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A Dangerous Commitment

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California Welfare and Institutions Code Section 1800 et seq., allows for a continued involuntary confinement of persons committed to, but about to be subject to release from, the California Youth Authority. The category is "dangerousness" and the risks of injustice are unusually great as the statutes now stand. Constitutional mandate and sound social policy stand behind the safeguards proposed in this comment.

A juvenile has been committed by the court to the California Youth Authority[1] for involvement in an activity which, were the matter heard as an adult proceeding, would have been a criminal offense.[2] From a life of freedom and diverse experiences, the juvenile is confined to an institution which is the most restrictive and regimented of all of the possible juvenile dispositions. Indeed, a California Court of Appeals, in *In re Donna G.*,[3] has viewed the potential commitment to the Youth Authority as so akin to an adult penal commitment as to require the constitutionality test of vagueness applicable to a statute in a *criminal* proceeding to apply to a statute which might result in a commitment of a juvenile to the Youth Authority.[4]

The *discharge* of the juvenile—his release to the life of autonomy and opportunity which Americans cherish so deeply—is mandatory under Section 1769 at the end of two years or on his twenty-first birthday, whichever occurs later.[5] Mandatory, that is, *unless* at the time of that mandatory discharge the juvenile, now adult, is further detained pursuant to Sections 1800 *et seq.*[6]

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1. Hereinafter cited as Youth Authority.

2. CAL. WELF. AND INST. CODE § 602. Hereinafter, all references to code sections are references to the California Welfare and Institutions Code.

3. 6 Cal. App. 3d 890, 86 Cal. Rptr. 421 (1970). Hereinafter cited as *Donna G.*

4. *Donna G.* deemed proper the *most* demanding due process considerations (*i.e.*, those applicable in a *criminal* proceeding) while considering whether § 777 was void for vagueness.

5. Section 1769:

> 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 comes later, unless an order for further detention has been made pursuant to Article 6 (commencing with Section 1800).

6. Otherwise referred to herein as 1800 proceeding or 1800 commitment. If our hypothetical person who had been convicted in Superior Court of a

Under an 1800 proceeding, the Youth Authority may petition the court to further detain a person then committed to the Youth Authority. Following an in camera hearing by the juvenile court, if the individual is ordered to remain detained in the Youth Authority, he may demand, within 10 days and in writing, a jury trial[7] wherein the sole issue before the jurors is whether the appealing individual: "Is . . . physically dangerous to the public because of his mental or physical deficiency, disorder or abnormality?"[8] According to judicial construction of 1800 *et seq.*, by the California Supreme Court, the maximum period of time for which the individual may be detained under the 1800 proceeding is two years[9] although this procedure may be evoked at biennial intervals, so that the ". . . theoretical maximum period of detention is *life.*"[10]

"Sections 1800-1803 apply only to . . . minors committed to the Youth Authority by the juvenile court pursuant to authority of Sections 730, 731, and 777, and to young adults committed by the Superior Court pursuant to Sections 1730-1731.5."[11] Consequently the great majority of those committed to the Youth Authority *reached* that institution only after an adjudication *beyond a reasonable doubt* that they had committed an offense punishable against

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criminal offense but was, at the time, under the age of 21 years, he could have been committed to the Youth Authority pursuant to §§ 1730-1731.5. In this event, in addition to being subject to possible further detention under § 1800 *et seq.*, that person could, *alternatively*, have been returned to the committing court, should he have been found by the Youth Authority

> . . . to be an improper person to be retained in any [Youth Authority] institution or facility, or to be so incorrigible or so incapable of reformation . . . as to render his detention detrimental to the interests of the authority and other persons committed thereto. . . .

In such case, the person may be committed to a state prison or county jail with a maximum term of imprisonment being that "period equal to the maximum term prescribed by law for the offense of which he was convicted less the period during which he was under the control of the Youth Authority." CAL. WELF. & INST. CODE § 1737.1 (West 1972). This "continued detention" of the person involved, however, involves a determinate sentence, whereas commitment under § 1800 *et seq.* theoretically does not (*see* text accompanying note 10 *infra*).

7. Section 1801.5.

8. *Id.*

9. People v. Smith, 5 Cal. 3d 313, 486 P.2d 1213, 96 Cal. Rptr. 13 (1971). Hereinafter cited as *Smith.* Section 1802 provides that an order for further detention continues for five years if the person was committed by an adult court, but only for two years if committed by the juvenile court. *Smith* held that the distinction was without rational or compelling basis and hence violative of equal protection. Thus commitments in either category may be for a maximum of two years per petition.

10. *In re* Gary W., 5 Cal. 3d 296, 300, 486 P.2d 1201, 1204, 96 Cal. Rptr. 1, 4 (1971). Hereinafter cited as *Gary W.*

11. *Id.* at 299-300, 486 P.2d at 1204, 96 Cal. Rptr. at 4.

adults under the criminal law.[12] In the 1800 proceeding, however, a finding of "dangerousness" must be made by three-fourths of the

12. Theoretically, a juvenile could be committed to the California Youth Authority resulting from an adjudication under the combined effect of §§ 601 and 777. (Unless otherwise indicated, reference to Appendix for pertinent portions of statutes mentioned). According to Section 701, a person described under § 601 may be brought within the jurisdiction of the juvenile court if the allegations against him are supported by proof amounting to a preponderance of the evidence. This would indicate that presently, Youth Authority committees subject to § 1800 *et seq.* may in fact have entered the process based on a finding of only a preponderance of the evidence. The contrast, however, between the juvenile's jurisdictional contact and that individual's continued detention under § 1800 *et seq.* remains striking.

Although California courts have declared that the preponderance standard is constitutionally adequate with regard to § 600 commitments (*see In re* Eva S., 18 Cal. App. 3d 788, 96 Cal. Rptr. 203 (1971), dependent child) and *In re* Winship, 397 U.S. 358 (1970), has been acknowledged as establishing the beyond a reasonable doubt standard as the requisite burden of proof for § 602 commitments (*In re* C.D.H., 7 Cal. App. 3d 230, 86 Cal. Rptr. 565 (1970)), no California case, since *In re* Winship, has held that the preponderance test affords adequate due process safeguards in a § 601 commitment. The § 601 proceeding is readily distinguishable from a § 600 proceeding. The former potentially results in the juvenile becomine a "ward" of the court (as with § 602 proceedings) rather than a mere "dependent child". A "600" dependent child may be placed with reputable persons of good moral character; or some association, or society or corporation which embraces within its objects the purpose of caring for such minors; or a suitable family home or private institution; or any other public agency organized to provide care for needy or neglected children (*see* § 727). The "§ 601" ward may also be committed, pursuant to § 730, to a juvenile home, ranch or forestry camp. And finally, under § 777, a § 601 ward may be committed to the California Youth Authority. *See In re* Donna G., 6 Cal. App. 3d 890, 86 Cal. Rptr. 421 (1970) as judicial recognition of the significance of such potential commitment. Although the "601" and "602" *labels* may arguably produce different stigmas, the proceeding itself and the potential or actual commitment seem to bear substantially more weight in determining the stigma than does the technical distinction between whether a juvenile was found involved in an activity which if presented in adult criminal court would constitute a crime (602) or that juvenile was found by the court to be a person who habitually disobeys authorities, is "beyond . . . control", an habitual truant or is in danger of leading an idle, dissolute, lewd or immoral life (§ 601). The distinction between the § 601 and § 602 adjudication, as relating to the associated effect on the involved individual's future social and economic future, is surely present in the eyes of those who see form and not substance, those who view academically what they themselves have not experienced. So although it is true that a person subject to the commitment under §§ 1800 *et seq. may* have originally been committed there resulting from an original jurisdictional contact supported by a mere preponderance of the evidence, this is not only the *exception*, but also sound social policy and constitutional mandate require that the burden *should* have been beyond a reasonable doubt, as is required by *Winship* for

jurors for a commitment to be allowed[13] and the requisite standard of proof is a mere *preponderance* of the evidence.[14]

Close to freedom, society calls the individual back to the involuntary commitment of the Youth Authority. The interests at stake are the individual's liberty versus society's declared interest in that individual's rehabilitation from an alleged physically dangerous condition. The normal release of the juvenile-now-adult being jeopardized, the *issue* is what safeguards society owes to the involved individual in order to assure that involuntary commitment results only where a substantial and constitutionally sufficient societal interest is present. The institutional *molding* of character—as distinct from societal intervention with criminally sanctionable behavior—remains a suspect procedure in a society holding a high regard for individuality. And even if the proceeding to accomplish this character molding is seen as justifiable in select circumstances, the proposed rehabilitation has been so historically fallible that the nature of the proceeding itself should be subject to *close* scrutiny.

