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The California Sexually Violent Predator Act and the Failure to Mentally Evaluate Sexually Violent Child Molesters

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COMMENT

THE CALIFORNIA SEXUALLY VIOLENT PREDATOR ACT AND THE FAILURE TO MENTALLY EVALUATE SEXUALLY VIOLENT CHILD MOLESTERS

INTRODUCTION

Children are extremely vulnerable and require the protection of adults. Children who are sexually molested are subject to chronic psychological problems and may become molesters themselves.[1] Children who have suffered more severe sexual abuse experience more traumatic symptoms throughout their lives.[2] Adolescent sex offenders who were sexually abused as children tend to abuse victims in ways similar to their own sexual abuse.[3] Some of these similarities include age,[4] sex,[5] relationship[6] and the sex act performed.[7] In

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[1] Irving Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 62-63 (1982).

[2] *See* Scott A. Ketring & Leslie L. Feinauer, *Perpetrator-Victim Relationship: Long-term Effects of Sexual Abuse for Men and Women*, 27 AM. J. FAM. THERAPY 109, 117 (1999). In addition children who are sexually abused by father figures experience significantly more trauma symptoms than do children sexually abused by other family members, friends, or strangers. *Id.* at 116.

[3] *See* Carol Veneziano, Lousi Veneziano & Scott LeGrand, *The Relationship Between Adolescent Sex Offender Behaviors and Victim Characteristics with Prior Victimization*, 15 J. INTERPERSONAL VIOLENCE 363, 370 (2000).

[4] *See id.* Adolescent sex offenders who were "sexually abused when they were younger than the age of 5 were twice as likely to victimize someone younger than the age of 5." *Id.*

[5] *See id.* Adolescent sex offenders "were twice as likely to have sexually abused males if they had been so abused by males." *Id.*

[6] *See id.* Adolescent sex offenders who were abused by a relative were 1.5 times more likely to abuse a relative. *Id.*

[7] *See id.* Adolescent sex offenders were more likely to abuse their victims using sex acts similar to their own abuse. *Id.*

addition, adult women who have been sexually abused as children are more likely than nonvictims to report being sexually assaulted and/or raped in adulthood.[8]

Public outrage and media coverage of violent sexual attacks has resulted in the creation of federal and state laws to protect children from child molesters.[9] Certain laws have been created to allow for the notification of law enforcement and the local community when certain child molesters have decided to take up residency in that community.[10] Laws that allow for the civil commitment of sexually violent predators take the protection of children one step further.[11] These laws ensure that particular child molesters will not have the opportunity to continue to harm children.[12] In order to be civilly committed in California, a convicted child molester must be assessed as being a future risk to repeat sexually violent behavior.[13]

Studies have identified many factors that are possible predictors of future sexually violent behavior.[14] There is no definitive way, however, to confidently assess the danger a

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[8] Terri L. Messman-Moore & Patricia J. Long, *Child Sexual Abuse and Revictimization in the Form of Adult Sexual Abuse, Adult Physical Abuse, and Adult Psychological Maltreatment*, 15 J. INTERPERSONAL VIOLENCE 489, 498 (2000).

[9] *See* Judge Joan Comparet-Cassani, *A Primer on the Civil Trial of a Sexually Violent Predator*, 37 SAN DIEGO L. REV. 1057, 1060-1061 (2000).

[10] *See id.* at 1061. *See generally* 42 U.S.C. § 14071 (West 2003) (includes the Jacob Wetterling Law, Megan's Law and the Pam Lyncher Act).

[11] *See generally* Stats. 1995, c. 762 § 1 (S.B. 1143) (Cal.), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1101-1150/sb_1143_bill_951011_chaptered.html (Sept. 11, 1995) (finding by legislature that a certain group of sex offenders should be civilly committed in order to protect society).

[12] *Id.*

[13] *See* CAL. WELF. & INST. CODE § 6600(a)(1) (West 2003).

[14] *See generally* M.E. Rice, V.L. Quinsey & G.T. Harris, *Sexual Recidivism Among Child Molesters Released From a Maximum Security Psychiatric Institution*, 59 J. CONSULTING CLINICAL PSYCHOL. 381, 383 (1991) (finding that the best predictors are if the child molester has ever been in a correctional institution, ever been convicted of a sexual crime, and if they had ever received a diagnosis of a personality disorder); *see generally* R.A. Prentky, R.A. Knight & A.F.S. Lee, *Risk Factors Associated with Recidivism Among Extrafamilial Child Molesters*, 65 J. CONSULTING CLINICAL PSYCHOL. 141, 147 (1997) (finding that fixation, paraphilias, and the number of prior sexual offenses are the best predictors of sexual offense recidivism); *see generally* R.K. Hanson, R.A. Steffy & R. Gauthier, *Long-term Recidivism of Child Molesters*, 61 J. CONSULTING CLINICAL PSYCHOL. 646, 649 (1993) (finding that the best predictive variables were if the perpetrator had "never been married, had prior sexual convictions, and admitted to many previous offenses."); *see generally* H.E. Barbaree & W.L. Marshall, *Deviant Sexual Arousal, Offense History and Demographic Variables as Predictors of Reoffense Among Child Molesters*, 6 BEHAV. SCI. & L. 267, 278 (1988) (finding that three factors that correlate with deviant sexual arousal are the amount of force used, the act of intercourse, and the number of previous victims).

person poses, either for the immediate moment or for the distant future.[15] This is an often-cited reason for not using the prediction of future sexual violence to civilly commit a sex offender.[16] An argument against civilly committing sex offenders is that sex offenders may not have committed another violent sex act if they were allowed freedom.[17] This Comment takes the opposite stance by showing how the California Sexually Violent Predator Act ("SVPA"),[18] while using assessment of future dangerousness, does not civilly commit a majority of sexually violent predators. Consequently, the California SVPA does not protect children as intended.

Section I of this Comment explores both past and current methods of protecting potential victims from sexually violent predators. Section I also discusses the constitutional issues surrounding modern sexually violent predator civil commitment laws and the ongoing debate regarding the ability to predict future dangerousness. Section II analyzes the problems with the California SVPA, specifically in regards to the requirements under the Act and the implications these problems create. Finally, in Section III, solutions are proposed to the problems within the Act, as well as future directions government and society need to take to further protect children.

I. BACKGROUND

State and federal laws that pertain specifically to sexual predators are not new.[19] As early as 1937, Michigan law allowed for the civil commitment of sexual psychopaths.[20] States enacted these early sexual predator laws to protect

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[15] *See* Douglass P. Boer, Robin J. Wilson, Claudine M. Gauthier & Stephen D. Hart, *Assessing Risk of Sexual Violence: Guidelines for Clinical Practice, in* IMPULSIVITY: THEORY ASSESSMENT AND TREATMENT 326, 327 (C.D. Webster ed., 1997).

[16] *Cf.* Dennis M. Doren, *Recidivism Base Rates, Predictions of Sex Offender Recidivism, and the "Sexual Preditor" Commitment Laws*, 16 BEHAV. SCI. & L. 97, 97-98 (1998) (discusses how some people argue that the inaccuracy of predicting dangerousness can lead to the unnecessary depravation of rights).

[17] *Id.*

[18] CAL WELF. & INST. CODE § 6600 (West 2003).

[19] *See generally* Raquel Blacher, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 890-897 (1995) (gives the history behind laws pertaining to sexual offenders beginning with English common law).

[20] *Id.* at 897.

society and to treat the offender.[21] Between the 1930's and the 1950's the prevailing theory was that sexual predators were not able to control themselves and, thus, were not responsible for their actions.[22] A few jurisdictions, such as Minnesota and the District of Columbia, provided civil commitment for sexual offenders regardless of whether or not criminal charges were filed against them.[23] To warrant civil commitment, the offender must have committed a sexual transgression and be powerless to prevent himself or herself from committing future sexual crimes.[24] Other states, such as Colorado, committed convicted sex offenders to hospitals instead of sending them to prison.[25]

In the 1960's, California enacted the Mentally Disordered Sex Offender ("MDSO") statute.[26] The MDSO provided for civil commitment of convicted sex offenders instead of prison time if the person was a "mentally disordered sex offender" who could benefit from treatment.[27] If there was a determination that the person could not benefit from treatment, then the offender was sentenced in criminal court.[28] Mentally disordered sex offenders were placed in hospitals for treatment while sex offenders who were not found to be mentally disordered served time in prison.[29]

By 1960, more than half of the states had civil commitment statutes that allowed for the treatment of sexual offenders, but by the end of the 1980's, the number of states with sexual offender civil commitment laws was reduced by half.[30] Most states repealed the laws based on lack of effective treatment, civil rights concerns and evidence that sexual offenders were not necessarily mentally ill.[31] For example, California repealed

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21 *See id.* at 900-901.

22 *See id.* at 897-899.

23 *See* John Kip Cornwell, *Protection and Treatment: The Permissible Civil Detention of Sexual Predators,* 53 WASH. & LEE L. REV. 1293, 1325 (1996); *see also* D.C. CODE ANN. § 22-3804(a) (2003) (states the law in the District of Columbia pertaining to civil commitment of sex offenders).

24 Cornwell, *surpa* note 23, at 1297-1298.

25 *Id.* at 1298.

26 CAL. WELF. & INST. CODE § 6316 (West 2003).

27 *Id.* at § 6316(a)(1).

