

LOWERING THE BAR: *IN RE VAN ORDEN* AND THE
CONSTITUTIONALITY OF THE 2006 AMENDMENTS TO
MISSOURI’S SEXUALLY VIOLENT PREDATOR ACT

Lauren Standlee

I. INTRODUCTION

Misdemeanor child molestation, rape, promotion of prostitution, and forcible sodomy: fourteen and sixteen.¹ Eight rapes, effectuated through death threats and excessive force: twelve and thirteen.² First degree sexual abuse and sexual misconduct: five and four.³ These are some of the offenses for which three of Missouri’s sexually violent predators (“SVP”)⁴ have been convicted and a sampling of their victims’ ages. Enacted in 1998 to become effective in 1999,⁵ the Sexually Violent Predator Act is a mechanism whereby Missouri may civilly commit those found to be sexually violent predators⁶—defined as one “who suffers from a mental abnormality which makes [him] more likely than not to engage in predatory acts of sexual violence if not confined” and who has previously pled guilty to or been convicted of a sexually violent offense.⁷

Missouri’s SVP Act was amended in 2006 to lower the standard of proof required for an SVP finding and to establish a conditional release program for those committed.⁸ Now, the court or the jury must find one to be an SVP by clear and convincing evidence, whereas prior to the

· Lauren Standlee graduated from the University of Missouri-Columbia School of Law in May 2008 and currently serves as a Law Clerk on the Missouri Court of Appeals, Eastern District, in St. Louis, Missouri.

1. *Dunivan v. State*, 247 S.W.3d 77, 77 (Mo. Ct. App. 2008).

2. *Elliott v. State*, 215 S.W.3d 88, 90 (Mo. 2007) (en banc).

3. *In re Van Orden*, 271 S.W.3d 579, 583 (Mo. 2008) (en banc).

4. The term “sexually violent predator” and the acronym “SVP” are used interchangeably throughout this article.

5. H.B. 1405, Mo. Gen. Assembly (1998) (enacted).

6. MO. REV. STAT. §§ 632.480–.513 (2006 & Cum. Supp. 2009).

7. *Id.* § 632.480(5).

8. H.B. 1698, Mo. Gen. Assembly (2006), §§ 632.495, 632.505 (enacted).

2006 amendments, the standard of proof was beyond a reasonable doubt.⁹ Further, Missouri's revised SVP Act seems to provide only for a conditional release, instead of a complete discharge, for those committed.¹⁰

No one will argue with the fact that these crimes are heinous and that these perpetrators need treatment. When one is adjudged to be a sexually violent predator, however, the commitment is involuntary, and the confinement term is indefinite.¹¹ Given the public's fear and anxiety regarding sex offenders, especially those who target children, society is predisposed to lock them up and throw away the key.¹² To avoid reproach, however, our society must trust in our judicial processes and involuntarily commit only those who are found to be sexually violent predators beyond a reasonable doubt. Furthermore, the judicial system must unconditionally release sexually violent predators when they are deemed to no longer pose a danger to themselves or to others. The methods by which our society commits and holds such individuals implicate not only their behavior but also our own, for "[t]he degree of civilization in a society can be judged by entering its prisons."¹³

Part II of this article discusses the facts and holding of *In re Van Orden*, the case at bar. The legal background, Part III, addresses relevant case law from the Supreme Court of the United States, as well as the reasons courts have always deemed SVP laws civil statutes rather than criminal. Part III proceeds to discuss Missouri's SVP Act and the pertinent 2006 amendments. After addressing *Addington v. Texas*, the seminal Supreme Court case on which *Van Orden* based its holding, Part IV analyzes the *Van Orden* decision itself. Finally, in Part V, this article concludes that *In re Van Orden* constituted a blemish on the Missouri legislature and judiciary alike. Missouri, along with other states, must recognize that SVP proceedings are akin to criminal trials and that their result—indefinite and involuntary confinement—resembles criminal

9. Compare MO. REV. STAT. § 632.495 (2006) (requiring an SVP finding beyond a reasonable doubt), with MO. REV. STAT. § 632.495.1 (Cum. Supp. 2009) (requiring an SVP finding by clear and convincing evidence).

10. Compare MO. REV. STAT. § 632.498 (2006) (discussing the possibility of a *discharge* upon a finding that the person "no longer suffers from a mental abnormality that makes the person likely to engage in acts of sexual violence"), with MO. REV. STAT. §§ 632.498, 632.505 (Cum. Supp. 2009) (discussing only the possibility of a *conditional release* upon the finding "that the person's mental abnormality has so changed that the person is not likely to commit acts of sexual violence").

11. MO. REV. STAT. § 632.495 (Cum. Supp. 2009).

12. See, e.g., Eric Harrison, *Tougher Sex-Crime Laws Spark Right-to-Know Flap*, L.A. TIMES, Feb. 18, 1997, at A1.

13. Quote attributed to Fyodor Dostoevsky. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 286 (Suzy Platt ed., 1989).

punishment. States, therefore, should require proof beyond a reasonable doubt.

II. *IN RE VAN ORDEN*'S FACTS AND HOLDING

Richard Wheeler and John Van Orden had sordid histories of sexually violent behavior and mainly victimized children. Wheeler, born in 1947, had convictions dating back to 1967 for sexual abuse, sexual misconduct, molestation, and sodomy.¹⁴ Van Orden, born in 1962, first offended in 1987 and subsequently received convictions for sexual misconduct, sexual abuse, and molestation.¹⁵

The State's attempts to rehabilitate Wheeler and Van Orden through sex offender treatment during periods of incarceration proved unsuccessful. While serving a ten-year sentence for first-degree statutory sodomy involving a four-year-old boy, Wheeler refused sex offender treatment and continued to engage in sexually offensive behavior.¹⁶ Prior to Wheeler's release from prison for the sodomy offense, a psychologist from the Department of Corrections determined that Wheeler might meet the definition of a sexually violent predator.¹⁷ She accordingly notified the State Attorney General, who filed a petition for Wheeler's commitment.¹⁸ After a bench trial, the court found that Wheeler met the definition of an SVP by clear and convincing evidence and ordered him committed.¹⁹

Van Orden, who served a seven-year sentence for first-degree child molestation of a four-year-old girl, violated his parole conditions twice by drinking alcohol and receiving an unsuccessful discharge from sex offender treatment.²⁰ After Van Orden's return to state custody due to his second parole violation, the Department of Corrections similarly notified the Attorney General that Van Orden might qualify as an SVP, and the Attorney General then filed a petition to commit him.²¹ At Van Orden's jury trial, the State's psychologist diagnosed Van Orden with pedophilia and anti-social personality disorder and opined that he was

14. *In re Van Orden*, 271 S.W.3d 579, 582 (Mo. 2008) (en banc).

