1-1-1973

Toward a Less Benevolent Despotism: The Case for Abolition of California's MDSO Laws

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TOWARD A LESS BENEVOLENT DESPOTISM:
THE CASE FOR ABOLITION OF
CALIFORNIA’S MDSO LAWS

INTRODUCTION

California’s Mentally Disordered Sex Offender laws can best be described as Janus-faced. One face looks to the civil structure of the law and the other to the criminal. The Mentally Disordered Sex Offender or “MDSO” commitments have been regarded by the courts of California as civil proceedings although they may only be instituted after a criminal conviction. Many of the requisite due process safeguards afforded to criminal defendants are also afforded to the alleged MDSO. Many however are not.

In evaluating MDSO laws the courts have been forced to strain semantics in order to reconcile the realities of the commitment with its civil appellation. However, newly emerging legal considerations of right to treatment and recent equal protection—due process analyses have begun to undermine this civil facade.


2. Janus, the Roman god of beginnings, was usually portrayed with two bearded heads placed back to back. Thus he might look in two directions at the same time.


5. CAL. WELF. & INST’NS CODE §§ 6303 (notification); 6305 (advice as to allegation and right of reply and production of witnesses—if requested the court shall appoint an attorney to represent the alleged MDSO); 6318 (right to demand jury trial if found to be MDSO). It is unclear at this time if an MDSO has a right to a second jury trial, if after spending time at Atascadero State Hospital, he is sent back to the committing court as still dangerous and recertified pursuant to section 6325. See People v. Washington, 269 Cal. App. 2d 246, 74 Cal. Rptr. 823 (1969).

6. The jury trial provided under Cal. Welf. & Inst’n Code §§ 6318, 6321 is trial by civil standards which permits a person to be adjudged an MDSO by three-quarters of a jury based upon a preponderance of the evidence.


8. See Humphrey v. Cady, 405 U.S. 504 (1971); Specht v. Patterson,
If one accepts the premise that these proceedings are in fact criminal, then their constitutionality becomes suspect particularly in light of recent cases dealing with cruel and unusual punishment, the civil/criminal dichotomy, and punishment for status.

It is the contention of this author that both of the Janus faces of the MDSO statutes—the civil and the criminal—must necessarily be deemed unconstitutional. Viewed from either perspective the MDSO laws should be abolished. Society's legitimate interest in protection from sexual offenders would not be compromised. The criminal laws and the provisions for civil commitment of imminently dangerous persons under the Lanterman-Petris-Short Act offer society ample protection without impermissibly infringing on individual constitutional rights.

I. THE HISTORICAL PERSPECTIVE

In order to relate these emergent constitutional concepts to the MDSO statutes it is necessary to first look at the development of the laws regulating and classifying sexual offenders generally and in California.

In response to pressure exerted upon lawmakers, partially by medical and legal experts, the California legislature passed a "Sexual Psychopath Act" in 1939. The Act reflected the belief of certain segments of society that "criminal behavior, especially criminal sexual behavior (is) related to mental illness . . ." and that medicine, in particular psychiatry, would provide the answers to the problems posed by sexual offenders.

In 1963, in response to repeated criticisms of the use of

14. Bowman, Review of Sex Legislation and Control of Sex Offenders in the United States of America in FINAL REPORT ON CALIFORNIA SEXUAL DEVIATION RESEARCH, The Langley Porter Clinic and State of California, Department of Mental Hygiene 15 (1954) [hereinafter cited as BOWMAN].
15. Id.
the term "sexual psychopath" the legislature enacted section 6300 of the Welfare and Institutions Code which provides that:

As used in this article, "mentally disordered sex offender" means 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. Wherever the term "sexual psychopath" is used in any code, such terms shall be construed to refer to and mean a "mentally disordered sex offender."18

The Indeterminate Sentence and Disordered Sexual Offender Laws

The disposition of the disordered sexual offender has at its base the concept of an indeterminate sentence,10 which confines a defendant until such time as he20 is deemed to have received

For a description of the intricate procedural requirements of MDSO proceedings see CAL. WELF. & INST'NS CODE §§ 6300-6330; see also Comment, The MDSO—Uncivil Civil Commitment, 11 SANTA CLARA LAWYER 169, 171-73 (1970). The only substantial change in the procedures outlined in the Comment, supra deals with § 6316 of the Code which was amended in 1970. The 90 day statutory observation period formerly required prior to an indeterminate commitment to the Department of Mental Hygiene was abolished. A person adjudged an MDSO is immediately committed on an indeterminate sentence to the Department.

17. HACKER, supra note 16, at 769-71; S. BRAKEL AND R. ROCK, THE MENTALLY DISABLED AND THE LAW 351 (rev. ed. 1971) [hereinafter cited as BRACKEL AND ROCK]. The term "sexual psychopath" was criticized as a legal term having no medical counterpart. It was therefore difficult for testifying psychiatrists to conform their diagnosis to the required legal terminology. It appears that the term "mentally disordered sex offender" is not appreciably more precise. Cf. S. POLLACK, THE SEX OFFENDER AND THE LAW 183-88 Institute of Psychiatry and Law (1972) (unpublished manual prepared for use of faculty of Institute on The Sex Offender and the Law held at the University of Southern California School of Medicine, August 19, 1972. The material is considered preliminary.) [hereinafter cited as POLLACK].

19. Id. § 6316 provides in part:

If, after examination and hearing, the court finds that the person is a mentally disordered sex offender but will not benefit by care or treatment in a state hospital the court shall then cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge. Such court shall resume the proceedings and shall impose sentence or make such other suitable disposition of the case as the court deems necessary. If, however, such court is satisfied that the person is a mentally disordered sex offender but would not benefit by care or treatment in a state hospital it may re-certify the person to the superior court of the county. The superior court may make an order committing the person for an indefinite period to the Department of Mental Hygiene for placement in a state institution or institutional unit for the care and treatment of mentally disordered sex offenders designated by the court and provided pursuant to Section 6326 (emphasis added).

20. The pronoun "he" is used advisedly. Those adjudged MDSOs are almost exclusively male. Of the 3,706 subjects of a study conducted by the
optimum benefit from hospitalization and is "not a danger to the health and safety of others."\textsuperscript{21} The indeterminate sentence may continue if he is not amenable to treatment and "still a danger to the health and safety of others. . . ."\textsuperscript{22}

The standard method of dealing with disordered sexual offenders is the indeterminate sentence until "cure." This method first appeared in a 1911 Massachusetts law,\textsuperscript{23} which distinguished "defective delinquents" as a separate class and provided for their indeterminate commitment if adjudged either dangerous or tending to become so.\textsuperscript{24} In 1921 New York passed a similar law.\textsuperscript{25}

These early examples were followed by other states in the 1940's, largely in response to public pressure for stronger measures against sex offenders.\textsuperscript{26} Much of this pressure stemmed from the news media.\textsuperscript{27} Commentators have noted that although

\begin{footnotesize}
\begin{itemize}
\item California Bureau of Criminal Statistics between 1966 and 1970, only 7 were females. Five of the seven were declared not to be MDSOs; two were declared MDSO and given indeterminate sentences. \textit{The Mentally Disordered Sex Offender in California, Bureau of Criminal Statistics, Dep't of Justice 10-11 (1972) [hereinafter cited as MDSO-Statistics, 1972].}
\item CAL. WELF. & INST'NS CODE § 6325 (West 1972) provides: Whenever a person who is committed for an indeterminate period to the department for placement in a state hospital as a mentally disordered sex offender (a) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a danger to the health and safety of others, or (b) has not recovered, and in the opinion of the superintendent the person is still a danger to the health and safety of others, the superintendent of the hospital shall file with the committing court a certification of his opinion under (a) or (b), as the case may be, including therein a report, diagnosis and recommendation concerning the person's future care, supervision or treatment. If the opinion so certified is under (a) the committing court shall forthwith order the return of the person to said committing court and shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge.
Such court shall resume the proceedings, upon the return of the person to the court, and after considering all the evidence before it may place the person on probation for a period of not less than five years if the criminal charge permits such probation and the person is otherwise eligible for probation. As a condition of such probation the person shall totally abstain from the use of alcoholic liquor or beverages. In any case, where the person is sentenced on a criminal charge, the time the person spent under indeterminate commitment as a mentally disordered sex offender shall be credited in fixing his term of sentence.
\item The subdivisions, "a" and "b" result in the so-called "A" and "B" ratings given to a 'patient' returning to court from Atascadero. See People v. Rancier, 240 Cal. App. 2d 579, 581, 49 Cal. Rptr. 876, 878 (1966).
\item CAL. WELF. & INST'NS CODE § 6325 (West 1972).
\item MASS. LAWS ANN., Ch. 123, § 113 (1965).
\item CONFERENCE MANUAL ON LAW ENFORCEMENT AND THE SEXUAL OFFENDER, Boston University Law—Medicine Institute 4 (1964) [hereinafter cited as BOSTON REPORT]; BOWMAN, supra note 14, at 15.
\item BOWMAN, supra note 14, at 15.
\item See BOSTON REPORT, supra note 14, at 2.
\item Id.
\end{itemize}
\end{footnotesize}
there was little increase in sex crimes during the period 1946 to 1950 there was a marked increase in sensational magazine articles dealing with the topic.29

This public pressure for greater control of sexual offenders was countered with medical and legal prodding for treatment rather than punishment.30 This combination led to the enactment of special legislation in at least 28 states.31 The statutes are all premised on the notion that psychiatry will in fact be able to identify, isolate and then treat sexual offenders.32 This rationale has been increasingly challenged33 and has led some observers to note that there are as many definitions of the sexual offender as there are laws which attempt to deal with him.34

The sexual offender statutes are of two general types: pre-conviction35 and post-conviction.36 The trend today is towards


31. BRACKEL AND ROCK, supra note 17, at 341, 362-73; Comment, supra note 16, at 167-70 n.11; POLLACK, supra note 17, at 147. There is some discrepancy in the figures cited in BRACKEL AND ROCK and the Comment which have to do with the repeal of certain statutes and their classification. Some authors do not include post-sentencing transfers of child-molesters, a narrowly drawn law, in the category of sexual offender laws (S.D. COMPIL. LAWS ANN. §§ 22-22-9 to 22-22-10 (1967)). Additionally, "defective delinquent" acts are sometimes not included (Md. ANN. CODE ART. 31B (1971)). See also Annot., 34 A.L.R.3d 652 (1970); Comment, 14 BAYLOR L.R. 93 (1962).

