DUE PROCESS REQUIRES PROOF BEYOND REASONABLE DOUBT FOR COMMITMENT OF SEX OFFENDERS

People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975)

Appellant was convicted in municipal court of contributing to the delinquency of a minor[1] and child molestation.[2] Pursuant to the California statute governing commitment of mentally disordered sex offenders (MDSOs),[3] the trial court in lieu of sentence certified appellant to superior court for an initial hearing to determine his mental status.[4] The superior court issued a commitment order.[5] Appellant then exercised his statutory right to a full hearing and petitioned the court to apply a standard of proof beyond reasonable doubt.[6] This request was re-

1. CAL. PENAL CODE § 272 (Deering 1975). Violation of this section is a misdemeanor, punishable by a $1000 fine, one year's imprisonment, or both.

2. *Id.* § 647a. Violation of this section is a misdemeanor, punishable by a $500 fine, six months' imprisonment, or both. The record was silent on appellant's precise offenses, details of which were provided by the Attorney General and accepted as true by the court. People v. Burnick, 14 Cal. 3d 306, 311, 535 P.2d 352, 355, 121 Cal. Rptr. 488, 491 (1975). The specific conduct with which Burnick was charged consisted of four to six homosexual encounters with two boys, aged 13 and 15. Appellant had no other record of criminal offenses, nor was there evidence of other homosexual conduct with either minors or adults. *Id.*, 535 P.2d at 355, 121 Cal. Rptr. at 491.

3. CAL. WELF. & INST'NS CODE § 6300 (Deering 1969) defines a mentally disordered sex offender (MDSO) as

> any person who by reason of mental defect, disease or disorder is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others.

Any criminal conviction can trigger the commitment proceeding; if the trial court finds probable cause to believe that defendant is an MDSO, it may certify him for examination in the superior court. *Id.* § 6302. Upon such certification the superior court must notify defendant, appoint qualified psychiatrists to examine him, and receive their written report. *Id.* §§ 6303, 6307-08 (Deering Supp. 1975). The statute provides the defendant with rights to counsel, to be present at the hearing, to confront adverse witnesses, and to subpoena favorable witnesses. *Id.* §§ 6305, 6309, 6312, 6314 (Deering 1969). Defendants may also challenge the psychiatric testimony of the state with expert testimony on their behalf. *Id.* § 6311.

4. People v. Burnick, 14 Cal. 3d 306, 311, 535 P.2d 352, 354-55, 121 Cal. Rptr. 488, 490-91 (1975).

5. *Id.* at 311, 535 P.2d at 355, 121 Cal. Rptr. at 491.

6. The California system provides for an initial determination of mental competence by the superior court judge alone. CAL. WELF. & INST'NS CODE §§ 6315-16 (Deering Supp. 1975). If the defendant is found not to be an MDSO, the case is returned to the original court for further proceedings. *Id.* § 6315 (Deering Supp. 1975). If the offender is found to be an MDSO capable of "benefit[ting] by treatment in a state hospital," the court may either remand the case to the original court for "further disposi-

fused,[7] and the court, sitting without jury,[8] found by a preponderance of the evidence that appellant was an MDSO "dangerous to the health and safety of others."[9] Appellant was committed indefinitely to a state hospital.[10] On appeal, the California Supreme Court reversed and *held*: The due process clauses of the fourteenth amendment and the California constitution require proof beyond reasonable doubt of all elements necessary for commitment of mentally disordered sex offenders.[11]

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tion" or order the offender committed to a state hospital for treatment. *Id.* § 6316 (Deering Supp. 1975). If the superior court issues a commitment order, the defendant may demand a second hearing, including a jury trial on his mental condition. *Id.* § 6318 (Deering Supp. 1975). Although the statute provides that the vote of nine of twelve jurors is sufficient to commit, *id.* § 6321 (Deering Supp. 1975), a companion case to *Burnick* held that the three-fourths verdict violated both due process and equal protection, and required a unanimous verdict. People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). If the jury finds the defendant to be an MDSO, the court issues a second commitment order similar to the first. CAL. WELF. & INST'NS CODE § 6321 (Deering Supp. 1975).

7. 14 Cal. 3d at 311, 535 P.2d at 355, 121 Cal. Rptr. at 491. The court based its refusal on the language of § 6321, which states that the MDSO proceeding "shall be had as provided by law for the trial of civil causes . . . ." CAL. WELF. & INST'NS CODE § 6321 (Deering 1969). The usual standard of proof in civil cases is preponderance of evidence.

8. Section 6318 permits the second hearing to be conducted before either a judge or a jury at defendant's option. CAL. WELF. & INST'NS CODE § 6318 (Deering Supp. 1975). Burnick originally demanded a jury trial but subsequently waived the demand.

9. Three psychiatrists testified at the hearing. The state's expert thought that repeated homosexual encounters with youths were likely, with significant danger of encouraging homosexual tendencies in youths undecided about their sexual preferences. On cross examination, he conceded the possibility that appellant would confine his attentions to overtly homosexual youths, who would suffer no harm. 14 Cal. 3d at 312, 535 P.2d at 355, 121 Cal. Rptr. at 491.

Defendant's experts strongly disagreed. One testified that further seduction of children was unlikely, given the strong guilt feelings arising from appellant's current escapade. He also testified that isolated homosexual encounters would have slight effect on sexually undecided adolescents. *Id.* Another expert testified that appellant was usually uninterested in adolescents. He thought that the youths involved had probably initiated the encounters, and that the average adolescent could have homosexual experiences without serious harm. *Id.* at 313, 535 P.2d at 356, 121 Cal. Rptr. at 492.

No further evidence was offered. Nonetheless, the trial court, using the preponderance standard, found defendant to be an MDSO. *Id.* at 311, 535 P.2d at 356, 121 Cal. Rptr. at 491.

10. *Id.*, 535 P.2d at 356, 121 Cal. Rptr. at 491.

11. People v. Burnick, 14 Cal. 3d 306, 332, 535 P.2d 352, 369, 121 Cal. Rptr. 488, 505 (1975). The companion case of People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975), held that a less than unanimous jury verdict failed to meet the reasonable doubt standard. The *Feagley* court relied on People v. Superior Court, 67 Cal. 2d 929, 434 P.2d 623, 64 Cal. Rptr. 327 (1967), which interpreted article I,

It is now clear that some elements of due process are required in proceedings that might result in loss of liberty, whether the proceeding is labelled "civil" or "criminal."[12] The leading case of *In re Gault*[13] held that juvenile hearings must incorporate basic due process safeguards, including notice, right to counsel, privilege against self-incrimination,

§ 7 of the California constitution to require unanimous jury verdicts in all criminal cases. The same reasons that mandated imposition of the reasonable doubt standard required unanimous jury verdicts in commitment proceedings. *Feagley* also applied the reasonable doubt standard to a second class of persons, those found to be MDSOs but not susceptible of treatment in a state hospital. By statute, such a person may be either remanded to the original court for disposition of his criminal case or committed indefinitely to a state institution other than a hospital for "care and treatment." CAL. WELF. & INST'NS CODE § 6316 (Deering Supp. 1975). According to the *Feagley* court, these institutions constituted little more than prisons; thus the practice of committing individuals to state units other than mental hospitals violated the offender's constitutional right to treatment under both the eighth amendment and the California constitution. People v. Feagley, *supra* at 376, 535 P.2d at 398, 121 Cal. Rptr. at 534. *See* note 42 *infra.*

Feagley thus established that the commitment of the MDSO *qua* MDSO is constitutionally impermissible unless accompanied by "adequate treatment." *Id.* at 359, 535 P.2d at 386, 121 Cal. Rptr. at 522. Absent such treatment, the offender may not be retained in custody. The prospect of adequate treatment therefore appears to be one of the "dispositive . . . facts" that, under *Burnick*, must be proven beyond reasonable doubt. People v. Burnick, 14 Cal. 3d 306, 324, 535 P.2d 352, 364, 121 Cal. Rptr. 488, 500 (1975).