Perspective

The 1800 proceeding operates in the midst of a system which is generally opposed to such concerns as dangerousness, without more. It is axiomatic that the criminal law will not convict a man on proof of evil intent alone. A man who had been convicted of attempt to steal a slave was freed by the Appellate Court because:

> The time proposed for consummating the crime was so far distant as to render it very doubtful whether the accused had fully resolved upon the commission of the act. There was ample room for

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§ 602 proceedings.

Thus, it remains the case that although the *highest standard* was appropriate for the juvenile's jurisdictional contact which eventually resulted in his original commitment to the Youth Authority, the § 1800 proceeding attempts to *extend* that confinement beyond the otherwise mandatory release date and into the individual's majority, based upon the *lesser* standard—one historically limited to proceedings involving potential losses characteristic of mere civil matters—the preponderance of the evidence test.

13. Section 1801.5.

14. *Gary W., supra* note 10, at 308, 486 P.2d at 1210, 96 Cal. Rptr. at 10, held that the proper standard of proof in a § 1800 proceeding is that "of a like manner as is made available" to those persons subject to involuntary commitment under the Lanterman-Petris-Short Act and related legislation (*Stats.* 1967, ch. 1667; Cal. Welf. & Inst. Code §§ 5000-5401, 6250-6825). *See, e.g.*, People v. Moore, 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968) and People v. Valdez, 260 Cal. App. 2d 895, 67 Cal. Rptr. 583 (1968) (commitment for narcotic addiction based on Section 3100 *et seq.*, preponderance of evidence sufficient); People v. Levy, 151 Cal. App. 2d 460, 311 P.2d 897 (1957) (commitment for sexual psychopathy, based on § 5500 *et seq.*, not akin to a criminal proceeding and, therefore, not requiring the procedural safeguards of, *inter alia*, proof beyond a reasonable doubt).

> the *locus penitentiae* before making a final decision. It would be too much to say he would not have awakened to a just sense of the enormity of the crime and relented before the proposed time for its perpetration arrived. *Lovett v. State*, 19 Tex. 174, 177 (1857).[15]

Perkins states that, as to the requirement of an *act* in the *perpetration* of criminally sanctionable conduct:

> . . .(A) wrongful intent which has no consequences in the external world . . . [is of no matter of special interest to the criminal law]. Ordinarily, such an intent would be known only to him who entertained it, but if he freely admits that such a thought was once in his mind, no crime has been established. *There has been no "social harm". Few are so upright* as to be able to exclude any criminal thought from entering the mind under any and all circumstances. The average law abiding citizen is not one who never has a criminal intent, but one who never permits such a thought to rule his conduct. (Emphasis supplied).[16]

But the courts are quick to advise all persons concerned that the 1800 proceeding results not in a "conviction" nor an "imprisonment" for evil thoughts and possible future misconduct, but rather results only in a "medical" determination of a "sociopathic" condition of "physical dangerousness" and a "civil" commitment for rehabilitative purposes only, devoid of the stigma of a criminal conviction.[17] These contentions may be accurate[18] at least to the extent that under *some* circumstances, with certain strict procedural safeguards, persons could be subjected to involuntary civil commitment arguably without infringement on constitutional guarantees of due process of law. However, the 1800 proceeding today is of such a character as to not embody the requisite strict procedural guarantees and thereby violates the *constitutional rights* of the involved individual through the due process clauses of the Fourteenth Amendment to the United States Constitution and Article I Section 13 of the Cali-

15. Waite, *Crime Prevention and Judicial Casuistry*, 5 HAST. L.J. 169, 172 (1954).

16. R. Perkins, PERKINS ON CRIMINAL LAW 546 (2d ed. 1969); *see also*, B. Witkin, CALIFORNIA CRIMES §§ 66, 93, 106 (1964).

17. *See Gary W., supra* note 10, at 301-02, 486 P.2d at 1205-06, 96 Cal. Rptr. at 5-6. Physical dangerousness, if a category giving rise to penal consequences, would be violative, under Robinson v. California, 370 U.S. 660 (1962) (punishment for status), of the constitutional proscription against cruel and unusual punishments. *Gary W.*, at 301, 486 P.2d at 1205, 96 Cal. Rptr. at 5.

18. *See* note 71 *infra* and accompanying text.

fornia Constitution.[19]

Although all penal institutions give lip-service to having a primary objective of rehabilitation of their inmates, it would certainly be an unwise policy to abandon, on the theory that the defendant was merely to undergo medical rehabilitation, the many constitutional principles which have, over the years, been built up as safeguards against the deprivation of liberty of innocent persons caught in the criminal process.[20] Substance, not form, is of paramount importance in determining the requirements of due process in any particular case.

The purpose of due process of law is to give protection against any arbitrary interference with rights[21] and may be generally described as requiring an orderly proceeding adapted to the nature of the case, in which a person has an opportunity to defend, enforce and protect his rights as a free individual in society.[22] According to the *importance* of the interests at stake then, due process guarantees will decide whether a jury is to be required, whether a light or strict burden of proof is to apply, whether a unanimous or 3/4 jury verdict is to be required, what specificity of standards is to be required in guiding judge and jury in their determinations, and what are to constitute the applicable rules of evidence.[23]

The propriety of *any* proceeding dealing solely with dangerousness is not beyond question. In spite of any professed commitment to treatment being tied to the 1800 commitment, the fact remains that the individual will be returned to the Youth Authority, the very place where he had already received, for a minimum of two

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19. U.S. CONST. amend. XIV, Section 1:
No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .
CAL. CONST. Art. 1, Section 13:
No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

20. *See* Trop v. Dulles, 356 U.S. 86, 111 (1958) (Brennan, J., concurring opinion).

21. *See* Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 184 P. 431 (1919).

22. Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298 (1929).

23. *Gary W., supra* note 10, held, *inter alia*, that in all adult commitment cases the person against whom the proceedings are brought is entitled to the same discovery procedures as are allowed adults in criminal cases and juveniles.
Although full discovery rights available in a civil action are not available to a minor in juvenile court, he is entitled, on a proper showing, to all of the discovery procedures to which a criminal defendant is entitled. This includes admissions the minor may have made to the authorities and, for impeachment purposes, statements of witnesses that the prosecution intends to call at the hearing. Joe Z. v. Superior Court, 3 Cal. 3d 797, 478 P.2d 26, 91 Cal. Rptr. 594 (1970). Also in adult commitment proceedings, upon a

years, admittedly ineffective treatment.[24] These proceedings are by their nature and in practice proceedings delving into sociopathic tendencies—concepts no more understood by society than appreciated by it[25]—and therefore *ripe* for ethnocentric abuse. The threat of harrassment and unjust results is at a height where not even an inchoate form of a crime is required to bring a party before the court. In any event, the prediction of this dangerousness is at best a skill limited to the practiced clinical psychologist or psychiatrist,[26] and any jury determination of dangerousness for the purposes of treatment should therefore be closely tied to the expert witnesses' testimony.

