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Will California's Sexually Violent Predators Act Survive Constitutional Attacks?

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WILL CALIFORNIA'S SEXUALLY VIOLENT PREDATORS ACT SURVIVE CONSTITUTIONAL ATTACKS?

I. INTRODUCTION

Christopher Evans Hubbart terrorized young women in the suburbs of East Los Angeles in the 1970s and 1980s.[1] Hubbart's modus operandi was to surprise women living alone by breaking into their homes either at night or in the early morning hours.[2] He would threaten his victims, tie their hands together, and place a pillowcase over their heads.[3] He then would forcibly rape, sodomize, and often times force enemas.[4] His probation officer's report quotes Hubbart admitting he had committed similar acts with twenty women.[5]

When the authorities finally caught up with him, Hubbart pled guilty to three counts of sodomy and one count of forcible rape.[6] Hubbart was committed to Atascadero State Hospital in 1973 where he received both individual and group psychotherapy, in addition to behavioral treatments developed specifically for sex offenders.[7] He was released to outpatient treatment in November 1979, and raped another woman on the day of his release.[8] He avoided apprehension and raped at least nine more women over the next two years.[9] Hubbart was not readmitted to Atascadero until 1981 when it had become apparent to his doctor that he had been re-

1. *See* Joseph M. Bessette, *In Pursuit of Criminal Justice*, PUB. INTEREST, Sept. 22, 1997, at 61.
2. *See id.*; Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 276 (1997).
3. *Hubbart*, 58 Cal. Rptr. at 276.
4. *id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See* Bessette, *supra* note 1, at 61.
9. *id.*

offending.[10] In September 1982, he was convicted of forcible rape, oral copulation, six counts of false imprisonment and numerous burglary counts and was sentenced to sixteen years in state prison.[11] In April 1990, Hubbart was released on parole.[12] Just three months after his release, he assaulted a female jogger by running up behind her, grabbing her and fondling her.[13] Parole was revoked and he was convicted of false imprisonment and sentenced to five years in prison.[14] For his twenty-four convictions (he was suspected by authorities for many more crimes), Hubbart served a total of fourteen years behind bars, an average of seven months per rape.[15]

Violent sexual offenders, such as Hubbart, arguably commit the most heinous crimes in society, and the rate of recidivism among them is extremely high.[16] While these in-

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10. Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 276 (1997).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *See* Bessette, *supra* note 1, at 61.
16. *See* Shawn Hubler, *"Pillowcase Rapist" Latest Catlayst for Anti-Crime Drives*, L.A. TIMES, Jan. 27, 1996, at A1. One Department of Corrections study showed that 51% of sex offenders paroled in California in 1990 were back in custody by 1992, 58% of them for sex offenses. *Id.* Stephen Lally, clinical psychologist at a forensic inpatient program, states that estimates of recidivism (repetition of the crime) among sexual offenders range from 13% to 40%. Stephen Lally, Steel Beds v. Iron Bars: *New Laws Muddle How to Handle Sex Offenders*, WASH. POST, July 27, 1997, at C01.

A prime example of recidivism among sex offenders is James Porter. On September 2, 1998, Porter raped a 62 year old woman while being monitored through an electronic anklet just 12 hours after being released. John M. Glionna, *Inmate Freed, Accused Next day of Rape Crime*, L.A. TIMES, Sept. 5, 1998. Porter was released by the state Department of Corrections, along with approximately 134 mentally ill inmates, as a result of *C.A. Terhune v. Superior Court*, 76 Cal. Rptr. 2d 841 (1998). Porter was being held beyond his parole under an administrative regulation, Cal. Code Regs. tit. 15 §§ 2616(a)(7), 2615 (1998), that was found by the First District Court of Appeal to be void because it permitted an individual's parole to be revoked before he or she is ever even released into the community. *Id.* at 843. The court held that the statute was preempted by other state statutes, such as the Mentally Disordered Offender Law, see *infra* note 96, the Lanterman-Petris-Short Act, see *infra* note 96, and the Sexually Violent Predators Act, see *infra* Part II. Porter had originally been held under the Sexually Violent Predators Act, however, there was not sufficient probable cause under the statute. *Terhune*, 76 Cal. Rptr. at 844. The heinous nature of the crimes committed by sex offenders and the high rates of recidivism among them have forced states to specifically target repeat sex offenders with legislation. *See* Hubler *supra*, at A1.

dividuals recognize the animal nature of their conduct, they do not feel they are in full control of their impulses.[17] It is clear that they should be removed from society and either incarcerated for life or treated.[18] However, under the California and United States Constitutions, the solution favored by society is not always constitutionally sound. Incarcerating an individual for life for whatever reason society deems proper may be depriving an individual of their liberty without due process of law.[19] Furthermore, keeping them confined after they have served their sentence may violate the Double Jeopardy[20] and Ex Post Facto Clauses of the Constitutions.[21] Although violent sexual offenders need specialized treatment,[22] such treatment may violate the Equal Protection Clauses.[23]

These constitutional clauses are essential to the California and United States Constitutions because they assure that no individual or group of individuals is unfairly treated under the laws. However, it is a general consensus among society that sexually violent predators are not worthy of constitutional safeguards because of the repulsive nature of their crimes.[24] Thus, it appears that California legislators are willing to walk close to the fine line between "constitutional" and "unconstitutional" in order to protect Californians from these predators.[25]

In 1995, the California legislature passed the Sexually Violent Predators Act (the "Act").[26] This Act allows for the

17. *See* Lally, *supra* note 16, at C01.

18. *See id.*

19. U.S. CONST. amend. V; CAL. CONST. art. I, § 7.

20. U.S. CONST. amend. V; CAL. CONST. art. I, § 15.

21. U.S. CONST. art. I, § 10, cl. 1; CAL. CONST. art. I, § 9.

22. *See* Katherine Seligman, *Woman Faces Sex Predator Label, Could Be First Female Comitted Under State Law,* S.F. EXAM., Aug. 1, 1998, at A7. According to Norma Romero, spokeswoman for the state Department of Health, "[t]reatment is not considered a cure . . . but is aimed at controlling behavior . . . [violent sex offenders] learn the triggers that prompt their behavior and strategies for avoiding them." *See id.*

23. U.S. CONST. amend. XIV, § 1; CAL. CONST., art. I, § 7.

24. *See* Scott Winokur, *Will Rapist Return to the City?*, S.F. CHRON., Mar. 19, 1996, at A15.

25. *See id.*

26. CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 1998). Two identical bills were signed in order to pass the Act: Chapter 763, A.B. 888, 1995-1996 Reg. Sess., ch. 763, § 3 (Cal. 1995), and Chapter 762, S.B. 1143, 1995-1996 Reg. Sess., ch. 762, § 3 (Cal. 1995). *See also* Matthew E. Farmer, Comment, *Crimes: Sexually Violent Predators*, 27 PAC. L.J. 574, 580 (1996). Both pieces of legislation are identical, however, Chapter 763 originated in the Assembly, while

civil commitment[27] of those who are deemed "sexually violent predators" upon completion of their sentence[28] and keeps them excluded from society until it is determined that they are no longer a threat.[29] Numerous individuals who have been civilly committed under the Act are now challenging its constitutionality.[30] The California Supreme Court has recently granted review to these cases.[31] Although the legislature intended to prevent the release of dangerous sexual predators,[32] the California Supreme Court may find that such confinement is not a constitutionally appropriate way to deal with sexually violent predators. Therefore, the legislature may have to find an alternative method of both excluding these individuals from society and providing them with treatment.[33]

This comment evaluates the constitutionality of California's Sexually Violent Predator's Act[34] and proposes an alternative way of dealing with sexually violent predators so that their constitutional rights are preserved.[35] Part II of this comment is divided into four sections. First, it provides a de-

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Chapter 762 originated in the Senate. *See id.* Assembly member Rogan, the author of Chapter 763, and Senator Mountjoy, the author of Chapter 762, worked together to get the Act passed. *Id.* Chapter 762 was repealed on January 1, 1998. 1997 Cal. Legis. Serv. 17 § 151 (West). However, Chapter 763 remains effective and the repealment of Chapter 762 does "not make any substantive change in the law." 1997 Cal. Legis. Serv. 17 (West).

27. "Civil commitment" refers to the process whereby an individual is judicially committed as a sick person, and not as a criminal. CAL. WELF. & INST. CODE § 6250 (West 1998). Civil Commitment under section 6250 of the Welfare and Institutions Code is distinguished from the incarceration of individuals under the Penal Code, other laws relating to mentally disordered persons charged with a crime and the criminally insane. *Id.*

28. CAL. WELF. & INST. CODE § 6601 (West. Supp. 1998).

29. *Id.* § 6609.1.

30. *See* People v. Putney, 67 Cal. Rptr. 2d 283 (Ct. App. 1997), *rev. granted*, 950 P.2d 56 (Cal. Dec. 23, 1997) (No. S065144); People v. Hedge, 65 Cal. Rptr. 2d 693 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S063954); Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268 (Ct. App. 1996), *rev. granted sub nom.* Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136); Giarcetti v. Los Angeles County Superior Court (Rasmuson), 931 P.2d 262 (Cal. Feb. 5, 1997) (No. S057336); People v. Superior Court (Cain), 57 Cal. Rptr. 2d 296 (Ct. App. 1996), *rev. granted*, 931 P.2d 262 (Cal. Feb. 5, 1997) (No. B103020).

31. *See* cases cited *supra* note 30.

32. *See* Sexually Violent Predators Act, 1995 Cal. Legis. Serv. 763, § 3 (West); *see* discussion *infra* Part II.B.

33. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2098 (1997).

34. *See* discussion *infra* Part IV.