12. *In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Smith v. Bennett, 365 U.S. 708 (1961). In each of these cases, the Court emphasized that the impact of the proceeding on the defendant, rather than the rubric under which it was conducted, determined the necessity for due process. In *Smith*, a state habeas corpus proceeding, the state argued that the writ was a civil remedy; the Court responded, "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." 365 U.S. at 712. In *Gault*, a juvenile proceeding, the Court stated that "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" 387 U.S. at 50. In *Winship*, another juvenile case, the Court summarized the general rule:

> We made it clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for a proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.

397 U.S. at 365-66.

This concern with the results of state action, rather than the motives that underlie it, is the basic ground upon which the *Burnick* majority and dissent clashed in applying due process. The majority was concerned with the substantive effect the proceeding could have on the defendant, 14 Cal. 3d at 315, 535 P.2d at 358, 121 Cal. Rptr. at 494; the dissent focused on the beneficent purposes for which the state acted. *Id.* at 335, 535 P.2d at 371-72, 121 Cal. Rptr. at 507-08. *See In re* Winship, *supra* at 375 (Burger, C.J., dissenting), *discussed in* note 46 *infra.*

13. 387 U.S. 1 (1967), *noted in The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 171 (1967).

and confrontation.[14] One month earlier, in *Specht v. Patterson*,[15] the

14. 387 U.S. at 33, 41, 55, 57.

15. 386 U.S. 605 (1967). In *Specht* the Court anticipated its ruling in *Gault* by discarding the "civil-criminal" distinction in favor of examination of the substantive consequences of commitment under the Colorado Sex Offenders Act. Like the MDSO statute in California, the Colorado commitment proceeding was triggered by a criminal conviction and required proof of the additional facts that defendant was both mentally disordered and a danger to the community. Since the new findings of fact exposed the defendant to a significant risk of loss of liberty, the Court in *Specht* reasoned that he was entitled to full procedural safeguards in the hearing that determined those facts. *Id.* at 608.

Following the *Gault* rationale, courts have applied procedural safeguards to commitment of the mentally ill. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) (proof beyond reasonable doubt); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (right to hearing, timely notice, counsel, confrontation); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 421 U.S. 957 (1975) (right to hearing, notice, counsel, jury trial); Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd mem. sub nom.* Briggs v. Arafeh, 411 U.S. 911 (1973) (hearing); *In re* Popp, 33 Ohio App. 2d 22, 292 N.E.2d 330 (1972) (right to counsel); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588 (1973) (right to hearing, proof by "clear, cogent, and convincing evidence").

Procedural safeguards have also been applied to the commitment of narcotics addicts, People v. Fuller, 24 N.Y.2d 292, 248 N.E.2d 17, 300 N.Y.S.2d 102 (1969) (right to trial by jury), and of mentally disordered sex offenders, Specht v. Patterson, *supra* (right to hearing, timely notice, and counsel); Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973) (right to hearing and to timely assistance of counsel); Stachulak v. Coughlin, 369 F. Supp. 628 (N.D. Ill. 1973), *aff'd sub nom.* United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) (proof beyond reasonable doubt); People v. Studdard, 51 Ill. 2d 290, 281 N.E.2d 678 (1972) (basic due process protections); People v. Pembrock, 23 Ill. App. 3d 991, 320 N.E.2d 470 (1974) (proof beyond reasonable doubt); Huebner v. State, 33 Wis. 2d 505, 147 N.W.2d 647 (1967) (right to hearing).

In the related field of persons acquitted of criminal charges by reason of insanity, courts have required due process in commitment hearings. United States v. Wright, 511 F.2d 1311 (D.C. Cir. 1975) (statutory right to jury trial); United States v. McNeil, 434 F.2d 502 (D.C. Cir. 1970) (right to explicit findings of fact and law to permit appellate review); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (right to hearing, timely notice, counsel, jury trial); State v. Clemons, 110 Ariz. 79, 515 P.2d 324 (1973) (burden of proof on state in termination hearing). When states have established procedures to commit habitual criminals, procedural safeguards have also been imposed. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom.* Murel v. Baltimore City Crim. Court, 407 U.S. 355 (1972) (right to hearing, timely notice, jury trial); United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966) (right to hearing, confrontation); Dixon v. Attorney Gen., 325 F. Supp. 966 (M.D. Pa. 1971) (right to hearing, counsel, confrontation of opposing witnesses, subpoena of friendly ones).

Determining the precise extent of procedural due process required in state commitment hearings poses two difficulties. First, the bounds of due process in state criminal proceedings are unclear. Justice Black advocated the incorporation theory, under which

Supreme Court had invalidated a state sex offender statute that provided neither notice nor hearing prior to commitment. Neither case dealt specifically with the appropriate standard of proof. It remained for the 1970 decision in *In re Winship*[16] to hold that in criminal proceedings a state must prove its case beyond reasonable doubt,[17] and to apply that

due process meant the procedural protections explicitly mentioned in the Bill of Rights and no more. *See In re* Winship, 397 U.S. 358, 377 (1970) (Black, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting). An alternate theory, whose foremost advocates included Justices Frankfurter and Harlan, is the natural law theory, under which due process includes the "requirements of fundamental fairness 'implicit in the concept of ordered liberty.'" Pointer v. Texas, 380 U.S. 400, 409 (1965) (Harlan, J., concurring), *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937). Such requirements are those embedded in the common law, or the absence of which "shocks the conscience" of the Court. *See* Rochin v. California, 342 U.S. 165, 172 (1952); Adamson v. California, *supra* at 59 (Frankfurter, J., concurring).

> In each case, due process of law requires an evaluation based on a disinterested inquiry pursued in the spirit of science on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

Rochin v. California, *supra* at 172.

A third theory, identified with Justice Douglas, incorporates both enumerated rights and peripheral rights implied in the Bill of Rights. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The current approach, "selective incorporation," holds only some of the Bill of Rights protections to be elements of fourteenth amendment due process. Duncan v. Louisiana, *supra* at 164 (Black, J., concurring); Henkin, *Selective Incorporation in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

A number of specific elements of the Bill of Rights have thus been imposed on state criminal proceedings. *In re* Winship, *supra* (proof beyond reasonable doubt); Benton v. Maryland, 395 U.S. 784 (1969) (protection against double jeopardy); Duncan v. Louisiana, *supra* (right to jury trial); Washington v. Texas, 388 U.S. 14 (1967) (right to subpoena witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to speedy trial); Pointer v. Texas, *supra* (right to confront opposing witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (right to refrain from self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel).

In some recent decisions, the Court declined to apply Bill of Rights protections to state criminal proceedings. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972) (unanimous jury not required); Williams v. Florida, 399 U.S. 78 (1970) (twelve-person jury not required). *See generally* Nagle & Neef, *Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict*, 1975 WASH. U.L.Q. 933.

There is even less agreement on which of these elements of due process must be applied in noncriminal proceedings that jeopardize individual liberty. For a discussion of this second major difficulty in determining what process is due in commitment hearings, see note 20 *infra*.

