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Matthew K. M. Chan

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Outpatient Status: Beyond The Term Of Commitment

Under current California law, persons convicted of a crime but "found to be not guilty by reason of insanity"[1] (hereinafter referred to as NGIs) *must* be committed to a state hospital or other treatment facility in lieu of criminal punishment.[2] The maximum term of commitment for the NGI, as prescribed in Section 1026.5 of the California Penal Code, is the longest term of imprisonment that could have been imposed for the offense or offenses for which the person was convicted.[3] Section 1026.5 specifically declares that a person may not be kept in *actual custody* for longer than the maximum term of confinement.[4]

The California Supreme Court in In re *Moye*[5] held that the period of *actual custody* does not include time served on outpatient status.[6] Accordingly, *Moye* can be interpreted as permitting a court to *impose*[7]

1. In law, the term "insanity" is used to denote that degree of mental illness that negates the individual's legal responsibility or capacity. *See* BLACK'S LAW DICTIONARY 714 (5th ed. 1979). *See generally* A. DEUTSCH, THE MENTALLY ILL IN AMERICA 387-90 (2d ed. 1949). Since the word "insanity" lacked scientific sanction or precise meaning in English common law, its interpretations varied greatly in different jurisdictions. In an effort to clarify the meaning of "insanity," a succession of jurists and legal commentators, beginning in the seventeenth century, devised different "tests" for determining the kind and degree of insanity that excuses a person from criminal responsibility. *See generally* A. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW 12-22 (1970). The tests that American courts have applied in determining insanity include the M'Naughten rule, the Durham rule and the American Law Institute test for insanity.

2. *See* CAL. PENAL CODE §1026(a) (the defendant must have been found insane at the time of the commission of the offense to assert the defense of not guilty by reason of insanity). *See generally* PROPOSITION 8 on the June 1982 ballot (copy on file at the *Pacific Law Journal*). This proposition, referred to as "The Victims' Bill of Rights," requires that NGIs must prove, by a preponderance of the evidence, that they are incapable of knowing or understanding the nature and quality of their acts and of distinguishing right from wrong at the time of the commission of the offense.

3. *See* CAL. PENAL CODE §1026.5(a)(1) (the maximum term includes the upper term of the base offense and any enhancements and consecutive offenses).

4. *See id. See generally id.* §1026.5(b)(1). The maximum term of confinement, however, can be extended by the court if the defendant is found to have committed a serious crime and is determined to be a danger to others.

5. 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978).

6. Persons under voluntary or involuntary outpatient treatment are considered to be on outpatient status. *See id.* at 467, 584 P.2d at 1103, 149 Cal. Rptr. at 497. *See generally* Note, *Commitment and Release of Persons Found Not Guilty By Reason of Insanity: A Georgia Perspective* 15 GA. L. REV. 1065, 1101-02 (1981).

7. *See generally* telephone conversation with Norman Black, an attorney for the legal office of the State Department of Mental Health, Dec. 3, 1981. Outpatient status is usually granted and not imposed because the required recommendations of the treatment facility and the county director would normally not be initiated without the patient's approval (notes on file at the *Pacific Law Journal*) [hereinafter cited as Black conversation].

outpatient status on NGIs beyond their commitment periods.[8] *Moye*, however, also can be interpreted as allowing the *granting or imposition* of outpatient status only *during* the commitment period.[9] Since the precise meaning of *Moye* is uncertain, persons released from commitment may be forced unjustly to participate in an outpatient treatment program.

The purpose of this comment is to demonstrate that the court lacks authority to impose outpatient status on NGIs after their maximum terms of commitment have expired. This will be achieved by a showing of the lack of support for the view that outpatient status can be imposed beyond the commitment period and by an illustration of the unconstitutionality of this action.

This comment will begin by providing the reader with a review of the development and current status of the laws pertaining to commitment. The ambiguities in the application of these laws will be revealed in a discussion of the impact of In re *Moye*. Next, the comment will review relevant statutory law in an effort to determine the proper interpretation of *Moye*. An application of an equal protection analysis then will be applied to conclude that the court can not constitutionally fix outpatient status beyond the commitment period. Finally, this comment will propose legislative amendments that would clarify the statutory law pertaining to the release of committed persons and the imposition of outpatient status, thereby removing the ambiguity of *Moye*. To enable a better understanding of whether the court can impose outpatient status beyond the commitment period, the laws pertaining to commitment in California first must be examined.

THE COMMITMENT LAWS

The laws pertaining to commitment include *law* that authorizes the confinement of criminal offenders for treatment purposes *and law* that limits these confinement periods. This section will review the development and current status of *these* commitment laws. In addition, this section will discuss the ambiguity in the application of the commitment laws that was caused by *Moye*.

8. *See generally* hearing to determine outpatient status of a committed person, People v. Johnson, No. 49398, 24 (Super. Ct., Sacramento, 1981). The judge determined that he did have the authority to impose outpatient status upon the committed person even after the commitment period had ended [hereinafter cited as Johnson hearing].

9. *See* Black conversation, *supra* note 7; telephone conversation with Rick Mandella, Office of Forensic Services, State Department of Mental Health, Jan. 7, 1982. The courts interpret the *Moye* decision as permitting the imposition of outpatient status only during the commitment period (notes on file at the *Pacific Law Journal*) [hereinafter cited as Mandella conversation].

