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Closing the Loophole in California's Sexually Violent Predatory Act: Jessica's Law's Band-Aid Will Not Result in Treatment for Sexual Predators

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Closing the Loophole in California's Sexually Violent Predator Act: Jessica's Law's Band-Aid Will Not Result in Treatment for Sexual Predators

Melissa M. Mathews*

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I. INTRODUCTION

Melvin Carter, the "College Terrace Rapist," was convicted of twenty-three felonies and confessed to over 100 rapes on college campuses in the San Francisco Bay Area, Stockton, and Davis, California.¹ In 1996, he was set to be paroled from prison.² Voters put pressure on former Governor Pete Wilson to

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1. Mareva Brown & Sam Stanton, *Special Report: Sexual Predators Evading Treatment*, SACRAMENTO BEE, Feb. 12, 2006, at A1.

2. *Id.*

prevent Carter's anticipated parole in 1996.³ As a result, state officials sent Carter to live at a prison camp on U.S. Forest Service land.⁴ Later he was escorted to the San Francisco International Airport, placed on a flight leaving California, and no one would divulge where Carter went.⁵ The administration narrowly avoided the release of a dangerous felon back into society. But such drastic measures are not available in every situation. Thus, the question remained, what would California do in the future with other predators like Carter, their release dates looming ominously on the horizon?

The ensuing public uproar demanded a solution that would keep the highest risk offenders out of society even after they completed their prison sentences.⁶ In response to Carter's release and other similar cases, California enacted the Sexually Violent Predator Act (SVPA).⁷ Former Governor Pete Wilson praised the SVPA, claiming it would curb the release of the "sickest and most dangerous criminals" back into society.⁸ Unfortunately, as this Comment will discuss, it has failed to fulfill its promise, and high risk offenders such as Carter could still be released.

When the Secretary of the California Department of Corrections and Rehabilitation (CDCR) determines that an incarcerated person may be a sexually violent predator, that person must be evaluated.⁹ The CDCR and the Board of Prison Terms evaluates whether the inmate committed a sexually violent predatory¹⁰ offense¹¹ and "assesses the person's social, criminal, and institutional

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See Mary Lynne Vellinga, *Mentally Ill Sex Criminals Face Longer Lockup*, SACRAMENTO BEE, Oct. 11, 1995, at A3 (explaining the decision to pass the legislation after thousands protested the release of Reginald Muldrew, the "Pillowcase Rapist," who was found mentally unfit to be released from prison but was released upon completion of his sentence and parole period); see also Peter A. Zamoyski, *Will California's "One Strike" Law Stop Sexual Predators, or Is a Civil Commitment System Needed?*, 32 SAN DIEGO L. REV. 1249, 1250-51 (1995) (describing the public demand for California lawmakers to push through "tougher laws to protect society from repeat offenders, especially violent sex offenders" after Richard Allen Davis, a parolee with prior sex crime convictions, sexually assaulted and murdered twelve-year-old Polly Klaas).

8. Vellinga, *supra* note 7.

9. CAL. WELF. & INST. CODE § 6601(a)(1) (West Supp. 2007).

10. See *id.* § 6600(e) ("'Predatory' means an act [that] is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.").

11. See *id.* § 6600(b) (defining "sexually violent offenses" as a felony violation of specified California Penal Code sections "when committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person," which "result[s] in [either] a conviction or a finding of not guilty by reason of insanity"); see also Cal. Dep't of Mental Health, Frequently Asked Questions, Sept. 7, 2001, http://www.dmh.cahwnet.gov/Services_and_Programs/Forensic_Services/Sex_Offender_Commitment_Program/FAQs.asp [hereinafter Frequently Asked Questions] (on file with the *McGeorge Law Review*) (stating that the specified sex-related crimes "include rape, sodomy, oral copulation, spousal rape, or lewd or lascivious acts with a child").

history.”¹² If the inmate is determined “likely to be a sexually violent predator” based on this evaluation, the CDCR then refers the person for a full evaluation by the California Department of Mental Health (CDMH).¹³

Two CDMH licensed psychiatrists or psychologists assess whether the inmate “has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual predatory violence.”¹⁴ If the person is labeled a sexually violent predator, a petition requesting that the person be committed to a state mental health facility is filed in superior court.¹⁵ If a superior court finds there is probable cause that the inmate “is likely to engage in sexually violent predatory criminal behavior,”¹⁶ the judge will order a trial “to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release.”¹⁷ If the court or jury determines the person is a sexually violent predator, that person is committed to a facility designated by the Director of Mental Health.¹⁸

As originally enacted, the SVPA required that sexually violent predators be committed to a mental health facility for a two-year term after their sentences were completed.¹⁹ The commitment could only be extended if the court granted a petition for extension.²⁰ The inmate was not required to undergo treatment while committed,²¹ and if the inmate received treatment, the treatment did not need to be “successful” for the person to be released at the end of the two-year commitment.²² In fact, an individual could be released without even admitting that he or she had a problem.²³ Further, the SVPA provided for automatic annual

12. CAL. WELF. & INST. CODE § 6601(b) (West 2006 & Supp. 2007).

13. *Id.*

14. Cal. Dep’t of Mental Health, SOCP: Evaluation Program, 2008, http://www.dmh.cahwnet.gov/Services_and_Programs/Forensic_Services/Sex_Offender_Commitment_Program/Evaluation.asp (on file with the *McGeorge Law Review*); see also CAL. WELF. & INST. CODE § 6601(d) (West 2006) (requiring the evaluation to be conducted “by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist”). The evaluation includes an “assessment of diagnosable mental disorders, as well as various factors” associated with the risk of recidivism. *Id.* § 6601(c). Risk factors that must be considered “include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder.” *Id.*

15. CAL. WELF. & INST. CODE § 6601(i) (West 2006) (stating that the petition will “be filed in the superior court of the county in which the person was convicted”).

16. *Id.* § 6602.5(a) (“No person may be placed in a state hospital pursuant to the provisions of this article until there has been a determination . . . that there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior.”).

17. *Id.* § 6602(a).

18. *Id.* § 6604 (amended by Cal. Proposition 83 § 27 (2006)).

19. *Id.* § 6604.1(a) (West Supp. 2007) (amended by Cal. Proposition 83 (2006)).

20. *Id.* § 6605(b) (West Supp. 2007) (amended by Cal. Proposition 83 (2006)).

21. See *id.* § 6606(a) (explaining that those who decline treatment will continue to be offered the opportunity for treatment on a monthly basis).

22. See *id.* § 6606(b) (“Treatment does not mean that the treatment [must] be successful or potentially successful . . .”).

23. See *id.* (“Treatment does not . . . mean that the person must recognize his or her problem and

hearings to determine whether the committed person had changed such that he or she could be conditionally released.²⁴ Unfortunately, many sexually violent predators committed to mental health facilities pursuant to the SVPA refused treatment but were nevertheless released back into society.²⁵

In February 2006, the *Sacramento Bee* printed an exposé revealing that many sexually violent predators were released from mental health facilities without receiving any treatment whatsoever.²⁶ Within days, California legislators began working to address the problem.²⁷ Proposition 83, on the November 2006 ballot, presented California voters with a proposal aimed, in part, at fixing the perceived shortcomings of the SVPA.²⁸ California voters approved Proposition 83 by a landslide.²⁹

Proposition 83, more commonly known as Jessica's Law,³⁰ increased restrictions on releasing sex offenders by lengthening the SVPA's civil commitment term from two years to an indeterminate period.³¹ It also provided that a committed person could seek authorization from the Director of CDMH to petition the court for conditional or unconditional release.³² However, the law allowed sexually violent predators to petition the court for conditional release or an unconditional discharge "without the recommendation or concurrence of the Director of Mental Health."³³ Thus, although Jessica's Law increases restrictions on released sex offenders and requires that committed persons petition before they can be released, it still contains loopholes through which untreated sexually

willingly participate in the treatment program.").

24. *Id.* § 6605(b) (West 2006) (amended by Cal. Proposition 83 (2006)).

25. Brown & Stanton, *supra* note 1.

26. *Id.*

27. See Sam Stanton, *Lawmakers Rush to Close Loopholes in Sex Predator Program*, SACRAMENTO BEE, Feb. 15, 2006, at A1 ("Senator Chuck Poochigian, R-Fresno, said . . . that he had amended an existing bill to close loopholes in the program for sexually violent predators that were revealed in a Bee series this week.").

28. See Cal. Proposition 83 § 2(h) (2006) ("[E]xisting laws that provide for the commitment and control of sexually violent predators must be strengthened and improved.").