32. BRACKEL AND ROCK, supra note 17, at 341.

33. See id. at 348-53; cf. Chambers, Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives, 70 MICH. L.R. 1107 (1972); POLLACK, supra note 17, at 73-74.

34. BRACKEL AND ROCK, supra note 17, at 343. Illustrative are the definitions found in ALA. CODE 15, § 434 (Supp. 1969):

Any person who is suffering from a mental disorder but is not mentally ill or feebleminded to an extent making him criminally irresponsible for his acts, such mental disorder being coupled with criminal propensities to the commission of sex offenses, is hereby declared to be a criminal sexual psychopathic person. . . .

and in ILL. ANN. STAT. 38, § 105-1.01 (Smith Hurd 1970):

All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children, are hereby declared sexually dangerous persons.


post-conviction statutes,\textsuperscript{37} with only one-third of the 28 states following the pre-conviction model.\textsuperscript{38} The majority of post-conviction statutes apply only to convictions of a sexual crime\textsuperscript{39} but under some laws, proceedings may be instituted after the conviction of any crime. California is in the latter category.\textsuperscript{40} Under California's MDSO provisions a person may be certified to superior court after conviction of any crime.\textsuperscript{41} If he is found to be predisposed to the commission of sexual offenses and dangerous he may be committed indefinitely to the Department of Mental Hygiene\textsuperscript{42} and sent to Atascadero State Hospital (which is the hos-

\textsuperscript{37} Comment, \textit{The Validity of the Segregation of the Sexual Psychopath Under the Law}, 26 OHIO ST. L.J. 640, 646 (1965). Cal. Welf. & Inst'ns Code § 5501 formerly provided for commitment "when any person is charged with a crime, either before or after adjudication of the charge," but \textit{amended} § 6302 provides for commitment only after conviction of a crime. (West 1972).

\textsuperscript{38} Brakel and Rock, \textit{supra} note 17, at 343.

\textsuperscript{39} Id. at 344.

\textsuperscript{40} Cal. Welf. & Inst'ns Code § 6302(a) (West 1972).

\textsuperscript{41} Cal. Welf. & Inst'ns Code § 6302 (West 1972) provides:

(a) When a person is convicted of any criminal offense, whether or not a sex offense, the trial judge, on his own motion, or on motion of the prosecuting attorney, or on application by affidavit by or on behalf of the defendant, if it appears to the satisfaction of the court that there is probable cause for believing such a person is a mentally disordered sex offender within the meaning of this chapter, may adjourn the proceeding or suspend the sentence, as the case may be, and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article. Conviction upon a charge of violation of Section 290 of the Penal Code by failure to register as required thereby is conviction of a criminal offense within the meaning of this subdivision.

(b) Child under 14; misdemeanor. When a person is convicted of a sex offense involving a child under 14 years of age and it is a misdemeanor, and if the person has been previously convicted of a sex offense in this or any other state, the court shall adjourn the proceeding or suspend the sentence, as the case may be, and shall certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

(c) Child under 14; felony. When a person is convicted of a sex offense involving a child under 14 years of age and it is a felony, the court shall adjourn the proceeding or suspend the sentence, as the case may be, and shall certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

(d) Ward of court over 16. When a person over the age of 16 years has been found by the juvenile court to be a person described by Section 601 or 602 of this code and adjudged to be a ward of the court, the juvenile court judge on his own motion, or on motion of the probation officer, or on application by affidavit by or on behalf of the ward, if it appears to the satisfaction of the court that there is probable cause for believing such person is a mentally disordered sex offender within the meaning of this article, may adjourn the proceeding and may certify the person for hearing and examination by the superior court of the county to determine whether the person is a mentally disordered sex offender within the meaning of this article.

\textsuperscript{42} Id. § 6316 which provides in part:

If, after examination and hearing, the court finds that the person
pital for treatment of the criminally insane and sexual offenders in California). Subsequently, if he is found to be not amenable to treatment and still dangerous, he may be recertified and sent to a facility administered by the Department of Corrections —that is, a prison.

Significantly, the sexual psychopath statutes are not widely applied except in California and Wisconsin.

The Question of Constitutionality

The constitutionality of sexual offender laws has been infrequently litigated before the United States Supreme Court. The first challenge to a sexual psychopath statute to reach the Court was Minnesota ex rel. Pearson v. Probate Court, decided in 1940.

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43. Information About Department of Mental Hygiene-Programs-Admissions-Hospitals-Local Programs 16 DEPT. OF MENTAL HYGIENE (undated pamphlet). Of the 464 "sex offenders" admitted to hospitals under the aegis of the Department of Mental Hygiene during the 1971-72 fiscal year, 446 went to Atascadero. Between July 1, 1972 and Feb. 28, 1973, 301 of the 319 "sex offenders" committed were sent to Atascadero. Letter from Department of Health—Program Analysis and Statistics Section, April 6, 1973.

44. CAL. WELF. & INST'NS CODE § 6316 (West 1972). See note 19 supra. Section 6326 provides in part:

Facilities for custodial care and treatment. The Director of Mental Hygiene, with the approval of the Director of Corrections and the Director of Finance, may provide on the grounds of a state institution or institutions under the jurisdiction of the Department of Corrections or the Department of Mental Hygiene one or more institutional units to be used for the custodial care and treatment of mentally disordered sex offenders. Each such unit shall be administered in the manner provided by law for the government of the institution in which such unit is established (emphasis added).


46. See Jackson v. Indiana, 406 U.S. 715 (1972), where Justice Blackmun notes, "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." Supra at 737 (footnotes omitted). "This power" to which the Court refers, is the power to commit persons found to be mentally ill either through civil commitment, sexual psychopath laws, defective delinquent laws, or procedures instituted after a person is found not guilty by reason of insanity; Schneider, Civil Commitment of the Mentally Ill, 58 ABAJ 1059, 1063 (1972).

47. Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940). The Supreme Court found the Minnesota statute constitutional based upon the limiting construction given to it by the Minnesota Supreme Court:

Applying these principles to the case before us, it can reasonably be said that the language of § 1 of the act is intended to include those persons who, by an habitual course of misconduct in sexual matters, have evidenced an utter lack of power to control their sexual impulses and who, as a result, are likely to attack or otherwise inflict injury,
In 1951, *Pearson* was found controlling in a constitutional challenge to California's Sexual Psychopath Act.\(^4\) Considering the abundance of appellate court challenges\(^4\) to MDSO proceedings, the Supreme Court of California has reviewed these laws relatively infrequently and usually on procedural technicalities.\(^6\)

loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire. It would not be reasonable to apply the provisions of the statute to every person guilty of sexual misconduct nor even to persons having strong sexual propensities. Such a definition would not only make the act impracticable of enforcement and, perhaps, unconstitutional in its application, but would also be an unwarranted departure from the accepted meaning of the words defined.

\(\text{Id. at 273, citing State ex rel. Pearson v. Probate Court, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939) (emphasis added).}\)

48. *In re Keddy*, 105 Cal. App. 2d 215, 233 P.2d 159 (1951). In his opinion, Judge (now Justice) McComb made no attempt to distinguish *Pearson* or explain why it was controlling. The requirement in *Pearson* of "an habitual course of misconduct in sexual matters" and the need to "have evidenced an utter lack of power to control their sexual impulses" was totally absent in the California statute. That plus the large number of "first-time" offenders adjudicated MDSO [\(68.6\%\) had no previous sexual offense record—MDSO-STATISTICS, 1972 at 27] would seem to have required a different decision in *Keddy* and the lack of analysis is therefore disturbing. Having summarily dismissed the constitutional challenge, the court addressed the question of whether or not the defendant was entitled to bail pending sexual psychopath hearings, a question it answered affirmatively. *In re Keddy*, supra at 218. See generally Note, 30 CHI. KENT L.R. 160 (1951); Note, 31 NEB. L.R. 95 (1951).


