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THE MDSO—UNCIVIL CIVIL COMMITMENT

American society both fears and is fascinated by sex.¹ The supposedly aberrational activities of "sex offenders" have resulted in innumerable attempts at societal protection. These attempts fall into two major statutory categories:² 1) those statutes defining the various forms of conduct proscribed as sexual offenses, such as rape, pedophilia, or the "infamous crime against nature"³; and, 2) those enactments outlining the medico-legal status known as the sexual psychopath,⁴ sexually dangerous person,⁵ or the mentally disordered sex offender.⁶ California's codes contain both types of statutes, with the former leading to a criminal conviction,⁷ and the latter culminating in a civil commitment.⁸

The controversy over civil commitment has raged for many years between those who deem it a necessary and beneficial adjunct to criminal proceedings⁹ and those who denounce it as punitive and nothing less than preventive detention.¹⁰ This comment examines California's mentally disordered sex offender proceedings, with particular emphasis upon the standard of proof used in the adjudicatory phase, and the overall penal nature of this "civil" commitment.

WHO IS AN MDSO?

Thirty-one states currently have statutes dealing with mentally disturbed sexual offenders.¹¹ California terms such individuals

¹ See the Best Seller List, N.Y. Times Book Review, Oct. 25, 1970, at 69, where three sex oriented books place among the top ten sellers of general books in the country. D. REUBEN, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX* has been on the list for 40 weeks. *Id.*

² R. KORN AND L. MCCORKLE, *CRIMINOLOGY AND PENOLOGY* 158 (1965).

³ CAL. PEN. CODE § 286 (West 1970): "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than one year."

⁴ See generally, D.C. CODE ANN. §§ 22-3501-22-3511 (1951); IND. ANN. STAT. §§ 9-3401-9-3412 (1956); IOWA CODE ANN. §§ 225A-225A.15 (1959).

⁵ ILL. ANN. STAT. ch. 38, §§ 105-1.01-105-12 (1969).

⁶ CAL. WELF. & INST'NS CODE §§ 6300-6330 (West Supp. 1970).

⁷ See, for example, CAL. PEN. CODE §§ 264, 288, 288(a) (West Supp. 1970).

⁸ CAL. WELF. & INST'NS CODE §§ 6316, 6321 (West Supp. 1970).

⁹ See generally, *Minnesota ex rel Pearson v. Probate Court of Ramsay County*, 309 U.S. 270 (1940); *People v. Levy*, 151 Cal. App. 2d 460, 311 P.2d 397 (1957); *In re Moulton*, 96 N.H. 370, 77 A.2d 26 (1950); *People v. Chapman*, 301 Mich. 584, 4 N.W.2d 18 (1942).

¹⁰ *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969) (declaring that commitment of allegedly dangerous persons constituted a form of preventive detention). See also *Specht v. Patterson*, 386 U.S. 605 (1967); *Hill v. Burke*, 422 F.2d 1195 (7th Cir. 1970).

¹¹ ALA. CODE tit. 15, §§ 434-442 (1967); CAL. WELF. & INST'NS CODE §§ 6300-6330 (West Supp. 1970); COLO. REV. STAT. ANN. §§ 39-19-1-39-19-16 (Supp. 1969); D.C. CODE ANN. §§ 22-3501-22-3511 (1963); FLA. STAT. ANN. § 917.12 (Supp. 1970);

“mentally disordered sex offenders,”¹² or MDSO’s. The California Welfare and Institutions Code defines a mentally disordered sex offender as : “Any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others.”¹³ This individual is not legally insane,¹⁴ nor is he always a convicted sex offender.¹⁵ Although MDSO proceedings are only triggered by criminal convictions or juvenile court wardships, the original offense does not have to be of a sexual nature. Individuals convicted of death penalty offenses and those ineligible for probation are excluded from the application of MDSO provisions in California.¹⁶

California civilly commits mentally disordered sex offenders, not for their past criminal convictions, sexual or otherwise, but solely upon the basis of their present status as MDSO’s.¹⁷ An MDSO may be confined until “cured” or until he is no longer a danger to the safety of others.¹⁸