29. See Don Thompson, *Prosecutors and California Lawyers Narrow Jessica's Law's Reach*, S.F. CHRON., Nov. 18, 2006, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2006/11/17/state/n170936S24.DTL> (on file with the *McGeorge Law Review*) (stating that Proposition 83 passed with seventy percent voter support).

30. Denny Walsh, *Sexual Predator Law Again Targeted: Capital-Area Man Claims the Restrictions Violate his Constitutional Rights*, SACRAMENTO BEE, Nov. 17, 2006, at A3 ("The measure is called 'Jessica's Law,' after 9-year-old Jessica Lunsford, who was killed by a convicted sex offender last year in Florida.").

31. Cal. Proposition 83 § 27 (2006) (amending CAL. WELF. & INST. CODE § 6604).

32. See Cal. Proposition 83 § 29 (2006) (amending CAL. WELF. & INST. CODE § 6605(b)).

If the Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release . . . or for an unconditional discharge.

Id.

33. Cal. Proposition 83 (2006) (amending CAL. WELF. & INST. CODE § 6608(a)).

violent predators may be released back into society.³⁴ To date, at least fifty-four sexually violent predators have slipped through the loophole in the SVPA without receiving any treatment.³⁵

Part II of this Comment argues that although Jessica's Law will likely refuel constitutional challenges to the SVPA, ultimately, the SVPA remains constitutionally sound. Part III contends that even as amended by Jessica's Law, California's SVPA does not further legislative intent and fails to close the loophole. Finally, Part IV presents alternative solutions to solve the problem. Whether the California Legislature creates a new outpatient civil commitment program similar to the program currently used in Texas or statutorily requires treatment before release, the loophole in California's SVPA must be closed.

II. CONSTITUTIONALITY OF CALIFORNIA'S SEXUALLY VIOLENT PREDATOR ACT

In *Hubbart v. Superior Court*, the California Supreme Court upheld the SVPA against constitutional attack.³⁶ Although the U.S. Supreme Court has not specifically reviewed California's SVPA, the Court has upheld similar statutes.³⁷

Civil commitment statutes, like California's SVPA, are generally upheld as a valid exercise of state police power.³⁸ Because such statutes involve deprivation of personal liberty, individuals subject to the statutory provisions are guaranteed certain constitutional safeguards.³⁹ Even so, both the California Supreme Court and the U.S. Supreme Court have held a statute that civilly commits a sexually violent predator constitutionally sound if the inmate is dangerous and suffers from a diagnosable medical disorder.⁴⁰

35. Brown & Stanton, *supra* note 1; see *infra* Part III.B (explaining that allowing sexually violent predators to refuse treatment while committed defeats the legislative purpose of the SVPA).

36. See 969 P.2d 584, 611 (Cal. 1999) (holding that California's SVPA was constitutionally sound).

37. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 346 (1997) (holding that the Kansas Sexually Violent Predator Act did not violate the U.S. Constitution); *Hubbart*, 969 P.2d 584 (applying *Hendricks* to find that California's SVPA was constitutionally sound).

38. See, e.g., *People ex rel. Elliott v. Juergens*, 95 N.E.2d 602, 605 (Ill. 1950) (holding that the state has the power and duty to protect society from sex criminals who have a continuing propensity to commit sex crimes after they have completed their penal sentence); *People v. Chapman*, 4 N.W.2d 18, 28 (Mich. 1942) (holding that the state statute providing for civil commitment of sexual psychopaths was a valid exercise of the state's police power in the interest of public safety); *State ex rel. Sweezer v. Green*, 232 S.W.2d 897, 901 (Mo. 1950) (holding valid as an exercise of state police power the restraint of sexual psychopaths predisposed to continue breaking the law); *In re Moulton*, 77 A.2d 26, 30 (N.H. 1950) (holding that legislation providing for the care, treatment, and rehabilitation of sexual psychopaths was within the scope of the state's police power).

39. See, e.g., *infra* Parts II.A-C (discussing the constitutional safeguards provided for individuals under the prohibition against passing ex post facto laws, substantive due process guarantees, and double jeopardy provisions).

40. See, e.g., *People v. Levy*, 311 P.2d 897, 902 (Cal. 1st Dist. Ct. App. 1957) (holding a statute valid that provides for the civil commitment of an individual determined to be a sexual psychopath); *Hendricks*, 521 U.S. at 358 (holding that involuntary civil commitment is not a due process violation as long as the statute requires more than a mere finding of dangerousness).

For example, in *Kansas v. Hendricks*, the U.S. Supreme Court upheld the constitutionality of the Kansas SVPA.⁴¹ Similar to California's SVPA, the Kansas SVPA required a finding of a present "mental abnormality" and evidence of past sexually violent behavior for a person to be civilly committed as a sexually violent predator.⁴² In determining whether Hendricks qualified as a sexually violent predator, the jury found a "chilling history" of his sexual offenses against children.⁴³ In addition to the inculpatory testimony of his victims, including his stepchildren, Hendricks testified that he "repeatedly abused children whenever he was not confined" and "stated that the only sure way he could keep from sexually abusing children in the future was 'to die.'"⁴⁴ He admitted that he suffered from pedophilia and agreed with the state physician's diagnosis "that he [was] not cured of the condition."⁴⁵ The trial court determined that pedophilia qualified as a "mental abnormality" and ordered Hendricks civilly committed as a sexually violent predator.⁴⁶ Hendricks appealed on the grounds that the Kansas SVPA violated his rights under the Due Process, Double Jeopardy, and Ex Post Facto Clauses.⁴⁷ The Kansas Supreme Court did not address the double jeopardy and ex post facto claims but found that the Kansas SVPA violated Hendricks' substantive due process rights.⁴⁸

The U.S. Supreme Court reversed, upholding the constitutionality of Kansas's SVPA.⁴⁹ The Court held that the SVPA's definition of "mental abnormality" satisfied due process⁵⁰ and that because the SVPA was non-punitive in nature and in effect, it did not violate double jeopardy and ex post facto principles.⁵¹ This decision is widely understood to uphold the constitutionality of state statutes providing for the civil commitment of sexually violent predators for the purpose of treatment.⁵²

Although the SVPA was held constitutional,⁵³ Jessica's Law's recent amendments have not been examined by the courts. Recent amendments fuel

41. See generally *Hendricks*, 521 U.S. 346 (holding, in a five-to-four vote, that Kansas's SVPA did not violate the Due Process, Double Jeopardy, or Ex Post Facto Clauses of the U.S. Constitution).

42. *Id.* at 355-56; see also Frequently Asked Questions, *supra* note 11 (stating that the Kansas SVPA, as discussed in *Hendricks*, is similar to California's SVPA).

43. *Hendricks*, 521 U.S. at 354.

44. *Id.* at 355.

45. *Id.*

46. *Id.* at 355-56.

47. *Id.* at 356.

48. *Id.* ("The court then determined that the Act's definition of 'mental abnormality' did not satisfy what it perceived to be this Court's 'mental illness' requirement in the civil commitment context.").

49. *Id.* at 360.

50. *Id.*

51. *Id.* at 369.

52. See, e.g., Frequently Asked Questions, *supra* note 11 (stating that the case "upheld the constitutionality of states which provide for the civil commitment of sexually violent predators for treatment purposes").

53. *Hubbart v. Superior Court*, 969 P.2d 584, 611 (Cal. 1999).

arguments that the SVPA now violates the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the U.S. Constitution. Ultimately, the following analysis demonstrates that the U.S. and California Supreme Courts will likely uphold the Act's constitutionality.

A. *Ex Post Facto* Concerns

The Ex Post Facto Clause of the U.S. Constitution⁵⁴ prohibits the passage of “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”⁵⁵ California’s SVPA defines a “sexually violent predator” largely based on past convictions of sexually violent offenses⁵⁶ and provides for their civil commitment after the completion of their sentences.⁵⁷ For this reason, prior to the enactment of Jessica’s Law, the SVPA was challenged as violating the Ex Post Facto Clause by changing the consequences of a crime after the crime was committed.⁵⁸

To determine whether the SVPA violates the Ex Post Facto Clause, the threshold inquiry is whether the Act “alter[s] the definition of crimes or increase[s] the punishment for criminal acts.”⁵⁹ The U.S. Supreme Court has provided factors for determining what constitutes punishment.⁶⁰ Accordingly, most courts consider “holistic factors” that include “the practical effect of the legislation,” legislative intent, “the purpose of the statute, and analogous historical precedents.”⁶¹

Though the SVPA has withstood ex post facto challenges in the past,⁶² Jessica’s Law made the terms of the civil commitment more stringent, which may renew ex post facto challenges. Specifically, because the SVPA now imposes an “indeterminate” commitment⁶³ and no longer provides that a person

54. U.S. CONST. art. I, § 9, cl. 3.

55. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

56. See CAL. WELF. & INST. CODE § 6600(a) (West Supp. 2007) (listing offenses that will lead to being defined a “sexually violent predator”).