28 *Id.*

29 *Id.*

30 Cornwell, *supra* note 23, at 1297.

31 Blacher, *supra* note 19, at 906.

the MDSO statute because the legislature acknowledged that sex crimes were not the result of a mental illness.[32] Some states, however, soon found that the existing laws were not always able to protect the public from sexual predators who would reoffend once they were released from incarceration.[33] The first state to deal with this lack of protection was Washington.[34]

In May 1989, a little boy was riding his bike in South Tacoma, Washington when he was sexually attacked and mutilated.[35] His attacker, Earl Shriner, had recently been released from prison and had a history of violent sexual attacks.[36] Law enforcement officials were aware of the danger that Shriner posed to the people of Washington, but under their existing laws they had no choice but to let him out of prison.[37] The people of Washington were outraged that a known, dangerous offender had been released from prison.[38] In response, Washington created a task force consisting of victims' family members, attorneys, legislators, treatment professionals and academics.[39] This task force reviewed the existing laws and constructed a proposal to tighten existing sex offender legislation.[40] In 1990, Washington enacted the first modern civil commitment law for violent sexual offenders.[41]

The Washington statute provides for the civil commitment of sexually violent predators, who are defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure

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[32] Stats. 1981, c. 928, § 1 p. 3485 (Cal.).

[33] *See generally* Cornwell, *supra* note 23, at 1298-1299 (discusses how some states enacted their laws in response to released sex offenders that were not subject to civil commitment but were known to be dangerous).

[34] Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators,* 8 S. CAL. INTERDISCIPLINARY L.R. 39, 42 (1998).

[35] David Boerner, *Predators and Politics: A Symposium on Washington's Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 525, 525 (1992).

[36] *See generally id.* at 525-527 (lists the criminal history of Earl Shriner).

[37] *See id.* at 527-530.

[38] *See generally id.* at 528-530 (cites newspaper articles that indicate the public's frustration).

[39] *Id.* at 538.

[40] *Id.*

[41] Blacher, *supra* note 19, at 907.

facility."[42] A mental abnormality, for purposes of this statute, is defined as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts ...."[43] The phrase "likely to engage in predatory acts" means that the person "more probably than not will engage in such acts if released ...."[44]

Since Washington's creation of a civil commitment law for sex offenders, other states have followed suit.[45] Modern sexual predator laws are different from previous laws in regards to when the sexually violent predator is hospitalized for treatment.[46] Earlier laws permitted treatment in hospitals instead of incarceration, while the newer laws provide for treatment in hospitals only after completion of the prison sentence.[47]

A. FEDERAL LAW

The States are not alone in their concern about violent sexual predators.[48] In response to violent attacks on children, the federal government enacted registration and notification laws[49] aimed at identifying and monitoring sex offenders.[50] In 1989, Jacob Wetterling, an eleven-year-old boy from Minnesota, disappeared.[51] The man responsible for his abduction and disappearance was never found.[52] In 1994, the federal government enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration

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42 WASH. REV. CODE § 71.09.020(16) (West 2003).

43 *Id.* § 71.09.020(8).

44 *Id.* § 71.09.020(7).

45 *See* Blacher, *supra* note 19, at 914.

46 *See* Johnson, *supra* note 34, at 45.

47 *Id.*

48 *See generally* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 94 (1996) (discusses Congress' creation of laws to protect the public from sex offenders).

49 *See* Comparet-Cassani, *supra* note 9, at 1060-1064.

50 *Id.* at 1060-1061.

51 *See* Lewis, *supra* note 48, at 89.

52 The Jacob Wetterling Foundation, http://www.jwf.org/jwf_about.html (full story) (last visited Feb. 17, 2003).

Act,[53] which requires sex offenders to register with local authorities for ten years after their release from prison.[54]

In 1996, the federal government amended the Jacob Wetterling Act to incorporate the Pam Lyncher[55] Sexual Offender Tracking and Identification Act, which required lifetime registration of serious sex offenders and created a Federal Bureau of Investigation (FBI) national database to track sex offenders.[56] When a state has not met the minimum registration requirements for sex offenders set forth in the Jacob Wetterling Law, the FBI is now required to register the offenders for that state.[57]

The 1994 kidnapping, rape and murder of 7-year-old Megan Kanka in New Jersey outraged the nation and led to the enactment of Megan's Law.[58] Unbeknownst to the community, Megan's neighbor, who committed these crimes, was a convicted pedophile who lived with two other convicted child molesters.[59] Megan's Law requires mandatory notification of the offender's whereabouts to the community in which specified sex offenders live.[60]

The federal government has not enacted any statutes that require civil commitment for sexually violent predators.[61] The United States Supreme Court has, however, had the opportunity to rule on controversial constitutional issues that have been raised by the involuntary civil commitment of sexually violent predators under state statutes.[62] Hendrick's put forth constitutional challenges to Kansas' Sexually Violent

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53 42 U.S.C. § 14071 (West 2003).

54 *See id.*; *see also* Wayne A. Logan, *A Study in "Actuarial Justice:" Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 598-600 (2000) (summarizes the law).

55 Pam Lyncher was an anticrime activist who was killed in a plane crash. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 329 n. 95 (2001).

56 42 U.S.C. § 14071(b)(6)(B)(i-iii) (West 2003).

57 *Id.* § 14072(c); *see also* Comparet-Cassani, *supra* note 9, at 1065 (summarizes the law).

58 42 U.S.C. § 14071 (a)-(f) (West 2003); *see also* Blacher, *supra* note 19, at 915-916 (explains the events that led up to the enactment of the law).

59 Blacher, *supra* note 19, at 915-916.

60 42 U.S.C. § 14071 (a)-(f) (West 2003); *see also* Blacher, *supra* note 19, at 916 (summarizes the law).

61 *See* Blacher, *supra* note 19, at 917-918.

62 *See generally* Kansas v. Hendricks, 521 U.S. 346 (1997) (case where the United States Supreme Court deals with constitutional issues surrounding sexually violent predator statutes).

Predator ("SVP") civil commitment laws due to violations of due process rights, the prohibition against double jeopardy and ex post facto laws.[63]

In 1994, Kansas adopted a SVPA, which provided for the civil commitment of a sex offender if that person had been:

> (1) Either charged or convicted of a sexually violent offense;
>
> (2) Had a mental abnormality or personality disorder; and
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> (3) As a result of this abnormality or disorder was likely to commit future violent sexual offenses.[64]

Kansas first used the act to civilly commit Leroy Hendricks, a sex offender with a history of molesting children.[65] Hendricks based his constitutional challenges to the act on substantive due process, double jeopardy and ex post facto principles.[66] The Kansas Supreme Court decided that the Act violated Hendricks' substantive due process rights because the term "mental abnormality" did not meet the "requirement that involuntary civil commitment must be predicated on a finding of mental illness."[67] The State of Kansas filed a petition of certiorari, which the United States Supreme Court granted in 1996.[68]

In 1997, in *Kansas v. Hendricks*, the United States Supreme Court found the Kansas Sexually Violent Predator Act to be constitutional.[69] The United States Supreme Court held that the Act's terminology satisfied substantive due process.[70] The Court also ruled that the Act was clearly civil in nature and was not intended to be punitive.[71]

In 1984, Hendricks was convicted of molesting two teenage boys.[72] During the civil commitment trial, Hendricks admitted to repeatedly molesting various children for over twenty-five

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63 *Id.* at 356.
64 *See id.* at 351-352.
65 *Id.* at 350.
66 *Id.*
67 *Id.*
68 *Id.*
69 *See id.* at 371.
70 *See id.* at 359-360.
71 *See id.* at 369.
72 *Id.* at 353.

years.[73] Approximately twenty years before Hendricks' conviction he had been treated in a psychiatric facility for his sexual problems until the government considered him safe enough to be discharged.[74] Soon after Hendricks' release from the psychiatric facility, he sexually assaulted two young children and was again sent to prison where he refused to take part in a treatment course for sex offenders.[75] When Hendricks was again paroled in 1972, he repeatedly abused his two stepchildren for the next four years.[76] Hendricks also admitted that he had an uncontrollable urge to molest children and that the only way to stop him was if he was dead.[77]

Hendricks claimed that the Kansas SVPA violated his substantive due process rights by using the term "mental abnormality" instead of "mental illness."[78] Hendricks also claimed that the Act violated the prohibition against double jeopardy and ex post facto principles because it created criminal rather than civil proceedings that could result in punishment for behavior for which he had already been punished.[79] In addition, Hendricks argued that the Act was punitive because the confinement was indefinite and there was no legitimate treatment offered.[80]

In response to Hendricks' arguments that the use of the term "mental abnormality" was not equivalent to the term "mental illness," the United States Supreme Court declared that the "term 'mental illness' is devoid of any talismanic significance."[81] The Court recognized that legal terminology regarding issues of mental health varied and were different from the meanings given to the same terms by the psychiatric community.[82] The United States Supreme Court found that Kansas' SVPA's use of the term 'mental abnormality' satisfied substantive due process because the Act further required that

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[73] *See id.* at 354.
[74] *See id.*
[75] *Id.*
[76] *Id.* at 354-355.
[77] *Id.* at 355.
[78] *See id.* at 358-360.
[79] *Id.* at 360-361.
[80] *See id.* at 363-365.
[81] *Id.* at 358-359.
[82] *Id.* at 359.

the mental abnormality contribute to an individual's lack of control over his or her dangerous behavior.[83]

The United States Supreme Court also disagreed with Hendricks' claim that the Act violated double jeopardy and ex post facto principles by being criminal in nature.[84] The Court found that because the Act was in the probate code, not the criminal code, the Act on its face showed the legislative intent to be civil and not criminal.[85] In order for Hendricks to negate this intent, he had to "provide[] 'the clearest proof' that 'the statutory scheme [is] ... punitive either in purpose or effect ....'"[86] A civil statute may be found to be a criminal statute if it embodies certain objectives of criminal law.[87] Two primary objectives of a criminal law are retribution and deterrence, neither of which the Untied States Supreme Court found to be contained in Kansas' SVP Act.[88] The United States Supreme Court reasoned that the Kansas SVPA was not retributive because it only used the acts as evidence and not to establish culpability.[89] In addition, the Act did not require a conviction or evidence of intent in order to confine the person.[90] The Act was also not meant as a deterrent because it applied to people who had a hard time controlling their behavior as a result of a mental abnormality or disorder.[91] Sex offenders who are unable to control their behavior are not deterred from committing sex crimes by the possibility of civil commitment.[92]

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[83] *Id.* at 360. "The mental health professionals who evaluated Hendricks diagnosed him as suffering from pedophilia, a condition the psychiatric profession itself classifies as a serious mental disorder." *Id.*

[84] *Id.* at 360-361.