15. *Id.* at 583.

16. *Id.* at 582–83.

17. *Id.* at 583.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

more likely than not to sexually re-offend if not committed.²² The jury found Van Orden to be an SVP by clear and convincing evidence, and the judge ordered him committed.²³

Prior to their respective commitments, both Wheeler and Van Orden filed motions to dismiss the State's commitment petitions in the trial court.²⁴ They argued, *inter alia*, that the 2006 amendment to section 432.495 of Missouri's Sexually Violent Predator Act²⁵ was unconstitutional because due process requires the State to prove that a person meets the definition of a sexually violent predator beyond a reasonable doubt, rather than by clear and convincing evidence.²⁶ Both motions were denied by the trial courts, but Wheeler and Van Orden appealed the issue to the Missouri Supreme Court.²⁷ In a consolidated action, the Missouri Supreme Court affirmed the trial courts' decisions and held that Missouri "constitutionally may utilize the clear and convincing evidence burden of proof" to effectuate the civil commitment of sexually violent predators.²⁸

III. LEGAL BACKGROUND

A. The Kansas v. Hendricks Decision

In 1997, in a five to four decision, the Supreme Court of the United States first upheld a sexually violent predator statute against constitutional attack in the case of *Kansas v. Hendricks*.²⁹ Kansas's SVP law provided for the indefinite confinement of any person who, due to a mental abnormality or personality disorder, was found likely to engage in predatory acts of sexual violence.³⁰ The Honorable Clarence Thomas, writing for the majority, found that the Act properly limited confinement to those who could not control their dangerousness.³¹ The Court also held that because the Act was civil and non-punitive in nature, it did not violate the Constitution's prohibition on Double

22. *Id.* at 583–84.

23. *Id.* at 584.

24. *Id.* at 583.

25. See *supra* notes 9–10 and accompanying text.

26. *Van Orden*, 271 S.W.3d at 583.

27. *Id.* at 581–82, 583.

28. *Id.* at 582, 586.

29. 521 U.S. 346, 350 (1997).

30. KAN. STAT. ANN. §§ 59-29a02(a), 59-29a07(a) (1994).

31. *Hendricks*, 521 U.S. at 348, 358.

Jeopardy or *Ex Post Facto* laws.³²

The *Hendricks* Court stated that, under the Kansas SVP statute, the purpose of the confinement is to hold the sexually violent predator until his mental abnormality no longer causes him to be a threat to others.³³ Therefore, an SVP is entitled to release when he “is adjudged ‘safe to be at large.’”³⁴ In dicta, however, the Court stated that to ensure the safety of the community, a State may involuntarily commit one for whom no treatment is available, and thus, left open the possibility that a State might civilly restrain a person’s liberty in perpetuity.³⁵ The Court has reaffirmed this stance in later opinions, stating that “[f]or those individuals with untreatable conditions... there [is] no federal constitutional bar to their civil confinement, because the State [has] an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.”³⁶

B. Constitutional Requirements for the Involuntary Commitment of Sexually Violent Predators

It is well-established that freedom from arbitrary physical restraint by the government lies at the core of due process.³⁷ Despite this axiom, the Supreme Court of the United States has repeatedly upheld involuntary commitment statutes, including those for sexually violent predators, “provided the confinement takes place pursuant to proper procedures and evidentiary standards.”³⁸ In general, the Court has “sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a ‘mental illness’ or ‘mental abnormality.’”³⁹ A showing of both traits is constitutionally required, as mental abnormality or dangerousness alone is insufficient to justify involuntary civil commitment.⁴⁰ Thus, so long

32. *Id.* at 369, 371.

33. *Id.* at 363.

34. *Id.* at 364 (quoting KAN. STAT. ANN. § 59-29a07 (1994)).

35. *Id.* at 366. (“To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.”).

36. *Seling v. Young*, 531 U.S. 250, 262 (2001).

37. *Hendricks*, 521 U.S. at 356; *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

38. *Hendricks*, 521 U.S. at 357.

39. *Id.* at 358.

40. *See Murrell v. State*, 215 S.W.3d 96, 104 (Mo. 2007) (en banc) (“[D]ue process requires that a person be both mentally ill and dangerous in order to be civilly committed; the absence of either characteristic renders involuntary civil confinement unconstitutional.” (citing *Foucha*, 504 U.S. at

as the SVP statutes effect the confinement pursuant to proper standards and evidentiary procedures and require a finding of dangerousness to self or to others as well as a mental abnormality, the Supreme Court of the United States has held them to be constitutional.⁴¹

Involuntary commitment statutes are typically justified under the states' *parens patriae* powers, as well as its police powers.⁴² The *parens patriae* function allows the State to care for and attempt to rehabilitate those citizens who are unable to care for themselves because of an emotional disturbance.⁴³ The police powers, on the other hand, empower the State to protect the community at large from those who are dangerous due to a mental illness.⁴⁴ Courts typically highlight the rehabilitation and treatment aspects of the involuntary commitment process, the *parens patriae* function, and are careful to distinguish civil commitment from a "mechanism for retribution and general deterrence."⁴⁵

Thus, *Hendricks* underscored the constitutional necessity of distinguishing a dangerous sexual offender subject to involuntary confinement from "other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."⁴⁶ For the *Hendricks* Court, the crucial distinction was the sexually violent predator's "lack of volitional control, coupled with a prediction of future dangerousness."⁴⁷

Five years later, in *Kansas v. Crane*, the Court addressed Kansas's argument that the Kansas Supreme Court had applied *Hendricks* in an overly-restrictive manner when it required a sexually violent predator's "lack of volitional control" to be total or complete.⁴⁸ The *Crane* Court agreed that *Hendricks* did not require proof of a total or complete lack of control and held that an SVP must suffer from a mental illness or abnormality that results only in "serious difficulty in controlling [his]

77)).