35. *See* discussion *infra* Part V.

tailed analysis of the Act to facilitate understanding of the criteria and process by which an individual may be civilly committed.[36] Second, it discusses the Legislature's intent in passing the Act.[37] Third, it discusses cases arising under the Act[38] and several constitutional issues that the California Supreme Court will likely analyze in their decision.[39] The constitutional issues discussed include the following: ex post facto,[40] double jeopardy,[41] substantive due process[42] and equal protection.[43] Finally, it discusses the United States Supreme Court's approach to a similar statute in *Kansas v. Hendricks*[44] and looks at how other states have been affected by this decision.[45]

Part III of this comment briefly identifies the constitutional problems raised by the passage of the Act, and Part IV analyzes each of these four constitutional issues individually.[46] Finally, Part V presents a proposal for ensuring that the implementation of the Act is constitutionally sound and effective in dealing with sexually violent predators. Specifically, this section proposes that treatment of sex offenders should begin immediately upon incarceration, and "conditional release" of sex offenders should be implemented more often than "unconditional release."[47]

II. BACKGROUND

A. *Definitions, Process, and Procedure Under the Act*

According to the Act, the Director of Corrections[48] determines whether an individual in custody is potentially a

36. *See* discussion *infra* Part II.A.
37. *See* discussion *infra* Part II.C.
38. *See* discussion *infra* Part II.C.1.
39. *See* discussion *infra* Part II.C.2.
40. *See* discussion *infra* Part II.C.2.a.
41. *See* discussion *infra* Part II.C.2.b.
42. *See* discussion *infra* Part II.C.2.c.
43. *See* discussion *infra* Part II.C.2.d.
44. *See* discussion *infra* Part II.D.1.
45. *See* discussion *infra* Part II.D.2.
46. The constitutional issues discussed in the Background include the following: ex post facto, double jeopardy, substantive due process, and equal protection.
47. *See* discussion *infra* Part V.
48. The Director of Corrections is the director of The Department of Corrections. CAL. PENAL CODE § 6080 (West 1998); *see infra* note 34.

"sexually violent predator" and may refer that individual for an evaluation at least six months prior to his or her[49] scheduled date for release.[50] Once the individual is referred for an evaluation, he or she is subject to screening by the Department of Corrections[51] and the Board of Prison Terms.[52] These entities determine whether an individual is a "sexual violent predator" by evaluating whether the individual has committed a sexually violent predatory[53] offense and by reviewing the individual's social, criminal, and institutional history.[54] If, as a result of the screening, it is determined that the individual is likely to be a sexually violent predator, the Department of Corrections refers the individual to the State Department of Mental Health[55] for a full evaluation conducted by two practicing psychologists or psychiatrists.[56] Under their review, a final determination will be made as to whether the individual meets the criteria set out in section

49. Charlotte Mae Thrailkill was the first woman to be deemed a sexually violent predator under the Act. *Sex Offender to be Kept in State Hospital*, S.F. CHRON. Sept. 9, 1998, at A20. Thrailkill is 38 years old and was sentenced to 14 years in state prison in 1988 when she plead no contest to lewd and lascivious acts with five children, between the ages of five and seven. *Id.*

50. CAL. WELF. & INST. CODE § 6601(a) (West Supp. 1998).

51. "The Department of Corrections meets the need for the provision of facilities and programs for the control and treatment of convicted felons and narcotic addicts in order to execute the sentences prescribed by the courts and parole boards in this portion of the total criminal justice effort of public protection." SECRETARY OF STATE BILL JONES, CALIFORNIA ROSTER: DIRECTORY OF STATES SERVICES OF THE STATE OF CALIFORNIA 59 (1995).

52. "Members [of the Board of Prison Terms] set the terms for all persons sentenced to prison for life with a possibility of parole." SECRETARY OF STATE BILL JONES, CALIFORNIA ROSTER: DIRECTORY OF STATES SERVICES OF THE STATE OF CALIFORNIA 82 (1995). The Board also makes pardon recommendations to the governor. *Id.*

53. According to the Act, "predatory" means an act 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. CAL. WELF. & INST. CODE § 6600(e) (West 1998).

54. CAL. WELF. & INST. CODE § 6601(b) (West 1998).

55. "The Department of Mental Health administers a program of services for the prevention of mental illness in California. Services are delivered directly through state hospitals and indirectly through county-administered local mental health programs .... The Department operates four state hospitals: Atascadero, Metropolitan, Napa and Patton." SECRETARY OF STATE MARCH FONG EU, CALIFORNIA ROSTER: DIRECTORY OF STATES SERVICES OF THE STATE OF CALIFORNIA 61 (1990).

56. CAL. WELF. & INST. CODE § 6601(d) (West 1998).

6600 of the Act.[57]

Under section 6600, a "sexually violent predator" is a person who has (1) been convicted of a sexually violent offense, (2) against two or more victims, (3) for which a sentence was received, and (4) who has a diagnosed mental disorder that makes the individual a danger to others in society.[58] A "sexually violent offense" is defined in section 6600 as the following acts when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person: rape; rape with an object; lewd and lascivious conduct with a minor under the age of 14; sodomy; and oral copulation.[59]

In determining whether the individual is a sexually violent predator, the evaluators will assess diagnosable mental disorders[60] and other factors known to be associated with the risk of recidivism among sex offenders.[61] The "risk factors" include criminal and psycho-sexual history, type, degree and duration of the sexual deviance and severity of the mental disorder.[62] If both evaluators agree[63] that the individual has a diagnosed mental disorder that will likely result in sexual violence without appropriate treatment and custody, the Di-

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57. *Id.*

58. *Id.* § 6600(a).

59. *Id.* § 6600(b). The specific Penal Code sections listed in the Act are: § 261(a)(2); § 262(a)(1); § 264.1; § 288(a) or (b); § 289(a); or sodomy or oral copulation in violation of § 286 or § 288(a). *Id.* However, even if the individual did not receive a sentence for a prior sexual offense, that act is still to be deemed a sexually violent offense if there is a prior finding of the following: a finding of not guilty by reason of insanity of a sexually violent offense; 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 of the elements of a sexually violent offense. *Id.* § 6600(a).

60. According the the Act, a "diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the individual to the commission of criminal sexual acts so that the individual is a menace to the health and safety of others. CAL. WELF. & INST. CODE § 6600(c) (West 1998); *cf. infra* note 270 and accompanying text.

61. CAL. WELF. & INST. CODE § 6601(c) (West 1998).

62. *Id.*

63. If the evaluators do not agree, the Director of Mental Health will arrange for further evaluation of the individual by two independent professionals. CAL. WELF. & INST. CODE § 6601(e) (West 1998). These independent professionals cannot be state government employees, must have five years experience in the diagnosis and treatment of mental disorders, and must be licensed with doctoral degrees in psychology. *Id.* § 6601(g). If both independent professionals agree that the individual meets the criteria, a petition to request commitment may be filed. *Id.* § 6601(f).

rector of Mental Health will forward a request for a petition for commitment to the designated county under the Act.[64] If the designated county district attorney's office agrees with the recommendation, a petition for commitment is filed with the superior court of the county in which the individual was originally convicted.[65]

The individual is then entitled to a hearing that requires a judge of the superior court to review the petition and decide whether there is probable cause to believe that the individual is likely to engage in sexually violent predatory criminal behavior.[66] The individual is entitled to counsel at this hearing[67] and is guaranteed all of the constitutional protections afforded to a criminal defendant.[68] If the judge finds that no probable cause exists, then the petition shall be dismissed.[69] If the judge does find that probable cause exists, then the individual remains in custody and a trial is conducted to determine, beyond a reasonable doubt,[70] whether the individual 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 . . . ."[71]

The individual may choose either a jury or a bench trial.[72] If a jury trial is selected, a unanimous verdict is required.[73] If the judge or jury determines that the individual is a sexually violent predator, the individual will be committed to the State Department of Mental Health for appropriate treatment and confinement in a secure facility for two years.[74] Upon completion of the two years of treatment and confinement, a petition may be filed pursuant to the Act to repeat the process.[75]

Once an individual is committed, he or she is entitled to

64. CAL. WELF. & INST. CODE § 6601(c) (West Supp. 1998).
65. *Id.* § 6601(i).
66. *Id.* § 6602.
67. *Id.*
68. *Id.* § 6603.
69. *Id.* § 6602.
70. CAL. WELF. & INST. CODE § 6604 (West 1998).
71. *Id.* § 6602. Under the Act, "danger to the health and safety of others" does not require proof of a recent overt act while the individual is in custody. CAL. WELF. & INST. CODE § 6600(d) (West 1998).
72. *Id.* § 6603(c).
73. *Id.*
74. *Id.* § 6604.
75. *Id.*

the appointment of an expert and an annual review of all records.[76] The individual is also entitled to a hearing to determine whether his or her condition has changed so that he or she would no longer be a danger to the health and safety of others upon release.[77] If it is so determined, the individual is entitled to a full trial at which he will be afforded the same constitutional guarantees as at the initial commitment proceedings.[78] If either a judge or jury finds that the person should not be released, then the individual shall be confined for another two years, beginning from the date of the new ruling.[79] If the ruling is in favor of the individual, he or she will be "unconditionally" released.[80] Furthermore, if at *any* time during the commitment of an individual the Department of Mental Health has reason to believe that the individual is no longer a sexually violent predator, it *must* seek judicial review of the commitment.[81]

The individual may petition for a "conditional" release or the Director of the Department of Health may recommend such a release.[82] A hearing for conditional release is then held to determine whether the individual would be a danger to the health and safety of others if he or she is released under community supervision and treatment.[83] If the court rules in favor of the individual, he or she is placed on conditional release for one year. At the end of one year, another hearing is held to determine whether the individual should be unconditionally released.[84]

The Act requires the State Department of Mental Health, upon the request of a law enforcement official, to provide information[85] concerning individuals committed un-