16. 397 U.S. 358 (1970), *noted in The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 156 (1970).

17. 397 U.S. at 364. Like *Winship*, this Comment will discuss the burden of proof only in terms of the burden of persuasion, ignoring the burden of producing evidence.

ruling to juvenile proceedings on the theory that youthful offenders face both lengthy incarceration and social stigma.[18] The Court reasoned that any possibility of error must be resolved in favor of an individual facing deprivations of this magnitude, a resolution achieved only by imposing the reasonable doubt standard.[19] The Supreme Court has yet, however, to specify the extent to which due process requires this standard in noncriminal proceedings that jeopardize liberty.[20]

In civil commitment cases, state courts have developed three standards of proof.[21] Traditionally, courts held that since commitment pro-

18. *Id.* at 365-67.

19. The concurring opinion of Justice Harlan is of particular importance in applying the reasonable doubt standard to noncriminal proceedings that threaten individual liberty. Harlan concluded that the function of burden of proof is to allocate the probability of error to minimize the social disutility of error. *Id.* at 371 (Harlan, J., concurring). In criminal trials, a governmental burden of proof beyond reasonable doubt serves additional moral and symbolic values. *See* Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1378 (1971). In choosing the appropriate standard of proof for noncriminal proceedings such as civil commitment, recognition of the error-allocating function of the burden of proof provides valuable insights. *See* note 41 *infra*.

20. The Court declined an opportunity to consider the standard of proof in the analogous field of indefinite commitment of habitual criminals whose mental disorders indicate a significant likelihood of recidivism. Murel v. Baltimore City Crim. Court, 407 U.S. 355 (1972). Over a strong dissent by Justice Douglas, the Court dismissed the petition for certiorari from Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), as improvidently granted, partly on grounds of mootness and partly because the state was revising the relevant portions of its penal code. 407 U.S. at 357-58.

The reasoning of *Specht*, *Gault*, and *Winship* lends much support to the thesis that the reasonable doubt standard is required by the due process clause of the fourteenth amendment. *See* People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); notes 26-32 *infra* and accompanying text. The strongest language supporting full incorporation of criminal due process into commitment proceedings is found in Specht v. Patterson, 386 U.S. 605, 609-10 (1967), *quoting* United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1965):

> A defendant in such proceedings is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial . . . .

As the *Burnick* dissent noted, however, *Specht* did not explicitly address the standard of proof. 14 Cal. 3d at 334, 535 P.2d at 371, 121 Cal. Rptr. at 507. Dictum in the more recent case of Humphrey v. Cady, 405 U.S. 504 (1972), suggests that a preponderance standard would pass constitutional muster: "If the state establishes the need for treatment by a preponderance of evidence, the court must commit the defendant . . . ." *Id.* at 507.

21. In general, state legislatures have deferred to the judiciary for the choice of an appropriate standard of proof in commitment proceedings. *See* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 284 (1966) (burden of proof in deportation proceeding left to courts). *But cf.* COLO. REV. STAT. ANN. § 16-13-211 (1973) (apply-

ceedings were civil rather than criminal, the civil standard of preponderance of evidence governed.[22] More recently, concern with the potential for erroneous confinement led courts to impose the stricter standard of clear and convincing evidence.[23] A growing number of

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ing criminal evidence rules to hearings to commit sex offenders); WASH. REV. CODE ANN. § 71.05.310 (Supp. 1975) (requiring "clear, cogent and convincing evidence" to commit mentally disordered persons).

22. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed as improvidently granted sub nom.* Murel v. Baltimore City Crim. Court, 407 U.S. 355 (1972), is representative of the decisions upholding the preponderance standard. The Fourth Circuit reasoned that the state proceeding to commit indefinitely habitual criminals was "civil," and satisfied due process by requiring a full hearing with counsel. The court thought that a standard of clear and convincing evidence would serve no practical purpose, since juries tended to decide on preponderance even when otherwise instructed. *But see* Speiser v. Randall, 357 U.S. 513 (1958). In dissent, Judge Sobeloff opted for the clear and convincing evidence standard as the best compromise between the state interest in commitment and the constitutional requirement of due process. Tippett v. Maryland, *supra* at 1165-66.

Many courts have accepted the preponderance standard without meaningful discussion of the issues. *E.g., In re* Alexander, 372 F.2d 925 (D.C. Cir. 1967); Sabon v. People, 142 Colo. 323, 350 P.2d 576 (1960); State Bd. of Control v. Fechner, 192 Minn. 412, 256 N.W. 662 (1934); *In re* Hogan, 232 Wis. 521, 287 N.W. 725 (1939). *See also* Fhagen v. Miller, 65 Misc. 2d 163, 317 N.Y.S.2d 128 (1970), *modified and aff'd*, 36 App. Div. 2d 926, 321 N.Y.S.2d 61 (1971), *aff'd*, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393 (1972) (upholding the preponderance standard for temporary detention under emergency commitment procedures).

Until 1970 defendants in the District of Columbia who were acquitted by reason of insanity were also subject to commitment hearings in which the government bore the burden of proof by preponderance. The constitutionality of the procedure was upheld in United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973). For discussion of commitment procedures that follow a successful insanity defense, see note 50 *infra*.

23. *See* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Dixon v. Attorney Gen., 325 F. Supp. 966 (M.D. Pa. 1971); *In re* Ciancanelli, 26 Ill. App. 3d 884, 326 N.E.2d 47 (1975); *In re* Sciara, 21 Ill. App. 3d 889, 316 N.E.2d 153 (1974); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974); State *ex rel.* Hawks v. Lazaro, — W. Va. —, 202 S.E.2d 109 (1974), *overruling* Schutte v. Schutte, 86 W. Va. 701, 104 S.E. 108 (1920) (requiring proof beyond reasonable doubt). *See also* Tippett v. Maryland, 436 F.2d 1152, 1159 (4th Cir. 1971) (Sobeloff, J., dissenting).

There is often no discussion of the merits. Lynch v. Baxley, *supra*, is representative of the more analytic opinions; it rejected the preponderance standard as inadequate in light of the effects of commitment on individual liberty. But the court found the reasonable doubt standard to be impractical for dealing with the subjective conclusions and tentative predictions characteristic of psychiatry. The court chose the clear and convincing evidence standard as a compromise designed to produce "evidence having the highest degree of certitude reasonably attainable in view of the matter at issue." Lynch v. Baxley, *supra* at 393.

For other applications of the clear and convincing evidence standard, see Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (certain libel suits); Woodby v. Immigration

jurisdictions consider commitment proceedings so closely analogous to criminal trials that only proof beyond reasonable doubt can satisfy due process.[24]

In *People v. Burnick*,[25] the California Supreme Court based its decision primarily on *Specht* and *Winship*.[26] Although *Specht* did not discuss the appropriate standard of proof in sex offender commitments,[27] the *Burnick* majority rationalized the omission by noting that no court before *Specht* had explicitly held that the reasonable doubt standard was an element of procedural due process.[28] *Winship* provid-

& Naturalization Serv., 385 U.S. 276 (1966) (deportation proceeding); Chaunt v. United States, 364 U.S. 350 (1960) (revocation of naturalized citizenship).