50. This author has found the following cases which have been heard by the California Supreme Court regarding MDSO proceedings: *People v. Barnett*, 27 Cal. 2d 649, 166 P.2d 4 (1946) (the trial court abused its discretion in not allowing accused a hearing on his status as a sex psychopath); *People v. McCracken*, 39 Cal. 2d 336, 246 P.2d 913 (1952) (the statutory proceeding is applicable regardless of the nature of the underlying crime; the primary purpose of the law is protection of society and it is a civil proceeding); *People v. Howerton*, 40 Cal. 2d 217, 253 P.2d 8 (1953) (nothing done in a sex psychopath hearing can modify original conviction); *Gross v. Superior Court*, 42 Cal. 2d 816, 270 P.2d 1025 (1954) (an appeal may be taken from an order of commitment); *People v. Gross*, 44 Cal. 2d 859, 285 P.2d 630 (1955) (all subsequent commitment orders are also appealable); *Thurmond v. Superior Court*, 49 Cal. 2d 17, 314 P.2d 6 (1957) (commitment as a sex psychopath does not preclude new trial on original charge); *People v. Jackson*, 59 Cal. 2d 375, 379 P.2d 937, 29 Cal. Rptr. 505 (1963) (the court was not required to give a *sua sponte* instruction on the law relating to confinement of sexual psychopaths in a murder case); *People v. Westbrook*, 62 Cal. 2d 197, 397 P.2d 545, 41 Cal. Rptr. 809 (1964) (the trial court abused its discretion in not considering MDSO proceedings where defendant's record demonstrated he was a sex psychopath although he was convicted of a crime which was not sexual); *People v. Failla*, 64 Cal. 2d 560, 414 P.2d 39, 51 Cal. Rptr. 103 (1966) (a defendant with two
In the last five years the California court has heard only four MDSO cases,\(^{51}\) two of which were decided on technical points.\(^ {52}\)

**In re Bevill**\(^ {23}\)—the traditional view

The California Supreme Court last addressed itself to the issue of the nature of MDSO proceedings in 1968.\(^ {54}\) Guy Earl Bevill was confined at San Quentin on an indeterminate commitment as an MDSO after having spent two years at Atascadero State Hospital. The superintendent of Atascadero had given Bevill a "B" rating,\(^ {55}\) which signified that he would no longer benefit from treatment but that he remained a danger to society. By writ of habeas corpus Bevill sought to attack not his commitment, but the underlying criminal conviction.\(^ {56}\) He contended

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\(^{52}\) See note 21 supra.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) See note 21 supra.

\(^{56}\) Bevill was found guilty of a violation of Penal Code § 650½ which provides in part: A person who wilfully and wrongfully commits any act * * * which seriously disturbs or endangers the public peace or health, or which openly outrages public decency * * * for which no other punishment is expressly prescribed by this code, is guilty of a misdemeanor.
that if the underlying conviction was invalid the entire MDSO commitment procedure must fall as it had to be predicated on a valid criminal conviction. The pivotal question in the case was whether "a person confined as a mentally disordered sex offender may challenge the validity of his criminal conviction on habeas corpus." The court answered this query affirmatively, and in the process reiterated, without discussion, the accepted notions about the nature of MDSO proceedings:

[1] A person committed as a mentally disordered sex offender is not confined for the criminal offense but because of his status as a mentally disordered sex offender.

[2] The confinement is pursuant to a law the primary purpose of which is protection of society.

[3] While a person is under such commitment, the criminal case against him is suspended. When the proceedings relating to commitment as a mentally disordered sex offender have run their course, the criminal case may be resumed and sentence imposed.

[4] Habeas corpus is appropriate to challenge the validity of a person's commitment or continued confinement as a mentally disordered sex offender.

[5] The mentally disordered sex offender is not legally insane...; he is not even necessarily a 'sex offender' because the crime of which he is convicted need not be a sex offense.

The court went on to discuss the possible disabilities faced by an MDSO, and commented that if "... the rehabilitative ideal fail(s) of fruition, he faces life imprisonment in a penal institution."

Bevill thus articulated the state of the law in California in 1968. The MDSO laws and the premises which underlie them have not been directly challenged until this term. Thus the

Actually he had been arrested for engaging in an act of masturbation in front of two children. The court decided that his conviction was invalid as § 650¾ applies only to acts "for which no other punishment is expressly prescribed in this code." Cal. Pen. Code § 650¾ (West 1972). Bevill's alleged conduct clearly brought him under Penal Code § 314(1), relating to indecent exposure. 57. Cal. Welf. & Inst'ns Code § 6302 (West 1972); See note 41 supra and accompanying text; In re Stoneham, 232 Cal. App. 2d 337, 340-41, 42 Cal. Rptr. 741, 742-43 (1965).

58. 68 Cal. 2d at 857-58, 442 P.2d at 681-82, 69 Cal. Rptr. at 601-02.
59. Id. at 858, 442 P.2d at 681, 69 Cal. Rptr. at 601.
60. Id.
61. Id.
62. Id.
63. Id. at 860, 442 P.2d at 682, 69 Cal. Rptr. at 602.
64. Id. at 861, 442 P.2d at 683, 69 Cal. Rptr. at 603.
65. The only exception to this is dicta appearing in People v. Maugh, 1
court has not addressed itself to recent developments in constitutional law which tend to undermine the conceptual foundation of California's MDSO statutes. However, it has considered these developments in cases analogous to MDSO challenges, and these cases may be seen as mounting an indirect assault on the validity of the MDSO proceeding itself.

II. THE INDIRECT ASSAULT

_In re Gary W._—the emerging view

Gary W. was a ward of the California Youth Authority, having been committed to the Authority by the juvenile court after a finding that he had molested a child. He was entitled to a mandatory discharge at the end of two years or on his twenty-first birthday, whichever occurred later. However, the Youth Authority filed a petition under Welfare and Institutions Code Section 1800 alleging that Gary's release would endanger the public. They requested a two-year extension of his commitment and after a hearing at which both Gary and the Authority presented evidence as to his "dangerousness," he was adjudged still a ward of the court and subject to control of the Authority.

Cal. App. 3d 856, 82 Cal. Rptr. 147 (1969) where the court denominates MDSO proceedings as similar to criminal prosecutions, requiring criminal due process standards. _Id._ at 864, 82 Cal. Rptr. at 151.


67. CAL. WELF. AND INST'NS CODE § 602 (West 1972) provides:

Any person under the age of 21 years who violates any law of this State or of the United States or any ordinance of any city or county of this State defining crime or who, after having been found by the juvenile court to be a person described by Section 601, fails to obey any lawful order of the juvenile court, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

68. _Id._ § 1769 provides:

Every person committed to the authority by a juvenile court shall be discharged upon the expiration of a two-year period of control or when the person reaches his 21st birthday, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800).

69. _Id._ § 1800 provides:

Whenever the Youth Authority Board determines that the discharge of a person from the control of the Youth Authority at the time required by Section 1769, 1770, 1770.1, or 1771, as applicable, would be physically dangerous to the public because of the person's mental or physical defect, disorder, or abnormality, the board, through its chairman, shall make application to the committing court for an order directing that the person remain subject to the control of the authority beyond such time. The application shall be filed at least 90 days before the time of discharge otherwise required. The application shall be accompanied by a written statement of the facts upon which the board bases its opinion that discharge from control of the Youth Authority at the time stated would be physically dangerous to the public, but no such application shall be dismissed nor shall an order be denied merely because of technical defects in the application.
Although this was not an MDSO case the challenges made to these proceedings are important to our discussion. They were essentially three-fold: 1) Gary contended that he was being punished for his alleged status of "dangerousness" in violation of the Eighth Amendment to the United States Constitution and Article I, Section 6 of the California Constitution; 2) he claimed that he was denied treatment; and 3) he alleged that failure to afford him a jury trial denied him due process and equal protection of the laws.

Status—The court quickly dismissed Gary's status argument but the distinctions drawn were quite revealing. The court saw the issue as whether the statutory scheme in question "'imprisons' petitioner 'as a criminal' [which would amount to imprisonment for status], or constitutes 'compulsory treatment' of petitioner as a sick person requiring 'periods of involuntary confinement.'" The court looked to the legislative language of section 1801 and concluded that confinement was for the purpose of treatment. In fact, the court noted that the Youth Authority was under an affirmative duty to provide treatment and "(i)f the cause is not a physical or mental condition or the condition is not amenable to treatment, the Youth Authority may not extend its control over the ward pursuant to sections 1800-1803."

Because sections 1800-1803 served a "demonstrably civil purpose" and there was no evidence that persons so committed were included among the general prison population or were confined without treatment, the court did not believe that Gary's confinement constituted punishment for status within the constitutional definition.

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70. 5 Cal. 3d at 301, 486 P.2d at 1205, 96 Cal. Rptr. at 5.
71. Id. at 302, 486 P.2d at 1206, 96 Cal. Rptr. at 6.
72. Id. at 303-08, 486 P.2d at 1206-10, 96 Cal. Rptr. at 6-10.
73. Id. at 301, 486 P.2d at 1205, 96 Cal. Rptr. at 5 citing In re De La O, 59 Cal. 2d 128, 136, 378 P.2d 793, 798, 28 Cal. Rptr. 489, 494 (1963).
74. CAL. WELF. & INST'NS CODE § 1801 provides in part:

If after a full hearing the court is of the opinion that discharge of the person would be physically dangerous to the public because of his mental or physical deficiency, disorder, or abnormality the court shall order the Youth Authority to continue the treatment of such person.

If the court is of the opinion that discharge of the person from continued control of the authority would not be physically dangerous to the public, the court shall order the person to be discharged from control of the authority. (emphasis added).

75. 5 Cal. 3d at 302, 486 P.2d at 1206, 96 Cal. Rptr. at 6. In a footnote the court emphasized that it was not, however, suggesting freedom for "dangerous" individuals and it suggested other possible restraint techniques such as the use of Welfare and Institutions Code § 1780 (commitment of dangerous ward to state prison if period of control does not equal more than the term for the offense); § 5000 et seq. (detention and certification for involuntary treatment of imminently dangerous persons); § 6300 et seq. (commitment as MDSO).
76. Id. Under Robinson v. California, 370 U.S. 660 (1962), the United
Right to Treatment—Although Gary was able to substantiate his charge that he was “warehoused” at Atascadero, the court sidestepped the issue of his right to treatment by granting relief based on his due process-equal protection contention. The court stated that a habeas corpus procedure was available to secure the release of any individual who was denied treatment. However, it failed to note that this procedure will not secure the release of others similarly denied treatment.