A. Laws Authorizing Commitment

Since persons adjudicated mentally disordered sex offenders[10] (hereinafter referred to as MDSOs) under prior law were subject to the imposition of outpatient status, a determination of the meaning of *Moye* will also affect MDSOs.[11] Thus, a review of the laws pertaining to commitment of NGIs and MDSOs is relevant to the understanding of the impact of *Moye*. The purpose of this subsection is to provide an overview of the laws that authorize commitment and placement of outpatient status for criminal offenders found insane at the time of the commission of their offenses.

Prior to 1982, the law that authorized the commitment of MDSOs was substantially similar to the law that authorized the commitment of NGIs.[12] An MDSO was *allowed*[13] to be committed to a state hospital or other treatment facility if the court found that the person would benefit from treatment.[14] In 1982, all laws relating to the MDSO program were repealed.[15] Existing law, however, still provides for the commitment of persons found guilty of criminal acts but whose mental conditions warrant commitment in lieu of criminal punishment.[16]

Under California Penal Code Section 1026, NGIs can be committed to state hospitals, public treatment facilities, or private treatment facilities.[17] Additionally, Section 1026 provides for the imposition of outpatient status on NGIs pursuant to Title 15[18] of the Penal Code.[19] Under Title 15, NGIs can be placed into outpatient status either immediately or only after a mandatory term of commitment has been served in a state hospital or other treatment facility.[20] Although the enactment of Section 1026 authorized the commitment of NGIs, statutory law lacked restrictions on the length of time a person could be committed.[21] The

10. *See generally* CAL. STATS. 1980, c. 547, §19, at 1525 (amending CAL. WELF. & INST. CODE §6316).

11. See text accompanying note 15 *infra*.

12. Both MDSOs and NGIs are persons who initially have been found guilty of committing a criminal act, but whose mental condition warrants a period of confinement for treatment in lieu of criminal punishment. In addition, both classes of persons are subject to the imposition of outpatient status during the term of commitment. *See* 22 Cal. 3d at 463, 584 P.2d at 1101, 149 Cal. Rptr. at 495. *Compare* CAL. PENAL CODE §1026 *with* CAL. STATS 1980, c. 547, §19(a)(1), at 1525.

13. *See* CAL. STATS. 1980, c. 547, §19(a)(1), at 1525 (the court may either order commitment for the person or return the person to the criminal court for further disposition).

14. *See id.*

15. *See id.* 1981, c. 928, §2, at — (repealing CAL. WELF. & INST. CODE §§6300-6330) (all persons adjudicated MDSOs prior to 1982 will not be affected).

16. *See* CAL. PENAL CODE §1026(a).

17. *See id.*

18. *See id.* §§1600-1614. Title 15 deals with "outpatient status for mentally disordered and developmentally disabled offenders."

19. *See id.* §1026(a).

20. *See id.* §1601 (the mandatory commitment term is required if the NGI was found to have committed one of the serious crimes listed in this section).

21. *See id.* §1026.

period of commitment became limited with the development of the "maximum term of commitment."

B. Development of the "Maximum Term of Commitment"

Prior to 1977, NGIs and MDSOs were committed to state hospitals or other treatment facilities for "indefinite" periods.[22] Since no "maximum" term existed, NGIs and MDSOs remained committed until the court determined that they had regained their sanity.[23] The development of the "maximum term of commitment" for NGIs paralleled the development of the maximum term for MDSOs.[24]

The erosion of the "indefinite" period of commitment began with two California Supreme Court decisions casting substantial doubt on the validity of indefinite commitment periods for MDSOs in *prison* treatment facilities.[25] In *People v. Feagley*,[26] the court held that the state could not involuntarily confine a *civilly* committed MDSO for an indefinite period when commitment was in a prison setting.[27] *Feagley* did not purport to invalidate indefinite commitment procedures for MDSOs amenable to treatment in a state hospital.[28] The Legislature, however, subsequently enacted new provisions which limited the duration of *all* MDSO commitments.[29]

In 1977, Sections 6316.1 and 6316.2 were added to the Welfare and Institutions Code.[30] Section 6316.1 stipulated that an MDSO could not be kept in "actual custody" for a period longer than the maximum term of commitment.[31] The "maximum term of commitment" was defined as "the longest term of imprisonment which could have been imposed for the offense or offenses of which the defendant was convicted, including the upper term of the base offense and any enhancements and consecutive offenses."[32] Section 6316.2 provided for a special extended commitment period of one year beyond the maximum term of imprisonment following jury trial if the court found that the MDSO was a

22. *See In re* Moye, 22 Cal. 3d 457, 463, 584 P.2d 1097, 1101, 149 Cal. Rptr. 491, 495 (1978).
23. *See generally* Black conversation, *supra* note 7.
24. See text accompanying notes 25-46 *infra*.
25. *See generally* 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491; People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975); People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).
26. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509.
27. *See id.* at 376, 535 P.2d at 398, 121 Cal. Rptr. at 534; *see also* 22 Cal. 3d at 463-64, 584 P.2d at 1101, 149 Cal. Rptr. at 495. An example of a prison setting is a state treatment facility located on prison grounds.
28. *See* 22 Cal. 3d at 464, 584 P.2d at 1101, 149 Cal. Rptr. at 495.
29. *See* CAL. STATS. 1979, c. 255, §63, at 570 (amending CAL. WELF. & INST. CODE §6316.1).
30. *See* 22 Cal. 3d at 464, 584 P.2d at 1101-02, 149 Cal. Rptr. at 495-96; *see also* CAL. STATS. 1977, c. 164, §§2, 3, at 633-34 (adding CAL. WELF. & INST. CODE §§6316.1, 6316.2).
31. *See* CAL. STATS. 1979, c. 255, §63, at 570.
32. *See id.*

serious threat to the health and safety of others.[33]

