CHAPTER THREE

PUNISHMENT AND SENTENCING

In the last decade, the United States has experienced a shift from indeterminate to determinate sentencing. This has resulted in many states creating "Three Strikes" laws designed to keep serious repeat offenders away from the rest of society. California has its own version of the "Three Strikes Law," and it was recently upheld in a battle that went all the way to the U.S. Supreme Court. See Chapter 2 Case Study. [1]

PUNISHMENT

In order to actually be a crime in California, there must be the combination of legislated or statutory language clearly prohibiting or restricting the behavior (act or omission) and some form of punishment or sanction attached to it. Because there is a restraint placed on one's liberty, the legal umbrella of the 4th Amendment covers this issue since it addresses:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In this context, a detention, arrest or imprisonment, is a definite restriction of one's personal liberty to move about freely. In the first quarter of 2006, the total population of California's Department of Corrections and Rehabilitation population were 309,476. Of those, 170,475 were actually incarcerated. Interestingly, at the same time we are seeing dramatic drops in crime rates; we see increases in incarceration rates. This is still a significant number of Californians who are either incarcerated, or on parole. The cost to maintain an inmate in California prisons is $34,150 per inmate. In relation to the total population in prisons, there has been a dramatic increase in extensive overtime pay for correctional officers. Since there are approximately 54,868 people currently employed in the CDCR, including 47,256 in Institutions, 3,067 in Parole, and 4,545 in Administration (with about 33,428 sworn peace officers), the result is a powerful political lobby. The cost to maintain Parolees are just over $4,000 per year. [2]

California law PC 15, clarifies both the definitions of crime and the possible punishments:

PC 15 Definition of Crime or Public Offense
A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. *Death*
2. *Imprisonment*
3. *Fine*
4. *Removal from office*
5. *Disqualification to hold* and enjoy any office of honor, trust or profit in this State

[1] Stogner v. California, 539 U.S. 607 (2003) http://laws.findlaw.com/us/000/01-1757.html
[2] http://www.cdcr.ca.gov/DivisionsBoards/AOAP/FactsFigures.html

PURPOSE OF PUNISHMENT

While the general purpose of punishment remain retribution, deterrence, rehabilitation, incapacitation and restoration, the bulk of the punishments remain, in California, incarceration or incapacitation. In other words, to keep them away from the rest of us as long as possible. However, this dilemma always resurfaces when the inmate is eventually returned to the community, which most will do. It is here that restoration or rehabilitation comes into focus. For failing to not just prepare them to return to society is not enough, as there are many other issues to be considered, not the least of which is public safety.

The recent developments in pedophile cases, for example, have promoted a new industry – just where do you put convicted pedophiles when they are released from prison? And, what are communities to do when no one wants them within asteroid distance from their neighborhoods? The advent of "Megan's Law" websites that can locate convicted pedophiles in seconds, has created a virtual reality of frightened parents with their computers set to local police websites tracking known pedophiles in the near vicinity of their homes.

SVP's – Sexually Violent Predators

In a recent San Diego case, a judge determined that a formerly incarcerated sexually violent predator, Douglas Badger, was suitable for outpatient community treatment but the community and law enforcement outcry was so great that Badger will have to be housed (through an agreement with the State Department of Mental Health) within the grounds of the local State Prison in the Otay Mesa area of San Diego County. The location is on State of California land on Richard J. Donovan State Prison grounds outside of the locked gates of the prison structure itself. This location is within the jurisdiction of the San Diego County Sheriff's Department (SDSD), Imperial Beach Sheriff's Station.

In a related, earlier case, pedophile Mathew Hedge pled guilty to child molestation against four children in 1989. He was sentenced to 12 years in prison. Investigative reports indicated he had also exposed himself to several children at an elementary school on two occasions. After serving his prison sentence, Hedge was civilly committed as a "Sexually Violent Predator" (SVP) to the Atascadero State Hospital in 1998, where he has been participating in the Sexually Violent Predator treatment program. He was recommitted for subsequent two-year intervals as an SVP. State laws require that the final phase of his SVP treatment be conducted in the community. Hedge remains in Atascadero State Hospital until the Court makes a ruling on an appropriate placement for Hedge in the community.