57. See *id.* § 6601 (West Supp. 2007) (establishing the process for the civil commitment of sexually violent predators).

58. See, e.g., *Hubbart*, 969 P.2d at 605 (noting that the petitioner claimed the statutory scheme of the SVPA violated federal and state Ex Post Facto Clauses “by altering the consequences of criminal behavior after the fact”).

59. See *id.* (explaining that the basic issue raised by an ex post facto challenge is whether the SVPA inflicts punishment) (emphasis added).

60. See *United States v. Ursery*, 518 U.S. 267, 288 (1996) (describing a two-part test used to determine what constitutes punishment: (1) whether the proceedings were intended to be criminal or civil, and (2) whether the proceedings are so punitive as to not be civil).

61. *Doe v. Weld*, 954 F. Supp. 425, 432 (D. Mass. 1996).

62. See, e.g., *Hubbart*, 969 P.2d at 611 (holding that SVPA neither “imposes punishment [n]or otherwise implicates ex post facto concerns”).

63. CAL. WELF. & INST. CODE § 6604 (amended by Cal. Proposition 83 § 27 (2006)).

may automatically petition for a less restrictive alternative annually,⁶⁴ it may lead to challenges that the statute's practical effect now constitutes punishment.

California Supreme Court precedent suggests that such a challenge would likely fail. In *Hubbart*, a civilly committed inmate challenged the constitutionality of the SVPA on its face and as it was applied to his civil commitment as a sexually violent predator.⁶⁵ Hubbart had a long history of "violent, and sometimes bizarre, sex crimes against women" who were strangers to him.⁶⁶ His most recent incarceration was for assaulting a female jogger while out on parole.⁶⁷ Both psychologists who were asked to evaluate him found that he was suffering from "paraphilia," a diagnosable mental disorder,⁶⁸ and that he presented a high risk of committing more sexually violent crimes if released into society.⁶⁹ As a result, he was labeled a sexually violent predator.⁷⁰

Hubbart challenged the constitutionality of California's SVPA.⁷¹ He argued, inter alia, that the SVPA violated the Ex Post Facto Clauses of both the federal and state constitutions because "the SVPA postpones the release from confinement of individuals who are incarcerated at the time commitment proceedings begin," and it allows "the commitment determination to be based on sexually violent offenses 'committed . . . before [its] effective date.'"⁷² The California Supreme Court, however, rejected those arguments and, quoting *Hendricks*, noted that the duration of the civil commitment was "linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."⁷³ Thus, the SVPA was not punitive in effect and not a violation of ex post facto principles.⁷⁴

As a result, the California Supreme Court adopted the U.S. Supreme Court's rationale in *Hendricks* and concluded that "restrict[ing] the freedom of the dangerously mentally ill [individuals] . . . is a legitimate nonpunitive governmental objective."⁷⁵ However, despite the change in the term of confinement from two years to an indeterminate term,⁷⁶ the SVPA still provides that a person will only remain committed for as long as he or she is found to present a danger to others and is likely to commit a sexually violent crime upon

64. CAL. WELF. & INST. CODE § 6605(b) (amended by Cal. Proposition 83 § 29 (2006)).

65. *Hubbart*, 969 P.2d at 586-87.

66. *Id.* at 586, 591.

67. *Id.* at 591.

68. *Id.* at 592. Paraphilia was described as "recurrent and intense sexual fantasies and behaviors involving the humiliation and forcible sexual penetration of persons against their will." *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 605.

72. *Id.*

73. *Id.* at 607 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997)).

74. *Id.* at 608.

75. *Id.* at 607 (quoting *Hendricks*, 521 U.S. at 363).

76. CAL. WELF. & INST. CODE § 6604 (amended by Cal. Proposition 83 § 27 (2006)).

release.⁷⁷ In other words, the duration of commitment is still intended “to hold the person until his mental abnormality no longer causes him to be a threat to others.”⁷⁸ *Hubbart*’s reasoning that the SVPA is not punitive still applies, despite the more stringent standards of commitment created by Jessica’s Law.

Moreover, courts are highly deferential to legislative statements of intent, especially if they suggest that a statutory scheme is not “penal in nature.”⁷⁹ For example, the U.S. Supreme Court maintains that it “will reject the legislature’s manifest intent only where a party challenging the statute provides ‘the clearest proof’ that ‘the statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’”⁸⁰

Furthermore, statements in the legislative history and in the California Welfare and Institutions Code provide that the purpose of the SVPA was to confine and treat sexually violent predators, not to punish them.⁸¹ In fact, the placement of the SVPA within the California Welfare and Institutions Code, which focuses on “the care and treatment of various mentally ill and disabled groups,” emphasizes that sexually violent predators ought to be treated as mentally ill and/or disabled persons in need of care and treatment.⁸² Therefore, because the courts usually defer to legislative intent in determining the purpose of a law for an ex post facto analysis, a challenge to the SVPA on this basis is also likely to fail because the clearly stated legislative intent and purpose for the SVPA are not punitive.

B. Substantive Due Process Concerns

The U.S. Constitution protects citizens from deprivations of liberty without due process of law.⁸³ This protection includes “a substantive component that bars certain arbitrary, wrongful government actions ‘regardless of the fairness of the procedures used to implement them.’”⁸⁴ A strict scrutiny analysis is employed if a court deems that a “fundamental” individual right is at issue.⁸⁵ The government

77. *Id.* § 6605(b) (amended by Cal. Proposition 83 § 29 (2006)).

78. *Hubbart*, 969 P.2d at 607 (quoting *Hendricks*, 521 U.S. at 363-64).

79. *See id.* at 605-06 (“Courts should ‘ordinarily defer’ to statements in the legislative record indicating that a measure is not penal in nature.” (citing *Hendricks*, 521 U.S. at 361)).

80. *Hendricks*, 521 U.S. at 361 (alteration in original).

81. *See, e.g.*, CAL. WELF. & INST. CODE § 6250 (West Supp. 2007) (stating the SVPA is not intended to alter or interfere with the Penal Code and clarifying that sexually violent predators are to be treated “not as criminals, but as sick persons”); SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating the intent that sexually violent criminals be “‘confined and treated’”).

82. *See Hubbart*, 969 P.2d at 606 (stating that the placement of the SVPA within the Welfare and Institutions Code was consistent with statements of legislative intent because the statute was “surrounded on each side by other schemes concerned with the care and treatment of various mentally ill and disabled groups”).

83. U.S. CONST. amend. V, XIV.

84. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (quoting *Zinerman v. Burch*, 494 U.S. 113, 125 (1990)).

85. *Id.* at 115 (Thomas, J., dissenting).

may only infringe on a fundamental right if the means of accomplishing the goal are "narrowly tailored to serve a compelling state interest."⁸⁶

Historically, freedom from bodily restraint has been considered a fundamental liberty interest protected under the Due Process Clause.⁸⁷ Thus, to survive strict scrutiny, the involuntary commitment of sexually violent predators must be narrowly tailored to serve a compelling state interest.⁸⁸

Although the SVPA has withstood past constitutional challenges on substantive due process grounds,⁸⁹ Jessica's Law amendments to the SVPA may lead to renewed challenges. Jessica's Law makes it more difficult for sexually violent predators to petition for less restrictive alternatives to commitment⁹⁰ and imposes an indefinite commitment period.⁹¹ For these reasons, some may argue that the SVPA is no longer narrowly tailored to serve a compelling state interest.

Prior to the enactment of Jessica's Law, the California Supreme Court, applying strict scrutiny analysis, held that the SVPA did not violate the substantive due process rights of sexually violent predators.⁹² The court held that the state had a compelling interest in protecting the public from and providing treatment for sexually violent predators.⁹³ Since the state's interest after Jessica's law is presumably no less compelling, the dispositive question remaining is whether the statute is narrowly tailored to serve that compelling interest.

Before Jessica's Law, the California Supreme Court found that the SVPA was narrowly tailored because the SVPA targeted a limited group and required specific conditions to be met before commitment could be imposed.⁹⁴ One

86. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

87. *See* *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) ("[T]he contours of this historic liberty interest . . . always have been thought to encompass freedom from bodily restraint and punishment. It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." (citation omitted)).

88. *See* *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982) (stating that involuntary commitment does not extinguish the liberty interest in freedom from bodily restraint).

89. *See, e.g.,* *Hubbart v. Superior Court*, 969 P.2d 584, 593 (Cal. 1999).