76. *Id.* § 6605(a).
77. CAL. WELF. & INST. CODE §§ 6005(b), 6005(c) (West. Supp. 1998).
78. *Id.* §§ 6005(c), 6005(d).
79. *Id.* § 6005(e).
80. *Id.*
81. *Id.* § 6005(f).
82. *Id.* § 6608.
83. CAL. WELF. & INST. CODE § 6608(d) (West. 1998).
84. *Id.*
85. The Department of Mental Health is permitted to provide the following information to the law enforcement official: name, address, date of commitment, country from which committed, date of placement in the conditional release program, fingerprints and a glossy photograph no smaller than three and one-eighth inches by three and one-eighth inches in size, or clear copies of the fingerprints and photograph. *Id.* § 6609.

der the Act.[86] Moreover, if the person is going to be unconditionally released, the State Department of Health must notify county law enforcement of the individual's name, the community in which that person will reside and whether or not the individual is required to register with law enforcement.[87]

While committed, the individual must be given treatment for his or her diagnosed mental disorder, whether or not it is found that the sexually violent predator is responsive to treatment.[88] The right to such treatment does not mean that it must be potentially successful, but that it "shall be consistent with current institutional standards for the treatment of sex offenders."[89]

B. *Legislative Intent: Rehabilitative or Punitive?*

California's Violent Sexual Predator's Act[90] became law in 1995 as a legislative response to the problem of recidivating sexually violent predators.[91] In order to be categorized as "criminally insane" in California, a defendant must have either a mental disorder or a developmental disability and be unable to understand the nature of the criminal proceedings against him or unable to aid counsel in his defense.[92] Sexual predators rarely meet this criteria, yet they may suffer from "mental disorders,"[93] which arguably compel them to commit sexual assaults.[94] Psychologists agree that repeat sex offenders are not always amenable to treatment and most are unlikely to change.[95] Nevertheless, the Legislature has chosen

86. *Id.* § 6609. "Law Enforcement Official" is limited to the chief of police of a city or the sheriff of a county. *Id.*

87. *Id.* § 6609.1(a); *see generally* CAL. PENAL CODE § 290 (West 1997) (registration of sex offenders).

88. CAL. WELF. & INST. CODE § 6606 (West. 1998).

89. *Id.* §§ 6606(b), 6606(c).

90. CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 1998).

91. *See* 1995 Cal. Legis. Serv. 763, § 3 (West).

92. CAL. PENAL CODE § 1367 (West 1998).

93. *See supra* note 60.

94. *Id.*; *see Sexual Predators Controversial Statute Does Not Violate Constitution*, SACRAMENTO BEE, July 7, 1997, at B6.

95. *See* Scott Winokur, *Will Rapist Return to the City?*, S.F. EXAMINER, Mar. 19, 1996, at A15. Forensic Psychologist Jonathan French, who has done 12 evaluations under the Act, states that this notion is true because sexual orientation is established very early in life. *Id.* He states, "[w]e don't monitor sexuality in our kids, and so you're not going to turn around aberrant development." *Id.*

to attempt to treat sexually violent predators as a separate group through laws that require their civil commitment.[96] Once their criminal sentences have come to an end,[97] sexual predators targeted by the law are to be treated as sick persons, not as criminals.[98]

The intent of the legislature in passing the Act was clearly explained in 1995:

> 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 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.[99]

The Legislature further explained that it intends for "these individuals [to] be committed and treated for their disorders only as long as the disorders persist and *not for any punitive*

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96. CAL. WELF. & INST. CODE §§ 6600-6609.3 (West. 1998). The Legislature has addressed mentally disordered prisoners in two other statutes. In 1969, the Legislature enacted the Lanterman-Petris-Short Act (LPS). CAL. WELF. & INST. CODE § 5000-569 (West 1998). The LPS permits the involuntary civil commitment of prisoners who, by reason of a mental disorder, are dangerous to others or to themselves, or who are gravely disabled. *id.* § 5001. Examples under the statute are inebriated individuals, *id.* at § 5170, or those with suicidal tendencies, *id.* § 5260. The primary difference between the LPS and the Act is that the LPS permits involuntary civil commitment for up to 180 days, unless a jury deems that the person should be further confined for additional treatment. *id.*

In 1986, the Legislature enacted the Mentally Disordered Offender Law (MDO), CAL. PENAL CODE § 2960-2981 (West Supp. 1998), which is similar to the Act. The MDO was intended to protect the public from prisoners who have "treatable, severe mental disorder[s] that was one of the causes of, or was an aggravating factor in the commission of the crime for which they were incarcerated." *Id.* § 2960. The MDO differs from the Act in that it provides mental health treatment to paroled prisoners as a condition of their parole, without confining them beyond their scheduled release. *Id.* § 2962. The treatment is to be continued until the mental condition is in remission. *Id.* § 2968.

97. *Id.* § 6601.

98. *Id.* § 6250.

99. 1995 Cal. Legis. Serv. 763, § 3 (West).

purposes."[100]

C. *Constitutional Cases and Issues Arising Under the Act*

1. *California Cases*

The California Constitution is similar to the United States Constitution in that it guarantees due process,[101] equal protection,[102] prohibits ex post facto laws,[103] and double jeopardy laws.[104] Since the Act became effective in January of 1996, several prisoners have moved to dismiss petitions brought against them under the Act, claiming that it infringes on their constitutional rights.[105]

Althor Cain was the first alleged violent sexual predator to go before a jury in 1996.[106] As required under the Act, he was released to the county where he was last convicted—San Francisco.[107] Along with Cain, nine other prisoners against whom petitions were filed under the Act moved to dismiss the petitions, arguing that the Act was an ex post facto law because it allowed confinement after the completion of their criminal sentences.[108] The superior court agreed with the prisoners and dismissed the petitions.[109] However, the First District Court of Appeals disagreed with the superior court and concluded that the Act was not an ex post facto law, because it does prescribe a penal commitment.[110] This case has

100. *Id.* (emphasis added).
101. U.S. CONST. amend. V; CAL. CONST. art. I, § 7.
102. U.S. CONST. amend. XIV, § 1; CAL. CONST., art. I, § 7.
103. U.S. CONST. art. I, § 10, cl. 1; CAL. CONST. art. I, § 9.
104. U.S. CONST. amend. V; CAL. CONST. art. I, § 15.
105. *See* cases cited *supra* note 30.
106. People v. Superior Court (Cain), 57 Cal. Rptr. 2d 296 (Ct. App. 1996), *rev. granted*, 931 P.2d 262 (Cal. Feb. 5, 1997) (No. B103020). Cain is a white Caucasian male who is currently 53 years old. *See* Winokur, *supra* note 24, at A1. He was "obsessed with Asian women when he was a free man . . . . He raped them . . . [and] [g]ot violent with them in other ways too." *See id.* When he was arrested in 1990, after an incident that led to his second rape conviction, the police officers found a book with pictures of 50 Asian women among his belongings. *Id.* He eventually served two terms in state prison, where he will be remembered for "aberrant behavior," including exposing his genitals. *Id.*
107. People v. Superior Court (Cain), 57 Cal. Rptr. 2d 296 (Ct. App. 1996), *rev. granted*, 931 P.2d 262 (Cal. Feb. 5, 1997) (No. B103020).
108. *Id.* at 297.
109. *Id.*
110. *Id.* at 300.

been granted review by the California Supreme Court.[111] The following year, the same court of appeals also affirmed a Sonoma County Superior Court decision that rejected a prisoner's ex post facto argument.[112]

In 1997, the Superior Court of San Diego County faced similar cases involving seven prisoners who demurred to the petition on the grounds that the Act was unconstitutional.[113] The court agreed with the prisoners and found the Act unconstitutional "both facially and as applied to defendants."[114] However, these cases were consolidated and the People appealed in *People v. Hedge*, where the decision was reversed.[115] The Fourth District Court of Appeals also held that the Act was not a penal statute and, therefore, was not an ex post facto law.[116] The court further held that commitment under the Act was not punishment; therefore, it did not violate the Double Jeopardy Clause, nor did it violate the Due Process or Equal Protection Clauses.[117] *Hedge* was also granted review by the California Supreme Court.[118] The counties of Los Angeles and Santa Clara both have similar cases pending before the California Supreme Court.[119]

All legislation in California is presumed to be constitutional and may not be struck down without a showing that it is clearly and unmistakably contrary to the constitution.[120] Therefore, all doubts are to be resolved in favor of the legisla-

111. *Id.* at 296.

112. People v. Putney, 67 Cal. Rptr.2d 283 (Ct. App. 1997), *rev. granted*, 950 P.2d 56 (Cal. Dec. 23, 1997) (No. S065144).

113. *See* People v. Hedge, 65 Cal. Rptr. 2d 693 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S063954). The following Superior Court cases were consolidated with *Hedge*: People v. Donnell (No. D026742); People v. Badger (No. D026868); People v. Roberge (No. D027104); People v. Blevins (No. D027221); People v. Crane (No. D027701).

114. *Hedge*, 65 Cal. Rptr. 2d at 698.

115. *Id.* at 698, 710.

116. *Id.* at 706.

117. *Id.*

118. *Id.* at 693.

119. *See* Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People) 932 P.2d 755, (Cal. Feb. 26, 1997) (No. S052136); *see also* Garcetti v. Superior Court (Rasmuson), 57 Cal. Rptr. 2d 420 (Ct. App. 1997), *rev. granted sub nom.*, Garcetti v. Los Angeles County Superior Court (Rasmuson), 931 P.2d 262 (Cal. Feb. 5, 1997) (No. S057336) (fifteen petitions consolidated into one case).