[85] *Id.* at 361.

[86] *See id.* (quoting United States v. Ward, 448 U.S. 242, 248-249 (1980)).

[87] United States v. Ward, 448 U.S. at 249; *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963) (lists factors that are important in establishing that an intended civil sanction is actually criminal, these factors are "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution, and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned ...." *Id.*).

[88] Kansas v. Hendricks, 521 U.S. at 361-362.

[89] *Id.* at 362.

[90] *See id.*

[91] *Id.* at 362-363.

[92] *See id.* at 362-363.

The United States Supreme Court disagreed with Hendricks' claim that the Act was punitive.[93] Hendricks' argued that the Act was punitive because it resulted in indefinite commitment without guaranteed successful treatment.[94] The Court found that by being indefinite, the length of confinement was not motivated by the desire to punish, but was instead linked to how long the person's mental abnormality made him or her a threat to society.[95] The Court disagreed that a lack of legitimate treatment made confinement punitive, because Kansas' "overriding concern" to protect its citizens from violent sexual predators was not negated simply because the person might not be cured once confined.[96] The United States Supreme Court held that Hendricks had been unable to prove that the Kansas SVPA was a criminal rather than a civil statute.[97]

The Court held that "the Act does not establish criminal proceedings and ... involuntary confinement pursuant to the act is not punitive."[98] Due to this ruling, Hendricks' claims that the Act violated double jeopardy and ex post facto principles necessarily failed.[99] Thus, *Kansas v. Hendricks* set the stage for the passage of similar laws in other states.[100]

B. CALIFORNIA LAW

In 1995, the California legislature determined that a small population of sexually violent predators had a diagnosable mental disorder and would be a danger to society if released.[101] The legislature determined that these SVP's could be identified while they were still incarcerated and subjected to civil

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93 *Id.* at 369.

94 *Id.* at 363, 365.

95 *Id.* at 363.

96 *See id.* at 365-366.

97 *See id.* at 361.

98 *Id.* at 369.

99 *Id.* Double jeopardy prohibits states from punishing or prosecuting an individual twice for the same crime. *Id.* The ex post facto clause only relates to criminal statutes. *Id.* at 370. Due to the United States Supreme Court ruling that the Kansas SVPA was both civil and nonpunitive, civil commitments under the Act did not violate the double jeopardy or ex post facto clauses. *Id.* at 369-371.

100 *See* Johnson, *supra* note 34, at 81.

101 *See* Stats. 1995, c. 762 § 1 (S.B. 1143) (Cal.), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1101-1150/sb_1143_bill_951011_chaptered.html (Sept. 11, 1995).

commitment until they no longer posed a threat.[102] The legislature also made clear that SVP's had already served their criminal sentence and civil commitment was not punitive in nature but was used for the purpose of treatment.[103]

Under California law, a person can be deemed a SVP if they have "been convicted of a sexually violent offense against two or more victims and ... [have] a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior."[104] Under the law, a "diagnosed mental disorder" is one that is either congenital or acquired and affects the person emotionally and/or volitionally such that he or she is predisposed to commit criminal sexual acts that make him or her a danger to others.[105] The crimes that are included in the statute are rape, penetration of genital or anal openings by foreign object, sodomy, oral copulation, or lewd or lascivious acts with a child under fourteen with or without force, violence, duress, menace or fear of injury.[106]

Children are vulnerable to both non-violent and violent repeat felony child molesters.[107] Under the law, a child molester can be defined as a sexually violent predator if he or she has engaged in substantial sexual acts against children younger than fourteen on two or more occasions, even if the perpetrator did not use force, violence, menace or fear.[108] A "substantial sexual contact" consists of "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation or masturbation of either the victim or the offender."[109]

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102 *Id.*

103 *Id.*

104 CAL. WELF. & INST. CODE § 6600(a)(1) (West 2003).

105 *Id.* § 6600(c) (West 2003).

106 *See id.* § 6600(b). "Sexually violent offense" means the following acts ... a felony violation of paragraph (2) of subdivision (a) of Section 261 [rape], paragraph (1) of subdivision (a) of Section 262 [rape of a spouse], Section 264.1 [rape or penetration of genital or anal openings by foreign object, etc.; acting in concert by force or violence], subdivision (a) or (b) of Section 288 [lewd or lascivious acts], or subdivision (a) of Section 289 [forcible acts of sexual penetration] of the Penal Code, or sodomy or oral copulation in violation of Section 286 [sodomy] or 288a [oral copulation] of the Penal Code." *Id.*

107 People v. Superior Court (Johannes), 70 Cal. App. 4th 558, 568 (1999).

108 *Id.* at 569.

109 CAL. WELF. & INST. CODE § 6600.1(b) (West 2003).

Under the California Sexually Violent Predator Act, if the California Department of Corrections determines that one of their inmates meets the criteria of an SVP, they must refer the inmate to the California Department of Mental Health at least six months before his or her release from prison.[110] The Department of Mental Health then assigns two psychologists or psychiatrists to perform a mental assessment of the inmate.[111] The standardized assessment must evaluate the inmate for diagnosable mental disorders and "factors known to be associated with the risk of reoffense among sex offenders."[112] Risk factors "include criminal and psychosexual history, type, degree, and duration of sexual deviance and severity of mental disorder."[113]

If both mental health professionals agree that the person has a mental disorder that puts him or her at risk for recidivating, the Department of Mental Health will then petition the prosecutor of the county in which the person was convicted to have the person civilly committed.[114] The prosecutor then makes the decision to file a petition with the court.[115] After receiving a petition, the court holds a probable cause hearing to determine whether there is probable cause to believe that the person is a SVP.[116] If probable cause exists, the person then goes to trial where the trier of fact must find beyond a reasonable doubt that the person is a SVP before he or she can be civilly committed.[117]

The person who is the subject of the SVP hearing and trial has the right to a jury trial, the right to counsel and the right to expert evaluation as well as access to all relevant records.[118] Once a person has been found to be a SVP, he or she must be

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110 *Id.* § 6601(a)(1) and (b). The six month requirement is not applicable for inmates who were received by the department with less than nine months of his or her sentence to serve, or if the inmate's release date is modified by judicial or administrative action ...." *Id.* at (a)(1).

111 *Id.* § 6601(d).

112 *Id.* § 6601(c).

113 *Id.* § 6601(c).

114 *Id.* § 6601(d), (e). If both mental health evaluators do not agree then the Director of Mental Health retains two independent professionals to give the evaluation. *Id.*

115 *Id.* § 6601(i).

116 *Id.* § 6602(a).

117 *Id.* § 6602(a), § 6604.

118 *Id.* § 6603(a).

housed at a designated mental hospital for two years.[119] A SVP's civil commitment is subject to annual review.[120] Unless the SVP "affirmatively waive[s] his or her right to petition ..." for release, a hearing to show cause will be held.[121] The purpose of the hearing is to decide if "facts exist that warrant a hearing on whether the person's condition has so changed that he or she would not be a danger to the health and safety of others if discharged."[122] If there is probable cause to believe that he or she is no longer a danger, then the SVP is entitled to a hearing in which the SVP has the same rights and the prosecutor has the same burden of proof as in the initial trial.[123] If at the hearing the prosecutor cannot show that the person is still a SVP, then the person must be released according to the type of petition filed.[124]

At the end of the two years of civil commitment the SVP is entitled to a new civil commitment trial.[125] If the trier of fact again finds that the person is a SVP, he or she returns to the mental hospital for another two years.[126] This continues until the trier of fact finds that the SVP no longer has a mental disorder that makes him or her a danger to society.[127]

California's SVPA has been constitutionally challenged.[128] In *Hubbart v. Superior Court*, the court ruled that the SVPA did not violate due process, equal protection or ex post facto principles.[129] Hubbart was near the end of his sentence for breaking into numerous homes, placing a cloth over the lone female in each home and raping her.[130] He was convicted of

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119 *Id.* § 6604.

120 *Id.* § 6605(a).

121 *Id.* § 6605(b).

122 *Id.* § 6605(b).

123 *See id.* § 6605(c) and (d).