90. *See* Cal. Proposition 83 § 29 (2006) (amending CAL. WELF. & INST. CODE § 6605(b)) (stating that a committed person shall now be authorized to petition for a less restrictive alternative only upon various determinations of the Director of the Department of Mental Health, rather than being allowed to automatically file such a petition, as was provided in the former version of the SVPA).

91. *See* Cal. Proposition 83 § 27 (2006) (amending CAL. WELF. & INST. CODE § 6604) (changing the term of commitment from two years to an indefinite term).

92. *Hubbart*, 969 P.2d at 593.

93. *Id.* at 593 n.20 ("[T]he state interests—protection of the public and mental health treatment—are compelling.").

94. *Id.*

The SVPA is narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts . . . and who are incarcerated at the time commitment proceedings begin. Commitment as an SVP cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder, is dangerous and likely to continue committing such crimes if released into the community, and has been found to have sexually victimized at least two people in prior criminal proceedings.

Id.

condition required a prior conviction of a violent sexual offense against at least two people.⁹⁵ However, after Jessica's Law, a prior conviction of a single violent sexual offense is sufficient.⁹⁶

Although Jessica's Law increases the number of people that will be classified as sexually violent predators, this change is unlikely to violate due process. Even though Jessica's Law broadened the sexually violent predator definition, the SVPA is still "narrowly focused on a select group of violent criminal offenders who commit particular forms of predatory sex acts."⁹⁷ Moreover, Jessica's Law did not alter the remaining conditions that were critical to the California Supreme Court's analysis upholding the SVPA.⁹⁸ Because the SVPA after Jessica's Law still only applies to a particular group of offenders and because the specific conditions on imposing civil commitment remain, the SVPA would probably withstand a challenge in California courts on substantive due process grounds.

The U.S. Supreme Court has been more deferential to the legislature than the California Supreme Court in reviewing "involuntary civil commitment laws challenged under federal Constitutional grounds."⁹⁹ The U.S. Supreme Court has emphasized that legislators are the appropriate parties to "defin[e] terms of a medical nature that have legal significance."¹⁰⁰ As a result, the Court has not required any specific definition of a sexually violent predator for civil commitment to be constitutionally sound.¹⁰¹ Thus, involuntary civil commitment will likely survive a federal substantive due process challenge so long as the statute requires more than a mere finding of dangerousness, such as when the commitment is limited to "those who suffer from a volitional impairment rendering them dangerous beyond their control."¹⁰² Even more broadly, the Court has held "that the involuntary civil confinement of a limited subclass of dangerous persons is [not] contrary to our understanding of ordered liberty."¹⁰³

95. *Id.*

96. Cal. Proposition 83 § 24 (2006) (amending CAL. WELF. & INST. CODE § 6600(a)(1)).

97. *Hubbart*, 969 P.2d at 593 n.20.

98. *See id.* ("Commitment as an SVP cannot occur unless it is proven, beyond a reasonable doubt, that the person currently suffers from a clinically diagnosed mental disorder, is dangerous and likely to continue committing such crimes if released into the community, and has been found to have sexually victimized at least two people in prior criminal proceedings."). Of the conditions listed, Jessica's Law changed only the condition regarding the number of victims. *See* Cal. Proposition 83 § 24 (2006) (amending CAL. WELF. & INST. CODE § 6600(a)(1)) (requiring only that the person be convicted of a sexually violent offense against one or more victims).

99. *See Hubbart*, 969 P.2d at 593 n.20 (pointing out that, contrary to the California Supreme Court, the U.S. Supreme Court "accord[s] substantial deference to involuntary civil commitment laws challenged under the federal Constitution").

100. *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997).

101. *See id.* ("[W]e have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes.").

102. *Id.* at 358; *see also* *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) (holding that the state's confinement of "the harmless mentally ill" is unconstitutional).

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

The fact that Jessica's Law allows for indefinite civil commitment, removes the automatic annual right to petition for a less restrictive alternative, and classifies a person as a sexually violent predator if he or she has victimized one or more victims does not change the constitutional soundness of the SVPA. The SVPA is properly applied to "a limited subclass of dangerous persons;"¹⁰⁴ thus, it should still be found constitutionally sound.

Similarly, although the California Supreme Court subjects the involuntary civil commitment statutes "to the most rigorous form of constitutional review,"¹⁰⁵ the U.S. Supreme Court is unlikely to find that the SVPA violates substantive due process rights because it continues to provide a narrowly tailored solution to a compelling state concern.

C. Double Jeopardy Concerns

The U.S. Constitution protects individuals from being tried or punished for the same offense twice.¹⁰⁶ Because the SVPA provides for the confinement of sexually violent predators after the completion of their sentence, the SVPA has been challenged on the theory that it is placing a person in jeopardy twice for the same offense.¹⁰⁷ Because Jessica's Law allows for an indeterminate term of commitment¹⁰⁸ and removes the automatic right to petition annually for a less restrictive alternative,¹⁰⁹ there may be renewed challenges to the SVPA on the basis that it now more closely resembles punishment and, thus, places individuals in jeopardy twice for the same offense.

Despite the more stringent standards imposed by Jessica's Law, this Comment argues that the SVPA still does not violate the principles of double jeopardy. While a person is found to be a sexually violent predator based largely on his or her prior convictions,¹¹⁰ a person is not civilly committed because of those prior convictions.¹¹¹ Rather, a sexually violent predator is committed because he or she has a "mental disorder" that makes it likely he or she will continue to engage in sexually violent criminal behavior, which makes that person dangerous to society.¹¹² Past criminal behavior is only used for evidentiary purposes in determining whether a person is a

104. *See id.*

105. *Hubbart v. Superior Court*, 969 P.2d 584, 593 n.20 (Cal. 1999).

106. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

107. *See, e.g., Ex parte Keddy*, 233 P.2d 159, 161 (Cal. 2d Dist. Ct. App. 1951) (addressing the petitioner's argument that the statute allowing for civil commitment of sexual psychopaths constituted a violation of the prohibition against punishing people twice for the same offense).

108. Cal. Proposition 83 § 27 (2006) (amending CAL. WELF. & INST. CODE § 6604).

109. Cal. Proposition 83 § 29 (2006) (amending CAL. WELF. & INST. CODE § 6605(b)).

110. *See id.* § 6600 (West Supp. 2007) (defining "sexually violent predator" largely on the basis of convictions for past sexually violent crimes).

111. *See* CAL. WELF. & INST. CODE § 6600(a)(1) (emphasizing that a sexually violent predator is civilly committed because he or she has a diagnosed mental disorder).

112. *Id.*

sexually violent predator; it is not used as the sole ground for civil commitment.¹¹³ Thus, a sexually violent predator is not civilly committed for past crimes. Rather, past crimes are evidence of a person's mental disorder.¹¹⁴ While this may seem like a matter of semantics to some, the California Supreme Court has used this reasoning to defeat double jeopardy challenges to the SVPA.¹¹⁵ Thus, it is likely that the California Supreme Court will not construe the SVPA's civil commitment as punishment, even under the more stringent terms added by Jessica's Law."

In sum, the SVPA after Jessica's Law will likely withstand constitutional challenges. Jessica's Law, however, still leaves open a loophole that allows the release of untreated sexually violent predators.¹¹⁶ For that reason, alternate solutions need to be explored that will close the loophole altogether.

III. THE LOOPHOLE IN CALIFORNIA'S SVPA REMAINS

California originally enacted the SVPA to "confine[] and treat[]" sexually violent predators.¹¹⁷ In contrast, the stated legislative intent of Jessica's Law was to better protect society from sexual offenders.¹¹⁸ Thus, the modified intent of California's SVPA, as amended by Jessica's Law, is to treat sexually violent predators and, at the same time, to protect society from persons who pose a threat.¹¹⁹

Unfortunately, while Jessica's Law may have narrowed the number of sexually violent predators that slip back into society untreated, the loophole remains open; some sexually violent predators are still released into society without receiving treatment.¹²⁰

A. *The Legislative Intent Behind California's SVPA*

The broad purpose of the SVPA is to protect unsuspecting communities from individuals who are likely to commit sexually violent acts upon their release from

113. See *Hubbart v. Superior Court*, 969 P.2d 584, 596 (Cal. 1999) ("[P]ast criminal conduct serve[s] an important evidentiary function in establishing the dangerous mental impairments of sex offenders . . .").

114. *Id.*

115. *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997).

116. See *infra* Part III.

117. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating the legislative intent that sexually violent criminals be "confined and treated"); CAL. WELF. & INST. CODE § 6250 (West Supp. 2007) (stating that sexually violent predators "shall be treated, not as criminals, but as sick persons").