In 1978, the California Supreme Court determined, in In re *Moye*,[34] that the principles of equal protection also prohibited institutional confinement of an NGI for longer than the maximum term for the underlying offense.[35] In the absence of further legislation applicable to commitments under Section 1026 of the Penal Code, the court authorized the use of Section 6316.1 of the Welfare and Institutions Code for the calculation of the maximum term of commitment.[36] In an effort to protect society,[37] the court also sanctioned the extension of the maximum term of commitment if the conclusion can be drawn that an NGI who had served his or her maximum commitment period still remained a danger to the health and safety of themselves or others.[38] The *Moye* court held that if further confinement and treatment were sought after the expiration of the extended maximum term, the only available procedures were the civil commitment provisions of the Lanterman-Petris-Short Act[39] and the outpatient supervision programs.[40]

As a result of the court's decision in *Moye*, the Legislature enacted Penal Code Section 1026.5 in 1979.[41] Like Section 6316.1 of the Welfare and Institutions Code, Penal Code Section 1026.5 provides for a "maximum term of commitment" for NGIs to limit the period that they may be kept in *actual custody*.[42] Section 1026.5 specifies different formulas and procedures for determining the maximum terms of commitment, depending upon the severity of the offense and the date on which it was committed.[43] In addition, Section 1026.5 establishes the criteria

33. *See id.* c. 992, §2(d), (f), at 3380 (amending CAL. WELF. & INST. CODE §6316.2, urgency clause effective Sept. 22, 1979, operative Jan. 1, 1980). The trial must be by jury unless waived by both the patient and the prosecuting attorney. *See generally id.* §2(h) (the extended commitment period may be renewed). *See also* Black conversation, *supra* note 7.

34. 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978).

35. *See id.* at 460, 584 P.2d at 1099, 149 Cal. Rptr. at 493.

36. *See id.* at 466, 584 P.2d at 1103, 149 Cal. Rptr. at 497 (the court held that the principles of equal protection require that NGIs be treated like MDSOs with regard to the maximum term of commitment).

37. *See* 11 PAC. L. J., REVIEW OF SELECTED 1979 CALIFORNIA LEGISLATION 445, 448 (1980) (criminal procedure; commitment and release of persons acquitted by reason of insanity) [hereinafter cited as *Commitment and Release*].

38. *See* 22 Cal. 3d at 467, 584 P.2d at 1103-04, 149 Cal. Rptr. at 497-98; CAL. PENAL CODE §1026.5(b)(6), (8) (the term of commitment can be extended by a two-year period an indefinite number of times). *See generally* Black conversation, *supra* note 7.

39. *See* CAL. WELF. & INST. CODE §§5000-5371 (the Lanterman-Petris-Short Act establishes procedures, guidelines, and requirements which must be met before persons can be civilly committed).

40. *See* 22 Cal. 3d at 460, 584 P.2d at 1099, 149 Cal. Rptr. at 493 (this statement by the court can be used to argue that the imposition of outpatient status beyond the term of commitment is within the authority of the court).

41. *See* 64 Op. Att'y Gen. 23, 27 (1981).

42. *See* CAL. PENAL CODE §1026.5(a); 64 Op. Att'y Gen. 23, 27 (1981).

43. *See* CAL. PENAL CODE §1026.5(a); *Commitment and Release*, *supra* note 37, at 447. *See generally* 63 Op. Att'y Gen. 199, 199-200 (1980).

for the extension of commitment *beyond* the maximum term.[44] Since the term "actual custody" lacks statutory definition,[45] courts have adopted the *Moye* definition of actual custody in applying Section 1026.5 to NGIs and MDSOs.[46] The *Moye* holding, however, is the source of considerable confusion.

C. *The Area of Confusion*

Although statutory law authorizes the courts to impose outpatient status on NGIs, considerable confusion exists regarding *when* this status may be imposed. The solution to this problem lies in the proper interpretation of *Moye*.

The language used in Penal Code Section 1026.5 and in the recently repealed Welfare and Institutions Code Section 6316.1 indicates that the definition of "actual custody" is critical in determining the court's ability to impose restrictions on an NGI beyond the maximum term of commitment.[47] The *Moye* court held that actual custody did not include periods of outpatient supervision.[48] Thus, *Moye* can be interpreted to mean that persons who have served their maximum periods of commitment may be placed on outpatient status.[49] This interpretation is reinforced by the language in the *Moye* opinion. The court stated that the only available procedures for further confinement *after* the expiration of an extended commitment term are the civil commitment provisions of the Lanterman-Petris-Short Act *and the outpatient treatment programs*.[50] Commentators, however, have interpreted *Moye* as holding that outpatient status may be imposed only *prior to or during* the NGI's term of commitment.[51] Commentators have analogized the imposition of outpatient status as stopping the "clock" that measures the time left to be served on an NGI's commitment period.[52] The "clock" is reactivated at the end of the outpatient period[53] if the court determines that the NGI is to be recommitted.[54] In no event, however,