But even assuming that the 1800 proceeding serves a worthy societal interest in the abstract, it stands as a *faulty mechanism* for its task. The "dangerousness" standard is excessively vague and is overbroad and the preponderance of evidence standard belies the tremendous gravity of the interests at stake in the 1800 proceeding.

LACK OF STANDARDS

The United States Supreme Court, in *Giaccio v. Pennsylvania*,[27] considered a statute which allowed a jury to impose court costs on a criminal defendant who had been acquitted from the charge. Although the state analogized the process to the *civil* practice of granting compensation to a litigant for expenses, the court stated that *whatever* the label given to the purported jury prerogative as to imposition of costs, the process must stand up to the test for procedural due process of law. And even establishing "*misconduct*" by the defendant therein to serve as the fixed standard by which the jury was to decide what conduct would and would not allow such an imposition of costs, such a process;

> still falls short of the kind of legal standard due process requires

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showing of relevance and necessity the court may authorize any discovery procedures available in a civil case, or issue an out-of-county subpoena. *Gary W., supra* note 10, at 310, 478 P.2d at 1212, 96 Cal. Rptr. at 12.

24. *See* note 88 *infra*, and accompanying text.

25. *See* Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L.R. 602, 613-16, 618-21 (1970).

26. S. Halleck, M.D., PSYCHIATRY AND THE DILEMMAS OF CRIME, 1971, at 314-18.

27. 382 U.S. 399 (1966).

> . . . It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct" or "reprehensible conduct."[28]

Physical dangerousness, it is submitted, similarly is excessively vague, preventing a defendant from preparing a defense, notwithstanding the "civil" label of the proceeding.

Moreover, since the 1800 proceeding results in confinement, albeit for treatment, in the Youth Authority—the most restrictive of all of the facilities in California for youthful offenders—whether "physically dangerous" affords sufficient detail is to be determined by a *demanding* test of due process. The court, in *In re Donna G.*,[29] has deemed proper the *most* demanding due process considerations in a proceeding with potential consequences of the nature of an 1800 proceeding. Considering whether Section 777 was void for vagueness, the court declared that in light of *In re Winship*,[30] and *In re Gault*[31] and "[s]ince the possible result of a . . . proceeding under Section 777 is that of a commitment to the Youth Authority . . . the test of vagueness applicable to a criminal proceeding must be applied."[32]

The potential consequences of the 1800 proceeding are indeed grave for the individual against whom the proceeding is brought—unexpected extended commitment in a confining institution. As in *In re Gault*,

> His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of . . . [family and friends], his world is peopled by guards, custodians, state employees and "delinquents" confined with him for anything from waywardness to rape and homicide.[33]

In *In re Gary W.*,[34] the California Supreme Court gave recognition to the importance of the interests at stake in the 1800 proceeding. The *Gary W.* court held that due process of law requires that a jury trial accompany an 1800 commitment. Nothwithstanding the civil label of the 1800 proceeding,

> *To the person who is threatened with involuntary confinement*, these considerations [the interests at stake and the need for a jury trial safeguard] are equally important whether the threat of confinement originates in a civil action or a criminal prosecution. (Emphasis supplied.)[35]

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28. *Id.*, at 404; *accord*, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).
29. *Donna G., supra* note 3.
30. *See supra* note 12.
31. 387 U.S. 1 (1967).
32. *Donna G., supra* note 3, at 894, 86 Cal. Rptr. at 423.
33. 387 U.S. 1, 27 (1967).
34. *Supra* note 10.
35. *Id.*, at 307, 486 P.2d at 1209, 96 Cal. Rptr. at 9; *see Smith, supra* note

And although the *Gary W.* holding is limited to requiring that the *jury trial* be afforded an 1800 potential committee, the force and effect of the decision is to underline the substantial losses possible should a commitment be in fact without proper justification. Here an inquiry into "physically dangerous" smacks of a search for a criminal mentality. Without necessary reference to any recent and aggressive overt acts, the jury is allowed to decide the fate of an individual tagged by Youth Authority officials as dangerous. The absence of substantive standards has, as recognized since the days of the Star Chambers,

> frequently resulted not in enlightened procedure, [and judgments] but in arbitrariness. . . . It is . . . [the] instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.[36]

Certainly it is a slight burden on the state to have to proceed in the 1800 hearing under more exacting a standard than one of the nature as was condemned in *Giaccio v. Pennsylvania, supra*[37]—i.e., more exacting than mere "physically dangerous."

The 1800 proceeding deals not with conduct or public offenses which the ward has exhibited or committed in the past (for which he might be prosecuted under normal criminal proceedings), but rather seeks to *predict*, through the ordinary experience of the "man off the street"—the juror—whether that ward will be "physically dangerous" if released.[38] No standards are delineated for the jury for assistance in their task. The court is not required by law to advise the jurors that a pre-condition to a finding of "dangerous" shall be that they first find, for example, that the ward has "committed recent overt acts of physical aggression upon the person of another and has stated that he intends to engage in similar behavior if allowed . . . free," or that "doctors predict that he will continue . . . to commit [said overt acts of physical aggression] . . . if allowed . . . free," or that "his behavior reflects a very substantial risk of physical harm to his own person as manifested by recent

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9, at 317, 486 P.2d at 1216, 96 Cal. Rptr. at 16, where the court noted that although their decision in *Gary W., supra* note 10, spoke in terms of an "equal protection" analysis, the holding was based also on Fourteenth Amendment due process requirements.

36. *In re* Gault, 387 U.S. 1, 18-19 and 21 (1967).
37. *Supra* note 27.
38. *See* note 47 *infra.*

attempt or attempts of suicide or serious bodily harm," or that "his behavior reflects a very substantial risk of physical harm to his own person as manifested by personal *threats* of suicide or serious bodily harm," or even that the ward is dangerous to *property* "as he has committed acts destructive of the property of others and doctors predict that he will do so in the future."[39] No such standards are forwarded for the jury's, and the proposed committee's, benefit, but rather, the question is simply put to the jury: "Is the person physically dangerous to the public because of his mental or physical deficiency, disorder, or abnormality?"[40]

California courts have declared the concept of "dangerous" to be not so vague as to be constitutionally infirm therefor.[41] "Physically dangerous" is susceptible to "reasonable definition, and may readily be applied in specific factual situations," declares one court.[42] A statute is void for vagueness, however, if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning. . . ."[43] And a statute is void for overbreadth if it offends the constitutional principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[44]

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39. Special Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 102-3 (1971); *see also*, CAL. WELF. & INST. CODE §§ 5300, 5260, 5008(h) (West 1972). *But see*, Minnesota v. Probate Ct., 309 U.S. 270, 273-74 (1940), where the court declared that for a statute regarding the "sexual psychopath" to impose upon the "patient" an involuntary civil commitment, it must, to avoid constitutional infirmity through excessive vagueness or indefiniteness, require,

> "proof of a habitual course of misconduct in sexual matters" on a part of the person against whom a proceeding under the statute is directed, which has shown "an utter lack of power to control their sexual impulses," and hence that they "are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire."

Hence, it is likely that a variation of this standard is constitutionally required with regard to § 1800 proceedings, albeit has not as yet been so ruled by California courts. *Cf.* People v. Levy, 151 Cal. App. 2d 460, 466, 311 P.2d 897, 901 (1957), where the court cites *Minnesota, supra*, in defining "sexual psychopath" for purposes of rendering constitutional CAL. WELF. & INST. CODE § 6300 *et seq.* (West 1972).

