Id.*

127. *Id.*

128. Fifth Amended Complaint at 20, *Van Orden v. Schafer*, No. 4:09-cv-00971 AGF (E.D. Mo. Feb. 19, 2014), ECF 258.

129. *Id.* There were 136 patients being housed in the Farmington facility as of 2013. Sixty-two of those patients were categorized as being of “No Apparent Risk.” *Id.* at 21.

130. *See id.* at 20–21.

131. *Id.* at 5.

132. *Id.* The seven states with such facilities are: Wisconsin, Washington, Illinois, Florida, Kansas, Iowa, and Minnesota. *Id.*

133. Fifth Amended Complaint, *supra* note 128, at 5. Minnesota and Iowa have released one patient, Kansas has released four, Florida has released six, Illinois has released eighteen, Washington has released fifteen, and Wisconsin has released forty-six. *Id.*

should be housed in the Least Restrictive Alternative (“LRA”).¹³⁴ Indeed, the concept of LRA being applied in cases of the involuntary civil commitment has been around a long time.¹³⁵ In *Lessard v. Schmidt*, a decision that was later overturned by the United States Supreme Court, the district court held that even if an individual is deemed to be mentally ill and a danger to society, the court should nonetheless “order full-time involuntary hospitalization only as a last resort,” suggesting that such confinement would certainly not qualify as a LRA.¹³⁶

Many critics of SORTS, and Missouri’s SVP Law in general, have pointed out that the state essentially uses SORTS as a “prison disguised as a mental health facility.”¹³⁷ Much of this may be due to the perception that SORTS operates under its own authority, which was perhaps solidified by the Department of Mental Health’s victory in *Strutton v. Meade*, decided by the District Court for the Eastern District of Missouri and affirmed by the Eighth Circuit Court of Appeals.¹³⁸ Dennis Strutton was a SORTS patient who had been temporarily suspended from participating in a treatment group as a disciplinary measure because facility psychologists alleged that he was disturbing the other patients in the group.¹³⁹ Strutton filed suit against the Department of Mental Health, claiming that his Fourteenth Amendment substantive due process rights were violated when SORTS did not provide him with consistent access to adequate mental health treatment.¹⁴⁰ The district court ultimately held that Strutton did not have “a fundamental right to treatment while committed to the [Missouri Sexual Offender Treatment Center].”¹⁴¹ In the district court’s analysis, it explained that in order to establish a Fourteenth Amendment claim, the inadequacies in the treatment he received must be “so arbitrary or egregious as to shock the conscience.”¹⁴² The district court held that removing Strutton from the therapy group was below the professional

134. *Id.* at 20.

135. See J.M. Johnston & Robert A. Sherman, *Applying the Least Restrictive Alternative Principle to Treatment Decisions: A Legal and Behavioral Analysis*, 16 BEHAV. ANALYST 103, 104 (1993). There are different interpretations of how LRA should apply to a treatment procedure. First, there is the opinion that “before a procedure can be implemented, all or at least some less intrusive procedures must have been tried and shown to be ineffective.” *Id.* at 106. Another school of thought suggests that only a “reasonable justification” that a less restrictive procedure would be inappropriate is required. *Id.*

136. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972).

137. Fifth Amended Complaint, *supra* note 128, at 57.

138. *Id.* at 9–10; *Strutton v. Meade*, 668 F.3d 549 (8th Cir. 2012).

139. *Strutton*, 668 F.3d at 554.

140. *Id.*

141. *Id.* SORTS was formerly known as the Missouri Sexual Offender Treatment Center. MO. DEP’T OF MENTAL HEALTH, *supra* note 2.