44. *See* CAL. PENAL CODE §1026.5(a); *Commitment and Release, supra* note 37, at 447.
45. *See generally* CAL. PENAL CODE §1026.5.
46. See text accompanying notes 48-51 *infra*.
47. *See generally* CAL. PENAL CODE §1026.5(a)(1), (2), (3); CAL. WELF. & INST. CODE §6316.1(a), (b), (c).
48. *See In re* Moye, 22 Cal. 3d 457, 461, 584 P.2d 1097, 1101, 149 Cal. Rptr. 491, 495 (1978).
49. *See generally* Johnson hearing, *supra* note 8, at 24; 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (outpatient status constitutes constructive custody).
50. *See* 22 Cal. 3d at 460, 584 P.2d at 1099, 149 Cal. Rptr. at 493.
51. *See* Black conversation, *supra* note 7; Mandella conversation, *supra* note 9. *See generally* 64 Op. Att'y Gen. 23, 28-29 (1981).
52. *See* Mandella conversation, *supra* note 9.
53. *See generally* CAL. PENAL CODE §1606 (although outpatient status is limited to a one-year period, it may be renewed indefinitely).
54. An example may be useful to the understanding of this concept. Assume A has been committed to a state hospital for a term of five years. At the end of the fourth year of commit-

may the outpatient status be imposed after the commitment period has expired.[55] The different interpretations of the *Moye* holding have led to considerable confusion over the court's authority to impose outpatient status on NGIs who have served their maximum terms of commitment. While an examination of the laws pertaining to commitment has revealed that outpatient status can be imposed prior to, and during, the maximum term of commitment, the *Moye* definition of "actual custody" has raised the question of whether courts can impose outpatient status beyond the commitment period.

At present, *Moye* is the only case that addresses the issue of the court's authority to impose outpatient status beyond the commitment period. Thus, a thorough examination of the relevant statutory and constitutional law is necessary to determine whether the court can authorize outpatient status for an NGI after the maximum term of commitment has been served. This comment will now analyze the statutory law of California in an effort to determine the precise meaning of *Moye*. In addition, this comment will use an equal protection analysis to determine the constitutional validity of a law that permits the imposition of outpatient status on NGIs who have fully served their terms of commitment.

The Void in Existing Statutory Law

Existing statutory law does not provide a definitive answer to the question of whether the court has authority to impose outpatient status beyond the commitment period. No statutory provision exists that either *prohibits* the imposition of outpatient status after the commitment period has expired,[56] or expressly *grants* the courts this authority.[57] Although certain sections of the Penal Code can be read as granting the court authority to impose outpatient status beyond the commitment period,[58] the ambiguity of the statutes makes this interpretation unpersuasive.[59]

Sections 1600 and 1612 of Title 15 of the Penal Code can be cited as authority for the court to impose outpatient status upon NGIs who have fully served their terms of commitment. Section 1600 provides

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ment, A is placed on outpatient status. At the end of the one-year term of outpatient status, the court has the options of renewing outpatient status, returning A to the state hospital for the remaining term, or releasing A without condition. Should the court decide that A has drastically regressed and may be a danger to others, it can return A to the state hospital for the remaining year left on A's five-year commitment period. *See* Mandella conversation, *supra* note 9.

55. *See* Mandella conversation, *supra* note 9.
56. *See generally* CAL. PENAL CODE §§1026-1026.5, 1600-1614.
57. *See generally id.* §§1026, 1026.5, 1600-1614.
58. *See generally id.* §§1026.3, 1600, 1612.
59. See text accompanying notes 60-68 *infra*.

that any person committed to a state hospital or other treatment facility as an NGI or an MDSO can be placed on outpatient status "from *such* commitment" subject to the procedures and provisions of Title 15.[60] Since the language "from such commitment"[61] *can* be interpreted as "after the end of the commitment period," one can argue that this section specifically permits outpatient status to be imposed after the commitment period. The statute, however, does not state that the committed person can be placed on outpatient status "from the *end* of commitment." Thus, the phrase "from such commitment" could also be interpreted as meaning "from the existing term of commitment."[62] Accordingly, absent a legislative or judicial determination of the meaning of the statutory language of "from such commitment," the phrase can not be interpreted convincingly as meaning "after the end of the commitment period."

Section 1612 of the Penal Code provides that any person who is committed to a state hospital or other treatment facility as an NGI or an MDSO shall not be released therefrom except as expressly provided under the outpatient provisions of Title 15.[63] Since the language of Section 1612 states that committed NGIs and MDSOs can be released only under the outpatient status provisions, committed persons, arguably, cannot be *directly* released from their commitment without first being placed on outpatient status. Section 1026.1 of the Penal Code, however, may conflict with this interpretation of the language in Section 1612.[64] Section 1026.1 enumerates different criteria for the release of NGIs from commitment.[65] These standards are that a person committed to a state hospital or other treatment facility must be released upon a determination that sanity has been restored,[66] upon an expiration of the maximum term of commitment,[67] or as otherwise expressly provided under the outpatient status provisions of Title 15.[68]