120. *See* People v. Superior Court (Cain), 57 Cal. Rptr. 296, 300 (Ct. App. 1996), *rev. granted*, 913 P.2d 262 (Cal. Feb. 5, 1997) (No. S057272) (citing People v. Jackson, 28 Cal. 3d 264, 317 (1980)).

tion.[121] "[T]he presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions in mind . . . . In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision."[122]

2. *Constitutional Issues*

a. *Ex Post Facto*

The Ex Post Facto Clause of the California Constitution[123] and the Ex Post Facto Clause of the United States Constitution[124] are interpreted in the same manner.[125] The Ex Post Facto Clauses prohibit the creation of additional punishment for crimes after such crimes are committed.[126] The current test for whether a law is ex post facto was set forth in *Collins v. Youngblood*,[127] which held that a statue violates the ex post facto prohibition if it is a criminal or penal law which makes more burdensome the punishment for a crime after its commission.[128] The focus of the analysis of a burden is on whether the defendant's *punishment* is more burdensome, not just on whether the defendant has suffered *any* burden.[129]

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121. *Hubbart*, 58 Cal. Rptr. 2d at 277 (quoting California Housing Finance Agency v. Elliot, 551 P.2d 1193, 1204-05 (1976); Amwest Surety Ins. Co. v. Wilson, 906 P.2d 1112, 1117 (1995)).

122. *Id.* (quoting Pacific Legal Found. v. Brown, 624 P.2d 1215, 1221 (1981) (citations omitted)).

123. CAL. CONST. art. I, § 9. The Ex Post Facto Clause reads, "[a] bill of ex post facto law . . . may not be passed." *Id.*

124. U.S. CONST. art. I, § 10, cl. 1.

125. *See* People v. McVickers, 840 P.2d 955, 957 (1992); Tapia v. Superior Court, 807 P.2d 434, 441-43 (1991).

126. *See* Garcetti v. Superior Court (Rasmuson), 57 Cal. Rptr. 2d 420 (Ct. App. 1997), *rev. granted sub nom.*, Garcetti v. Los Angeles Superior Court (Rasmuson), 931 P.2d 262 (Cal. Feb. 5 1997) (No. S057336).

127. 497 U.S. 37 (1990) (*cited with approval in* People v. McVickers, 840 P.2d 955, 957 (1992)).

128. *Id.* at 42; *McVickers*, 840 P.2d at 957.

129. Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268 (1997), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136) (citing *McVickers*, 840 P.2d at 957). Prior to *Collins*, a string of cases had improperly inquired as to whether the defendant suffered a "disadvantage" in their ex post facto analysis: Weaver v. Graham, 450 U.S. 24, 28-29 (1981); Kring v. Missouri, 107 U.S. 221, 228-29 (1883); Thompson v. Utah, 170 U.S. 343, 352-53 (1898); *But see*, California Dept. of Corrections v. Morales, 514 U.S. 499, 506, n.3; Pro-Family Advocates v. Gomez,

Since the Ex Post Facto Clauses apply only to legislation with a punitive effect or purpose, a primary threshold in an ex post facto analysis is whether the law is criminal or civil in nature.[130] If the law punishes a person for a past crime it is considered criminal in nature.[131] On the other hand, if the law imposes an involuntary confinement in order to treat a present sickness, it is considered civil in nature.[132] Thus, the government's motivation is the most important factor.[133] However, a law may be found to be punitive, regardless of an express legislative intent to the contrary, if the overall design and effect of the statute is punitive.[134] A person attempting to disprove the legislature's expressed intent must do so by providing the "clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to negate [that] intention."[135] If such an attempt fails, then the expressed goals of the legislature are controlling.[136]

b. *Double Jeopardy*

The Double Jeopardy Clause of the California Constitution provides that, "[p]ersons may not be put in jeopardy twice for the same offense."[137] This clause protects against multiple punishments for the same offense.[138] If a law does not constitute "punishment" for a criminal offense, there can be no double jeopardy violation.[139] However, a violation of double jeopardy still may occur when a defendant has already been punished for a crime and is subject to an additional civil sanction for the same offense. For example, the second sanction is unconstitutional if it is found to be only for deterrence or retribution instead of for a remedial purpose.[140]

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54 Cal. Rptr. 2d 600, 605 (1996).

130. *Hubbart*, 58 Cal. Rptr. 2d at 277.

131. *Id.* at 278.

132. *Id.*

133. *Id.*

134. *Id.* (citing United States v. Huss, 7 F.3d 1444, 1447-48 (9th Cir. 1993)).

135. Allen v. Illinois, 478 U.S. 364, 369 (1986) (citing United States v. Ward, 448 U.S. 242, 248-49 (1980)).

136. *See* Kennedy v. Mendoza, 372 U.S. 144 (1963).

137. CAL. CONST. art. I, § 15.

138. *See* Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136) (citing United States v. Halper, 490 U.S. at 435, 440 (1989)).

139. *See id.* at 285.

140. *See* United States v. Halper, 490 U.S. 435, 449 (1989); *see also* Montana

A violation of the Double Jeopardy Clause "can be identified only by assessing the character of the actual sanctions imposed on the individual by the . . . state."[141] In other words, it is the purpose of the sanctions, not the underlying nature of the proceeding, that must be evaluated in determining whether a civil sanction constitutes criminal punishment.[142] Under this type of analysis, the labels of "criminal" or "civil" are not important.[143] Therefore, the legislature is not able to disguise a criminal punishment by expressing its intent to create a mere "civil" sanction.[144]

c. *Substantive Due Process*

The California and United States Constitutions require that a person not be deprived of life, liberty or property without due process of the law.[145] The United States Supreme Court has held that freedom from personal restraint is a fundamental liberty interest.[146] Substantive due process requires that a governmental restriction on a fundamental right be examined under strict scrutiny.[147] Therefore, if the court finds that a state law infringes upon a fundamental right, it is unconstitutional unless it is found to further a compelling state interest and is narrowly tailored to serve that interest.[148] The United States Supreme Court specifically held in *Foucha v. Lousiana*[149] that an individual may be committed through civil commitment proceedings, without offending substantive due process, if the state can prove by "clear and convincing" evidence that the individual is mentally ill and dangerous.[150]

d. *Equal Protection*

The California Constitution states, "[a] person may not be . . . denied equal protection of the laws."[151] Equal protec-

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Dep't. of Revenue v. Kurth Ranch, 511 U.S. 767 (1994).

141. *Halper*, 490 U.S. at 447.
142. *Id.* at 447 n.7.
143. *Id.* at 447.
144. *See supra* Part II.C.
145. U.S. CONST. amend. V; CAL. CONST. art. I, § 7.
146. *See* United States v. Salerno, 481 U.S. 739, 750 (1987).
147. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).
148. *See* Reno v. Flores, 507 U.S. 292 (1993).
149. 504 U.S. 71, 80 (1992).
150. *Id.* at 82.
151. CAL. CONST. art. I, § 7.

tion of the laws is violated if the state adopts a classification that affects "similarly situated" groups in an unequal manner.[152] Where the classification does not involve a protected "fundamental right"[153] or a "suspect class,"[154] the legislation is presumed to be valid and will be sustained if the classification is "rationally related to a legitimate state interest."[155] A legislature that creates a non-protected category of people does not need to "actually articulate at any time the purpose or rationale supporting its classification."[156] Instead, such a classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[157]

D. *U.S. Supreme Court Decision on Kansas' Sexually Violent Predators Act*

1. Kansas v. Hendricks[158]

Kansas enacted a statute similar to California's Act in 1994, which established procedures for the civil commitment of persons who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence."[159] Kansas legislators passed the statute in order to commit Leroy Hendricks, a prisoner who had a

152. *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); *In re* Eric J., 25 Cal. 3d 522, 530 (1979).

153. Fundamental rights involve the "basic civil rights of man" and, thus, are subject to strict scrutiny review. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Strict scrutiny requires that a law only be upheld if it is "necessary to achieve a compelling government purpose." *See* Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995); Sugarman v. Dougall, 413 U.S. 634 (1973). Examples of fundamental rights are: the right to procreate, *see, e.g., Skinner*, 316 U.S. 535 (1942); the right to vote, *see, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); access to the judicial process, *see, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); and interstate travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

154. Suspect classifications are also subject to strict scrutiny review and include classifications based on race, ethnicity, and national origin. *See* Graham v. Richardson, 403 U.S. 365 (1971); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

155. *See* Heller v. Doe, 509 U.S. 312, 320 (1993).

156. *Id.* (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).

157. *Id.* (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

158. 521 U.S. 346 (1997).

159. KAN. STAT. ANN. §§ 59-29a01 to 59-29a15 (1994).

long history of sexually molesting children.[160] The importance of preventing Hendricks' release was evident when he stated that the only sure way he could keep from sexually abusing children in the future is if he were "to die."[161] Hendricks challenged his commitment under the Kansas statute on substantive due process, double jeopardy, and ex post facto grounds.[162]

In a five to four decision, the United States Supreme Court ruled that the Kansas statute was constitutional, with Justice Thomas writing the opinion of the Court.[163] Hendricks argued that the Kansas statute established criminal proceedings and, therefore, confinement under it necessarily constituted punishment.[164] The Court rejected this argument and concluded:

> 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, and then only after meeting the strictest procedural standards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.[165]

Further, the Court found that Hendricks' right to due process was not violated since "civil confinement of a limited subclass of dangerous persons" does not oppose our current understanding of "ordered liberty."[166] Since the court determined that the Kansas statute is civil in nature, there was no valid claim based on double jeopardy or ex post facto because the commitment does not constitute criminal punishment.[167]

2. *The Impact of* Kansas v. Hendricks*: States Follow Supreme Court Decision*

Prior to the *Hendricks* decision, Washington, Arizona,

160. *Hendricks*, 117 S. Ct. at 2076.
161. *Id.* at 2078.
162. *Id.*
163. *Id.*; *see generally* Harriet Chang, *New Ruling on Sexual Predators: They Can Be Jailed After Serving Term*, S.F. CHRON., June 24, 1997, at A1; Joan Biskupic, *Court Gives Leeway in Confining Sex Offenders*, WASH. POST, June 24, 1997, A1.
164. *Hendricks*, 117 S. Ct. at 2081.
165. *Id.* at 2083.
166. *Id.* at 2080.
167. *Id.* at 2086.