124 *Id.*; *see also id.* § 6605(e) (standard of proof beyond a reasonable doubt for unconditional release); *see also id.* § 6608(i) (standard of proof preponderance of the evidence for conditional release).

125 *Id.* § 6604.1 (a) and (b).

126 *Id.*

127 *See generally* Stats. 1995, c. 762 § 1 (S.B. 1143) (Cal.), *available at* http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1101-1150/sb_1143_bill_951011_chaptered.html (Sept. 11, 1995) ("individuals ... found likely to commit acts of sexually violent criminal behavior ... [should] be confined and treated until such time that it can be determined that they no longer present a threat to society.").

128 Hubbart v. Superior Court, 19 Cal. 4th 1138, 1142-1143 (1999).

129 *See id.* at 1143.

130 *See id.* at 1149.

assaulting six different victims.[131] After being examined by two mental health professionals as required under California law, he was diagnosed in part as having "recurrent intense sexually arousing fantasies, sexual urges or behaviors generally involving ... non-consenting persons" where this behavior caused "clinically significant distress or impairment ... [in] important areas of functioning."[132] The experts also agreed that Hubbart presented a high risk for reoffending.[133]

Hubbart claimed that the California SVPA violated his due process rights because the "definitions of mental impairment and dangerousness used for commitment ... are flawed ...."[134] Hubbart argued that his right to due process was also violated due to a lack of reputable treatment for sex offenders.[135] Hubbart based his equal protection claim on the fact that the dangerousness requirement in the SVPA was not as stringent as in other California civil commitment statutes.[136] Hubbart also argued that the SVPA violated the ex post facto clause because the Act allowed for sexually violent crimes committed before its enactment to be the basis of civil commitment.[137]

In coming to its decision in *Hubbart*, the California Supreme Court followed the United States Supreme Court's reasoning in *Hendricks*.[138] The California Supreme Court rejected Hubbart's claim that the California SVPA's definition of a "diagnosed mental disorder" was "broader than what is constitutionally allowed ...."[139] The court reasoned that the

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131 *Id.* at 1150.

132 AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 522-523 (fourth edition, 1994). Actual diagnosis in the case was "Paraphilia Not Otherwise Specified, Bondage, Rape and Sodomy of Adult Women, Severe .... [and] Personality Disorder, not otherwise specified with antisocial traits." Hubbart, 19 Cal. 4th at 1150.

133 Hubbart, 19 Cal. 4th at 1150.

134 *Id.* at 1151-1152.

135 *Id.* at 1164.

136 *Id.* at 1168.

137 *Id.* at 1170.

138 *See generally id.*at 1138 (the court in *Hubbart* refers to the United State Supreme Court's reasoning in *Kansas v. Hendricks* in making its decisions in regards to Hubbart).

139 *Id.* at 1152-1153. Diagnosed mental disorder includes any "congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." CAL. WELF. & INST. CODE § 6600(c) (West 2003).

differences between the terms "mental disorder" and "mental illness" were "purely semantical [sic]."[140]

Contrary to Hubbart's claim that the SVPA necessarily included persons who were only remotely harmful, the California Supreme Court found that the Act actually required a finding that the "SVP is dangerous at the time of commitment."[141] The court also referred to *Hendricks* when rejecting Hubbart's claims that his due process rights were violated because there was no viable treatment.[142] The court noted that there was no constitutional right to treatment for people who are involuntarily committed.[143]

The California Supreme Court disagreed with Hubbart's claim that the California SVPA commitment criteria regarding dangerousness was less stringent than other civil commitment statutes, such that it violated his equal protection rights.[144] The court pointed out that Hubbart's equal protection attack was identical to his unsuccessful due process argument that the SVPA failed to require a "present dangerousness."[145] Finally, the California Supreme Court rejected Hubbart's assertion that the SVPA violated the ex post facto clause.[146] The ex post facto clause only concerns laws, which "retroactively alter the definition of crimes or *increase the punishment for criminal acts.*"[147] The court reasoned that the California SVPA pertained only to a civil proceeding, not criminal and thus the confinement was not punishment.[148]

C. DANGEROUSNESS

In *Murel v. Baltimore City Criminal Court*, the United States Supreme Court stated that, "[p]redictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, ... psychiatrists are not uniquely qualified to

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140 *Id.* at 1157.
141 *See id.* at 1161-1163.
142 *Id.* at 1164.
143 *Id.* at 1166.
144 *See id.* at 1168-1170.
145 *Id.* at 1169.
146 *Id.* at 1179.
147 *Id.* at 1170-1171 (citations omitted).
148 *Id.* at 1170-1172.

predict dangerous behavior ...."[149] The Court, however, has also stated that, "there is nothing inherently unattainable about a prediction of future criminal conduct."[150] In other words, although the Court recognizes that predicting future dangerousness is not an exact science, the Court also realizes that such predictions play an important role for the trier of fact in certain cases.

California courts have also acknowledged that psychiatrists and psychologists cannot accurately diagnose an illness in every case, let alone predict the risk of future dangerousness of an individual.[151] Despite the lack of predictability of dangerousness and the loss of liberty that occurs from civil commitment, the California Supreme Court decided in *People v. Burnick* that using a reasonable doubt standard "is not negated by the 'predictive' content of the ultimate finding."[152] In other words, the risks involved in predicting future dangerousness in civil commitment proceedings can be reduced by a reasonable doubt standard.[153]

In 1980, under California's Mentally Disordered Sex Offender (MDSO) statute, a California Appellate Court in *People v. Henderson* faced the problems inherent in predicting future dangerousness.[154] Future dangerousness has been defined as the existence of "present proclivities" that, if given the right stimulus and situation, could result in behavior that is dangerous to others.[155] The *Henderson* court cautioned against interpreting the requirement of future dangerousness as being absolute before civilly committing a person under the Act by stating, "the very real statistical possibility that the prediction may never be fulfilled does not detract from the validity of the expert's opinion as to the *present* threat of substantial harm posed by the defendant."[156] The mental health expert who completed the assessment merely gave his

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149 Murel v. Baltimore City Crim. Ct., 407 U.S. 355, 364-365 n.2 (1972).

150 Schall v. Martin, 467 US 253, 278 (1984).

151 *See* People v. Burnick, 14 Cal. 3d. 306, 365-326 (1975).

152 *See id.* at 327-328.

153 *See id.*

154 *See generally* People v. Henderson, 107 Cal. App. 3d 475 (1980) (discussed the application of risk assessments to the MDSO).

155 *Id.* at 484.

156 *Id.* (emphasis added).

opinion as to future dangerousness; it was up to the trier of fact to decide how much weight to give the prediction.[157]

California has recently faced similar issues under the SVPA.[158] Patrick Ghilotti was committed under the SVPA in 1998 because he had been found to be a sexually violent predator.[159] In November of 2001, the Marin County District Attorney filed a petition for recommitment.[160] The Director of Mental Health requested the petition despite the fact that the two mental health professionals who evaluated Ghilotti felt he no longer met the criteria for civil commitment.[161] The district attorney argued that the director should be able to disregard the evaluations when the director believes that the person is still a SVP.[162] The California Supreme Court disagreed, finding that the Act did not permit the filing of a petition unless two mental health professionals agreed that the person was a SVP.[163]

The court also found, however, that if the conclusions of the mental health professionals were based on legal error, then the evaluations were invalid.[164] "[A]n evaluator applying this standard must conclude that the person is 'likely' to reoffend, if, because of a current mental disorder ... the person presents a *substantial danger*, that is, a *serious and well-founded risk* that he or she will commit such crimes if free in the community."[165] The court defined the term "*likely*" as meaning more than a "mere *possibility*," but this possibility did not have to be "*better than even.*"[166] In other words, the evaluator did

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157 *See id.* at 485-486.

158 *See generally* People v. Superior Court (Ghilotti), 27 Cal. 4th 888, 896 (2002) (discusses the level of risk needed for a mental evaluator to recommend an individual for commitment or recommitment).

159 *Id.* at 896.

160 *Id.* at 895. Although Ghilotti's first two year term was up in 2000, at a hearing for recommitment he stipulated to extending his term for another year. *Id.* at 896.

161 *Id.* at 893-894.

162 *Id.* at 894.

163 *Id.* at 894-895.

164 *Id.* at 895. "The recommendation of an evaluator is subject to judicial review for such material legal error at the behest of the appropriate party. If ... the court finds no material legal error on the face of the report, ... the evaluator's recommendation [will be] valid .... If the court finds material legal error on the face of the report, it shall direct ... the erring evaluator [to] prepare a new or corrected report applying correct legal standards." *Id.*

165 *Id.* at 922.

166 *See id.* "If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without

not have to conclude that there was more than a fifty percent chance that the person would commit another sexually violent act to find that the person fit the criteria for civil commitment.[167]

Although the evaluators do not have to decide that the risk the person poses to society is greater than chance, they do have to be aware of the problems involved in predicting future dangerousness.[168] In addressing the inaccuracy of such predictions the court reasoned that, these predictions are made at the "*initial screening stage*" to decide if the offender meets the civil commitment requirements under the SVPA.[169] It is still up to the trier of fact to find beyond a reasonable doubt that the offender is an SVP.[170]

II. ANALYSIS

A. PREDICTION OF DANGEROUSNESS

> "[S]exual violence is actual, attempted or threatened sexual contact with a person who is nonconsenting or unable to give consent."[171] There has been a mounting apprehension about the ability to predict dangerous behavior, especially as it pertains to civil commitment.[172] While it is true that the predictions in SVP cases cannot be made with a 100% surety, the problem with SVP laws is that not enough sexual offenders are even being evaluated.[173]

In order to understand how many child molesters are not mentally evaluated, it is useful to know how many child molesters actually reoffend. When studying recidivism risk as it pertains to the SVPA, the issue is determining "the rate that previously convicted sex offenders recommit the types of

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appropriate treatment and custody ...." CAL. WELF. & INST. CODE § 6601(d) (West 2003).