GA. CODE ANN. § 77-539 (1956); IDAHO CODE § 66-317 (1956); ILL. ANN. STAT. ch. 38, §§ 105-1.01-105-12 (1970); IND. ANN. STAT. §§ 9-3401-9-3412 (1956); IOWA CODE ANN. §§ 225A-225A.15 (1959); KAN. STAT. ANN. §§ 62-1534-63-1537 (1959); MASS. ANN. LAWS ch. 123A, §§ 1-11 (1958); MICH. STAT. ANN. §§ 28.964(1)-28.964(12) (Supp. 1969); MINN. STAT. §§ 526.09-526.11 (1969); MO. ANN. STAT. §§ 202-700-202-770 (1949); NEB. REV. STAT. §§ 29.2901-29.2906 (Supp. 1969); N.H. REV. STAT. ANN. §§ 173-A:1-173-A:10 (1969); N.J. STAT. ANN. §§ 2A:164-3-2A:164-13 (1968); N.D. CENT. CODE § 12-30-12 (1963); OHIO REV. CODE ANN. §§ 2947.24-2947.29 (1958); ORE. REV. CODE §§ 137.111-137.117 (1967); PA. STAT. ANN. tit. 19, §§ 1166-1174 (1965); S.D. COMP. LAWS §§ 22-22-9-22-22-10 (Supp. 1967); TENN. CODE ANN. §§ 33-1301-33-1305 (Supp. 1970); UTAH CODE ANN. §§ 77-49-1-77-49-8 (Supp. 1969); VT. STAT. ANN. §§ 18-8501-18-8506 (1969); VA. CODE ANN. §§ 53-278.2-53-278.4 (1950); WASH. REV. CODE §§ 71.06.010-71.06.060 (1957); W. VA. CODE §§ 27-6A-1-27-6A-20 (1966); WIS. STAT. ANN. §§ 975.01-975.17 (1970); WYO. COMP. STAT. ANN. §§ 7-348-7-356 (1967).

¹² Cf. CAL. WELF. & INST’NS CODE §§ 6450-6457 (West Supp. 1970) which outline the procedures for mentally abnormal sex offenders. MASO proceedings occur at the individual’s or a relative’s initiative, in the absence of criminal proceedings. *Id.*

¹³ CAL. WELF. & INST’NS CODE § 6300 (West Supp. 1970).

¹⁴ *Ex parte* Keddy, 105 Cal. App. 2d 215, 218, 233 P.2d 159, 162 (1951). *See also In re* Bevill, 68 Cal. 2d 854, 442 P.2d 679 (1968); *People v. Tipton*, 90 Cal. App. 2d 103, 202 P.2d 330 (1949).

¹⁵ CAL. WELF. & INST’NS CODE § 6302(a) (West Supp. 1970) provides that a conviction of any offense, whether or not a sex offense, may lead to certification to the superior court for MDSO proceedings. *See also In re* Bevill, 68 Cal. 2d 854, 442 P.2d 679 (1968).

¹⁶ CAL. WELF. & INST’NS CODE § 6301 (West Supp. 1970).

¹⁷ *In re* Bevill, 68 Cal. 2d 854, 858, 442 P.2d 679, 681 (1968); *Ex parte* Keddy, 105 Cal. App. 2d 215, 217, 233 P.2d 159, 162 (1951).

¹⁸ *In re* Kramer, 257 Cal. App. 2d 287, 64 Cal. Rptr. 686 (1968). *See also* *People v. Rancier*, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966), which declared that the confinement of an MDSO is not a substitute for the criminal punishment due the offender.

MDSO CIVIL COMMITMENT PROCEDURE

Sections 6300 through 6330 of the California Welfare and Institutions Code outline the procedures for the commitment of alleged MDSO's.¹⁹

A trial judge may institute MDSO actions only after the felony or misdemeanor conviction of an adult offender. He may initiate the proceedings upon his own motion, upon a motion by the prosecuting attorney, or upon application by an affidavit on behalf of or by the defendant.²⁰ Juvenile court judges may also initiate MDSO proceedings for wards of the court, aged 16 or over. The procedure for juveniles may be commenced by the judge's own motion, upon a probation officer's motion, or upon application by affidavit by or on behalf of the ward.²¹ The commencement of MDSO proceedings is mandatory following a conviction for a felonious sex offense, involving a child under 14.²²

After conviction or adjudication as a ward, the judge begins MDSO actions by adjourning the proceedings in juvenile court or by suspending sentencing in the case of an adult, pending the outcome of the hearings on the defendant's status.²³ At this point, the judge certifies the individual to the county superior court for examinations and hearings to determine if he falls within the classification of MDSO.²⁴ Both juveniles and adults are certified to the superior court and all subsequent proceedings apply similarly to both classes.

Prior to a hearing upon the certification, the superior court judge assigns at least two, but no more than three psychiatrists to examine the alleged offender.²⁵ These psychiatrists submit their reports to the court and may testify at the certification hearing.²⁶ A probation officer also submits a report to the court, outlining the circumstances of the present offense, and the individual's past history.²⁷ At the certification hearing itself, in addition to the expert testimony presented by the state, the alleged MDSO may present other expert witnesses in his own behalf.²⁸

¹⁹ CAL. WELF. & INST'NS CODE §§ 6300-6330 (West Supp. 1970).

²⁰ *Id.* § 6302(a).

²¹ *Id.* § 6302(d).

²² *Id.* § 6302(c). If the offense is a misdemeanor sex offense with a child under 14, and the individual has a prior sexual offense, proceedings are also mandatory. *Id.* § 6302(b).

²³ *Id.* §§ 6302(a), 6302(d).

²⁴ *Id.*

²⁵ *Id.* § 6307. One psychiatrist must be from the medical staff of a state hospital or county psychiatric facility.

²⁶ *Id.* § 6308.

²⁷ *Id.* § 6306.

²⁸ *Id.* § 6311.

