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## Colloquium Remarks

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## COLLOQUIUM REMARKS

*Rowan K. Klein\**

I have a client whose case is before the California Supreme Court in which the issue is the constitutionality of the California Sexually Violent Predator Law<sup>1</sup> (SVP). I have other clients involved in the prison system who have been committed for crimes. I would like to talk about broader policy issues that are raised by the *Hendricks*<sup>2</sup> case and by the questions that I think we have to answer relating to what we do with people who commit violent sex crimes. Are we going to pass our laws just in response to public outcry, or should we have a more informed system that tries to deal with the problem, that tries to provide treatment to the individual, and be honest with what we are trying to do?

In order to answer these questions, I think we need to have perspective and not just look at this from a lawyer's standpoint of challenging the constitutionality of laws such as the SVP law. In California, prior to the SVP law, we had what was known as the Mentally Disordered Offender (MDO) law, which was in the Penal Code, sec-

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1. See CAL. WELF. & INST. CODE §§ 6600-6609.3 (West Supp. 1998). The author is lead counsel in *Hubbart v. Superior Court*, 50 Cal. App. 4th 1155, 1162, 58 Cal. Rptr. 2d 268, 273 (1996), *rev. granted*, 1997 Cal. LEXIS 1008 (Feb. 26, 1997) (ordered temporarily depublished pending Supreme Court review), one of a series of cases pending before the California Supreme Court challenging the constitutionality of the SVP law on various grounds. These include (1) ex post facto violation, since the law applies to those presently in prison or on parole; (2) equal protection violation, since the law does not require present dangerousness as do other civil commitment schemes; and (3) substantive due process violation, since the definition of "sexually violent predator" is overly broad.

2. *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997). In *Hendricks*, a challenge to a Kansas civil commitment law regarding sexually violent predators was narrowly upheld, 5-4, with Justice Thomas as the swing vote. See *id.* at 2076. The high Court upheld constitutional challenges against substantive due process, ex post facto, and double jeopardy claims. See *id.* at 2086. The Court did not have before it an equal protection challenge such as the one before the California Supreme Court.

tion 2960, in California.<sup>3</sup> Before that we had the Mentally Disordered Sex Offender (MDSO) law.<sup>4</sup> The MDSO law was designed to suspend the criminal proceedings and treat people in mental hospitals and in state hospitals. We did away with the MDSO law in California because we felt it was a dishonest way of saying what we were really doing to these people when we locked them up in state hospitals, which was just punish them for what they were doing, and also raised the question of whether or not you could really provide treatment for these types of offenders.

So during the seventies we switched in California from an indeterminate sentence law to a determinate sentence law, which means that offenders who are convicted of these types of crimes will be released on parole.<sup>5</sup>

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3. See CAL. PENAL CODE § 2960 (West 1982 & Supp. 1998) (repealed by Stats. 1981, c. 928, p. 3485, § 2). The new SVP law was consciously placed in the Welfare and Institutions Code in anticipation of an ex post facto challenge to the new law. See CAL. WELF. & INST. CODE §§ 6600-6609 (West Supp. 1998). The MDO law is found at California Penal Code §§ 2960-2981, enacted in 1981 and as modified as a result of *People v. Gibson*, 204 Cal. App. 3d 1425, 252 Cal. Rptr. 56 (1988). The author was counsel in *Gibson*, which held the MDO law unconstitutional as violative of the ex post facto and equal protection clauses. See *id.* at 1434-35, 1440-41, 252 Cal. Rptr. at 61, 65. The MDO law was amended to be prospective only to resolve the ex post facto challenge and added a requirement of present dangerousness to resolve the equal protection challenge. See CAL. PENAL CODE § 2962 (West 1982 & Supp. 1998).

4. See CAL. WELF. & INST. CODE §§ 6300-6322 (West 1984 & Supp. 1998) (repealed by Stats. 1981, c. 928, 3485, § 2). For a discussion of the Mentally Disordered Sex Offender (MDSO) law, see *People v. Burnick*, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) and *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

5. See CAL. PENAL CODE § 1170-1170.95 (West 1985 & Supp. 1998) (effective July 1, 1977). See also, *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975) (stating: "[B]ecause [Adult Authority] has determined that petitioner is not ready for parole, it has either failed to fulfill its obligation to fix petitioner's term at a number of years proportionate to his offense, or, having impliedly fixed it at life [citation omitted], has imposed excessive punishment on him."); April Kestell Cassou and Brian Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PAC. L.J. 5 (1978) (a detailed survey of California's 1978 determinate sentence law subsequent to its enactment); Paula A. Johnson, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133 (1977) (examining the indeterminate sentencing system and its administration and evaluating the Act's ability to alleviate the difficulties of indeterminate sentencing); Raymond I. Parnas and Michael B. Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U.C. DAVIS L. REV. 29 (1978) (tracing the background and purposes of the California Determinate Sentencing Act and surveying the potential problems and advantages of its implementation).

