2000

A Primer on the Civil Trial of a Sexually Violent Predator

Joan Comparet Cassani

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Civil Procedure Commons

Recommended Citation

Joan C. Cassani, A Primer on the Civil Trial of a Sexually Violent Predator, 37 SAN DIEGO L. REV. (2020). Available at: https://digital.sandiego.edu/sdlr/vol37/iss4/6

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
A Primer on the Civil Trial of a Sexually Violent Predator

JUDGE JOAN COMPARET-CASSANI*

TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................................. 1058

II. THE GENESIS OF THE SEXUALLY VIOLENT PREDATOR ACT ......................................................... 1060
   A. Federal and State Legislation .............................................................................................. 1060
   B. The Magnitude of the Problem ........................................................................................... 1067
      1. Statistics of Sexually Violent Offenders ........................................................................... 1067
      2. Recidivism Rates ............................................................................................................ 1069
      3. Legislative Intent ............................................................................................................ 1075
      4. Predicting Dangerousness ............................................................................................... 1077

III. THE CIVIL TRIAL ................................................................................................................. 1079
   A. Pretrial Procedures .............................................................................................................. 1079
   B. Contentions to Be Proved ................................................................................................... 1089
      1. The Qualifying Prior Convictions .................................................................................... 1089
         a. The Predatory Nature of the Prior
            Offenses Must Be Proved ................................................................................................ 1089
         b. A Determinate Sentence Should Not
            Be Required .............................................................................................................. 1093
      2. The Diagnosed Mental Disorder and the Likelihood of Reoffending .................................... 1099

* Judge Joan Comparet-Cassani presides over a felony criminal trial calendar in Long Beach, California. Prior to her appointment to the bench in 1995 by Governor Pete Wilson, she was a Deputy Attorney General in the California Attorney General’s Office and handled criminal appeals, death penalty cases, and writs. Before entering the field of law, Judge Comparet-Cassani taught philosophy. In addition to her felony trial calendar, she writes law review articles and is a featured speaker at legal conferences.
I. INTRODUCTION

Involuntary commitment\(^1\) for sexually violent predators\(^2\) became the law in California in 1996.\(^3\) This law, the Sexually Violent Predator Act,\(^4\) provides for a civil jury trial.\(^5\) This trial is unique, since some of the procedural protections afforded a criminal defendant apply. For example, a unanimous jury must find, beyond a reasonable doubt, that the individual is a sexually violent predator.\(^6\)

---

1. The commitment is for a two-year period, reviewable after one year. See CAL. WELF. & INST. CODE §§ 6604, 6605 (West 1998).
2. A “[s]exually violent predator” is defined as:
   a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has 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.
   Id. § 6600(a).
4. Id. §§ 6600-6609.3.
5. See id. § 6603(b). However, if a trial by jury is not requested, a “trial before the court without a jury” will be provided. Id. § 6603(c).
6. See id. § 6604. This section provides:
   The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health, and the person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under this article or unless the term of commitment changes pursuant to subdivision (e) of Section 6605. Time spent on conditional release
The Act provides for the treatment of the individual if committed,\textsuperscript{7} and carefully crafts the procedures for the mental health evaluation and review process. Unfortunately, the part of the statute that provides for the civil trial is not as tightly drafted. Consequently, it is subject to some internal inconsistencies requiring clarification and statutory interpretation. This Article will address several problems in this area with specific recommendations to resolve those issues and clarify what elements should be subject to proof at trial. However, before any attempt to interpret the law is undertaken, the historical roots of the Sexually Violent Predator Act must be explored as an aid to that interpretation. The Act was enacted due to a profoundly serious problem of such magnitude that, prior to its legislation, three related federal statutes were enacted.\textsuperscript{8}

As will be shown, statistics available to law enforcement on both the state and federal level revealed an alarming growth in the number of sexually violent offenders. Additionally, several experts in the mental

\begin{itemize}
\item \textsuperscript{7} See id. § 6606. This sections provides:
\begin{enumerate}
\item A person who is committed under this article shall be provided with programming by the State Department of Mental Health which shall afford the person with treatment for his or her diagnosed mental disorder.
\item Amenability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.
\item The programming provided by the State Department of Mental Health in facilities shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol developed by the State Department of Mental Health. The protocol shall describe the number and types of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The protocol shall also specify measures that will be used to assess treatment progress and changes with respect to the individual’s risk of reoffense.
\end{enumerate}
\end{itemize}

\begin{itemize}
\item \textsuperscript{8} See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (1994) [hereinafter Jacob Wetterling Act]; Megan’s Law, id. § 14071(d); Pam Lyncher Offender Tracking and Identification Act, 42 U.S.C. § 14072(b) (Supp. IV 1998) [hereinafter Pam Lyncher Act].
\end{itemize}
health field have concluded that the rate of recidivism for sexually violent predators has been greatly underestimated. The combination of these factors, the occurrence of several infamous crimes by individuals on parole, and the public’s demand for more restraints for sex offenders about to be paroled, presaged the new law.

Each of these historical factors will be explored first, since it is only when one fully understands the problem that the answer (the Sexually Violent Predator Act) can be correctly interpreted.

II. THE GENESIS OF THE SEXUALLY VIOLENT PREDATOR ACT

A. Federal and State Legislation

Public outrage has often been the catalyst for the creation of new laws. In fact, a combination of media coverage of emotionally charged high-profile stories, the public’s outraged response, and the repetition of the same type of conduct which heretofore was not a crime, but which presents a high level of danger to public safety, has often resulted in the creation of a new law. Crimes such as stalking, carjacking, drive-by shootings, and terrorist threats are all relatively new laws that arose in that manner.

The creation of the Sexually Violent Predator Act has much the same genesis. The public’s moral outrage, and corresponding media coverage, which occurred in response to a series of violent and highly publicized sexual assaults, resulted in the enactment of several new federal laws. Two of the three cases culminated in murder, and, in each case, the offense was committed by an individual who had an extensive prior sexual criminal history and had recently been released from prison. The kidnapping and presumptive murder of Jacob Wetterling, whose body

---

10. See id. § 215.
11. See id. § 417.3; id. §12022.55
12. See id. § 422.
13. See Introduction to NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, at vii, vii (U.S. Dep’t of Justice, 1998). In discussing the issue of registering sex offenders one commenter noted:

Americans have become increasingly angry in recent years in response to a series of violent and highly publicized sexual assaults, primarily against children, committed by individuals with extensive prior sexual offense histories. This outrage has been intensified by the perception . . . that systems traditionally used by justice agencies to monitor law-breakers returned to the community do not adequately protect the public from that unique category of individual known as the sex offender.

Jan M. Chaiken, Forward to NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra, at v, v.
has never been recovered, the sexual assault and murder of Megan Kanka by a neighbor who, unknown to her family, was a twice-convicted pedophile, and the sexual assault of Pam Lyncher by a twice-convicted felon each resulted in the creation of several statutes on both the federal and state levels. The three federal laws, the Jacob Wetterling Act, Megan's Law, and the Pam Lyncher Act, collectively require the states to strengthen the procedures they use to keep track of sex offenders.

The main objective of the Jacob Wetterling Act is to protect the public from sex offenders and child molesters through registration requirements. It requires sexually violent predators and other sexual offenders to register their current residence with local authorities. The registration requirement is intended to control crime and prevent recidivism by making sex offenders readily available for police surveillance at all times. This requirement is necessary because, as the courts have acknowledged, sex offenders often have a transitory lifestyle

15. See id.
16. See id.
18. Id. § 14071(d).
20. See Jan M. Chaiken, Forward to National Conference on Sex Offender Registries, supra note 13, at v, v (stating that all three statutes were designed to strengthen state procedures for tracking sex offenders).
23. See 42 U.S.C. § 14701(a)(1). This section provides that the Attorney General must create guidelines that require that "a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency." Id. § 14701(a)(1)(A). The statute also states that "a person who is a sexually violent predator [must] register a current address with a designated State law enforcement agency." Id. § 14701(a)(1)(B).
24. See People v. Franklin, 975 P.2d 30, 33 (Cal. 1999) ("The registration act is intended to promote the state's interest in controlling crime and preventing recidivism in sex offenders by making them readily available for police surveillance at all times."); Wright v. Superior Court, 936 P.2d 101, 104 (Cal. 1997) ("The purpose of section 290 [the sex offender registration act] is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future.") (citations omitted).
and deliberately attempt to keep their movements secret.\textsuperscript{25}

The Jacob Wetterling Act places four obligations on the states: (1) register the current addresses of sexual offenders and sexually violent predators;\textsuperscript{26} (2) maintain accurate registries;\textsuperscript{27} (3) maintain and distribute registry information to law enforcement;\textsuperscript{28} and (4) disclose information to the public when necessary to provide for public safety.\textsuperscript{29}

\begin{itemize}
\item \textsuperscript{25} See Wright, 936 P.2d at 105 ("In large cities . . . where offenders can easily relocate without reregistering, section 290(f) seeks to prevent them from disappearing from the rolls. Ensuring offenders are 'readily available for police surveillance' depends on timely change-of-address notification." (quoting Barrows v. Municipal Court, 464 P.2d 483, 486 (Cal. 1970))).
\item \textsuperscript{26} See 42 U.S.C. § 14071(a); see also supra note 23.
\item \textsuperscript{27} See 42 U.S.C. § 14071(b). This sections provides that a registration program must contain the following elements:
\begin{itemize}
\item (A) If a person who is required to register under this section is released from prison, or placed on parole, supervised release, or probation, a State prison officer, or in the case of probation, the court, shall—
\begin{itemize}
\item (i) inform the person of the duty to register and obtain the information required for such registration;
\item (ii) inform the person that if the person changes residence address, the person shall give the new address to a designated State law enforcement agency in writing within 10 days;
\item (iii) inform the person that if the person changes residence to another State, the person shall register the new address with the law enforcement agency with whom the person last registered, and the person is also required to register with a designated law enforcement agency in the new State not later than 10 days after establishing residence in the new State, if the new State has a registration requirement;
\item (iv) obtain fingerprints and a photograph of the person if these have not already been obtained in connection with the offense that triggers registration; and
\item (v) require the person to read and sign a form stating that the duty of the person to register under this section has been explained.
\end{itemize}
\end{itemize}
\item \textsuperscript{28} See id. § 14071(b)(1)(A).
\item \textsuperscript{29} See id. § 14071(b)(2). This section provides:
\begin{itemize}
\item (A) State reporting. State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation.
\item (B) National reporting. A State shall participate in the national database established under section 14072(b) of this title in accordance with guidelines issued by the Attorney General, including transmission of current address information and other information on registrants to the extent provided by the guidelines.
\end{itemize}
\item \textsuperscript{29} See id. § 14071(e). This section discusses the release of information and states:
\begin{itemize}
\item (1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.
\item (2) The State or any agency authorized by the State shall release relevant information that is necessary to protect the public concerning a specific person
\end{itemize}
\end{itemize}
California was the first state to require sex offender registration.\textsuperscript{30} The statute was first enacted in 1947.\textsuperscript{31} The number of individuals required to register in California grew steadily for the first forty years to approximately 70,000 convicted sex offenders.\textsuperscript{32} As of 1998, the figure exceeded 77,000, which means, at that time, approximately 1 in every 150 adult males in California was required to register as a sex offender.\textsuperscript{33} New sexual offender registrants amount to 3000 individuals annually, and approximately 7000 individuals of those required to register have never registered.\textsuperscript{34} Of the 77,000 individuals who are required to register in California, sixty percent were found guilty of sex offenses against children.\textsuperscript{35} Currently, all fifty states have sex offender registration laws.\textsuperscript{36}
Megan’s Law was enacted in 1996 in honor of Megan Kanka, and it amended the Jacob Wetterling Act to make community notification of a paroled sex offender in a community mandatory instead of discretionary. California added its own Megan’s Law in 1996. Only three states—Kentucky, Nebraska, and New Mexico—currently do not have community notification laws and do not allow access to sex offender registration information.

---


SECTION 1. SHORT TITLE.

This Act may be cited as “Megan’s Law”.

SEC. 2. RELEASE OF INFORMATION AND CLARIFICATION OF PUBLIC NATURE OF INFORMATION.

Section 170101(d) of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071(d)) is amended to read as follows:

“(d) RELEASE OF INFORMATION.—

“(1) The information collected under a State registration program may be disclosed for any purpose permitted under the laws of the State.

“(2) The designated State law enforcement agency and any local law enforcement agency authorized by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section, except that the identity of a victim of an offense that requires registration under this section shall not be released.”.

Id.


39. See CAL. PENAL CODE § 290 (West 1999). Subdivision (m) of Penal Code section 290 provides in relevant part:

(m)(1) When a peace officer reasonably suspects, based on information that has come to his or her attention through information provided by any peace officer or member of the public, that a child or other person may be at risk from a sex offender convicted of a crime listed in paragraph (1) of subdivision (a) of Section 290.4, a law enforcement agency may, notwithstanding any other provision of law, provide any of the information specified in paragraph (4) of this subdivision about that registered sex offender that the agency deems relevant and necessary to protect the public, to the following persons, agencies or organizations the offender is likely to encounter, including, but no limited to, the following:

(A) Public and private educational institutions, day care establishments, and establishments and organizations that primarily serve individuals likely to be victimized by the offender.

(B) Other community members at risk.

(2) The law enforcement agency may authorize persons and entities who receive the information pursuant to paragraph (1) to disclose information to additional persons . . .

Id. § 290(m). Subdivision (n) of section 290 provides in relevant part: “In addition to the procedures set forth elsewhere in this section, a designated law enforcement entity may advise the public of the presence of high-risk sex offenders in its community pursuant to this subdivision.” Id. § 290(n).

The Pam Lyncher Act:41 (1) obligates the Federal Bureau of Investigation ("FBI") to establish a national database to track the whereabouts and movements of sex offenders;42 (2) requires the FBI to handle sex offender registration in states which fail to meet minimum requirements;43 and (3) amends the Jacob Wetterling Act to make sex registration requirements more stringent.44 The federal law requires states to establish sex offender registration programs so that "local law enforcement will know the whereabouts of sex offenders released into their jurisdictions, and [community] notification programs so the public can be warned about sex offenders living in the community."45

Even with these laws in place, public concern continued, fueled by the perception, right or wrong, justified or not, that the current justice system did not adequately address the need to protect the public from


42. See 42 U.S.C. § 14072(b) (Supp. IV 1998). This act provides:
   The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of—
   (1) each person who has been convicted of a criminal offense against a victim who is a minor;
   (2) each person who has been convicted of a sexually violent offense; and
   (3) each person who is a sexually violent predator.

43. See 42 U.S.C. § 14072(c). This sections states:
   Each person described in subsection (b) of this section who resides in a State that has not established a minimally sufficient sexual offender registration program shall register a current address, fingerprints of that person, and a current photograph of that person with the FBI for inclusion in the database established under subsection (b) of this section for the time period specified under subsection (d) of this section.

44. See 42 U.S.C. § 14072(d). This section sets forth the requirements for the length of registration and provides:
   A person described in subsection (b) of this section who is required to register under subsection (c) of this section shall, except during ensuing periods of incarceration, continue to comply with this section—
   (1) until 10 years after the date on which the person was released from prison or placed on parole, supervised release, or probation; or
   (2) for the life of the person, if that person—
      (A) has 2 or more convictions for an offense described in subsection (b) of this section;
      (B) has been convicted of aggravated sexual abuse, as defined in section 2241 of title 18 or in a comparable provision of State law; or
      (C) has been determined to be a sexually violent predator.