After examining the reports and testimony, the court decides whether to continue the proceedings or return the individual to the original court for further action upon his criminal conviction or juvenile court adjudication. If the judge finds that the individual is not an MDSO, the person must be returned to the court of origin.²⁹ If the individual is found non-amenable to treatment in a hospital, but still within the category of MDSO, he may be returned to the trial court.³⁰ Should the court have reasonable cause to believe that the individual is a mentally disordered sex offender, who is amenable to treatment, the judge may impose the next procedural step by ordering observation and diagnosis at a state hospital or a county psychiatric facility for a period of 90 days.³¹

The superintendent of the hospital or the director of the county facility must report to the court upon the status of the alleged offender within the 90 day observation period.³² Three possible classifications may result from this report.³³ First, the individual may be found not to be an MDSO. As such, he must be returned to the trial court. Second, the person may be a probable MDSO, but non-amenable to treatment in a hospital. This individual is also returned to the trial court. There, the trial judge, in his discretion, may impose sentence under the original conviction, or he may recertify the individual to the superior court. If the superior court, after a hearing, finds this person to be an MDSO, non-amenable to treatment, and a danger to others, the judge may order the individual committed to the Department of Mental Hygiene for an indefinite period. Finally, if the hospital staff reports that the person is an MDSO, who would benefit by treatment in a hospital, the court may return the individual to the originating court or may issue an order for "indefinite commitment" as a mentally disordered sex offender.

Within 10 days of such an order, the offender or a "friend"³⁴ may demand a jury or court trial upon the single issue of whether or not the person is in fact a mentally disordered sex offender.³⁵ If three-fourths of the jury in this "civil" trial find the individual to be an MDSO, he may be ordered committed immediately.³⁶

This trial and its potential or actual results provide the bases

²⁹ *Id.* § 6315.

³⁰ *Id.*

³¹ *Id.* § 6316.

³² *Id.*

³³ *Id.*

³⁴ *Id.* § 6318. "Friend" is not defined within the statute.

³⁵ *Id.* §§ 6318, 6321.

³⁶ *Id.* § 6321.

for the following due process analysis of the standard of proof used in MDSO proceedings.

IN RE WINSHIP AND THE CIVIL COMMITMENT STANDARD OF PROOF

The aforementioned proceedings for the commitment of MDSO's have repeatedly been characterized as "civil" in nature by California's courts.³⁷ Even though the actions are grafted onto "criminal" actions, judges view the proceedings as separate, "civil" actions.³⁸ Within this civil framework, however, the legislature has provided that the offender must be informed of his rights,³⁹ and be afforded counsel,⁴⁰ cross-examination of witnesses,⁴¹ and adequate notice of all proceedings.⁴² Further, the individual may demand a jury trial upon the sole issue of his status.⁴³

The trial upon the status of the alleged MDSO is, by statute, a civil proceeding.⁴⁴ The standard of proof generally used in California civil trials is a preponderance of the evidence.⁴⁵ Preponderance of the evidence is defined as "such evidence as when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."⁴⁶ When the evidence is contradictory, the preponderance test demands that the jury be controlled by the "apparent credibility of the witnesses, rather than their numerical preponderance."⁴⁷ The plaintiff is entitled to a decision whenever the

³⁷ See, e.g., *People v. McCracken*, 39 Cal. 2d 336, 246 P.2d 913 (1952); *People v. Loignon*, 250 Cal. App. 2d 386, 58 Cal. Rptr. 866 (1967); *Ex parte Keddy*, 105 Cal. App. 2d 215, 233 P.2d 159 (1951). See also *Gross v. Superior Court*, 42 Cal. 2d 816, 270 P.2d 1025 (1954). But cf. *People v. Maugh*, 1 Cal. App. 3d 856, 82 Cal. Rptr. 147 (1969).

³⁸ *People v. Redford*, 194 Cal. App. 2d 200, 14 Cal. Rptr. 866 (1961).

³⁹ CAL. WELF. & INST'NS CODE § 6305 (West Supp. 1970). See *People v. Austin*, 260 Cal. App. 2d 658, 67 Cal. Rptr. 391 (1968), which declared that MDSO hearings without proper advice of rights lack validity.

⁴⁰ *Id.* § 6314. See *In re Brown*, 275 A.C.A. 624, 79 Cal. Rptr. 897 (1969) upholding the right to counsel at MDSO hearings.

⁴¹ *Id.* §§ 6309, 6312. See also *People v. Armstrong*, 260 Cal. App. 2d 190, 67 Cal. Rptr. 73 (1968), reversing an MDSO determination for lack of cross-examination rights.

⁴² CAL. WELF. & INST'NS CODE § 6303 (West Supp. 1970).

⁴³ *Id.* § 6318.

⁴⁴ *Id.* § 6321.

⁴⁵ CAL. EVID. CODE § 115 (West 1965) states that "except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." See also *Ford v. Chambers*, 19 Cal. 143 (1861); *Halberstady v. Nielsen*, 113 Cal. App. 313, 298 P. 37 (1931).