41. See *Kansas v. Crane*, 534 U.S. 407, 409–10 (2002); *Young*, 531 U.S. at 254, 267; *Hendricks*, 521 U.S. at 350–53, 371; *Allen v. Illinois*, 478 U.S. 364, 366–67, 375 (1986). All of these cases involved SVP statutes requiring proof beyond a reasonable doubt. *Crane*, 534 U.S. at 416 (Scalia, J., dissenting); *Young*, 531 U.S. at 254; *Hendricks*, 521 U.S. at 352–53; *Allen*, 478 U.S. at 378 (Stevens, J., dissenting).

42. *Addington v. Texas*, 441 U.S. 418, 426 (1979); see also *Hendricks*, 521 U.S. at 366.

43. *Addington*, 441 U.S. at 426.

44. *Id.*; see also *Hendricks*, 521 U.S. at 357.

45. *Crane*, 534 U.S. at 412 (quoting *Hendricks*, 521 U.S. at 372–73 (Kennedy, J., concurring)).

46. *Hendricks*, 521 U.S. at 360.

47. *Id.*

48. *Crane*, 534 U.S. at 410–11.

behavior.”⁴⁹ Insisting on a complete lack of control would risk barring the civil commitment of highly dangerous persons who still had a modicum of ability to control their behavior.⁵⁰ Though the *Crane* Court did not delineate a bright-line test, it indicated that the inability to control behavior must be severe.⁵¹ Thus, through *Hendricks* and *Crane*, the Supreme Court clarified that an individual’s serious inability to control his impulses,

combined with the prediction of future dangerousness, distinguishes the sexually violent predator from one better-suited to the criminal justice system.⁵²

C. Sexually Violent Predator Laws Are Civil and Non-Punitive

Significantly, the Supreme Court of the United States has refused to label the involuntary commitment of sexually violent predators as a criminal proceeding, and instead, deems such confinement as civil and non-punitive in nature.⁵³ A primary reason these laws are regarded as civil is that State legislatures always denominate them as such and that designation is extremely difficult to challenge judicially.⁵⁴ SVP laws’ stated purposes are always treatment and amelioration of the committed individual,⁵⁵ and thus, the Court has found that SVP laws lack the retributive and deterrent functions of criminal laws.⁵⁶ Prior criminal conduct is used for evidentiary rather than retributive purposes, and unlike criminal laws, sexually violent predator statutes do not require a finding of scienter prior to commitment.⁵⁷ Given that SVP laws have never been categorized as criminal in nature, it naturally follows that they have been upheld in the face of Double Jeopardy and *Ex Post Facto*

49. *Id.* at 411, 413.

50. *Id.* at 412.

51. *Id.* at 412–13.

52. *Id.* at 410, 412.

53. *Id.* at 409; *Seling v. Young*, 531 U.S. 250, 260 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 361–63 (1997).

54. *E.g.*, *Hendricks*, 521 U.S. at 361. Whether an act is civil or punitive in nature is a matter of statutory construction. *Young*, 531 U.S. at 261. The court must ascertain whether the legislature intended to establish civil proceedings and will reject the legislature’s manifest intent only when a party challenging the act provides the clearest proof that the legislature intended otherwise. *Id.*

55. *E.g.*, *Young*, 531 U.S. at 254–55.

56. *E.g.*, *Hendricks*, 521 U.S. at 361–62.

57. *Id.* at 362.

challenges.⁵⁸

In another case involving sexually violent predator laws, *Seling v. Young*, the Court rejected an “as-applied” challenge to Washington State’s Community Protection Act on Double Jeopardy and *Ex Post Facto* grounds.⁵⁹ Andre Young, confined pursuant to the Washington Act, alleged that the conditions of his confinement were such as to render his commitment punitive.⁶⁰ The Washington Supreme Court had already held,

however, and the Ninth Circuit had affirmed, that the Act was civil in nature.⁶¹

The United States Supreme Court stated that an “as-applied” challenge was unworkable in the context of civil commitment because individual challenges would never fully resolve whether a particular scheme as a whole is punitive.⁶² The Court therefore believed that “as-applied” challenges would “prevent a final determination of [a particular sexually violent predator] scheme’s validity under the Double Jeopardy and *Ex Post Facto* Clauses.”⁶³ For that reason, the Court held that “[a]n Act, found to be civil, cannot be deemed punitive ‘as-applied’ to a single individual in violation of the Double Jeopardy and *Ex Post Facto* Clauses and provide cause for release.”⁶⁴

D. Missouri’s Sexually Violent Predator Act

Beginning with Washington State in 1990, states around the country began enacting statutes providing for the involuntary civil commitment of persons deemed to be sexually violent predators.⁶⁵ Effective January 1, 1999, Missouri followed suit and introduced the Sexually Violent Predator Act.⁶⁶ Contained in sections 632.480 through 632.513, the

58. See, e.g., *Hendricks*, 521 U.S. at 369, 371.

59. *Young*, 531 U.S. at 254, 263.

60. *Id.* at 255–56, 259. Young alleged that, for seven years, he had been subjected to more restrictive conditions than those placed on other prisoners and that the restrictions placed upon him were not reasonably related to a non-punitive goal. *Id.* at 259. Young also asserted that the facility lacked certified sex offender treatment providers and that there was no possibility of release. *Id.* at 260.

61. *Id.* at 260.

62. *Id.* at 263.

63. *Id.*

64. *Id.* at 267.