167 *See* People v. Superior Court (Ghilotti), 27 Cal. 4th at 922.

168 *See id.* at 921-922.

169 *See id.* at 921-922.

170 *Id.* at 922.

171 Boer et. al., *supra* note 15, at 328.

172 George E. Dix, *Determining the Continued Dangerousness of Psychologically Abnormal Sex Offenders*, 3 J. PSYCHIATRY L. 327, 327 (1975).

173 *See generally* Doren, *supra* note 16, at 98 (describes base rates in general and points out how the true base rate of sexual predators are not known).

behavior [the] law portrays as sexually predatory ...."[174] There are several problems with the research on the base rate of recidivism of child molesters.[175] One methodological problem with the research studies about recidivism rates of child molesters is that a majority of studies use reconviction as evidence of recidivism.[176] The SVPA defines risk as how likely the person is to commit a future "sexually predatory act," so the use of reconviction rates underestimates the true base rate of recidivism.[177] For example, when using data other than just convictions, such as rearrests, probation, parole and self-report, studies have shown a 27% - 47% increase in sexual recidivism.[178]

Using conviction data also poses a problem when trying to determine how active a given SVP has been.[179] "[I]ndex offense[s] and known criminal convictions at the time of admission are very poor indicators of the extent of an individual's actual deviant sexual behavior."[180] Asking child molesters about their past deviant behavior may result in an underestimation of the true number of victims.[181] These people are reluctant to admit past deviant behavior, which makes such research difficult.[182]

The recidivism rate can also depend on methodology such as the length of time the child molester is tracked after release from custody.[183] The SVPA takes into account any qualifying sex crimes that are committed during the perpetrator's lifetime.[184] Although research studies have varied in their

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174 *Id.*

175 *Id.* at 99.

176 *Id.*

177 *Id.* at 100.

178 *Id.* at 99.

179 *See e.g.* A. Nicholas Groth, Robert E. Long & J. Bradley McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME & DELINQ. 450, 453 (1982).

180 Lea H. Studer, Steven R. Clelland, A. Scott Aylwin, John R. Reddon & Audrine Monro, *Rethinking Risk Assessment for Incest* Offenders, 23 INT'L. J. L. PSYCHIATRY 15, 19 (2000).

181 *See* Groth et. al., *supra* note 179, at 456.

182 Studer et. al., *supra* note 180, at 19. *See generally* Groth et. al. *supra* note 179, at 450 (study illustrates that an average of 4.7 offenses go undetected when official records are used).

183 Vernon L. Quinsey, Martin L. Lalumiere, Marnie E. Rice & Grant T. Harris, *Predicting Sexual Offenses*, *in* ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS AND CHILD ABUSERS 116 (J.C. Campell ed., 1995).

184 *See* Doren, *supra* note 16, at 100.

length of follow-up periods, no study's duration has been conducted for the life of the perpetrator.[185] Not all repeat offenders will be caught during the time period specified by the research.[186] Thus, they are labeled as non-recidivists when they are actually unknown recidivists.[187] In addition, most recidivism studies concentrate solely on static variables (unchanging variables such as marital status and prior offenses) instead of dynamic factors, which help to classify each individual offender as being dangerous.[188]

Prentky et. al (1997) conducted a 25-year follow-up study where the researchers defined recidivism as a new charge, conviction or imprisonment.[189] They used multiple sources and took into account how long each offender was actually free during the follow-up period.[190] Out of 115 child molesters, 52% committed another sexual offense.[191] Through the addition of new charges to the definition of recidivism (as opposed to only new convictions), the recidivism rate for child molesters increased by 11%.[192] When taking into account the amount of time that the offender was actually free (exposure time), as opposed to using the "simple percentage" of offenders who were charged at some point during the 25 years, there was a 20% increase in recidivism.[193] In order to better understand the recidivism base rate of sexual offenders in a manner that is useful to the SVPA, studies should consist of lifelong follow-ups and both static and dynamic factors of recidivism.

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185 *See id.*

186 *See id.*

187 *See id.*

188 *See* R. Karl Hansen, Richard A. Steffy & Rene Gauthier, *Long-Term Recidivism of Child Molesters*, 61 J. CONSULTING CLINICAL PSYCHOL. 646, 646 (1993).

189 Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 LAW HUM. BEHAV. 635, 637, (1997). Although the follow-up period was 25 years, the average amount of time between release date and new offense was 3.64 years. *Id* at 643.

190 *See id.* at 637.

191 *See id.* at 650-651.

192 *See id.* at 644.

193 *See id.* at 643. Researchers calculated both the "simple proportion of individuals known to have reoffended during the study period" as well as the "failure rate" (FR). *Id.* at 641. FR was defined as the "proportion of individuals who reoffended ... [when] tak[ing] into account the amount of time each offender [had] been on the street and thus able to reoffend." *Id.* For child molesters, the simple proportion of new sexual offenses was 32% while the FR for sexual offenses was 52% with a difference of 20%. *Id.* at 643.

In California, there are about 96,162 convicted sex offenders, of which 70% are child molesters.[194] Only 1% of California's sex offenders are actually committed as SVP's.[195] Between the years 1998 and 2001, there have been 11,154 admissions to the prison system for felony sex crimes which include rape, lewd acts with a child, oral copulation, sodomy, penetration with an object and other sex offenses.[196] As of Dec 31, 2000, there were a total of 12,017 felony sex offenders in the California prison system, and an additional 5,538 under supervision of the parole board.[197] Since 1996 only 4,682 of the convicted sex offenders in California have been referred to the Department of Mental Health (DMH).[198] Of these 4,682, only 404 have been civilly committed.[199] Using the numbers above it is obvious that the low percentage of civilly committed sex offenders is not the result a mental evaluation finding that the offender is not dangerous, but is the result of the offender not meeting the criteria to be mentally evaluated in the first place.

B. PROBLEMS WITH THE CALIFORNIA SVPA

Under the SVPA, the California Department of Corrections (CDC) screens each child molester to determine if he or she is a potential sexually violent predator.[200] The CDC determines whether child molesters are potential SVPs based on qualifying crimes (rape, penetration of genital or anal openings by foreign object, sodomy, oral copulation, or lewd or lascivious acts with a child under 14 with or without force, violence, duress, menace, or fear of injury) and/or whether convictions were

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194 Julian Guthrie, *Care or Jail for Molesters? Mental Health, Victims' Rights Groups Sharply Split,* S.V. CHRON. Sept. 4, 2002 at A4.

195 *Id.*

196 *See* California Department of Corrections, www.cdc.state.ca.us/OffenderInfoServices/Reports/Annual/Archive.asp. 2,785 in 1998, 2,767 in 1999, 2,784 in 2000, and 2,818 in 2001. *Id.*

197 *Id.*

198 See California Department of Mental Health, www.dmh.ca/socp, (Facts and Figures), (2/03/03).

199 *Id.* Of the 4,682 offenders referred to DMH, 2,567 have met the criteria for a mental evaluation. *Id.* Of the 2,567, 1,076 have had a positive clinical evaluation, 1,453 have had a negative clinical evaluation and 38 have a pending evaluation. *Id.* Of the 1,076 positive evaluations, 160 were rejected by the District Attorney, 138 lacked probable cause and 404 have been civilly committed. *Id.*

200 CAL. WELF. & INST. CODE § 6601(a)(1) (West 2003).

against two different victims.[201] Child molesters who meet the screening criteria are referred to the Department of Mental Health for a mental evaluation.[202]

1. Convictions

Prosecutors have sole discretion regarding decisions to prosecute and what charges to file.[203] Prosecutors at times "avoid uncertainty" by pursuing cases where a conviction is highly probable and refusing cases were a conviction is doubtful.[204] Most of the relevant sex crimes are listed in the Act, but incest[205] and continuous sexual abuse of a child[206] are not.[207] As long as these latter crimes are not listed, prosecutors need to be aware of their exclusion and make decisions regarding charges accordingly. If the prosecutor charges a defendant with either one of these crimes, the defendant may not be eligible for a mental evaluation under the SVPA even if he or she is a sexually violent predator.

a. Incest:[208]

The law defines incest as "[p]ersons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who commit fornication or adultery with each other, are punishable by imprisonment in the state prison."[209] There is a logical reason why incest is not included as an offense that would qualify a person as a potential SVP. Incest can occur between two consenting adults while the SVPA protects society

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201 CDC Department Operations Manual 6.2130.8, http://www.cdc.state.ca.us/Regulations Policies/PDF/DOM/00_dept_ops_manual.pdf (last visited Feb. 16, 2003).

202 CAL. WELF. & INST. CODE § 6601(b) (West 2003).

203 *See* Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 652 (2001).

204 *Id.*

205 CAL. PENAL CODE § 285 (West 2003).

206 Id. § 288.5.

207 *See generally* CAL. WELF. & INST. CODE § 6600.1 (West 2003) (California Penal Code sections 288 and 288.5 are not listed as qualifying offenses).