118. See generally Cal. Proposition 83 (2006) (amending various sections of the California Welfare and Institute Code and the California Penal Code and stating that the intent of Jessica's Law, which amended the SVPA, was to better protect society from sex offenders).

119. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) ("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.").

120. See *supra* Part I (describing the loophole).

incarceration.¹²¹ To prevent such societal harm, the SVPA established civil commitment procedures to treat and confine sexually violent predators.¹²²

One central purpose of the SVPA is to “provide for continued incarceration of some sex offenders after completion of their determinate prison sentences.”¹²³ However, the continued incarceration of sexually violent predators is not meant to punish but rather to protect society.¹²⁴ The SVPA specifically provides that sexually violent predators will only be confined as long as they pose a danger to others and are likely to commit a sexually violent crime if released.¹²⁵ If this condition changes, the person will no longer be considered a sexually violent predator and will be unconditionally released.¹²⁶

The other primary purpose of California's SVPA is to treat sexually violent predators.¹²⁷ The legislative record is clear that the intent behind the SVPA is that sexually violent predators should receive treatment for their mental disorders for “as long as the disorders persist.”¹²⁸ In fact, California courts have interpreted the intent of the SVPA as keeping sexually violent predators institutionalized until “cured” of their disorders.¹²⁹ Thus, sexually violent predators are meant to be treated, “not as criminals, but as sick persons.”¹³⁰

The dual purpose behind the SVPA is to both confine *and* treat sexually violent predators until they no longer pose a threat to society, as evidenced by legislative history, California case law, and even the SVPA itself.¹³¹ However,

121. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating that because sexually violent predators are likely to engage in further acts of violence, they should be confined and treated until they are no longer a threat to society).

122. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 888, at 5-6 (Sept. 15, 1995) (explaining that the SVPA “establishes civil commitment procedures for the placement and treatment of sexually violent offenders in a secure mental health facility following their release from prison”).

123. SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995).

124. See *Hubbart v. Superior Court*, 969 P.2d 584, 606 (Cal. 1999) (stating that “the Legislature disavowed any ‘punitive purpose’” of the SVPA (alternation omitted)); see also SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating that sexually violent predators should be “confined and treated” until they are no longer a threat to society).

125. See generally CAL. WELF. & INST. CODE § 6605(b) (West Supp. 2007) (establishing procedures for the release of a person whose condition has changed such that the person “no longer meets the definition of a sexually violent predator”).

126. See *id.* § 6605(f) (“If the superior court determines that the person is no longer a sexually violent predator, he or she shall be unconditionally released and unconditionally discharged.”).

127. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating the legislative intent that sexually violent criminals be “confined and treated”); CAL. WELF. & INST. CODE § 6250 (West Supp. 2007) (stating that sexually violent predators “shall be treated, not as criminals, but as sick persons”).

128. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 3 (Sept. 12, 1995) (stating that the intent of the Legislature is for sexually violent predators to receive treatment for their disorders “only as long as the disorders persist”).

129. See, e.g., *Ex parte Keddy*, 233 P.2d 159, 164 (Cal. 2d Dist. Ct. App. 1951) (stating that a sexually violent predator “is an unfortunate person and until cured is not fit to mingle in society and should be institutionalized until it is safe both for him and for society that he be released”).

130. CAL. WELF. & INST. CODE § 6250 (West Supp. 2007).

131. See, e.g., SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (stating the intent to “confine and treat” sexually violent predators until they are no longer a threat to society).

over time it became clear that this intent was not being effectuated by the SVPA,¹³² and Jessica's Law was passed, at least partially in an attempt to bring the SVPA closer to complying with its legislative intent.¹³³

B. SVPA Currently Violates Legislative Intent

Jessica's Law includes provisions that protect society from released sex offenders,¹³⁴ but its amendments to the SVPA do little to further the legislative intent of treating and confining these predators. Even with the Jessica's Law amendments, the SVPA still contains a loophole that not only allows sex offenders to refuse treatment but also allows them to be released without receiving treatment.

California's SVPA allows sexually violent predators to refuse to undergo treatment for their diagnosed disorders,¹³⁵ despite the clear legislative intent to treat them "not as criminals, but as sick persons."¹³⁶ As noted earlier, when an incarcerated person is labeled as a sexually violent predator, that person will be civilly committed to a mental health facility for an indeterminate period.¹³⁷ Upon arriving at the mental health facility, the inmate will be offered treatment.¹³⁸ If the inmate refuses treatment, treatment is continually offered on a monthly basis.¹³⁹ This process could continue indefinitely, with the person never receiving treatment.¹⁴⁰

The result of optional treatment is that sexually violent predators may be released from civil commitment without receiving treatment for their condition.¹⁴¹ In fact, under the current SVPA, sexually violent predators can be released without recognizing that they have a mental disorder.¹⁴² Jessica's Law seemingly makes it more difficult for sexually violent predators to be released because it

132. See *supra* Part I.

133. See Cal. Proposition 83 § 2(h) (2006) (stating the intent to strengthen and improve the laws that provide for "commitment and control of sexually violent predators").

134. See generally Cal. Proposition 83 (2006) (amending various sections of the Penal Code to provide for GPS tracking of certain released sex offenders and increasing the geographic limitations on where registered sex offenders may reside, among other things).

135. See CAL. WELF. & INST. CODE § 6606(a) (West Supp. 2007) (explaining that those who decline treatment will continue to be offered the opportunity for treatment on a monthly basis).

136. *Id.* § 6250.

137. *Id.* § 6604.

138. See *id.* § 6606(a) (stating that the CDMH will treat a person who is committed as a sexually violent predator for his or her mental disorder).

139. *Id.*; see also *id.* § 6606(e) (stating that CDMH professionals will meet with those who refuse treatment at monthly "treatment planning conferences").

140. See generally *id.* § 6606(b) (stating that a sexually violent predator does not have to be amenable to treatment or even admit they have a problem during the time of commitment).

141. See generally *id.* § 6605 (West Supp. 2007) (describing the process of petitioning for the release of the sexually violent predator, with no mention of a treatment requirement).

142. See *id.* § 6606(b) (stating that a sexually violent predator does not have to admit they have a problem during the time of commitment).

appears they are only allowed to petition for release if authorized to do so by the Director of CDMH, as opposed to the automatic annual hearings formerly required by the SVPA.¹⁴³ However, this is qualified by another provision that states that the SVPA does not remove a sexually violent predator's right to petition the court for release *without* authorization from the Director of the CDMH.¹⁴⁴ Thus the loophole remains; sexually violent predators may still be released into "unsuspecting communities"¹⁴⁵ without being treated for their diagnosed mental disorders.

In sum, even after the Jessica's Law amendments, sexually violent predators who are committed to mental health facilities under the SVPA may be released back into society without undergoing treatment. This result frustrates the SVPA's dual legislative purpose to both confine and treat sexually violent predators to better protect society.

IV. SUGGESTIONS FOR CLOSING THE LOOPHOLE

Although Jessica's Law tightens the loophole in the SVPA, there is still enough room for sexually violent predators to slip back into society untreated. Because Jessica's Law only recently passed, we do not know if sexually violent predators are slipping through that loophole. However, a better system would close the loophole altogether and make it impossible for sexually violent predators to be released into society without undergoing treatment—as intended by the Legislature.¹⁴⁶ Whether by creating a new outpatient civil commitment program similar to the one program currently used in Texas or by statutorily requiring treatment before release, the loophole in California's SVPA must be closed.

143. Compare *id.* § 6605(b) (West Supp. 2006) ("The director [of the Department of Mental Health] shall provide the committed person with an annual written notice of his or her right to petition the court for conditional release under Section 6608. . . . If the person does not affirmatively waive his or her right to petition the court for conditional release, the court shall set a show cause hearing to determine whether facts exist that warrant a hearing"), with *id.* § 6605(b) (West Supp. 2007) (amended by Cal. Proposition 83 § 29 (2006)) ("If the Department of Mental Health determines that either: (1) the person's condition has so changed that the person no longer meets the definition of a sexually violent predator, or (2) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the director shall authorize the person to petition the court for conditional release . . . or for an unconditional discharge.").

144. Cal. Proposition 83 § 30 (2006) (amending CAL. WELF. & INST. CODE § 6608(a)).

145. See ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 888, at 5-6 (Sept. 15, 1995) (explaining the need to create a procedure that will prevent the release of sexually violent predators into "unsuspecting communities").