65. WASH. REV. CODE § 71.09.050 (2008).

66. H.B. 1405, Mo. Gen. Assembly (1998) (enacted).

SVP Act delineates the involuntary civil commitment procedures for sexually violent predators in Missouri.⁶⁷ Section 632.480 defines a sexually violent predator as one who “[h]as pled guilty or been found guilty, or been found not guilty by reason of mental disease or defect... of a sexually violent offense.”⁶⁸ However, in order to be an SVP, the person must also be found to “suffer[] from a mental abnormality which makes [him] more likely than not to engage in predatory acts of sexual violence” if not civilly committed.⁶⁹

The commitment procedure typically begins before the person is released from a correctional center.⁷⁰ A psychologist will complete an end of confinement review and notify the Attorney General and Multidisciplinary Review Team if he believes the person may meet the definition of an SVP.⁷¹ If the Multidisciplinary Review Team and the Prosecutorial Review Committee agree with the psychologist’s SVP assessment, the Attorney General will then file a petition for that person’s commitment.⁷²

Upon the filing of the petition, the court makes a preliminary determination regarding whether probable cause exists to believe that the person is an SVP.⁷³ If the court finds probable cause, the individual is taken into custody, and the court is required to hold a formal hearing within seventy-two hours of the individual’s confinement.⁷⁴ If the court finds probable cause at the formal hearing, the court orders a psychiatric evaluation and holds a trial within sixty days thereafter.⁷⁵

Section 632.495 provides that “[t]he court or jury shall determine

67. MO. REV. STAT. §§ 632.480–513 (2006 & Cum. Supp. 2009).

68. *Id.* § 632.480(5)(a). A person who “[h]as been committed as a criminal sexual psychopath pursuant to section 632.475” also satisfies the definition of an SVP. *Id.* § 632.480(5)(b).

69. *Id.* § 632.480(5).

70. *Id.* § 632.483.1(1). The statute also provides civil commitment procedures for one who is not presently incarcerated, but who has committed a recent overt act and who has pled guilty to or been convicted of a sexually violent offense. *Id.* § 632.484.1.

71. *Id.* § 632.483.2(3). The Multidisciplinary Review Team is a seven-member team established by the Director of the Department of Mental Health and the Director of the Department of Corrections to assess whether or not a person meets the definition of an SVP. *Id.* § 632.483.4.

72. *Id.* § 632.486.

73. *Id.* § 632.489.1.

74. *Id.* § 632.489.

75. *Id.* §§ 632.489, 632.492.

whether, by clear and convincing evidence, the person is a sexually violent predator.”⁷⁶ Prior to 2006, section 632.495 required a finding that the person is an SVP beyond a reasonable doubt.⁷⁷

E. The 2006 Amendments to Missouri’s Sexually Violent Predator Act

Effective June 2006, the Missouri legislature enacted two substantial reforms to Missouri’s SVP statutes.⁷⁸ The first amendment, at issue in *Van Orden*, reduced the burden of proof embodied in section 632.495 to clear and convincing evidence, rather than proof beyond a reasonable doubt.⁷⁹

The effect is that, after 2006, a Missouri fact-finder is only required to find that a person meets the definition of a sexually violent predator by clear and convincing evidence.⁸⁰

The remaining amendments, similarly significant but not presented in *Van Orden*, establish a conditional release program.⁸¹ The program appears to eliminate the possibility that a person committed as a sexually violent predator in Missouri will ever obtain a complete discharge from the Department of Mental Health. Prior to the 2006 amendments, a person confined as an SVP could potentially be discharged from confinement.⁸² After 2006, however, the SVP statutes provide that, even “[i]f the court or jury finds that a person’s mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released, the person shall be *conditionally released* as provided in section 632.505.”⁸³ A conditionally released person is subject to continual monitoring and oversight by the Department of Mental Health.⁸⁴

76. *Id.* § 632.495.1 (Cum. Supp. 2009).

77. *See supra* notes 9–10 and accompanying text.

78. H.B. 1698, Mo. Gen. Assembly (2006), §§ 632.495.1, 632.498.5(4), 632.505 (enacted).

79. H.B. 1698, § 632.495.1.

80. *Id.*

81. H.B. 1698, §§ 632.498.5(4), 632.505.

82. *See* H.B. 1698, §§ 632.498, 632.505 (changing language that provided for a discharge upon a finding that the committed person’s mental abnormality has changed so no longer likely to commit acts of sexual violence to language that only provides for a conditional release); *see also supra* note 11 and accompanying text.

83. MO. REV. STAT. § 632.498.5(4) (Cum. Supp. 2009) (emphasis added).

84. *Id.* § 632.505.1.

The 2006 amendments further provide that annual review will not be conducted once a person is conditionally released.⁸⁵ Accordingly, section 632.498.1 now states that “[t]he court shall conduct an annual review of the status of the committed person. The court shall not conduct an annual review of a person’s status if he or she has been conditionally released pursuant to section 632.505.”⁸⁶

F. The Addington v. Texas Decision

Addington v. Texas first addressed the question of whether an involuntary civil commitment could be predicated on a finding of clear and convincing evidence, rather than proof beyond a reasonable doubt.⁸⁷ The *Addington* Court concluded that although proof beyond a reasonable doubt was not constitutionally required,⁸⁸ a preponderance of the evidence standard was insufficient to satisfy due process.⁸⁹ Thus, *Addington* held that a clear and convincing evidence standard in such proceedings was constitutional, based largely on the understanding that commitment proceedings are civil and rehabilitative in nature, rather than criminal and punitive.⁹⁰

The *Addington* Court considered and rejected the appellant’s argument that the rationale of *In re Winship*, a case that addressed the rights of juvenile delinquents,⁹¹ applied with equal force in *Addington*.⁹² The *In re Winship* Court held that juveniles, like adults, are constitutionally entitled to the proof beyond a reasonable doubt standard when charged with a violation of the criminal law in a delinquency proceeding.⁹³ The *Winship* Court acknowledged that juvenile delinquency proceedings are not criminal and that the delinquency status is not made a crime.⁹⁴ However, the *Winship* Court stated that the gradual assimilation of juvenile delinquency proceedings into traditional criminal trials warranted the application of the most stringent burden of proof.⁹⁵ The Court noted that the State’s “civil labels and good

85. H.B. 1698, § 632.498.1.

86. MO. REV. STAT. § 632.498.1 (Cum. Supp. 2009).

87. 441 U.S. 418, 419–20 (1979).