In California everybody is placed on parole,<sup>6</sup> which starts after you serve your fixed sentence.<sup>7</sup> And so we had this gap about what we were going to do with these violent sex offenders because we did not have an MDSO law anymore, and we were just punishing people for what they did. And so somebody thought up passing a “mentally disordered offender” law, which is really not very different from the SVP that was passed in California.<sup>8</sup> It is not very different from the Kansas law,<sup>9</sup> except that the definition of “mentally disordered offender”<sup>10</sup> was really much more based upon the diagnosis that would be found in the DSM<sup>11</sup> and it was more limited in its time frames than the SVP law.<sup>12</sup> The same kinds of legal challenges immediately came to the forefront in California in the mid-eighties when this law was passed. The first question was: Can you apply it to people in prison who are about to be released on parole? Can you apply it retroactively to lengthen their sentences—the *ex post facto* question. And the other question is: Are they being treated differently, these offenders, because the law requires that they be proved to be dangerous before we can lock them up as mentally disordered offenders?<sup>13</sup>

The California courts in the mid-eighties did not have any problem striking down the MDO law on the ground that there was not any requirement in the statute that they be “presently dangerous.”<sup>14</sup> But the legal challenge is really a short-sighted way to deal with the problem because these are legislative questions. It is really easy for the legislature to write an MDO law or an SVP law that is only going to apply to people in the future. It is only going to apply to people who we specifically require to be presently dangerous.<sup>15</sup> And, of

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6. See CAL. PENAL CODE § 3000 (West 1982 & Supp. 1998).

7. See CAL. PENAL CODE § 2930-2935 (West 1982 & Supp. 1998).

8. See *supra* note 3.

9. See KAN. STAT. ANN. §§ 59-29a01 - 59-29a17 (1994 & Supp. 1996).

10. See CAL. PENAL CODE § 2962 (West 1982 & Supp. 1998).

11. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS xxi (4th ed. 1994) (describing a mental disorder as a “behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress . . . or disability . . . or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.”).

12. See CAL. WELF. & INST. CODE § 6600(a) (West Supp. 1998).

13. See *Gibson*, 204 Cal. App. 3d 1425, 252 Cal. Rptr. 56.

14. See, e.g., *In re Hofferber*, 28 Cal. 3d 161, 616 P.2d 836, 167 Cal. Rptr. 854 (1980); *Gibson* at 1434, 252 Cal. Rptr. at 61; *People v. Blackwell*, 117 Cal. App. 3d 372, 172 Cal. Rptr. 636 (1981).

15. The present version of the MDO law is such an example, as amended in response to *Gibson*. See *supra* note 3.

course, that is what the California legislature did after the court held the law was unconstitutional; all it did was postpone, for a few years, the ability of the state to confine these individuals as mentally disordered offenders.<sup>16</sup> And if the legal challenge in the *Hendricks* case was successful on ex post facto grounds, all that would do is postpone the ability of the state to lock up Mr. Hendricks because what triggers the law is that Mr. Hendricks had committed a crime and was in prison. If he had not been in prison, then the Kansas law would not apply to him, and that is really what the legislature is trying to deal with in these kinds of cases, which is a gap in our public policy about what we are going to do with these supposedly dangerous individuals.

The question is: are they presently dangerous because of what they did in the past? Because the new definition, especially in the SVP law—and which Justice Thomas did not have any problem with under substantive due process—is basically, if an individual committed these crimes in the past and we think he is going to do it in the future, then are we going to lock up the individual under one of these civil commitment laws?<sup>17</sup>

And Justice Thomas did not have any problem with that. He basically said, "That is fine." Basically what we have Justice Thomas saying is that it is really easy for the legislature to write a law that is going to eventually pass constitutional muster to lock people up potentially for the rest of their lives without providing them with treatment.<sup>18</sup> That, to me, is the very serious public policy question that

16. In other words, the MDO law became effective in 1982. Since it initially was applied retroactively, it was held violative of ex post facto. See *Gibson*, 204 Cal. App. 3d at 1432-35, 252 Cal. Rptr. at 58-61. When the amended MDO law became effective on July 1, 1986, it was applied prospectively only. Thus, the MDO law was not effective between 1982 and July 1986 because of the legislature's attempt to apply it retroactively.