146. See *supra* Part III.A (discussing the legislative intent that sexually violent predators undergo treatment).

A. An Outpatient Civil Commitment Requiring Treatment

The loophole could be closed by drastically changing the form of a sexually violent predator's civil commitment. A program that releases sexually violent predators back into society under intense monitoring¹⁴⁷ and simultaneously requires the committed individuals to undergo treatment removes the possibility of their release back into the community without treatment.¹⁴⁸ Such a program would shift the emphasis from confinement to rehabilitation and treatment and would operate on a "philosophy that rehabilitation of even the most heinous offenders is possible."¹⁴⁹

In 1999, Texas established the first and only outpatient civil commitment program for sexually violent predators in the United States.¹⁵⁰ The Outpatient Sexually Violent Predator Treatment Program was enacted due to fiscal constraints,¹⁵¹ as well as legislative findings that inpatient civil commitment programs inadequately addressed the risk of recidivism posed by sexually violent predators.¹⁵² "The intent of the [amended Texas Sexually Violent Predator Act] is to provide intensive outpatient rehabilitation and treatment to all sexually violent predators."¹⁵³ As such, the Texas SVPA requires "participation in and compliance with a specific course of treatment."¹⁵⁴ Failure to participate in treatment is "a felony in the third degree," resulting in criminal penalties.¹⁵⁵

147. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 841.082(a) (Vernon Supp. 2007) (describing the conditions of Texas's Outpatient Sexually Violent Predator Treatment Program, which, among other things, requires a judge's authorization before changing residence and submission to tracking with tracking equipment, and "to any other appropriate supervision").

148. California currently provides outpatient treatment for sexually violent predators who are granted conditional release from their civil commitment. See CAL. WELF. & INST. CODE § 6609.1 (West Supp. 2007). This is different from the program suggested in this section, which provides outpatient treatment as the only form of civil commitment.

149. Tex. Dep't of State Health Servs., Council on Sex Offender Treatment, Civil Commitment of the Sexually Violent Predator - History of Civil SVP Act, July 7, 2005, http://www.dshs.state.tx.us/csot/csot_cctxhist.shtml (on file with the *McGeorge Law Review*).

150. Tex. Dep't of State Health Servs., Council on Sex Offender Treatment, Treatment of Sex Offenders - Sexually Violent Predators, July 7, 2005, http://www.dshs.state.tx.us/csot/csot_tsvp.shtml [hereinafter Treatment of Sex Offenders] (on file with the *McGeorge Law Review*).

151. *Id.* ("The Outpatient Program was chosen strictly due to fiscal constraints.").

152. See TEX. HEALTH & SAFETY CODE ANN. § 841.001 (Vernon 2007) ("[E]xisting involuntary commitment provisions . . . are inadequate to address the risk of repeated predatory behavior that sexually violent predators pose to society.").

153. Treatment of Sex Offenders, *supra* note 150.

154. TEX. HEALTH & SAFETY CODE ANN. § 841.082(a)(4) (Vernon Supp. 2007).

155. See *id.* § 841.085 (Vernon 2007) ("A person commits an offense if the person violates a requirement imposed under Section 841.082. An offense under this section is a felony of the third degree."); see also Treatment of Sex Offenders, *supra* note 150 ("[F]ail[ing] to comply with the order of commitment . . . may result in incarceration.").

Under the Texas SVPA, a person classified as a sexually violent predator¹⁵⁶ is committed to outpatient treatment¹⁵⁷ under supervision “coordinated by a case manager.”¹⁵⁸ The treatment and supervision begins immediately upon release from a correctional facility or state hospital and continues “until the person’s behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.”¹⁵⁹ The sexually violent predator is also subject to any requirements that may be deemed necessary to ensure “compliance with treatment and supervision and to protect the community,” such as residential housing requirements, global positioning satellite tracking, restricted transportation, and substance abuse testing.¹⁶⁰

People may be concerned that outpatient sexually violent predator treatment programs, like the one established in Texas, leave communities vulnerable to dangerous sexual predators. Quite surprisingly, the Texas SVPA outpatient program may advance public safety more than the inpatient programs.¹⁶¹ This is because the outpatient programs, which mandate treatment, are arguably more effective in rehabilitating sexually violent predators than inpatient programs.¹⁶²

According to the Council on Sex Offender Treatment (a division of the Texas Department of State Health Services), “[t]he success rate for offenders treated in an inpatient setting is about half of that for offenders treated in an outpatient setting.”¹⁶³ A likely explanation for this discrepancy is that the inpatient programs, like the one in California, allow sexually violent predators to refuse

156. The process under the Texas SVPA for assessing whether a person is a sexually violent predator is similar to the procedure under California’s SVPA. For example, under both acts, the state assesses the individual and only “the most predatory” go on to trial for civil commitment. *See generally* Tex. Dep’t of State Health Servs., Council on Sex Offender Treatment, Civil Commitment of the Sexually Violent Predator—Inpatient vs. Outpatient SVP Civil Commitment, July 7, 2005, http://www.dshs.state.tx.us/csot/csot_ccinout.shtm [hereinafter Civil Commitment of the Sexually Violent Predator] (on file with the *McGeorge Law Review*) (describing the similarities between Texas’s SVPA and other states’ SVPA that require inpatient commitment).

157. As part of the required treatment, sexually violent predators “attend group therapy two (2) times per week and have two (2) individual sessions per month.” Treatment of Sex Offenders, *supra* note 150. They are also required to take polygraph tests regarding, among other things, the offense for which they were committed and their sexual history. *Id.* In addition, penile plethysmographs are also used to assess sexual arousal and “[s]elf-help, drug intervention, or time-limited treatment is used only as adjuncts to more comprehensive treatment.” *Id.* “Intensive sex offender treatment” in some instances may also include family therapy sessions. *Id.*

158. TEX. HEALTH & SAFETY CODE ANN. § 841.081 (Vernon Supp. 2007).

159. *Id.*

160. *Id.* § 841.082(a); *see also* Treatment of Sex Offenders, *supra* note 150 (listing treatment and supervision requirements of the Outpatient Sexually Violent Predator Treatment Program to be administrated by the Council on Sex Offender Treatment).

161. *See* Civil Commitment of the Sexually Violent Predator, *supra* note 156 (“[T]o date the Texas outpatient program has shown the most success in the treatment of SVPs while maintaining the highest level of community safety.”).

162. *See id.* (“[T]o date the Texas outpatient program has shown the most success in the treatment of SVPs while maintaining the highest level of community safety.”).

163. *Id.*

treatment,¹⁶⁴ whereas the Texas outpatient program makes treatment mandatory for all sexually violent predators.¹⁶⁵ Because sex offenders generally need long-term treatment, allowing sexually violent predators to refuse treatment is detrimental to long-term community safety.¹⁶⁶

Another reason for the higher rate of success in outpatient treatment programs is that such programs require sexually violent predators to develop internal controls to stop themselves from re-offending.¹⁶⁷ Because inpatient programs protect sexually violent predators from the stresses of life outside of incarceration, “the availability of alcohol or drugs, and the inadvertent contact with potential victims,” these predators are less likely to develop the ability to “identify[] triggers and deviant behaviors,” and to stop themselves prior to acting on their impulses.¹⁶⁸

Sexually violent predators released from inpatient treatment programs are left to struggle largely alone outside of confinement.¹⁶⁹ By contrast, an outpatient program allows offenders to work through their struggles while still undergoing treatment and supervision.¹⁷⁰ The result is that society is better protected by a mandatory outpatient program than a voluntary inpatient program.

The implementation of an outpatient program in California would seemingly ignore one prong of the dual intent behind California’s SVPA—protecting society by confining sexually violent predators.¹⁷¹ However, the overarching purpose of California’s SVPA is to protect society from sexually violent predators¹⁷² until such predators are no longer a threat.¹⁷³ Evidence suggests that outpatient programs that mandate treatment would better protect society than an inpatient program that allows for refusal of treatment, such as the current program in California. For example, “[s]ince the inception of the Texas program, none of the sexually violent predators released in Texas communities have been charged or convicted of a new sexually violent offense.”¹⁷⁴

164. See *id.* (stating that eighty percent of California’s sexually violent predators refuse treatment, seventy-five percent in Wisconsin refuse treatment, and seventy percent in Florida refuse treatment).

165. TEX. HEALTH & SAFETY CODE ANN. § 841.082(a)(4) (Vernon Supp. 2006).

166. See Civil Commitment of the Sexually Violent Predator, *supra* note 156 (“Use of an outpatient program, in which treatment is mandated in Texas, can potentially provide for more long-term community safety than inpatient programs.”).

167. See *id.* (stating that because inpatient programs rely on external controls such as locked facilities, sexually violent predators do not develop internal controls).