208 CAL. PENAL CODE § 285 (West 2003).

209 *Id.* § 285.

from sex offenders who are predatory and violent, not from people who commit any sex crime.

Although excluding incest as a listed crime in the SVPA is rational, prosecutors need to keep its exclusion in mind when charging child molesters who molest family members. If the child molester is only convicted of the crime of incest, he or she cannot be evaluated as a possible SVP even if every other criterion is met and the offender is potentially dangerous. Prosecutors may want to consider charging child molestation that occurs between family members as one of the listed crimes rather than solely as incest. For example, under the California Penal Code, lewd and lascivious conduct[210] is considered to be a separate crime from incest such that a defendant can be convicted of both incest and lewd and lascivious conduct for the same acts.[211] Prosecutors may thus add an additional charge of lewd and lascivious conduct to any charge of incest against a child so that the defendant convicted of lewd and lascivious conduct can be subject to a mental evaluation under the SVPA.

b. Continuous Sexual Abuse of a Child: [212]

The crime of continuous sexual abuse of a child occurs when anyone who either resides with or has repeated access to a child under fourteen years of age engages in three or more acts of "substantial sexual conduct" over at least a three month period with that child.[213] "Substantial sexual conduct means penetration of the vagina or rectum of either the victim or the offender by the penis or by any foreign object, oral copulation, or masturbation of either the victim or the offender."[214] Defendants found guilty of this offense "shall be punished by imprisonment in the state prison for a term of 6, 12, or 16

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[210] *Id.* § 288. "Any person who willfully and lewdly commits any lewd or lascivious act ..." including rape, penetration of genital or anal openings by foreign object, sodomy or oral copulation on a "child who is under 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child ... shall be punished by imprisonment in the state prison for three, six, or eight years." *Id.* at § 288(a).

[211] CAL. PENAL CODE § 288 (WEST 2003); *see* People v. McAfee, 82 Cal. App. 389, 393, 405 (2002). Lewd and lascivious conduct is a separate crime from incest under California Penal Code § 288. *Id.*

[212] CAL. PENAL CODE § 288.5 (West 2003).

[213] *Id.* § 288.5(a).

[214] CAL. PENAL CODE § 1203.066(b) (West 2003).

years."[215] Due to the continuous nature of the abuse required for a charge of continuous sexual abuse of a child, a majority of those who are charged are likely to be "resident child molesters."[216]

Family members that abuse children exploit the child's innocence, naïveté and the child's inclination to be deferential to adults.[217] Children learn from a young age that they need to rely on their family for care and safety.[218] A family member that continuously molests a child has ample time to groom and/or threaten the child to ensure that any abuse is not resisted or disclosed to third parties.[219] Not only can the abuser threaten to hurt the child or another family member if the child tells, but they can threaten the child with the breakup of the family and the possibility that the child will have to live with strangers.[220] The coercion by the parent offender coupled with the guilt felt by the child victim often keeps the child silent, which allows the abuse to be ongoing.[221]

Family child abusers are not only a danger to their own family but to children outside the family as well.[222] The conventional wisdom among professionals dealing with these issues is that incest offenders are at a lower risk to reoffend and that their sex offenses are "limited to family members."[223] This belief, however, is not the case.[224] In one study, 88 of 150 (58.7%) incestuous offenders admitted to having nonincestuous victims.[225] In addition, 53.3% of the fathers with biological victims also admitted to nonincestuous victims.[226] Of the 178 sex offenders who had been convicted of a sex offense involving

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215 *Id.* § 288.5(a).

216 *See* Stats. 1989, c. 1402, § 1(a) (Cal.).

217 *See* Cory Jewell Jensen, Patti Bailey & Steve Jensen, *Selection, Engagement and Seduction of Children and Adults by Child Molesters*, 36-DEC PROSECUTOR 20, 43 (2002).

218 *See id.*

219 *See generally* Patrick Parkinson, *Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse*, 23 MELB. U. L. REV. 345, 363-364 (1999) (discusses types of grooming and how sex offenders keep children silent about the abuse).

220 *See* Jenson, *supra* note 217, at 45.

221 *See id.*

222 *See* Studer, *supra* note 180, at 18-19.

223 *Id* at 16.

224 *See generally id.* at 18-19 (provides research findings indicating that some incest offenders molest children outside of their family).

225 *Id.* at 18.

226 *Id.* at 19.

a nonbiological victim, 12.9% had been convicted of, or admitted to having committed, an incestuous sex offense.[227]

Familial offenders are predators and will not stop molesting children just because family members are inaccessible.[228] Sex offenders who have abused their own family members need to be evaluated to assess their potential dangerousness to other children. By not allowing convictions for continuous sexual abuse of a child to count toward the criteria required for a SVP mental evaluation, the Act allows certain sexually violent child molesters to be free to either continue to molest their own family members or to find new victims outside of the family.

On August 31, 2000, the California legislature attempted to close this loophole in the SVPA.[229] The Legislature passed a bill that allowed for the inclusion of California Penal Code section 288.5 in the SVPA.[230] Governor Gray Davis vetoed this bill on September 29, 2000, stating that "[e]xpanding the definition of SVP would increase the number of SVP patients treated by the Department of Mental Health and civilly committed by counties" and would result in increased costs.[231] Governor Davis also stated that the California Department of Corrections was beginning a more intensive supervision and treatment program for "sex offender parolees that are deemed to be a high risk to re-offend."[232]

Governor Davis' reasoning that including continuous sexual abuse of a child in the SVPA would make the Act too broad is not in line with the goal of the Act.[233] The Act is

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[227] *Id.* at 18-19.

[228] *See generally id.* at 15 (provides research findings indicating that some incest offenders molest children outside of their family).

[229] *See generally* A.B. 1458, (2000) (Cal.) (bill analysis), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1451-1500/ab_1458_bill_20000831_enrolled.html (Aug 31, 2000) (the assembly included continuous sexual abuse of a child in this bill, which was ultimately vetoed). Within the bill analysis the legislature noted that 219 people had been convicted of continuous sexual abuse of a child in 1997-1998. *Id.*

[230] A.B. 1458, (2000) (Cal.), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1451-1500/ab_1458_bill_20000831_enrolled.html (Aug 31, 2000) (this bill was ultimately vetoed).

[231] A.B. 1458, (2000) (Cal.), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1451-1500/ab_1458_vt_20000929.html (Sept. 29, 2000) (Governor's veto).

[232] *Id.*

[233] *See generally* Stats. 1995, c. 762 § 1 (S.B. 1143) (Cal.), http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_1101-

intended to protect society from repeat sex offenders who will continue to be a danger to society if they are free.[234] Under the Act, the offender must be convicted of one of the enumerated crimes against two separate victims before they are eligible for a mental evaluation.[235] Including another crime that consists of sexual abuse of a child does not create a situation where more offenders will be automatically committed, but instead creates a situation where more potentially dangerous offenders will be evaluated for their potential dangerousness. By not allowing the inclusion of continuous sexual abuse of a child, Governor Davis is permitting the continuation of an existing loophole in the Act and perpetuating the inability of the Act to protect society as intended by the legislature. In addition, the California Supreme Court's decision in *People v. Johnson* has created an even bigger loophole by not allowing a defendant to be convicted of both lewd and lascivious conduct and continuous sexual abuse of a child in regards to the same act.[236]

Under California Penal code section 288.5 (c), when a defendant is charged under section 288.5, he or she cannot also be charged "in the same proceeding with a charge under this section unless the other charged offense ..." refers to offenses outside of the time period charged under section 288.5 or "the other offense is charged in the alternative."[237] Until recently, the California courts have followed *People v. Valdez* by interpreting this to mean that the defendant could be charged and convicted of both section 288 and section 288.5 when the charges pertained to the same acts, but that the defendant could not be punished for both convictions.[238] In other words, the defendant's record would reflect a conviction for both crimes, but his prison time could only be calculated based on one of the convictions.[239] In the summer of 2002, the California Supreme Court in *People v. Johnson* overruled this

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1150/sb_1143_bill_951011_chaptered.html (Sept. 11, 1995) (the goal of the statute is to civilly commit sexually violent predators that are dangerous to the public).

234 *See id.*

235 CAL WELF. & INST. CODE § 6600(a)(1) & § 6601(b) (West 2003).

236 *See* People v. Johnson, 28 Cal. 4th 240, 246 (2002).

237 CAL PENAL CODE § 288.5(c) (West 2003).

238 *See* People v. Valdez, 23 Cal.App.4th 46, 48-49 (1994). Under this interpretation, the prosecutor could charge the defendant under both California Penal Code sections 288 and 288.5 and if the defendant was convicted of both then there would be a conviction that was listed under the SVPA.