In summary, while statutory law does not prohibit the imposition of outpatient status upon an NGI after expiration of the confinement period, no provision of existing law unequivocally supports the view that the court has the authority to impose outpatient status beyond the maximum term of commitment. Thus, neither case law nor statutory law

60. *See* CAL. PENAL CODE §1600 (emphasis added).
61. *See generally id.* §1026.3 (this section also contains the "from such commitment" language).
62. *See generally id.* §1604 (recommendations for eligibility of outpatient status are made during the term of commitment).
63. *See id.* §1612.
64. *See id.* §1026.1.
65. *See id.*
66. *See id.* §1026.1(a).
67. *See id.* §1026.1(b).
68. *See id.* §1026.1(c).

can be used to determine the precise meaning of *Moye*. The proper interpretation of *Moye*, however, can be determined through an examination of the constitutional validity of a law that permits the imposition of outpatient status beyond the term of commitment.

An Equal Protection Analysis

The fourteenth amendment of the United States Constitution guarantees each person the right to equal protection under the law.[69] Although this right does not guarantee that every law shall treat every person equally,[70] it does require that laws treating one class of people differently from another class be justified under an equal protection analysis.[71] A law that permits the imposition of outpatient status upon NGIs beyond their terms of commitment would result in a discriminatory classification by permitting NGIs to be treated differently from persons who are found guilty of the same crime and sent to jail. Prisoners in jail would be required to be released *directly* from jail after fully serving their sentences; NGIs, however, would be subject to outpatient status beyond their terms of commitment.[72] Accordingly, even if case law[73] or statutory law[74] can be interpreted to authorize courts to impose outpatient status upon NGIs after their commitment period has ended, the constitutional validity of that law must be justified under an equal protection analysis.[75] The constitutionality of the law depends upon the *standard* of analysis applied and the findings of the court in that application.[76]

A. The Appropriate Standard of Analysis

The appropriate standard for equal protection analysis depends

69. U.S. CONST. amend. XIV, §1.
70. *See generally* Dunn v. Blumstein, 405 U.S. 330 (1972).
71. *See id.* at 335 (the standard applied depends upon the interests affected or the classification involved).
72. An example may be useful to the understanding of this concept. Assume A and B are both found guilty of the same type of crime. If only A were found to be insane at the time of the commission of the crime, A would be committed to a treatment facility or be placed on outpatient status as an NGI. B would be sent to jail. Assuming the maximum penalty for the crime was a five-year term of imprisonment, both A and B can be confined for a period of five years. At the end of the five-year period, B would be absolutely free. A, however, might be required to participate in an outpatient treatment program. This results in discriminatory treatment to A.
The imposition of outpatient status beyond the term of commitment differs from the granting of parole to persons in prison. Parole is granted while the prisoner still has time to serve on the sentence and cannot be imposed after the sentence has expired. Moreover, outpatient status is limited to a one-year period, but it may be renewed indefinitely.
73. *See generally In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978).
74. *See generally* CAL. PENAL CODE §§1026.3, 1600, 1612.
75. See text accompanying notes 69-72 *supra*.
76. *See generally* Dunn v. Blumstein, 405 U.S. 330 (1972).

upon the type of rights infringed.[77] When fundamental rights are denied, the court must apply a strict scrutiny standard.[78] The court in *Livingston v. Ewing*[79] held that fundamental rights are those rights guaranteed implicitly or explicitly by the Constitution.[80] Hence, the right to liberty and the right to travel are fundamental rights.[81] The imposition of outpatient status is an infringement of a person's fundamental rights to liberty and travel.

The court in *Bolling v. Sharpe*[82] held that the term "liberty" is not confined to mere freedom of bodily restraint.[83] Liberty extends to the full range of lawful conduct that the individual desires to pursue.[84] Outpatients are either required to be housed at the outpatient facility or to check into the facility periodically.[85] Regardless of where the outpatients live, they must comply with the rules and regulations that the facility has imposed on them.[86] Since the choices of where to live and what one can do are included in the right to liberty,[87] the imposition of outpatient status constitutes an infringement upon that right.

The constitutional right to travel includes the right to move from one state to another.[88] Outpatients, however, are not permitted to move out of state and, perhaps, may not move from county to county.[89] Outpatient status, therefore, also infringes on the NGI's right to travel. Since the fixing of outpatient status is an infringement on the fundamental interests of liberty and right to travel, a strict scrutiny standard of analysis must be applied under an equal protection challenge.[90]

77. *See id.* at 335. *See generally* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1972). The court must apply a strict scrutiny test for "suspect" classifications. In determining whether a class is suspect, the court traditionally looks for an indication that the class is saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process. NGIs, however, do not fit within this definition and thus cannot be considered a suspect classification. *See generally* Note, *Commitment and Release of Persons Found Not Guilty By Reason of Insanity: A Georgia Perspective*, 15 GA. L. REV. 1065, 1082 n.94 (1981). See note 71 *supra*.

78. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969).

79. 455 F. Supp. 825 (D.N.M. 1978).

80. *See id.* at 831.

81. *See* 394 U.S. at 629-31; *In re* Moye, 22 Cal. 3d 457, 465, 584 P.2d 1097, 1102-03, 149 Cal. Rptr. 491, 496-97 (1978); People v. Olivas, 17 Cal. 3d 236, 243-51, 551 P.2d 375, 379-84, 131 Cal. Rptr. 55, 59-64 (1976); U.S. CONST. amends. V, XIV, §1.