40. CAL. WELF. & INST. CODE § 1801.5 (West 1972).

41. *In re* Cavanaugh, 234 Cal. App. 2d 316, 44 Cal. Rptr. 422 (1965); *In re* J.F., 268 Cal. App. 2d 761, 74 Cal. Rptr. 464 (1969).

42. *In re* Cavanaugh, *supra* note 41, at 323, 44 Cal. Rptr. at 427.

43. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

44. Zwickler v. Koota, 389 U.S. 241, 249-50 (1967); *see also, In re* Berry, 68 Cal. 2d 137, 156, n.15, 436 P.2d 273, 286, n.15, 65 Cal. Rptr. 273, 286, n.15 (1968).

Physical dangerousness is far from a concrete concept.[45] Many questions, not immediately apparent, arise when one seeks to apply that concept to fact situations. What extent of force is seen as likely emanating from the individual? For what purposes might this latent aggression assert itself—would a slightly over-zealous assertion of right of way in a hallway justify commitment? To what *standard* is the individual involved to be compared—a dock worker, farmer, athlete, or bookkeeper? The question quickly becomes: Dangerous to *whom*? To what *extent*? For what *reasons*? And relative to *what standard*?[46]

45. Special Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 96-117 (1971). Civil commitment based upon "dangerousness" was found, in this extensive survey, to be fraught with uncertainties in meaning and statewide implementation: ". . . (T)he psychiatrist is not competent to perform such a predictive task [citation];" (at 96). Quoting the Subcommittee on Mental Health Services, California Legislative Assembly Interim Committee on Ways and Means, the Dilemma of Mental Commitments in California 143 (1965), the Arizona survey affirmed that, "with regard to potentially dangerous persons, the evidence available indicates that there are no tests that can predict an individual's capacity for dangerous behavior;" (at 97). Most such commitments are made on a "better safe than sorry" theory; (at 98). Often, commitments are made not on an evaluation of dangerousness, as called for by statute, but rather, "as a problem solving device," the recommendation for commitment being, "candidly based on . . . [testifying doctors'] opinion [sic] of the patient's need for psychiatric evaluation;" (at 100). Commitment was sometimes seen as a way of, "purging the community of undesirables," thereby maintaining the "quality of the community;" (at 101). And finally, the report cited,

> (P)rofessors Livermore, Malmquist and Meehl . . . [in] what has become the classic statistical paradigm revealing the risk involved in commitment by prediction of dangerousness. "Assume that one person out of a thousand will kill. Assume also that an exceptionally accurate test is created which differentiates with ninety-five percent effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill, 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people. If, in the criminal law, it is better that ten guilty men go free than that one innocent man suffer, how can we say in the civil commitment area that it is better that fifty-four harmless people be incarcerated lest one dangerous man be free?" . . . . The point is that the error cuts both ways so that while five of the one hundred (5 percent) who will kill are not identified, 5 percent of the remaining 99,900 individuals who will *not* kill will be erroneously identified as predictable killers; (at 99). (Hereinafter cited as 13 ARIZ. L. REV.).

46. No less a figure than Sigmund Freud himself warned of the inevitable connection between the personal attitudes of psychiatric examiners and their consequent appraisals of examinees:

> Illusions need not necessarily be false—that is to say, unrealiza-

Where no overt acts amounting to a crime have been committed[47] it would seem that the people's burden of assuring certainty, by affording an unusually narrow and definitive statutory standard to the findings of fact, should be greater, not less, than in the normal criminal tests for procedural due process as quoted above.[48] The 1800 proceeding is distinguishable from other civil commitments in California since, as distinct from a narcotics addiction commitment,[49] gravely disabled persons commitment[50] or a sexual psychopath commitment[51] the 1800 commitment is based neither on a purely medical diagnosis,[52] in its traditional sense, nor necessarily on past acts, as must surely be the case, in practice, with sexual psychopath commitments.[53]

Again, there may be some individuals who could very well use treatment for their anti-social behavioral patterns, and are of such a disposition that the public-at-large may be justifiably relieved to see them removed from open society. And, of course, regardless

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> ble or in contradiction to reality. For instance, a middle-class girl may have the illusion that a prince will come and marry her. This is possible; and a few such cases have occurred. That the Messiah will come and found a golden age is much less likely. Whether one classifies this belief as an illusion or as something analogous to a delusion will depend on one's personal attitude.

S. FREUD, THE FUTURE OF AN ILLUSION 49 (1964). (G. Swan, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAWYER 1334 (1973)).

47. As stated in *In re* J.F., 268 Cal. App. 2d 761, 769, 74 Cal. Rptr. 464, 469 (1969) with regard to a sexual psychopath commitment (a proceeding, according to the California Supreme Court, akin to a § 1800 proceeding (*see, Gary W., supra* note 10, at 308, 486 P.2d at 1210, 96 Cal. Rptr. at 10 (1971))),

> a commitment, continued beyond the age of majority, is permitted by statute not because of what the minor has done in the past, but by reason of what "because of his mental or physical deficiency, disorder or abnormality," he is likely to do in the future.

48. *See supra*, text accompanying notes 43 and 44.

49. CAL. WELF. & INST. CODE § 3100 *et seq.* (West 1972).

50. CAL. WELF. & INST. CODE § 5150 *et seq.* (West 1972).

51. CAL. WELF. & INST. CODE § 6300 *et seq.* (West 1972).

52. The court, in *In re* J.F., *supra* note 41, at 771, 74 Cal. Rptr. at 471, remarked in response to an argument that a strict standard of beyond a reasonable doubt should be required in a narcotics addiction commitment, that,

> narcotic commitment proceedings . . . [are] "civil", "non-punitive" and "remedial" . . . . It must be remembered that in a narcotic(s) commitment case the jury is in reality asked to confirm what is essentially *a medical diagnosis*. (Emphasis supplied).

Although this statement was not directed towards the problem of the specificity or over-inclusiveness of the concept of "physically dangerous" and the requisite imminency and gravity thereof, the message remains that much of the flexibility which is allowed in, for example, the narcotic addiction commitment, is due to the *medical certainty* which may accompany that commitment. We have no similar medical assurance in § 1800 proceedings.

53. *But see*, CAL. WELF. & INST. CODE § 6302 subd. (a) (West 1972) providing that a conviction of any offense, whether or not a sex offense, may lead to certification to the Superior Court for proceedings under § 6300 *et seq.*

of the specificity and narrowness of a statutory guideline, if that guideline is not adhered to, but rather cited only summarily and symbolically, any abusive proclivities which originally attended the statutory proceeding will continue. And even diligent adherence to such a carefully phrased yardstick will not eliminate mistakes from being made. But to safeguard the nonconformist, creative sector of our society, we must hold out, as required by due process of law, a standard which most nearly as possible focuses in on the "physically dangerous" person which the Legislature intended, and the State and Federal constitutions permit, to be involuntarily confined for treatment. Accordingly, the following standard is presented:

> No person shall be involuntarily committed under this chapter unless and until he is found by a jury to present an imminent threat of grave physical danger to society; such a finding, moreover, shall not be made unless and until he is found by a jury to recently, without reasonable provocation, have inflicted or attempted to inflict serious physical harm or substantial damage upon the person or property of another.[54]

The recent overt acts as referred to in the above standard would amount to criminal offenses. While it is certainly tenable that criminally sanctionable behavior should not be required to be proved as a precondition, for example, for a civil commitment for insanity, the same is not so readily apparent with regard to the 1800 proceeding. Dangerousness is certainly not as readily definable as insanity, nor is success in treatment as well established as with insanity. If society's purpose in the 1800 commitment is, in reality, treatment for the physically dangerous person, then surely the Legislature should have no serious objections to requiring, as a *precondition* to an 1800 proceeding petition, a *criminal* conviction on the overt acts on which the 1800 commitment is to be based. And the maximum term of incarceration, for treatment or otherwise, should accordingly be a period equal to the maximum term prescribed by law for the offense of which he was convicted and upon which his civil commitment was based.[55]

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54. The substance of this standard was originally forwarded in, *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judicary*, 91st Cong., 1st & 2nd Sess. 393 (1970), and quoted in part in 13 ARIZ. L. REV., *supra* note 45, at 115.