Minnesota and Wisconsin already had similar laws.[168] The Wisconsin Legislature passed its sexual predator law in 1994 and currently has 150 individuals imprisoned under that law.[169] Furthermore, since the Washington Legislature passed its law in 1990, fifty-one prisoners in that state have been determined to be sexually violent predators.[170]

The decision of *Hendricks* has had an impact on other states' decisions to pass their own sexual predators laws.[171] The New York Legislature waited for the Supreme Court to address the issue before it passed its own statute, which became law two days after the *Hendricks* decision.[172] Legislatures in Hawaii, Illinois,[173] Iowa, Maine, Massachusetts, Michigan, Nebraska, New Hampshire, Nevada and North Dakota[174] are currently developing similar statutes following the *Hendricks* decision.[175] The Legislatures in New Hampshire and Maine failed to pass sexual predator bills prior to the *Hendricks* decision due to constitutional concerns, but now plan to re-file those bills with more success.[176]

Furthermore, several state officials have commented that before the *Hendricks* decision they were frustrated because they had to release dangerous sexual predators into society at the end of their prison sentence.[177] Some believe that it is inevitable that every state legislature will soon have their own sexual predator statute as a result of the *Hendricks* de-

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168. *See* Michelle Boorstein, *States Busy with Sex Predator Laws After High Court's Ruling*, SAN DIEGO UNION-TRIB., June 28, 1997, at A23.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* New York Senator Dale Yolker, whose name is on the state's sexually violent predator act, stated, "[u]ntil the Supreme Court decision of the other day . . . we were reluctant to move because we wanted to feel we were on totally solid ground." *Id.*

173. The Illinois law is modeled after the Kansas statue and went into effect January 1, 1998. Terry Burns, *Edgar Signs Sexual Predator Bill Into Law: Act Means Offenders Can be Locked up for Further Treatment*, PEORIA J. STAR, July 1, 1997, D7. It is estimated that in any given year, more than 600 sex offenders are released from Illinois prisons. *Id.* Under the new law, about 20 of those offenders could be involuntarily committed for further mental treatment. *Id.*

174. North Dakota has a sexual predator law which became effective August 1, 1997. This law differs from most in that is allows indefinite confinement, without conviction, of individuals who are considered to be sexual predators by police and other criminal experts. Boorstein, *supra* note 168.

175. *See* Boorstein, *supra* note 168.

176. *Id.*

177. *Id.*

cision.[178]

The District of Columbia has dealt with sex offenders since 1948 with a law entitled the "Sexual Psychopath Act."[179] Under that statute, an individual "who . . . has evidenced such a lack of power to control his or her sexual impulses as to be dangerous to other persons because he or she is likely to attack or otherwise inflict injury, loss, pain or evil on the objects of his or her desire" is considered to be a sexual psychopath.[180] This statute varies greatly from those of other states because treatment of sexual offenders occurs prior to and irrespective of the outcome of a criminal proceeding.[181] The confinement may occur before trial, sentencing, or release and has been justified by the courts as a means of providing treatment to the offender.[182] However, the individual need not be charged with a crime to be considered a sexual psychopath.[183] The commitment lasts until the person is "sufficiently recovered" and is no longer dangerous to other persons.[184] At that time, the offender may be released, tried for the alleged offense, or if already convicted, serve his or her sentence.[185]

Although it appears that many states have followed the Kansas statute as a guideline following the *Hendricks* decision, other state legislatures such as California enacted similar statutes prior to *Hendricks*. Furthermore, it does not appear that the *Hendricks* decision guarantees constitutionality under state constitutions. That is, it does not guarantee that all state supreme courts will agree with the reasoning in *Hendricks*,[186] because state constitutions may provide greater protection to individuals than the United States Constitution.[187] Therefore, states have the option to invalidate their sexual predator statutes in order to provide greater protec-

178. *See* Laura LaFay, *Fine Print on Crime Has a Few Problems Some Ideas Are Already Law; Others, Experts Say, Are Just Unworkable*, VIRGINIAN-PILOT STAR, October 30, 1997, at A1.

179. D.C. CODE ANN. tit. 22, §§ 3503-3511 (1996); *see also* Lally *supra* note 16.

180. Title 22, § 3503(1).

181. Title 22, § 3503-3511.

182. *Id.* § 3504.

183. *Id.* § 3504(a).

184. *Id.* § 3509.

185. *Id.*

186. *See generally* Chang, *supra* note 163, at A1.

187. *See* Arizona v. Evans, 514 U.S. 1,2 (1995).

tion to defendants.

III. IDENTIFICATION OF THE PROBLEM

In California, the punishment for a repeat sexual offender, whose crimes are committed by "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person,"[188] is confinement in a state prison for life with an eligibility for parole after twenty-five years.[189] An individual who has committed one of these heinous crimes is incarcerated, without treatment for twenty-five years.[190] California legislators have concluded that these types of criminals have a very high rate of recidivism.[191] Therefore, the Legislature's means of protecting the public is the Act, which permits involuntary civil commitment of these individuals.[192]

The California Legislature is not unique among the states in its approach to the problem of repeat violent sexual offenders.[193] The California Supreme Court has granted review to many cases challenging the constitutionality of the Act.[194] Although the United States Supreme Court has upheld the constitutionality of a similar statute passed by the Kansas Legislature,[195] the California Supreme Court will have to decide for itself whether the Act is valid under the California Constitution.[196] However, because the California

188. *See* CAL. PEN. CODE §§ 261(a)(2), 262(a)(1), 264.1, 288(b)(1), 289(a) (West. 1998) (rape, lewd, and lascivious acts with child under the age of 14, and penetration by unknown objects).

189. *See* CAL. PEN. CODE § 667.61 (West 1998). The punishment for a violent sexual offense without a prior violent sexual offense is confinement in a state prison for three to nine years. *Id.* § 264.1 (punishment for violent rape is five, seven, or nine years); *Id.* § 286 (punishment for violent sodomy is three, six, or eight years); *Id.* § 288 (punishment for violent lewd and lascivious conduct with a child is three, six or eight years); *Id.* § 289(e) (punishment for violent penetration with an unknown object is three, six, or eight years).

190. *See* codes cited *supra* note 189.

191. 1995 Cal. Legis. Serv. 763, § 3 (West). "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." *Id.*; *see supra* Part II.B.

192. CAL. WELF. & INST. CODE §§ 6600-6609.3 (West 1998). *See supra* text accompanying notes 78-88.

193. *See supra* Part II.D.2.

194. *See supra* Part II.C.1.

195. *See supra* Part II.D.1.

196. *See* cases cited *supra* note 30.

Constitution is similar to the United States Constitution, the Court's analysis may still be similar to that of the United States Supreme Court in *Hendricks*.[197] Regardless of the similarities between the California and the United States Constitution, the California Supreme Court must look to previous interpretations of the California Constitution to determine whether the Act is valid.

A threshold issue for the constitutional analysis is whether a defendant can be guaranteed constitutional protections in a non-criminal proceeding.[198] Most of the objections to the Act involve rights guaranteed to the criminally accused.[199] Thus, if the Act is found to be exactly what it proclaims to be, a civil commitment, it is not likely that a defendant has a valid constitutional objection against the Act. This comment specifically addresses whether the civil commitment of those deemed to be sexually violent predators under the Act is unconstitutional.

IV. ANALYSIS

A. *The Sexually Violent Predators Act Prescribes Civil Commitment and Survives an Ex Post Facto Challenge*

A successful constitutional challenge will depend on whether the Act is considered punitive or rehabilitative in nature.[200] Moreover, whether or not the Act is truly a civil commitment depends on whether the confinement is for a committed crime or for the treatment of the individual.[201] The two primary objectives of criminal punishment are retribution and deterrence.[202] Therefore, the Act cannot be considered punitive unless retribution and deterrence are found

197. Kansas v. Hendricks, 117 S. Ct. 2072 (1997).

198. Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 277 (Ct. App.), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 5, 1997) (No. S052136).

199. For example, in the California Constitution, double jeopardy and due process pertain to "a defendant in a criminal cause." CAL. CONST. art. 1, § 15; *see also* U.S. CONST. amend. 5. In addition, the Ex post facto Clause of both the California, CAL. CONST., art. 1, § 9, and the United State Consitution, U.S. CONST., art. 1, § 9, cl. 3, pertain only to penal statutes. *See* California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995).

200. *See supra* Part II.C.2.a.

201. *See Hubbart*, 58 Cal. Rptr. at 277.

202. *See Hendricks*, 117 S. Ct. at 2082.

to be its primary objectives.[203]

The Act does not require the defendant to have a criminal intent before he or she is committed as a sexually violent predator.[204] The Supreme Court in *Hendricks* found that "[t]he absence of such a requirement here is [further] evidence that confinement under the statute is not intended to be *retributive*."[205] Similar to the Kansas statute, the Act does not add culpability for prior criminal conduct.[206] The prior criminal conduct is used only for evidentiary purposes to show that a diagnosed mental disorder or illness exists or to support a finding that the individual will be dangerous in the future.[207] In other words, prior criminal conduct helps to determine whether the individual falls under the class of persons defined by the Act.[208] Since the Act applies only to those individuals who suffer from mental disorders that prevent them from controlling their sexual tendencies, it does not function as a *deterrent*. Therefore, confinement under the Act does not constitute punishment.[209]

The Act clearly states that "potentially successful" treatment is not required.[210] However, the commitment does not become punitive merely because sexual predators are not likely to respond to treatment.[211] Circumstances specific to the individual are irrelevant in determining whether the commitment should be deemed punishment.[212] Regardless of whether the mental disorder is treatable, mental health commitments are generally not considered penal, but rather curative and civil.[213] Also, the failure to treat a patient does not render a mental health commitment unconstitutional if

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203. *Id.*

204. *See* People v. Hedge, 65 Cal. Rptr. 2d 693, 704 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S063954).