24. *E.g.*, *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Stachulak v. Coughlin, 369 F. Supp. 628 (N.D. Ill. 1973), *aff'd sub nom.* United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 421 U.S. 957 (1975); *In re* Hodges, 325 A.2d 605 (D.C. App. 1974); *In re* Pickles, 170 So. 2d 603 (Fla. Ct. App. 1965); Denton v. Commonwealth, 383 S.W.2d 681 (Ky. Ct. App. 1964); *In re* Andrews, — Mass. —, 334 N.E.2d 15 (1975); *In re* J.W., 44 N.J. Super. 216, 130 A.2d 64 (Super. Ct. App. Div. 1957); *In re* Heukelekian, 24 N.J. Super. 407, 94 A.2d 501 (Super. Ct. App. Div. 1952); *Ex parte* Perry, 137 N.J. Eq. 161, 43 A.2d 885 (Ch. 1945); COLO. REV. STAT. ANN. § 16-13-211 (1973).

Most opinions provide no more than the simple conclusion that when liberty is at stake, "a reasonable doubt of [defendant's] insanity should be resolved in his favor." *Ex parte* Perry, *supra* at 164, 43 A.2d at 887. *Cf.* State v. Taylor, 158 Mont. 323, 491 P.2d 877 (1971), *cert. denied*, 406 U.S. 978 (1972) (in release of defendant acquitted by reason of insanity any reasonable doubt of his sanity should be resolved in favor of society). Only United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976), *In re* Ballay, *supra*, and People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975), discussed the issue in detail.

25. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975).

26. *In re* Winship, 397 U.S. 358 (1970); Specht v. Patterson, 386 U.S. 605 (1967).

27. Specht v. Patterson, 386 U.S. 605 (1967), dealt specifically with the denial of a hearing and right to counsel. Compare the *Burnick* court's treatment of *Specht* with the rationale of the Seventh Circuit in United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976), in which the state relied on *Specht* to contend that a formal hearing and right to counsel were the outer limits of process due in sex offender commitments. The court distinguished *Specht* on the basis that the reasonable doubt standard had not then been held to be an element of procedural due process. *Id.* at 935.

28. The majority opinion emphasized the time sequence of *Winship* and *Specht*. 14 Cal. 3d at 317, 535 P.2d at 359, 121 Cal. Rptr. at 495. In 1967, when *Specht* was heard, no court had explicitly held that the reasonable doubt standard was an element of due process even in criminal cases. Moreover, the *Gerchman* decision, a cornerstone of *Specht*, had declined to require a jury trial for commitment of sex offenders on the explicit ground that jury trials had not been held a fundamental procedural right.

ed that explicit holding.[29] Moreover, the *Burnick* court noted, the Court's concern in *Winship* with lengthy incarceration and social stigma was equally applicable to MDSO proceedings, which expose defendants to equal or greater loss of liberty than do juvenile proceedings,[30] and to significantly greater social stigma.[31] The California court concluded, "under *Specht*, this defendant is entitled to all the safeguards of due process of law, and under *Winship* those safeguards must include the standard of proof beyond a reasonable doubt."[32]

The three dissenters observed that *Specht* was silent on the standard of proof,[33] and reasoned that *Winship*, which dealt with juvenile trials,

United States *ex rel.* Gerchman v. Maroney, 355 F.2d 302, 313 (3d Cir. 1965). The *Burnick* majority relied heavily on the language in *Specht* that defendants in commitment proceedings are entitled to the "full panoply" of due process safeguards. *See* note 15 *supra*. Since *Winship* subsequently held proof beyond reasonable doubt to be one such safeguard required in all criminal trials, so, reasoned the *Burnick* majority, does *Specht* in commitment proceedings. 14 Cal. 3d at 318, 535 P.2d at 359, 121 Cal. Rptr. at 495.

29. *In re* Winship, 397 U.S. 359 (1970).

30. Juveniles are normally released from custody upon attaining their majority, whereas MDSO proceedings may result in indefinite commitment. *Compare* CAL. WELF. & INST'NS CODE §§ 1769-71 (Deering 1969) (release of juveniles on attaining majority) *with id.* § 6316 (Deering Supp. 1975) (MDSO to be held for indefinite period). Moreover, MDSOs are committed to state mental hospitals or other institutions, which the *Burnick* majority found to bear a remarkable resemblance to jails. In contrast, juveniles are eligible for probation or placement in a number of less restrictive settings. 14 Cal. 3d at 320, 535 P.2d at 361, 121 Cal. Rptr. at 497.

31. The majority isolated four respects in which the social stigma of MDSO commitment exceeded the odium of a juvenile conviction. First, the public is more frightened by and mistrustful of the mentally ill. Second, sexual perversity strikes a peculiarly sensitive chord in the public mind. Third, juvenile proceedings are confidential and juvenile records subject to destruction after the court's custody is terminated; neither is true with MDSO hearings. Finally, the public is likely to be far more forgiving of juvenile indiscretions than of sexual misconduct by an adult. 14 Cal. 3d at 322, 535 P.2d at 362, 121 Cal. Rptr. at 498.

32. *Id.* at 324-25, 535 P.2d at 364, 121 Cal. Rptr. at 500 (footnote omitted). The state's counterarguments received short shrift. The predictive nature of the commitment proceeding did not warrant a reduction in the state's burden of proof, the majority reasoned, because psychiatrists are no more accurate in predicting dangerousness than are jurors in assessing the probability of past events. *See* note 44 *infra*.

Defendant's prior conviction does not justify a lesser standard of proof at the commitment hearing; as *Specht* makes clear, the latter hearing makes a new factual determination, jeopardizing defendant's liberty, in which due process is required. The claim that juries merely confirm the diagnosis of psychiatrists, a diagnosis that cannot be expressed beyond reasonable doubt, confuses the role of witness and jury. The witness states an expert opinion; the jury determines if the sum total of the evidence fulfills the standard of proof. That the state's proof is inherently weak does not warrant lowering the standard of proof. *Id.* at 325-30, 535 P.2d at 364-68, 121 Cal. Rptr. at 500-04.

33. 14 Cal. 3d at 334, 535 P.2d at 371, 121 Cal. Rptr. at 507. The dissent also

was less analogous to MDSO proceedings than were prior California decisions concerning commitment of narcotics addicts.[34] These decisions emphasized the rehabilitative purposes of the statute and held that the burden on the state should not exceed the degree of assurance with which reputable physicians could reasonably be expected to speak.[35] Finally, the dissent stressed that the state could neither prove insanity nor predict dangerousness beyond reasonable doubt; hence, imposition of the reasonable doubt standard would prevent the state from achieving the benefits of MDSO commitments.[36]

Courts that have dealt with the standard of proof required for civil commitment have, in general, offered little support for their conclusions.[37] By contrast, the *Burnick* court discussed in detail both legal

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noted the dictum in Humphrey v. Cady, 405 U.S. 504, 507 (1972), *quoted in* note 20 *supra.*

34. 14 Cal. 3d at 334, 535 P.2d at 371, 121 Cal. Rptr. at 507. *See* People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968); *In re* De La O, 59 Cal. 2d 128, 378 P.2d 793, 28 Cal. Rptr. 489 (1963); People v. Valdez, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968). *Moore* affirmed the *Valdez* reasoning that the distinction between criminal confinement and civil commitment for rehabilitative purposes was sufficiently clear to render the reasonable doubt standard unnecessary. These cases are in accord with the older view that emphasized the beneficent purpose of the state in determining which, if any, elements of due process must be applied. *See* note 12 *infra.* The dissent also reasoned that subsequent judicial review was adequate to prevent groundless continuation of commitment, and that this review was an additional reason obviating the need for the reasonable doubt standard. 14 Cal. 3d at 335-36, 535 P.2d at 372, 121 Cal. Rptr. at 508.