55. As an example of this time limit approach, *see* CAL. WELF. & INST. CODE §§ 1780-1783.

Sufficiently elaborate standards is but one of the safeguards involved in the concept of procedural due process. The opposition's *burden of proof* of course may be determinative of the outcome of any particular hearing or litigation. The preponderance of evidence standard, presently applicable in the 1800 proceeding, has long been associated with civil, non-criminal matters. As the potential *loss* to the defending party becomes greater, greater caution in the decision-making process which may result in such loss requires an increasingly more strict burden of proof. The California Supreme Court, however, has declined to accept the contention that the standard of proof in an 1800 proceeding need be any more than a mere preponderance of the evidence.[56] That decision is contrary to federal constitutional mandate and invites loss of liberty by persons not rightfully subject to involuntary confinement for treatment.

The 1800 proceeding deals with inherently inflammatory evidence and consequently carries with it an internal source of abuse—failure of a jury to critically evaluate the evidence presented. Professor Kaplan of Stanford University has written[57] of the *utilities* attached to the two possible factual outcomes in civil and criminal cases—guilt and innocence. The professor postulates generally that a finding of fact should be based on a standard of proof commensurate with the social utility of convicting a guilty man versus the social disutility of convicting an innocent man. As the disutility of a wrongful conviction increases so should the standard of proof become more strict. As the likelihood of injustice increases, so should the system adjust itself procedurally to provide additional internal safeguards against the threatening injustice.

Professor Kaplan is arguing that the standards of proof should be adjusted from within the minds of the jurors. This can be accomplished, he argues, by communicating to the jurors, for example, the severity of the sentence (*i.e.*, the interests at stake) upon a finding of "guilty." In illustration, if the potential consequence for a conviction for crime "X" is six months in jail and the potential consequence of a conviction for crime "Y" is six months in jail *plus* registration as a "sex offender"—wherever he may travel!—the disutilities of wrongful convictions being different, this difference, if communicated to the jurors, would assist them in their mental

56. *Gary W., supra* note 10. *See also,* note 73, *infra.*

57. J. Kaplan, *Decision Theory and the Factfinding Process,* 20 STAN. L. REV. 1065 (1968).

formulation of the standard for the requisite probability for a finding of fact adverse to the defending party.

The professor's argument is especially relevant here as he also points out the *limitations* of his proposal. Professor Kaplan is careful to point out that in the assessment of what to communicate to the trier of fact as to the utilities involved, the likelihood of abuse of the communicated information, by the trier of the fact is an important consideration. *Character testimony*, as opposed to sentence severity, is seen to hold obvious deleterious potentialities if used by the fact finder in formulating his mental, requisite probability standard. Evidence as to earlier convictions and propensity to commit crimes, although ostensibly a valid factor in the determination of what disutilities exist in a finding of innocence of an in fact guilty man, is actually more prejudicial to public interest than of probative value. For these factors to enter into the standard of requisite proof formulation would be to invite a condition abhorrent to our system of justice. "Obviously," Professor Kaplan writes,

> in a system of justice that regards it as crucial that the defendant be found guilty only of the crime specifically charged, we cannot permit a mistaken factual judgment to be made either on the theory that even if the defendant did not commit the crime charged he probably committed others, or on the theory that since the defendant has been convicted several times before it is not very important to him or society that he is convicted one more time.[58]

Evidence of earlier convictions, general relationships with others, unusual habits, and general propensity to commit crimes might create in the minds of jurors privy to this information a feeling that because of the defending party's disfavorable background, not only would the disutility of finding him innocent, if he was in truth guilty, be unusually great, but the disutility of finding him guilty, if he were in truth innocent in this particular incident, would be of lesser consequence than in the "normal" case. The American tradition embodies at its essence the principal of a government of laws not of men. Surely, as the professor speculates, the above situation would pervert this basic tenet.

The logic of the Kaplan argument may be extended to this analysis. The 1800 proceeding, of course, deals with a matter where

58. *Id.*, at 1074.

the *precise issue at hand* is, in fact, the defending party's propensity to commit anti-social, "physically dangerous" acts. The point is striking, therefore, that upon introduction of evidence to the fact finder of the defending party's character, past associations and past conduct (including prior contacts with the law), that fact finder is clearly subject to precisely the same pitfall as would be true if similar evidence were admissible during a criminal trial! That is, upon hearing evidence on social behavior and past conduct of the defending party, the fact finder will inevitably and predictably *lower*, in practice, whatever standard of proof is given to him. The officially promulgated quantum of requisite proof will be made to conform to the juror's *own assessment*, subconscious or otherwise, of the *utilities* of a finding of "physically dangerous" of even an innocent man. And the utilities will tip towards such a finding where the *potential* for subsequent grievous malfeasance upon release of the defending party appears relatively *high*, given the nature of the proceeding and thrust of the evidence admitted.

Where inflammatory evidence of character and past acts is admitted for purposes of a factual determination of a defendant's personal involvement in certain alleged conduct, the fact finder, in a criminal trial, might certainly run in the face of the court's adamant requirement that a defendant be proved involved beyond a reasonable doubt and be found guilty only of the crime charged. So too, with the admission of similar evidence in an 1800 proceeding, might the fact finder *adjust*, personally, the proof standard to which the court has admonished conscientious adherence, so as to conform to his perception of the societal utilities at stake. The process of removing "physically dangerous" persons from open society may necessarily be continued but since we are limited by the nature of the proceeding from removing the inflammatory-evidence source of potential abuse of the fact finder's role in the 1800 proceeding, then the only remaining solution to assuring that defending party due process of law is to *raise the standard of proof*, in *anticipation* of this foreseeable abuse![59]

59. In Schneiderman v. United States, 320 U.S. 118, 125 and 159 (1943) the Court, in requiring "clear and convincing" evidence, rather than a mere preponderance, as the quantum of evidence in a denaturalization proceeding stated that this higher burden of proof was required where the right at stake (conferred citizenship) is "precious and when . . . conferred by solemn adjudication. . . . Were the law otherwise, valuable rights would rest upon a slender reed. . . ." Woodby v. Immigration Service, 385 U.S. 276, 285 (1966), extended the *Schneiderman* logic to deportation hearings, also requiring a burden of establishing the grounds for deportation by "clear and convincing" evidence.

To be sure, a deportation proceeding is not a criminal prosecution.

The preponderance of the evidence quantum of proof, presently deemed applicable in 1800 proceedings, has the dispositive significance of *allowing* room for reasonable doubt in any determination thereunder. Furthermore, "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted [citation]."[60]

> [Citation]. But it does not syllogistically follow that a person can be banished from this country upon no higher degree of proof than applies in a negligence case. This Court has not closed its eyes to the drastic deprivation that may follow when a resident . . . is compelled . . . to go to a foreign land. . . .