17. Citing the Kansas SVP statute, Justice Thomas noted that a sexually violent predator is "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." *Hendricks*, 117 S. Ct. at 2077 (citing KAN. STAT. ANN. §§ 59-29a02(a)).

18. Justice Thomas stated:

[I]t would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.

*Id.* at 2084; cf. *O'Connor v. Donaldson*, 422 U.S. 563, 584 (1975) (Burger, C.J., concurring) ("[I]t remains a stubborn fact that there are many forms of mental

needs to be addressed. If that is what the public wants, it is really not civil commitment because you are not providing treatment—you are really just punishing somebody for what they did in the past.<sup>19</sup> To me, it just brings up the specter of the old indeterminate sentence law, which is what we decided in the seventies was not a fair system. We were not really rehabilitating people in prison.

What should we do? Let us be up front. We will tell somebody how much time they are going to be punished for what they did. We will punish them for what they did, and they can be released and they will go about their business.<sup>20</sup> If they violate the law, we will punish them again. But what is happening in many jurisdictions is that people are not satisfied with that. Or there are certain groups of people for whom it is difficult to predict future dangerousness, or for certain groups of people for whom we think that what they did in the past was so bad that we want to lock them up, potentially, for the rest of their lives.<sup>21</sup> What the legislature is doing is switching back from determinate sentence laws to indeterminate sentence laws.<sup>22</sup>

That is what is happening with the individuals such as those who are sexually violent predators. My proposition is that these SVP laws are really nothing more than a perpetual indeterminate sentence for these offenders and that the really honest and fair way to deal with these individuals, if that is what the public and the legislature want, is to pass an indeterminate sentence law. Such a law would say that somebody who commits a sex offense, a child molester or a rapist—could be sentenced to life with the possibility of parole.<sup>23</sup> The problem with that is, of course, that we have a system in California that deals with murderers and kidnapers and robbery. They are pun-

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illness which are not understood, some which are untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low."); *Greenwood v. United States*, 350 U.S. 366, 375 (1956) ("The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner.").

19. See CAL. WELF. & INST. CODE §§ 6600(a), 6601(a) (West Supp. 1998).

20. See, e.g., CAL. PENAL CODE § 264 (West 1988 & Supp. 1998), § 1170 (West 1985 & Supp. 1998), § 3000 (West 1982 & Supp. 1998).

21. For example, the punishment for attempted first degree murder is now seven years to life. See CAL. PENAL CODE § 664 (West 1988 & Supp. 1998). The legislature could, for example, change the punishment for rape from a determinate term of three, six, or eight years to an indeterminate term of seven years to life. See *id.* § 264 (West 1988 & Supp. 1998).

22. See CAL. PENAL CODE §§ 3040-3065 (West 1982 & Supp. 1998); CAL. CODE REGS. tit. 15, §§ 2400-2411 (1997); *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 552 (1975); *In re Fain*, 65 Cal. App. 3d 376, 135 Cal. Rptr. 543 (1976).

23. See CAL. PENAL CODE § 3046 (West 1982 & Supp. 1998).

ished, theoretically, for the rest of their lives, but they are eligible for parole.<sup>24</sup> What has happened to the public client that we have in California is that the parole board is not letting anybody out even if they are rehabilitated. So that is another public policy question that has to be dealt with.

It has become even worse in California because of clients such as the one I represent in the California Supreme Court, who was convicted of an offense back in 1990. He got a determinate sentence for what he did, and he was eligible to be released on parole about three or four years later. Under the determinate sentence law, they have to let you out after you serve your fixed sentence. The way the California law is defined, parole immediately follows the imprisonment, unless the parole system decides to waive parole<sup>25</sup>—which never happens, of course, in California. This client was about to be released on parole and it just so happened that he was one of the poster boys in California for Governor Wilson's reelection campaign.<sup>26</sup> Governor Wilson chose to mention his name prominently in his State of the State speech in California<sup>27</sup> and some of the different newspapers in the state chose to do articles about what is going to happen to these sex offenders because they are really not mentally disordered offenders.<sup>28</sup>