What this points out is the uncertainty of what to do with offenders, particularly pedophiles or other sex offenders, (who will literally always run the risk of re-offending,) but who have served out the term of their sentence. Many states, including California, use the recent development of "Civil Commitments," in an attempt to protect the community after they have served their sentence, but before they are placed in the community.

The California Welfare and Institutions Code 1608 states: *"(a) Upon the filing of a request for revocation (of Parole) under Section 1608 or 1609 and pending the court's decision on revocation, the person subject to revocation* ***may be confined*** *in a facility designated by the community program director when it is the opinion of that director that the person will now be a danger to self or to another while on outpatient status and that to delay confinement until the revocation hearing would pose an imminent risk of harm to the person or to another…"*

The California Department of Corrections and Rehabilitation (CDCR) (a recent name change included *Rehabilitation*) states their mission is ***"To improve public safety through evidence-based crime prevention and recidivism reduction strategies."***

SENTENCING

Despite the challenges and concern by both citizens and legislature to "regulate" how best to incarcerate those who break the law, with calls for reform and rehabilitation, the California legislature, (perhaps more in frustration after seeing what hasn't worked in the past) and after nearly 30 years after California policy-makers declared that the purpose of imprisonment was punishment, recently changed its philosophy "that the purpose of imprisonment for crime is punishment," to include the preparation for successful re-entry into the community.

A "Little Hoover Commission" report revealing that of over 125, 0000 paroled inmates yearly, 70 percent returned within only 18 months for new crimes or parole violations. Unfortunately, only one in five completed their parole supervision -- half the success rate nationally and worse than any other state except Utah.[3]

Determinate vs. Indeterminate Sentencing

The legislature goes on to say that this purpose (punishment) is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. This is to eliminate disparity and to ensure uniformity of sentences by establishing ***determinate sentences*** fixed by statute in proportion to the seriousness of the offense. It does state, "…as determined by the Legislature to be imposed by the court with specified discretion." This allows for judicial discretion vs. a strict, hard-line sentencing mandate.

However, the statute does say that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court ***shall order imposition of the middle term***, unless there are circumstances in aggravation or mitigation of the crime. PC 1170 (b)

A judge may sentence an individual convicted of a crime to imprisonment, (state prison or jails) fines, probation, (pre-trial diversions, for example,) or intermediate sanctions. Judges no longer impose the death penalty due to a recent Supreme Court decision, requiring juries and a bifurcated process (Trial and separate sentencing session).

Indeterminate sentencing is one where there is no fixed or definite time frame, within a maximum range. For example, if one were sentenced to "life with possibility of parole," you would have no idea of when you would get out, if at all. Eligibility for parole is determined by the California Board of Parole Hearings (formerly Board of Prison Terms (BPT)): The Board of Parole Hearings conducts parole and parole revocation hearings for prisoners sentenced to state prison for a term of life with the possibility of parole and various custody hearings for mentally disordered sex offenders. They also conduct revocation hearings for parolees who violate conditions of parole. Additionally, the Board makes recommendations to the Governor regarding applicants for pardon and executive clemency. They also oversee the Civil Addict Program. The Board conducts outpatient status/parole hearings, annual reviews, hearings of alleged outpatient/parole violations, and may recommend discharge from the program.

[3] http://info.sen.ca.gov/pub/03-04/bill/asm/ab_0851-0900/ab_854_cfa_20040112_105725_asm_comm.html

SENTENCING GUIDELINES

In Ring v. Arizona, 536 U.S. 584 (2002) the Supreme Court ruled that a jury, not a judge, must determine whether a capital defendant gets the death penalty, a decision that could ultimately take more people off death row than any other ruling by the court in three decades. By a vote of 7-2, the court ruled that Arizona's death-sentencing law violates the constitutional guarantee of a jury trial. Under that law, judges alone decided whether the crime included "aggravating" factors, such as extreme brutality, that call for capital punishment. [4]

To demonstrate, consider:

- *California Rules of Court: Rule 4-421. Circumstances in Aggravation*
  - ***Aggravation*** *or "circumstances in aggravation" means facts which justify the imposition of the maximum, or upper level prison term.*
- *California Rules of Court: Rule 4-423. Circumstances in Mitigation*
  - ***Mitigation*** *or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.*
  - ***Enhancement.*** *The facts giving rise to an enhancement, which is an increase in a sentence, based on specific circumstances provided for in certain statutes, such as a "hate crime" enhancement or a "weapons" enhancement. This adds more time onto the sentence originally set, thus "enhances" the original sentence.*

In 2005, the California Supreme Court (People v. Black, 05 C.D.O.S. 5326) upheld the state sentencing guidelines, ruling that allowing judges to impose a discretionary range of sentences for various crimes did not give them too much power. In a 6-1 ruling, the court, led by Chief Justice Ronald George, said trial judges' discretion in applying upper-term sentences for criminal defendants based on aggravating factors did not violate their right to a fair trial.