The lack of efficacy of a single habeas corpus petition reminds one of the reasons for the growth of “the fruit of the poisonous tree doctrine.” It first was argued that an aggrieved defendant’s fourth amendment rights could be sufficiently assuaged by a civil suit for damages against the offending officers. The tainted evidence was still admissible; the civil suits were notably unsuccessful; and police misconduct was encouraged. The United States Supreme Court realized the fallacy of effectively condoning this official illegal behavior by relegateing the injured party to an inadequate remedy. In much the same way, the failure of the Youth Authority to meet its “affirmative duty to provide treatment” cannot be cured by each individual ward’s habeas corpus petition. In both situations, any injured party’s rights can be vindicated, but neither civil suit nor habeas corpus reaches the core of the problem—illegal official behavior and the attendant burden on the recipients of such behavior.

Perhaps as one commentator has suggested, the solution to inadequate or non-existent treatment is the release of all persons so incarcerated as the only effective method of forcing the state

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77. 5 Cal. 3d at 302, 486 P.2d at 1206, 96 Cal. Rptr. at 6.
78. In another, and arguably similar situation, the court has found that habeas corpus is not a sufficient remedy to insure the constitutional safeguards of those committed as incompetent to stand trial. PEN. CODE § 1368 (West 1970). In re Davis, 8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973). As with incompetents, MDSOs are committed because of an alleged “mental defect, disease, or disorder” and as such may not be able to shoulder the “burden of initiating proceedings to secure their freedom.” Id. at 806-07, n.6.
79. See Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Nardone v. United States, 308 U.S. 338 (1939) (first used the phrase “fruit of the poisonous tree”).
83. Id. “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the charter of its own existence.” 367 U.S. at 659.
84. 5 Cal. 3d at 302, 486 P.2d at 1206, 96 Cal. Rptr. at 6.
to meet the standards of medical treatment which due process requires.  

Right to a Jury Trial—Due Process and Equal Protection—The court carefully analyzed other statutes dealing with the involuntary commitment of "dangerous" persons. In these statutes the legislature extended the right to jury trial to other classes of persons subject to involuntary civil commitment. Implicit in the legislation was a recognition of the fundamental right of trial by jury absent a compelling state interest in denying such a trial. The court found no such compelling state interest in Section 1800. It therefore held that the denial of jury trial in section 1800 proceedings violated both due process of law and equal protection of the law. Citing Baxstrom v. Herold the court concluded that "(t)he state having made jury trial on the issue of status a prerequisite to commitment 'generally available . . . may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.'"

Deeming Gary's position must closely analogous to that of an MDSO or a narcotics addict, the court held that he was entitled to a jury trial similar to the one afforded to those classes. In both proceedings, that right is to a civil jury trial.

Thus Gary W. expresses the view that when a fundamental interest, a person's liberty, is in question, it is irrelevant what nomenclature is attached to the proceeding. It has been clearly and unequivocally recognized that

the interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction.

The California Supreme Court thus provides a significant

85. Birnbaum, The Right to Treatment, 46 ABAJ 499, 503 (1960). This would, of course, require the use of class actions in the area of involuntary commitments.
86. 5 Cal. 3d at 307, 486 P.2d at 1209-10, 96 Cal. Rptr. at 9-10.
87. For a discussion of Gary W's application to the commitment of the mentally retarded, the only other classification which is denied the right to a jury trial, see Kay, Farnham, Karren, Krakal, Diamond, Legal Planning for the Mentally Retarded: The California Experience, 60 CAL. L.R. 438, 522-23 (1972).
88. 5 Cal. 3d at 303-08, 486 P.2d at 1206-10, 96 Cal. Rptr. at 6-10.
90. 5 Cal. 3d at 308, 486 P.2d at 1210, 96 Cal. Rptr. at 10, citing Baxstrom v. Herold, 383 U.S. 107, 111 (1966).
91. See, e.g., CAL. WELF. & INST'NS CODE §§ 3050, 3051, 3108 (West 1972).
92. 5 Cal. 3d at 308, 486 P.2d at 1210, 96 Cal. Rptr. at 10.
93. Id. at 307, 486 P.2d at 1209, 96 Cal. Rptr. at 9.
weapon in the attack on the limitations imposed by the civil appellation of MDSO procedures.

_in re Lynch_94—a new look at cruel and unusual punishment

Another case which may well lay the groundwork for a direct assault on the MDSO statutes was decided in December, 1972 by the California Supreme Court. In _in re Lynch_, the petitioner was convicted of a violation of Penal Code Section 314, indecent exposure. As this was a second conviction for indecent exposure, it was charged as a felony.95 The court found that a potential life sentence for this offense constituted cruel and unusual punishment under Article I, Section 6 of the California Constitution. In doing so, it examined three rationales: 1) comparative offenses 2) preventive detention and 3) the rule of proportionality.

_Comparative Offenses_—One of Lynch's applicable rationales was to look within the “same jurisdiction for different offenses”96 which though more serious in nature are punished less severely. There are numerous crimes which are considered far more dangerous than those which underlie the MDSO commitment, and yet carry potentially lower sentences.97

Another closely related rationale utilized by the court was

95. _Id._ at 413, 503 P.2d at 922, 105 Cal. Rptr. at 218. Lynch was convicted of violation of Penal Code § 314 (West 1972) (Indecent Exposure). As this was a second offense he fell under paragraph 2 of the Code which stipulates that:

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code [lewd or lascivious acts upon a child], every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison for not less than one year.

96. _Id._ at 426, 503 P.2d at 931, 105 Cal. Rptr. at 228.
97. See, e.g., _Cal. Pen. Code_ §§ 193, 204, 208 (West 1972) (manslaughter—up to 15 years; mayhem—up to 14 years; kidnapping—1 to 25 years).

The ultimate seriousness of an MDSO commitment was made explicit by the court in _in re Kramer_, 257 Cal. App. 2d 287, 291, 64 Cal. Rptr. 686, 689 (1967):

_Courts and attorneys must recognize that sex psychopathy proceedings may have consequences much more serious than the prison term prescribed in the Penal Code. If the court finds the person is a danger to others but will not benefit by treatment in a state hospital, the court may, in its discretion, commit him for placement in an institution under the jurisdiction of the Department of Corrections (i.e., a state prison), there to remain until he is no longer a danger to others. For a prisoner who has been officially declared to be both dangerous and not treatable, the prospects of proving a recovery are bleak. The practical effect of the civil commitment may be life imprisonment without possibility of parole. A decision to impose such a commitment should be arrived at only after proceedings which are appropriate to the gravity of the issue._ (emphasis added).
to examine the ways in which other jurisdictions have dealt with the same offense. As noted earlier, unlike other states California seems to be particularly preoccupied with commitment of mentally disordered sexual offenders.98

Following the analysis in Lynch, a person convicted of indecent exposure, an offense with a maximum six-month sentence, may have his criminal disposition suspended and be certified to superior court as a potential MDSO. He then faces a possible indeterminate sentence of life imprisonment under the guise of "treatment" in the custody of the Department of Corrections. Mr. Lynch was fortunate—he was sent to prison as a time server. Had he been adjudged an MDSO he might still be there!100

Preventive Detention—The court's analysis in Lynch did not stop with comparing offenses, but proceeded to answer several contentions raised by the Attorney General. The court's language bears directly on the underlying rationale of any predictive law which, like MDSO proceedings attempts to predict future behavior. The court noted that the possibility of recidivism will not justify a pro tanto repeal of the cruel and unusual punishment clause.100 Nor, in the case of indecent exposure, does a second offense validate "greatly enhanced punishment."101 In reply to the allegation that exhibitionists move on to more aggressive acts, the court concluded that "this risk appears to be mere fantasy."102

In the case of MDSOs it is unclear what criteria are utilized to demonstrate a predisposition to the commission of sexual offenses. Certainly it is not their past criminal record. Between 1966 and 1970, 66% of all referrals had no prior sexual offense record and 68.6% of those who received indeterminate commitments had no such previous record.103 Considering the large percentage of "first-time offenders" it is difficult to understand the criteria used to find them "predisposed" to the commitment of sexual crimes.

98. See note 44 supra and accompanying text. Even in 1950 there had been more people committed as sex psychopaths in California than any other state. Preliminary Report of the Subcommittee on Sex Crimes of the Assembly Interim Committee on Judicial System and Judicial Processes 47 (1950).

99. Mr. Lynch, even after only one conviction, could have been adjudicated an MDSO and might still be facing life imprisonment.

100. 8 Cal. 3d at 432, 503 P.2d at 936, 105 Cal. Rptr. 232.

101. Id. at 433, 503 P.2d at 936, 105 Cal. Rptr. at 232.


103. MDSO-Statistics, 1972, supra note 20 at 27.
Thus if even actual recidivism is insufficient, as in Lynch, a mere prediction of future behavior must fall; particularly in light of the unreliability of psychiatric predictions.104

The Rule of Proportionality—Although the court in Lynch carefully limited its holding to the "particular indeterminant sentence imposed . . ."105 its language indicates a broader application. After examining the state of the law regarding cruel and unusual punishments, the court concluded that

in California a punishment violates Article I, Section 6, of the Constitution if, although not cruel and unusual in its method, it is so disproportionate to the crime for which it was inflicted that it shocks the conscience and offends fundamental notions of human dignity.106

The court thus announced a "rule of proportionality." A checklist was set forth to aid in delineating and applying this rule in regard to any particular sentence. The criteria deemed notable included the following:

1. Are the nature and circumstances of the offense ordinary?
2. Are the facts of the offense trivial?
3. Is the impact of the offense violent?
4. Are the controlling factors of the offense aggravated?
5. Is the gravity of the offense sufficient?
6. Is the offender dangerous?
7. Do the characteristics of the offender mitigate the crime?107

The analogy between Lynch and an attack on MDSO commitments is even closer than that of In re Gary W. Lynch, after all, was a convicted sexual offender who, either by chance or design, escaped the doubtful benefits of the MDSO proceeding and remained within the criminal process. The reasoning in Lynch ought therefore to apply particularly when read with Gary W's admonition that nomenclature is irrelevant. The "checklist" in Lynch demonstrates that a possible life sentence is disproportionate to the crime and, if the civil appellation does not control, is clearly cruel and unusual punishment.