82. 347 U.S. 497 (1954).

83. *See id.* at 499-500.

84. *See id.* at 499.

85. *See* Mandella conversation, *supra* note 9.

86. *See* Mandella conversation, *supra* note 9 (these restrictions vary from case to case).

87. See text accompanying notes 83 and 84 *supra*.

88. *See generally* Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969).

89. *See* Mandella conversation, *supra* note 9 (an outpatient is not allowed to move to another county unless that other county has an adequate treatment facility that is willing to be responsible for that outpatient).

90. *See generally In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978).

B. The Strict Scrutiny Test

Under a strict scrutiny standard, a law is valid only if the distinctions drawn by the law are necessary to effectuate a "compelling state interest."[91] Accordingly, the court must find that California has a *compelling* state interest in the imposition of outpatient status beyond the term of commitment. In addition, the court must *also* determine that the imposition of outpatient status is *necessary* to that interest before the action can be deemed constitutionally valid.

A "compelling state interest" has been defined broadly as an interest the state is forced or obliged to protect.[92] From this general definition, the courts of different states have found many varied interests to be "compelling."[93] In *People v. Saffell*,[94] the California Supreme Court held the MDSO procedures of the state were justified by the *dual*[95] compelling interests of assuring the safety of the public *and* of providing effective treatment[96] for those disposed to the commission of this particular category of criminal conduct.[97] Accordingly, one court of appeal has interpreted the *Saffell* decision as holding that the state has a compelling interest in the confinement of persons for the purpose of treatment.[98]

The defendant, in *Saffell*, was convicted of forcible rape and forcible sexual perversion, both offenses aggravated by the use of a dangerous weapon.[99] The *Saffell* court noted that confining MDSOs for the purpose of treatment, rather than punishing them through confinement in a state prison, is not a violation of equal protection.[100] The court's rationale, however, probably was based on the premise that the defend-

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91. *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972); 394 U.S. at 634; 22 Cal. 3d at 465, 584 P.2d at 1102-03, 149 Cal. Rptr. at 496-97.

92. *See generally* BLACK'S LAW DICTIONARY 256 (5th ed. 1979) (the term "compelling state interest" is used to uphold state action in the face of an attack grounded on equal protection or first amendment rights because of the serious need for state action).

93. *See generally* People v. Saffell, 25 Cal. 3d 223, 599 P.2d 92, 157 Cal. Rptr. 897 (1979) (the state has a dual compelling interest in protecting the public and providing treatment for the mentally ill); State v. Coleman, 616 P.2d 1090 (Mont. 1980) (the state has a compelling interest in eliminating the sale of methamphetamines); Coleman v. Coleman, 291 N.E.2d 530 (Ohio 1972) (the state has a compelling interest in overseeing its divorce and marriage laws); Wallegham v. Thompson, 185 N.W.2d 649 (N. Dakota 1971) (the state has a compelling interest in constructing water control devices in those parts of the state susceptible to flooding).

94. 25 Cal. 3d 223, 599 P.2d 92, 157 Cal. Rptr. 897 (1979).

95. The phrase "dual compelling interests" can imply separate and independent compelling interests. See text accompanying note 93 *supra*.

96. *See generally* BLACK'S LAW DICTIONARY 1346 (5th ed. 1979) (definition of treatment); *see also* Goodrich v. Tinker, 437 S.W.2d 882, 884 (Tex. 1969).

97. *See* 25 Cal. 3d at 232-33, 599 P.2d at 97, 157 Cal. Rptr. at 903.

98. *See* People v. Smith, 120 Cal. App. 3d 817, 821, 175 Cal. Rptr. 54, 55-56 (1981).

99. *See* 25 Cal. 3d at 227, 599 P.2d at 94, 157 Cal. Rptr. at 899.

100. *See* 120 Cal. App. 3d 817 at 821, 175 Cal. Rptr. at 55-56.

ant would be confined, whether in a prison or a hospital setting.[101] Since confinement was imminent, the court unnecessarily identified the interests of treatment of the MDSO and the protection of the public as *separate and independent* compelling state interests. Accordingly, the *Saffell* case should not be interpreted to mean that treatment, in itself, is a sufficiently compelling state interest for confinement purposes.

The interest of the state in protecting its citizens may be a "compelling" one.[102] The state, nonetheless, cannot validly claim an interest in the protection of its citizens as the basis for the imposition of outpatient status because persons found to be harmful to themselves or others are ineligible for outpatient status.[103] The purpose of outpatient status is to ensure that the previously committed individuals will be treated properly so that they can successfully re-enter society.[104] Although the interest of the state in the treatment of its citizens is commendable, this interest is secondary[105] and should not rise to the level of a necessary or compelling state interest. Thus, the state would lack a sufficient interest to justify the authorization of the imposition of outpatient status beyond the term of commitment.