What are we going to do with them? We are just going to let them out and they are going to go out and re-offend. So, some intelligent lawyer who works for the state thought: "Why do we have to let them out on parole? This is a mentally ill person because he is dangerous. He is going to re-offend sometime in the future." And because parole is not something that you have to agree to in California—it is not a contract where you have to agree to conditions and negotiate it—it is mandatory under the law.<sup>29</sup> The law is also that the state can impose whatever conditions are constitutional. So there is a standard condition of parole in California which says, "I agree to go back to prison if I am mentally ill and dangerous to myself or oth-

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24. See CAL. PENAL CODE §§ 190, 209 (West 1988 & Supp. 1998), § 3046 (West 1982 & Supp. 1998).

25. See 15 C.F.R. § 2400 et seq.; CAL. PENAL CODE § 300 (West 1988 & Supp. 1998).

26. See Daniel M. Weintraub, *Wilson Rallies for 'One Strike' Law*, L.A. TIMES, Mar. 24, 1994, at B1.

27. See Governor Pete Wilson, *1995 State of the State Address* (last modified Jan. 9, 1995) <<http://www.ca.gov/s/governor/sos95.html>>.

28. See, e.g., *Sex Offender Case Will Go to High Court*, S.F. CHRON., Feb. 28, 1997, at A22; Weintraub, *supra* note 26, at B1.

29. See CAL. PENAL CODE §§ 3000, 3060.5 (West 1982 & Supp. 1998).

ers.”<sup>30</sup> It sounds, of course, just like the standard mental health commitment law in California, the Lanterman-Petris-Short Act,<sup>31</sup> which is a civil commitment law which is done in court: You have a right to counsel,<sup>32</sup> you have a right to jury trial if they are going to lock you up for an extended period of time.<sup>33</sup> The courts have interpreted that to mean that there has to be some proof of present dangerousness.<sup>34</sup> And of course this particular client, the only reason they wanted to lock him up after he served his determinate sentence was because he was on the front page of the newspaper and because Governor Wilson had mentioned him in his State of the State speech. What they did was that they never let him out on parole. They just said, “We are going to violate your parole because you are mentally ill and dangerous in the community.” And they got a prison psychiatrist to interview him, and the psychiatrist wrote a report, and they held a parole violation hearing<sup>35</sup> in a little room in the prison. Parole in California is for up to three years,<sup>36</sup> but he never got out on parole for three years. They just violated his parole for one-year periods based on the report of the psychiatrist who, of course, had preordained what the result was going to be.<sup>37</sup>

Curiously, I am sort of a manic to prepare these cases. I went and looked at every file in preparing for this first parole violation hearing to see what kind of evidence there was besides the report of the psychiatrist. This psychiatrist had written a memo to his own file about the interview that he conducted with my client. It was an all-day interview at a prison out in Chino, and he took a break for lunch. The memo to the file said, “I received a telephone call from the Director of Corrections in California who wanted to know how my interview with this poster boy was coming. I let him know that we were

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30. See *id.* §§ 3000, 3057; CAL. CODE REGS. tit. 15, § 2616(a)(7) (1997); *In re Naito*, 186 Cal. App. 3d 1656, 1660-61, 231 Cal. Rptr. 506, 508 (1986).

31. See CAL. WELF. & INST. CODE § 5150 (West 1984).

32. See *id.* §§ 5226, 5302 (West 1984).

33. See *id.* § 5303 (West 1984).

34. See *Gibson*, 204 Cal. App. 3d at 1442, 252 Cal. Rptr. at 66.

35. This hearing is also known as a “psychiatric return hearing.”

36. See CAL. PENAL CODE § 3000 (West 1982 & Supp. 1998).

37. See CAL. CODE REGS. tit. 15, § 2646(d) (1997); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (due process requires conditional right to counsel at parole revocation hearing); *Morrissey v. Brewer*, 408 U.S. 471, 487-89 (1972) (due process requires procedural protection at parole revocation hearing, including notice of charges, right to present evidence and confront adverse witnesses and a written summary of the decision); *In re Love*, 11 Cal. 3d 179, 185, 520 P.2d 713, 716, 113 Cal. Rptr. 89, 92 (1974) (due process requires conditional right to counsel at parole revocation hearing).