45. Chaiken, supra note 13, at v.
one specific group of violent offenders—the sexually violent predator.\footnote{See id.}

A sexually violent predator is an individual who is a member of a subclass of the most highly dangerous violent offenders.\footnote{See Lisa Gursky Sorkin, The Trilogy of Federal Statutes, in NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra note 13, at 16. Sexually violent predators are subject to more stringent registration requirements than other sex offenders under Federal and State law. Section 14072(e)(2) of the U.S. Code provides that sexually violent predators “must verify the registration once every 90 days after the date of the initial release or commencement of parole of that person.” 42 U.S.C. § 14072(e)(2) (Supp. IV 1998). Subdivision (a)(1)(E) of Section 290 requires sexually violent predators to register once every 90 days, and subdivision (f)(5) of the same statute requires the sexually violent predator to verify his registration every 90 days. “[The Jacob Wetterling Act] requires states to establish effective registration systems for convicted child molesters and other sexually violent offenders. It also requires the establishment of registration requirements for a subclass of the most highly dangerous offenders, who are designated under the Act as ‘sexually violent predators.’” Lisa Gursky Sorkin, supra note 13, at 16.}

They are the least likely to be cured and the most likely to reoffend, and they prey on the most vulnerable members of society—children and strangers.\footnote{See Florence Shapiro, The Big Picture of Sex Offenders and Public Policy, in NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra note 13, at 92-93. Because the sexually violent predator is in a subclass of sexually violent offenders, the statistics that apply to the latter also apply to the former.}

Even though the Jacob Wetterling Act requires sexually violent predators to register, neither that Act nor any other law requires treatment of the individual, if needed, nor a determination of whether the person had a mental abnormality or was a continuing threat to the community. Additionally, no laws prevented the individual’s release, even though the individual needed treatment and presented a present danger to the safety of others. In other words, none of the former laws addressed the fact that sexually violent predators were being released, untreated, into communities. The magnitude of the problem that confronted law enforcement, in terms of the number of sexually violent predator offenders who were being released into communities,\footnote{The statistical information from the United States Department of Justice on recidivism of sexually violent predatory offenders and other inmates, and the information from California law enforcement, was referred to in the Senate and Assembly discussions on the SVPA. See e.g., Assembly Committee on Public Safety, SB 536, Bill Analysis (Cal. 1997); Sex Offender Registration: Certificate of Rehabilitation, Senate Committee on Criminal Procedure, SB 2161, (Cal. 1996); Third Reading, S.B. 2161, (Cal. 1996) (amended July 2, 1996); Senate Appropriations Committee, SB 1143, Bill Analysis (Cal. 1995); Assembly Appropriations Committee, AB 888, Bill Analysis (Cal. 1995).} and the statistical information about their rate of recidivism were crucial factors which
influenced the enactment of the Sexually Violent Predator Act.\(^5\)

### B. The Magnitude of the Problem

#### 1. Statistics of Sexually Violent Offenders

No issue is as sensitive or as emotionally charged as the issue of sexual assault. The intensity surrounding this issue is heightened even more when the statistical information on the number of incidents of sexual offenses, and the increase in the commission of sexual offenses, is reviewed.

According to the United States Department of Justice, as of 1994, there were approximately 906,000 offenders incarcerated in state prisons nationwide.\(^5\) Of that number, 88,000, or 9.7%, are violent sex offenders.\(^5\) However, in 1980, only fourteen years earlier, of the then 295,819 offenders incarcerated in state prisons, 20,500, or 6.9%, were violent sex offenders.\(^5\)

From 1980 to 1994, the number of prisoners in all categories of crimes has increased by approximately 7.6% each year.\(^5\) However, the increase

---

50. A legislative statement is appended to the Act:
   The Legislature finds and declares that a small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. The Legislature further finds and declares that it is in the interest of society to identify these individuals prior to the expiration of their terms of imprisonment. It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.
   The Legislature further finds and declares that while these individuals have been duly punished for their criminal acts, they are, if adjudicated sexually violent predators, a continuing threat to society. The continuing danger posed by these individuals and the continuing basis for their judicial commitment is a currently diagnosed mental disorder which predisposes them to engage in sexually violent criminal behavior. It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes.


51. See LAWRENCE A. GREENFELD, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 17 (Tom Hester & Yvonne Boston eds., 1997).

52. See id.

53. See id.

54. See id. at 19. The number of imprisoned rapists grew at an annual average of
of violent sexual assault offenders, other than rapists, increased annually by more than 15%. This rate of increase is faster than any other category of violent crime, and second only to the increase of drug offenders. In fact, the most startling statistic is that, while the state prison population increased 206% during that fourteen-year time period, the increase in sexually violent offenders was a staggering 330%. Though these are the most current statistics to date, even these figures are no longer accurate. The most current information available from the United States Department of Justice is that the number of sex offenders in state prison as of 1998 is approximately 95,000. The Department of Justice has not issued updated statistics on comparable figures for other offenses, so current comparison rates of increase are unknown.

Unfortunately, the most recent figures available, which reflect the number of sexual violent offenders nationwide, inside and outside state prison, are from 1994. Those figures reveal that approximately 234,000 offenders convicted of a violent sexual crime are under the care, custody, or control of state correctional agencies. Of that number, approximately 58%, or more than 134,000 sexually violent predators, are under conditional supervision in local communities, either on parole or on probation.

According to the California Department of Corrections, as of May 1995, there were approximately 11,000 sex offenders in local prisons. Of these, 250 are released each month, or approximately 3000 each year. Among those released are predatory child molesters, forcible rapists, and repeat violent sex offenders. Prior to the passage of the Sexually Violent Predator Act, there was no mechanism or legal authority to detain or to treat these individuals who are deemed the most

about 7%. See id.
55. See id.
56. See id. Inmates serving time for drug offenses had an annual increase of 18%.
See id.
57. See id. at 17 n.2. ("Sexual assault includes convictions for statutory rape, forcible sodomy, lewd acts with children, and other conviction offenses related to fondling, molestation, or indecent practices.").
58. See Introduction to NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra note 13, at vii. Comparable statistical information is not available to date.
59. See GREENFELD, supra note 51.
60. See id. These figures are based on the background information obtained by the U.S. Department of Justice from “more than two dozen statistical datasets maintained by the Bureau of Justice Statistics and the Uniform Crime Reporting Program of the FBI.” Id. at iii.
61. See id.
62. See Civil Commitment: Sexual Offenders, Senate Committee on Criminal Procedure, AB 888, Bill Analysis 2-3 (Cal. 1995).
63. See id.
64. See id.
dangerous because they are the most violent and the most likely to reoffend.\textsuperscript{65}

2. \textit{Recidivism Rates}

The dangerousness of any sexually violent predator is assessed in terms of the risk of reoffending.\textsuperscript{66} Therefore, studies of recidivism rates for sexually violent offenders, which include sexually violent predators as a subclass, reveal the danger to public safety targeted by the Sexually Violent Predator Act.\textsuperscript{67}

Initially, studies on recidivism rates performed by mental health experts and government agencies appeared to contradict one another because they produced different estimates of recidivism for violent sexual offenders.\textsuperscript{68} However, as will be shown, the reason for these disparities was due to the methodological variables used.\textsuperscript{69} When reconciled, the information strongly supports the conclusion that the rate of recidivism for violent sexual offenders is higher than previously

\textsuperscript{66} See \textit{CAL. WELF. \\& INST. CODE} § 6600 (West 1998).
\textsuperscript{67} See 1995 Cal. Stat. 763 § 1.
\textsuperscript{68} This is referred to as the “base rate” which means “the known prevalence of a specific type of violent behavior within a given population over a given time period.” Randy Borum, \textit{Improving the Clinical Practice of Violence Risk Assessment: Technology, Guidelines, and Training}, 51 AM. PSYCHOLOGIST 945, 946 (1996).
\textsuperscript{69} See Robert A. Prentky et al., \textit{Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis}, 21 LAW \\& HUM. BEHAV. 635, 636 (1997). In this article the authors noted:
Indeed, relatively little can be concluded from extant studies, primarily because of the methodological variability of these studies. Indeed, studies examining re-offense rates among sex offenders have varied in a number of critical dimensions. Among these are: (a) the study sample; (b) the criterion for recidivism, which includes the source of criterion information, the types of outcome criminal activity assessed, and the operationalization of recidivism; and (c) the length and consistency of the follow-up period.
Unfortunately, almost all of this research [concerning risk factors] has employed the outcome measure of sexual reconviction over relatively short periods of time. Hence, most of what we currently know about risk factors pertains to the prediction of sexual offense reconviction within the first five years post-incarceration, rather than the more general and far more frequent re-committing of a sexual offense within extended periods of time.
\textit{Id.}}
Those studies, which examine recidivism, use a selected group of sexually violent offenders who have committed specified sexual offenses against victims, and who are tracked for a period of time. Each of these factors—the nature of the study group, the criteria used for recidivism, the nature of the prior sexual offenses, the age and sex of the victims, and the length of the follow-up period—affect the risk assessment.

For example, some studies define recidivism in terms of an arrest or a conviction, and still others define recidivism through sentencing. Those studies which use arrest as the criteria for recidivism will necessarily omit the number of sexual offenses committed but not reported, or instances which were reported but for which an arrest was not made. Obviously, those studies which use sentencing as the definition of recidivism ignore the incidents noted above as well as those cases in which an arrest has occurred and a case is pending, or an arrest was made and charges occurred but the case was dismissed, or an arrest was made but a conviction was not obtained, or a conviction has

---

70.  See Borum, supra note 68, at 947 ("However, current research has shown that base rates for violence are considerably higher than was previously believed."). See also Prentky et al., supra note 69, at 635. The authors stated:  
The data indicate that: (a) both rapists and child molesters remain at risk to reoffend long after their discharge, in some cases 15-20 years after discharge;  
(b) there was a marked underestimation of recidivism when calculating a simple proportion (%) consisting of those who were known to have reoffended during the follow-up period, and (c) there was a marked underestimation of recidivism when the criterion was based on conviction or imprisonment.  
Id.  See also R. Karl Hanson & David Thornton, Static 99: Improving Actuarial Risk Assessments for Sex Offenders 1999-02, at 15 (visited Sept. 9, 1999) <http://www.sgc.gc.ca/epub/Corr/en199902.htm> ("Estimating absolute recidivism rates is a difficult task since many sex offences go undetected .... Observed recidivism rates (especially with short follow-up periods) are likely to substantially underestimate the actual recidivism rates."); R. Karl Hanson et al., Long-Term Recidivism of Child Molesters, 61 J. CONSULTING & CLINICAL PSYCHOL. 646, 650 (1993) ("Although recovation rates were used as the recidivism criteria in this study, it is likely that recovation rates underestimate the rate of reoffending."); R. Karl Hanson & Monique T. Bussière, Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 349 (1998) ("The absolute recidivism rates vary across studies as a result of differences in follow-up periods, definitions, and local criminal justice practices.").  
71.  See Prentky et al., supra note 69, at 635; Doren, supra note 69, at 99-100.  
72.  See LAWRENCE A. GREENFELD, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 1, 4, 6-7 (1996) (looking at sentencing of offenders); Doren, supra note 69, at 101 (discussing a study done by Prentky in which recidivism was defined as a "new sex offender charge"); Hanson et al., supra note 70, at 648 (declining to use charges as an outcome criteria because these are not consistently recorded); R. Karl Hanson et al., A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism, 32 J. RES. CRIME & DELINQ. 325, 329 (1995) (declining to use charges as a measure of recidivism because this information is not consistently recorded).
occurred but sentencing has not. Furthermore, if the new offense must be a sexual offense, then those cases that resulted in a plea bargain to a lesser included non-sexual offense, such as assault, or battery, would also be omitted.\textsuperscript{73} Such definitional variations will necessarily affect estimates of recidivism and will also significantly underestimate its recurrence. As one authority noted:

The sexual predator laws uniformly specify only that there be a certain probability that the person will recommit a defined “sexually predatory act,” not get caught, arrested, or especially reconvicted for that new act. Hence, reconviction rates from professional research should be viewed as representing significant underestimations of sex offender recidivism base rates relevant to these commitment laws.\textsuperscript{74}

Even with such shortcomings, some studies, when corrected for any underestimation, have estimated the rate of recidivism at 72% for child molesters and 52% for rapists.\textsuperscript{75}

Any study which tracks sexual offenders for less than a five-year period, according to several experts, would miss approximately two-thirds of the new sexual offenses committed by child molesters and more than half of the new offenses committed by rapists.\textsuperscript{76} This criticism is borne out by studies performed by the U.S. Department of Justice.\textsuperscript{77} A three-year follow-up of sex offenders showed that about one-half of both rapists and sexual assaulters were rearrested for a new crime, more than one-third were reconvicted, and more than one-quarter were reimprisoned within the three-year follow-up.\textsuperscript{78} However in the same study, only “28% of released rapists were re-arrested for a new violent

\textsuperscript{73} See generally Hanson et al., \textit{supra} note 70, at 648, 650 (including assault convictions with explicitly sexual offenses because sex offense charges are commonly reduced and noting that reconviction rates are generally understated because many offenses do not result in conviction).

\textsuperscript{74} Doren, \textit{supra} note 69, at 100. Yet another factor for underestimating recidivism is that all of the research uses only male sex offenders since base rates for female offenders have not been studied. \textit{See id.}

\textsuperscript{75} See Prentky et al., \textit{supra} note 69, at 651. In that study, recidivism was defined in terms of a new criminal charge. \textit{See id.} at 650. The recidivism rate was 52% for child molesters with an underestimation of 20%, and 39% for rapists with an underestimation of 13%. \textit{See id.} at 651.

\textsuperscript{76} See Prentky et al., \textit{supra} note 69, at 652. One study found a sexual recidivism rate of 77% for child molesters. \textit{See Doren, supra note 69 at 111.}


\textsuperscript{78} See GREENFELD, \textit{supra} note 51, at 26.
crime," whereas a fifteen-year study detailed a recidivism rate from 49.4% to 63.8%. These figures reveal that the three-year study did miss more than half of the new offenses, and because the criterion used for recidivism was a new arrest, these figures underestimate the actual rate of recidivism.

Another study followed 197 child molesters from sixteen to thirty-one years after their release and used a conviction as the criteria for recidivism. Of that number, 42% were reconvicted. The authors acknowledged the figure most likely underestimated the rate of reoffending and that it was possible that all reoffended but only half were caught. In fact, experts agree that meaningful base rates for recidivism require that a subject group be followed for life. Statistics demonstrate that offenders reoffend as late as twenty or twenty-four years after release and that the number of individuals who reoffend increases as time passes.

Unfortunately, few studies have examined recidivism patterns of offenders for a long term and even fewer have focused on child molesters. In fact, it is recognized that only a fraction of actual offenses against children result in the offender being convicted. Some researchers have even concluded that most sexual assaults against children are not reported. One study that followed child molesters for a fifteen- to thirty-year period and compared them with a group of non-sexual offenders, followed for the same period of time, concluded that child molesters were responsible for 97% of the sexual offense recidivism.