35. 14 Cal. 3d at 335, 535 P.2d at 372, 121 Cal. Rptr. at 508. The dissent relied on People v. Valdez, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968), as support for this argument. *Valdez* held that "the People's burden of persuasion ought to be no greater than the degree of assurance with which reputable physicians express themselves." *Id.* at 903, 67 Cal. Rptr. at 589. *Valdez* in turn relied upon Bauman v. San Francisco, 42 Cal. App. 2d 144, 163 (1940), in which plaintiff was required to prove that future damages were reasonably certain to occur. *Bauman* held that plaintiff's expert testimony on the issue was admissible, although the expert refused to state that he was reasonably certain that further injuries would develop; but it did *not* lower the plaintiff's burden of persuasion. *Bauman*, in short, held that expert witnesses need not state their opinions with the same degree of certainty by which the factfinder tests the adequacy of the plaintiff's entire case. The case thus offers no support for the thesis that the burden of proof may be lowered to meet the inadequacies of the plaintiff's proof. The *Valdez* rule is plainly insupportable. A proper application of *Bauman* to MDSO hearings would permit psychiatrists to testify that a defendant was mentally disordered, whatever the psychiatrists' level of certainty; but the overall burden would remain upon the state to prove defendant's insanity by whatever standard of proof was appropriate, employing the expert testimony and whatever other evidence might be available.

36. 14 Cal. 3d at 332, 535 P.2d at 370, 121 Cal. Rptr. at 506.

37. *See* cases cited notes 22-24 *supra.* In People v. Valdez, 260 Cal. App. 2d 895,

precedent and social concern. The analogy to *Winship* is clear and persuasive, sufficient alone to warrant the result.[38]

The *Burnick* court's reliance on *Specht* is less convincing. *Specht* did not mention burden of proof; a majority of the Supreme Court has never accepted the sweeping dictum that civil commitment requires the same due process safeguards as do criminal trials.[39] Nor should it, at least

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67 Cal. Rptr. 583 (1968), the California court misunderstood its precedent. *See* note 35 *supra*. Courts in other jurisdictions have fared no better. For example, the Wisconsin Supreme Court accepted the preponderance standard for commitment of the mentally ill without significant discussion. *In re* Hogan, 232 Wis. 521, 287 N.W. 725 (1939). One year later, the same court, in an opinion by the same justice, held that a living individual could be deprived of control of his property only on clear and convincing evidence of incompetency, because such was the degree of proof required in will contests. *In re* Olson, 236 Wis. 301, 295 N.W. 24 (1940). That rule, of course, reflects the difficulty of assessing the competence of an individual no longer available for psychiatric examination, *see In re* Colton's Estate, 166 A. 521, 526 (N.J. Prerogative Ct. 1933), and has no relevance to an incompetency proceeding in which the alleged incompetent is contesting his incapacity. The anomalous result of *Hogan* and *Olson* was that one might be deprived of his liberty by a mere preponderance of evidence, but could only lose control of his property on clear and convincing evidence. It is not known how many persons committed to state mental institutions continued to manage their own business affairs.

38. *See, e.g.*, Stachulak v. Coughlin, 369 F. Supp. 628 (N.D. Ill. 1973), *aff'd sub nom.* United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) (*Winship* was the basis for decision to require proof beyond reasonable doubt in sex offender commitments). The *Burnick* dissent was least effective in its discussion of *Winship*, which it incorrectly attempted to distinguish on two grounds. First, the dissent reasoned, juvenile hearings consider factual questions while MDSO proceedings attempt predictive judgments. 14 Cal. 3d at 333, 535 P.2d at 370, 121 Cal. Rptr. at 506. The new "label of convenience" is irrelevant; the substantive effects of the proceeding upon the defendant were the rationale for the ruling in *Winship*. Those effects are not altered by the predictive nature of the hearing. Second, the dissent reasoned, MDSO proceedings follow criminal trials in which the defendant has been proven guilty of a crime beyond reasonable doubt. 14 Cal. 3d at 334, 535 P.2d at 370, 121 Cal. Rptr. at 506. MDSO hearings, however, expose defendents to significantly greater jeopardy. Burnick, for instance, could have received a maximum sentence of eighteen months in the court which convicted him; but his commitment was for "an indeterminate period." CAL. WELF. & INST'NS CODE § 6316 (Deering Supp. 1975).

The *Burnick* majority, however, significantly weakened the persuasive force of *Winship* by subordinating it to the *Specht* dictum that sex offenders are entitled to the full panoply of criminal due process protections. By contrast, the Seventh Circuit in United States *ex rel.* Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3489 (U.S. Mar. 2, 1976) relied exclusively on *Winship* in imposing the reasonable doubt standard on Illinois sex offender commitment proceedings. The state had argued that *Specht* defined the outer limits of due process as the right to a hearing and counsel. The Seventh Circuit distinguished *Specht* on the ground that in *Specht* the burden of proof was not an issue. *Id.* at 935.

39. In an area of the law so imprecise as the extent of due process required in non-

with respect to standards of proof. The proper burden of proof in any category of proceeding requires an assessment of the probability of error in favor of each party and the relative social costs of such errors.[40] The

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criminal proceedings, courts should be cautious in relying on such sweeping dicta, especially in opinions by Justice Douglas. *Compare* People v. Burnick, 14 Cal. 3d 306, 317, 535 P.2d 352, 359, 121 Cal. Rptr. 488, 495 (*Specht* held that Colorado sex offender statute was "deficient in due process 'as measured by the requirements of the Fourteenth Amendment' "), *with* Menechino v. Oswald, 430 F.2d 403, 411 (2d Cir. 1970) (*Specht* held that "defendant must be represented by counsel" when new finding of fact may impose different punishment than specified in statute under which defendant pleaded guilty).

40. No decisionmaking process can ever be completely free of error; even in assessing past events one can never assert with positive certainty that a particular event occurred. *See In re* Winship, 397 U.S. 359, 368 (1970) (Harlan, J., concurring). The rational decisionmaker, recognizing this metaphysical truth, therefore designs the judicial machinery to minimize the impact of these errors. *See generally* Ball, *The Moment of Truth: Probability Theory and Standard of Proof*, 14 VAND. L. REV. 807 (1961); Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968); McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242 (1944). *But see* Tribe, *supra* note 19, at 1378.

The social consequences of some errors are obviously far worse than the consequences of other errors. The celebrated formula that one hundred guilty men should be freed rather than one innocent man unjustly convicted, *cf.* Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 385 n.64 (1970), represents a social belief that the consequences of erroneous conviction are more than 100 times greater than the social costs of erroneous acquittal. When the net social cost of error in one direction is equal to the net social cost of error in the other, social welfare is maximized only by decreasing the absolute number of errors. When the net social cost of error in one direction is extremely large, and the net loss from error in the other direction is low, social welfare is maximized by making the probability of the former error many times smaller than the probability of the latter. Thus, it is correct but somewhat misleading to state:

> Where *one* party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (emphasis added). The statement is misleading because if the other party also has at stake an interest of "transcending value," the cost of erroneous decision against him would be equally great. If we hypothesize a trial in which the liberty of both parties is at stake, society would be indifferent about the direction of error and concerned only with reducing the absolute number of errors. It is comparative social cost of error, rather than its absolute magnitude, that is important.