88. *Id.* at 430–31.

89. *Id.* at 426–27.

90. *Id.* at 428, 432–33.

91. 397 U.S. 358, 368 (1970).

92. *Addington*, 441 U.S. at 427–28.

93. *Winship*, 397 U.S. at 368.

94. *Id.* at 365–66.

95. *Id.*

intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”⁹⁶ The *Winship* Court went on to state that “[a] proceeding where the issue is whether the child will be found to be [d]elinquent[] and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.”⁹⁷

The *Addington* Court’s primary rationale in declining to extend the *Winship* holding to civil commitment proceedings was that “[i]n a civil commitment state power is not exercised in a punitive sense.”⁹⁸ The Court highlighted the fact that Texas’s SVP statutes confined a person *only* to provide care for the individual in question.⁹⁹ Furthermore, the committed person was entitled to treatment, periodic reevaluation of his mental state, and release when he no longer presented a danger to self or to others.¹⁰⁰

Given the enlightened goals of an involuntary civil commitment proceeding, the *Addington* Court stated that it “can in no sense be equated to a criminal prosecution.”¹⁰¹

IV. ANALYSIS OF THE *IN RE VAN ORDEN* DECISION

In holding that the clear and convincing evidence standard is a constitutional burden of proof in civil commitment proceedings, *In re Van Orden* relied almost exclusively on *Addington v. Texas*.¹⁰² Before it addressed *Addington*’s holding specifically, the Missouri Supreme Court discussed the interrelationship between due process and various burdens of proof.¹⁰³ Due process, the court noted, requires a burden of proof that accurately reflects the weight of the public and private interests involved in the case, as well as “a societal judgment about how the risk of error should be distributed between the litigants.”¹⁰⁴ The burden of proof in routine civil litigation is a mere preponderance of the evidence

96. *Id.*

97. *Id.* at 366 (quoting *In re Gault*, 387 U.S. 1, 36 (1967)).

98. *Addington v. Texas*, 441 U.S. 418, 428 (1979).

99. *Id.* at 428 n.4 (emphasis added).

100. *Id.*

101. *Id.*

102. *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008) (en banc).

103. *Id.*

104. *Id.* (quoting *Jamison v. State Dep’t of Soc. Servs.*, 218 S.W.3d 399, 411 (Mo. 2007) (en banc)).

because private interests predominate.¹⁰⁵ In civil litigation that involves a fundamental right or liberty interest, however, due process requires clear and convincing evidence in order to further reduce the risk of an erroneous decision.¹⁰⁶ Finally, because criminal proceedings implicate the criminal defendant's liberty interest, due process shifts the risk of error almost entirely to the State and requires proof beyond a reasonable doubt.¹⁰⁷

After discussing the significance of the burden of proof, the Missouri Supreme Court reviewed the United States Supreme Court's reasoning, proffered in *Addington*, as to why proof beyond a reasonable doubt is not constitutionally required in the civil commitment context.¹⁰⁸ First, *Addington* emphasized that the State is "not exercising its powers in a punitive sense" in civil commitment proceedings.¹⁰⁹ Moreover, the SVP statutes minimize the risk of error by providing ongoing opportunities for review that reduce the need for a heightened burden of proof.¹¹⁰ *Addington* also expressed concern whether, given the inherent uncertainty in psychiatric diagnosis, the State could ever meet the stringent beyond a reasonable doubt standard.¹¹¹ Finally, *Addington* cited federalism concerns and held that whether to set the burden at beyond a reasonable a doubt or by clear and convincing evidence was a matter of State prerogative.¹¹²

The Missouri Supreme Court thus used *Addington* to support its own rationale for the reduced burden of proof. It immediately stated that, post-*Addington*, the choice between the beyond a reasonable doubt standard of proof and the by clear and convincing evidence standard of proof was a matter of legislative prerogative.¹¹³ The remainder of the court's analysis focused largely on the fact that civil proceedings were at issue, as opposed to criminal proceedings.¹¹⁴ Though civil commitments implicate a liberty interest, the court noted that civil commitments are not solely punitive because they aim to secure necessary treatment for

105. *Id.* (citing *Addington*, 441 U.S. at 423).

106. *Id.* (citing *Addington*, 441 U.S. at 424).

107. *Id.* (citing *In re Winship*, 397 U.S. 358, 363–64 (1970)).

108. *Id.*

109. *Id.* (citing *Addington*, 441 U.S. at 428).

110. *Id.* (citing *Addington*, 441 U.S. at 428–29).

111. *Id.* (citing *Addington*, 441 U.S. at 429).

112. *Id.* (citing *Addington*, 441 U.S. at 431).

113. *Id.*

114. *Id.*

the committed person.¹¹⁵

The Missouri Supreme Court also stressed that the commitment term for an SVP is not indefinite.¹¹⁶ Missouri's SVP statutes, the court reasoned, reduce the risk of an erroneous commitment by providing for annual review and permitting the offender to file a petition for review at any time.¹¹⁷ Thus, there are multiple avenues for an SVP to ask the court to determine whether his mental abnormality has so changed that commitment is no longer necessary.¹¹⁸ Furthermore, the subject of a civil commitment petition is afforded many of the same constitutional protections as a criminal defendant, "including a formal probable cause hearing, the right to a jury trial, the right to an attorney, and the right to appeal."¹¹⁹ Based on the *Addington* decision and the foregoing considerations, the Missouri Supreme Court held that Missouri's law for the civil commitment of sexually violent predators may constitutionally utilize the clear and convincing evidence burden of proof.¹²⁰

The Honorable Richard Teitelman dissented.¹²¹ He posited that Missouri's civil commitment proceedings were akin to those for juvenile delinquents in that they had transitioned into "a process that was tantamount to a traditional criminal proceeding."¹²² He, therefore, argued that civil commitment proceedings warranted the application of the same due process protections as those afforded to both criminal and juvenile delinquent proceedings, namely proof beyond a reasonable doubt.¹²³

The crux of Judge Teitelman's dissent relied on his analysis of the *Addington* decision. He enumerated the four underlying tenets of *Addington* and explained why each one did not apply to Missouri's SVP statutes.¹²⁴ Judge Teitelman first stated that the lynchpin of *Addington*, that Texas's civil commitment statutes were remedial rather than punitive in nature, was absent in Missouri's revised SVP statutory scheme.¹²⁵ Per amended section 632.505.1, a committed person may be

115. *Id.*

116. *Id.* at 586.