This case essentially stabilizes thousands of prisoners' sentences that might otherwise have been contested. Two earlier U.S. Supreme Court rulings, (Blakely 2004)[5] where the court made it unconstitutional for judges to increase sentences beyond the statutory maximum based on factors decided by a sentencing judge, rather than a jury and in U.S. v. Booker, 125 S. Ct. 738,[6] the court extended that reasoning to the federal system in U.S., calling the sentencing guidelines ***advisory***, not mandatory.

Today, ***determinate*** has replaced ***indeterminate*** sentencing as the primary approach in the United States. This reflects a shift from rehabilitation to retribution, deterrence, incapacitation and treatment of offenders. Sentencing guidelines provide for a presumptive sentence that reflects the gravity of the offense and offender history. There may be a downward or upward departure from this presumptive sentence based on mitigating or aggravating factors. Recent Supreme Court decisions have resulted in these guidelines being considered advisory rather than binding.

[4] http://www.supreme.state.az.us/opin/aaastateazvring.htm
[5] Blakely v. Washington, No. 02-1632, 124 S. Ct. 2531, http://laws.findlaw.com/us/000/02-1632.html
[6] U.S. v. Booker, http://www.law.cornell.edu/supct/html/04-104.ZS.html

California Sentencing Issues

California Penal Code, Chapter 4.5. regulates **"Trial Court Sentencing."**
Article 1 PC 1170. Initial Sentencing - Legislative Findings; Imprisonment; Uniformity of Sentences

In the California Rules of (the) Court, Rule 4.433. The following issues are to be considered at time set for sentencing:
(a) In every case, at the time set for sentencing pursuant to section 1191, the sentencing judge shall hold a hearing at which the judge shall:

(1) Hear and determine any matters raised by the defendant pursuant to section 1201.
(2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel.

(b) If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper or lower term if probation is later revoked, based upon evidence admitted at the trial.
(c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge shall:

(1) Hear evidence in aggravation and mitigation, and determine, pursuant to section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.
(2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken.
(3) Determine whether the sentences shall be consecutive or concurrent if the defendant has been convicted of multiple crimes.
(4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447.
(5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

TRUTH IN SENTENCING

"Truth in sentencing" requires that prisoners serve a significant percentage of their sentence. Generally, "truth" measures address the criminal sentence imposed by the court and the actual time an offender serves in prison. The federal government now provides funds to construct prisons to states that guarantee that prisoners serve as least ***eighty-five percent*** of their sentence. To assure that offenders serve a large portion of their sentence, the U.S. Congress authorized funding for additional State prisons and jails through the Violent Crime Control and Law Enforcement Act of 1994.

For example, in California's "Truth in sentencing," a ***habitual sexual offender*** is punishable by imprisonment in the state prison for 25 years to life. In no case shall any person who is punished under this section be released on parole prior to serving at least ***85 percent of the minimum term of 25 or 15 years in the state prison***. *PC 667.71. Habitual Sex Offender Defined; Penalty Enhancements.*

Or, in PC 667.61. Life Sentences; Specified Circumstances
(a) A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified (Sexual assaults/rape/child abuse) in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and ***shall not be eligible for release on parole for 25 years except for certain conditions.***

VICTIMS' RIGHTS

In 1965, California implemented the Victims of Crime Program to allow victims to be reimbursed for losses suffered while recovering from the trauma of a violent crime. The concept of giving the crime victims a voice in the justice process was realized with the introduction of the first victim impact statement in 1976. In 1979, the Legislature established funding for rape crisis and victim/witness centers to provide support to victims. In 1982, Proposition 8, The Victims' Bill of Rights, became law in California. This legislation recognized the rights of victims in criminal justice proceedings and provided victims the right to speak at sentencing and parole hearings. The passage of Proposition 115, known as the Crime Victims' Justice Reform Act in 1990, benefited crime victims by reducing the number of times crime victims must testify, promoted speedy trials, increased sentences and punishment, and required reciprocal discovery of evidence