Even if the state could show that mere treatment is a compelling interest, it would additionally have to illustrate that the challenged procedure was *necessary* for the attainment of its goals.[106] This requirement can not be fulfilled if the court finds that the state action does not further the interest of the state or that alternatives to the state action are available to achieve the same goals with a lesser burden on constitutionally protected activities.[107]

Commentators doubt that the imposition of outpatient status beyond the term of commitment will further the state's interest of treatment.[108] One of the conditions precedent to placing an MDSO or an NGI on outpatient status is that the county mental health director make the proper recommendations and treatment program suggestions to the court.[109] The program suggestions, which include the naming of the proposed treatment facility for the committed person, are weighed

101. *See* CAL. PENAL CODE §1601 (since the defendant's crimes were serious, he would not be eligible for outpatient status until *at least* 90 days of commitment had been served).

102. *See generally* People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975). Although confinement of MDSOs is not "solely" for the protection of society, the protection of society is the primary purpose of confinement. Rehabilitative treatment is, at best, only a secondary purpose for confinement. See text accompanying notes 94-101 *supra*.

103. *See* CAL. PENAL CODE §§1602(a), 1603(a).

104. *See generally id.* §§1602(a), (b), (c), 1603(a), (b).

105. *See* 14 Cal. 3d at 361, 535 P.2d at 388, 121 Cal. Rptr. at 524.

106. *See* Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

107. *See id.*

108. See text accompanying notes 109-113 *infra*.

109. *See* CAL. PENAL CODE §§1602(b), 1603(b); Mandella conversation, *supra* note 9.

heavily at the hearing to determine if outpatient status should be granted to the particular individual.[110] Commentators have suggested, however, that facilities that treat outpatients would be unwilling to assume treatment responsibility for an outpatient when that person can no longer be returned to commitment.[111] If the county mental health director is unable to find a suitable facility to accept treatment responsibility,[112] the person released from commitment will not receive treatment.[113] Accordingly, the interest of the state in ensuring treatment for persons released from commitment would not be realized.

Assuming arguendo that outpatient treatment facilities were required to accept responsibility for persons to be placed on outpatient status, alternatives to the imposition of outpatient status beyond the commitment period may be shown to defeat an assertion that imposition of outpatient status is "necessary" to achieve the state's desired goal.[114] One alternative is for the court simply to urge persons released from commitment to seek outpatient treatment. One commentator has suggested that some released patients would be willing to follow the court's recommendation.[115] A second alternative is for the court to extend the term of commitment. This permits outpatient status to be imposed beyond the original term of commitment.[116] The term of commitment may be extended only if the NGI has committed a serious crime[117] and is found to be a substantial danger to others.[118] Many courts, however, have used the rationale that an NGI is dangerous if released without outpatient treatment to satisfy the "danger" requirement for extending commitment.[119] A third alternative is for the legislature to raise the maximum term of imprisonment allowable for all offenses.[120] This

110. *See* Mandella conversation, *supra* note 9.

111. *See* Mandella conversation, *supra* note 9. *See generally* Johnson hearing, *supra* note 8 (the court doubted its ability to impose contempt of court sanctions upon outpatients whose commitment terms have already ended).

112. *See generally* telephone conversation with Kathy Fagarstrom, Acting Chief of the Statistics Office at the State Department of Mental Health, Dec. 7, 1981. There are over 1000 treatment facilities in California. They are either operated by the county or contracted with the county. Of those, there are only 17 or 18 treatment facilities that specifically handle outpatients who were formerly MDSOs or NGIs. Last year, there were only about 500 outpatients from MDSO and NGI commitments (notes on file at the *Pacific Law Journal*).

113. *See generally* CAL. PENAL CODE §1611 (if the county does not wish to assume outpatient treatment responsibility, the committed person may be placed on parole).

114. See text accompanying note 107 *supra*.

115. *See* Mandella conversation, *supra* note 9 (a large number will submit voluntarily to outpatient treatment at the court's request because many persons released from commitment are not able to care for themselves).

116. *See* CAL. PENAL CODE §1026.5(b)(7).

117. *See id.* §1026.5(b)(1).

118. *See id.*

119. *See generally* Black conversation, *supra* note 7; Mandella conversation, *supra* note 9.

120. The increase in the maximum terms of imprisonment would simply give the courts greater flexibility in the imposition of outpatient status. Persons committed to treatment facilities may still be released before the end of the maximum term.

would increase the maximum term of commitment for future NGIs thereby extending the period of outpatient status that may be imposed. Finally, the obvious alternative to the imposition of outpatient status beyond the term of commitment is simply to begin outpatient status before the commitment period ends. There is no dispute that the law has authorized the court to order outpatient status before the end of the commitment term.[121] Since outpatient status may begin even one day before the end of commitment, there is no logical reason to increase the burden on constitutionally protected activities by waiting until the commitment period has ended.[122] Thus, successful alternatives to the imposition of outpatient status beyond the term of commitment are available to defeat the "necessary" requirement of the compelling interest assertion.

Since the state cannot show successfully that its interest is compelling[123] or that if compelling, the procedures used are necessary to further that interest,[124] the imposition of outpatient status after the commitment period does not pass the strict scrutiny standard of analysis.[125] Accordingly, the validity of this state procedure cannot withstand an equal protection attack. Thus, *Moye* should not be interpreted as permitting the imposition of outpatient status upon NGIs who have served their terms of commitment. To ensure the proper interpretation of *Moye*, legislative amendments to existing laws that pertain to commitment are proposed.