The Misdemeanant MDSO—Several of the underlying crimes which trigger commitment as an MDSO are passive misdemeanors with maximum terms of six months in county jail.

104. Even those psychiatrists who espouse forensic psychiatry recognize the difficulty in predicting future dangerousness and its potential for gross error. POLLACK, supra note 17 at 73; See L. Frisbie, Another Look at Sex Offenders in California, 12 CAL. MENTAL HEALTH RESEARCH MONOGRAPH 235 (1969).
105. 8 Cal. 3d at 415, 503 P.2d at 924, 105 Cal. Rptr. at 220.
106. Id. at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226.
107. Id. at 425-26, 503 P.2d at 930-31, 105 Cal. Rptr. at 226-27.
Of the 2,869 offenders who were referred to the Department of Mental Hygiene between 1966 and 1970, 683 were convicted of a crime in municipal and justice courts and 2,186 in superior court. Of the 683 lower court referrals 537 (79%) were given indeterminate commitments.

According to the study, of those convicted of the crimes of indecent exposure and annoying children, both misdemeanors, 42 were initially considered MDSOs but not amenable to treatment and of those 19 (45.2%) were sent to prison. Of the 35 who received treatment and were subsequently rated as still dangerous 13 (37.1%) went to prison.

The significance of the fact that these misdemeanants were sent to prison as opposed to being placed on probation or sent to county jail is that their prison sentence could only have resulted from re-certification as an MDSO. It has been noted that it is often the misdemeanor rather than the felon who is subjected to recommitment.

The judge in this type of case faces a dilemma. He has three choices open to him when faced with an MDSO who is sent back to court as not amenable to treatment and dangerous: 1) he can sentence him on the criminal conviction, 2) he can grant probation or 3) he can re-certify him to superior court pursuant to Section 6326, which sets in motion the hearing procedure to re-adjudicate him an MDSO.

The maximum sentence which can be imposed for indecent exposure or annoying children is six months in the county jail. Often a judge is reluctant to risk having a person who has been labeled “dangerous” by the superintendent at Atascadero at large in the community that soon. The onus for any subsequent acts by

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108. MDSO-STATISTICS, 1972, supra note 20 at iv.
109. Id. at 6. Only 65% of superior court defendants were given indeterminate sentence.
110. CAL. PEN. CODE § 314 (West 1972).
111. Id. § 647a.
112. MDSO-STATISTICS, 1972, supra note 20 at 42.
113. Id.
114. Address by The Hon. R. Donald Chapman, Presiding Judge of the Municipal Court, San Jose, California to The Second Annual Meeting of the American Association for the Abolition of Involuntary Mental Hospitalization, Inc., October 21, 1972. [hereinafter cited as CHAPMAN]. See also MDSO-STATISTICS, 1972, supra note 20 at vi where it is noted that a “much higher proportion of lower court defendants [are] treated at Mental Hygiene and Correctional facilities, 19 percent, than of the superior court defendants, 7 percent.”
116. Id. § 6325. See note 22 supra.
117. Id. § 6316. See note 19 supra. Id. § 6326. See note 43 supra.
118. CAL. PEN. CODE §§ 314, 647a (West 1972). These code sections provide for a 6 month sentence and/or a fine not to exceed $500.
this person may, in the judge's opinion, fall on his shoulders. Both statistics and cases appear to bear out the observation that it is more often the misdemeanant than the felon who is subjected to an indeterminate recommitment to a penal institution. The felon is usually sentenced on his original criminal charge and processed as a "regular" prisoner within the Department of Corrections.

III. THE DIRECT ASSAULT

The California Supreme Court in Lynch and in Gary W. has laid the foundation for a direct assault on MDSO commitments, especially in view of several United States Supreme Court and federal district court decisions. This assault has in fact been mounted but whether or not it will succeed has yet to be determined. The MDSO procedure is open to attack on at least five grounds. If the civil appellation is reaffirmed, the statute nevertheless denies both equal protection of the laws and the right to treatment. If the essential criminal nature of the proceeding is recognized then the statute is unconstitutional because it punishes for status, imposes cruel and unusual punishment and denies due process of law.

MDSO-unconstitutional civil commitment

Even viewed civilly, the MDSO proceedings fail to meet the constitutional requirements of equal protection of the laws. Following the reasoning in Gary W., it is necessary to juxtapose the MDSO procedure with other involuntary civil commitment procedures.

119. See MDSO-STATISTICS, 1972 at 41-46 (the difficulty with these statistics is that felony dispositions are not broken down into those who were subsequently sent to prison on their original felony charge, as is often the case, and those who went to prison on an MDSO commitment; additionally, the dispositions of the 901 persons who were committed to Atascadero based upon convictions of non-sex crimes were not recorded); People v. Levy, 151 Cal. App. 2d 460, 311 P.2d 397 (1957); People v. Rancier, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966); People v. Succop, 67 Cal. 2d 785, 433 P.2d 473, 63 Cal. Rptr. 569 (1967); In re Bevill, 68 Cal. 2d 854, 442 P.2d 679, 69 Cal. Rptr. 599 (1968); In re Krieger, 272 Cal. App. 2d 885, 77 Cal. Rptr. 822 (1969); In re Brown, 275 Cal. App. 2d 537, 79 Cal. Rptr. 897 (1969); People v. Ruiz, 1 Cal. App. 3d 992, 82 Cal. Rptr. 408 (1971); In re Acosta, 21 Cal. App. 3d 51, 98 Cal. Rptr. 208 (1971) (In all of these cases defendants were initially convicted of misdemeanors, and after being returned as not amenable to treatment were placed in prison facilities). See note 109 supra and accompanying text.

120. CHAPMAN, supra note 114.

121. 5 Cal. 3d at 307, 486 P.2d at 1209, 96 Cal. Rptr. at 9. See In re Franklin, 7 Cal. 3d 126, 135, 496 P.2d 465, 470, 101 Cal. Rptr. 553, 558 (1972).
There is no rational reason to distinguish a disordered sex offender commitment from that of involuntary civil commitment of imminently dangerous persons under the Lanterman-Petris-Short Act. Under the LPS Act, California’s civil commitment statute, a person may be committed for post-certification confinement as an “imminently dangerous person.” However, such confinement may only be pursuant to a decision arrived at by a unanimous jury.

While the overall concern is with the mentally ill, the LPS description requires a person to have “threatened, attempted, or inflicted physical harm upon the person of another . . . and who, as a result of mental disorder, presents an imminent threat of substantial physical harm to others.” The MDSO description refers to “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 . . . .” The distinction is therefore, that the MDSO classification is for potential sexual dangerousness even previous to any overt act, while LPS only includes persons who have threatened, attempted or inflicted physical harm. Because LPS has a unanimity requirement, it is logically inconsistent that the MDSO statute require only a three-quarters jury verdict. The three-quarters jury requirement of the MDSO statute is less restrictive than the unanimity requirement under LPS and thus the state has discriminated against the allegedly sexually dangerous. This discrimination is invidious under Article I, Sections 11 and 21 of the California Constitution and the Fourteenth Amendment to the United States Constitution. A similar argument may also be made as to the standard of proof required as confinement under LPS must be made in accordance with the “constitutional guarantees of due process of law and procedures required under Section 13 of Article 1 of the Constitution of the State of California.”

122. CAL. WELF. & INST’NS CODE § 5303 (West 1972).
123. Id. § 5300 et seq. (West 1972).
124. Id. § 5303.
125. Id. § 5300.
126. Id. § 6300.
127. It is not clear what is the burden of proof under section 5303 of the LPS Act. There do not appear to be any appellate cases in which it has been judicially interpreted. Although “civil commitment” statutes have generally required merely a civil standard of proof, the wording of section 5303 indicates a different legislative intent. It is the only section of LPS which explicitly requires an unanimous jury and the only section to reference due process safeguards to Article I, Section 13 of the California Constitution. Article I, Section 13 refers to criminal cases and requires that no person be deprived of liberty without due process of law. Traditionally criminal due process has required proof beyond a reasonable doubt. As the California Supreme Court noted
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Of course, a determination that a classification is invidious because it denies a fundamental right to a distinct class does not end the inquiry. The state may show that its interest is compelling and that it has no narrower tool to accomplish its purpose. In the case of MDSO commitments however, the state cannot even demonstrate a mere rational relationship between the classification and the purpose.

The argument that the MDSO is a distinct and special class from the generally dangerous because they are “predisposed to the commission of sexual offenses,” was effectively laid to rest in Humphrey v. Cady. In comparing Wisconsin’s Mental Health Act, the equivalent of LPS, with its Sex Crimes Act the Court noted that these statutes were not mutually exclusive and that the mental state warranting commitment under the sexual psychopath statute might also warrant commitment under the civil statute. Justice Marshall in Cady found that the equal protection argument would be “especially persuasive” if it were determined that the deprivation of procedural protections rested on the arbitrary decision of the state to pursue commitment under one statute instead of the other. Further, in Baxstrom v. Herold, the United States Supreme Court held that

[c]lassification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all.