EIGHTH AMENDMENT

The Eighth Amendment to the United States Constitution prohibits ***cruel and unusual punishment.*** This clause limits the methods employed to inflict punishment; restricts the "amount of punishment" that may be imposed; and prohibits the criminal punishment of certain acts. The Eighth Amendment is not limited to punishments that were prohibited at the time of the adoption of the Eighth Amendment and draws its meaning from evolving standards of decency. While you may disagree, the death penalty is not prohibited. Capital punishment, however, is restricted to murder in which aggravating outweigh mitigating factors. The administration of the death penalty is subject to various procedures intended to insure that capital punishment is imposed in a proportionate fashion. Courts generally have held that state and ***federal statutes providing for punishment for a "term of years," such as*** "three strikes and you're out laws" and drug offenses are proportionate to the offender's crime. Individuals under the Eighth Amendment are to be punished for their criminal acts rather than for their personal status.

EQUAL PROTECTION

A judge may not base a criminal sentence on a defendant's race, gender, religion, ethnicity or nationality. A defendant seeking to establish that a statute that is "neutral on its face" is violative of equal protection must demonstrate both a discriminatory intent and a discriminatory impact.

Review Questions:

1. Just what is a mitigating factor? What is it used for?
2. What does "truth in sentencing" actually mean?
3. What is a "determinate" vs. "indeterminate" sentence?
4. What is the role of the judge in the sentencing hearing?
5. What did Proposition 8 in California do for the criminal justice system?

Web Resources

- Blakely v. Washington, No. 02-1632, 124 S. Ct. 2531, http://laws.findlaw.com/us/000/02-1632.html
- California Parole Board, http://www.cdcr.ca.gov/DivisionsBoards/AOAP/FactsFigures.html
- California Senate –AB 854, http://info.sen.ca.gov/pub/03-04/bill/asm/ab_0851-0900/ab_854_cfa_20040112_105725_asm_comm.html
- http://www.oyez.org/oyez/resource/case/1550/
- http://www.supreme.state.az.us/opin/aaastateazvring.htm
- Stogner v. California, 539 U.S. 607 (2003) http://laws.findlaw.com/us/000/01-1757.html
- U.S. v. Booker, http://www.law.cornell.edu/supct/html/04-104.ZS.html

Case Study #1: Stogner v. CA. 539 U.S. 607 (2003)

Discussion Question: Does the Ex Post Facto Clause bar the application of California's retroactive extension of the statutes of limitations for sexual offenses committed against minors? Keep in mind that this case was not about his “guilt” for abusing children, but whether or not the state (California) could basically enhance the sentences based on new statutory requirements for sex offenders.

Facts
In 1993, California enacted a new criminal statute of limitations permitting prosecution for sex-related child abuse where the prior limitations period has expired if the prosecution is begun within one year of a victim's report to police. In 1998, Marion Stogner was indicted for sex-related child abuse committed between 1955 and 1973.

Issue
Without the new statute allowing revival of the State's cause of action, California could not have prosecuted Stogner. Stogner moved to dismiss the complaint on the ground that the Ex Post Facto Clause forbids revival of a previously time-barred prosecution. The trial court agreed, but the California Court of Appeal reversed. The trial court denied Stogner's subsequent dismissal motion, in which he argued that his prosecution violated the Ex Post Facto and Due Process Clauses. The Court of Appeal affirmed.

Decision
Yes. In a 5-4 opinion delivered by Justice Stephen G. Breyer, the Court held that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. The Court reasoned that the features of the law produce the kind of retroactivity that the Constitution forbids by inflicting punishment where the party was not, by law, liable to any punishment. "After...the original statute of limitations had expired,...Stogner was not 'liable to any punishment,'" wrote Justice Breyer. "California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that...it 'inflicted punishment' for past criminal conduct that...did not trigger any such liability." In his dissent, Justice Anthony M. Kennedy argued, "A law which does not alter the definition of the crime but only revives prosecution does not make the crime 'greater than it was, when committed.'" [7]

[7] http://www.oyez.org/oyez/resource/case/1550/

Case Study #2: People v. Superior Court (Cain), 49 Cal. App. 4th 1164 (1996)

Discussion Question: Was the “Sexual Predator” act also an ex-post facto law?