having a good conversation and I was going to write my report based upon what I thought was appropriate."<sup>38</sup> This individual spent his entire parole period in a hospital, in a prison. He did his time in prison first—he did not get any treatment there. There really is no treatment in prison for sexually violent predators.<sup>39</sup> He would have to be discharged under California law because it was a determinate sentence, and parole ends after a period of time.<sup>40</sup> He did not qualify as a mentally disordered offender because not even the state psychiatrist had ever diagnosed him with anything under the DSM that qualified as anything other than an anti-social personality.<sup>41</sup> Governor Wilson saw this loophole that we had in California and that is where the Sexually Violent Predator Law came in. In California there is a much broader definition of the person who is a sexually violent predator.<sup>42</sup> He was going to be discharged from parole on January 15, 1996, which is right after the law went into effect.<sup>43</sup>

I had another client whose name was also on the front page of a lot of newspapers, and his parole period ended the middle of December 1995. They did not have the ability to do anything with him because the definition in the sexually violent predator law has always been connected with being in prison or on parole.<sup>44</sup> It really is not necessary—and probably, to not be subject to challenges, it would be even better if the laws were drafted broadly to apply to the public and not just to people who are in prison or on parole.<sup>45</sup> Curiously

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38. Memorandum from Dr. Barry Bass to James Gomez, California Director of Corrections regarding Christopher Hubbart (Mar. 16, 1994) (on file with author).

39. See letter from Dr. Nadium Khoury, Assistant Deputy Director Health Care Policy, California Department of Corrections, to Shanti Bright, Prison Law Office (Aug. 13, 1997) (on file with author).

40. The maximum period of parole for the typical determinately-sentenced prisoner is three years. See CAL. PENAL CODE § 3000 (West 1982 & Supp. 1998).

41. See *id.* § 2962(a) (West 1982 & Supp. 1998) (stating that the term "severe mental disorder" does not apply to personality disorders).

42. See CAL. WELF. & INST. CODE § 6600 (West Supp. 1998).

43. See *id.* §§ 6600-6608 (West Supp. 1998) (effective Jan. 1, 1996).

44. See *id.* §§ 6600(a), 6601(a) (West Supp. 1998).

45. The pertinent provisions of the Kansas law Justice Thomas refers to in *Hendricks* provide:

When it appears that a person may meet the criteria of a sexually violent predator as defined in K.S.A. 59-29a02 and amendments thereto, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team established in subsection (d), 90 days prior to:

(1) The anticipated release from total confinement of a person who has been convicted of a sexually violent offense, except that in the case of persons who are returned to prison

enough, if you read the Kansas law at issue in the *Hendricks* case, there is a provision in it that requires the jury to make a special finding that the individual is a sexually violent predator<sup>46</sup> but no requirement that the person presently be serving a prison sentence or presently be on parole, as opposed to the California law which does have that requirement.<sup>47</sup> And that, of course, makes it sound much, much more like punishment in California than in Kansas—although I expect to lose my argument in front of the California Supreme Court also just because the client base is not a particularly popular one. So what we have done in California is much more “Machiavellian” than the SVP law. We have taken these individuals and turned their parole period into another part of the punishment under the guise of treatment.

I have another case going on that is related to this discussion. It is a class action in federal court about whether or not it is a violation of equal protection or due process to hold a psychiatric return hearing without the procedural protections of a jury trial and a higher burden of proof and without finding a violation of a condition of parole.<sup>48</sup> It is really much more like a civil commitment without any

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for no more than 90 days as a result of revocation of postrelease supervision, written notice shall be given as soon as practicable following the person's readmission to prison;

(2) release of a person who has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial pursuant to K.S.A. 22-3305 and amendments thereto;

(3) release of a person who has been found not guilty by reason of insanity of a sexually violent offense pursuant to K.S.A. 22-3428 and amendments thereto; or

(4) release of a person who has been found not guilty of a sexually violent offense pursuant to K.S.A. 22-3428, and amendments thereto, and the jury who returned the verdict of not guilty answers in the affirmative to the special question asked pursuant to K.S.A. 22-3221.

KAN. STAT. ANN. § 59-29a03(a) (1994 & Supp. 1996).

According to Justice Thomas, the Kansas law only uses prior criminal conduct, “solely for evidentiary purposes . . . to demonstrate that a ‘mental abnormality’ exists or to [show] . . . future dangerousness . . . [T]he Kansas Act does not make a criminal conviction a prerequisite for commitment [since those] absolved of criminal responsibility may nonetheless be subject to confinement . . .” *Hendricks*, 117 S. Ct. at 2082.