Other reasons for the lack of concurrence between statistical results is that some studies do not include offenses where the victim was under the age of twelve; others do not include male victims, and it appears that some studies exclude female and juvenile offenders. For example, the U.S. Department of Justice changed the questions used in the National

---

79. Id.
80. See Senate Committee on Public Safety, SB 2161, Third Reading, at 4 (Cal. 1996). This study was for a 15-year period from 1973 to 1988 and involved 1362 sex offenders.
81. See Hanson et al., supra note 70, at 648.
82. See id.
83. See id. at 650.
84. See Doren, supra note 69, at 100; Hanson et al., supra note 70, at 650; Hanson & Bussière, supra note 70, at 358.
85. See Prentky et al., supra note 69, at 636.
86. See Hanson et al., supra note 70, at 650.
87. See R. Karl Hanson, How to Know What Works with Sexual Offenders, 9 Sexual Abuse J. RES. & TREATMENT 129, 131 (1997).
88. See Hanson et al., supra note 72, at 332, 334.
89. See GREENFELD, supra note 51, at 1, 6.
Crime Victimization Survey. This survey samples residents who are asked questions about any crimes they may have experienced, whether or not the crimes were reported. Originally, the questions were limited to rape or attempted rape, but from 1992 to 1993 questions were phased in about sexual assault. Based on the new questions, the “estimated rates of rape and sexual assault... were about 4 times higher than previously measured.” Additionally, of those surveyed, only 32% reported the offenses to law enforcement. However, as a measure of crime incidents, these figures are incomplete as well since only victims of age twelve or older were included in the survey. When that omission is compared to the fact that incarcerated violent sexual offenders admitted that two-thirds of their victims were under the age of eighteen, and, of that number, 58% were under the age of twelve, the inescapable conclusion is that the reoffense risk has been greatly underestimated.

Non-reporting of sexual crimes is also consistent with the fact that sex offenders are less likely than other violent offenders to have a history of prior conviction. Yet follow-up studies reveal that sex offenders are substantially more likely than other violent offenders to be rearrested for a new violent sex offense. For example, released rapists were found to be 10.5 times as likely as non-rapists to be rearrested for rape. Of “those who had served time for sexual assaults” they “were 7.5 times as likely as those convicted of [non-sexual] crimes to be rearrested for a new sexual assault.”

Another factor listed above that affects the base rate of recidivism is the sample selection characteristics of the study group. Identified risk factors include lifestyle, impulsivity, number of prior sex offenses, anger, fixation, age, antisociality, and psychopathy. Methodological

90. See id. at 1.
91. See id.
92. See id.
93. Id.
94. See id. at 2. This statistic is based on the years 1994 and 1995. See id.
95. See id. Thus any sex victim younger than 12 years of age was not counted.
96. See id. at 24.
97. See id. at 23.
98. See id. at 26.
99. See id.
100. Id. at 27.
101. See Prentky et al., supra note 69, at 652.
102. See id. at 654; see also CAL. WELF. & INST. CODE § 6601(c) (discussing risk factors considered by the Department of Mental Health to determine if the person is a
variability of these factors in a selected group will impact reoffense rates; for example, the higher the proportion of risk factors in any given study group, the higher the reoffense rate, while a lower reoffense rate will result with a study group that has a lower number of factors present. Therefore, failure to note the presence of these factors in a study increases the possibility of error.

Statistical estimates from the United States Department of Justice on child molesters are also consistent with the fact that recidivism is underestimated. State prison inmates who reported having committed their crimes against a child were more likely to have had multiple victims. Based on the number of child victims reported by the state inmates, the Department concluded that the more than 60,000 violent offenders may have had as many as 95,000 victims. Regardless of the fact that violent child offenders admit to multiple victims, they had a less extensive criminal history than those offenders with adult victims. While four out of ten child victimizers had never been arrested prior to their current offense, just over one-fourth of those who victimized adults were serving time for their first offense. Both non-reporting and underestimation of recidivism explain this inconsistency.

The distinguishing quality between child victims and adult victims is the victim-offender relationship. “[A]dult victimizers are substantially less likely to have had a prior relationship with their victim than . . . those who committed their crimes against children.” This fact is reflected in the definition of “predatory” in the law. According to statistics promulgated by the Department of Justice, 86% of child victimizers had a prior relationship with the victim. “More than 40% of offenders with child victims said the victim had been a relative or member of their immediate family.” Of this number, three out of four of the victims were the offender’s child or stepchild. This is consistent with

sexually violent predator).

103. See Prentky et al., supra note 69, at 654.
104. See id. at 656.
105. See GREENFELD, supra note 72, at 9.
106. See id.
107. See id. These figures were calculated in 1991. See id.
108. See id. at 4.
109. See id.
110. See id. at 11.
111. Id.
112. See CAL. WELF. & INST. CODE § 6600(e) (West 1998) (“‘Predatory’ means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.”).
113. See GREENFELD, supra note 72, at 10.
114. Id.
115. See id.
with the fact that such individuals will use “complicated techniques for obtaining access to” a potential victim, including a marriage.6

“Compared to violent offenders with adult victims, child victimizers . . . were 6 times as likely to have had a victim who was a relative . . . . Conversely, adult victimizers were nearly 4 times more likely than child victimizers to have had a victim who was a stranger to them—55% versus 15%.”7

Although experts may not agree on what is the correct percentage of recidivism for violent sex offenders and predators, they do agree that prediction of recidivism, and the approximate dangerousness of the offender, is a realistic objective.8 What is not possible is the determination of the exact percentage of likelihood of reoffending for any given individual.9

3. Legislative Intent

The Legislature concluded, based on the information obtained from local and federal authorities, and mental health experts, that the state needed “a(n) [involuntary] civil commitment procedure to allow the state a means to place and treat sexually violent predators in a secure mental facility following their release from prison.”10

“The problem targeted by the Act is acute, and the state interests—protection of the public and mental health treatment—are compelling.”11 Prior to the enactment of the Sexually Violent Predator Act, there was “no legal authority to detain and treat sexually violent offenders who are likely to commit new offenses because of their mental abnormality and defects. There is no procedure to prevent the release into unsuspecting

117. GREENFELD, supra note 72, at 11.
118. See Prentky et al., supra note 69, at 656.
119. See id.; see also Doren, supra note 69, at 110 (“Only if and when a state refers a percentage of sex offenders for possible commitment equal to, or greater than the known recidivism base rates will the concept of a systematic over-prediction of sexual predation become accurate.”).
120. AB 888, Assembly Third Reading, Bill Analysis (Cal. 1995) (as amended May 31, 1995). Section 6250 of the California Welfare and Institutions Code, which applies to the Sexually Violent Predator Act as well as others, provides: “This part shall be liberally construed so that, as far as possible and consistent with the rights of persons subject to commitment, those persons shall be treated, not as criminals, but as sick persons.” CAL. WELF. & INST. CODE § 6250 (West 1998).
121. Hubbart v. Superior Court, 969 P.2d 584, 593 n.20 (Cal. 1999).
communities of sexually violent offenders who have completed their prison sentences.\footnote{122}

Thus the intent of the Act is threefold. Without doubt, the primary aim of the Act is the protection of the public.\footnote{123} As stated earlier, sexually violent predators prey on the most innocent and vulnerable members of society.\footnote{124} Both the large number of sexually violent offenders who exist both inside and outside of state prisons, and the fact that their numbers have been increasing at an alarming rate,\footnote{125} impact on the necessity to protect the public.

Secondly, the Act provides for the detention and treatment of dangerous and violent sexual offenders.\footnote{126} Prior to its enactment, there was no procedure to treat these individuals.\footnote{127} Involuntary commitment provides that vehicle. While experts disagree on the effectiveness of treating some offenders,\footnote{128} at least some clinicians support the view that long-term intensive community supervision and aftercare do affect recidivism and should be used as an attempt at intervention.\footnote{129} In either case, any positive effect on recidivism is a necessary and worthy objective.

The final objective of the Act is to prevent and deter the alarming number of sexually violent crimes committed by this legally and medically recognizable class of sexually violent offenders.\footnote{130} The Act

\begin{itemize}
\item \footnote{122} Sexually Violent Predators, Senate Rules Committee, SB 1143, Bill Analysis 5 (Cal. 1995).
\item \footnote{123} See Hubbart, 969 P.2d at 587 n.5.
\item \footnote{124} See Florence Shapiro, The Big Picture of Sex Offenders and Public Policy, in NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra note 13, at 92-93.
\item \footnote{125} See GREENFELD, supra note 51, at 4, 19-20.
\item \footnote{126} See CAL. WELF. & INST. CODE §§ 6604, 6606 (West 1998); see also Hubbart, 969 P.2d at 587 (noting that, through passage of the Act, California both hospitalizes and treats offenders in addition to applying criminal sanctions).
\item \footnote{127} “The state has a legitimate interest under its \textit{parens patriae} powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some . . . .” Addington v. Texas, 441 U.S. 418, 426 (1979).
\item \footnote{128} See Jan M. Chaiken, Federal Funding Support for Sex Offender Registries, in NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES, supra note 13, at 31, 32.
\item \footnote{129} See Gene G. Abel et al., Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs, 2 J. INTERPERSONAL VIOLENCE 3, 23 (1987); Hanson et al., supra note 70, at 646-52; Hanson & Bussière, supra note 70, at 358; Hanson, supra note 87, at 129; Prentky et al., supra note 69, at 655.
\item \footnote{130} See Abel et al., supra note 129, at 11 (stating the “frequency of self-reported crimes was vastly greater than the number of crimes for which subjects had been arrested”); Howard E. Barbaree & William L. Marshall, Deviant Sexual Arousal, Offense History, and Demographic Variables as Predictors of Reoﬀense Among Child Molesters, 6 BEHAV. SCI. & L. 267, 278 (noting that the likely reason for a lower number for recidivism is that there are “underestimates of the actual percentages”); Hanson et al., supra note 70, at 650 (“It is widely recognized that only a fraction of the sexual offenses

1076
Civil Trial of Sexually Violent Predators
SAN DIEGO LAW REVIEW

was promulgated to deter and prevent further sexually violent crimes. As has been shown, the rate of recidivism among sexually violent predators has been grossly underestimated and is much greater than earlier studies concluded.

4. Predicting Dangerousness

A sexually violent predator is one who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has 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.

A "diagnosed mental disorder," in turn, is defined as "a 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." Evidence that the individual has in the past committed sexually violent offenses and currently has a mental disorder which predisposes him to commit sexually violent acts is probative of the individual's potential dangerousness.

Predicting dangerousness in a legal setting is not a novel concept. In fact, a legal determination, predicting that one may be dangerous in some respect, based on previous behavior, has been accepted by the courts. Courts have traditionally viewed the fact that a person has in

131. See discussion supra Part II.B.2.
132. CAL. WELF. & INST. CODE § 6600(a) (West 1998). Several problems in this definition are discussed infra notes 216-24 and accompanying text.
133. Id. § 6600(c).
134. See Kansas v. Hendricks, 521 U.S. 346, 352 (1997); Hubbart v. Superior Court, 969 P.2d 584, 600 (Cal. 1999). The Act provides that the fact that this likelihood exists must be proved beyond a reasonable doubt. See CAL. WELF. & INST. CODE § 6604 (West 1998).
135. See Hendricks, 521 U.S. at 371 (1997) (discussing the Kansas Sexually Violent Predator Act, which provides for the involuntary civil commitment of sexually violent predator and satisfies constitutional principles, and noting that the act permits confinement to a small segment of particularly dangerous individuals, who "currently both suffer[] from a 'mental abnormality' or 'personality disorder' and [are] likely to pose a future danger to the public"); Heller v. Doe, 509 U.S. 312, 323 (1993) (finding
the past committed a criminal act as a sufficient indication of
dangerousness.\footnote{136}

Furthermore, each of the offenses that qualify an offender as a
sexually violent predator\footnote{137} are also offenses which require the individual
to register as a sex offender.\footnote{138} This registration requirement illustrates
that the Legislature has deemed that offenders convicted of sexually
violent crimes are likely to commit similar offenses in the future.\footnote{139}

Even though the determination of dangerousness is a prediction,
subject to quantification, that alone does not preclude proving that

\begin{quote}
that the determination that an individual is dangerous because of previous instances of
violent behavior in the case of those who are mentally ill or mentally retarded could be
(acknowledging that mentally disordered sex offenders had propensities for the
commission of sex offenses); Schall v. Martin, 467 U.S. 253, 278 (1984) (holding that
there was nothing "inherently unattainable" about the prediction of future criminal
conduct and explicitly rejecting the contention that it was impossible to predict future
behavior); Minnesota v. Probate Court, 309 U.S. 270, 272, 274 (1940) (finding that
"proof of a habitual course of misconduct in sexual matters" shows "an utter lack of
power to control their sexual impulses," which points to the probability of its recurrence
as "susceptible of proof" (internal quotations omitted)).
\end{quote}

\footnote{136}{See generally Heller, 509 U.S. at 323 ("Previous instances of violent behavior
are an important indicator of future violent tendencies."); Schall, 467 U.S. at 278
("[F]rom a legal point of view there is nothing inherently unattainable about a prediction
fact that a person has been found, beyond a reasonable doubt, to have committed a
criminal act certainly indicates dangerousness.").

\footnote{137}{See CAL. WELF. & INST. CODE § 6600(b). This section provides:
"Sexually violent offense" means the following acts when committed by force,
vioence, duress, menace, or fear of immediate and unlawful bodily injury on
the victim or another person, and that are committed on, before, or after the
effective date of this article and result in a conviction or a finding of not guilty
by reason of insanity, as provided in subdivision (a): a felony violation of
paragraph (2) of subdivision (a) of Section 261 [forcible rape], paragraph (1)
of subdivision (a) of Section 262 [spousal rape], Section 264.1 [rape in
circuit], subdivision (a) or (b) of Section 288 [lewd acts on children under
14], or subdivision (a) of Section 289 of the Penal Code [penetration by
foreign object], or sodomy or oral copulation in violation of Section 286 or
288a of the Penal Code.


Sexually violent predators are required to register or update registration and must, on release from custody, check their
address at a minimum every 90 days. See id. § 290(a)(1)(D).

\footnote{139}{See People v. Franklin, 975 P.2d 30, 33 (Cal. 1999) ("[T]he registration act is
intended to promote the state's interest in controlling crime and preventing recidivism
in sex offenders by making them readily available for police surveillance at all times.");
Wright v. Superior Court, 936 P.2d 101, 105 (Cal. 1997) ("Plainly, the Legislature
perceives that sex offenders pose a continuing threat to society." (internal quotations
omitted)); People v. McClellan, 862 P.2d 739, 745 n.7 (Cal. 1993) ("The purpose of
section 290 is 'to assure that persons convicted of the crimes enumerated therein shall be
readily available for police surveillance at all times because the Legislature deemed them
likely to commit similar offenses in the future.'" (citing Barrows v. Municipal Court, 464
P.2d 483, 486 (Cal. 1970))).

1078
likelihood beyond a reasonable doubt. Rather, given the known risk factors whose cumulative presence presages reoffending,\textsuperscript{140} proof of that likelihood is a question of fact to be explained and supported by expert testimony.\textsuperscript{141} Any prediction, of course, has only a certain probability of occurring. That is not a novel concept; in fact, that is the essential nature of all empirical statements. Any statement, other than a tautology, is subject to only a certain probability of truth. Of course, there are some statements whose probability of truth have a very high estimate because of the frequency of the subject matter’s recurrence.\textsuperscript{142} By the same token, the recidivism studies and expert testimony in this area provide the empirical support for the fact that mental health experts can predict the likelihood of reoffending and thus the dangerousness of a given sexually violent predator.