Similarly, the classification as sexually dangerous may be important for treatment but ought not to control the original procedures for commitment.

Given neither a compelling state interest in making the distinction between MDSOs and those committed under LPS, nor even

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in a recent case, under Evidence Code § 115, “Except as otherwise provided by law the burden of proof requires proof by a preponderance of the evidence.” In re Franklin, 7 Cal. 3d 126, 148, 496 P.2d 465, 479, 101 Cal. Rptr. 553, 567 (1972). Section 5303 does provide by law by reference to Article 1, Section 13. The legislative intent in drafting section 5303 would appear therefore to require proof beyond a reasonable doubt.

132. 405 U.S. at 512.
133. Id.
135. 383 U.S. at 111.
a rational relationship between such a classification and the purpose of the law, MDSO's are denied equal protection of the laws when committed by less than a unanimous jury and on a lesser standard of proof than beyond a reasonable doubt.

Right To Treatment—The major justification and rationalization of MDSO commitments has been the insistence that what is meted out is "treatment" and not punishment. Commenting on one MDSO's objection to the fact that although he was found guilty of a misdemeanor he now found himself in San Quentin, possibly for life, the court in People v. Levy136 asserted that "the purpose of confinement is to protect society and to try and cure the accused."137 His confinement, the court maintained, was not for punishment. The court failed to recognize that the twin purposes of protection and cure may not be severed. The confinement is real. The treatment must be more than illusory; it must exist in fact.

In his seminal opinion, in Rouse v. Cameron,138 Chief Judge Bazelon explored the concept of a right to treatment. Noting that the purpose of involuntary hospitalization was treatment, not punishment, he concluded that "(c)ontinuing failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities."139 The right to treatment in Rouse was based on a statutory right similar to that which the California court recognized in Gary W.140 The MDSO statutes, as those in Gary W., also speak in terms of treatment.141

The MDSO population is distributed between Atascadero State Hospital and the general prison population. Any discussion of the MDSO's right to treatment must therefore deal with both milieus.

Department of Mental Hygiene-Atascadero—After a person has been adjudicated an MDSO and found amenable to treatment he is sent to Atascadero State Hospital which is administered by the Department of Mental Hygiene. It is not within the scope of

139. 373 F.2d at 457.
140. See notes 66-68 supra and accompanying text.
141. CAL. WELF. & INST'NS CODE §§ 6316, 6317 (which permits the court to request progress reports concerning the person's recovery), 6325, 6326. There is no doubt that even under section 6326 which provides for penal commitment a person is required to be placed in a "unit for the care and treatment" of such offenders (emphasis added).
this comment to attempt to deal exhaustively with the quality of treatment at Atascadero. It is, however, highly questionable whether even those MDSOs at Atascadero are receiving "... such individual treatment as will give each of them a realistic opportunity to be cured or to improve his ... mental condition."\textsuperscript{142}

In 1970-71 of those MDSOs to leave Atascadero, 9 were transferred to other hospitals within the Department of Mental Hygiene; 199 were returned to court as no longer amenable to treatment and not dangerous (an "A" rating); and 281 were returned as no longer amenable to treatment and still dangerous (a "B" rating).\textsuperscript{143} The high number of those considered still dangerous may speak for itself. It is this group which will most likely be recertified as MDSO and indeterminately committed to a penal institution.\textsuperscript{144}

In August, 1972 a \textit{Sexual Reorientation Program} was proposed for one-third of the approximately 535 MDSOs admitted to Atascadero yearly. In the prospectus for this new program it was mentioned that the population turns over completely within a 12 month period. The program is aimed at improving "severe behavioral deficits in both (1) sex-related social skills, and (2) explicit sexual skills to such an extent that they have behaved in a manner that society refuses to support."\textsuperscript{145}

This author cannot comment on the medical efficacy of the proposed reorientation plan; however, it is designed to accommodate only one-third of those committed, and even if substantially effective it would still leave a large number of those committed as MDSOs dependent on the hospital's other facilities. If past statistics are any indication, these other "treatment" methods are not notably successful. Without effective treatment even commitment to Atascadero becomes reduced to incarceration for status.

\textit{Department of Corrections—the prison system}—Although many MDSOs are at Atascadero State Hospital, others are at the California Medical Facility\textsuperscript{146} or within prisons.\textsuperscript{147} Justice Mosk in

\begin{footnotesize}
\begin{enumerate}
\item Community Planning, Orientation and Transfer, Staff Paper, Atascadero State Hospital, Appendix 2.
\item Cf. Id. The report considers those with "B" ratings as likely candidates for jail or prison but it is difficult to tell if that refers to sentencing on their original charge or recommitment to prison as an MDSO.
\item Sexual Reorientation Program 1, Staff Paper, Atascadero State Hospital, August 1, 1972.
\item As of December 31, 1972 there were 22 MDSOs at the California Medical Facility. Note 149 \textit{infra} and accompanying text.
\item As of December 31, 1972 there were 66 MDSOs in California prisons. Note 149 \textit{infra} and accompanying text.
\end{enumerate}
\end{footnotesize}
In re Lynch cites to an affidavit of the assistant superintendent in charge of psychiatric services at the Vacaville Medical Facility who “describes the available group therapy as follows:

Such a person is placed in a group whose members suffer from a variety of mental problems. Since some inmates tend to look down on the exhibitionists, if such a person manages to overcome such intimidation and function adequately in such a masculine environment the group therapy will benefit him.

[Justice Mosk continues to say]

“We are not told what happens to the individual who does not ‘manage to overcome’ that concerted peer scorn. At best, we suppose, he continues to serve his sentence until a new attempt is made; at worst, we can only presume that the ordeal confirms or even increases his prior feelings of insecurity and inadequacy. In any event if this is the most optimistic treatment offered for exhibitionism in the most psychiatrically oriented institution in the Department of Corrections, the long prison sentence imposed by section 314 can hardly be justified as an act of benevolence towards the offender.”

If this is an indicia of the type of treatment offered at “the most psychiatrically oriented institution in the Department of Corrections” than one can only surmise that the availability of such services are essentially nil in other prison facilities.

As of December 31, 1972 there were 88 men under the “care” of the Department of Corrections who had been committed under MDSO procedures. These men were housed as follows:

- 8 in Northern Reception-Guidance Center
- 6 in San Quentin
- 22 in California Medical Facility (Vacaville)
- 52 in California Men’s Colony

The 52 MDSOs at the California Men’s Colony are housed in Quad “D” which holds 600 men. Additionally, although nine psychiatrists are available at the Men’s Colony, they rarely treat MDSOs. The totality of the MDSO’s treatment consists of one, one hour and fifteen minute group therapy session a week.

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148. 8 Cal. 3d at 434, 503 P.2d at 937, 105 Cal. Rptr. at 233.
149. Letter from M.V. Ryan, Senior Statistician, Department of Corrections, to the author, February 14, 1973 on file at the SANTA CLARA LAWYER.
150. Telephone interview with Mr. Wade, Information Officer at the California Men’s Colony, February 13, 1973.
151. Telephone interview with Mr. Carl Weaver, Correctional Counselor, California Men’s Colony, April 25, 1973. According to this interview, in addition to the nine full-time psychiatrists who do not work with MDSOs, there are 6 psychologists, 4 of whom are assigned to “D” Quad to serve its 600 men. There are also 17 correctional counselors distributed throughout the entire
MDSOs are, therefore, housed within the general prison population, and receive negligible treatment which violates both the letter and the spirit of the law.¹⁵²

Even if the MDSO laws accomplish what the courts of California have always claimed as their purpose—protecting society by incarcerating suspected deviants—and even if one accepts the predictive ability of psychiatry, these commitments violate the right to treatment of every alleged MDSO. Such drastic action is not necessary or proper, either for protection of the individual so committed, or for that of society at large. Society's interests can be preserved through commitment under LPS and incarceration under the criminal laws, while still respecting the fundamental rights of those affected.

**MDSO—unconstitutional criminal commitment**

What is an MDSO commitment and how does it differ from a criminal commitment? The California courts have consistently maintained that MDSO proceedings are civil in nature while recognizing that their primary function is the protection of society,¹⁵³ which is normally a criminal function.

A satisfactory test for the difference between criminal and civil statutes has not yet been announced by the Supreme Court.

In *In re Gault*¹⁵⁵ and *In re Winship*¹⁵⁶ the Court examined the adjudicatory process and determined that the benign purpose of juvenile courts could not mask the substantial deprivation of rights which had often been inflicted on juveniles. The Court in *Specht v. Patterson*¹⁵⁷ looked at the disposition of sexual psychopaths, indicating that they were subjected to "criminal punishment even though it is designated not so much as retribution as it is to keep individuals from inflicting future harm."¹⁵⁸ The *Specht* Court cited with approval an earlier third circuit decision which insisted that "'a defendant in (a sexual psychopath) proceeding is entitled to the full panoply of the relevant protections which due process guarantees in criminal proceedings:'"¹⁵⁹

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¹⁵⁸. *Id.* at 608.
¹⁵⁹. *Id.* at 609-10 citing Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966).
If the test is therefore the severity of the consequences of one affected by an allegedly civil proceeding, the MDSO laws are clearly the type of statute to which the Gault, Winship, Specht and Gerchman decisions were addressed. These decisions thus require criminal due process in an MDSO commitment. The question then becomes: which rights are not extended to a mentally disordered sex offender that are included in the "full panoply of relevant protections"?

The Standard of Proof—Criminal or Civil?—In Lessard v. Schmidt, a three-judge federal district court, recently expressed surprise that the civil/criminal dichotomy had not been laid to rest by Gault. The court in Lessard was dealing with a Wisconsin involuntary civil commitment which did not require a criminal conviction, but the contentions of the court are equally applicable to MDSO proceedings.