168. See *id.* (describing impediments to the development of internal controls in inpatient programs).

169. See *id.* (describing impediments to the development of internal controls in inpatient programs).

170. *Id.*

171. See *supra* Part III (discussing the dual legislative intent for confining and treating sexually violent predators under California’s SVPA).

172. See generally Cal. Proposition 83 (2006) (stating that the intent of Jessica’s Law, which amended the SVPA, is to better protect society from sex offenders).

173. See SENATE FLOOR, COMMITTEE ANALYSIS OF AB 888, at 2 (Sept. 12, 1995) (emphasizing the threat that sexually violent predators pose to society and the intent to confine them only so long as they continue to pose such a threat).

174. Tex. Dep’t of State Health Servs., Council on Sex Offender Treatment, Civil Commitment of the

Thus, because an outpatient program that mandates treatment is actually more effective in protecting society than an inpatient program, such a program would better fulfill the legislative intent of California's SVPA.¹⁷⁵ At the same time, such a program would also effectively close the loophole by preventing the release of sexually violent predators who have not undergone treatment.

B. Requiring Treatment Before Release from Civil Commitment

A less drastic approach to closing the loophole that would also satisfy the legislative intent of confining and treating sexually violent predators would be to require that a person participate in treatment before being released from civil commitment. Currently, California's SVPA allows sexually violent predators to petition for release from their civil commitment either with or without the authorization of the Director of Mental Health.¹⁷⁶ Further, there is no requirement that a sexually violent predator undergo treatment during civil commitment.¹⁷⁷ As a result, sexually violent predators may be released into society without obtaining any treatment for their diagnosed mental disorders.¹⁷⁸

Requiring that sexually violent predators receive treatment may seem like an obvious method of closing the loophole, but it also raises several concerns. For example, requiring an individual to undergo psychological treatment is arguably an invasion of the constitutional right to privacy and personal autonomy.¹⁷⁹ In

Sexually Violent Predator—Conclusion, July 7, 2005, http://www.dshs.state.tx.us/csot/csot_cconclc.shtml (on file with the *McGeorge Law Review*). Unfortunately, California does not track the recidivism of sexually violent offenders released from civil commitment under the SVPA. See Tex. Dep't of State Health Servs., Council on Sex Offender Treatment, State by State SVP Act Comparison, July 2005, http://www.dshs.state.tx.us/csot/csot_compar.shtml [hereinafter State by State Comparison] (on file with the *McGeorge Law Review*).

175. In addition, Texas's Outpatient Sexually Violent Predator Treatment Program is more cost-effective than California's current inpatient program. State by State Comparison, *supra* note 174. California's projected total annual program cost in 2004 was \$45.5 million, while Texas's projected total annual program cost the same year was \$490,000. *Id.* At the same time, California's program applied to 486 individuals, while Texas' program applied to only forty-one individuals. *Id.*

176. See Cal. Proposition 83 § 29 (2006) (amending CAL. WELF. & INST. CODE § 6605(b)) (allowing a sexually violent predator to petition for release upon authorization from the Director of the Department of Mental Health); see also Cal. Proposition 83 § 30 (2006) (amending CAL. WELF. & INST. CODE § 6608(a)) (clarifying that sexually violent predators have the right to petition for release even without express authorization from the Director of the Department of Mental Health).

177. See CAL. WELF. & INST. CODE § 6606(a) (West Supp. 2007) (stating that sexually violent predators who decline treatment will continue to have treatment offered to them).

178. See *supra* Part III.B (describing the loophole in California's SVPA that ultimately allows the release of sexually violent predators into society without treatment).

179. See, e.g., *Jarvis v. Levine*, 418 N.W.2d 139, 145, 148-49 (Minn. 1988) (stating that there is a protected privacy interest in the individual's right to choose to refrain from taking neuroleptic drugs); *Price v. Sheppard*, 239 N.W.2d 905, 910-11 (Minn. 1976) (discussing the plaintiff's claim that his right of privacy was violated by being required to undergo electroshock therapy while involuntarily committed to a state mental health facility).

addition, there is debate, particularly among mental health professionals, as to whether required, involuntary treatment would be effective.¹⁸⁰

1. *Requiring Treatment Would Not Violate Sexually Violent Predators' Constitutional Rights*

The U.S. Supreme Court has expressed concern that institutionalized mental health patients are often subjected to intrusive medical treatment that may violate their "right to bodily integrity."¹⁸¹ Individuals who are involuntarily committed to mental health facilities retain the constitutional right to refuse unwanted medication.¹⁸² However, lower courts have made it clear that the right to be free from bodily intrusion is far from absolute.¹⁸³ Personal "autonomy must yield to the legitimate government interests that are incidental to the basis for legal institutionalization."¹⁸⁴ Thus, the civilly committed individual is protected only against "arbitrary and capricious" government actions.¹⁸⁵

To determine whether an individual's right to privacy should yield to legitimate governmental interests, the Minnesota Supreme Court has held that there must be a proceeding in which the court determines "the necessity and reasonableness of the prescribed treatment."¹⁸⁶ To make that determination, "the patient's need for the treatment [should be balanced] against the intrusiveness of the prescribed treatment."¹⁸⁷ According to the court, such a proceeding should be required for the most intrusive forms of treatment, such as psychosurgery or electroshock therapy.¹⁸⁸ However, such a proceeding would not be required for

180. See generally Karen J. Terry & Edward W. Mitchell, *Motivation and Sex Offender Treatment Efficacy: Leading a Horse to Water and Making It Drink?*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 663 (2001) (discussing the debate regarding the efficacy of treatment for sex offenders).

181. See *Parham v. J.R.*, 442 U.S. 584, 626 (1979) (Brennan, J., concurring in part and dissenting in part) (discussing the possibility that treatment administered while committed to a mental facility may violate an individual's "right to bodily integrity").

182. See *Mills v. Rogers*, 457 U.S. 291, 299 n.16 (1982) (assuming for purposes of the discussion that "involuntarily committed mental patients retain liberty interests protected directly by the Constitution . . . and that these interests are implicated by the involuntary administration of antipsychotic drugs" (citation omitted)).

183. See *United States v. Charters*, 863 F.2d 302, 305 (4th Cir. 1988) (stating that individuals who are legally confined retain significant interests, but those interests are not absolute).

184. *Id.*

185. *Id.* (stating that the interests retained by involuntarily committed individuals "are only afforded protection against arbitrary and capricious government action").

186. *Price v. Sheppard*, 239 N.W.2d 905, 913 (Minn. 1976).

Factors which should be considered are (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment, (2) the risks of adverse side effects, (3) the experimental nature of the treatment, (4) its acceptance by the medical community of [the] state, (5) the extent of intrusion into the patient's body and the pain connected with the treatment, and (6) the patient's ability to competently determine for himself whether the treatment is desirable.

Id.

187. *Id.*

188. *Id.*

less intrusive treatments, such as the use of mild tranquilizers and therapies that require the cooperation of the patient.¹⁸⁹

Though the Minnesota Supreme Court decision is certainly not mandatory authority for California courts, other state and federal courts have cited its decision.¹⁹⁰ Furthermore, it is a helpful model to analyze whether requiring participation in the treatment provided for civilly committed sexually violent predators violates those individuals' right of privacy.

The CDMH runs the "Sex Offender Commitment Program" for sexually violent predators to help participants gain the skills and behavior needed to manage their deviant behavior and reduce their risk of recidivism.¹⁹¹ Components of the program include "[c]ognitive behavioral and relapse prevention training," "[b]ehavioral reconditioning and pharmacological treatments," "[p]olygraph examination and plethysmography,"¹⁹² "[s]ubstance abuse treatment, vocational training, and cultivation of prosocial behaviors and constructive use of leisure time," and "[c]lose community treatment and surveillance upon discharge."¹⁹³ Treatment consists of five phases: treatment readiness, skills acquisition, skills application, discharge readiness, and community outpatient treatment.¹⁹⁴

To determine whether the treatment offered by the CDMH is necessary and reasonable, the Minnesota model suggests balancing "the patient's need for treatment against the intrusiveness of the prescribed treatment."¹⁹⁵ With regard to

189. *Id.*

190. See *Parham v. J.R.*, 442 U.S. 584, 626 n.3 (1979) (Brennan, J., concurring in part and dissenting in part) (citing *Price v. Sheppard* as an example that convulsive therapy may violate the institutionalized patient's "right to bodily integrity"); *Andrews v. Ballard*, 498 F. Supp. 1038, 1048-51 (S.D. Tex. 1980) (citing *Price* in a list of cases used to support the holding that "the decision to obtain or reject medical treatment . . . is protected by the right of privacy"); *Oslund v. United States*, 128 F.R.D. 110, 112 (D. Minn. 1989) (quoting *Price* for the proposition that "'an intrusion into the right of privacy can only be justified by a legitimate and important state interest, and even then the intrusion must be by the least intrusive means'"); *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 251-52 (Alaska 2006) (agreeing with *Price* that the judiciary should determine the appropriateness of requiring certain medical treatments and specifically finding the procedure and factors of consideration suggested by *Price* to be "sensible"); *Steinkruger v. Miller*, 612 N.W.2d 591, 600 (S.D. 2000) (citing *Price* to support the holding that for treatment to be essential or necessary so as to prevent the individual from being able to refuse treatment, there must not be alternative, less intrusive means available).