III. THE CIVIL TRIAL

A. Pretrial Procedures

As stated, the Sexually Violent Predator Act is narrowly drawn to focus on a small, legally and medically recognized class of “violent criminal offenders who commit particular forms of predatory sex acts against both adults and children”—the sexually violent predator.\textsuperscript{143} A sexually violent predator, as stated earlier, is:

\begin{quote}
am person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has a diagnosed mental disorder that makes the person a danger to the health and
\end{quote}

\begin{itemize}
\item \textsuperscript{140} See Cal. Welf. & Inst. Code § 6601(c) (West 1998). This section provides: The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of re-offense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.
\item \textsuperscript{141} See id. § 6604; Kansas v. Hendricks, 521 U.S. 346, 359 (1997); Hubbart v. Superior Court, 969 P.2d 584, 590, 600 n.25 (Cal. 1999).
\item \textsuperscript{142} An example is, “The sun will rise in the morning.”
\item \textsuperscript{143} Hubbart, 969 P.2d at 593 n.20. According to the California Supreme Court, the Kansas Sexually Violent Predator Act, which was the subject of Hendricks, 521 U.S. 346 (1997), and California's Act track one another. Differences, if any, are purely semantical. See Hubbart, 969 P.2d at 596. Both laws “base the commitment determination, in part, on the commission of sexually violent predatory crimes.” Id. at 608 (emphasis added).
\end{itemize}
safety of others in that it is likely that he or she will engage in sexually violent
criminal behavior.\textsuperscript{144}

The concern that the statute addresses is that a sexually violent predator,
because of his or her current diagnosed mental disorder, will likely,
without treatment, continue to prey on the unsuspecting public and will
continue to commit the type of offenses for which that person has been
convicted in the past.\textsuperscript{145}

The procedures used to determine whether an individual is a sexually
violent predator are specifically designed to further the accuracy of that
determination.\textsuperscript{146} The review begins with the tentative identification of a
sexually violent predator by the correctional agencies, progresses to an
evaluation of the person by mental health experts, and concludes with
judicial proceedings designed to test the sufficiency of the evidence in
support of an involuntary civil commitment as a sexually violent
predator. Each level of review focuses on different characteristics of a
sexually violent predator, uses different criteria, and thereby selectively
narrows the number of individuals to which the Act applies.\textsuperscript{147} Initially,

\textsuperscript{144} \textit{Id.} § 6600(a).

The Legislature has attempted to enlarge the category to include offenses wherein an
individual received an indeterminate term, or a finding of not guilty by reason of
Senate Committee on Criminal Procedure, AB 3130, Bill Analysis 3 (Cal. 1996) (as
amended July 7, 1996); \textit{Garcetti v. Superior Court}, 90 Cal. Rptr. 2d 581, 586 (1999);
\textit{People v. West}, 82 Cal. Rptr. 2d 549, 556-58 (1999). That attempt will be discussed

A diagnosed mental disorder includes "a 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

\textsuperscript{145} \textit{See Hubbard}, 969 P.2d at 593 n.20 (stating that the "SVPA is narrowly focused
on a select group of violent criminal offenders who commit \textit{particular forms} of
predatory sex acts" and are "dangerous and likely to continue committing \textit{such crimes}"
(emphasis added)). The statute does not explicitly state in its definition of a sexually
violent predator that a sexually violent predator will likely commit sexually violent
\textit{predatory} offenses. But, as will be shown, that is what the Legislature intended.

\textsuperscript{146} \textit{Cf. United States v. Salerno}, 481 U.S. 739 (1987). In \textit{Salerno}, the issue was
the constitutionality of the 1984 Bail Reform Act that allowed a federal court to detain
certain arrestees pending trial. \textit{See id.} at 741. The Court acknowledged that
"sufficiently compelling governmental interests can justify detention of dangerous
persons" and that the prevention of crime is a compelling government interest. \textit{Id.} at
748-49. Because the SVPA focused on a particularly acute problem, and applied only to
a specific category of extremely serious offenses, and to individuals likely to be
responsible for dangerous acts, and because the detainees were provided with
constitutional safeguards such as the right to counsel, to testify, to present information,
and to cross-examine witnesses, the Court concluded that those procedures were
designed to further the accuracy of the determination of the likelihood of future
dangerousness. \textit{See id.} at 750-51.

\textsuperscript{147} An example of the narrowing process afforded by these procedures is best
demonstrated by the statistics for involuntary commitment as of June 30, 1997. Initially,

1080
the preliminary identification consists of a paper review of the individual’s criminal history, proceeds to a mental health evaluation of the person, and concludes with a trial at which the trier of fact must unanimously conclude beyond a reasonable doubt that the person is a sexually violent predator.\textsuperscript{4}

Proceedings usually begin while the person is in custody, at least six months prior to his release from custody. Based on the fact that the individual has committed a sexually violent predatory offense\textsuperscript{4} and thus may be a sexually violent predator, he is referred for an evaluation.\textsuperscript{5} Both the Department of Corrections and the Board of Prison Terms screen the individual.\textsuperscript{15} A review of the person’s social, criminal, and institutional history is conducted using a structured screening instrument developed in conjunction with the Department of Mental Health.\textsuperscript{15} If, as a result, “it is determined that the person is likely to be a sexually violent

1355 cases were referred to the Department of Mental Health as potential sexually violent predators. Of that number, 467 received negative evaluations. The prosecuting attorney rejected another 76 cases, and filed 263 petitions. Probable cause was not found in 27 other cases, with the result that 34 individuals were committed as sexually violent predators and 46 trials were still pending. Therefore, a total of 2.5\% of the original number were found to be sexually violent predators and committed; more than 65\%, or 884 cases, were rejected; no decision had been reached in approximately one-third of the cases. See Assembly Committee on Public Safety, SB 536, Bill Analysis (Cal. 1997) (hearing date July 8, 1997).


149. According to the Act’s definition of a sexually violent predator, the individual must have been convicted of at least two sexually violent offenses, not one. See id. § 6600(a). Section 6601(b), which uses the singular phrase, “a sexually violent predator offense,” should be amended accordingly to require, as a minimum, two prior sexually violent predatory offenses as a prerequisite for preliminary identification. Id. § 6601(b) (emphasis added).

150. See id. § 6601(a)(1). This section provides:

Whenever the Director of Corrections determines that an individual who is in custody under the jurisdiction of the Department of Corrections, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the director shall, at least six months prior to that individual’s scheduled date for release from prison, refer the person for evaluation in accordance with this section. However, if the inmate was 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, the director may refer the person for evaluation in accordance with this section at a date that is less than six months prior to the inmate’s scheduled release date.

Id.

151. See id. § 6601(b).

152. See id.
predator, the Department of Corrections shall refer the person to the State Department of Mental Health for a full evaluation."  

At this point of the procedure, the process has narrowed the number of potential sexually violent predators from those who "may be" to those who are "likely to be" sexually violent predators. A review of the individual's social, criminal, and institutional history reveals whether the person has been convicted of any qualifying sexual offenses and whether those offenses were predatory in nature.  

Next, the Department of Mental Health evaluates the person. Two mental health experts must determine whether the individual meets the other criteria in section 6600—whether he has a diagnosable mental disorder and whether, because of that, the person is likely to engage in acts of sexual violence without appropriate treatment and custody. The standardized assessment protocol is used to determine the presence of a mental disorder. Risk factors known to be associated with the risk of reoffending, such as the individual’s "criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of

153. Id. (emphasis added). This section provides:

The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history. This screening shall be conducted in accordance with a structured screening instrument developed and updated by the State Department of Mental Health in consultation with the Department of Corrections.

154. "Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." Id. § 6600(e). The issue of whether the prior offenses must be predatory is currently before the California Supreme Court and will be discussed infra at note 193.


156. See id. § 6601(c) (West Supp. 2000) ("Diagnosed mental disorder" includes a 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.").

157. See id. § 6601(d). This section states:

Pursuant to subdivision (c), the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health. 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 appropriate treatment and custody, the Director of Mental Health shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment.

158. See id. § 6601(c).
mental disorder,” are used to determine whether the individual is a danger to the health and safety of others. Both assigned mental health experts must agree that the person has a diagnosable mental disorder and is sexually dangerous within the meaning of the Act.

If one of the two mental health experts does not concur that the person meets the criteria of a sexually violent predator, then two independent professionals, with certain minimum requirements, are appointed to perform further examinations. Both of these experts must agree that the person meets the Act’s criteria before a petition for commitment may be requested.

159. Id. The section states in full:
The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.

160. See id. § 6601(d).

161. See id. § 6601(e)-(g). The relevant portion of the Code provides:
(e) If one of the professionals performing the evaluation pursuant to subdivision (d) does not concur that the person meets the criteria specified in subdivision (d), but the other professional concludes that the person meets those criteria, the Director of Mental Health shall arrange for further examination of the person by two independent professionals selected in accordance with subdivision (g).

(f) If an examination by independent professionals pursuant to subdivision (e) is conducted, a petition to request commitment under this article shall only be filed if both independent professionals who evaluate the person pursuant to subdivision (e) concur that the person meets the criteria for commitment specified in subdivision (d). The professionals selected to evaluate the person pursuant to subdivision (g) shall inform the person that the purpose of their examination is not treatment but to determine if the person meets certain criteria to be involuntarily committed pursuant to this article. It is not required that the person appreciate or understand that information.

(g) Any independent professional who is designated by the Director of Corrections or the Director of Mental Health for purposes of this section shall not be a state government employee, shall have at least five years of experience in the diagnosis and treatment of mental disorders, and shall include psychiatrists and licensed psychologists who have a doctoral degree in psychology. The requirements set forth in this section also shall apply to any professionals appointed by the court to evaluate the person for purposes of any other proceedings under this article.

Id.

162. See id. § 6601(f).
In those cases where it is concluded that the person is a sexually violent predator, then a request for a petition for commitment with the evaluation reports and any other supporting documents are forwarded to the county where the individual’s last conviction occurred.\(^{163}\) If the government’s counsel concurs with the recommendation, then “a petition for commitment shall be filed” in the county’s superior court.\(^{164}\) As shown, the statute has narrowed the number of targeted individuals from those who were provisionally identified because of the nature of their prior convictions, to those who are likely to be sexually violent predators (because of the screening assessment), to an even smaller class of those who, in addition, have a diagnosable mental disorder and are likely to reoffend because of that condition.

Only after all of the discussed procedures have occurred does the third level of review, judicial proceedings, begin. A probable cause hearing is held in the superior court.\(^{165}\) That hearing tests the sufficiency of the evidentiary support for the petition’s allegation that the named individual is a sexually violent predator.\(^{166}\) The probable cause review serves as a preliminary check and evaluation of the propriety of the proceedings.\(^{167}\) It requires evidence, established under the governing burden of proof, to meet the objectives of the proceedings. In other

\begin{footnotes}

\footnote{163. See id. §§ 6601(d), (h), (i), (l). Said subdivisions provide:
(h) If the State Department of Mental Health determines that the person is a sexually violent predator as defined in this article, the Director of Mental Health shall forward a request for a petition to be filed for commitment under this article to the county designated in subdivision (i). Copies of the evaluation reports and any other supporting documents shall be made available to the attorney designated by the county pursuant to subdivision (i) who may file a petition for commitment in the superior court.
(i) If the county’s designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections. The petition shall be filed, and the proceedings shall be handled, by either the district attorney or the county counsel of that county. The county board of supervisors shall designate either the district attorney or the county counsel to assume responsibility for proceedings under this article.
(l) Pursuant to subdivision (d), the attorney designated by the county pursuant to subdivision (i) shall notify the State Department of Mental Health of its decision regarding the filing of a petition for commitment within 15 days of making that decision.

\textit{Id.} §§ 6601(h), (i), and (l).
\footnote{164. Id. § 6601(i).
\footnote{165. See id. § 6602.
\footnote{166. See id. § 6602(a).

\footnote{167. See Gerstein v. Pugh, 420 U.S. 103, 119-20 (1975) (discussing the standard of probable cause); People v. Elliot, 354 P.2d 225, 229 (Cal. 1960) (stating that the preliminary cause hearing fulfills a necessary function of stopping unjustifiable prosecution); Jaffe v. Stone, 114 P.2d 335, 337-38 (Cal. 1941) (discussing the purpose of preliminary cause hearings).}
words, the evidence presented must lead an individual of ordinary
cautions and prudence to believe or conservatively entertain a strong
suspicion that the targeted individual is a sexually violent predator and
that he is likely to engage in sexually violent predatory behavior upon
release.\footnote{168}{See \textsc{Cal. Welf. \\& Inst. Code} § 6602(a); \textit{People v. Nagle}, 153 P.2d 344, 347
(Cal. 1944); \textit{People v. Dickinson}, 130 Cal. Rptr. 561, 563-64 (Ct. App. 1976); \textit{People v.
Ct. App. 1957).}

At the probable cause hearing, several procedural safeguards are
afforded the individual. For example, “[t]he person named in the
petition shall be entitled to assistance of counsel,”\footnote{169}{\textsc{Cal. Welf. \\& Inst. Code} § 6602(a) (West Supp. 2000). This section
provides: A judge of the superior court shall review the petition and shall determine
whether there is probable cause to believe that the individual named in the
petition is likely to engage in sexually violent predatory criminal behavior
upon his or her release. The person named in the petition shall be entitled to
assistance of counsel at the probable cause hearing. If the judge determines
there is not probable cause, he or she shall dismiss the petition and any person
subject to parole shall report to parole. If the judge determines that there is
probable cause, the judge shall order that the person remain in custody in a
secure facility until a trial is completed and shall order that a trial be conducted
to determine whether the person is, by reason of a diagnosed mental disorder, a
danger to the health and safety of others in that the person is likely to engage in
acts of sexual violence upon his or her release from the jurisdiction of the
Department of Corrections or other secure facility. \textit{Id.}} to the admission of
oral and written evidence, to cross-examine and confront witnesses, and
to call witnesses on his behalf, including expert witnesses.\footnote{170}{\textit{In re Parker}, 71 Cal. Rptr.
2d 167, 178 (Ct. App. 1998); see also \textit{People v. Butler}, 80 Cal. Rptr. 2d 357, 366 (Ct. App. 1998) (agreeing with the \textit{Parker} court that
the defendant may call and cross-examine experts).} In this
hearing, the individual may challenge the legal adequacy of the facts in
support of the petition.\footnote{171}{\textit{In re Parker}, 71 Cal. Rptr. 2d at 168. The procedures available at the
probable cause hearing are not specified in the statute. \textit{See id. The \textit{Parker} court correctly called upon either “the Supreme Court or the Legislature” to address this void
“by describing the specific procedures to ensure fairness for all \{sexually violent predator\} cases.” \textit{Id.}}

The standard to be used at the probable cause hearing is “whether
there is probable cause to believe that the individual named in the
petition is likely to engage in sexually violent predatory criminal
behavior upon his or her release.”\footnote{172}{\textsc{Cal. Welf. \\& Inst. Code} § 6602(a).} If the superior court judge
determines that probable cause has not been established, the petition is dismissed and, if subject to parole, the individual shall so report. On the other hand, if the superior court judge determines that probable cause has been established, the judge orders “that the person remain in custody in a secure facility until a trial is completed.” 173 The court also orders “that a trial be conducted to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others, in that the person is likely to engage in acts of sexual violence upon his or her release.” 174

Specific safeguards are also provided for those subject to a civil trial under the Act. The individual is entitled to a court or a jury trial, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and to have access to all relevant medical and psychological records and reports. 175 If the person cannot afford to hire counsel, one will be appointed, and if the person requests assistance in obtaining expert or professional persons to perform an examination, and participate in the trial on the person’s behalf, that assistance will be provided as well. 176 At trial, a unanimous verdict is required. 177 The court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator. 178 If this burden is not met, the person is released. 179 However, if the court or jury determines that the individual is a sexually violent predator, then the person is committed for two years to the custody of the Department of Mental Health for treatment and confinement. 180

173. Id.; see id. § 6600.05(a) (“Until a permanent housing and treatment facility is available, Atascadero State Hospital shall be used whenever a person is committed to a secure facility . . . .”).
174. Id. § 6602(a).
175. See id. § 6603.
176. See id. This section provides:
(a) A person subject to this article shall be entitled to a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports. In the case of a person who is indigent, the court shall appoint counsel to assist him or her, and, upon the person’s request, assist the person in obtaining an expert or professional person to perform an examination or participate in the trial on the person’s behalf.
(b) The attorney petitioning for commitment under this article shall have the right to demand that the trial be before a jury.
(c) If no demand is made by the person subject to this article or the petitioning attorney, the trial shall be before the court without jury.
Id. § 6603(a)-(c).
177. See id. § 6603(d) (“A unanimous verdict shall be required in any jury trial.”).
178. See id. § 6604.
179. See id.
180. See id. This section provides:
The court or jury shall determine whether, beyond a reasonable doubt, the
By requiring a unanimous jury verdict, and by using the reasonable doubt standard, the Legislature has used constitutional procedures to further the accuracy of the verdict and to narrow the application of the Act. In California:

Our Supreme Court has long held that such beyond a reasonable doubt burden of proof is required in civil commitment proceedings because "the interests involved in [such] proceedings are no less fundamental than those in criminal

person is a sexually violent predator. If the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator, the court shall direct that the person be released at the conclusion of the term for which he or she was initially sentenced, or that the person be unconditionally released at the end of parole, whichever is applicable. If the court or jury determines that the person is a sexually violent predator, the person shall be committed for two years to the custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health, and the person shall not be kept in actual custody longer than two years unless a subsequent extended commitment is obtained from the court incident to the filing of a new petition for commitment under this article or unless the term of commitment changes pursuant to subdivision (e) of Section 6605. Time spent on conditional release shall not count toward the two-year term of commitment, unless the person is placed in a locked facility by the conditional release program, in which case the time in a locked facility shall count toward the two-year term of commitment. The facility shall be located on the grounds of an institution under the jurisdiction of the Department of Corrections.