Facts

The Act became law in 1995 as a legislative response to the problem of sexually violent **predators.** In the Act's uncodified purpose clause, "The Legislature finds and declares that a small but extremely dangerous group of sexually violent **predators** . . . have diagnosable mental disorders [and] can be identified while they are incarcerated. These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence. . . . 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. [P] . . . It is the intent of the Legislature that these individuals be committed and treated for their disorders only as long as the disorders persist and not for any punitive purposes." (Stats. 1995, ch.763, § 1, No. 10 West's Cal. Legis. Service, p. 4611.)

The Act defines a sexually violent **predator** in terms of both prior sexual offenses and present mental illness. A **predator** is a person who (1) has been convicted of a sexually violent offense against two or more victims and has received a determinate prison sentence, and who (2) has a diagnosed mental disorder that makes the person "a danger to the health and safety of others in that it is likely that [the person] will engage in sexually violent criminal behavior." (§ 6600, subd. (a).) n2

A screening process to determine whether an inmate is a **predator** begins at least six months prior to the scheduled date for release from prison. (§ 6601, subds. (a) & (b).) n3 If the Director of the Department of Corrections determines that a prisoner may be a **predator,** the director must refer the prisoner for screening and psychiatric evaluation by two practicing psychiatrists or psychologists designated by the Department of Mental Health. (§ 6601, subds. (a), (b), (c) & (d).) If both evaluators conclude that the prisoner "has a diagnosed mental disorder such that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody" (§ 6601, subd. (d)), the Department of Mental Health transmits a request for a petition for commitment to the county in which the prisoner was convicted. (§ 6601, subds. (d), (h) & (i).) n4 Copies of the evaluation reports and other supporting documents are sent to that county's district attorney or county counsel. (§ 6601, subds. (d) & (i).) If the attorney for the county concurs in the request, a petition for commitment is duly filed in that county's superior court. (§ 6601, subd. (i).)

Upon the filing of the petition, the superior court is obligated to commence a process to test the petition for probable cause. The court "shall" review the petition for commitment and "shall" determine whether "there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release. (§ 6602.) The court makes the probable cause determination after a hearing at which the alleged **predator** has the right to the assistance of counsel. (§ 6602.) If the court finds no probable cause, the court must dismiss the petition and the prisoner reports to parole. (§ 6602.) If the court finds probable cause, the court sets the petition for trial on the issue whether the person "Is, by reason of 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 release. (§ 6602.) The alleged **predator** must remain in custody in a secure facility until trial is completed. (§ 6602.)

At trial, the alleged **predator** is entitled to a jury, to the assistance of counsel and experts, to appointed counsel if indigent, and to access to relevant medical and psychological reports. (§ 6603.) The jury (or, if waived, the court) must determine beyond a reasonable doubt whether the alleged **predator** is in fact a sexually violent **predator.** (§ 6604.) If there is a reasonable doubt on the part of the trier of fact, the prisoner is released at the expiration of his or her sentence. If the prisoner is found to be a **predator,** he or

she must be civilly committed to the custody of the Department of Mental Health for two years, subject to annual review and extension of commitment if the diagnosed mental disorder, and consequent danger to the community, persists. (§§ 6604 & 6605.) The committed **predator** has the right to petition for conditional release. (§ 6608.) The committed **predator** also has a right to treatment. (§ 6606, subd. (a).) However, "Amenability to treatment is not required for a finding that any person is [a sexually violent **predator**], nor is it required for treatment of that person." (§ 6606, subd. (b).) The right to treatment does not mean such treatment must be potentially successful. (§ 6606, subd. (b).)