142. *Strutton*, 668 F.3d at 554.

standard but was not “conscience-shockingly deficient.”¹⁴³ As a result, the Eighth Circuit Court of Appeals denied the plaintiff’s Fourteenth Amendment claim.¹⁴⁴ This decision had major implications for SORTS and its patients, as the court essentially refused to intervene with the way the facility was run, even in a situation in which a patient was being denied treatment—the very purpose for which the facility supposedly exists, and the basis for calling this process a “treatment” rather than a “punishment.” The problem, then, is that where there is no honest attempt at rehabilitating these individual, the civil confinement system is, in effect, issuing life sentences for crimes that these people have yet to commit.

B. *Fiscal Disaster*

SORTS also faces many financial concerns that make its stated mission of treating and rehabilitating patients a near impossibility. The importance that the Department of Mental Health places on the SORTS program and the aforementioned “mission” may be reflected in the funding that is allocated to the facility. The department computes a number that they refer to as the “Cost Per Bed Day,” reflecting the average dollar amount per resident that the department allocates to all of their programs.¹⁴⁵ Out of the six inpatient care facilities that the department operates, SORTS far and away receives the least amount of funding.¹⁴⁶ In fact, SORTS receives over \$100 less in “Cost Per Bed Day” than the next lowest funded program.¹⁴⁷ The department has attempted to justify such low funding by pointing out that sex offenders are the most difficult patients to treat.¹⁴⁸ The argument would seem to suggest that since the department considers treating the patients of SORTS to be futile, it would not be wise to waste significant funding on the facility and its treatment practices. However, since the goal of rehabilitation is what allows the program to be constitutional, it would seem to follow that an earnest attempt should be made at treating these “difficult” patients, which would seemingly require more funding instead of less.¹⁴⁹

The allocation of funding within the SORTS facility is also an issue. According to another department metric, SORTS allocates a mere fifteen

143. *Id.* at 555.

144. *Id.* at 558.

145. Fifth Amended Complaint, *supra* note 128, at 16.

146. *Id.* The following illustrates the various programs and the funding allocated to them by the Missouri Department of Mental Health, using the “Cost Per Bed Day” metric: Acute Care–Child Inpatient: \$477; Acute Care–Adult Inpatient: \$464; Residential Care–Child: \$392; Correctional Treatment–Inpatient: \$343; Long Term Care–Adult Inpatient: \$285; MSOTC (currently known as SORTS): \$182. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 16–17.

percent of its funding to “Treatment Staff.”¹⁵⁰ The Treatment Staff is said to include: Psychology, Substance Abuse Counselor, Activity Therapy, Social Work, and Academic Teachers.¹⁵¹ It is, at the very least, peculiar to have the fewest dollars allocated to the unit that is responsible for carrying out the very purpose for which the facilities exist. During discovery in *Van Orden v. Schafer*, there were countless internal e-mails uncovered, illustrating the facility’s intention to cut costs by *reducing treatment*.¹⁵² Alan Blake, who formerly served as chief operating officer of SORTS, sent several concerning e-mails referring to problems within the facilities.¹⁵³ In one such e-mail, Blake referred to a conversation he had with an individual responsible for financing the facility, in which this individual stated, “If we reduce treatment to 1½ per week, we can greatly reduce needing to hire more psychologists and social workers.”¹⁵⁴ In a separate e-mail, Blake wrote, “We have been trying to find how to make a \$600,000 core reduction and the ramifications. [If that happens] most nursing and medical staff will leave, and most professional staff will follow. *At that point we become a prison.*”¹⁵⁵

V. A NEW HOPE FOR CHANGE

After years of frustration for SORTS residents, the recent federal district court decision in *Van Orden v. Schafer* may finally provide cause for hope. The district court held that SORTS “suffers from systemic failures regarding risk assessment and release that have resulted in the continued confinement of individuals who no longer meet the criteria for commitment, in violation of the Due Process Clause.”¹⁵⁶ The court found three “constitutional deficiencies” with Missouri’s SVP Law:

- (1) Defendants have not performed annual reviews in accordance with the SVP Act, as interpreted by the Missouri Supreme Court, and as required by the Due Process Clause;
- (2) Defendants have not properly implemented any program to ensure the least restrictive environment, and have not implemented—or even designed—the community reintegration phase of the SORTS treatment programs; and
- (3) Defendants have not implemented release procedures,

150. Fifth Amended Complaint, *supra* note 128, at 17.

151. *Id.* at 18. The following is a list of services within SORTS, and the percentage of facility funding that each “unit” is allocated: Medical—18%; Unit Security—42%; Housekeeping, Maintenance, External Security, Food Service, Accounting, Administration—25%. *Id.*

152. *Id.* at 4.