Id.

Once a person is committed, he undergoes treatment. See id. § 6606. This section states:

(a) A person who is committed under this article shall be provided with programming by the State Department of Mental Health which shall afford the person with treatment for his or her diagnosed mental disorder.

(b) Amenability to treatment is not required for a finding that any person is a person described in Section 6600, nor is it required for treatment of that person. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in the treatment program.

(c) The programming provided by the State Department of Mental Health in facilities shall be consistent with current institutional standards for the treatment of sex offenders, and shall be based on a structured treatment protocol developed by the State Department of Mental Health. The protocol shall describe the number and types of treatment components that are provided in the program, and shall specify how assessment data will be used to determine the course of treatment for each individual offender. The protocol shall also specify measures that will be used to assess treatment progress and changes with respect to the individual's risk of reoffense.

Id.

Further proceedings are provided under the Act for treatment and for review of the individual's mental disorder; these proceeding are not pertinent to the civil trial and, thus, will not be discussed in this Article. See id. §§ 6604.1-6609.3.

1087
proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction.\textsuperscript{181} For the same reasons, a person subject to such proceedings is entitled to a unanimous verdict rather than the usual three-fourths agreement for a regular civil verdict.\textsuperscript{181}

There is always, in litigation, "a margin of error, representing error in factfinding, which both parties must take into account."\textsuperscript{182} In a criminal case, in which one's life or liberty is at stake, these interests of the defendant are of such magnitude, and the value society places on them so great, that they are protected by a standard of proof designed to exclude, as nearly as possible, the likelihood of an erroneous judgment.\textsuperscript{183} "This is accomplished by requiring under the Due Process Clause that the state prove the guilt of the accused beyond a reasonable doubt."\textsuperscript{184} This standard of proof "allocates the risk of error" between the two parties, the People and the accused,\textsuperscript{185} it also places almost the entire risk on the People.

Another function of this standard of proof in the realm of fact finding "is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"\textsuperscript{186} This heavy standard manifests society's concern that the risk to the individual must be minimized even at the risk that some that are guilty might go free.\textsuperscript{187} This requirement reflects the view "that it is far worse to convict an innocent man than to let a guilty man go free."\textsuperscript{188} It is also meant to "impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered."\textsuperscript{189} This excludes as nearly as possible the likelihood of an erroneous judgment.\textsuperscript{190}

\begin{itemize}
  \item \textsuperscript{181} People v. Turner, 93 Cal. Rptr. 2d 459, 466 (2000) (quoting \textit{In re Gary W.}, 486 P.2d 1201, 1209 (Cal. 1971)) (alteration in original).
  \item \textsuperscript{182} Speiser v. Randall, 357 U.S. 513, 525 (1958).
  \item \textsuperscript{183} See id. at 525-26; see also Addington v. Texas, 441 U.S. 418, 425 (1979) ("In cases involving individual rights, whether criminal or civil, ['t]he standard of proof [at a minimum] reflects the value society places on individual liberty."). (quoting Tippett v. Murel, 436 F.2d 1153, 1166 (4th Cir. 1971) (alteration in original)); \textit{In re Winship}, 397 U.S. 358, 363 (1970) ("The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance . . .").
  \item \textsuperscript{184} Addington, 441 U.S. at 424; see \textit{In re Winship}, 397 U.S. at 363.
  \item \textsuperscript{185} Addington, 441 U.S. at 423.
  \item \textsuperscript{186} Id. at 423 (quoting \textit{In re Winship}, 397 U.S. at 370).
  \item \textsuperscript{187} \textit{See In re Winship}, 397 U.S. at 372 ("In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty."); see also Patterson v. New York, 432 U.S. 197, 208 (1977) (discussing \textit{In re Winship}).
  \item \textsuperscript{188} \textit{In re Winship}, 397 U.S. at 372.
  \item \textsuperscript{189} Addington, 441 U.S. at 427.
  \item \textsuperscript{190} See id. at 424.
\end{itemize}
The standard of proof influences the relative frequency of two types of erroneous outcomes—convicting the innocent or letting the guilty go free. "Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied ... should ... reflect an assessment of the comparative social disutility of each." In this context, the standard reflects the fundamental value determination that it is far worse to convict an innocent man than to let a guilty man go free.

B. Contentions to Be Proved

1. The Qualifying Prior Convictions

a. The Predatory Nature of the Prior Offenses Must Be Proved

One of the contentions subject to proof beyond a reasonable doubt is that the individual named in the petition has suffered a minimum of two prior convictions that involved at least two different victims, and which were committed on, before, or after the effective date of the Act. However, courts have disagreed whether the prosecution must also prove that the prior convictions involved a predatory relationship between the offender and the victim. This problem arises because the Act refers to the predatory nature of the prior offenses in only one section of the law, and omits that qualifying adjective in all other references. Even though this discrepancy exists, one of the most basic rules of statutory construction is that "[a] statute must be construed in light of the legislative purpose and design."

193. The California Supreme Court granted review to People v. Dacayana, 91 Cal. Rptr. 2d 121 (Ct. App. 1999), reh'g granted, 996 P.2d 26 (Cal. 2000), People v. Torres, 84 Cal. Rptr. 2d 276 (Ct. App. 1999), reh'g granted, 982 P.2d 153 (Cal. 1999), and People v. Hurtado, 88 Cal. Rptr. 2d 389 (Ct. App. 1999), reh'g granted, 986 P.2d 862 (Cal. 1999). The courts in Dacayana and Torres had concluded that the Legislature intended the predatory nature of the prior offenses to be at issue at the evaluation stage and the probable cause determination, but not at trial. See Dacayana, 91 Cal. Rptr. 2d at 127; Torres, 84 Cal. Rptr. 2d at 105. The court in Hurtado disagreed, and held that the predatory nature must be proved at trial. See Hurtado, 88 Cal. Rptr. 2d at 395-96.
194. See CAL. WELF. & INST. CODE § 6601(b) ("The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense ....") (emphasis added).
195. People v. Navarro, 497 P.2d 481, 499 (Cal. 1972); see People v. Coronado,
statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. 9196 The words used in a statute, thus, “must be construed in context, keeping in mind the nature and obvious purpose of the statute.” 9197 Furthermore, the language of a statute should not be given a literal meaning if doing so would result in consequences which the Legislature did not intend and would frustrate the legislative purpose. 9198 Finally, when a “word or phrase has been given a particular... meaning in one part or portion of a law it shall be given the same... meaning in other parts or portions of the law.” 9199

As shown above, the historical reason for the Act was to fill a specific void in the law. 9200 Even though there were laws which required registration of the most dangerous sexual criminals, sexually violent predators, there were no laws which prevented the release of these individuals into the community untreated, even though they were still suffering from a disorder which causes them to continue to commit violent sexual crimes and makes the individual a danger to the safety of others. The Act was drafted to narrow focus only on those individuals identified as sexually violent predators. The Act restricts involuntary civil commitment to those who have committed sexually violent predatory offenses and who have the propensity, due to their mental disorder, to continue to commit the same acts. 9201

The Legislature concluded, based on information obtained by local and federal correctional authorities, that the state needed “a civil commitment procedure to allow the state a means to place and treat sexually violent predators in a secure mental facility following their release from prison.” 9202

Clearly then, the Act applies only to this narrow group of offenders—the sexually violent predator. Preliminary identification of those individuals who may come within the confines of the Act begins with the screening, the identification process that flags those individuals who

---

906 P.2d 1232, 1234 (Cal. 1995).
200. See discussion supra Part II.
201. See Hubbart v. Superior Court, 969 P.2d 584, 593 n.20 (Cal. 1999).
202. AB 888, Assembly Third Reading, Bill Analysis (Cal. 1995) (as amended May 31, 1995); see CAL. WELF. & INST. CODE § 6250 (West 1998) (“This part shall be liberally construed so that, as far as possible and consistent with the rights of persons subject to commitment, those persons shall be treated, not as criminals, but as sick persons.”).
have committed prior sexually violent offenses of a predatory nature.\textsuperscript{203} Given the predator focus of the Act, it would be illogical to conclude that the prior offenses used to identify one as a sexually violent predator need not be predatory in nature. In fact, the clear, express, unequivocal language of one section of the Act requires just that.\textsuperscript{204}

Furthermore, the Act explicitly provides for the manner in which the predatory nature of the prior offenses may be proved to the trier of fact.\textsuperscript{205} A specific hearsay exception is drafted into the Act which permits the “details underlying the commission of an offense that led to a prior conviction, including a predatory relationship . . . [to] be shown by documentary evidence.”\textsuperscript{206} Jurors are permitted to consider that evidence in reaching a verdict that a person is a sexually violent predator if, and only if, there is also evidence that the defendant currently has a diagnosed mental disorder that makes him sexually dangerous.\textsuperscript{207} Unless the prior offenses involved a sexually violent predatory crime, the prior offenses would not be relevant to a finding that an individual is a sexually violent predator. Evidence that an individual in the past has committed that type of offense, taken into consideration with evidence that the individual currently has a mental disorder which predisposes him to commit that same type of criminal behavior, is strong circumstantial evidence highly relevant for the trier of fact.\textsuperscript{208} Prior predatory offenses, current mental disorder, and future dangerous criminal

\begin{thebibliography}{99}
\bibitem{203} As noted, there is an internal inconsistency in the Act since the trier of fact must find beyond a reasonable doubt that the individual has committed a minimum of two prior sexually violent offenses. \textit{See} \textsc{Cal. Welf. \& Inst. Code} § 6600(a) (West 1998 & Supp. 2000). However, the language used in that part of the Act that deals with the tentative identification of a sexually violent predator uses the singular phrase “a sexually violent predatory offense.” \textit{Id.} § 6601(b) (emphasis added). This latter section should be redrafted to correspond to section 6600(a).
\bibitem{204} \textit{See supra} note 203.
\bibitem{205} \textit{See} \textsc{Cal. Welf. \& Inst. Code} § 6606(a).
\bibitem{206} \textit{Id.} § 6600(a). This language provides an exception to section 788 of the Evidence Code, which makes inadmissible the facts of the prior conviction. \textsc{Cal. Evid. Code} § 788 (West 1995). In criminal trials, only the nature of the crime and the date and place of the conviction may be admitted into evidence. \textit{See} \textit{People v. Long}, 86 Cal. Rptr. 227, 232-33 (Ct. App. 1970); \textit{People v. Hall}, 85 Cal. Rptr. 188, 194 (Ct. App. 1970).
\bibitem{207} \textit{See} \textsc{Cal. Welf. \& Inst. Code} § 6600(a). “[P]rior sexually violent offenses are used solely for evidentiary purposes to help establish the main prerequisites upon which civil commitment is based—current mental disorder and the likelihood of future violent sex crimes.” \textit{Hubbart v. Superior Court}, 969 P.2d 584, 608 (Cal. 1999) (internal quotations omitted).
\bibitem{208} \textit{See} \textsc{Cal. Welf. \& Inst. Code} § 6600(a); \textit{Hubbart}, 969 P.2d at 608.
\end{thebibliography}
conduct, when present, are the three strands of the braid evidencing a sexually violent predator.\textsuperscript{209}

Moreover, the Act mandates that the jurors be cautioned not to base their finding that a person is a sexually violent predator \textit{solely} on the fact of his prior convictions.\textsuperscript{210} This caution— that the "[j]urors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder"—would not be necessary unless the prior offenses are predatory.\textsuperscript{211} What that caution means is that the trier of fact is not to conclude that one is a sexually violent predator solely because he was found guilty of predatory sexual offenses in the past.

Finally, the Legislative Counsel’s Digest presentation to the Assembly on February 22, 1995, included this statement of intent as to Assembly Bill 888: “The bill would require \textit{the Department of Corrections and the Board of Prison Terms to screen the person based on whether the person has committed a sexually violent predatory offense . . . .}”\textsuperscript{212}

In fact, the italicized portion of the above statement of intent became part of the Act.\textsuperscript{213} Clearly, this is what the Legislature intended; it is what the Legislature meant, and furthermore, it is what the Legislature said. The fact that the word “predatory” does not appear as a companion term where each instance of “prior offense” is used is clearly a drafting oversight. The alternative interpretation would lead to the absurd result that a sexually violent predator is one who has committed non-predatory crimes, and would thus be indistinguishable from any other sexually violent offender.

Therefore, for all these reasons, one contention that must be proved beyond a reasonable doubt is that the person named in the petition had suffered a minimum of two prior convictions for sexually violent offenses as defined in the Act, which involved a minimum of two victims and were predatory in nature.

\textsuperscript{209} See CAL. WELF. & INST. CODE § 6600(a); Hubbart, 969 P.2d at 593 n.20 (“The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts . . . [and are] dangerous and likely to continue committing such crimes if released into the community . . . .”). As the court in \textit{Hubbart} noted “the person’s history of sexually violent crimes was used solely for evidentiary purposes, either to demonstrate that a ‘mental abnormality’ exists or to support a finding of future dangerousness.” \textit{Id.} at 606-07 (internal quotations omitted).

\textsuperscript{210} See CAL. WELF. & INST. CODE § 6600(a).

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} \textit{Sexually Violent Predators}, AB 888, Legislative Counsel’s Digest 1 (Cal. 1995) (filed with Sec. State Oct. 11, 1995) (emphasis added).

\textsuperscript{213} See CAL. WELF. & INST. CODE § 6601(b) (“The person shall be screened by the Department of Corrections and the Board of Prison Terms based on whether the person has committed a sexually violent predatory offense . . . .”) (emphasis added).
b. A Determinate Sentence Should Not Be Required

As originally drafted, the statute limited qualifying prior convictions to those for which an individual had received a determinate sentence. But in hearings held in 1996, the Legislature discussed, and eventually passed, legislation that amended that part of the law. The stated intent was that the new version of subdivision (a) would clarify and expand the definition of a sexually violent predator to include those prior convictions which had been sentenced under the Indeterminate Sentencing Law ("ISL"), had a finding of not guilty by reason of insanity, or had a finding of a mentally disordered sex offender, and to include out-of-state convictions for an offense that includes all the elements of an offense listed in subdivision (b) of the Act.