In *Woodby,* one of the defendant-petitioners was being deported for carrying on prostitution. 8 U.S.C. § 1251, generally, is a statute enabling the deportation of aliens from the United States on certain specified grounds. One *purpose* of the section was to provide for deportation of aliens found to exhibit through the commission, even if prior to entry into the United States, of offenses involving moral turpitude. It was designed to end hospitality to aliens possessing a criminal *tendency* (Fong Haw Tan v. Phelan, 162 F.2d 663 (9th Cir. 1947), *reversed on other grounds,* 333 U.S. 6 (1947)). Thus, the public interests at stake in § 1251 deportation cases and § 1800 proceedings are substantially similar—criminal tendency and tendency towards physical dangerousness, respectively. And the interests of the individual, as well, are comparable. With § 1251 deportations, the defending party stands to lose his residence and is uprooted against his will (although once gone from the country, free to travel as he is able, according to the laws and customs of his host sovereign nation). The § 1800 proceeding defending party is likewise uprooted from free movement in this society, restricted from his personal residence and retained in an institution where he is not free to roam. The person against whom a § 1800 proceeding is levied, although not deprived of a country, is substantially deprived of his liberty and reaps as a benefit to himself, only what rehabilitation may be afforded him through our state agencies (*see* note 90 *infra* and accompanying text). The standard of proof required for a § 1800 commitment should, on the authority of *Schneiderman* and *Woodby, supra,* be *at minimum* proof of a "clear and convincing" nature. What the § 1800 proceeding defendant loses relative to the deported alien, through restrictions on freedom of movement, he certainly does not gain from his presence in his home-country without such freedoms, nor by the *extension* of the admittedly ineffective, to that point, treatment afforded him by the Youth Authority.

60. *In re* Winship, 397 U.S. 358, 367-68 (1970). *See, e.g.,* J. WIGMORE, WIGMORE ON EVIDENCE (3d Ed. 1940), V. 9, Section 2498, at 327:

> What those who have laid down the principle that "preponderance" of evidence will justify and require a decision conformable with it, have failed to realize, is that perception of the preponderance of evidence is quite consistent with want of belief. Of two pieces of very weak evidence, one may preponderate. . . . It would be

A California court declared that, "the controlling factor [in allowing lesser procedural safeguards] . . . lies in the specific declaration of policy of the legislature that persons addicted to narcotics shall be treated civilly and nonpunitively for their own protection."[61] The "for their own good" rationale for diminishing the procedural safeguards which are deemed to be constitutionally necessary in involuntary civil commitments extends into 1800 proceedings as well,[62] notwithstanding the fact that physical dangerousness is a concept of a basically non-"medical" variety.[63]

The United States Supreme Court has never been much impressed with the significance of labels of "civil,"[64] and in *In re Winship*[65] it once again cast suspicion on the widespread use of the term. In *Winship*, a 12 year-old boy was charged under juvenile law with acts which if done by an adult would constitute larceny. The sole question on this appeal was whether proof beyond a reasonable doubt was among the "essentials of due process and fair treatment"[66] required during an adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.

Repeatedly, the Court in *Winship* emphasized and affirmed that the right of a criminally accused to conviction only under proof beyond a reasonable doubt is "basic in our law," "historically grounded," of "vital importance," "a prime instrument for reducing risk of convictions resting on factual error," "provides concrete substance for the presumption of innocence" and protects the defendant not only from unjust loss of liberty but also from unjust stigma of a criminal conviction.[67]

But in *Winship* the Court was not dealing with the normal adult criminal prosecution, but rather with a proceeding labelled "civil."[68] The proceeding was labelled by the Appellate Court as being designed "not to punish, but to save the child," as not being a "convic-

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fatuous to affirm that every man ought to believe, even faintly, everything the evidence for which is, in his opinion, stronger than the evidence against it. (Citation).

61. People v. Lipscomb, 263 Cal. App. 2d 59, 67, 69 Cal. Rptr. 127, 131 (1968).

62. *See, e.g., In re* Cavanaugh, 234 Cal. App. 2d 316, 44 Cal. Rptr. 422 (1965); *In re* J.F., 268 Cal. App. 2d 761, 74 Cal. Rptr. 464 (1969).

63. *See, supra* note 48, and accompanying text.

64. *See, e.g.*, Woodby v. Immigration Service, 385 U.S. 276, 285 (1966); *In re* Gault, 387 U.S. 1, 17, 49-50 (1966); Kent v. United States, 383 U.S. 541, 554 (1966).

65. 397 U.S. 358 (1970).

66. *Id.*, at 359.

67. *Id.*, at 362 and 363.

68. *Id.*, at 365.

tion," and therefore not in constitutional need of the strict standard of proof required in matters of penal consequence.[69] "Civil labels and good intentions. . . ," however, were exposed by the Supreme Court to ". . . not themselves obviate the need for criminal due process safeguards in juvenile courts. . . ."[70]

Summarizing the Court's holding, Justice Harlan, in a concurring opinion in *Winship* noted that, "while the consequences (of a criminal proceeding) are not identical to those in a juvenile case, the differences will not support a distinction in the standard of proof."[71] The interests at stake in young Winship's involvement in the proceedings were two-fold:

> First, *and of paramount importance*, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state imposed confinement away from his home, family and friends. And, second, a delinquency determination, to some extent at least, stigmatizes a youth in that it is by definition bottomed on a finding that the accused committed a crime. (Emphasis supplied).[72]

As we shall see, the same, if not more weighty, interests are fully present and at stake in an 1800 proceeding.

The California Supreme Court has dealt with the problem of what procedural due process requires of the 1800 proceeding. In *In re Gary W.*, the apparent issue[73] was whether the aim, method

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69. *Id.*, at 365.
70. *Id.*, at 365-66.
71. *Id.*, at 373-74 (concurring opinion).
72. *Id.*, at 374 (concurring opinion, Harlan, J.). The Opinion of the Court noted, additionally, that the imposition of a stricter standard of proof in this nature of juvenile proceeding will have no adverse effect on the informality, flexibility or speed of the hearing at which the fact finding will take place. (*Id.*, at 366).
73. I say "apparent" because, although *Gary W.* speaks of argument focused on allegations of cruel and unusual punishment, equal protection and due process as they relate to a right to a jury trial, at no time does the reader become aware that the case also stands for the proposition that a strict standard of proof is not required, according to the opinion, by due process considerations in a § 1800 proceeding. The court does hold quite plainly though that,

> Appellant is entitled to a jury trial [presumably, one would believe at first glance, as distinct from a *non*-jury trial] in like manner as is made available to . . . [other civil commitment procedures of the Lanterman-Petris-Short Act, *supra* note 14] (*Gary W.*, *supra* note 10, at 308, 486 P.2d at 1210, 96 Cal. Rptr. at 10).

It is only when we refer to the companion case of *Smith* (*supra* note 7)

and effect of the 1800 proceeding was such that a jury trial must be made available to the accused for a commitment to not be violative of due process and equal protection of the laws under the United States and California constitutions.[74] On the question of equal protection, the court notes that a right to trial by jury is, *in a proceeding of the nature of an 1800 proceeding*, a *fundamental* right[75] and that the denial thereof, to the accused party, must therefore be supported by a compelling state interest.[76] Indeed, the court adopted a view of the interests at stake in an 1800 proceeding consonant with that of the California Legislature. The court wrote:

> In extending the right to trial by jury to other classes of persons subject to civil commitment proceedings, the *California Legislature* has recognized that the *interests involved* . . . 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. . . . (T)he right to jury trial is a requirement of due process of law. . . . (Emphasis added).[77]

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that it becomes ascertained that in *Gary W.*, the court,

> also decided that the *burden of proof* in . . . [1800] proceedings should be that of other civil commitments [*Smith*, *supra* note 9, at 316, 489 P.2d at 1215, 96 Cal. Rptr. at 15; emphasis added].

The issue of requisite quantum of proof hardly received its just publication and discussion, especially in light of the earlier appellate level holding that proof beyond a reasonable doubt *was* required as a matter of due process, given that the § 1800 proceeding is " 'penal in nature and effect.' " (People v. Smith, 11 Cal. App. 3d 513, 521, 89 Cal. Rptr. 881, 885 (1970)).