117. *Id.* (citing MO. REV. STAT. § 632.498 (2006 & Cum. Supp. 2009)).

118. *Id.*

119. *Id.* at 585.

120. *Id.* at 586.

121. *Id.* at 592–94 (Teitelman, J., dissenting).

122. *Id.* at 592.

123. *Id.*

124. *Id.* at 592–93.

125. *Id.* at 592.

conditionally released when a court or jury determines that “the person’s mental abnormality has so changed that the person is not likely to commit acts of sexual violence if released....”¹²⁶ Section 632.505.5, however, states that a person who is conditionally released “remains under the control, care, and treatment of the department of mental health.”¹²⁷ Therefore, Judge Teitelman argued that Missouri’s SVP statutes are punitive, rather than remedial, because they subject an SVP to perpetual oversight by the Department of Mental Health.¹²⁸

Secondly, Judge Teitelman argued that *Addington* relied on the fact that proof beyond a reasonable doubt had historically been reserved for criminal cases.¹²⁹ Since the *Addington* decision in 1979, however, he asserted that numerous states have enacted SVP statutes that require proof beyond a reasonable doubt and that, until 2006, Missouri was among these states.¹³⁰ Thus, he argued that *Addington*’s historical rationale was less applicable today than in 1979.¹³¹

Thirdly, Judge Teitelman argued that the *Addington* decision relied on the SVP statutes’ provisions providing for ongoing review of the committed person’s mental condition and his immediate release if his condition improved sufficiently.¹³² Under Missouri’s revised SVP statutory scheme, however, Judge Teitelman again stressed that section 632.505.5 only provides for conditional release and subjects persons to continuing supervision by the Department of Mental Health, even after they have been successfully treated.¹³³ He noted that the State admitted in oral argument that only a “miniscule percentage” of those committed pursuant to Missouri’s SVP law have ever been released.¹³⁴ He, therefore, argued that “[b]oth the plain language and actual administration of [Missouri’s] SVP law lead to the inescapable conclusion that the initial commitment decision under the SVP law is effectively final.”¹³⁵

Finally, Judge Teitelman argued that the *Addington* Court’s fear that the beyond a reasonable doubt standard would remain unworkable in the

126. *Id.* (quoting MO. REV. STAT. § 632.505.1 (Cum. Supp. 2009)).

127. *Id.* (quoting MO. REV. STAT. § 632.505.5 (Cum. Supp. 2009)).

128. *Id.*

129. *Id.* at 593.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

SVP context has proven unfounded over time.¹³⁶ He cited multiple Missouri cases decided between 1999 and 2006 in which the State proved the necessity of committing an SVP beyond a reasonable doubt.¹³⁷

The Honorable Jacqueline Cook wrote a concurring opinion wherein she agreed with the majority opinion based on the points that Wheeler and Van Orden had presented on appeal.¹³⁸ She wrote, however, to express serious concerns, not raised directly on appeal, regarding the constitutionality of Missouri's SVP statutory scheme after the 2006 amendments.¹³⁹ Namely, Judge Cook was concerned about the constitutionality of the conditional release program implemented in 2006.¹⁴⁰ She feared that the new statutory structure would result in one who was no longer dangerous being denied the complete restoration of his liberty nonetheless.¹⁴¹ "A review of the statutory scheme following the 2006 amendments," she stated, "casts doubt, on whether an unconditional release or discharge is ever available to a person confined under the SVP statutes."¹⁴² Judge Cook believed such a failure might constitute a due process violation.¹⁴³

V. FUTURE IMPLICATIONS

It is not surprising that Missouri chose to reduce the due process protections for those deemed to be sexually violent predators in 2006.¹⁴⁴ Sex offenders are likely the least respected, most unpopular, and therefore, the most easily targeted group in the nation.¹⁴⁵ They are the pariahs of a society that has ostracized them through registration requirements, residency restrictions, and sexually violent predator laws.¹⁴⁶ Given the frequently heinous nature of SVPs' offenses, encumbrances on sex offenders' rights have been effectuated with little

136. *Id.*

137. *Id.* (citing *Cokes v. State*, 183 S.W.3d 281 (Mo. Ct. App. 2005); *In re Spencer*, 171 S.W.3d 813 (Mo. Ct. App. 2005); *In re Collins*, 140 S.W.3d 121 (Mo. Ct. App. 2004)).

138. *Id.* at 588 (Cook, J., concurring).

139. *Id.*

140. *See supra* notes 83–86 and accompanying text.

141. *Van Orden*, 271 S.W.3d at 589–90 (Cook, J., concurring).

142. *Id.* at 591.

143. *Id.*

144. *See supra* Part III.E.

145. *See* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L.R. 101, 105 (2007).