214. See id. § 6600(a).
216. See Assembly Committee on Appropriations, AB 3130, Bill Analysis (Cal. 1996) (for hearing on May 22, 1996); Assembly Committee on Public Safety, AB 3130 Third Reading, Bill Analysis (Cal. 1996) (as amended May 24, 1996); Senate Committee on Criminal Procedure, AB 3130, Bill Analysis (Cal. 1996) (as amended May 24, 1996, for hearing June 18, 1996); Senate Committee on Criminal Procedure, AB 3130, Bill Analysis (Cal. 1996) (as amended July 7, 1996, for hearing July 9, 1996); Senate Rules Committee, AB 3130 Third Reading, Bill Analysis (Cal. 1996) (as amended July 15, 1996); Appropriations Committee Fiscal Summary, AB 3130, Bill Analysis (Cal. 1996) (as amended July 15, 1996, for hearing Aug. 12, 1996); Senate Committee on Criminal Procedure, SB 2161, Bill Analysis (Cal. 1996) (as amended August 28, 1996, for hearing Aug. 31, 1996). AB 3130 is discussed herein and it is noted that the bill would expand the definition of a SVP.

217. The original version of the Act would not apply to those who had been sentenced under the Indeterminate Sentencing Law. See CAL. PENAL CODE § 1168 (West 1985). That law was enacted in 1917 and was in effect until July 1, 1977, when the Determinate Sentencing Law ("DSL") took effect. See id. § 1170. The ISL did not require the trial judge to set a fixed term but simply sentenced the individual to the term prescribed by law. When the DSL took effect, those who had been sentenced under the ISL were not resentenced under the DSL. Instead, the Community Release Board determines the release date using the sentence that would have been imposed had the person been sentenced under the DSL. See id. § 1168(a)-(c).

218. The Fifth District Court of Appeal did not directly address this issue, but stated in dicta that the Legislature failed by its amendment to achieve its stated purpose. See People v. West, 82 Cal. Rptr. 2d 549, 557-58, 558 n.5 (Ct. App. 1999). The Third District Court of Appeal held that a foreign conviction did not qualify as a prior offense under the terms of the Act. See People v. Hunt, 88 Cal. Rptr. 2d 524, 527-30 (Ct. App. 1999). The Sixth District Court of Appeal held that a literal reading of subdivision (b) would preclude its application to prior convictions of Penal Code § 261(3). See People v. Butler, 80 Cal. Rptr. 2d 357, 368 (Ct. App. 1998). Because such offenders who commit that crime come within the intent of the Act's coverage, the court refused to adopt that construction of the statute since it would lead to absurd consequences. See id. Recently, the Second District Court of Appeal held that a prior conviction of a sexual
The current version of subdivision (a), as amended, now provides:

(a) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence and who has 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.

For purposes of this subdivision, a prior finding of not guilty by reason of insanity for an offense described in subdivision (b), a conviction prior to July 1, 1977, for an offense described in subdivision (b), a conviction resulting in a finding that the person was a mentally disordered sex offender, or a conviction in another state for an offense that includes all the elements of an offense described in subdivision (b), shall also be deemed to be a sexually violent offense even if the offender did not receive a determinate sentence for that prior offense.

The second paragraph was added as a result of the new legislation. As previously stated, that paragraph was intended to enlarge the definition of a sexually violent predator, but a literal reading of the statute reveals that it fails in that regard. The actual effect of the passage is to define the phrase "sexually violent offenses" to include those in which the person was sentenced under the ISL, found not guilty by reason of insanity, or found to be a mentally disordered sex offender, as well as out-of-state convictions for an offense which includes all of the elements of an offense described in subdivision (b). However, subdivision (b) already included those offenses, so the amendment, if interpreted literally, did not change the law in the manner intended. A sexually violent predator is still one whom, inter alia, was sentenced under the Determinate Sentencing Law ("DSL") for his or her prior sexually violent offenses.

Thus, the question arises whether to interpret the law literally, which would frustrate the stated intent, or ignore the literal meaning of the amendment and interpret it in accordance with what the Legislature intended. To answer that question, the legislative history of the amendment must be reviewed, since one of the most basic rules of statutory construction is that a statute should not be interpreted to frustrate a change in the law, but rather "to ascertain and effectuate [that] legislative intent." Fortunately, the history of Assembly Bill 3130 provides numerous statements of what the Legislature was trying to achieve with this amendment. A bill analysis provided for the Assembly Committee on

---

220. See supra notes 216-19.
Public Safety for the hearing on April 23, 1996, included the statement that the bill “[m]odifies the definition of a ‘sexually violent predator’” to include those “found not guilty by reason of insanity in this state . . . or in another jurisdiction which includes all the elements of any sexually violent offense . . . .”222 According to this analysis, the purpose of the modification was to clarify the law and enlarge the definition of a sexually violent predator.223

“[A]nalysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent.”224 In fact, in addition to statements of intent, “a material change in the language of a legislative enactment is ordinarily viewed as showing an intent on the part of the Legislature to change the meaning of the statute.”225 In this case, the legislative history confirms that fact. Therefore, the statute must be construed in light of that legislative purpose and design.226 In fact, as noted by the California Supreme Court, “the intent of the enacting body is the paramount consideration.”227

Furthermore, the “language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.”228 “The intent prevails over the letter [of the law], and the letter will, if possible, be so read as to conform to the spirit of the act.”229 When “uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.”230 Additionally, courts “may resort to extrinsic sources” to help in this analysis, such as the “objects to be achieved and the legislative

223. See id.; Contrary to the Court of Appeal’s statement in West, that “[n]othing in the 1996 amendment states that it is intended to clarify existing law,” the history of Assembly Bill 3130 relates just that. West, 82 Cal. Rptr. 2d at 557. In fact, the Court of Appeal, in People v. Butler, reached the opposite conclusion, finding that the amendment was to clarify the law rather than simply to enlarge its application. See Butler, 80 Cal. Rptr. 2d at 370.
225. Long Beach Police Officers Ass’n v. Long Beach, 759 P.2d 504, 509 (Cal. 1988).
228. Bruce v. Gregory, 423 P.2d 193, 198 (Cal. 1967); see Coronado, 906 P.2d at 1234.
history."

Not only must statutory construction "effectuate the law's purpose," but it must also analyze the provisions so as to harmonize them with the diverse sections of the statute so as not to lead to absurd results. In fact, courts are constrained to select that construction "that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute." Finally, one of the most basic rules of statutory construction is that courts should avoid an interpretation that renders part of the statute surplusage.

With these rules in mind, if the meaning of the amendment is taken literally, the result is that there is no change in the law. In other words, even though the Legislature intended to amend, clarify, and expand the definition of a sexually violent predator, the result is that the law remains unchanged. Obviously, this result violates a number of the rules of statutory construction set forth above: it frustrates the intent of the Legislature, it results in an amendment to the law which makes no changes to the law, it fails to expand the definition of a sexually violent predator, and it results in the absurd consequence that the amendment did not amend the law.

A literal analysis would also promote the internal inconsistency that was inherent in that part of the law with respect to the qualifying convictions. Subdivision (b) permits the introduction into evidence of any prior conviction of a sexually violent offense whether committed on, before, or after the date of the Act. As noted, the Act became operative on January 1, 1996. The explicit language of subdivision (b) permits evidence of convictions that predate 1996, as evidence of an individual's status as a sexually violent predator. The indeterminate sentencing law was in effect until July 1, 1977. The result is that prior convictions would be admissible under subdivision (b), but would be inadmissible under subdivision (a) of the Act. Thus, a literal interpretation of the amendment would perpetuate this inconsistency inherent in the Act, and

---

231. Coronado, 906 P.2d at 1234; see Granberry v. Islay Invs., 889 P.2d 970, 973 (Cal. 1995).
233. Coronado, 906 P.2d at 1234 (quoting People v. Jenkins, 893 P.2d 1224, 1231 (Cal. 1995)).
236. See CAL. WELF. & INST. CODE § 6600(b) (West 1998).
would violate another rule of statutory construction, which requires that
the section in question be “construed with reference to the entire
system . . . of which it is a part,” so as to harmonize the diverse
sections.238

Another reason that a literal interpretation of the amendment should
be eschewed is that all those individuals who received a disposition
other than a determinate sentence would be exempted from the Act’s
application. This interpretation would render a large number of the most
violent and dangerous sexual offenders free to be returned to community
life untreated, even though they are a current danger to others.239 A
result of this sort defeats not only the intent of the amendment, but also
the Act itself, presenting a very persuasive reason not to adopt a literal
interpretation of the amendment.240

The Act does not limit the age of a prior conviction. Presumptively,
there would be many instances of prior convictions where the defendant
was sentenced under the ISL. Given the fact that the Legislature did
have this information before it during its discussions about the Act, an
expansive reading of the amendment should be favored by the courts to
achieve consistency with the Act’s provisions.241 This would be
consistent with the rule that when there are two possible constructions of
the law, that which leads to the more reasonable result should be
adopted.242

Finally, one last point must be made. It is a well-known rule of law
that “cases are not authority for propositions not considered.”243 The
California Supreme Court in Hubbart v. Superior Court was concerned
only with the issue of whether the Act was constitutional.244 The court
did not indulge in statutory construction. Thus, any such statements
interpreting the Act are only dicta. Nevertheless, it must be noted that
the court did read and describe the added paragraph to subdivision (a), as
an amendment, and further stated that:

240. See id. at 369-70 (holding that the Act applied even though the individual
named in the petition had prior convictions which did not exactly meet the requirements
of subdivision (b) of section 6600).
242. See id. at 1287.
243. People v. Burnick, 535 P.2d 352, 359 (Cal. 1975) (“In the federal system no
less than in California, cases are not authority for propositions not considered.”).
244. See Hubbart v. Superior Court, 969 P.2d 584, 592-93 (Cal. 1999).
As originally enacted, section 6600, subdivision (a) referred only to persons who had "received a determinate sentence" for any qualifying prior conviction. However, this section has since been amended to also apply in cases where the prior conviction did not result in a determinate sentence, and where a prior sexually violent offense charge resulted in a finding of not guilty by reason of insanity.\(^{245}\)

This interpretation of the amendment is repeated in *Hubbart* a second time.\(^{246}\) If anything, these passages show that the reading suggested herein is a viable interpretation of the amendment.

In a recent decision, Division Four of the Second Appellate District concluded that the Act did apply to qualifying convictions sentenced under the ISL.\(^{247}\) The court in *Garcetti v. Superior Court* characterized the amendment as one of substance. Even though a literal meaning of the amendment only affected the definition of a sexually violent offense, the court found several persuasive reasons not to interpret the amendment in this way.\(^{248}\) First, the amendment, by its own terms, applies to subdivision (a), the definition of a sexually violent predator, and not to subdivision (b), the definition of a sexually violent offense.\(^{249}\) Second, the amendment explicitly applies to convictions suffered prior to July 1, 1977, the operative date of the DSL.\(^{250}\) Finally, this interpretation is consistent with the purpose of the Act and the legislative history of the amendment, and it prevents part of the amendment from being surplusage.\(^{251}\)

Nevertheless, even though courts should be constrained to adopt this view of the law for purposes of clarity, the Legislature should change the language of the amendment. Deleting the phrase, "for which he or she received a determinate sentence" from the definition of a sexually violent predator would achieve the desired effect.\(^{252}\) Alternatively, section 6600, subdivision (a), of the California Welfare and Institutions Code should be amended as follows:\(^{253}\)

\[
(a)(1) \text{ "Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence, or other disposition, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.}\]

\(^{245}\) Id. at 588 n.7.
\(^{246}\) See id. 608 n.34.
\(^{247}\) See *Garcetti v. Superior Court*, 90 Cal. Rptr. 2d 581, 583 (Ct. App. 1999).
\(^{248}\) See id. at 585-86.
\(^{249}\) See id. at 585.
\(^{250}\) See id.
\(^{251}\) See id. at 588.
\(^{252}\) CAL. WELF. & INST. CODE § 6600(a) (West 1998).
\(^{253}\) For ease of the reader, the additions are italicized.
(2) For purposes of subdivision (a)(1), "other disposition" means a finding of not guilty by reason of insanity, a finding of mentally disordered sex offender, a sentence under the Indeterminate Sentencing Law, or a conviction in another state for an offense that includes all of the elements of an offense described in subdivision (b).255

Either amendment would clarify the statute, provide guidance to trial courts, and eliminate further proceedings on this issue.

2. The Diagnosed Mental Disorder and the Likelihood of Reoffending

The last two components of the definition which must be proven beyond a reasonable doubt are: (1) the person named in the petition has a diagnosed mental disorder, and (2) the mental disorder makes the person dangerous to others in that it is likely he or she will engage in sexually violent criminal behavior.256 A diagnosed mental disorder is defined to include "a 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."257

Exactly how the person's mental disorder is related to the individual's sexual criminal behavior is not explained in the statute. Clearly, there is a causal relationship. But the exact nature of that causal relationship is to be made to this definition and will be addressed infra.

255. The remaining portion of subdivision (a) should be renumbered (a)(3). See CAL. WELF. & INST. CODE § 6600(a).


257. CAL. WELF. & INST. CODE § 6600(c).
unclear. It is submitted that the individual’s criminal act is a result of his conscious choice and his wrongful intent, and moreover, is a result of the individual’s free will. The criminal act is a deliberate act, the nature of which is delineated by the nature of the mental disease, as will be shown.

In both Kansas v. Hendricks and Hubbart v. Superior Court, the courts used various phrases to describe the relationship between the disorder and the criminal act, such as: “a diagnosed mental disorder which prevents him from controlling sexually violent behavior”, a “present inability to control sexually violent behavior”, “a currently diagnosed mental disorder characterized by an inability to control dangerous sexual behavior”, a “personality disorder that makes it difficult, if not impossible, for the person to control his dangerous behavior”, “a [diagnosed] volitional impairment rendering them dangerous beyond their control”, a mental disorder that “makes the person likely to engage in the predatory acts of sexual violence”, and “current mental disorder which significantly impairs the ability to control sexually violent behavior.” These descriptive phrases are not synonymous in meaning. Some of the phrases, such as “an inability to control” and “beyond their control” indicate behavior where choice is absent. Yet other phrases, such as “likely to engage in” or “impairs the ability” are consistent with behavior that reflects a deliberate choice on the part of the actor. Because these phrases have such diverse meanings.

258. For example, is the criminal act one that the individual committed because of an irresistible impulse, which is uncontrollable yet does not affect his reasoning abilities? See People v. Gorshen, 336 P.2d 492, 498-99 (Cal. 1959). Or, is the criminal act one where choice is absent and the individual could not do otherwise? See People v. Buffington, 88 Cal. Rptr. 2d 696, 702 (Ct. App. 1999).

259. This meaning is consonant with the philosophical assumption implicit in criminal law that man has a free will and is responsible for his acts. See Enmund v. Florida, 458 U.S. 782, 800-01 (1982); Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975); Morrisette v. United States, 342 U.S. 246, 252 (1952). A detailed discussion on that subject is beyond the scope of this Article. However, see Joan Comparet-Cassani, How the Abolition of Diminished Capacity Affected Parity of Sentencing in Murder Cases Under the California Determinate Sentencing Law, 29 Sw. U. L. Rev. 51 (1999) for a more complete discussion.


261. 969 P.2d 584 (Cal. 1999). The court in Hubbart acknowledged that the differences between the two Acts with respect to the mental disorder were only semantical. Id. at 596.