205. *Id.* (citing Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997) (emphasis added)).

206. *Id.*

207. *Id.*

208. *Id.* at 704.

209. *Id.*

210. CAL. WELF. & INST. CODE § 6606(b) (West. 1998).

211. *See supra* note 89 and accompanying text.

212. *See* People v. Superior Court (Cain), 57 Cal. Rptr. 2d 296, 302 (Ct. App. 1996), *rev. granted*, 931 P.2d 262 (Cal. Feb. 5, 1997) (No. B103020).

213. *Id.* at 300; *see e.g.*, Conservatorship of Hofferber, 616 P.2d 836, 849-50 (1980); People v. Juarez, 229 Cal. Rptr. 145, 148 (1986); Stickel v. Superior Court, 186 Cal. Rptr. 560, 561 (1982).

the confinement is necessary for the protection of others.[214] If a predictable response to treatment is required for custody under a mental health civil commitment, the curable would be confined while the incurable, who are likely to be the most dangerous, would have to be released.[215] "The right to treatment is not a right to success . . . . Given the current state of psychiatry, a mental health commitment cannot be invalidated because the person committed may not ever be cured."[216]

Many opponents to the Act state that legislative intent is masking what is actually a criminal confinement,[217] because it lengthens the period of incarceration for sentences already served and it operates retrospectively.[218] As stated previously, the fact that the legislature has declared a nonpunitive intent is only one factor in an ex post facto analysis.[219] The "clearest proof" must be shown in order to find that the Act is so punitive that it negates that intention.[220]

The California Legislature clearly did not act with punitive intent when it passed the Act.[221] Legislators stated that "these individuals [must] be committed and treated for their disorders only as long as the disorders persist and not for any punitive purpose."[222] In addition, the Act was placed in the Welfare and Institutions Code instead of the Penal Code.[223]

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214. *Cain*, 57 Cal. Rptr. 2d at 302; *see* Bailey v. Gardebring, 940 F.2d 1150, 1155 (8th Cir. 1991).

215. *Cain*, 57 Cal. Rptr. 2d at 302.

216. *Id.* (citing O'conner v. Donaldson, 422 U.S. 563, 587-89 (1975)).

217. *See* Kansas v. Hendricks, 117 S. Ct. 2072, 2083 (1997) (Hendricks argued that confinement under the Kansas statute was "disguised punishment").

218. *See* People v. Putney, 67 Cal. Rptr. 2d 283, 287 (Ct. App. 1997), *rev. granted*, 950 P.2d 56 (Cal. Dec. 23, 1997) (No. S065144). In the *Hendricks* dissent, Justice Breyer argued:

> [T]he Act did not provide Hendricks (or others like him) with any treatment until after his release date from prison . . . [t]hese . . . features of the Act convince me that it was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him . . . . The Ex post facto Clause therefore prohibits the Act's application to Hendricks, who commited his crimes prior to its enactment.

Hendricks, 117 S. Ct. at 2088 (Breyer, J., dissenting).

219. *See supra* Part II.C.2.a.

220. *See supra* Part II.C.2.a.

221. *See supra* Part II.B.

222. *See supra* note 99.

223. *See* People v. Hedge, 65 Cal. Rptr. 2d 693, 703 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S063954).

Had the Legislature intended the Act to further punish sexual offenders, it would have made more sense to place it in the Penal Code. Since the Act is in the Welfare and Institutions Code, it was passed to *civilly* commit specific individuals in order to protect the public from harm caused by them. Although civil labels should not always be determinative in an ex post facto analysis, the legislature's intent should only be rejected where the defendant provides the "clearest proof" that the statute is punitive in purpose or effect such that it negates the Legislature's intention.[224]

In *Hubbart v. Superior Court*, the defendant claimed the legislative history of the Act disproved non-punitive intent.[225] He claimed that the real purpose of the Act is to prevent the release of sexually violent offenders who have completed their prison sentences in response to public outcry.[226] Thus, the Act additionally punishes violent sex offenders beyond the sentences given by the courts.[227] However, selected statements from the legislative history of a statute, which might reflect a punitive motivation, are not enough to "overcome the presumption of constitutionality consistent with the statute's stated purpose."[228] The *Hubbart* court found that concerns about the danger of releasing violent sex offenders into the community did not indicate a punitive legislative intent.[229] Therefore, regardless of the true motivation behind the civil commitment, the legislature has declared that this procedure was established so that "these individuals be committed and treated for their disorders only as long as the disorders persist,"[230] and not for the punitive purpose of incarcerating them beyond their sentences.[231]

In *People v. Cain* the court did not agree that the Act was retroactive in its nature.[232] In its opinion the court stated,

224. *See id.* at 700 (citing Kansas v. Hendricks, 117 S. Ct. 2072, 2082 (1997)).

225. Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 277 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136).

226. *Hubbart*, 58 Cal. Rptr. 2d at 278 (quoting 1995 Cal. Legis. Serv. 763, § 3 (West)).

227. *Id.*

228. *Id.* at 278 (citing State v. Carpenter, 541 N.W.2d 105, 112 n.11 (Wis. 1995); Wiley v. Brown, 824 F.2d 1120, 1122 (D.C. Cir. 1987)).

229. *Hubbart*, 58 Cal. Rptr. 2d at 278.

230. *See supra* notes 99-100 and accompanying text.

231. *See supra* notes 99-100 and accompanying text.

232. People v. Superior Court (Cain), 57 Cal. Rptr. 296, 300 (Ct. App. 1996),

"the Act does not retroactively increase the sentence for [defendants'] original sex offenses: the Act imposes a mental health commitment for a present diagnosed mental illness which makes it likely the predator will commit future sexually violent offenses."[233] Furthermore, according to the Act, the jury cannot impose a civil commitment solely based on past criminal conduct.[234] In upholding a similar statute, the Washington Supreme Court ruled that "[t]he sexually violent predator [s]tatute is not concerned with the criminal culpability of [defendants'] past actions. Instead, it is focused on treating petitioners for current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality."[235]

The California Supreme Court is likely to find that the Act is what it purports to be—a civil commitment. Although it confines individuals who have committed horrendous criminal acts,[236] the purpose of the confinement is to protect the public and to rehabilitate their sexual disorders. Because the Legislature did not find that longer sentences would benefit the public or the convicted individuals, a civil commitment intended to treat the individual is appropriate.

Because it has been determined that the Act involves civil commitment, and not punishment, it is difficult to find merit in an ex post facto claim. The *Collings v. Youngblood*[237] test does not apply without a finding that the process constitutes punishment.[238] Therefore, there can be no finding that the Act violates the Ex post facto Clauses of the California and United States Constitutions.

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rev. granted, 931 P.2d 262 (Cal. Feb. 5, 1997) (No. B103020).

233. *Id.*

234. *Id.* at 300-01. The statute reads:

> Jurors 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 that makes the person a danger to the health and safety of others in that it is likely that he or she will engaged in sexually violent criminal behavior.

CAL. WELF. & INST. CODE § 6600(a) (West 1998) (emphasis added).

235. *Cain*, 57 Cal. Rptr. 2d at 300 (citing *In re* Young, 857 P.2d 989, 997 (Cal. 1993)).

236. The Act requires that the individual be convicted of a sexually violent offense against two or more victims. CAL. WELF. & INST. CODE § 6600(a) (West 1998).

237. 497 U.S. 37 (1990).

238. *See supra* text accompanying notes 127-29.

B. *A Double Jeopardy Claim Fails Because There Has Been No Finding of Punishment*

It is difficult to argue double jeopardy, multiple punishments for the same offense,[239] since the civil commitment does not constitute "punishment." However, opponents to the Act point out that some civil penalties have been found to constitute punishment under a double jeopardy analysis[240] where the second sanction could not be characterized as remedial, but only as a deterrent or retribution.[241] Therefore, it is important to evaluate the character of the burden that the law imposes on the individual to determine whether the law actually constitutes punishment.[242] The previous section analyzing an ex post facto claim determined that the Act is not penal in nature by looking beyond the Legislature's stated intent of a non-penal statute.[243] This analysis may also be applied to a double jeopardy claim to conclude that civil commitment under the Act does not constitute a second punishment.

Although sexually violent offenders remain confined after their sentences have been served, such confinement is necessary because they present a serious and continuous danger to society.[244] The Legislature has a legitimate and remedial purpose of providing a means of treating people with mental disorders who pose a continuing danger to society.[245] "Although the state must prove prior sexually violent offenses as a predicate to a . . . finding [of a sexually violent predator], the antecedent criminal conduct does not provide

239. *See supra* Part II.C.2.b.

240. *See* United States v. Halper, 490 U.S. 435, 440 (1989) (finding that a fine of $130,000 following a criminal conviction sentence for Medicare fraud violated double jeopardy protections); Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) (finding a Drug Tax Act under which a $900,000 fine was imposed on confiscated marijuana in a proceeding separate from criminal prosecution for possession of marijuana constituted double jeopardy).

241. United States v. Halper, 490 U.S. 435, 449 (1989).

242. *See supra* Part II.C.2.b.

243. *See supra* Part IV.A.

244. *See* Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 286 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136); *see, e.g.*, Conservatorship of Hofferber, 616 P.2d 836, 844 (1980) ("acts serious enough for criminal treatment justify a continuing special interest in a person's nonpenal confinement for purposes of public safety").

245. *See Hubbart*, 58 Cal. Rptr. 2d at 286; *see, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979).

the basis for a 'second sanction' but is received to show the person's mental disability and to predict future behavior."[246] Therefore, evaluating prior offenses committed by the individual to determine whether he or she suffers from a mental disorder does not necessarily render the civil commitment an additional punishment.

The finding of a double jeopardy claim by the California Supreme Court will largely depend on whether it is found that commitment under the Act constitutes punishment. Commitment under the Act only involves treatment until the offender is no longer a threat to society.[247] Therefore, it is not likely that the California Supreme Court will find a violation under the Double Jeopardy Clause.