⁴⁶ *People v. Miller*, 171 Cal. 649, 651, 154 P. 468, 470 (1916). See *Bruch v. Adams*, 259 Cal. App. 2d 585, 66 Cal. Rptr. 395 (1968); *In re Corey*, 230 Cal. App. 2d 813, 41 Cal. Rptr. 379 (1964); *Lawrence v. Goodwill*, 44 Cal. App. 440, 186 P. 781 (1919).

⁴⁷ *Shannon v. Mt. Eden Nursery Co.*, 134 Cal. App. 591, 592, 25 P.2d 849, 849 (1933).

evidence preponderates in his favor, no matter how small the preponderance may be.⁴⁸ One witness, if suitably credible, could conceivably outweigh any number of slightly less credible people, under a preponderance standard.⁴⁹

The United States Supreme Court has recently examined the preponderance test and its relation to due process in the adjudication of juvenile offenders. The Court in the case of *In re Winship*⁵⁰ held that proof beyond a reasonable doubt was one of the essentials of due process during the adjudicatory stage of juvenile court proceedings, where the juvenile was accused of an offense which would be a crime if committed by an adult.⁵¹ By analogizing the specific circumstances of the *Winship* case with those surrounding MDSO actions, one can argue that MDSO's are denied due process through the use of the preponderance test, and that alleged MDSO's should be accorded the same proof standards applicable to juvenile or criminal offenders.

The Supreme Court has long assumed that proof beyond a reasonable doubt of criminal charges is a constitutional requirement.⁵² This standard of proof provides the basis for the presumption of innocence, a cornerstone principle whose enforcement lies at the foundation of American criminal justice.⁵³ The *Winship* court removed any doubts concerning the constitutional stature of the reasonable doubt test, holding . . . "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."⁵⁴

In re Winship represents the Supreme Court's first application of the "criminal" beyond a reasonable doubt standard to "civil" juvenile court proceedings. Juvenile courts have historically acted

⁴⁸ *Schumacher v. Bedford Truck Lines*, 153 Cal. App. 2d 287, 314 P.2d 485 (1957); *Neudeck v. Vestal*, 117 Cal. App. 266, 3 P.2d 595 (1931).

⁴⁹ "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact." CAL. EVID. CODE § 411 (West 1965).

⁵⁰ 90 S. Ct. 1068 (1970).

⁵¹ *Id.* at 1075.

⁵² "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property." *Brinegar v. United States*, 338 U.S. 160, 174 (1949). See also *Leland v. Oregon*, 343 U.S. 790, 795 (1952) (Frankfurter, J., dissenting); *Miles v. United States*, 103 U.S. 304 (1880).

⁵³ *Coffin v. United States*, 156 U.S. 432, 453 (1895).

⁵⁴ *In re Winship*, 90 S. Ct. 1068, 1073 (1970).

under the umbrella of *parens patriae*,⁵⁵ characterizing their actions as civil and in the best interest of the child. The *parens patriae* concept and its attendant civil framework allowed juvenile courts to be somewhat more informal and flexible than their criminal counterparts, but it also facilitated a denial of basic constitutional rights.⁵⁶ Until the landmark decision of *In re Gault*,⁵⁷ juveniles in many jurisdictions were not given the rights to counsel, adequate notice, confrontation and cross-examination of witnesses, or the privilege of protection against self-incrimination. The *Gault* Court held these rights to be fundamental to due process in the adjudicatory stage of delinquency proceedings.⁵⁸ The *Winship* decision adds to the *Gault* formula the necessity of proof beyond a reasonable doubt in the specific instance when the juvenile is accused of an act which would constitute a crime if committed by an adult.⁵⁹

Mentally disordered sex offender proceedings bear the same civil labels as juvenile court actions. MDSO commitments are supposedly for the protection of society and the rehabilitation of the offender.⁶⁰ An alleged MDSO is, by statute, accorded all of the *Gault* rights,⁶¹ and should by analogy fit within the *Winship* rule.

The *Winship* rule only applies in the adjudicatory stage of juvenile proceedings. An adjudicatory hearing determines the validity of the petition filed⁶²—in effect, the guilt or innocence of the child. The analogous portion of the MDSO procedure encompasses the final phase of the statutory action—the trial. This trial provides a ruling upon the status of the individual.⁶³ Thus, as an adjudicatory hearing for juveniles determines the status of the alleged delinquent, the trial of the alleged MDSO decides his status.

Moving the analogy one step further, *Winship* applies to the adjudicatory stage only when the juvenile is charged with an offense which would be criminal if committed by an adult.⁶⁴ Samuel Winship allegedly stole \$112 from a purse in a locker, an act which "if done

⁵⁵ See *In re Gault*, 387 U.S. 1 (1967); TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1964).

⁵⁶ See Lehman, *A Juvenile's Rights to Counsel in a Delinquency Hearing*, 17 JUV. CT. JUDGES JOURN. 53, 54 (1966).

⁵⁷ 387 U.S. 1 (1967).

⁵⁸ *Id.*

⁵⁹ *In re Winship*, 90 S. Ct. 1068, 1070 (1970).