262. Id. at 599 (emphasis added).

263. Id. at 600 (emphasis added).

264. Id. at 597 (emphasis added).

265. Hendricks, 521 U.S. at 358 (quoting KAN. STAT. ANN. § 59-29a02(b) (1994) (emphasis added)).

266. Id. (emphasis added).

267. Id. at 357 (quoting KAN. STAT. ANN. § 59-29a02(b) (1994) (emphasis added)).

268. Hubbart, 969 P.2d at 604 (emphasis added).
and because neither court was addressing this issue when those descriptive phrases were used, to read too much into the use by the courts would be a mistake.269

Furthermore, it is unlikely that the relationship between the disorder and the criminal act is one bereft of choice. One reason for this conclusion is the choice of language the Legislature used in the definition of a sexually violent predator. That definition requires only that the disorder render the individual likely to commit such crimes.270 This characterization implies that there is only a probability or a likelihood that the offense will occur. If the individual could not do other than commit such acts, the Legislature would have defined a sexually violent predator as “one . . . who has a mental disorder that makes a person a danger to the health and safety of others in that it compels the person to engage in sexually violent behavior.”

Another reason is that the Legislature included in the definition of the diagnosed mental disorder the phrase “volitional capacity.”271 According to the definition, the mental disorder is a condition, which affects, among other things, the person’s volitional capacity.272 Volitional capacity refers to the act of choosing, willing, or deciding on a course of action, or an exercise of one’s will.273 As phrased, the condition affects the person’s ability to choose which criminal acts to commit and suggests that it “predisposes”274 him to commit certain types of acts. Again, the use of the term “predisposes” indicates activity that has a certain likelihood of occurring, not activity that will inevitably occur.

Finally, the last reason that favors this interpretation is the nature of the crimes committed. It is common knowledge that sex crimes are committed in secret.275 Rapes, sexual assaults, and child molestations rarely occur in public places in view of potential witnesses, other than

269. See People v. Buffington, 88 Cal. Rptr. 2d 696, 702 (1999), in which the Third District Court of Appeal does rely on those characterizations to conclude that the “mental condition that renders [a sexually violent predator] dangerous beyond his control” is “[t]he key consideration.” Id.
271. Id. § 6600(c).
272. See id.
273. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 2562 col.3 (1993).
274. Predispose means to make susceptible or to incline. See id. at 1786 col. 2.
275. See People v. Falsetta, 89 Cal. Rptr. 2d 847 (Cal. 1999); People v. Fitch, 63 Cal. Rptr. 2d 753 (Ct. App. 1997).
co-conspirators. Rather, such crimes are performed when third parties are not present, because the actor is aware of the act's criminal nature. The actor does not want to be discovered, stopped, or caught, or to have others present who could testify as to what happened. That is why such trials are usually credibility contests; they generally involve two conflicting versions of what occurred—that of the victim and that of the defendant. For the same reason, it follows that the actor does possess control over his disorder. The time, place, manner, and commission of the crime must be planned and plotted in order to avoid detection. Whatever causal relationship exists between the disorder and the criminal act, it is one that is subject to the actor's control and to choice.

What is not explicit in the definition of a sexually violent predator, nor in any of the other definitions in the statute, is that the State must also prove, and the trier of fact must find, that the danger posed by a sexually violent predator is that they are likely to engage in predatory sexually violent criminal behavior. That term is conspicuously, and surprisingly, absent in the definition of a sexually violent predator and in the definition of mental disorder. The only reasonable explanation is that the omission is an unintentional oversight. The alternative, that a sexually violent predator is one who is dangerous but does not commit sexually violent criminal predatory acts, is inherently inconsistent and simply unacceptable.

Thus, the prosecutor should be required to prove that the individual has a currently diagnosed mental disorder, which makes the person dangerous because it is likely the individual will engage in predatory sexually violent criminal acts, and the definition of the diagnosed mental disorder should include that it predisposes that person to commit predatory sexually violent criminal acts. The reasons for adopting this interpretation are numerous.

First, the most obvious reason to interpret the law in this way is that the Act applies to sexual predators. What precipitated its enactment, as already demonstrated, was the fact that sexually violent predators are the most dangerous of the violent criminals and the ones most likely to reoffend.

Second, courts agree that the "[p]rior qualifying sex crimes are used as

276. See Falsetta, 89 Cal. Rptr. 2d at 847.
277. This issue is currently pending before the California Supreme Court in People v. Hurtado, 88 Cal. Rptr. 2d 389 (Ct. App. 1999), reh'g granted, 986 P.2d 862 (Cal. 1999). The court in Hurtado held that the predatory nature must be proved at trial. See Hurtado, 88 Cal. Rptr. 2d at 395-96. See also discussion supra note 177.
278. See CAL. WELF. & INST. CODE. § 6600(a), (c). The term predator does appear in sections 6600(f), 6601(b), 6601.5, 6602(a), 6602.5(a), and 6607(a) of the Act.
279. It is recommended the Legislature amend subdivisions (a) and (c) accordingly.
evidence” of both the person’s mental disorder and dangerousness. It comports with common sense to conclude that someone whose diagnosed mental disorder was sufficient to cause him to commit a sexually violent predatory act in the past, and currently still has the same disorder, is likely to commit such acts in the future. It is also reasonable to conclude that the nature of the sex act committed in the past is due to the mental disorder. Thus, given the current existence of the same mental disorder, the same types of criminal conduct are likely to occur, including the predatory nature of the relationship between the potential victim and the actor. Prior offenses provide circumstantial evidence of that person’s mental disorder because they are manifestations of it. As shown earlier, the qualifying priors must involve a predatory relationship between the offender and the victim. That same relationship then must exist in any possible future crime or else the prior conviction would not be relevant evidence with respect to the defendant’s mental condition and future dangerousness. Prior crimes also provide circumstantial evidence of the individual’s dangerousness because of the causal link between the mental disorder and the likelihood of future criminal acts. In fact, the concern that sexually violent predators are individuals who repeat the same crimes “is echoed throughout the statutory scheme.” Indeed, the risk factors used to evaluate potential


281. See Hendricks, 521 U.S. at 358; id. at 362 (“[E]vidence of the prior criminal conduct was received... to show the accused’s mental condition and to predict future behavior.”) (internal quotations omitted); Hubbart, 969 P.2d at 596 (“[P]ast criminal conduct served an important evidentiary function in establishing the dangerous mental impairments of a SVP.”); id. at 599 (“Prior qualifying sex crimes are used as evidence in determining whether the person named in the petition is a SVP beyond a reasonable doubt.”); id. at 606-07 (“Instead, the person’s history of sexually violent crimes was used solely for evidentiary purposes, either to demonstrate that a mental abnormality exists or to support a finding of future dangerousness.”) (internal quotations omitted)); id. at 608 (“[P]rior sexually violent offenses are used ‘solely for evidentiary purposes’ to help establish the main prerequisites upon which the civil commitment is based—current mental disorder and the likelihood of future violent sex crimes.”) (quoting Hendricks, 521 U.S. at 362).

282. Hubbart, 969 P.2d at 604 (“[T]he qualifying mental disorder gives rise to the likelihood of more crimes and makes the person dangerous if released into the community.”).

283. Id. at 600 n.25 (“This concern over sexually violent offenders who are likely to repeat their crimes is echoed throughout the statutory scheme.”); see id. at 601 (“[T]he evidentiary methods contemplated by the Act are sufficiently reliable and accurate to accomplish its narrow and important purpose—confining and treating mentally disordered individuals who have demonstrated their inability to control specific sexually
sexually violent predators are those associated with recidivism. Third, as shown in Part II, the historical antecedents for the Act were the three federal Acts, the Jacob Wetterling Act, the Pam Lyncher Act, and Megan's Law. Both the Jacob Wetterling Act and the Lyncher Act define a sexually violent predator to mean “a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” Although not determinative, when state law is based on federal legislation, it is appropriate to look to federal law when statutory construction is required. Because a sexually violent predator is defined in the federal statutes as one who commits sexually violent predatory acts, and state law was promulgated in response to, and based on, the federal law, it is persuasive evidence that the State Legislature intended that the term sexually violent predator have the same meaning.

Additionally, the California Supreme Court in Hubbart acknowledged that the Kansas SVPA, under scrutiny in Hendricks, was almost identical to the California Act. But one important difference between the two Acts is the definition of a sexually violent predator. The Kansas Act defines a sexually violent predator as “any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.” Furthermore, unlike its California counterpart, the Kansas act requires the trier of fact to find that the individual is likely to commit predatory sexually violent acts. Finally, the preamble to the Kansas act includes comments not found in California’s statutory statement, namely, that this “small but extremely dangerous group of sexually violent predators . . . [are] likely to engage in . . . repeat acts of predatory sexual violence.”

Since both acts were drafted in response to the same problem, and deal with the same type of criminal offenders, and the California Supreme Court based its analysis in Hubbart on that of the Court in Hendricks, it is persuasive that the California drafters’ omission of the term

---

284. See CAL. WELF. & INST. CODE § 6601(c); Hubbart, 969 P.2d at 600 n.25.
287. See supra note 262 and accompanying text.
288. KAN. STAT. ANN. § 59-29a02(a) (1994) (emphasis added).
289. See KAN. STAT. ANN. § 59-29a01.
290. Id.
"predatory" was not deliberate.

Yet another important consideration weighs in favor of this interpretation:

The state has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.291

Due process292 concerns rise to the fore when forcible civil detainment of an individual is provided for by statute. There are two aspects to due process under the law: procedural due process and substantive due process.293 Procedural due process concerns the guarantee of fair procedures, including the right to counsel, or the right to appointed counsel if one is indigent, the right to confrontation, the right to be heard, and the right to notification.294 Substantive due process is "broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his... liberty," nor subject to "arbitrary and unreasonable government action."295 “[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”296 “[F]reedom from physical restraint ‘has always been at the core of the liberty protected by the Due Process clause from

292. The Fifth Amendment of the United States Constitution provides in relevant part, “[n]o person shall be... deprived of life, liberty, or property, without due process of law...” U.S. CONST. amend. V. The Fourteenth Amendment further provides, in part, that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. CONST. amend. XIV § 1. The California Constitution, in section 7, subdivision (a) of Article I, also provides, “A person may not be deprived of life, liberty, or property without due process of law...” CAL. CONST. art. 1, § 7. Due process of law means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs... Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

BLACK'S LAW DICTIONARY 449 (5th ed. 1979).
293. See id.
294. See id. at 1083.
295. Id. at 1281.
296. Addington, 441 U.S. at 425.
arbitrary governmental action."

But even that constitutionally protected interest may be overridden in the civil context in certain narrow circumstances. Preventing danger to the community is one such circumstance. An individual’s right to liberty gives way to the greater good of society where the government’s interest is sufficiently weighty. Restricting the freedom of an individual, who is a danger to others, “is a legitimate nonpunitive . . . objective” that a state may undertake. While recognizing, on the one hand, that a state has the right to restrict the freedom of those considered a danger to the safety of others, both the legislatures and the courts acknowledge, on the other hand, that such restrictions must comply with specific evidentiary requirements.

One limitation that has been imposed is that the class of individuals subject to forcible confinement be narrowly drawn, thereby protecting the individual from overreaching by the government. A second limitation is that the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” A third requirement is that the scope of the law’s application is pursuant to enumerated evidentiary standards, thereby protecting against arbitrary government action.

---

299. See id. at 751.
300. Hendricks, 521 U.S. at 363.
301. See id. at 364; see also Salerno, 481 U.S. at 741; Jones v. United States, 463 U.S. 354, 362 (1983); Addington, 441 U.S. at 427.
302. See Hendricks, 521 U.S. at 357 (“Accordingly, states have in certain narrow circumstances provided for the forcible civil detention of people who are unable to control their behavior and who thereby pose a danger to the public health and safety.” (emphasis added)); Foucha, 504 U.S. at 80 (1992) (“We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement . . . .”); Salerno, 481 U.S. at 747 (“The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes.” (emphasis added)).
303. See generally Hendricks, 521 U.S. at 358 (“These added statutory requirements [dangerousness and a mental abnormality] serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control,” (emphasis added)); id. (“The pre-commitment requirement of a ‘mental abnormality’ or ‘personality disorder’ is consistent with the requirements of these other statutes that we have upheld in that it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness.” (emphasis added)); id. at 364 (“The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals . . . .” (emphasis added)).
305. See Foucha, 504 U.S. at 81.
As shown, the Act has an inherent narrowing function, which begins with a tentative identification of an individual as a sexually violent predator based on prior predatory offenses. At the next stage, the analysis by mental health experts further limits the application of the Act to a smaller number of individuals, those who have a diagnosed mental disorder. The probable cause hearing tests the evidentiary basis of the petition for commitment, and thereby binds for trial only those individuals who the court has found probable cause to believe are likely to engage in "sexually violent predatory criminal behavior." Finally, at trial, the trier of fact must find that the State has proved "beyond a reasonable doubt, the person is a sexually violent predator." The Act is theoretically limited and narrowed to a small number of individuals by a finding of current dangerousness to others, a conviction of designated prior predatory sex offenses, or a currently diagnosed medical disorder of a type that disposes the individual to repeat the sexually violent predatory conduct.

However, if the standard to be used for this latter finding is that there is a "likelihood the individual will engage in sexually violent criminal behavior," then the Act's narrowing function has essentially been eviscerated. This standard is broader and looser than the one used for a probable cause determination, and necessarily would permit a larger number of individuals to be involuntarily committed than a standard which required a likelihood of the commission of a sexually violent predatory act. It would also nullify the safeguards sewn into the fabric of the Act since the narrowing process outlined above would be eliminated by the use of this more general standard, in violation of due process protection.

Moreover, Hubbart acknowledged that the "narrow and important purpose" of the Act is to confine and treat sexually violent predators until they are no longer a danger. Hubbart also acknowledges that

307. Id. § 6601(d).
308. Id. § 6601.5; see id. § 6602.
309. Id. § 6604.
311. Additionally, placement in a state hospital while awaiting trial requires a probable cause finding that the person is likely to engage in sexually violent predatory criminal behavior. See CAL. WELF. & INST. CODE § 6602.5(a) (West Supp. 2000). Conditional release into the community is based on a finding that the individual is not likely to commit acts of predatory sexual violence. See id. § 6608(d).
312. Hubbart, 969 P.2d at 601. The initial commitment is for a two-year period.
commitment, in part, is based on the "commission of sexually violent predatory crimes." If commitment instead is based on the likelihood of engaging in sexually violent criminal behavior, that standard would not have a reasonable relation to the purpose of the commitment, and would thus violate due process.

Finally, the purpose of commitment is to treat sexually violent predators. Confinement of a sexually violent predator is linked to the stated purpose of commitment, which is to hold that individual until his mental disorder no longer causes him to be a threat to others. Treatment for sexually violent predators is different than for those individuals committed under other civil commitment statutes. In fact, sexually violent predators are not amenable to existing mental illness treatment modalities. The Act is based, in part, on the premise that a sexually violent predator's mental disorder is not a proper basis for commitment under other mental health schemes and requires specific care and treatment devised specifically for their disorders. The Act mandates the Department of Mental Health develop such treatment, which must be individual for each person's specific disorder. Thus, if one is committed for reasons other than the likelihood of committing sexually violent predatory acts, then the treatment provided under the Act would be at variance with that individual's disorder since that person's mental disorder would not be related to predatory acts of sexual violence. Once again, the result is that the purpose of commitment would not bear a reasonable relation to the nature of the commission, in direct violation of due process.