239 *See id.*

interpretation of Penal Code section 288.5(c) and instead interpreted the code to mean that the prosecutor could *charge* the defendant under both Penal Code section 288 and section 288.5 for the same acts, but that the defendant could not be *convicted* of both crimes.[240]

As long as the SVPA excludes the crime of continuous sexual abuse of a child, prosecutors need to be cautious when charging a defendant with this crime. If the prosecutor charges the defendant with both continuous sexual abuse of a child and lewd and lascivious conduct for the same acts, one of two things could happen. The trier of fact has the option to convict the defendant of either continuous sexual abuse of a child *or* lewd and lascivious conduct, but not both. If the defendant were convicted of continuous sexual abuse of a child he or she would be subjected to a longer prison sentence but would not be classified as a SVP. If, however, the defendant were convicted of lewd and lascivious conduct, he or she would receive a lighter prison sentence but would be classified as a SVP. Before bringing charges under Penal Code section 288.5 and section 288 (that refer to the same acts), prosecutors should keep in mind that a conviction of continuous sexual abuse of a child does not qualify as a conviction that would result in the offender being labeled as a SVP. By vetoing the proposed amendment to include this crime in the Act, Governor Davis has created a situation where prosecutors must carefully choose their charges if they intend to prevent dangerous molesters from being released.

c. Juvenile Court:

In certain cases the prosecutor can decide to have the case tried solely in the juvenile courts.[241] Although the proceedings in juvenile court provide protection to the child, they do not

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[240] *See* People v. Johnson, 28 Cal. 4th at 246.

[241] *See* BILLIE WRIGHT DZIECH & JUDGE CHARLES B. SCHUDSON, ON TRIAL: AMERICA'S COURTS AND THEIR TREATMENT OF SEXUALLY ABUSED CHILDREN 39 (Beacon Books, 1991). The sexual abuse of a child can be dealt with in the juvenile court system when a "parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse." CAL. WELF. & INST. CODE § 300(d) (West 2003).

result in a conviction or punishment for the perpetrator.[242] The judge in juvenile court has substantial discretion when deciding how best to deal with a case once he or she has decided that the child was sexually abused,[243] but without a conviction the perpetrator is not susceptible to the SVPA.[244]

There are situations where deciding not to criminally prosecute the abuser is beneficial for the child, such as when the child is too young, the evidence is weak or a criminal trial could further traumatize the child.[245] In juvenile court, the child does not have to testify[246] and the standard of proof is lower than the standard required in criminal court.[247] Prosecutors, however, need to be cautious when deciding to take a case to juvenile court but not criminal court; even very young children can give effective testimony if they are adequately prepared.[248] In addition, testifying in court can be therapeutic for children who can feel a sense of empowerment and realize that adults take them seriously.[249] Prosecutors should avoid bringing child molestation cases solely to juvenile court when there is a good possibility of a guilty verdict in criminal court without trauma to the child.

2. Number of Victims

Under the SVPA, a child molester must be convicted of sex crimes involving more than one victim in order to be classified as a SVP.[250] This requirement was arguably created under the theory that more than one victim is evidence of predatory behavior.[251] There are two situations where this can become a

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242 *See* In re Alysha, 51 Cal. App. 4th 393, 397 (1996).

243 *See* In re Corey, 227 Cal. App. 3d 339, 345-346 (1991).

244 *See* CAL. WELF. & INST. CODE § 6600(a)(1) (West 2003).

245 *See* Lucy Berliner & Mary Kay Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J. SOC. ISSUES 125, 134-135 (1984).

246 *See* In re Kailee B., 18 Cal. App. 4th 719, 725-726 (1993).

247 *See* Dziech, *supra* note 242, at 39.

248 Berliner, *supra* note 245, at 129.

249 *Id.* at 135.

250 CAL. WELF. & INST. CODE § 6600(a)(1) (West 2003).

251 *See generally* Assembly Committee on Public Safety, S.B.X1 41, Comments § 4(a)(i) (Cal. 1994) *available at* http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0001-0050/sbx1_41_bill_940623_amended_sen (June 23, 2994) (this proposed Bill was never passed) (the California Legislature when first attempting to create a SVPA in 1994 discussed introducing the requirement that the offender must have been convicted of more than one sexually violent crime by asking "[s]hould a sexually violent predator by

problem. The first situation is when there is actually one victim. The second situation is where there are multiple victims but the child molester was only convicted of crimes against one of the victims.

a. Conviction for Only One Actual Victim:

The first situation occurs during the screening process by the CDC, at which time the child molester's record shows that his or her crime(s) involved only one victim. The legislature has decided that mental health professionals do not need to evaluate this child molester for future dangerousness, even though the research shows that there is a 52% chance that he or she may eventually reoffend.[252] In other words, another child, and possibly more, must suffer before this child molester is evaluated for his or her risk of future dangerousness.

If the legislature has faith in mental health professionals, what makes a professional's ability to predict any different when the sex offender has victimized only one victim rather than two? The evaluator should use multiple reliable and valid methods of assessing future risk that combines both statistical and clinical methods.[253] These methods need to use multiple sources of information, including both static and dynamic factors that tap multiple domains of functioning.[254] When using previous crimes as part of the assessment, the severity and/or the duration of the abuse as well as the presence of non-sexual crimes may be more important indicators of future dangerousness than the fact that two victims have been identified.[255] As discussed below the evaluations of potential

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definition commit more than one crime?" *Id.*).

[252] Prentky et. al., *supra* note 189, at 643.

[253] *See* Joel S. Milner & Jacquelyn C. Campbell, *Prediction Issues for Practitioners, in* ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS AND CHILD ABUSERS 21-22 (J.C. Cambell ed., 1995). The clinical method uses experience and observation of the researcher and the statistical method is based on "how others have acted in similar situations (actuarial) or on an individual's similarity to members of violent groups." *Id.* at 21.

[254] Boer et. al., *supra* note 15, at 329, Table 17.1.

[255] *See generally* CONREP Policy and Procedure Manual, Clinical Evaluation: Assessment Services § 1610.15 (March, 2002), http://www.dmh.cahwnet.gov/SpecialPrograms/Forensic/docs/vol1 chap1600/1610(9-02R4).pdf (last visited Feb. 16, 2003) (this is evidenced by the fact that the tests used by CONREP focus more on behavioral characteristics of the offender than on the number of victims). The tests used are the Minnesota Mutiphasic

SVPs consist of multiple reliable and valid sources of information on many areas of functioning.[256]

The statistical or actuarial method is helpful because "particular samples of sex offenders vary widely in their recidivism rates. ...[So] actuarial scale[s] would be successful in *ranking* child molesters and rapists from samples with different characteristics according to ... risk."[257] A good actuarial instrument includes static factors such as history of offenses, psychopathy and "phallometrically measured sexual preferences," as well as dynamic factors such as "gaining or losing employment. ...changes in attitude or mood. ... treatment induced changes ... [and] the opportunity to commit further offenses ...."[258] In the end, the strategy of risk assessment should be to "anchor clinical judgment ... start with an actuarial estimate of risk and then to alter it by examining dynamic variables such as treatment outcome and intensity and quality of supervision."[259] The SVP evaluator needs to use actuarial instruments that require different types of information and then supplement this with relevant dynamic factors in order to create a comprehensive assessment of an individual's future dangerousness.

In California, the Conditional Release Program ("CONREP") conducts clinical evaluations of potential SVPs.[260] CONREP defines assessment as "a comprehensive, mental health clinical evaluation of the etiology, course, and/or current status of the patient's mental, emotional or behavioral disorder."[261] The assessment that is used on SVPs consists of

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Personality Inventory-2 (MMPI-2), Rorchach, HCR-20, Hare Psychopathy Checklist, and the Mutliphasic Sex Inventory (MSI). *Id.* at § 1610.15.

256 *See generally* CONREP Policy and Procedure Manual, Clinical Evaluation: Assessment Services (March, 2002), http://www.dmh.cahwnet.gov/SpecialPrograms/Forensic/docs/vol1 chap1600/1610(9-02R4).pdf (last visited Feb. 16, 2003) (gives the different assessments that CONREP provides and what each one assesses).

257 Quinsey et. al., *supra* note 183, at 132.

258 *Id.* at 132-133.

259 *Id.* at 132.

260 *See generally* CONREP Policy and Procedure Manual, Clinical Evaluation: Assessment Services §1610.6 (March, 2002), http://www.dmh.cahwnet.gov/SpecialPrograms/Forensic/docs/vol1 chap1600/1610(9-02R4).pdf (last visited Feb. 16, 2003) (gives the different assessments that CONREP provides and what each one assesses).