Moreover, the probability of error in favor of one party may be significantly higher in some situations. If the evidence before the court is consistently biased in favor of one party in a certain class of cases, the probability of error in his favor may exceed the probability of erroneous decision against him. Again, the comparative rather than the absolute probability is the critical factor.

burden of proof may then be altered to minimize the social cost of errors in the decision-making process.[41]

41. The proper burden of proof in any class of proceedings allocates the risks of error to minimize the social costs of error. When society is indifferent about the direction of error, the goal is to minimize the probability of error. In most instances, a preponderance standard will accomplish this result. A higher burden of proof on one party would make it more difficult for him to prevail, thus increasing the chances of an erroneous decision against him.

When the social cost of error differs, however, this increased chance of an erroneous decision against one party is precisely what is desired. The ideal standard of proof would equate total risk of error in one direction, defined as probability of error multiplied by its social cost, with total risk of error in the other direction. Assuming that social costs are fixed, this result is achieved by varying the probability of error; the burden of proof accomplishes this function. Symbolically, (P_{ce}) (C_{ce}) should equal (P_{ae}) (C_{ae}) where P_{ce} represents the probability of erroneous conviction, C_{ce} represents the social cost of erroneous conviction, P_{ae} represents the probability of erroneous acquittal and C_{ae} the social cost of erroneous acquittal. If C_{ce} is arbitrarily assumed to be at least 100 times greater than C_{ae}, the burden of proof should be manipulated so that P_{ce} is less than one percent of P_{ae}. The differential probability should thus vary inversely with the differential social cost.

Kaplan expressed the same concept in different fashion. In the Kaplan scheme, $P = \frac{1}{1 + \frac{D_g}{D_i}}$, where P is the probability of guilt necessary to convict, D_g is the disutility of acquitting the guilty, and D_i is the disutility of convicting the innocent. Again, the fraction D_g/D_i represents the differential social cost of the two errors; the Kaplan formula reflects that differential in the varying level of proof required. Kaplan, *supra* note 40, at 1072.

Tribe has argued strongly that such mathematical analysis is inappropriate in the context of a criminal trial. Tribe, *supra* note 40 at 385-87; Tribe, *supra* note 19. Most of his criticism has turned on the attempt to quantify explicitly the variables involved, Tribe, *supra* note 19, at 1330 n.2, and to apply the model on an ad hoc basis to derive a different standard of proof for each trial. *Id.* at 1385. He has not questioned the utility of a cost-benefit analysis as a general method of thinking about burden of proof. *Id.* at 1386. Moreover, much of the symbolic value which Tribe has attached to the ritual of trial is applicable to criminal trials only and of correspondingly less importance in noncriminal proceedings that may result in loss of liberty.

The concept of social disutility provides a rational explanation for the proper standard of proof in negligence trials, deportation proceedings, and noncriminal hearings that jeopardize personal liberty. In negligence cases, society does not care which party assumes the cost of injury; preponderance of evidence is the appropriate standard. In deportation proceedings, a significant infringement on individual liberty is possible; the social cost of erroneous expulsion from the country is significantly greater than the social cost of an erroneous decision permitting the alien to remain. In proceedings that actually incarcerate a convicted defendant society has determined that the value of individual freedom is immensely greater than the social interest in punishment and rehabilitation; a standard of proof beyond reasonable doubt thus allocates errors to conform to our notions of social utility. In each situation, with the possible exception of the criminal trial, a proper decision on burden of proof can only be reached by bal-

Although *Burnick* discussed the relevant social interests, it failed to use such an explicit balancing process.[42] In commitment proceedings,

ancing the probabilities and costs of errors in each direction for the class of proceedings as a whole—a point overlooked by much of case law. *Cf.* Lego v. Twomey, 404 U.S. 477, 494-95 (1972) (Brennan, J., dissenting) (erroneous admission of involuntary confessions more serious than erroneous exclusion of voluntary confessions; hence, preponderance standard for test of voluntariness is too lax).

42. There is a twofold social interest in commitment. First, the state has an interest in promoting the physical and mental health of its citizenry, commonly known as the *parens patriae* doctrine. *See In re* Oakes, 8 Law Rept. 122 (Mass. 1855); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1199 (1974). When the individual is mentally disturbed to the point that he is dangerous to himself, or has lost the capacity for rational decision regarding his need for treatment, *parens patriae* dictates involuntary confinement. For a discussion of the state statutes dealing with *parens patriae* commitments, see MENTALLY DISABLED AND THE LAW, 36-49 (rev. ed. S. Brakel & R. Rock ed. 1971). An erroneous decision not to commit will forfeit the social interest in the health of the individual, the welfare of his family, and the reduction of public charges accomplished by effective treatment. On the other hand, an erroneous decision to confine deprives the individual of his freedom and privacy, subjects him to social stigma, and condemns a sane man to compulsory mind-altering treatment in the insane world of the mental institution. "The mental attitude of one who is falsely found insane and relegated to life imprisonment is beyond conception. No greater cruelty can be committed in the name of the law." 5 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1400 at 201 (Chadbourn rev. 1974). If the involuntarily committed patient is not insane when he enters the hospital, he may well be mentally disordered after "treatment." Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 398 (1973), *reprinted from* 179 SCIENCE, Jan. 19, 1973, at 250. Thus, the social cost of erroneous confinement far exceeds the damage done by erroneous release, warranting a burden on the state of proof beyond reasonable doubt. *Developments in the Law, supra* at 1299-1300.

Protection of the health of the individual is an increasingly disfavored justification for social action that intrudes on liberty. *See, e.g., In re* Winship, 397 U.S. 359 (1970); *In re* Gault, 387 U.S. 1 (1967). Such judicial skepticism perhaps reflects the oft-quoted warning of Justice Brandeis:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficial. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest of dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Even when the legislature has acted primarily for the benefit of the individual, courts have rationalized the law in terms of other social interests. *See, e.g.*, People v. Carmichael, 53 Misc. 2d 584, 279 N.Y.S.2d 272 (J.P. Ct. 1967), *rev'd*, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1968) (motorcycle helmet law). *See generally* Note, *Limiting the State's Police Power: Judicial Reaction to John Stuart Mill*, 37 U. CHI. L. REV. 605, 615 (1970).

The obvious corollary of the *parens patriae* rationale for commitment is that the individual must be susceptible to and receive some type of treatment. Robinson v. California, 370 U.S. 660 (1962) (status of narcotics addiction alone insufficient to warrant incarceration); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated on other grounds*, 422 U.S. 563 (1975) (failure to provide adequate treatment renders hospital

psychiatrists often diagnose the sane as disordered[43] and the innocuous

officials liable for damages to person committed); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (injunction will issue to require state to provide adequate treatment); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (persons not susceptible to treatment in state hospital may not be confined in penal institutions in which inadequate treatment is provided).

The quality of the treatment required by the United States Constitution is an open question. The Fifth Circuit has explicitly held that an involuntarily committed patient "has a constitutional right to receive such individual treatment as will give him an opportunity to be cured or improve his mental condition." Donaldson v. O'Connor, *supra* at 520; *see also* Wyatt v. Aderholt, *supra* at 1312-14. But the Supreme Court's narrow holding in *Donaldson* imposed no such mandate and the Court took pains to point out that its opinion, not the Fifth Circuit's, was the governing law of the case. 422 U.S. at 577-78 n.12. California, however, requires "adequate treatment" to avoid the state constitutional ban on cruel and unusual punishment. People v. Feagley, *supra* at 359, 535 P.2d at 373, 121 Cal. Rptr. at 522.