⁶⁰ *People v. McCracken*, 39 Cal. 2d 336, 246 P.2d 913 (1952); *People v. Rancier*, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966).

⁶¹ See text *supra* accompanying notes 39-41.

⁶² See generally, N.Y. FAMILY CT. ACT § 742 (McKinney Supp. 1970); CAL. WELF. & INST'NS CODE §§ 681-707 (West Supp. 1970).

⁶³ CAL. WELF. & INST'NS CODE § 6318 (West Supp. 1970).

⁶⁴ *In re Winship*, 90 S. Ct. 1068, 1070 (1970).

by an adult, would constitute the crime or crimes of Larceny."⁶⁵ A petition set out the law violations which allegedly composed the boy's delinquency, but the final adjudication was technically upon the delinquent or non-delinquent status of the child.⁶⁶

Mentally disordered sex offender trials also determine an individual's status, rather than the validity of any specific criminal charges. Certification forms set out the alleged status of the individual in terms of his predisposition to the commission of sexual offenses.⁶⁷ Past convictions or actions may provide evidence of an individual's predisposition, particularly in the case of a convicted sex offender.⁶⁸ In the case of the person originally convicted for a non-sexual offense, the certification essentially alleges a future predisposition to harmful sexual offenses. In both instances, the alleged predisposition, whether present or future, is toward *criminal* offenses. Thus, the adjudication of an MDSO may constitute a decision upon a charge of future adult crimes, allowing the *Winship* doctrine to apply.

Once the structural analogy between the *Winship* situation and that of the MDSO is complete, the question arises as to why the Court chose to reject the civil preponderance test in certain allegedly civil proceedings. The *Winship* Court, in agreement with the dissent in the lower court,⁶⁹ held "that where a 12 year old is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt."⁷⁰ The potentially substantial deprivation of liberty provided a strong push away from the preponderance test, toward the seemingly stronger reasonable doubt standard.

The adjudication of Samuel Winship involved a potential loss of six years of his liberty.⁷¹ The commitment of an MDSO may deprive him of his freedom for a lifetime.⁷² The MDSO may be "hospitalized" and "treated" until he is cured or until he is no longer

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ CAL. WELF. & INST'NS CODE § 6304 (West Supp. 1970).

⁶⁸ The probation officer's report in MDSO proceedings "shall include the criminal record, if any, of the person . . ." and "pertinent information concerning the circumstances surrounding the crime . . ." CAL. WELF. & INST'NS CODE § 6306 (West Supp. 1970).

⁶⁹ 24 N.Y.2d 196, 247 N.E.2d 253 (1969) (Fuld, C.J., dissenting).

⁷⁰ *In re Winship*, 90 S. Ct. 1068, 1075 (1970).

⁷¹ *Id.*

⁷² *In re Kramer*, 257 Cal. App. 2d 287, 291, 64 Cal. Rptr. 686, 689 (1968), declaring the potential of civil commitment to be life imprisonment. *See also* Meyers, *Psychiatric Examination of the Sexual Psychopath*, 56 J. CRIM. L.C. & P.S. 27 (1965).

a menace to the safety of others.⁷³ If, after an extended period of hospitalization, the individual is found to no longer benefit from treatment, and, if he still constitutes a danger to others, he may be confined indefinitely upon the grounds of a state prison.⁷⁴ The potential loss of liberty for an MDSO may far outweigh that applied to Samuel Winship. In the *Winship* decision, Mr. Justice Brennan declared that the susceptibility of the preponderance test to the misinterpretation that the trier of fact merely weighs the quantity of evidence made it inapplicable when an individual's liberty was at stake.⁷⁵

Under ideal conditions, a jury in a civil trial carefully weighs the *quality* of the evidence in an effort to determine where the preponderance lies. Unfortunately, the quality of evidence may be directly influenced by the quantity of evidence. In a civil MDSO trial or any other civil commitment proceeding, witnesses for one side may so outnumber those of the other as to swamp the minds of the jury. For example, if three psychiatrists affirm a status of mentally disordered sex offender and only one offers a counter view, the effectiveness of the counter view may suffer under the preponderance test. No matter how persuasive the argument of the lone defender, the fact that three of his colleagues disagree may outweigh any evidence he presents. Under the preponderance test, only a mere probability of the status is required. There need be no moral certainty or conviction in the minds of the jury as to the defendant's status, only the slightest probability that the individual constitutes a delinquent or MDSO.⁷⁶ A reasonable doubt test, on the other hand, provides the necessity of reaching a "subjective certainty" on the facts in question.⁷⁷ When a substantial deprivation of liberty rests upon an adjudicatory proceeding, preponderance of the evidence is insufficient under due process standards. As Mr. Justice Brennan declared, "civil labels and good intentions do not obviate the need for criminal due process safeguards in juvenile courts."⁷⁸ Neither do civil labels remove the necessity of the presence of these safeguards from MDSO proceedings.

The California Court of Appeals, Second District, has specifically recognized the need for due process safeguards in MDSO ac-

⁷³ See text *supra* accompanying note 18.