46. See KAN. STAT. ANN. § 59-29a03(a)(4) (1994 & Supp. 1996); *Hendricks*, 117 S. Ct. at 2077.

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

48. See *Hubbart v. Nielsen*, No. CIV S-95-1129 (E.D. Cal. filed June 20, 1995). For other cases related to this, see *Baxstrom v. Herold*, 383 U.S. 107, 110-15 (1966) (holding New York civil commitment statute denied prisoner equal protection because it allowed jury review and a judicial determination of danger-

treatment. In California, part of the pleadings in my case, we were lucky enough to receive a response to an innocent inquiry to the prison system about what kind of treatment they provide to prisoners who are sexually violent risk predators while they are in prison being punished or on parole. Of course, the answer is none, and that was the answer that we got in a letter from the Chief Medical Officer for the prison system, and we attached that as part of our pleadings in the California Supreme Court.<sup>49</sup> It is sort of an interesting problem that we have in California.

The other point that I wanted to raise in this discussion is that these laws where we are going to lock these people up either through parole violations or through court proceedings, they basically rely on the testimony of experts. In the parole violation settings there is just one expert from the state. The answer is preordained. They normally do not even let us present our own expert, which is probably a violation of due process.<sup>50</sup> But by the time we get a court to look at it, the time for the violation is up and the issue becomes moot,<sup>51</sup> so it is very difficult to deal with it. With these SVP law cases there is a jury trial and the state has experts.<sup>52</sup> If the person is indigent, he has the right to ask the state to appoint experts.<sup>53</sup> Basically, what you come down to is whether or not mental health experts can predict future violence in these areas.<sup>54</sup> The question I raise is: Should we be turning our commitment systems into areas where we are basically turning over the decision to mental health experts about predicting future violence—unless I am being particularly naive—and really what is happening here is that these people are just being locked up because of what they did in the past. Of course, if that is what it is, then maybe we should just be more honest and punish people under the indeterminate sentence law for the rest of their lives for whatever

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ousness to those subject to civil commitment, except mentally ill offenders) and *Gibson*, 204 Cal. App. 3d at 1435-43, 252 Cal. Rptr. 61-67 (holding California civil commitment statute denied prisoner equal protection because it required proof of future dangerousness as to all persons subject to involuntary commitment, except mentally disordered offenders).

49. See Khoury, *supra* note 38.

50. See CAL. CODE REGS. tit. 15, §§ 2668, 2677 (1997); *Morrissey*, 408 U.S. at 479-80; *In re Johnson*, 35 Cal. App. 4th 160, 169-72, 41 Cal. Rptr. 2d 449, 455-57 (1995).

51. See CAL. PENAL CODE § 3057 (West 1982 & Supp. 1998) (providing that the maximum parole violation is one year).

52. See CAL. WELF. & INST. CODE § 6605(d) (West Supp. 1998).

53. See CAL. PENAL CODE § 3057 (West 1982 & Supp. 1998).

54. See *People v. Murtishaw*, 29 Cal. 3d 733, 767-75, 631 P.2d 446, 466-71, 175 Cal. Rptr. 738, 758-63 (1981).

they did.

Thank you.

#### Question and Answer Session

Q: One of the things you mentioned was the old MDSO that got thrown on the scrap heap last year because of his punishment, one of the criteria on the MDSO was that you could not identify someone as an MDSO unless they were amenable to treatment. That was a requirement to be labeled an MDSO. And one of the issues that I want to deal with is the treatment. If that was such an essential point, how did that get so lost in all of this?

A: I think what has happened—I do not know if my point is relatively clear here—but I think what has happened here is these are political decisions that are being made to incapacitate a small group of individuals probably for the rest of their lives for whatever they did. If you read Justice Thomas's reasoning in the *Hendricks* case, he basically is up front and says it does not matter whether or not the person is amenable to treatment.<sup>55</sup> I think what the legislatures are realizing is that if they require amenability to treatment, they are not going to be able to lock up people who mental health professionals would say are not amenable to treatment. Or there is no such treatment that is available for these people, which, to me, just puts it back to the question I am suggesting which is: if what we are just going to do is punish people for what they did in the past, then let us just say that and forget about involving the mental health system into what we are doing with these individuals.

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55. See CAL. WELF. & INST. CODE § 6605(d) (West Supp. 1998); *supra* note 18.