The second rationale for commitment, that mental deviants may be dangerous to the rest of the community, presents more complex issues of social policy. Although the disutility of erroneous confinement remains the same, the social cost of erroneous release may be considerably greater. Were it possible to reliably predict strong antisocial character traits, the civil commitment process might serve far greater social values than the criminal justice system. *See* note 47 *infra*. The social cost of the erroneous release of an MDSO could in theory exceed the cost of erroneous acquittal of a substantive crime, thus warranting a less stringent standard of proof. In contrast to the potential criminal's probable immunity from preventive detention, mental illness may support incarceration on grounds of dangerousness to the community. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); *In re* Williams, 157 F. Supp. 871 (D.D.C.), *aff'd per curiam sub nom.* Overholser v. Williams, 252 F.2d 629 (D.C. Cir. 1958).

The flaw in this theoretical analysis, of course, is the dubious assumption that modern psychiatric analysis is capable of accurate diagnosis of the insane and reliable prediction of dangerousness. *See* notes 43-44 *infra*.

43. Evidence of the inaccuracy of psychiatric evaluation is legion. *See* People v. Burnick, 14 Cal. 3d 306, 325-27, 535 P.2d 352, 365-67, 121 Cal. Rptr. 488, 501-03 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Rosenhan, *supra* note 42; Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCH. 397 (1972); Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 619 (1970); Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972); *Developments in the Law*, *supra* note 42, at 1243.

Illustrative of these surveys is the Rosenhan experiment. Eight normal individuals gained admission to 12 different mental institutions by falsely alleging that they had heard voices saying "empty," "hollow," and "thud." No other false behavior was simulated, and after admission all ceased to exhibit any abnormalities. All were admitted, eleven under diagnosis of schizophrenia, while the twelfth (with identical symptoms) was diagnosed as manic depressive. Their fellow patients immediately recognized the deception; the hospital staffs could not. The patients were discharged with a diagnosis of schizophrenia in remission. Rosenhan, *supra* note 42, *cited in Burnick*, 14 Cal. 3d at 326 n.16, 535 P.2d at 365 n.16, 121 Cal. Rptr. at 501 n.16.

as dangerous.[44] Explicit balancing of the risk of error would reveal that commitment proceedings offer a high probability of erroneous confinement and a relatively smaller social interest in the confinement of any one person.[45] The dissent's concern with the inability of the state to prove a commitment case beyond reasonable doubt would be seen in its proper light as the single strongest argument supporting the majority

44. The accuracy of current psychiatric techniques in predicting dangerousness is quite low. *See* Ennis & Litwack, *supra* note 43; Wenk, Robison & Smith, *supra* note 43. "Operation Baxtrom" exemplifies the inadequacy of these techniques. Pursuant to the Supreme Court ruling in Baxtrom v. Herald, 383 U.S. 107 (1966), 989 persons originally classified as sufficiently dangerous to warrant treatment in maximum security hospitals were transferred to civil hospitals. Only seven later proved so obstreperous to require return to the maximum security institutions. People v. Burnick, 14 Cal. 3d 306, 326 n.17, 535 P.2d 352, 365 n.17, 121 Cal. Rptr. 488, 501 n.17 (1975).

Somewhat higher percentages of accuracy have been achieved in small, selected samples that used large quantities of detailed information about each individual whose behavior was being predicted. *Developments in the Law, supra* note 42, at 1243-44. The typical commitment proceeding does not even attempt such detailed investigation. *Id.* at 1244-45. Moreover, the most critical variable in predictive accuracy was prior aggressive behavior, *id.* at 1244, but sex offenders tend not to be aggressive. Tappan, *Some Myths About the Sex Offender*, 19 FED. PROBATION 7 (June 1955). Finally, the incidence of recidivism among sex criminals is quite low, *id.* at 8, a factor that is critical for accurate prediction of dangerousness. The mathematics of predictive tests dictate that when "the behavior which the test seeks to predict is rare, the ratio of false positives to true positives will be very large unless the predictive devices are *extremely* accurate." *Developments in the Law, supra* note 42, at 1242 (emphasis added). *See also* Wenk, Robison & Smith, *supra* note 43; *Developments in the Law, supra* note 42, at 1302-03 n.215. The absolute number of offenders falsely identified as dangerous will thus far exceed the number of persons correctly identified as dangerous. Consequently, the commitment process is inherently biased in favor of erroneous incarceration. *Developments in the Law, supra* note 42, at 1242.

45. Both aspects of the risk allocation process dictate the use of a reasonable doubt standard. First, the probability of erroneous confinement is significantly greater than the probability of erroneous release, given the systematic overprediction of dangerousness, *see* note 44 *supra*. Second, the social costs of erroneous confinement are much greater than the social costs of erroneous release. The individual is interested in retaining his liberty and averting the stigma of commitment for sexual perversity. The social interest in the commitment of any one individual, however, is low since there is but a relatively low probability that he will commit an antisocial act injurious to others. The state's interest in avoiding erroneous release pales by comparison with the individual's interest in averting erroneous incarceration.

Obviously, there will be far fewer persons committed under the reasonable doubt standard. But the public is not thereby endangered. Because the MDSO proceeding is triggered by a criminal conviction, and persons found not to be MDSOs are returned to the original court for further action, CAL. WELF. & INST'NS CODE § 6315 (Deering Supp. 1975), the normal safeguards of the criminal law remain for societal protection. If current criminal statutes provide inadequate sentences, the legislature retains the power to alter them. *See* People v. Feagley, 14 Cal. 3d 338, 376, 535 P.2d 373, 398, 121 Cal. Rptr. 509, 534 (1975).

result. That is, given the high probability of error in its favor, and its relatively small interest in a single commitment, the state should bear the heaviest burden of proof.[46] Moreover, the balancing approach would permit adjustment of the standard of proof should psychiatric evaluation and prediction become markedly more accurate.[47] Explicit balancing of the risks of error would produce a more flexible and more clearly defensible decision than the implicit weighing in *Burnick*.

In addition to requiring proof beyond reasonable doubt in MDSO proceedings, *Burnick* surely requires that California proceedings to commit the mentally retarded[48] employ a reasonable doubt standard.[49]

46. The inability of the state to prove its case beyond reasonable doubt means only that the social interest in commitment cannot outweigh the intrusion on individual liberty. The problem is not that the social interest in treating and restraining potentially dangerous sex deviates is not great; rather, we lack the proper tools to implement that interest. In this context, Chief Justice Burger's lament that the juvenile court system needs to escape the "straitjacket" of due process, *In re* Winship, 397 U.S. 359, 376 (1970) (Burger, C.J., dissenting), approaches the problem backwards. Were the juvenile justice system fulfilling the good intentions of its creators the reasonable doubt standard might well be inappropriate, because the social risk of erroneous release would be much greater. Given the sobering reality that in commitment of the mentally ill, no less than in juvenile hearings, we do not know how to achieve our laudable purposes, *see* notes 43-44 *supra*, the social disutility of erroneous release of any one individual is comparatively small. The likelihood that any one individual who has been diagnosed as a "dangerous" sex deviant will again engage in dangerous conduct is low. *See* note 44 *supra*.

47. The social interest in commitment, being prospective, is greater than the social interest in jailing the criminal. Retribution aside, the punishment of criminal offenders may be justified for rehabilitation, general deterrence, or incapacitation. Given a constitutional right to treatment, *see* note 42 *supra*, the rehabilitative efforts of a system dealing with the mentally ill should be more successful than those of the criminal system. The assumption behind incapacitation is that the individual who has sinned once is likely to sin again; while he is incarcerated, society is protected from his onslaughts. Some offenders are likely repeaters; others are not. A system of psychiatric evaluation geared specifically to the detection of probable future offenders, if accurate, should be superior to the blanket approach of the penal system. Only in general deterrence does the penal system look to the future, and the efficacy of general deterrence is questionable. *See* L. HALL & S. GLUECK, CRIMINAL LAW AND ENFORCEMENT 17 (2d ed. 1951). *But see* Andanaes, *The General Preventive Effect of Punishment*, 114 U. PA. L. REV. 949 (1966).