261 *Id.* § 1610.1.

both a Behavioral and Psychiatric Functioning Questionnaire ("BPFQ")[262] and Standardized Psychological Testing.[263]

The BPFQ is a "multi-part behavioral checklist ..." that "describes the range of social, behavioral, and psychiatric problems ...."[264] It measures such things as "employment/employability; living arrangement; social support; substance abuse; overall adherence to treatment program; behavioral obtrusiveness; self-confidence; and psychiatric symptomatology using the Forensic Adaptation of the Brief Psychiatric Rating Scale ("FBPRS")."[265] This particular assessment takes into account many areas of functioning both present and future.[266] The standard assessment used by CONREP also includes the Standardized Psychological Testing protocol, which is a more in-depth evaluation.[267]

The Standardized Psychological Testing protocol addresses functioning of "physical co-factors; intellectual functioning; neuropsychological functioning; risk assessment; and competency assessment (as appropriate)."[268] Physical co-factors "determine[] the presence and degree to which physical disorders are co-factors to a patient's mental disorder" while tests of intellectual functioning indicate the patient's capacity to take part in therapy.[269] Neuropsychological functioning is tested using both the Neurobehavioral Cognitive Screening Examine (NCSE) and the Trails Making A & B to "help identify the areas and severity of impairment and establish the need for further neuropsychological testing."[270] Testing the basic neurological functioning of potential SVPs is important to detect possible neurological problems that could effect overall assessment and possible treatment.[271]

The most important part of the Standardized Psychological Testing, when the subject is a possible SVP, is the Risk

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262 *Id.* § 1610.10-1610.11.
263 *Id.* § 1610.12-1610.15.
264 *Id.* § 1610.10.
265 *Id.* § 1610.10-1610.11.
266 *See generally id.* (the listed areas that are measured are both present and future).
267 *See generally id.* § 1610.12-1610.22 (this assessment covers cognitive factors as well as risk assessment).
268 *Id.* § 1610.12.
269 *Id.* § 1610.13.
270 *Id.* § 1610.14.
271 *Id.*

Assessment.[272] The Risk Assessment consists of several tests as well as "other clinical indicators such as psycho-social history, patient compliance with treatment progress in meeting treatment goals and monitoring behavior through supervision ...."[273] The battery of tests that are used include the Minnesota Multiphasic Personality Inventory-2 MMPI-2, Rorschach Comprehensive System (Exner), HCR-20 (behavioral measure), Hare Psychopathy Checklist (PCL) and/or the Hare Psychopathy Checklist Short Version (PCL-SV), and the Multiphasic Sex Inventory (MSI).[274]

The process used by CONREP follows the suggestions of the research concerning what information is relevant and how to go about obtaining the information. CONREP's assessment utilizes numerous methods and sources to gather relevant information on different domains of functioning. CONREP uses both statistical (actuarial) methods (as listed above) and the examination of dynamic goals (as listed above) to complete the assessment of a potential SVP.

The assessment procedure that CONREP uses to predict the future dangerousness of child molesters is adequate: there is no indication that information gleaned from sex crime conviction(s) involving two victims increases the accuracy of the assessment over information gleaned from a conviction involving one victim. Even in situations where a child molester convicted of a sex crime involving one child clearly admits that he or she intends to continue molesting children, under the present SVPA there is nothing that law enforcement can do once their prison sentence has been served. If the same child molester had been convicted of sex crimes involving more than one child, at the end of his or her prison sentence, he or she can be referred for an assessment of future dangerousness. The number of identifiable victims should not be as important as the actual danger a child molester poses to our children.

b. Conviction on Only One of Multiple Victims:

The second situation that arises concerning the requirement of two victims exists when evidence points to

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272 *See id.*
273 *Id.* §1610.15.
274 *Id.*

multiple victims, but the molester is charged with crimes pertaining to only one victim. The problem with the requirement of a conviction involving two different victims becomes more apparent when considering the fact that only a small percentage of sex crimes committed against children even come to the attention of the authorities.[275] This increases the existence of situations where a conviction is obtained in regard to one victim when in reality there are multiple victims.

An estimated 6% of sex crimes against children are reported to the authorities.[276] When reports of child molestations are made, children under the age of 12 make up a third (34%) of reported victims of sex crimes and constitute more than half of all juvenile victims (under 18).[277] One out of every seven victims (14%) of a sex crime is under the age of six with 69% of victims under six being female.[278] Of any age, males are most at risk of being sexually abused at four-years-old, however, they are still only half as likely to be victimized as females at the same age.[279] When a child under six has been sexually abused and the abuse has been reported to authorities, an arrest is made only 19% of the time.[280] Children aged 6-11 do not fare much better, with only 33% of their perpetrators being arrested when their abuse is reported.[281]

Hypothetically,[282] if in any year there are reports of 10,000 victims of sex assault, 1,400 are under six-years-old, and 966 of these children are female. Another 3,400 of these reported victims are children aged 6-11. There is also an additional 75,200 children whose sexual abuse is not reported. Only 466 of the 1,400 children under six who are victims of reported sexual assault, and 1,122 of the 3,400 6-11 year-olds will see their abuser arrested. Once the abuser is arrested it is up to the prosecutor whether or not to bring criminal charges. Looking at the above numbers, it is poignantly clear how few

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275 *See* Prager, *supra* note 1, at 62.

276 *Id.*

277 Howard N. Snyder, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*. BUREAU JUST. STAT. REP. NCJ 182990, 2 (July, 2000) Table 1.

278 *Id.* at 2, 4.

279 *Id.* at 4.

280 *Id* at 11.

281 *Id.*

282 These numbers are meant to illustrate the percentages given and are not derived from any source.

children who are sexually abused even have their case looked at by a prosecutor.

Child sexual abuse cases have unique characteristics that are significant with regard to a prosecutor's discretionary power and the desire to "avoid uncertainty" when bringing charges.[283] Unique characteristics that greatly influence whether or not the prosecutor will bring charges include both the victim's age, and presence or absence of other witnesses.[284] Issues surrounding young children in regards to their willingness and ability to testify are important factors when deciding whether or not to prosecute.[285] Under the SVPA, even if the perpetrator is eventually convicted of abusing a child, any evidence that he or she abused any other children where there were no convictions, cannot be used to qualify the child molester for a mental evaluation.[286] As a result, child molesters who abuse very young children are less likely to be mentally evaluated for their future dangerousness even though it is arguable that they are dangerous just by their choice of the most vulnerable of victims. A prosecutor needs to remember that child molesters who abuse young children are less likely to be mentally evaluated when deciding to charge a defendant with sex crimes against one child when there is evidence that there are multiple victims.

To protect society from sexually violent predators the SVPA must be changed. The Act should allow for the severity of the crime and evidence that there were other victims, regardless of convictions, to be considered when deciding whether or not to have the offender mentally evaluated for their potential future risk. Other victims can be identified through information collected during the investigation of the convicted crime, as well as talking to the victim of the convicted crime. Although, using evidence of other victims in the absence of a conviction may seem objectionable, the proposal here is not to bring evidence of other possible victims before the trier of fact, but to make such information available to mental health

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283 *See* Spohn & Holleran, *supra* note 203, at 652-653.

284 Dziech & Schudson, *supra* note 242, at 36.

285 *See* Berliner & Barbieri, *supra* note 246, at 134-135.

286 *See generally* CAL. WELF. & INST. CODE § 6600 (West 2003) (in order to be a sexually violent predator an individual has to have "been *convicted* of a sexually violent offense against two or more victims ...." *Id.* § 6600(a)(1) (emphasis added)).

evaluators. Evidence of other victims is an important source of information, useful to accurately assess future dangerousness.

Prosecutors can also influence how this Act achieves its goal of protecting society from sexually violent predators. Although prosecuting child sexual abuse cases is difficult, the courts have created ways to facilitate the process, such as closed-circuit televised testimony,[287] leniency on hearsay issues[288] and allowing children who would otherwise be too scared to testify to have more support during their testimony.[289] When prosecutors are deciding whether or not to charge a sex offender with crimes against a particular victim, they should utilize these facilitating options when assessing the strength of the evidence, the ability and willingness of the child to testify and the likelihood of winning a conviction. Prosecutors also need to take into account what effect their decision will have on the ability to classify the perpetrator as a sexually violent predator in the future. If a prosecutor believes that a child has been sexually abused and that a criminal trial would not further traumatize the child, then the prosecutor should bring that case to trial. By bringing the case to trial, the prosecutor may be protecting both the child victim from further abuse as well as other children that could be victimized by the perpetrator in the future.

III. CONCLUSION

The risk of over predicting the dangerousness of child molesters for the sake of civil commitment is not as significant as people think. Instead, the real danger is that sexual predators are set free without being assessed for their danger

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[287] CAL. PENAL CODE § 1347(b) (West 2003).

[288] CAL. EVID. CODE § 1228 (West 2003). Allows for the admission of a hearsay statement to establish the elements of certain crimes "in order to admit as evidence the confession of a person accused ..." if (a) the child is under 12 and the statement is "in a written report of a law enforcement official or an employee of a county welfare department," (b) "[t]he statement describes the minor child as a victim of sexual abuse," (c) "[t]he statement was made prior to the defendant's confession," (d) "[t]here are no circumstances ... that would render the statement unreliable," (e) "[t]he minor child is found to be unavailable ... or refuses to testify" and (f) "[t]he confession was memorialized in a trustworthy fashion by a law enforcement official." *Id.*

[289] *See* CAL. PENAL CODE § 868.5 (West 2003). In cases involving certain enumerated crimes a prosecuting witness is "entitled, for support, to the attendance of up to two persons of his or her own choosing ... one of those support persons may accompany the witness to the witness stand ...." *Id.* at (a).

to children. By excluding continuous sexual abuse of a child from the California SVPA, certain child molesters will not be mentally evaluated. In addition, the number of child victims of a child molester is less important than the actual risk that the child molester will continue to sexually abuse children. California must change the SVPA, both to include continuous sexual abuse of a child and to remove the requirement that there be two identifiable child victims.

Until California changes the SVPA, prosecutors need to consider its shortcomings when charging child molesters. Prosecutors need to be aware that incest and continuous sexual abuse of a child will not result in a risk assessment of the child molester. In addition, prosecutors should be sure that when they charge a child molester with both continuous sexual abuse of a child and lewd and lascivious conduct, the two charges refer to different acts. Finally, prosecutors need to be careful when assessing whether or not to take the case to criminal court. Whenever possible, the prosecutor should pursue the case in criminal court so the conviction can be used to classify the child molester as a sexually violent predator. Prosecuting cases of child sexual abuse is critical to punish the offender, to ensure he will be mentally evaluated and most importantly, to protect the innocent child from his abuse.

Nicole Yell[*]

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