In the matters now before us, real parties were evaluated pursuant to section 6601 as potential **predators,** and petitions for commitment were duly filed in respondeat superior court. Real parties demurred to the petitions on the ground the Act was unconstitutional. Real parties raised several arguments, but the trial court limited itself to the issue of whether the Act is an ex post facto law by increasing the period of physical confinement beyond the criminal sentence. The court declared the Act unconstitutional because it did not require amenability to treatment as a precondition to commitment. The court apparently reasoned that if a sexually violent **predator** was not amenable to treatment, his continued confinement beyond the length of his criminal sentence was not for curative purposes but punitive, and therefore increased punishment beyond that enforceable at the time the underlying crime was committed.

The People had no information regarding amenability of treatment, no doubt because amenability is specifically irrelevant, by statute, to the **predator** determination. Accordingly, the superior court dismissed the petitions for commitment. The People sought writ review. We stayed the orders of dismissal and directed the superior court to proceed, without regard to amenability to treatment, with the probable cause determinations required by the Act. (§§ 6601.5 & 6602.) We solicited opposition from real parties and issued an order to show cause in lieu of an alternative writ. Having heard oral argument, we uphold the Act and issue the peremptory writ.

Issue
The People contend the superior court erred by accepting real parties' constitutional challenge to the Act. We agree, and conclude the Act is ***not*** an ex post facto law.

The Act, like all legislation, is presumed constitutional and may not be struck down in the absence of clear and unmistaken constitutional infirmity. (People v. Jackson (1980) 28 Cal. 3d 264, 317, 168 Cal. Rptr. 603, 618 P.2d 149, cert. den. sub nom. Jackson v. California (1981) 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232.) If the Act suffers from the infirmity of being an ex post facto law, it must do one of three things: "Punish[] as a crime an act previously committed, which was innocent when done; . . . make[] more burdensome the punishment for a crime, after its commission, or . . . deprive[] one charged with crime of any defense available according to law at the time when the act was committed, . . ." (Collins v. Youngblood (1990) 497 U.S. 37, 42, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (Collins), quoting Beazell v. Ohio (1925) 269 U.S. 167, 169-170, 70 L. Ed. 216, 46 S. Ct. 68.) n7

An ex post facto law is not one which merely "disadvantages" the defendant retroactively. There has been some confusion in the law, traceable to the discussion of "disadvantage" in three decisions of the United States Supreme Court, including the oft-cited Weaver v. Graham (1981) 450 U.S. 24, 67 L. Ed. 2d 17, 101 S. Ct. 960. Many courts and attorneys, including counsel for real parties herein, contend that retroactive "disadvantage" is a component of an ex post facto law. The United States Supreme Court, however, has corrected its own course deviation and has firmly rejected any focus on "disadvantage" in an ex post facto analysis. "After Collins [supra, 497 U.S. 37], the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." (Cal. Dept. of Corrections v. Morales (1995) U.S. , [131 L. Ed. 2d 588, 595, fn. 3,115 S. Ct. 1597, 1602, fn. 3], italics original (Morales); see Pro-Family Advocates v. Gomez (1996) 46 Cal.

App. 4th 1674, 1683.)

The People contend the Act cannot be an ex post facto law because it is neither retroactive nor penal, and we agree. The Act does not retroactively increase the sentence for real parties' original sex offenses: the Act imposes a mental health commitment for a present diagnosed mental illness which makes it likely the **predator** will commit future sexually violent offenses. The Act specifically states that, at trial, "Jurors shall be admonished that they may not find a person a sexually violent **predator** based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a).) In other words, a jury cannot impose a civil commitment solely based on past criminal conduct. In upholding a similar statute as not an ex post facto law, the Supreme Court of Washington ruled "The sexually violent **predator** statute is not concerned with the criminal culpability of petitioners' past actions. ***Instead, it is focused on treating petitioners for a current mental abnormality, and protecting society from the sexually violent acts associated with that abnormality."*** (In re Young (Wash. 1993) 122 Wash. 2d 1, 857 P.2d 989, 997.)

Likewise the Act is not penal. The Act imposes a civil commitment for treatment of a diagnosed mental disorder. Mental health commitments are generally considered to be not penal, but curative and civil. (See, e.g., Conservatorship of Hofferber (1980) 28 Cal. 3d 161, 181-182, 167 Cal. Rptr. 854, 616 P.2d 836; People v. Juarez (1986) 184 Cal. App. 3d 570, 575, 229 Cal. Rptr. 145; Stickel v. Superior Court (1982) 136 Cal. App. 3d 850, 853, 186 Cal. Rptr. 560.) In any given specific case the question whether a statute is criminal or civil is a matter of statutory interpretation. (See United States v. Ward (1980) 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636.)