191. See Cal. Dep't of Mental Health, Coalinga State Hospital: Model Sex Offender Treatment, 2008, http://www.dmh.cahwnet.gov/Services_and_Programs/State_Hospitals/Coalinga/Treatment.asp [hereinafter Coalinga State Hospital] (on file with the *McGeorge Law Review*) ("This multi-modal treatment program is designed to assist participants in developing skills and behaviors for managing their deviant behavior and for reducing their risk of re-offending.").

192. Plethysmography is a procedure used to measure the sexual arousal of sex offenders when faced with certain stimuli. See generally Cal. Dep't of Mental Health, LTCS Best Practice Catalog Submission, http://www.dmh.cahwnet.gov/Services_and_Programs/State_Hospitals/Best_Practices/docs/I/1_C_5_031.pdf (last visited Feb. 17, 2008) (on file with the *McGeorge Law Review*) (describing the purpose and procedure involved with plethysmography as part of the treatment for sexually violent predators).

193. Coalinga State Hospital, *supra* note 191.

194. See *id.* (describing each phase of treatment in detail). Sexually violent predators are returned to the community after they have completed the fourth phase, and they then participate in the fifth phase of treatment on an outpatient basis. *Id.*

195. *Price v. Sheppard*, 239 N.W.2d 905, 913 (Minn. 1976) (creating a judicial procedure for

California's sexually violent predators, however, the Legislature has determined that these institutionalized individuals have such an extreme need for treatment that it is acceptable to commit them until they are no longer dangerous to society.¹⁹⁶

Furthermore, the "Sex Offender Commitment Program" provided by the CDMH is minimally intrusive. To begin with, it is difficult to distinguish the more intrusive forms of treatment that require a determination of necessity and reasonableness before they can be imposed upon an unwilling individual from treatment that does not require such a determination.¹⁹⁷ However, the Minnesota Supreme Court clarified that the use of mild tranquilizers and therapies requiring patient cooperation does not require such a determination.¹⁹⁸ The treatment offered to sexually violent predators who are civilly committed under California's SVPA primarily consists of therapy that does not require medication or other intrusions into the individual's bodily integrity.¹⁹⁹ Thus, the treatment would likely be found minimally intrusive.

As a result, because the psychological treatment of sexually violent predators is considered necessary to justify their civil commitment after completion of their penal sentence,²⁰⁰ and since their treatment would not violate their right to bodily integrity, requiring compliance with California's SVPA treatment program would not likely violate their privacy rights.

2. *Requiring Treatment Would Be Effective*

Even assuming that it would be constitutional to require sexually violent predators to obtain treatment, doubt remains in the minds of mental health professionals as to whether mandated treatment would be effective.²⁰¹ However,

determining whether an institutionalized individual's right of personal autonomy should yield to the state's interest in requiring treatment).

196. See *Hubbart v. Superior Court*, 969 P.2d 584, 604 (Cal. 1999) (noting that in order to be committed under the SVPA, the individual must pose "a danger to the health and safety of others" and must be likely to reoffend if released into the community; see also *supra* Part III.A (describing the legislative intent behind the SVPA as requiring that sexually violent predators receive treatment).

197. See *Price*, 239 N.W.2d at 913 ("We cannot draw a clear line between the more intrusive forms of treatment requiring this procedural hearing and those which do not.").

198. *Id.* ("Certainly this procedure is not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient.").

199. See *Coalinga State Hospital*, *supra* note 191 (describing the treatment program offered to sexually violent predators committed under California's SVPA).

200. See *supra* Part III.A (describing the legislative intent that sexually violent predators receive treatment).

201. See generally *Terry & Mitchell*, *supra* note 180 (discussing the debate regarding the efficacy of treatment for sex offenders).

at least one study²⁰² has demonstrated that there is little correlation between success rates and the motivation for participating in treatment.²⁰³

This study examined whether the outcome of treatment for sex offenders differed based on whether the offender voluntarily participated in treatment or was indirectly coerced.²⁰⁴ Indirect coercion was defined as “the feeling that there is no choice but to go into treatment because without the treatment there will be adverse consequences.”²⁰⁵ An example of indirect coercion is where states only release civil committed sexually violent predators when they are “no longer a danger to the community,” which usually requires that they be rehabilitated.²⁰⁶ Such programs do not make treatment a requirement but indirectly coerce offenders to participate so that they may be seen as rehabilitated.²⁰⁷

The type of treatment examined in the study is similar to the treatment that is offered to California's civilly committed sexually violent predators.²⁰⁸ This makes the study particularly relevant to determining whether adding a statutory requirement of participation in treatment to California's SVPA would be prudent. The study found no significant difference for successful completion²⁰⁹ of the program between those who wanted to change their behavior and those who were coerced (directly or indirectly) into participating in the treatment.²¹⁰ Thus, according to the study, “it is possible for sex offenders . . . to benefit from cognitive-behavioral treatment programs,” such as those offered under California's SVPA, “even if there is no desire to participate.”²¹¹

In sum, requiring that sexually violent predators obtain treatment effectuates legislative intent and closes the loophole that allowed the release of untreated sexually violent predators back into society.

202. *Id.* at 664-65 (conducting a study to determine whether a sex offender's motivation for participating in treatment, i.e., coerced or voluntary, is relevant to the efficacy of the treatment).

203. *Id.* at 669-70.

204. *Id.* at 664-65.

205. *Id.* at 665 (citation omitted).

206. *See id.* at 664-65 (stating that many offenders who participate in treatment programs because they expect to be released once they are rehabilitated are likely indirectly coerced into treatment).

207. *Id.*

208. *Compare id.* (describing the cognitive behavioral treatment examined by the study, which is aimed at eliminating the distorted thought processes of sex offenders), with Coalinga State Hospital, *supra* note 191 (describing the treatment program offered to sexually violent predators committed under California's SVPA and its focus on “managing their deviant behavior and for reducing their risk of re-offending”).

209. “*Efficacy* is defined as the offenders' ability to recognize and eliminate at least four [cognitive distortions] (over half) that were present at the outset of treatment and dichotomized into successful or unsuccessful.” Terry & Mitchell, *supra* note 180, at 665. Those offenders who were able to do that were considered to have successfully completed treatment. *Id.*

210. *Id.* at 669 (“[A]n equal number of offenders . . . who were and were not motivated to participate successfully completed the program, and there is no significant difference between the two populations . . .”).

211. *Id.* at 671 (stating that sex offenders can benefit from cognitive-behavioral treatment regardless of their motivation to participate in treatment).

V. CONCLUSION

Currently, approximately 2,700 sexually violent predators are civilly committed in nineteen states.²¹² “Of the 250 offenders released unconditionally since the first [sexually violent predator act] was passed in 1990, about half of them were [released] on legal or technical grounds unrelated to treatment.”²¹³ Clearly, many other states with sexually violent predator acts face problems similar to the loophole in California’s SVPA.²¹⁴

Jessica’s Law narrowed the loophole by making the procedure for release from civil commitment more stringent.²¹⁵ Nevertheless, sexually violent predators are still released without undergoing treatment.²¹⁶ As long as sexually violent predators are released back into society without undergoing treatment, the legislative intent of the SVPA will be frustrated.²¹⁷ If the SVPA loophole is left open, even as narrowed by Jessica’s Law, sexually violent predators will be able to slip through it and back into society without undergoing the treatment that has been deemed to be so necessary as to justify their civil confinement.

For these reasons, whether by creating a new outpatient civil commitment program similar to the Texas program or by statutorily requiring treatment before release, California must close the loophole in its SVPA.

212. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, at 1.

213. *Id.*

214. *See id.* (“Since [*Kansas v. Hendricks*], state officials, civil liberties advocates and lawyers have wrestled with exactly what that treatment requirement means.”).

215. *See supra* Part I (discussing how Jessica’s Law amends the SVPA).

216. *See supra* Part III.B (discussing how the loophole remains open despite the amendments of the SVPA).

217. *See supra* Part III.B (discussing how the SVPA frustrates legislative intent by allowing sexually violent predators to be released without treatment).

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