⁷⁴ CAL. WELF. & INST'NS CODE § 6326 (West Supp. 1970). See also *People v. Barzee*, 213 Cal. App. 2d 139, 28 Cal. Rptr. 692 (1963).

⁷⁵ *In re Winship*, 90 S. Ct. 1068, 1074 (1970). See Dorsen and Reznick, *In re Gault and the Future of Juvenile Law*, 1 FAMILY L. QUART., no. 4, 26 (1967).

⁷⁶ "In civil cases, which are decided in favor of the litigant upon a mere preponderance of the evidence, the rule of the decision is after all, but a rule of probability." *Wirz v. Wirz*, 96 Cal. App. 2d 171, 175, 214 P.2d 839, 842 (1950).

⁷⁷ Dorsen and Reznick, *supra* note 75, at 26.

⁷⁸ *In re Winship*, 90 S. Ct. 1068, 1074 (1970).

tions. In *People v. Maugh*,⁷⁹ Judge Lillie declared that MDSO proceedings are "similar to criminal prosecutions and the standards of due process applicable to the latter are equally applicable to the former."⁸⁰ Thus, if the proof beyond a reasonable doubt standard is an essential right for criminal and juvenile offenders, alleged mentally disordered sex offenders deserve, and, in fact, have a right to nothing less. A deprivation of liberty based upon a mere preponderance of evidence in juvenile and adult MDSO adjudication hearings results in a denial of basic due process. In these instances, the state must bear the burden of convincing the trier of fact of the defendant's status beyond a reasonable doubt.

PENAL ELEMENTS OF CIVIL COMMITMENT

Beyond the *Winship* argument for the incorporation of a reasonable doubt standard lies the assertion that MDSO proceedings are far too punitive to warrant anything less than the strongest standard of proof. The deprivation of a man's liberty upon a mere preponderance of the evidence of a "predisposition" to dangerous sexual offenses⁸¹ denies that individual the due process proof standard afforded criminal offenders subject to similar deprivations. An examination of the history, purpose, and resultant impact of MDSO legislation reveals that these allegedly civil actions are "penal in nature and effect."⁸²

The Legislature passed the Sex Psychopath Act,⁸³ the antecedent of MDSO legislation, because experience had shown that individuals who came within the classification of "sexual psychopath" were incapable of benefitting from ordinary imprisonment and were in need of medical treatment.⁸⁴ Many members of society were, and still are, convinced that most, if not all, sex criminals suffer from some mental deficiency or disorder which causes them to contravene society's moral standards.⁸⁵ To facilitate the treatment of these alleged sexual-mental disorders, California created an involuntary civil commitment procedure in 1939.⁸⁶ The procedures were made

⁷⁹ 1 Cal. App. 3d 856, 82 Cal. Rptr. 147 (1969).

⁸⁰ *Id.* at 864, 82 Cal. Rptr. at 151.

⁸¹ See *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969) stating: "Confinement for a mere propensity is preventive detention. Particularly where the act in question is commonly punishable only by a short jail sentence . . ." *Id.* at 1103.

⁸² Cf. *People v. Smith*, — Cal. App. 3d —, 89 Cal. Rptr. 881 (1970); *In re Valenzuela*, 275 A.C.A. 537, 79 Cal. Rptr. 760 (1969).

⁸³ Cal. Stats. 1939, ch. 447, at 1785 (1939).

⁸⁴ See generally, Hacker and Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CAL. L. REV. 766 (1955).

⁸⁵ *Id.*

⁸⁶ See text *supra* accompanying note 83.

statutorily civil, in congruence with the treatment-oriented commitment of insane persons.⁸⁷ Unfortunately, what was conceived as a treatment-focused civil procedure has gradually evolved into a punitive action which is essentially criminal despite its labels.⁸⁸ The fact that MDSO civil commitment may lead to lengthy involuntary hospitalization or even placement in a prison leaves little question that the procedure has all of the consequences and dangers of a criminal trial, without the criminal standard of proof. The civil framework and vocabulary used in MDSO actions only thinly shroud a penal purpose and impact.

The civil vocabulary utilizes terms different from, but still analogous to, its criminal counterpart. An individual is "certified" to superior court,⁸⁹ not bound over. He may be sent to a state hospital for observation and diagnosis,⁹⁰ while the judge in a criminal case, in committing a person to the Adult Authority, may effectively send an individual to a diagnostic and medical facility within the State Correctional system.

Ironically, however, the civil MDSO proceedings do not have treatment as a primary focus in the commitment of offenders. A California Court of Appeals declared in *People v. Rancier*⁹¹ that "the main purpose of the Act is to protect society against the activities of the sexual psychopath. The secondary purpose is to rehabilitate . . ." ⁹² the individual. The protection of society provides the primary justification for most penal legislation, with rehabilitation as an ultimate goal. The end result of penal or criminal statutes is punishment; the outcome of civil commitment is labelled treatment.⁹³ When society gets to the point of imposing sanctions primarily for the purpose of protecting itself, the result is nothing short of punishment.⁹⁴ Whether the courts and legislature choose to call these sanctions punishment or treatment, the impact of societal self-protection upon an MDSO is still an involuntary deprivation of liberty.⁹⁵ The individual receives neither the evidentiary protections

⁸⁷ *Id.*

⁸⁸ See text *supra* accompanying note 84.