74. U.S. CONST. amend. XIV, Section 1; CAL. CONST. Art. 1, Sections 11, 13 and 21. Petitioner therein also advanced argument that § 1800 proceedings were violative of the principle against cruel and unusual punishment (U.S. CONST. amend. VIII; CAL. CONST. Art. 1, Section 6), but this was dismissed on the basis that a § 1800 commitment does not amount to "punishment" (*Gary W., supra* note 10, at 301, 486 P.2d at 1201-04, 96 Cal. Rptr. at 5).

75. *Gary W., supra* note 10, at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9:

> A variety of interests have been held to be so 'fundamental' as to impose . . . on the state [the burden of establishing both that the state has a compelling interest which justifies the law and that the distinction is necessary to further that purpose]. Voting . . . procreation . . . inter-state travel . . . and education [are examples]. . . . The *right to a jury trial* in an action which may lead to the involuntary confinement of the defendant, even if such confinement is for the purpose of treatment, is no less fundamental. (Emphasis added).

76. *See In re* Antazo, 3 Cal. 3d 100, 110-11, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970).

77. *Gary W., supra* note 10, at 307, 486 P.2d at 1209-10, 96 Cal. Rptr. at 9-10. This reference to Legislative "recognition" of the fundamental status of the rights involved could not be intended by the court to diminish the *inherently* fundamental nature of the jury trial in these proceedings; rather, the reference is intended apparently as evidentiary of the heightened status of right to jury trial here. Certainly, the Legislature cannot establish a right as being "fundamental", under the United States Constitution (or state

Hence, the interests at stake are indeed fundamental, even in light of the proposed rehabilitation.[78]

Confronted with the argument that 1800 proceedings were a "continuation of juvenile proceedings"[79] and that therefore no right to a jury trial exists,[80] the *Gary W.* court declared that, quite to the contrary, the 1800 proceeding applies ". . . only to adults. It is in no way a juvenile proceeding, nor is it an extension of a prior juvenile court proceeding."[81] By holding the right to a jury trial to adhere in 1800 proceedings, the court in *Gary W.* rejected the applicability of the rationale of the decision in the United States Supreme Court case of *McKeiver v. Pennsylvania.*[82] *McKeiver* held that due process and equal protection do not require a jury trial in juvenile proceedings. The rationale of *McKeiver* is primarily that because of the rehabilitative purpose and force of civil commitment procedures, the jury would stand not as a guardian of liberty, but as an impediment to the flexibility required to implement such rehabilitative, civil commitment hearings.[83] By re-

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constitution) by indirect means (*e.g.*, by granting a right to other similar activities and proceedings) where such right would not otherwise be deemed to be

> . . . some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental [Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)].

See, e.g., Weiss v. Walsh, 324 F. Supp. 75 (S.D.N.Y. 1971), where the court denied that age was a suspect classification in employment standards notwithstanding the existence of several federal enactments expressing such a general policy.

78. "[C]onfinement pursuant to Sections 1800-1803 shall be only for the purpose of treatment." (*Gary W.*, *supra* note 10, at 301, 486 P.2d at 1205, 96 Cal. Rptr. at 5). *Note also*, the need for strong procedural safeguards seems especially great when one remembers that,

> in most cases the jurisdictional link [between the accused and the 1800 proceeding] is the commitment for a criminal [sic] offense for which a jury trial was . . . denied [People v. Smith, 11 Cal. App. 3d 515, 520, 89 Cal. Rptr. 881, 885, (1970), *reversed and remanded, Smith, supra* note 9].

79. *Gary W., supra* note 10, at 305, 486 P.2d at 1208, 96 Cal. Rptr. at 8.

80. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

81. *Gary W., supra* note 10, at 305, 486 P.2d at 1208, 96 Cal. Rptr. at 8.

82. *Supra* note 80.

83. A part of the rationale for the *McKeiver* decision is the adverse effect—arguably unique to juveniles—upon the juvenile's respect for the system of justice arising from the "clamor" of the courtroom, should a jury be impanelled for the proceeding. But note that the court also based its decision on (1) the fact that a jury trial would not strengthen the factfinding process, but rather might prejudice the "unique manner" in which the juvenile court is able to deal with their rehabilitative tasks; (2) the fact that a jury might act as an impediment to the "rehabilitative goals" of the

jecting the applicability of the *McKeiver* rationale to the 1800 proceeding, *Gary W.* firmly established that the interests to be protected when threatening the liberty of an adult are greater than the interests involved in a proceeding which affects juveniles. If the foregoing were not the case, the *McKeiver* rule would certainly be a forceful argument against the constitutional necessity of a jury trial in the *civil*, 1800 proceeding. That adults are entitled to greater safeguards than minors, moreover, seems well established in American jurisprudence.[84]

It should be remembered that one of the basic underlying justifications for increased "flexibility" in juvenile trials, and consequent relaxation of procedural safeguards therein, has always been that youths were seen to be unusually susceptible to rehabilitation through a sort of "remolding" of their character.[85] This justification can no longer logically be asserted when dealing with adults, the class of persons to which juveniles were compared when the "unusually" susceptible rationale was being formulated.

The characteristics of the 1800 proceeding meet up to the conditions established in *In re Winship, supra*, for requiring, as a matter of due process of law, proof beyond a reasonable doubt as a precondition to involuntary civil commitment. The person against whom an 1800 proceeding is brought stands to lose two years of

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juvenile court, the Court being,

> reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young. . . . [403 U.S. at 547];

(3) the fact that no inherent unfairness is shown to exist in not employing the jury in juvenile hearings; (4) the fact that a juvenile court judge is always able to call for a jury, should he deem it advisable in any particular case; (5) the fact that injection of a jury into the process would bring with it unwanted delay; and finally (6) the fact that the argument that the lack of a jury will create the,

> . . . likelihood of prejudgment . . . ignores . . . every aspect of fairness, of concern, of sympathy and of paternal attention that the juvenile court system [read: *civil commitment process* throughout the United States!] contemplates. (403 U.S. at 550).

McKeiver v. Pennsylvania, 403 U.S. 528, 547-50 (1971).

84. *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968), where the Court quotes from Prince v. Massachusetts, 321 U.S. 158, 170 (1943):

> . . . (T)he power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . .

Cf. Shapiro v. Thompson, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting opinion).

85. State v. L.V., 109 N.J. Super. 278, 283, 263 A.2d 150, 154-55 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring opinion); *In re* Gault, 387 U.S. 1, 14-16 (1967); Shone v. State, 237 A.2d 412, 415 (Sup. Jud. Ct. Maine 1968). *Cf.* M. Pirsig, *The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions*, 54 MINN. L. REV. 101 (1969) (hereinafter cited as *Pirsig*).

his liberty, with a potential commitment lasting his entire life.[86] The person subject to involuntary confinement in the 1800 commitment is an *adult*, and is perhaps entitled to greater, but certainly no lesser, safeguards against wrongful involuntary commitment than is a juvenile. And the *stigma* of an involuntary commitment under the 1800 proceeding is that which remains from the defending party's original commitment under Juvenile Law. The 1800 proceeding affects only those persons already adjudged to be a "delinquent" and committed to the Youth Authority under the authority of Sections 730, 731 or 777 and to young adults convicted of a crime in an adult criminal proceeding and committed to the Youth Authority under the authority of Sections 1730-1731.5.[87]

The stigma on the coattails of the original commitment to the Youth Authority is not magically brushed away upon petition to the court for continued detention of the Youth Authority ward, pursuant to Section 1800 *et seq.* Rather, that stigma is a *continuing* stigma, and even a *developing* stigma as the duration of the involuntary confinement extends itself and as the person commited is isolated from a free, productive, healthy existence in a normal social environment. The stigma, as it turns out, is the institution itself, as it enravels its guests in an unnatural setting, with pressures and problems unique to itself and alien to the outside world. And of course, the treatment which the committed party to an 1800 proceeding receives is none other than that same treatment from which he has come, the Youth Authority.[88] The evidence is com-

86. CAL. WELF. & INST. CODE § 1802 (West 1972); *see supra* note 10 and accompanying text. *Note also,* Justice Harlan considered the potential unjust loss of liberty, due to factual error, to be the factor "of paramount importance" as between this interest and the interest of avoiding a wrongful judgment eventuating in the stigmatizing of a youth. (*In re* Winship, 397 U.S. 358, 374 (1970) (Harlan, J., concurring opinion).