C. *The Act Fulfills All Requirements of Substantive Due Process*

The Act will withstand a substantive due process attack if it is found to further a compelling state interest and is narrowly tailored to serve that interest.[248] California has a compelling interest both in treating mentally disordered sex offenders and in protecting society from their dangerous behavior.[249] Therefore, the first requirement of the substantive due process analysis is satisfied and the focus must turn to whether the Act is narrowly tailored to serve those interests.[250]

In *Foucha v. Louisiana*[251] the United States Supreme Court held that a Louisiana statute violated due process be-

246. *Hubbart*, 58 Cal. Rptr. 2d at 286; *see e.g.*, Allen v. Illinois, 478 U.S. 364, 371 (1986).

247. CAL. WELF. & INST. CODE § 6605, 6606(b), 6608 (West 1998).

248. *See supra* text accompanying notes 146-48.

249. *See Hubbart*, 58 Cal. Rptr. 2d at 288 (citing Addington v. Texas, 441 U.S. 418, 426 (1979)). The Supreme Court has also recognized that an individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Kansas v. Hendricks, 117 S. Ct. 2072, 2079 (1997) (citing Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905)).

250. *See Hubbart*, 58 Cal. Rptr. 2d at 288.

251. 504 U.S. 71 (1992).

cause it allowed an individual to be held in a psychiatric facility without a finding that he was both mentally ill and dangerous.[252] Defendant Hubbart argues that the Act is invalid, as is the Louisiana statute, because it allows the state to commit a person on the basis of a "personality disorder" that does not rise to the level of mental illness.[253] Hubbart argues that a "mental disorder" is similar to a "personality disorder," which was found to be an insufficient basis for confinement in *Foucha*.[254] The requirement of a "mental disorder" as opposed to a mental illness is criticized as a meaningless label used by legislatures to keep sex offenders incarcerated beyond their sentences.[255]

Foucha has been misinterpreted and the Illinois statute is clearly distinguishable from the Act. The statute in *Foucha* provided for no particular proof by the state regarding the mental condition to support an involuntary commitment.[256] At Terry Foucha's hearing, a doctor testified that he was in "good shape mentally."[257] However, he had an antisocial personality that did not constitute a mental disease and was not treatable.[258] The doctor further testified that Foucha would be a "danger to himself or to other people."[259] Foucha was returned to the mental institution based on the doctor's testimony.[260] There is a clear difference between the Louisiana statute and the Act. The Act gives the state the highest

252. *Id.*

253. *Hubbart*, 58 Cal. Rptr. 2d at 288. In *People v. Hedge*, defendant Matthew Hedge argued that the Act violated due process on its face because it allows for involuntary commitment without proof of mental illness, therefore is unconstitutional as applied to him because he does not currently suffer from mental illness. People v. Hedge, 65 Cal. Rptr. 693, 706 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S06954).

254. *Hubbart*, 58 Cal. Rptr. 2d at 289.

255. *See* Boorstein *supra* note 168. Advocates of civil liberties and defense attorneys see "a dangerous precedent in laws that allow people to be jailed on the suspicion that they will commit a crime." *Id.* "They say the Kansas statute and others like it are panic-driven, unconstitutional reactions to the seemingly unsolvable problem of sex crime. Keeping people behind bars because of mental illness is one thing; keeping them under the arbitrary and unscientific term 'mentally abnormal' is another." *Id.*

256. *See* Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 289 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136).

257. Foucha v. Louisiana, 504 U.S. 71, 75 (1992).

258. *id.*

259. *Id.*

260. *Id.*

burden of proving that the person has a mental disorder that makes him or her a danger to others.[261] Unlike the Act, the Louisiana statute did not require any type of burden by the state.[262]

In addition, the court of appeals in *Hubbart v. Superior Court* stated that a finding that a "mental disorder" is not as constitutionally adequate as "mental illness" is not supported by authorities.[263] The United States Supreme Court has refused to "enunciate a single definition to describe the mental condition sufficient for involuntary mental commitment .... The court has used the terms 'mental illness' and 'mental disorder' interchangeably."[264] In *Hendricks*, the Court held that although a finding of dangerousness, standing alone, is not a sufficient basis for indefinite involuntary confinement, if "coupled . . . with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality,'" the statute is adequate.[265] In addition, California statutes that provide for commitment procedures "uniformly regard 'mental disorder' as a sufficient constitutional showing.[266]

The term "mental disorder" is not as vague and unscientific as some may argue.[267] Diagnoses of "mental disorders" are made pursuant to the diagnostic terminology and established criteria set forth in the Diagnostic and Statistical Manual of Mental Disorders,[268] which is prepared by the

261. CAL. WELF. & INST. CODE § 6604 (West 1998) ("The court or jury shall determine whether, *beyond a reasonable doubt*, the person is a sexually violent predator") (emphasis added).

262. *Foucha*, 504 U.S. at 86. The Court in *Foucha* required at least a burden of "clear and convincing evidence." *Id.*

263. Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 277 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136).

264. *Id.*; *see, e.g.*, Addington v. Texas, 441 U.S. 418, 425-26 (1979); United States v. Salerno, 481 U.S. 739, 748-49 (1987).

265. Kansas v. Hendricks, 117 S. Ct. 2072, 2080 (1997).

266. *See Hubbart*, 58 Cal. Rptr. 2d at 289, citing CAL. WELF. & INST. CODE § 5008 (h)(1)(A) (West. 1997) ("mental disorder"); CAL. PENAL CODE § 1026.5(b)(1) (West 1998) ("mental disease, defect or disorder"); CAL. WELF. & INST CODE § 1800 (West 1998) ("mental or physical deficiency, disorder or abnormality"). The Supreme Court in *Hendricks* noted that they "have traditionally left to legislators the task of defining terms of a medical nature that have legal significance." *Hendricks*, 117 S. Ct. at 2081 (citing Jones v. United States, 463 U.S. 354, 365 n.13 (1983)).

267. *See Hubbart*, 58 Cal. Rptr. 2d at 290.

268. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV (4th ed. 1994).

American Psychiatric Association. Therefore, the term "mental disorder" has an established and technical meaning.[269] A mental disorder is "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with . . . a significantly increased risk of suffering death, pain, disability, or *an important loss of freedom*."[270]

Both defendants Hedge and Hubbart challenged the component of dangerousness required by the Act because it can only be proven by a mere *likelihood* that they *may* engage in sexually violent criminal conduct.[271] Thus a person can be determined to be a sexually violent predator based on a pattern of prior sexual crimes absent any present symptoms or recent conduct.[272] In *Hubbart*, the court of appeals found that "there is nothing impermissible about using past conduct as relevant evidence in evaluating probable future behavior . . . . This is 'a constitutionally valid evidentiary consideration.'"[273] Finally, the plain language of the Act requires proof beyond a reasonable doubt that the person has a *currently* diagnosed mental disorder making him or her a danger to the health and safety of others.[274] Therefore, the Act will survive a constitutional attack under a substantive due process analysis, because the Act is specifically tailored to assure only those most likely to engage in violent sexual behavior can be com-

269. *See* People v. Martin, 107 Cal. App. 3d 714, 724 (1980).

270. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV xxi (4th ed. 1994) (emphasis added). The DSM-IV further states, "this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one . . . . Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual." *Id.* at xxi-ii. Mental disorders associated with sexually violent predators are labeled as "Paraphilias." *Id.* at 523. Specific mental disorders include: Frotteurism (rubbing genitals against a nonconsenting person), *Id.* at 527, Pedophilia (sexual activity with a prepubescent child), *Id.*, Sexual Sadism (sexual excitement from the physical suffering of a victim), *Id.* at 530.

271. People v. Hedge, 65 Cal. Rptr. 2d 693, 708 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997); *Hubbart*, 58 Cal. Rptr. 2d at 290.

272. *Hubbart*, 58 Cal. Rptr. 2d at 290.

273. *Id.* at 291 (citing Barefoot v. Estelle, 463 U.S. 880, 897 (1983); People v. Superior Court (Dodson), 196 Cal. Rptr. 431, 436 (1983); *see also* Heller v. Doe by Doe, 509 U.S. 312, 322-24 (1993) ("previous instances of violent behavior are an important indicator of future violent tendencies").

274. *See Hedge*, 65 Cal. Rptr. 2d at 708.

mitted under this provision.[275] The Act provides a constitutionally sufficient burden of proof and specifically defines those who may be civilly confined.

D. *The Act Does Not Violate Equal Protection*

Equal protection is violated if the state adopts a classification that affects similarly situated groups in an unequal manner that is not rationally related to a legitimate state interest.[276] Sexual predators claim the Act violates equal protection because it applies, without justification, a different civil commitment standard to imprisoned individuals who are similarly situated to people who have been committed under California's other civil commitment statutes.[277] Their claim is based on a California statute that defines those individuals who are "imminently dangerous" and subject to civil commitment.[278] This statute states that the individual must "present a demonstrated danger of inflicting substantial physical harm upon others."[279] It is argued that the Act allows for involuntary commitment based only on a criminal record and the likelihood of re-offending.[280]

The California Supreme Court has stated that involuntary commitment must be supported by a finding of present dangerousness.[281] However, in determining what "degree of dangerousness" should apply, the court found the distinctions among the various definitions were "more form than substance."[282] A "conclusive presumption of continuing dangerousness" based only on past violent felonious conduct would deny equal protection.[283] However, a finding that the person is presently a danger to others, is mentally ill and has engaged in qualifying past criminal conduct, satisfies not only a

275. *See Hedge*, 65 Cal. Rptr. 2d at 708.

276. *See supra* Part II.C.2.d.

277. *See Hedge*, 65 Cal. Rptr. 2d at 708.