RECOMMENDATIONS

As discussed previously,[126] existing laws relevant to commitment—and the imposition of outpatient status can be interpreted differently.[127] Since the imposition of outpatient status beyond the term of commitment has been shown to be constitutionally invalid,[128] statutory law should be amended to expressly prohibit this procedure. To accomplish this clarification, Sections 1026.1, 1026.3, 1600 and 1612 of the California Penal Code should be amended to read:[129]

§1026.1. [Release from state hospital or treatment facility]

121. *See* CAL. PENAL CODE §1600.
122. See text accompanying note 107 *supra*.
123. See text accompanying notes 92-103 *supra*.
124. See text accompanying notes 106-122 *supra*.
125. *See generally* Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); *In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978).
126. See text accompanying notes 60-68 *supra*.
127. *See generally* CAL. PENAL CODE §§1026.3, 1600, 1612.
128. See text accompanying notes 123-125 *supra*.
129. The italicized portions of the following sections are proposed amendments to the current code sections.

(*a*) A person committed to a state hospital or other treatment facility under the provisions of Section 1026 shall be released therefrom only:
(*1*) Upon determination that sanity has been restored as provided in Section 1026.1; or
(*2*) Upon expiration of the maximum term of commitment as provided in subdivision (a) of Section 1026.5, except as such term may be extended under the provisions of subdivision (b) of Section 1026.5; or
(*3*) As otherwise expressly provided in Title 15 (commencing with Section 1600) of Part 2.
(b) Upon expiration of the maximum term of commitment as provided in subdivision (a) of Section 1026.5 or the expiration of the extended term of commitment under the provisions of subdivision (b) of Section 1026.5, the court shall no longer have authority to impose outpatient status upon the previously committed individual.[130]
§1026.3. [Outpatient status]
A person committed to a state hospital or other treatment facility under the provisions of Section 1026 may be placed on outpatient status from *the existing term of* commitment as provided in Title 15 (commencing with Section 1600) of Part 2.[131]
§1600. [Applicability]
Any person committed to a state hospital or other treatment facility under the provisions of Section 1026, or Chapter 6 (commencing with Section 1367) of Title 10 of this code, or Section 6316 or 6321 of the Welfare and Institutions Code may be placed on outpatient status from *the existing term of* commitment subject to the procedures and provisions of this title, except that a developmentally disabled person may be placed on outpatient status from such commitment under the provisions of this title as modified by Section 1370.4.[132]
§1612. [Release]
Any person committed to a state hospital or other treatment facility under the provisions of Section 1026, or Chapter 6 (commencing with Section 1367) of Title 10 of this code, or Section 6316 or 6321 of the Welfare and Institutions Code, *who is placed on outpatient status*, shall not be released *from outpatient status* except as expressly provided in this title.[133]

The addition of subsection (b) to Section 1026.1 will stipulate that im-

130. *But see* CAL. PENAL CODE §1026.1 (the portion in italics are proposed additions to this code section).
131. *But see id.* §1026.3.
132. *But see id.* §1600 (the reference to Sections 6316 and 6321 of the code dealing with MDSOs have not been excluded since MDSOs committed prior to 1982 are still subject to this section).
133. *But see id.* §1612 (the reference to Sections 6316 and 6321 of the code dealing with MDSOs have not been excluded since MDSOs committed prior to 1982 are still subject to this section).

position of outpatient status beyond the commitment period is clearly prohibited. Moreover, the replacement of the nebulous phrase of "from such commitment" from Sections 1026.3 and 1600 with the phrase "from the existing term of commitment" will remove the ambiguity of these sections. Additionally, the proposed amendment to Section 1612 will eliminate the previous conflict with Section 1026.1. By clarifying the laws relating to the imposition of outpatient status upon NGIs who have fully served their terms of commitment, the California Legislature also would be ensuring a constitutionally valid interpretation of *Moye*.

CONCLUSION

In re *Moye* has led to uncertainty concerning the court's authority to impose outpatient status on NGIs beyond their terms of commitment. This comment has examined the relevant laws in California and has found that the statutes provide no support for the view that the court has authority to impose outpatient status beyond the commitment period. Although the statutes do not forbid the fixing of outpatient status after the commitment period has terminated, the lack of support for the view that this action is authorized indicates that the Legislature *did not intend* to permit the imposition of outpatient status beyond the commitment period. In addition, this comment has determined that a law that permits the imposition of outpatient status on NGIs after their commitment periods have expired is unconstitutional under the equal protection clause. Since the imposition of outpatient status beyond the commitment period is constitutionally prohibited, a better interpretation of *Moye* and of statutes that pertain to commitment is that outpatient status can be imposed only during the NGI's term of commitment. Thus, the *Moye* case should *not* be interpreted as permitting the imposition of outpatient status on NGIs beyond their terms of commitment. Finally, legislative amendments to current California statutes have been proposed. Implementation of these amendments will prevent future misinterpretations of the *Moye* case.

The conclusion drawn from this comment may cause unrest among those people who believe that the prohibition of the fixing of outpatient status beyond the commitment period will permit insufficiently treated and possibly dangerous persons to be returned to society. One must bear in mind, however, that NGIs determined to be dangerous are not eligible for outpatient status. In addition, alternatives to the imposition of outpatient status beyond the commitment period have been suggested to prevent the premature release of NGIs. Thus, while this com-

ment seeks to enhance the protection of individual rights, its impact will neither threaten nor burden society.

Mathew K. M. Chan