The Wisconsin Supreme Court had approved jury instructions which permitted involuntary civil commitment based upon a preponderance of the evidence. The MDSO statute permits trial "... as provided by law for the trial of civil cases, and if tried before a jury the person shall be discharged unless a verdict that he is a mentally disordered sex offender is found by at least three-fourths of the jury." Recent California appellate cases have affirmed that the standard of proof in such trials is merely a preponderance of the evidence.

Of particular interest in this regard is an amicus brief filed in a recent United States Supreme Court case, Murel v. Baltimore City Criminal Court which challenged Maryland's Defective Delinquency Law. After briefing and oral argument the Court dismissed the writ of certiorari as improvidently granted.

The Attorney General of California filed a brief as amicus curiae in support of the State of Maryland. In his statement of in-
terest, the Attorney General noted the similarity between the Maryland statute in question and California’s MDSO provisions. The amicus brief addressed itself to two questions: (1) the “civil” character of the Defective Delinquent Act and (2) the statute’s standard of proof: a preponderance of the evidence. The State of California argued that the reasonable doubt standard is “peculiarly applicable to criminal cases where the issue is guilt or innocence.” By asserting that these proceedings “do not involve a determination of the defendant’s guilt or innocence with respect to a criminal charge,” the Attorney General concluded that the proper standard of proof was a preponderance of the evidence.

The Attorney General argued that the underlying subject of the proceeding was not a crime, which requires a unity of act and intent, but status, which requires only the requisite state of mind and probability of future action. However, the cases discussed earlier make it clear that a proceeding is criminal when its purpose is the protection of society by the incarceration (commitment) of the individual. That which is to be determined—guilt versus status—does not define the proceeding. Rather, it is the consequences to the accused that control. Our laws prohibit criminal incarceration of an individual except upon proof beyond a reasonable doubt of the commission of certain proscribed acts.

“Guilt” may be adjudged under the MDSO statute upon a finding of predisposition to the commission of sexual offenses although no overt sexual offense has been charged. It is the determination of this predisposition (state of mind) coupled with an evaluation of the alleged MDSO’s potential dangerousness that is presented to the jury. In a normal criminal case each element of the unity of act and intent must be proved beyond a reasonable doubt. Often intent may be inferred from the commission and proof of an act. Yet state of mind or predisposition is undoubtedly harder to prove than the commission of an act. It is anomolous to argue that the elimination of one of these two elements should lower the standard of proof required for the other. Quite the opposite should be true. If a jury is being asked to predict behavior rather than judge if it has, in fact, occurred, then the standard of proof should be at least as high as if the act had allegedly occurred, i.e. beyond a reasonable doubt.

170. Amicus Brief at 9.
171. Id.
172. Cal. Welf. & Inst’ns Code § 6302 (West 1972) merely requires conviction of any criminal act. It is not necessary that it have a sexual connotation.
173. Id. § 6321.
In other areas the standard of proof beyond a reasonable doubt has been extended to "civil" proceedings. *In re Winship* extended that standard to juvenile proceedings. The "civil" nomenclature of juvenile proceedings is similar to that of MDSO actions. *Amicus curiae* in *Murel* contended that *Winship* was "a proceeding essentially criminal in nature" and that the application of the reasonable doubt standard to juveniles merely applies criminal procedures long applied in other "essentially criminal" arenas. However, the *amicus* fails to recognize that although a juvenile petition sets out the violations of law which allegedly compose a child's delinquency, the final adjudication is technically upon the delinquent or non-delinquent status of the child, just as a mentally disordered sex offender's trial determines his status.

*Amicus curiae* further asserts that proof by a preponderance of evidence is sufficient because all that the jury is asked to do is to confirm a psychiatric diagnosis. This statement is highly revealing. The traditional function of a jury, civil or criminal, is to weigh the evidence and reach its own conclusion. If the purpose of the jury safeguard presently afforded by the MDSO statute is nothing more than to rubber-stamp the psychiatric opinion presented, the safeguard is now a meaningless sham and the burden of proof irrelevant, since nothing is proved. The Attorney General also argues that a higher standard of proof will impose a substantial burden upon commitment proceedings. *Amicus* is probably correct in its assumption that a higher standard of proof places some burden on the state. We have long believed in criminal prosecutions that this burden is trivial when compared to an individual's fundamental interest in his liberty.

*Murel* was not decided on its merits, but the California Supreme Court is currently considering the same issues. *People v.*

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175. For a thorough analysis of the analogy between juvenile (*Winship*) and MDSO proceedings see *Comment*, supra note 16, at 174-78.
176. *Amicus Brief* at 10-11.
178. *Amicus Brief* at 13. See Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 4 TRIAL 29 (Feb./March 1968). Professor Dershowitz broadly describes the problem he sees in the area of involuntary civil commitment where the medical model has overtaken and usurped the function of the legal model. He points out that what few studies have been undertaken reveal that psychiatrists are poor predictors of anti-social conduct and that they tend to overpredict such conduct where, in fact, it would not occur.
180. *Amicus Brief* at 13.
Burnick\textsuperscript{181} was recently argued before the court and People v. Bonneville\textsuperscript{182} has been granted a hearing. Both Burnick and Bonneville involve appellants who were adjudicated MDSOs based on a preponderance of the evidence. Both cases were argued on the basis of the Winship analogy\textsuperscript{183} to juvenile proceedings. Additionally, Bonneville raises the issue of equal protection of the laws.\textsuperscript{184}

The lower court in Burnick gave only cursory treatment to the standard of proof question, considering the proper analogy to be to narcotics commitments.\textsuperscript{185} The Bonneville court refused, in the absence of a specific higher court ruling, to declare invalid a legislative decision "'clothed with the presumption of constitutionality.'"\textsuperscript{186} It also emphasized, as did the amicus brief in Murel, that a burden of proof beyond a reasonable doubt would ""foreclose the realistic use of medical testimony at criminal trials.'"\textsuperscript{187} The court seems confused; the burden of proof "at criminal trials" is already beyond a reasonable doubt, and the burden does not shift with the nature of the testimony presented. As with any evidence, the jury weighs the likelihood of certainty and arrives at its verdict. An alleged MDSO is already afforded the right to confront, cross-examine and present witnesses. If these rights are not to be rendered meaningless the jury function must be more than a rubber-stamp. The Bonneville court may simply be acknowledging the inherent imprecision of psychiatric diagnosis, but the failures of that profession should not be imposed upon the diagnostic subject.\textsuperscript{188}

\textsuperscript{181.} 27 Cal. App. 3d 326, 103 Cal. Rptr. 564 (1972) hearing granted, Crim. No. 16554, Oct. 12, 1972, argued Jan. 11, 1973. The appellate court had held Burnick's commitment invalid because two court-appointed psychiatrists were not present during the entire hearing pursuant to Section 6308. A retrial was ordered utilizing a preponderance of evidence standard.


\textsuperscript{183.} Brief for Appellant at 8-10, People v. Burnick, 29 Cal. App. 3d at 320-23, 105 Cal. Rptr. at 557-61.

\textsuperscript{184.} See notes 121-135 supra and accompanying text.

\textsuperscript{185.} People v. Valdez, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968). The Burnick court found Valdez controlling. The Valdez court held narcotic commitment proceedings to be "civil", "nonpunitive" and "remedial". However the court did note that "[a] situation may well arise where such characterization may break down in the face of the reality of the addict's involuntary confinement." \textit{Id.} at 904, 67 Cal. Rptr. at 589.

\textsuperscript{186.} 29 Cal. App. 3d at 323, 105 Cal. Rptr. at 559, \textit{citing} Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 484, 171 P.2d 21, 23 (1946).

\textsuperscript{187.} \textit{Id.} at 325, 105 Cal. Rptr. at 561 \textit{citing} People v. Phillips, 64 Cal. 2d 574, 579, n.2, 414 P.2d 353, 357-58, 51 Cal. Rptr. 225, 229-30 (1966) (emphasis by the Bonneville court).

\textsuperscript{188.} Consider for example the court's observation in People v. Bennett, 245 Cal. App. 2d 10, 53 Cal. Rptr. 579 (1966), where the defendant was contesting
The costs of such an imposition are clear. An adjudicated MDSO loses several fundamental rights and is stigmatized even after his release. These rights should not be lost "upon no higher degree of proof than applies in a negligence case." The argument for a stringent standard of proof is more compelling in the case of a civil commitment in which an individual will be deprived of basic civil rights and be certainly stigmatized by the lack of confidentiality of the adjudication. [The Lessard court therefore held] that the state must prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous.

**Punishment for Status—Cruel and Unusual?**—The United States Supreme Court in *Robinson v. California* recognized the concept that a person may not be imprisoned as a criminal for an illness, in that case, addiction to narcotics. The California Supreme Court in its discussion of "status" in *In re Gary W.* surveyed the legislative language which provided for an extension of commitment for juveniles. Like the statute in *Gary W.*, the

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his recommitment based solely upon the recommendation of the superintendent of Atascadero:

... by augmenting the record on this appeal, appellant has presented to us a letter written after the hearing held herein by a clinical psychologist at the hospital who claimed that appellant had been her patient while at the hospital. Her report on his activities and his progress was diametrically opposed to the conclusion reached by the superintendent. No reason is given why this information was not obtained prior to the hearing or why this psychologist had not been called as a witness on appellant's behalf. *Id.* at 26. (footnotes omitted)

189. Not only can one lose various civil rights while incarcerated as an MDSO but the stigma of being thus adjudicated lingers on. The Penal Code requires that "any person who... is determined to be a mentally disordered sex offender... shall within 30 days of his coming into any county or city... in which he resides or is temporarily domiciled for such a length of time... register with the chief of police of the city in which he resides..." CAL. PEN. CODE § 290 (West 1972). Section 290.5 provides for relief from the duty to register upon the granting of a certificate of rehabilitation pursuant to Section 4852.01 of the Penal Code. The latter section, however, applies only to the commission of felonies leaving the misdemeanant-MDSO without a remedy. *See also 52 Op. Att'y Gen. 118 (1969)* in which Section 1203.4 of the Penal Code (release from disabilities and penalties of crime or offense after successful completion of probation) is held applicable to criminal convictions but not to "civil" MDSO proceedings.