⁸⁹ CAL. WELF. & INST'NS CODE § 6302 (West Supp. 1970).

⁹⁰ *Id.* § 6316.

⁹¹ 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966).

⁹² *Id.* at 582, 49 Cal. Rptr. at 879.

⁹³ See CAL. WELF. & INST'NS CODE § 6315 (West Supp. 1970).

⁹⁴ See H. PACKER, LIMITS OF THE CRIMINAL SANCTION (1968).

⁹⁵ "To be taken without consent from my home and friends; to lose my liberty, to undergo all those assaults on my personality which modern psychotherapy knows how to deliver, to be re-made after some pattern of 'normality' hatched in a Viennese laboratory to which I never possessed allegiance, to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them—who cares whether this is called Punishment or not?" Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 227 (1953).

granted the criminal accused, nor much of the rehabilitative care envisioned for his status.⁹⁶ In a broad sense, the MDSO may be a victim of society over-protecting itself.

To accomplish the purpose of societal protection, California's Legislature has provided stringent sanctions for use in MDSO proceedings. The status of "mentally disordered sex offender" carries with it an immediate penalty which may deprive an individual of his liberty for months, years, or a lifetime.⁹⁷ An MDSO may be confined until he is cured or no longer dangerous. In the case of the individual who is officially declared dangerous and non-amenable to treatment, the practical effect of the civil commitment may constitute life imprisonment without possibility of parole.

Even if released, the MDSO suffers a social stigma which may never be removed,⁹⁸ and which may well surpass that of the ordinary ex-convict.⁹⁹ As a "sex offender," he must register in every city in which he resides for more than 30 days.¹⁰⁰ If he changes his address, he must notify the law enforcement agency within 10 days.¹⁰¹ Once an ex-convict completes his parole, he is generally free to move about and may be able to successfully conceal his former status from those around him, including the police department. In contrast, the MDSO carries his status with him constantly, and may never conceal it from the local law enforcement officials. Conceivably, an individual never convicted of a sex offense could be compelled to bear the status of "sex offender" around his neck like the infamous "Scarlet A"¹⁰² for the rest of his life.

Despite these potentially serious and permanent results of MDSO proceedings, California courts have clung to the theory that the actions are civil and non-penal in nature. As an example, the court in *People v. Barzee*¹⁰³ declared that "sexual psychopathy procedures are essentially civil in nature, even though the place provided for custodial care and treatment be on the grounds of a state prison."¹⁰⁴ This rationalization simply sugar-coats reality.¹⁰⁵ Mea-

⁹⁶ Cf. *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

⁹⁷ *In re Kramer*, 257 Cal. App. 2d 287, 64 Cal. Rptr. 686 (1968).

⁹⁸ See Meyers, *Psychiatric Examination of the Sexual Psychopath*, 56 J. CRIM. L.C. & P.S. 27 (1965).

⁹⁹ See Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L. QUART. 147 (1966).

¹⁰⁰ CAL. PEN. CODE § 290 (West 1970).

¹⁰¹ *Id.*

¹⁰² N. HAWTHORNE, *THE SCARLET LETTER* (Heritage 1946). Hester Prynne was compelled to wear a scarlet letter "A" embroidered upon her bosom as a "living sermon against sin." *Id.* at 67.

¹⁰³ 213 Cal. App. 2d 139, 28 Cal. Rptr. 692 (1963); *accord*, *People v. Levy*, 151 Cal. App. 2d 460, 311 P.2d 897 (1957).

¹⁰⁴ *Id.* at 141, 28 Cal. Rptr. at 692.

¹⁰⁵ See *People v. Cross*, 418 F.2d 1095 (D.C. Cir. 1969).

asures which subject individuals to substantial involuntary loss of liberty contain an inescapable punitive element. The reality is unaltered by the facts that the motivations prompting confinement are to protect society, provide therapy or otherwise rehabilitate the offender.¹⁰⁶

The punitive view of allegedly rehabilitative legislation has recently received support from a California appellate court. In *People v. Smith*,¹⁰⁷ the court held that even if the civil confinement did not constitute punishment in a historical sense, it was still punitive to the person confined. Mentally disordered sex offender civil commitments may not fit under the historical deterrence and retribution headings of punishment, but the confinement is nevertheless punitive.