146. *See* Charles Toutant, *Zoning Out Sex Offenders*, N.J. L.J., Nov. 21, 2005, at 6.

political resistance and with overwhelming popular support.¹⁴⁷ This, too, is unsurprising, for what legislator would dare to champion the constitutional rights of a convicted child molester? Or better yet, a thrice-convicted child molester? With respect to sexually violent predators, Missouri Governor Jay Nixon no doubt appealed to Republicans and Democrats alike when he stated in his role as the former Attorney General, “[m]y office continues to aggressively pursue the indefinite commitment of those [sex offenders] who still pose a threat to the public safety of Missourians.”¹⁴⁸

Regardless, Missouri’s 2006 amendments to the SVP Act were disappointing and constitute a blemish on the integrity of the legislative and judicial branches alike. The legislature reduced the fact-finder’s burden of proof under the SVP Act from beyond a reasonable doubt to clear and convincing evidence.¹⁴⁹ While *Addington* holds that states *may* constitutionally use the lower, clear and convincing evidence burden of proof, it does not mandate that standard.¹⁵⁰ The United States Constitution, as interpreted by the Supreme Court of the United States, sets the minimum protections a State shall afford its citizens, but a State is always free to provide more.¹⁵¹

Furthermore, while there is no reliable method to calculate the effect a burden of proof may have on the fact-finder’s decision-making process, one must recognize that “adopting a ‘standard of proof is more than an empty semantic exercise.’”¹⁵² More importantly, “[i]n cases involving individual rights, whether criminal or civil, ‘[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.’”¹⁵³ Thus, by lowering the burden of proof necessary to commit sexually violent predators, Missouri sends a clear signal about the value it accords to such person’s individual liberties. While some may argue that convicted sex offenders are despicable human beings and deserve no civil

147. See *id.* (noting that residency restrictions are typically passed with zero opposition).

148. Sarah AuBuchon, *DeSoto Man Declared a Sexually Violent Predator: Robert J. Brinkman Was Convicted in 2004 for Raping 6-Year-Old Girl*, STLtoday.COM, Aug. 30, 2008, <http://jeffcountyjournal.stltoday.com/articles/2008/09/04/news/sj2tn20080830-0831ndj-perv0.ii1.txt> (last visited Oct. 6, 2009).

149. See *supra* notes 79–80 and accompanying text.

150. *Addington v. Texas*, 441 U.S. 418, 432–33 (1979).

151. See *id.* at 433.

152. *Id.* at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971)).

153. *Id.* (quoting *Tippett*, 436 F.2d at 1166).

liberties, it is important to remember that individuals who are involuntarily committed as SVPs have largely completed the prison terms for their respective crimes.¹⁵⁴ Oftentimes, the Attorney General files the petition for involuntary commitment only a few days before an offender's scheduled release.¹⁵⁵ Thus, SVP laws are a serious deprivation of liberty for one who, according to the criminal law, has already repaid his debt to society.

Separation of powers principles clearly required the Missouri Supreme Court to defer to the legislature's prerogative to reduce the burden of proof.¹⁵⁶ However, a reading of the majority opinion in *Van Orden* leaves the distinct impression that the court did not scrutinize the issues as it could have. Rather, the court accepted the rationales of *Addington*, decided thirty years ago, and mechanically applied those same rationales to the newly-revised Missouri SVP Act.¹⁵⁷

While portions of the concurring and dissenting opinions addressed issues not presented on appeal,¹⁵⁸ Judge Teitelman's dissent raised applicable concerns regarding the lower burden of proof.¹⁵⁹ He argued that "the text of the law and the reality of its application reveal a process whereby the state exercises the power to impose a permanent, punitive restraint on individual liberty."¹⁶⁰ For that reason, he believed the Act to be punitive rather than remedial and argued it constitutionally required proof beyond a reasonable doubt.¹⁶¹

The implementation of Missouri's SVP Act, as well as sexually violent predator acts around the country, proves that Judge Teitelman's assessment is absolutely correct. As of August 2008, Missouri held 103 sexually violent predators in civil commitment.¹⁶² During oral argument in *Van Orden*, the State admitted that only a "miniscule percentage" of

154. See MO. REV. STAT. § 632.483.1(1) (2006) (authorizing the agency with jurisdiction to notify the Attorney General that a person may meet the definition of a sexually violent predator within 360 days of that person's anticipated release).

155. See, e.g., *Holtcamp v. State*, 259 S.W.3d 537, 538 (Mo. 2008) (en banc) (specifying that the State filed the petition five days before the prisoner's scheduled release); *Bernat v. State*, 194 S.W.3d 863, 865 (Mo. 2006) (en banc) (specifying that the State filed the petition two days before the prisoner's anticipated release).

156. *In re Van Orden*, 271 S.W.3d 579, 585 (Mo. 2008) (en banc).

157. See *supra* notes 108–13 and accompanying text.

158. Judge Cook's and Judge Teitelman's arguments regarding the constitutionality of the conditional release program addressed issues not presented on appeal because Wheeler and Van Orden did not claim they should be entitled to unconditional release. *Van Orden*, 271 S.W.3d at 586 n.5.

159. *Id.* at 592 (Teitelman, J., dissenting).

160. *Id.*

161. *Id.*

162. AuBuchon, *supra* note 148.

Missouri's SVPs had ever been released.¹⁶³ Release rates around the country are similarly low, estimated at slightly over one percent.¹⁶⁴ Thus, practice has shown that SVP laws result in indefinite and often permanent confinement. The logical counterpart of this fact is that SVP laws are not providing the necessary treatment and rehabilitation that is their stated goal.

Judge Teitelman cogently argued that the rationale of *In re Winship*, which held that due process requires the beyond a reasonable doubt standard for juvenile delinquency proceedings,¹⁶⁵ should apply to Missouri's SVP Act.¹⁶⁶ Notably, the same concerns that led the United States Supreme Court to enhance the due process protections for juveniles apply with equal force to SVP proceedings. Specifically, the *Winship* Court was concerned because juvenile proceedings result in a loss of liberty and engender stigmatization.¹⁶⁷ The same considerations, loss of liberty and stigmatization, are ubiquitous in the context of the involuntary commitment of sexually violent predators.