87. *Gary W., supra* note 10, at 299-300, 486 P.2d at 1204, 96 Cal. Rptr. at 4.

88. CAL. WELF. & INST. CODE § 1801 (West 1972). This is true unless the Youth Authority fails to heed the implicit warning by the court against use of the provision of § 1802 which purports to allow a transfer of custody of any so committed person over 21 years of age to the Director of Corrections "for placement in the appropriate institution." (CAL. WELF. & INST. CODE § 1802 (West 1972)). The court states:

> (T)he Legislature has been at pains to assure that confinement pursuant to Sections 1800-1803 shall be only for the purpose of treatment. Thus, we need not decide whether confinement under these sections, with the potential for confinement in state prison,

pelling—due process of law requires nothing less, in the 1800 proceeding, than that the defending party be involuntarily committed only where a conviction exists, in the minds of the jurors, that the defending party is of a character as alleged, beyond a reasonable doubt!

CONCLUSION

> Even a propensity to impassioned moods alone should not justify involuntary commitment: 'Many sane persons, under the influence of strong excitements, are subject to serious and perhaps dangerous fits of passion; but another could not be allowed, on this ground alone, to seize and imprison them, in anticipation that possibly the occasion for excitement might arise and the passion be manifested.' (*Van Densen v. Newcomer*, 40 Mich. 90, 129-130 (1879)).[89]

The involuntary commitment of a human being—whether called "civil" or "criminal," "rehabilitative" or "penal"—is an action which society must scrutinize with utmost care. At times the commitment may appear justifiable, or even of the utmost necessity. If the Legislature and the courts are truly concerned with only the welfare of the involved individual, then the procedure most consistent with due process would be to require an initial conviction, under criminal proceeding procedures, for past overt acts and then to allow a civil commitment for treatment for a maximum period of that period prescribed by law for the offense(s) committed. The 1800 commitment involves proof of an unusually inflammable nature and the character quality to be observed is not generally susceptible of clear-cut medical analysis. The interests at stake are comparable with or stronger than those of proceedings in which strong procedural safeguards are required as a matter of due process of law. Attention should be given by the courts to up-dating the 1800 proceeding so as to provide a more specific and narrow definition of the status in question, and to assure that an involuntary commitment rests upon no less than that standard of proof for which due process of law cries out—beyond a reasonable doubt.

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would be constitutionally permissible solely for the purpose of protecting society. [*Gary W.*, *supra* note 10, at 301, 486 P. 2d at 1205, 96 Cal. Rptr. at 5].

89. G. Swan, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAWYER 1334, 1353 (1973).

APPENDIX

Pertinent Portions of Statutes Cited
from
California Welfare & Institutions Code

Section 601: Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his parents, guardian, custodian or school authorities, or who is beyond the control of such person, or any person who is a habitual truant from school within the meaning of any law of this state, or who from any cause is in danger of leading an idle, dissolute, lewd, or immoral life, is within the jurisdiction of the juvenile court which may adjudge such person to be a ward of the court.

Section 602: Any person who is under the age of 18 years when he 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.

Section 730: When a minor is adjudged a ward of the court on the ground that he is a person described by Section 601, the court may order any of the types of treatment referred to in Section 727 (a section delineating appropriate dispositions for individuals declared "dependent" children pursuant to Section 600), and as an additional alternative, may commit the minor to a juvenile home, ranch, camp or forestry camp. If there is no county juvenile home, ranch, camp or forestry camp within the county, the court may commit the minor to the county juvenile hall.

When such ward is placed under the supervision of the probation officer or committed to his care, custody and control, the court may make any and all reasonable orders for the conduct of such ward. . . The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.

Such ward may be committed to the Youth Authority only upon a proceeding for the modification of an order of

the court conducted pursuant to the provisions of Section 777.

Section 731: When a minor is adjudged a ward of the court on the ground that he is a person described by Section 602, the court may order any of the types of treatment referred to in Sections 727 and 730, and as an additional alternative, may commit the minor to the Youth Authority.

Section 777: An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative or friend and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after noticed hearing upon a supplemental petition.

The supplemental petition shall be filed by the probation officer in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the minor.

. . . .

Section 1731.5: After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within subdivisions (a), (b) and (c), or subdivisions (a), (b), and (d), below:

(a) Is found to be less than 21 years of age at the time of apprehension.

(b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine. . .

(c) Is not granted probation.

(d) Was granted probation and probation is revoked and terminated.

The Youth Authority shall accept a person committed to it pursuant to this article if it believes that the person can be materially benefitted by its reformatory and educational discipline, and if it has adequate facilities to provide such care.

Section 1800: 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 deficiency, 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 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.

Section 1801: If the board applies to the court for an order as provided in Section 1800, the court shall notify the person whose liberty is involved . . . of the applicaton, and shall afford process to compel attendance of witnesses and production of evidence. . .

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.

Section 1801.5: If the person is ordered returned to the Youth Authority following a hearing by the court, he, or his parent or guardian on his behalf, may, within 10 days after the making of such order, file a written demand that the question of whether he is physically dangerous to the public be tried by a jury in the superior court of the county in which he was committed. Thereupon, the court shall cause a jury to be summoned and to be in attendance at a date stated, not less than four days nor more than 30 days from the date of the demand for a jury trial. The court shall submit to the jury the question: Is the person physically dangerous to the public because of his mental or physical deficiency, disorder or abnormality? The court's previous order entered pursuant to Section 1801 shall not be read to the jury, nor alluded to in such trial. The trial shall be had as provided by law for the trial of civil cases and shall require a verdict by at least three-fourths of the jury.

Section 1802: When an order for continued detention is made as provided in Section 1801, the control of the authority over the person shall continue, subject to the provisions of this chapter, but, unless the person is previously discharged as provided in Section 1766, the authority shall, within two years after the date of such order in the case of persons committed by the juvenile court, or within five years after

the date of such order in the case of persons committed after conviction in criminal proceedings, file a new application for continued detention in accordance with the provisions of Section 1800 if continued detention is deemed necessary. Such applications may be repeated at intervals as often as in the opinion of the authority may be necessary for the protection of the public, except that the authority shall have power, in order to protect other persons in the custody of the authority, to transfer the custody of any person over 21 years of age to the Director of Corrections for placement in the appropriate institution.

Every person shall be discharged from the control of the authority at the termination of the period stated in this section unless the board has filed a new application and the court has made a new order for continued detention as provided above in this section.
(Added by Stats.1963, c. 1693, p. 3323, § 4.)

Section 1803: An order of the committing court made pursuant to this article is appealable by the person whose liberty is involved in the same manner as a judgment in a criminal case. The appellate court may affirm the order of the lower court, or modify it, or reverse it and order the appellant to be discharged. Pending appeal, the appellant shall remain under the control of the authority.

(Added by Stats.1963, c. 1693, p. 3323, § 4.)