The *Smith* court applied a penal view to a proceeding by the California Youth Authority committing the defendant for a period 5 years beyond his twenty-fifth birthday.¹⁰⁸ Smith originally pleaded guilty to rape. As a 19 year old, he was eligible for transfer from the superior court to the Youth Authority. Following a parole and subsequent revocation, the Youth Authority sought to confine Smith for a period of five years after his twenty-fifth birthday, upon the basis of a potential physical dangerousness. The parallels between the facts in the case and those surrounding MDSO proceedings are quite strong. The procedure appealed from in *Smith* involved a civil commitment upon the basis of a dangerousness due to "mental or physical deficiency, disorder or abnormality."¹⁰⁹ Mentally disordered sex offenders are confined because of a predisposition to dangerous sex offenses due to "mental disease, defect, or disorder."¹¹⁰ In *Smith*, the Youth Authority could transfer authority to the department of corrections for confinement in a state prison.¹¹¹ MDSO's may be transferred from the hospital facilities of the Department of Mental Hygiene to other state institutions, including prisons.¹¹²

The Attorney-General in the *Smith* case relied upon *Sas v. Maryland*¹¹³ as a basis for arguing that the proceedings were civil and non-punitive in nature. While the *Sas* court held that Maryland's civil commitment statute for defective delinquents was fair on its face, it recognized the potential results from the abuse of the provisions. Thus, while *Sas* upheld a civil commitment procedure, it also

106 F. ALLEN, *Borderland of Criminal Justice* 37 (1964).

107 — Cal. App. 3d —, 89 Cal. Rptr. 881 (1970).

108 See CAL. WELF. & INST'NS CODE §§ 1800-1803 (West 1969).

109 *People v. Smith*, — Cal. App. 3d —, 89 Cal. Rptr. 881, 882 (1970).

110 See text *supra* accompanying note 13.

111 *People v. Smith*, — Cal. App. 3d —, 89 Cal. Rptr. 881, 885 (1970).

112 CAL. WELF. & INST'NS CODE § 6326 (West Supp. 1970).

113 334 F.2d 506 (4th Cir. 1964).

declared that such actions have the potential of becoming devices for "warehousing the obnoxious and anti-social elements of society."¹¹⁴

The court in *People v. Smith*¹¹⁵ specifically rejected the non-punitive argument put forward by the Attorney-General,¹¹⁶ declaring that although the challenged statutes were aimed at rehabilitation, they were actually "penal in nature and effect."¹¹⁷ The court apparently relied more upon the potential effects of the statutes than on the civil procedures attached to them.

As penal statutes, the code sections appealed from in *Smith* were held to come within the *Winship* rule of proof beyond a reasonable doubt.¹¹⁸ Mentally disordered sex offender proceedings, although designed for the protection of society and the rehabilitation of the offender, are also of a punitive nature and effect. Punishment lies in the province of criminal justice where the standard of evidence is proof beyond a reasonable doubt. Punishment of an MDSO, although officially called treatment, must not be imposed on a standard of evidence less rigid than that applied to adult or juvenile offenders.

CONCLUSION

The mentally disordered sex offender is currently confined upon the basis of a mere probability of his status. The use of the higher reasonable doubt standard would not affect the so-called beneficial elements of civil commitment. Courts could still hold hearings on an informal basis and the current range of dispositions would remain open after adjudication.

An alleged offender may embark upon a course of sexual conduct so dangerous to others as to warrant judicial intervention. Such intervention should not subject an individual to the label MDSO and a potentially lengthy confinement upon proof insufficient to convict an adult criminal or a juvenile offender.¹¹⁹ An individual being considered for involuntary commitment because of his status as an MDSO should have the same protected rights as a juvenile,¹²⁰ including proof beyond a reasonable doubt.

¹¹⁴ *Id.* at 516.

¹¹⁵ See text *supra* accompanying note 109.

¹¹⁶ *People v. Smith*, — Cal. App. 3d —, 89 Cal. Rptr. 881, 885 (1970).

¹¹⁷ See text *supra* accompanying note 82.

¹¹⁸ *People v. Smith*, — Cal. App. 3d —, 89 Cal. Rptr. 881, 885 (1970).

¹¹⁹ *Cf. In re Winship*, 90 S. Ct. 1068, 1074 (1970).

¹²⁰ See Comment, *Civil Commitment of the Mentally Ill in California*, 10 SANTA CLARA LAWYER 74 (1969).

Underlying this entire discussion has been the question of whether society really needs the classification of mentally disordered sex offender. Perhaps the best answer to society's label phobia was provided in Lewis Carroll's *Through the Looking Glass*,¹²¹ when the Gnat asked Alice the type of insects she preferred. She replied: "I don't rejoice in insects at all . . . because I'm rather afraid of them—at least the large kinds. But I can tell you the names of some of them." The following discussion ensued:

"Of course they answer to their names?" the Gnat remarked carelessly.

"I've never known them to do it."

"What's the use of having names," the Gnat said, "if they won't answer to them?"

"No use to them," said Alice, "but it's useful to the people that name them, I suppose . . ."

The name mentally disordered sex offender or "sexual psychopath" does nothing *for* the individual named. The classifications serve as society's way of enumerating that which it fears or dislikes. Society's fears and dislikes of the behavior of mentally disordered sex offenders do not justify a standard of proof less than that afforded other adjudicated offenders.

Mary Ann Grilli

121 L. CARROLL, *THROUGH THE LOOKING GLASS* 225 (Puffin ed. 1948).