278. CAL. PENAL CODE § 2962(d)(1) (West 1982 & Supp. 1998).

279. *Id.*

280. *See* Hubbart v. Superior Court, 58 Cal. Rptr. 2d 268, 287 (Ct. App. 1996), *rev. granted sub nom.*, Hubbart v. Santa Clara County Superior Court (People), 932 P.2d 755 (Cal. Feb. 26, 1997) (No. S052136).

281. *See* Conservator of Hofferber v. Hofferber, 616 P.2d 836, 847 (1980). The Court in *Hofferber* recognized that the confinement of a mentally ill person on the basis of dangerousness, however defined, is based on "propensities" and the "possibility" of further acts of violence. *id.*

282. *Id.*

283. *Id.* at 177.

substantive due process challenge, but also "negates an equal protection violation."[284] That persons near the end of their sentences and subject to other civil commitment processes may also be dangerous in varying degrees is irrelevant.[285] "[T]he Legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest."[286] Furthermore, the public purpose of the Act is legitimate in that it is designed to protect society from the dangerous tendencies of sexual predators, an objective which is appropriate under an equal protection analysis.[287] Therefore, the Act survives an equal protection attack in that the difference in classifications of these individuals is outweighed by the danger that these individuals may cause if released into society.

V. PROPOSAL

Dealing with sexually violent predators is complicated. On one hand, these individuals are not considered mentally ill.[288] On the other hand, they "uncontrollably" commit horrendous acts upon members of society.[289] Without a diagnosable mental illness, the only basis for confining these individuals is a violation of the Penal Code, which permits their release into society after twenty-five years.[290] However, a punishment of twenty-five years in prison is not enough to deter most sexually violent offenders.[291] Therefore, something must be done to prevent predictable future violent sexual assaults on innocent victims. The seriousness of this problem was appreciated by Leroy Hendricks, when he stated that the only sure way he could keep from sexually abusing children in the future is "to die."[292]

Since the current punishment for repeat violent sexual

284. *See* People v. Hedge, 65 Cal. Rptr. 2d 693, 710 (Ct. App. 1997), *rev. granted*, 945 P.2d 780 (Cal. Oct. 29, 1997) (No. S063954).

285. *See id.*

286. *Id.* (quoting State of Minnesota v. Probate Court, 309 U.S. 270, 275 (1940)).

287. *See Hedge*, 65 Cal. Rptr. 2d at 710.

288. *See* CAL. WELF. & INST. CODE § 6600(c) (West 1997).

289. *See* James J. Kilpatrick, *Protecting Kids and Putting Away the Predators*, TULSA WORLD, July, 26 1997, at A16.

290. *See* CAL. PENAL CODE § 667.61 (West 1998).

291. *See, e.g., supra* text accompanying notes 16-18.

292. Kansas v. Hendricks, 117 S. Ct. 2072, 2078 (1997).

offenders only delays the horrid acts that will eventually be committed by them, additional action is necessary to prevent future harm. The California Legislature's approach with the Sexually Violent Predators Act is rational in that it is designed to treat these individuals and prevent them from being a further threat to society.[293] Although *Kansas v. Hendricks*[294] was a five to four decision, the California Supreme Court will likely follow the United States Supreme Court and uphold the Act. However, there is a possibility that the California Supreme Court may narrowly decide the other way. However, creating a constitutionally stronger statute would not stray from the original intention of the legislatures and would only change the process of dealing with these sexual offenders.

It appears the reason for delaying treatment to sexually violent predators is to ensure that the individual is appropriately punished for the heinous crime committed.[295] However, delaying treatment to someone who may not respond to such treatment confines an individual beyond his or her sentence, thus creating a fine line between complying with the constitution and additionally punishing the offender. Treatment is not necessarily a privilege that should be separated from the punishment. In addition, allowing a jury to decide whether a repeat violent sexual offender who has served twenty-five years in prison without treatment is *currently* a sexually violent predator is likely to result in additional confinement regardless of the high burden imposed.[296] This is because the jury is not likely to conclude without substantial evidence that the individual has been cured of his or her mental disorder by sitting in prison for twenty-five years without treatment.[297]

Therefore, a statute that would treat a sexually violent predator *during* his or her confinement would be more successful against constitutional attacks than the Act, which

293. 1995 Cal. Legis. Serv. 763, § 3 (West).

294. 117 S. Ct. 2072 (1997).

295. *See id.* at 2094 (Breyer, J., dissenting).

296. *See* CAL. WELF. & INST. CODE § 6603 (West 1998).

297. This can be concluded from the current attitude of the public towards repeat sex offenders. David G. Savage and Maura Dolan, *Sex Predator Law Faces High Court Challenge*, L.A. TIMES, Dec. 9, 1996, at A1. It is unlikely that the public would be forgiving and permit the release of an individual with a history of dangerous behavior. *Id.*

delays treatment.[298] Also, if an individual is treated during the twenty-five years of confinement,[299] a jury would be able to adequately evaluate whether the individual has made any progress during his or her confinement. A model for providing immediate treatment is the District of Columbia's Sexual Psychopath Act.[300] This statute may not withstand due process[301] and equal protection[302] attacks because it allows for the commitment of sexual psychopaths even without criminal charges filed against the individual.[303] However, a synthesis of the California Act and District of Columbia statute would treat sexual offenders during their punishment for a criminal conviction and would likely withstand constitutional scrutiny.

If the Kansas statute had provided immediate treatment to Hendricks, it appears that the *Hendricks* dissent would not have found an ex post facto violation.[304] As Justice Breyer wrote for the dissent, "[t]he Act explicitly defers diagnosis, evaluation, and commitment proceedings . . . . Much of the treatment that Kansas offered here . . . can be given at the same time as, and in the same place where, Hendricks serves his punishment."[305] He adds, "[t]o find a violation of [the Ex post facto Clause] here, however, is not to hold that the Clause prevents Kansas, or other States, from enacting dangerous sexual offender statutes."[306] Furthermore, if there was treatment during punishment under the Act, there would be no valid claim of double jeopardy.[307]

Therefore, in order to ensure that California's Act withstands constitutional attacks, it should be amended to treat individuals while they are confined. This approach would not be detrimental to society because it would be an attempt to cure these disturbed individuals. Furthermore, society would benefit from the release of these sexually violent predators on

298. *See Hendricks*, 117 S. Ct. at 2087-99 (Breyer, J., dissenting).
299. *See* CAL. PENAL CODE § 667.61 (West 1998).
300. D.C. CODE ANN. tit. 22, §§ 3503-3511 (1996).
301. *See supra* Part II.C.2.c.
302. *See supra* Part II.C.2.d.
303. *See supra* Part II.A.
304. Kansas v. Hendricks, 117 S. Ct. 2072, 2093-94 (1997) (Breyer, J., dissenting).
305. *id.*
306. *Id.* at 2098.
307. *See supra* Part II.C.2.b.

a conditional basis only,[308] for it is important to monitor and supervise their activities while providing additional treatment in the community.[309] The Act already provides for a conditional release after one year of treatment,[310] but should be implemented more frequently than the unconditional release available under the Act.[311] Although conditional release does not guarantee that the offender will not commit another offense, unconditionally releasing sex offenders imposes a greater danger to society because treatment is no longer required.

VI. CONCLUSION

In passing the Sexually Violent Predators Act,[312] the California Legislature recognized society's refusal to tolerate the recidivism of sexually violent predators.[313] This comment supports this legislation by discussing the constitutional ground on which the Act stands despite the attacks under the Ex Post Facto, Double Jeopardy, Due Process, and Equal Protection Clauses.[314] The Act does not violate the Ex Post Facto Clause[315] because the civil commitment is not a punishment in disguise.[316] Punishment involves the goal of either retribution or deterrence, neither of which is found in the civil commitment prescribed by the Act.[317] Furthermore, without a finding of a second punishment, a challenge under the Double Jeopardy Clause will also fail.[318]

Additionally, the Act does not violate substantive due process because it satisfies both requirements of constitutionality.[319] First, the state of California has a compelling interest in both treating sexually violent predators and in protecting society from their dangerous behavior.[320] Second, the Act is specifically tailored to ensure that only those likely to

308. *See* CAL. WELF. & INST. CODE §§ 6608-6609 (West 1998).
309. *See supra* note 16.
310. CAL. WELF. & INST. CODE §§ 6608-6609 (West 1998).
311. *id.* §§ 6608, 6609.1.
312. *Id.* §§ 6600-6609.3.
313. 1995 Cal. Legis. Serv. 763, § 3 (West).
314. *See supra* Part IV.
315. *See supra* Part IV.A.
316. *See supra* Part IV.A.
317. *See supra* Part IV.A.
318. *See supra* Part IV.B.
319. *See supra* Part IV.C.
320. *See supra* Part IV.C.

engage in sexually violent predatory behavior may be committed.[321] Finally, the Act does not treat this particular group of offenders differently than those committed under other civil commitment procedures, and therefore it passes equal protection standards.[322]

There is no guarantee the California Supreme Court will find the Act constitutional.[323] There is a chance that California will interpret these constitutional clauses in a manner which invalidates the Act.[324] Despite this possibility, the California Legislature will still be able to achieve its goal of protecting California from sexually violent predators.[325] The current statute ensures that these predators are punished before being treated, a goal which is reasonable and legitimate.[326] Nevertheless, if the California Supreme Court finds the Act is unconstitutional, it is likely that the Legislature will amend the Act to provide treatment for these offenders while they are incarcerated.[327] Hopefully, with the use of modern technology and research, treatment of such individuals will be more effective,[328] and a revised Act will provide an appropriate method of preventing sexual predators from re-offending.

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321. *See supra* Part IV.C.
322. *See supra* Part IV.D.
323. *See supra* Part V.
324. *See supra* Part V.
325. *See supra* Part V.
326. CAL. WELF. & INST. CODE § 6601 (West 1998).
327. *See supra* Part V.
328. *See* CAL. WELF. & INST. CODE § 6606(b) (West 1998) (treatment does not need to be successful or potentially successful).

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