Should the evaluative and predictive techniques of psychiatry improve in accuracy, the social interest in commitment of any one individual would be correspondingly greater. The likelihood of that one individual engaging in dangerous activities would be much greater, while the probability of erroneous confinement due to systemic bias would shrink. Thus, due process might be satisfied by proof by clear and convincing evidence.

48. CAL. WELF. & INST'NS CODE §§ 6500-12 (Deering 1969, Supp. 1975).

49. This conclusion is justified on either due process or equal protection grounds. Having established the reasonable doubt standard for one group of involuntarily com-

Equal protection may require a similar standard for commitment of defendants acquitted by reason of insanity.[50] The consequence should be

mitted persons, the MDSOs, the state can hardly justify a different standard of proof for narcotics addicts or the mentally retarded unless it could demonstrate that predictive techniques for such groups were significantly more accurate than those employed for MDSOs. *See* Baxtrom v. Herald, 383 U.S. 107 (1966); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

50. *See* Baxtrom v. Herald, 383 U.S. 107 (1966); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); *cf.* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973). In California defendants are entitled to acquittal when a preponderance of the evidence indicates mental incapacity. People v. Monk, 56 Cal. 2d 288, 363 P.2d 865, 14 Cal. Rptr. 633 (1961); People v. McBride, 135 Cal. App. 522, 27 P.2d 776 (1933). If proof beyond reasonable doubt is required to commit, there may be a gap through which felons can escape.

The District of Columbia Circuit has wrestled with this problem for years. Under federal law a reasonable doubt of the sanity of the defendant warrants acquittal in criminal proceedings. Davis v. United States, 160 U.S. 469 (1895). Before 1970 involuntary commitment of such offenders required the government to prove present insanity and present dangerousness by a preponderance of evidence. Bolton v. Harris, *supra*. Thus, when the accused cast reasonable doubt on his sanity, but the government failed to marshal a preponderance of evidence of his mental incapacity, the defendant was acquitted of criminal charges but was not committed.

In United States v. Brown, *supra*, the District of Columbia Circuit held that the preponderance standard was a constitutionally permissible burden in proceedings to commit defendants previously acquitted by reason of insanity. "[E]ven assuming a higher standard is required prior to civil commitment," the court reasoned that defendants acquitted by reason of insanity occupied a different position than noncriminal offenders, since these persons had previously been proven guilty beyond reasonable doubt of antisocial conduct, and since Congress might well wish to discourage false insanity pleas. A strong dissent by Judge Wright reasoned that past antisocial conduct was not dispositive of the defendant's current mental state, 478 F.2d at 613, and that the equal protection analysis of Baxtrom v. Herald, *supra*, demanded equal treatment of all classes of offenders at commitment hearings. 478 F.2d at 613. As a matter of logic, the dissent was correct. Equal protection therefore requires proof beyond reasonable doubt to commit defendants acquitted of criminal charges by reason of insanity.

The current District of Columbia practice is similar to the statutory procedure employed in California. Persons acquitted by reason of insanity are automatically committed for a specific period; thereafter, the burden is on the defendant to prove by a preponderance of the evidence that he has recovered his sanity and deserves release. D.C. CODE ANN. § 24-301(d) (1973). But the constitutional status of this procedure is questionable. *Compare In re* Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972) (upholding California statute against due process and equal protection challenges), *with* United States v. Eichberg, 439 F.2d 620, 624 (1971) (Bazelon, C.J., concurring) (questioning due process aspects of the new District of Columbia statute).

The gap between standards for commitment and insanity acquittal may be of small practical importance. The experience in the District of Columbia before the 1970 change suggested that the insanity defense rarely succeeded, and that virtually all successful insanity pleas resulted in commitment. United States v. Wright, 511 F.2d 1311 (D.C. Cir. 1975); United States v. Greene, 489 F.2d 1145, 1172 n.73 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

a significant reduction in the number of persons committed under each of these kinds of proceedings.[51] Finally, *Burnick* is persuasive authority that the state may be required to shoulder a burden of proof beyond reasonable doubt at hearings in which the offender seeks release on the ground that he is cured.[52] If initial commitment is warranted only upon proof beyond reasonable doubt, continuation of custody can only be justified on a similar showing by the state.[53]

51. Of course, since MDSO proceedings are triggered by criminal conviction, the offender who escapes commitment must face whatever sentence the original court chooses to impose. *See* People v. Feagley, 14 Cal. 3d 338, 376, 535 P.2d 373, 398, 121 Cal. Rptr. 509, 534 (1975). That sentence, however, is fixed by statute, in distinct contrast to the indefinite commitment permitted in MDSO proceedings. Burnick, for instance, could have received a maximum sentence of eighteen months for his misdemeanor convictions, *see* notes 1 & 2 *supra*. Alternatively, the state might commit the offender as an MDSO, but limit the commitment to the maximum sentence fixed by the statute which he had been convicted of violating. Under those circumstances the MDSO proceeding would not jeopardize personal freedom, though it might increase stigma, and would arguably not require due process protections. The New Jersey sex offender statute, N.J. STAT. ANN. §2A:164-6-b (1971), which imposes such a ceiling on the commitment, has been upheld against due process challenges. United States *ex rel.* Demeter v. Yeager, 418 F.2d 612 (3d Cir.), *cert. denied*, 398 U.S. 942 (1970).

52. Standards for release vary. Some states require the offender to prove his recovery, but only by a preponderance of evidence. *See, e.g., In re* Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972); Mills v. State, 256 A.2d 752 (Del. 1968); Newton v. Brooks, 246 Ore. 484, 426 P.2d 446 (1967). Some impose a clear and convincing evidence standard, or some variant, on the offender. *See, e.g.*, State v. Carter, 64 N.J. 382, 408, 316 A.2d 449, 463 (1974); State v. Blubaugh, 80 Wash. 2d 28, 36, 491 P.2d 646, 651 (1971) (restoration of sanity must be "highly probable"). A few even require offenders to prove their sanity beyond reasonable doubt. Chase v. Kearns, 278 A.2d 132 (Me. 1971); State v. Taylor, 158 Mont. 323, 491 P.2d 877 (1971), *cert. denied*, 406 U.S. 978 (1972). Arizona places a continuing burden on the state to justify by a preponderance of the evidence the retention of either an insanity acquitted defendant or a mentally disordered individual. State v. Clemons, 110 Ariz. 79, 515 P.2d 324 (1973).

53. A criminal conviction justifies incarceration of the defendant for the full term of his sentence. Civil commitment deals not with the factual record of past conduct but with the present mental condition of the offender and an estimate of his future behavior; it is justified only when he is both mentally ill and dangerous to himself or others. Both conditions are obviously subject to change. Since commitment cannot be justified for longer than their simultaneous coexistence, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975), there should remain a continuing burden on the state to warrant its action. When the balance of interests dictates that the state must shoulder a burden of proof beyond reasonable doubt to commit initially, it would no less dictate that the burden of proof for continuing commitment also rests upon the state, sustainable only by the same degree of proof. At most the defendant should bear the burden of producing evidence indicating his recovery; once such evidence is produced, the burden of persuasion should be upon the state to prove beyond reasonable doubt that continued commitment is warranted.