While Judge Teitelman's argument makes perfect analytical sense, the problem lies in the fact that the United States Supreme Court has never defined SVP statutes as anything other than civil, non-punitive, and rehabilitative.¹⁶⁸ This article addressed the inherent difficulty in

challenging a State's designation of a statute as civil.¹⁶⁹ To make matters more difficult, an individual litigant may no longer challenge a sexually violent predator statute as punitive "as-applied" after *Seling v. Young*.¹⁷⁰

The crux of the problem in challenging SVP laws as punitive is that if a court were to recognize these statutes as punitive, it would expose involuntary civil commitment laws for sexually violent predators to Double Jeopardy and *Ex Post Facto* challenges and potentially undermine involuntary commitment proceedings altogether. In short,

163. *Van Orden*, 271 S.W.3d at 593 (Teitelman, J., dissenting).

164. Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 323 n.23 (2003).

165. *In re Winship*, 397 U.S. 358, 368 (1970).

166. *Van Orden*, 271 S.W.3d at 592 (Teitelman, J., dissenting).

167. *Winship*, 397 U.S. at 363.

168. *See supra* Part III.C.

169. *See id.*

170. *See supra* notes 59–64 and accompanying text.

challenging these laws as punitive and criminal in nature is not the avenue to success.

However, Judge Teitelman and Judge Cook also found the newly-implemented conditional release program constitutionally problematic because: (1) the conditional release program subjects a sexually violent predator to perpetual oversight by the Department of Mental Health without the requisite finding of dangerousness; and (2) there are no longer due process protections for one who is conditionally released because there is no provision for his annual review.¹⁷¹ The majority correctly declined to address this issue because it was not presented on appeal,¹⁷² but Judge Teitelman and Judge Cook had the foresight to envision its import for future adjudications involving the constitutionality of Missouri's SVP statutory scheme.

The United States Supreme Court has expressed support for a State's perpetual confinement of one with an untreatable mental illness, provided that the mental illness is coupled with a finding of dangerousness.¹⁷³ However, the Court has never sanctioned the State's continual confinement or supervision over one who is no longer a danger to self or to others. The Court has explicitly stated that involuntary confinement must be directly related to the stated goals, meaning it must end when the individual is found to no longer be dangerous.¹⁷⁴ In order to prevent an involuntary confinement which was initially constitutional from becoming unconstitutional at a later point in time, the Supreme Court of the United States has stated that there must be due process protections in place, meaning annual review, for those who are subject to involuntary commitment.¹⁷⁵ In eliminating the opportunity for annual review for SVPs who are conditionally released,¹⁷⁶ Missouri has effectively eliminated their due process protections.

Missouri's SVP statutory scheme will undoubtedly raise due process concerns if its provisions are interpreted to allow continuous

171. *Van Orden*, 271 S.W.3d at 588–91 (Cook, J., concurring); *Id.* at 592–93 (Teitelman, J., dissenting).

172. *Id.* at 586 n.5 (majority opinion).

173. *See supra* Part III.B.

174. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (“[T]he confinement’s duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others.”).

175. *O’Connor v. Donaldson*, 422 U.S. 563, 574–75 (1975); *Murrell v. State*, 215 S.W.3d 96, 105 (Mo. 2007) (en banc) (stating that Missouri’s annual review mechanism ensures that involuntary confinement that was initially permissible will not continue after the basis for it no longer exists).

176. *See supra* notes 85–86 and accompanying text.

Department of Mental Health supervision over one who has been adjudged no longer dangerous. As noted by Judge Cook, however, the amended statute on its face does not allow for full discharge from Department of Mental Health supervision.¹⁷⁷ One who has been conditionally released, meaning one who has been found not likely to commit further acts of sexual violence, remains subject to outpatient treatment and monitoring by the Department of Mental Health.¹⁷⁸ Missouri's revised SVP statutory scheme subjects the conditionally released person to no fewer than twenty restrictions, in addition to any others that the court deems necessary.¹⁷⁹ The Statute gives no indication of when or how one may be *unconditionally* released.¹⁸⁰ Thus, at this stage it appears that a credible attack against Missouri's revised Sexually Violent Predator Act must come from one who has been found "not likely to commit acts of sexual violence if released."¹⁸¹

For the time being though, sexually violent predators in Missouri will be subject to involuntarily commitments with fewer due process protections. They will be committed with a lower burden of proof, and on the rare occasion that an SVP is deemed eligible for release, he may forever remain under Department of Mental Health supervision.¹⁸² In 2003, prior to the amendments, the Honorable Judge Michael Wolff expressed concern as to whether even the beyond a reasonable doubt standard of proof provided a sufficient constitutional safeguard for SVPs, given the reprehensible and inflammatory nature of their crimes.¹⁸³ He eloquently summarized the due process challenges in such cases:

The reprehensible nature of the offenses makes observance of constitutional safeguards very difficult. The elephant in the room, to use a common metaphor, is that [these men] have been convicted of sexual offenses involving children.... *Once the state decides to proceed to commit one of these offenders, it can hardly*

177. *See supra* notes 140–42 and accompanying text.

178. *See* MO. REV. STAT. § 632.505.1 (Cum. Supp. 2009).

179. *Id.* § 632.505.3.

180. *See id.* § 632.505.

181. *Id.* § 632.505.1. Again, the problem with this avenue lies in the fact that only a "miniscule percentage" of SVPs are ever found eligible for release. *In re Van Orden*, 271 S.W.3d 579, 593 (Mo. 2008) (Teitelman, J., dissenting).

182. *See supra* Part III.E.

183. *In re Norton*, 123 S.W.3d 170, 177–78 (Mo. 2003) (Wolff, J., concurring).

lose.¹⁸⁴

According to the Supreme Court of the United States, the United States Constitution does not recognize the involuntary commitment of sexually violent predators as a punitive and permanent deprivation of individual liberty—in other words, as a criminal proceeding.¹⁸⁵ Nor does it require states to utilize the highest burden of proof in order to involuntarily commit them.¹⁸⁶ The State must, therefore, assume the onus and give even sex offenders the utmost due process. Though uttered in the context of the criminal law, Justice Brennan’s conviction in *In re Winship* has equal application here: “a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.”¹⁸⁷

184. *Id.* at 177–78 (emphasis added).

185. *See supra* Part III.C.

186. *See supra* Part III.F.

187. *In re Winship*, 397 U.S. 358, 363–64 (1970).