153. *Id.* at 11.

154. *Id.* at 13.

155. Fifth Amended Complaint, *supra* note 128, at 15 (emphasis in original).

156. *Van Orden v. Schafer*, No. 4:09-cv-00971 AGF, 2015 WL 5315753, at *3 (E.D. Mo. Sept. 11, 2015).

including director authorization for releases, in the manner required by the SVP Act and the Due Process Clause.¹⁵⁷

With respect to the first deficiency, the court noted that the SORTS annual reviewers had not been applying the correct legal standard in evaluating whether or not an individual met the requirements for conditional release.¹⁵⁸ At trial, defendant's expert testified that SORTS-Fulton annual reviewers were failing to recommend the conditional release of certain residents even though they no longer met the "dangerousness" requirement for confinement.¹⁵⁹ When analyzing the second deficiency, the court pointed out that the stated goal of SORTS, which is treating residents to the point where they could be reintegrated into society, was observed in theory only, not in practice.¹⁶⁰ In other words, SORTS was simply not completing the last phase of its program.¹⁶¹ As to the third constitutional deficiency, the court found that SORTS appeared to be blocking the director approval necessary for an individual resident to obtain a release.¹⁶² The director has not authorized a single resident to petition for conditional release.¹⁶³ These findings, as a whole, seem to be supported by the factual background surrounding the SORTS program, as detailed in this Comment. One can hope that this decision sets a true foundation for significant reform within Missouri's involuntary civil confinement system.

CONCLUSION

Based upon the success rate, or lack thereof, that SORTS has had in treating patients, the courts must act. The reason why this burden falls upon the judicial branch, quite frankly, is because no other government office will be inclined to act in order to erect significant changes with respect to Missouri's SVP Law. Certainly, the legislature has the power to amend and pass new laws that would address some of the concerns covered in this Comment. However, it is impractical to expect a politician to advocate for such changes. The truth of the matter is that the individuals confined in SORTS and other sex offenders are perhaps the most unpopular group of individuals in society. No politician, whether he or she is seeking reelection or not, is going to argue that more of these people should be released to live amongst the general voting population of Missouri. Even if a state senator or representative truly believed that

157. *Id.* at *29.

158. *Id.* at *28.

159. *Id.*

160. *Id.*

161. *Van Orden*, 2015 WL 5315753, at *28.

162. *Id.* at *29.

163. *Id.*

Missouri's SVP Law was unconstitutional, he or she would be committing "political suicide" by choosing to advocate for statutory change.

In the past, justices on both the United States Supreme Court and the Missouri Supreme Court expressed concerns about the application of involuntary civil confinement schemes for sex offenders.¹⁶⁴ Justice Kennedy alluded to the dangerous possibility that the civil system could be used to confine offenders for the rest of their lives if the statutory goals of treatment were a mere pretext to permanently remove certain individuals from society.¹⁶⁵ Judge Wolff further elaborated on this concern in his concurring opinion in *In re Care & Treatment of Norton*.¹⁶⁶ Judge Wolff pointed out that the concept behind civil confinement is not only to protect society but also to treat "sick" patients so they can be rehabilitated and reintegrated into society.¹⁶⁷ Furthermore, Judge Wolff wisely analyzed that the years after the enactment of the statute would allow the courts to see if the practices of the Department of Health and SORTS were sincere attempts to treat patients so they may be released, or whether these offenders were to be "warehoused without treatment and without meaningful efforts to re-integrate them into society."¹⁶⁸