Thus, for all these reasons, the conclusion is inescapable that the trier of fact must find beyond a reasonable doubt that the individual is likely to commit sexually violent predatory acts. Without doubt, that is the burden the state must shoulder in order to mandate commitment and the

See CAL. WELF. & INST. CODE § 6604.
313. Hubbart, 969 P.2d at 601.
314. See CAL. WELF. & INST. CODE § 6606 ("A person who is committed under this article shall be provided...with treatment for his or her diagnosed mental disorder."); Hubbart, 969 P.2d at 601.
315. See CAL. WELF. & INST. CODE §§ 6604, 6605, 6607, 6608.
317. See Hubbart, 969 P.2d at 587 ("Through the passage of the SVPA, California is one of several states to hospitalize or otherwise attempt to treat troubled sexual predators apart from any criminal sanctions they might receive, and apart from civil commitment schemes targeting other mental health problems.").
318. See id. at 603 ("The Act is based on the premise that SVP's suffer from clinically diagnosable mental disorders which require psychiatric care and treatment, and which are not a proper basis for commitment under other mental health schemes.").
319. See CAL. WELF. & INST. CODE § 6606.
Act should be so interpreted.  

3. Application of the Privilege Against Self-Incrimination to the Proceedings

a. Introduction

Proceedings under the Act are civil.  But because individuals subject to commitment under the Act have some rights afforded a criminal defendant, the question arises whether they also have the same rights under the Fifth Amendment as a criminal defendant. The short answer is no, but with caveats, clarifications, and explanations.

There are two separate and distinct privileges provided by the Fifth Amendment. First, the Fifth Amendment grants a defendant at his criminal trial the absolute right not to be called as a witness and the right not to testify. Second, any witness in any proceeding, whether civil or criminal, formal or informal, has the right to refuse to answer questions where the answers might incriminate that person in future criminal proceedings.

Historically, the purpose for the privilege against self-incrimination is to ensure that our criminal justice system remains accusatorial, not inquisitorial. In other words, convictions must be obtained by government securing independent evidence of the individual’s guilt, not by compelling a criminal defendant to testify against himself. In fact, convictions obtained by the use of involuntary confessions cannot stand regardless of whether the confession was true. The focus of the

320. The authors used the phrases “sexually violent predatory criminal behavior” interchangeably with “sexually violent criminal behavior.” This is a more reasonable interpretation of the Act. Indeed, this explanation is supported by the Legislature’s use of the phrases “sexually violent predatory criminal behavior” and “acts of sexual violence” within one paragraph in subdivision (a) of section 6602. Id. at § 6602(a).

321. See Hubbart, 969 P.2d at 606.

322. Amendment V of the Constitution of the United States provides in relevant part, “No person shall... be compelled in any criminal case to be a witness against himself...” U.S. Const. amend. V. Article I, section 15, of the California Constitution provides in relevant part, “Persons may not... be compelled in criminal cause to be a witness against themselves.” Cal. Const. art. 1, § 15.


324. See id.


326. See Rogers, 365 U.S. at 540-41.
privilege is not the veracity of the statement, but the methods used to obtain them. Any statement obtained by the use of coercion, whether physical or psychological, offends a fundamental principle of our criminal jurisprudence.\textsuperscript{327} Nevertheless, it is also the case that “no witness has a privilege to refuse to reveal to the trier of fact his . . . mental characteristics where they are relevant to the issues under consideration.”\textsuperscript{328} When issues about an individual’s mental status arise in the civil context, the privilege simply does not apply.\textsuperscript{329} Thus, traditional civil commitment, which involves issues of the accused’s mental condition, generally does not require application of the privilege against self-incrimination.\textsuperscript{330}

With these guidelines in place, the issues that need to be addressed are whether the individual has a Fifth Amendment privilege at two distinct periods in the process outlined by the Act: (1) at the mandatory section 6601 psychiatric evaluation to determine whether the individual has a diagnosed mental disorder which will result in evidence to be used at any trial, and (2) at the civil trial. Each of these issues will be discussed in turn.

\textit{b. Respondent Does Not Have a Constitutional Right to Refuse to Answer Questions at the Section 6601 Inquiry}

At the initial stages of the identification process, the Act requires a “full evaluation” of the individual by mental health experts.\textsuperscript{331} The person is interviewed by two psychiatrists or psychologists using a standardized assessment protocol to decide whether the person has a diagnosed mental disorder, is likely to reoffend, is dangerous to others, and requires treatment.\textsuperscript{332} Questions will delve into the person’s criminal and psychosexual history, the type, degree, and duration of any sexual deviance, and the type, severity, and history of the mental disorder.\textsuperscript{333} A meaningful evaluation of the individual’s mental condition will often depend upon an assessment of numerous incidents, some long in the past. It is possible that some uncharged criminal conduct, as well as adjudicated crimes, will be discussed. At issue is the subject’s entire lifetime behavioral pattern, not whether a certain act was committed. Although criminal conduct is necessarily bound up in every case, the

\begin{itemize}
\item \textsuperscript{327} See id. at 541.
\item \textsuperscript{328} Cramer, 588 P.2d at 796.
\item \textsuperscript{329} See Allen, 478 U.S. at 372.
\item \textsuperscript{330} See id.
\item \textsuperscript{331} CAL. WELF. & INST. CODE § 6601(b) (West 1998 & Supp. 2000).
\item \textsuperscript{332} See id. § 6601(c), (d).
\item \textsuperscript{333} See id. § 6601(c).
\end{itemize}
focus of the inquiry is not on the particular criminal acts, but on the mental condition of the individual indicated by these disclosures. The opinion or diagnosis of the experts turns on their interpretation of the information given by the individual.334

Thus, the interview is not designed to gather evidence that the individual has committed criminal offenses in the past. Rather, the inquiry is into the individual’s mental state so that the expert can offer an opinion, based any information they are given, that the individual meets the criteria of a sexually violent predator.335

The SVPA is similar to the Act involved in Allen v. Illinois.336 That Act337 dealt with individuals declared to be sexually dangerous individuals, who had a mental disorder, and had a criminal propensity to commit sex offenses.338 A petition for civil involuntary commitment, declaring the individual a sexually dangerous person, was filed and the individual was then subject to court-ordered interviews by two psychiatrists.339 At the subsequent trial, these experts testified to the information obtained from the individual despite the objection that it was obtained in violation of his constitutional right against self-incrimination.4

Because of the Act’s clearly civil nature, the Supreme Court found that the privilege did not apply341 and further emphasized the fact that “traditional civil commitment does not require application of the privilege.”342 Furthermore, the Court also opined that the Fourteenth Amendment’s guarantee of due process does not alter this conclusion.343 That protection is concerned with ensuring reliability, as shown above.344 “[T]he Fifth Amendment [privilege] is not designed to enhance the reliability of the factfinding determination.”345 In fact, the Court in Allen

335. See CAL. WELF. & INST. CODE §§ 6601(a), (b); Cramer v. Tyars, 588 P.2d 793, 797 (Cal. 1979).
337. The Sexually Dangerous Persons Act. See id. at 364.
338. See id. at 366 n.1.
339. See id.
340. See id. at 366.
341. See id. at 372.
342. Id.
343. See id. at 374 (“This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a non-criminal proceeding . . . .”).
344. See supra note 334 and accompanying text.
345. See Allen, 478 U.S. at 375.
adopted the view that "denying the evaluating psychiatrist the opportunity to question persons alleged to be sexually dangerous would decrease the reliability of a finding of sexual dangerousness." 346

However, an important caveat must be noted. 347 Allen did not address the issue whether incriminatory statements made concerning unadjudicated crimes or unadjudicated elements of charged crimes made by an individual would be admissible at his civil trial proceeding as not violative of the individual's Fifth Amendment rights. That issue was not addressed because the trial court in Allen had ruled that the individual's statements to the psychiatrists were not themselves admissible and the state supreme court ruled that any of the individual's statements to the psychiatrists could not be used against him in any subsequent criminal proceeding. 348 Thus, there was no need for the Supreme Court in Allen to address that issue. 349 Moreover, the Court in Allen relied on the state supreme court rulings as part of the reason for its conclusion that the privilege did not apply. 350 The Court in Allen stated: "This Court has never held that the Due Process Clause of its own force requires application of the privilege against self-incrimination in a noncriminal proceeding, where the privilege claimant is protected against his compelled answers in any subsequent criminal case. We decline to do so today." 351

Thus, Allen suggests that even though an individual subject to commitment does not have a Fifth Amendment privilege to refuse to answer questions presented to him at the compulsory psychiatric

---

346. Id. at 374-75.
347. It should be noted that even though the interview is "compulsory," in that the statute provides for it, that is not the type of compulsion meant for Fifth Amendment purposes. In Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), the Court stated that the Fifth Amendment protects only against compelled self-incrimination. Id. at 287. "Compulsion," as the term is used in the Fifth Amendment, does not include a statement made as the result of decisions or choices generated by the criminal procedural system. Whether there are pressures which "push" a defendant to testify is not "compulsion" for Fifth Amendment purposes. See id.
348. See Allen, 478 U.S. at 367-68.
349. The Court of Appeal in People v. Leonard, 93 Cal. Rptr. 2d 180 (Ct. App. 2000), held that the United States Supreme Court in Allen had decided this issue. Id. at 189-90. But the court in Leonard failed to note or discuss this aspect of the lower trial court's ruling in Allen, and also failed to discuss that the Supreme Court relied on that fact in reaching its decision in Allen.
350. See Allen, 478 U.S. at 366-74 (discussing the lower court's holdings). "The trial court ruled that petitioner's statements to the psychiatrists were not themselves admissible, but allowed each psychiatrist to give his opinion based upon his interview with petitioner." Id. at 366. "The [State Supreme Court of Illinois] held that 'a defendant's statement to a psychiatrist in a compulsory examination under the provisions here involved may not be used against him in any subsequent criminal proceedings.'" Id. at 367-68.
351. Id. at 374 (emphasis added).

1112
interview, any incriminatory statements made by him at that time to
those interviewers should not be admitted at his subsequent trial, nor
should they be a predicate for future criminal proceedings.

This conclusion would preserve an individual’s constitutional rights
and at the same time preserve the reliability of the proceedings. Any
answers given to the expert by the individual may provide clues to the
individual’s mental state on which the experts consider in order to render
their opinion as to whether the individual has a mental disorder and is
dangerous to others. A reliable determination of the individual’s mental
state is possible only with that person’s active cooperation. The
individual is asked questions so that the expert can gain insight into his
personality, psychological history, mental state, and emotions. Whether
the individual has a mental disorder, is dangerous, and is in need of
treatment, ultimately depends upon information that can only be gleaned
from the person subject to commitment. “[D]enying the evaluating
psychiatrist the opportunity to question persons alleged to be sexually
dangerous would decrease the reliability of a finding of sexual
dangerousness.”

If that occurred, the psychiatrist would be limited to
secondhand information such as probation reports or, if available, prior
medical records. Clearly, if mental health experts were limited to this
latter approach, the proceedings would be undermined and frustrated.
For these reasons (and because of the authorities cited) the privilege
against self-incrimination does not apply to the section 6601 compulsory
interviews. However, if in the course of those interviews the individual
supplies answers, which cover any non-adjudicated aspect of his former
crimes, or supplies information about uncharged criminal activity, those
responses should be inadmissible at the sexually violent predator’s trial
and should not be used as a predicate for criminal prosecution.

\[\text{c. Respondent May Be Called as a Witness by the Prosecution}\]

As stated earlier, no individual has a privilege to refuse to reveal to the
trier of fact his mental characteristics when they are relevant to the
issues under consideration. And, because proceedings under the

\[\text{352. Id. at 374-75; see Leonard, 93 Cal. Rptr. 2d at 190 (citing Allen, 478 U.S. at 374-75).}\]

\[\text{353. See Tippett v. Maryland, 436 F.2d 1153, 1161 n.6 (4th Cir. 1971).}\]

\[\text{354. See Cramer v. Tyars, 588 P.2d 793, 796 (Cal. 1979); People v. Merfeld, 67}\]
\[\text{Cal. Rptr. 2d 759, 762-63 (Ct. App. 1997) (holding that privilege does not prevent}\]
\[\text{calling and questioning an individual about his mental state at trial to determine whether}\]
Sexually Violent Predator Act are civil, the respondent does not have an absolute right not to be called as a witness and not to testify. The respondent would be required to respond to any non-incriminatory questioning which may reveal his current and past mental state to the trier of fact.

Reason and common sense suggest that it is appropriate under such circumstances that a jury be permitted fully to observe the person sought to be committed, and to hear him speak and respond in order that it may make an informed judgment. The receipt of such evidence may be analogized to the disclosure of physical as opposed to testimonial evidence and may in fact be the most reliable proof and probative indicator of the person's present mental condition. Similarly, a defendant even in a criminal proceeding may be required to give "real or physical" evidence in contrast to "communications or testimony" in the sense of disclosing knowledge.

Nor would the individual's statements to the mental health experts during the section 6601 interview be inadmissible. Those statements are not privileged under the patient-psychotherapist section of the Evidence Code since the individual is not a patient for the purposes of the interview. Also, when there is reasonable cause to believe the person presents a current danger to others, there is no privilege. Moreover, no privilege exists when the mental health expert is required to report such findings to a public agency, as herein, and the report is open to public inspection. Finally, the interviews would not be confidential since they are not taken in the course of providing services or treatment, but for an initial diagnosis.

Yet the person subject to commitment still retains the right, as does any witness, to refuse to answer any question that may tend to...
incriminate him in any criminal activity and might subject him to criminal prosecution. This would include the fact that the individual may not be compelled to answer questions about any unadjudicated crimes, uncharged acts, or elements of his prior convictions that were unadjudicated.\textsuperscript{364}

For example, subdivision (b) of section 6600 requires a determination that the prior sexually violent offenses for which the person received a sentence were committed by the use of “force, violence, duress, menace, or fear of immediate and unlawful bodily injury.”\textsuperscript{365} Since some of those listed offenses do not have these characteristics as part of their elements,\textsuperscript{366} those findings would be subject to proof beyond a reasonable doubt at the individual’s civil commitment trial. “To the extent that the necessary elements . . . may be established by evidence of criminal conduct, such evidence must, in its entirety, be elicited from sources other than the individual who is the subject of the commitment proceeding.”\textsuperscript{367}

This same conclusion would apply to any of the elements that must be proved beyond a reasonable doubt at the trial and which would be established by evidence of criminal conduct. To this extent, and only to this extent, the Fifth Amendment would apply.

If perchance, such questions are asked and answers given, then the individual should be protected against the use of the compelled answers in any subsequent criminal case. For the same reasons, any answers should not be used as predicates for new criminal charges.

\section*{IV. CONCLUSION}

For the reasons and arguments previously stated, it is recommended that the Act be amended in the following ways. The definition of a sexually violent predator should be clarified by adding “predatory” to those references of sexually violent prior offenses. Either the phrase “determinate sentence” should be eliminated from the definition of a sexually violent predator, or the definition should be amended as suggested in Part III of this Article. Finally, the evidentiary standard required for the finding that an individual is a sexually violent predator

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{364} See Cramer v. Tyars, 588 P.2d 793, 798 (Cal. 1979).
\item \textsuperscript{365} CAL. WELF. & INST. CODE § 6600 (West 1998).
\item \textsuperscript{366} See CAL. PENAL CODE § 288(a), (b) (West 1999) (listing lewd act upon a child); id. § 286 (listing sodomy); id. § 288(a) (oral copulation).
\item \textsuperscript{367} Cramer, 588 P.2d at 797.
\end{itemize}
\end{footnotesize}
should be changed to require proof, both in the definition of a sexually violent predator and in the definition of a diagnosed mental disorder, of a likelihood that the individual will engage in predatory sexually violent criminal behavior.

These changes would not only eliminate internal inconsistencies currently present in the Act, but would also clarify the elements subject to proof and lessen disagreement among the trial courts on these issues. This, in turn, would save court time and eliminate appellate review. For these reasons, the Legislature should revisit the Act with these recommendations in mind.