191. 349 F. Supp. at 1095.

192. Robinson v. California, 370 U.S. 660 (1961). In the recent case of McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1971), the Court affirmed that a person afflicted with mental illness could not be imprisoned for a willful criminal act (in this case civil contempt) if the act was "a manifestation of mental illness, for which he cannot fairly be held responsible." *Id.* at 251. *See Comment, supra* note 167 at 569.

193. 370 U.S. at 667.

194. 5 Cal. 3d at 301, 486 P.2d at 1205, 96 Cal. Rptr. at 5.

195. See notes 68-74 *supra* and accompanying text.
MDSO laws provide for treatment for some, but not all, "sex offenders." 196

The MDSO statute provides that those MDSOs who are not amenable to treatment may be returned to the court in which they were originally tried, recertified to superior court, and committed for an indeterminate period to a penal institution. 197 This is indeed imprisonment for status. By definition they will not benefit from treatment 198 and by experience they are mixed with the general prison population. 199

The court in Gary W. announced two criteria for rejecting the status argument: 1) there was no evidence that persons so committed were included among the general prison population, and; 2) there was no evidence that they were confined without treatment. 200 Justice Stewart in Robinson considered imprisonment predicated on illness for even one day to be cruel and unusual. 201 In the case of MDSOs recertified into the prison system all of the elements required in Gary W. are clearly present. For the MDSO committed on an indeterminate sentence and placed by the Department of Mental Hygiene within a facility of the Department of Corrections, the imprisonment may well be for life. Although the statute calls for periodic review, the hearing is not mandatory 202 and is held before the same judge who originally is-

196. Cal. Welf. & Inst'ns Code §§ 6316, 6326 (West 1972). A person may be adjudged not amenable to treatment either before or after spending time at Atascadero.

197. Id. § 6316. See note 19 supra for text of § 6316.

198. They will, after all, "not benefit by care or treatment in a state hospital..." Cal. Welf. & Inst'ns Code § 6316 (West 1972).

199. See notes 149-51 supra and accompanying text. The courts have long acknowledged that MDSOs are confined within the general prison population. This type of penal commitment has been recognized in People v. Levy, 151 Cal. App. 2d 460, 311 P.2d 867 (1957); People v. Rancier, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966); In re Bevill, 68 Cal. 2d 854, 442 P.2d 679, 69 Cal. Rptr. 599 (1968).

200. See notes 72-75 supra and accompanying text.

201. 370 U.S. at 667.

202. Cal. Welf. & Inst'ns Code § 6327 (West 1972) provides in part:

After a person has been committed for an indeterminate period to the department for placement in a state hospital as a mentally disordered sex offender and has been confined for a period of not less than six months from the date of the order of commitment, the committing court may upon its own motion or on motion by or on behalf of the person committed, require the superintendent of the state hospital to which the person was committed to forward to the committing court, within 30 days, his opinion under (a) or (b) of Section 6325, including therein a report, diagnosis and recommendation concerning the person's future care, supervision, or treatment. After receipt of the report, the committing court may order the return of the person to the court for a hearing as to whether the person is still a mentally disordered sex offender within the meaning of this article. (emphasis added). In In re Martinez, 130 Cal. App. 2d 239, 278 P.2d 727 (1955) the court read the "may" to be completely discretionary, regardless of
sued the commitment. Unlike a person under criminal sentence, the MDSO gets no parole date; he is not a "time server," but merely a custody case. In reality, for him, the sentence may be endless. Under the criteria of Robinson and Gary W. this disposition constitutes cruel and unusual punishment.

As early as 1966 the appellate court in People v. Rancier noted that if an MDSO's confinement had "external criminal indicia" which outweighed the "civil purpose, mechanism, and operation of the program set forth in the statutes," this could well constitute cruel and unusual punishment under Robinson. To be mixed within the prison population, receiving little or no "care and treatment," meets the test of "external criminal indicia."

Given the discussion of status in Gary W. and the clear evidence that MDSOs committed within the penal system are mixed with the general prison population and receive virtually no treatment, whatever is left of the "civil" facade vanishes. Clearly, penal commitment under the MDSO laws is unconstitutional as it imprisons for status and as such constitutes cruel and unusual punishment in violation of the California and United States Constitutions.

IV. THE FUTURE PERSPECTIVE

The mentally disordered sex offender laws, whether viewed as civil or criminal, fail to meet constitutional requirements. As such they should be declared unconstitutional.

the sufficiency of the showing. This makes the required showing of "abuse" by the lower court practically impossible to prove on appeal.

203. Id. § 6327.

204. CHAPMAN, supra note 114.

205. In light of these cases, the case of People v. Thomas, 260 Cal. App. 2d 196, 67 Cal. Rptr. 234 (1968), is clearly erroneous in concluding that such a commitment does not impose cruel and unusual punishment. Even while holding this, that court recognized that

[c]onfinement indefinitely in a facility located in a prison after a determination that a mentally disordered sex offender will not benefit from further hospital treatment is a drastic form of confinement.

Id. at 202.

206. People v. Rancier, 240 Cal. App. 2d 579, 49 Cal. Rptr. 876 (1966). Rancier was convicted initially of violation of Penal Code section 647a(1) (lewd or disorderly conduct in public) a misdemeanor punishable by a maximum jail sentence of six months or a fine not exceeding $500, or both. After spending one year at Atascadero he was designated as still dangerous but not amenable to treatment. After various certifications and recertifications he was sent to the California Medical Facility at Vacaville and then to the California Men's Colony at Los Padres. The court in Rancier refused to view this commitment as akin to life imprisonment without possibility of parole. The case, however, at least signifies an awareness of the potential for abuse within the realities of the present system.

207. Id. at 585, 49 Cal. Rptr. at 881.
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Considered as a purely civil commitment, the statutes fail to provide equal protection of the laws because they do not require the due process protections of other involuntary commitment procedures. It is also clear that the "treatment" provided MDSOs, especially those confined in prisons, cannot withstand the scrutiny of recent right to treatment cases, including the California Supreme Court's analysis in In re Gary W.

Viewed as criminal statutes, MDSO laws must also fail. They utilize a civil standard of proof, less than a unanimous jury and punish for what can only be described as status. Additionally, the length of the possible punishment, which by statute is "indeterminate," may be for life. In light of the criteria of In re Lynch this constitutes cruel and unusual punishment.

It is incumbent upon the court to recognize these inequities and act upon them, particularly as the legislature has been thwarted in its attempt to do so. A recent bill overwhelmingly passed by both houses of the legislature would have limited the length of penal confinement to "a period not to exceed the maximum sentence prescribed by law for the offense of which the person was convicted." The legislature has thus recognized the inequities associated with a possible life sentence in prison based upon a "civil" commitment, while at the same time recognizing society's right to protection. This legislative attempt at correction is praiseworthy, but it does not go far enough.

The unconstitutionality of the MDSO laws reaches beyond the area of penal confinement. It is time to reconsider the philosophical underpinnings of these laws and to ask if it is the right or purpose of the law to commit (imprison) people for possible future actions. What began as a benevolent attempt to aid the sex offender has itself become perverted.

We have come full circle; the Janus faces of the MDSO commitment are readily apparent and cannot be reconciled. There is an invidious dichotomy between the criminal and civil appella-

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208. Assembly Bill No. 1187, Introduced by Assemblyman John J. Miller, March 14, 1972, Passed 56-2 in the Assembly; unanimously by the Senate; returned unsigned by the Governor. In a digest of the bill put out by Assemblyman Miller's office, its purpose was characterized as intended to limit the maximum duration of such commitments to the maximum sentence prescribed for the offense of which the offender was convicted. If, during such confinement, the offender does not respond to treatment and is deemed a danger to others, the bill requires that he be cared for pursuant to the provisions of the L-P-S Act, i.e. conservatorship established, 72-hour evaluation, followed by a 14 day intensive treatment program and if following such evaluation and treatment he is deemed a potential danger to others he may be committed to the Department of Mental Hygiene or to a county facility for 90 day periods of involuntary treatment.

209. Id. at 2.
tions. More importantly, what began as an attempt to humanize the law and provide "curative" therapy for sex offenders has become a method for preventive detention, without treatment and without hope. The California Supreme Court should thus take the opportunity presented by the cases before it to abolish MDSO commitments.\(^{210}\)

Susan G. Tanenbaum

\(^{210}\) In addition to the *Burnick* and *Bonneville* cases, the court has also granted a hearing in an unreported case, People v. Feagley, Crim. No. 16818. In 1970, after pleading guilty to a misdemeanor, Mr. Feagley was sent to Atascadero. In return for his plea, there was an informal agreement with the district attorney that if he was found not amenable to treatment he would be sentenced on his original charge. When he was subsequently found not amenable to treatment and returned to court, he was recertified MDSO and committed to the California Men's Colony. (This case antedates People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970) which required the recording of plea bargains.) He was recently transferred back to Atascadero. Telephone Interview with Stephen L. Katz, Attorney for Mr. Feagley, April 26, 1973.