After fourteen years of the SORTS program, it would seem that the fears of Justice Kennedy and, specifically Judge Wolff, have come to fruition—that Missouri's sex offender civil commitment scheme has become a way to impose life sentences based upon the psychological categorization of an individual. The fact that zero patients have been granted unconditional release since the beginning of the program, combined with the lack of resources dedicated to treatment, lends support to the argument that the program has not been practiced in accordance with the legislature's initial intent.¹⁶⁹ Rather, based on these facts, it would seem that these offenders indeed are simply being "warehoused," where they are serving what is essentially a life sentence.¹⁷⁰

164. See *In re Care & Treatment of Norton*, 123 S.W.3d 170 (Mo. 2003) (en banc); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

165. *Hendricks*, 521 U.S. at 371–73 (Kennedy, J., concurring).

166. *Norton*, 123 S.W.3d at 176–82 (Wolff, J., concurring).

167. *Id.* at 176.

168. *Id.*

169. See *supra* Part IV; Bogan, *supra* note 3.

170. See *Norton*, 123 S.W.3d at 176 (Wolff, J., concurring). Comparing these offenders' confinement to a prison sentence may actually not be doing it justice. In many ways, the SORTS facilities are harsher and more restrictive than even a maximum security prison. For example, while prisoners can typically frequent the library or gym anytime, seven days per week, SORTS only allows patients to visit the library and gym for one or two hours per week; prisoners are allowed to sleep as late as they wish, while SORTS residents are required to be awake by 7:00 a.m.; prisoners can bathe as often as they wish, while SORTS patients are allowed one shower per day; prisoners can walk freely to meals, while SORTS residents must be escorted; prisoners have two men to a cell, while SORTS houses four to a "room"; and prisoners are allowed up to four

However, with the recent decision in *Van Orden v. Schafer*, there may be some hope yet. For the first time since the creation of SORTS, a judicial court has acknowledged that Missouri's SVP Law is being applied in an unconstitutional manner.¹⁷¹ In Minnesota, the state that adopted one of the first sex offender civil commitment statutes, a federal court has appointed a task force that recommended major reforms to their current program.¹⁷² Perhaps the appropriate next step for Missouri is a similar program. An idea that for a time seemed to qualify as wishful thinking, now seems like it actually may be possible after the federal court's decision in *Van Orden*. It will be efforts such as these that initiate change with respect to these involuntary civil confinement laws. Supreme Court Justice Felix Frankfurter was once quoted as saying, "It is a fair summary of constitutional history that the landmarks of our liberties have often been forged in cases involving not very nice people."¹⁷³ It has always been the province and duty of the courts in this country to protect the rights and liberties of all individuals, no matter how unpopular they may be.

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visitors per week, while SORTS only allows visitors on weekends and only if approximately two weeks notice is given to the facilities. Fifth Amended Complaint, *supra* note 128, at 50–52.

171. *Van Orden v. Schafer*, No. 4:09-cv-00971 AGF, 2015 WL 5315753, at *29 (E.D. Mo. Sept. 11, 2015).

172. *Id.*

173. *Civil Liberties and Civil Rights*, U.S. HISTORY.ORG, <http://www.ushistory.org/gov/10.asp> [<http://perma.cc/C68K-T9DY>] (last visited Feb. 18, 2016). Here are some examples of less than exemplary citizens who have successfully challenged the government's deprivation of certain liberties: "A pick ax murderer on death row who found God and asked for clemency; a publisher of magazines, books, and photos convicted for sending obscene materials through the United States mail; a convict whose electrocution was botched when 2,000 volts of electricity rushed into his body, causing flames to leap from his head; a university student criminally charged for writing and publishing on the internet about torturing and murdering women." *Id.*

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