…We note in closing that the People are free to initiate commitment proceedings under the Lanterman-Petris-Short Act (Welf. & Inst. Code, div. 5, pt. 1, ch. 1, §§ 5000 et seq.) against any state prisoner due to be released into the community. The Lanterman-Petris-Short Act provides for the civil commitment of a person who, because of a mental disorder, is gravely disabled or a danger to himself or others (§ 5150); the statute has passed constitutional muster. (See Thorn v. Superior Court (1970) 1 Cal. 3d 666, 83 Cal. Rptr. 600, 464 P.2d 56; 3 Witkin, Cal. Procedure (3d ed 1985) Actions, § 31, pp. 61-62.) The sexually violent **predator** proceedings are simply an extension of the police power of civil commitment into a narrower, more well-defined context for both the protection of society and the treatment of a mentally disordered criminal with probable proclivities to reoffend. Rather than await a reoffense and offer condolences to the family of the victim, the People are not only ensuring that predatory, violent sexual offenders be removed from society, but at the same time ensuring that they receive whatever treatment psychiatry can offer for their maladies. This seems to us an entirely reasonable approach to those that prey upon the innocent.

Decision

The Sexually Violent **Predators** Act is ***not an ex post facto law***. Accordingly, let a peremptory writ of mandate issue commanding respondeat superior court to set aside its orders dismissing the petitions for commitment, and to proceed further with the commitment proceedings under the Act as constitutional legislation.

Answers to Review Questions
Chapter 3

1. Just what is a mitigating factor? What is it used for?
A. Mitigation or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

2. What does “truth in sentencing” actually mean?
*A. **“Truth in sentencing”** requires that prisoners serve a significant percentage of their sentence. Generally, "truth" measures address the criminal sentence imposed by the court and the actual time an offender serves in prison. The federal government now provides funds to construct prisons to states that guarantee that prisoners serve as least **eighty-five percent** of their sentence. To assure that offenders serve a large portion of their sentence, the U.S. Congress authorized funding for additional State prisons and jails through the Violent Crime Control and Law Enforcement Act of 1994. For example, in California’s “Truth in sentencing,” a **habitual sexual offender** is punishable by imprisonment in the state prison for 25 years to life. In no case shall any person who is punished under this section be released on parole prior to serving at least **85 percent of the minimum term of 25 or 15 years in the state prison**. PC 667.71.Habitual Sex Offender Defined; Penalty Enhancements.*

3. What is a “determinate” vs. “indeterminate” sentence?
***A. Determinate sentences** are fixed by statute and eliminate disparity and ensure uniformity of sentences. **Indeterminate sentencing** is one where there is to fixed or definite time frame, within a maximum range.*

4. What is the role of the judge in the sentencing hearing?
A. Their role includes:
(1) Hear and determine any matters raised by the defendant pursuant to section 1201.
(2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel.

> *(b) If the imposition of sentence is to be suspended during a period of probation after a conviction by trial, the trial judge shall make factual findings as to circumstances which would justify imposition of the upper or lower term if probation is later revoked, based upon evidence admitted at the trial.*
> *(c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of imprisonment is to be suspended during a period of probation, the sentencing judge shall:*
>
> > *(1) Hear evidence in aggravation and mitigation, and determine, pursuant to section 1170(b), whether to impose the upper, middle or lower term; and set forth on the record the facts and reasons for imposing the upper or lower term.*
> > *(2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken.*
> > *(3) Determine whether the sentences shall be consecutive or concurrent if the defendant has been convicted of multiple crimes.*
> > *(4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447.*
> > *(5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.*

5. What did Proposition 8 in California do for the criminal justice system?
A. In 1982, Proposition 8, The Victims' Bill of Rights, became law in California. This legislation recognized the rights of victims in criminal justice proceedings and provided victims the right to speak at sentencing and parole hearings. The passage of Proposition 115, known as the Crime Victims' Justice Reform Act in 1990, benefited crime victims by reducing the number of times crime

victims must testify, promoted speedy trials, increased sentences and punishment, and required reciprocal discovery of evidence.