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Civil Commitment: Is There a Constitutionally Based Right to Treatment

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CIVIL COMMITMENT: IS THERE A CONSTITUTIONALLY BASED RIGHT TO TREATMENT? *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

A constitutionally based right to treatment for the civilly confined mental patient is now in its formative stage. Dr. Birnbaum in his seminal article[1] was the first to suggest that the right to treatment had constitutional bases. The first member of the judiciary to suggest that the right to treatment had roots in either the eighth amendment,[2] the equal protection clause[3] or the due process clause of the fourteenth amendment[4] was Judge Bazelon[5] in *Rouse v. Cameron*.[6] Bazelon's dicta touched off a wave of scholarly commentary[7] but received limited judicial recognition until recently. It was the due process clause that emerged as the prime candidate for establishing a substantive constitutional basis for this asserted right.

Wyatt v. Stickney[8] was the first case to hold unequivocally that due process was violated because of the failure of the state to provide adequate treatment. *Wyatt* rationalized that:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[9]

Subsequently, the Fifth Circuit Court of Appeals in *Donaldson v.*

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1. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

2. *See, e.g.*, Welsh v. Linkins, 373 F. Supp. 487 (D. Minn. 1974); Mantarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969); Note, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, 1969 DUKE L.J. 677, 716-17; Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1144-45 (1967); Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1330 and n. 62 (1974).

3. 373 F.2d at 453. *See, e.g.*, Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 GEO. L.J. 680, 690 (1969). Note, *The Nascent Right to Treatment, supra* note 2, at 1145-46; Note, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill, supra* note 2, at 718-20; Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

4. 373 F.2d at 453. *See, e.g.*, 46 MISS. L.J. 345 (1975); 27 U. FLA. L. REV. 295 (1974); 20 VIL. L. REV. 214 (1974); 23 U. KAN. L. REV. 206, 218 (1974).

5. Judge Bazelon has been the vanguard of the mentally ill in numerous cases. *See, e.g.*, Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); United States v. Brawner, 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon, C.J., concurring).

6. 373 F.2d 451 (D.C. Cir. 1966).

7. 77 YALE L.J. 87 (1967); Note, *The Nascent Right to Treatment, supra* note 4; 80 HARV. L. REV. 898 (1967); *Symposium—The Right to Treatment*, 57 GEO. L.J. 673 (1969). *Symposium—The Mentally Ill and The Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).

8. 325 F. Supp. 781 (M.D. Ala.), *hearing on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala. 1972).

9. 325 F. Supp. at 785.

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O'Connor[10] thoroughly analyzed the justification for basing a substantive right to treatment in the due process clause. The Supreme Court viewed the case somewhat differently.

I. Court of Appeals Decision

Donaldson was a non-dangerous mental patient[11] committed under Florida law[12] in January, 1957. In February of 1971, Donaldson brought an action[13] under 42 U.S.C. §1983[14] alleging that O'Connor, the superintendent of the hospital, and other members of the hospital staff had intentionally and maliciously deprived him of his constitutional right to liberty.[15] The district court judge had charged the jury in part:

> 37. You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such individual treatment as will give him a realistic opportunity to be cured or to improve his mental condition.
>
> 38. The purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not dangerous

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10. 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563, 577 (1975). The case was remanded so that the court of appeals could determine whether the district judge's failure to charge the jury in light of Wood v. Strickland, 420 U.S. 308 (1975) (an official has no duty to anticipate unforeseeable constitutional developments) necessitated a remand on the issue of immunity from liability for monetary damages.

11. The basis for Donaldson's commitment is unclear. At trial, however, uncontroverted evidence established that Donaldson was non-dangerous.

12. Fla. Laws Extra Sess., C. 31403, §1, 62 (1955-56). Florida law now provides a stautory right to individual medical treatment for the civilly confined. 14A Fla. Stat. Ann. §394.459 (1972).

13. Donaldson's original complaint was filed as a class action on behalf of himself and all of his fellow patients in an entire department of the Florida State Hospital at Chattahoochee. In addition to a damage claim, Donaldson's complaint also asked for habeas corpus relief ordering his release, as well as the release of all members of the class. Donaldson further sought declaratory and injunctive relief requiring the hospital to provide adequate psychiatric treatment.

After Donaldson's release and after the district court dismissed the action as a class suit, Donaldson filed an amended complaint, repeating his claim for compensatory and punitive damages. Although the amended complaint retained the prayer for declaratory and injunctive relief, that request was eliminated from the case prior to trial. See O'Connor v. Donaldson, 422 U.S. 563, n. 1 (1975).

14. 42 U.S.C. §1983 (1970) provides in pertinent part:

> Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15. Compare the manner in which the court of appeals phrased the issue: "Donaldson contends that he had a constitutional right to receive treatment . . . . In this action . . . he seeks damages . . . against five hospitals and state mental health officials who allegedly deprived him of this constitutional right." 493 F.2d at 509-10.

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to himself or others. *Without such treatment there is no justification, from a constitutional standpoint, for continued confinement.* (emphasis added).[16]

In rejecting petitioner's claim that the charge was erroneous because it acknowledged a substantive right to treatment, the Fifth Circuit Court of Appeals, per Judge Wisdom, advanced the following rationale: involuntary civil commitment entails a massive curtailment of liberty[17] and must, therefore, be justified by some permissible government goal. Justification to confine falls generally into two categories: police power,[18] for patients dangerous to others, and *parens patriae*, for non-dangerous patients in need of care or treatment. Danger to self combines elements of both. Since Donaldson was confined under the *parens patriae* rationale,[19] the due process clause requires that minimally adequate treatment in fact be established and enforced. The real key to this theory is the principle enunciated in *Jackson v. Indiana*:[20]

> [A]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed.[21]

The court reasoned that if treatment were the justification for Donaldson's confinement and were not in fact provided, then the nature of his commitment bore no reasonable relation to its purpose.[22]

The second theory in *Donaldson* establishing a constitutionally based right to treatment was the *quid pro quo* theory. In the context of criminal incarceration, commitment must be for a specific offense,[23] limited to a fixed term[24] and permitted after a proceeding

16. 493 F.2d at 518.

17. Humphrey v. Cade, 405 U.S. 504, 509 (1972). Civil commitment may involve a more serious curtailment of liberty than criminal incarceration because of its indefinite length and resulting stigmatization. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

18. *See* Note, *The Nascent Right to Treatment, supra* note 2, at 1138-39; Note, *Developments in the Law—Civil Commitment of the Mentally Ill, supra* note 2, at 1344-58; Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1119-21 (1972).

19. See note 11 *supra*.

20. 406 U.S. 715 (1972). *Accord*, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).

21. 406 U.S. at 738.

22. 493 F.2d 507, 518-21.

23. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962).

24. *See* Ward v. United States, 256 F.2d 179 (10th Cir. 1958); *but see* Chief Justice Burger's concurring opinion: "[T]he notion that confinement must be 'for a fixed term' is difficult to square with the widespread practice of indeterminate sentencing, at least where the upper limit is life." 422 U.S. 563, 586 and n. 7 (1975) (Burger, C.J., concurring).

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where procedural safeguards have been observed.[25] When these limitations on the government's confinement powers are absent, there must be a *quid pro quo* extended, *i.e.*, treatment. This theory is to be distinguished from a different *quid pro quo* rationale rejected in *Welsh v. Linkins*.[26] The *Welsh* theory stated that when *procedural safeguards*, present in criminal confinement were absent, the constitutional justification for this absence was that the purpose was to provide treatment.[27] The *Donaldson* rationale differs since it is based on the absence of procedural safeguards *plus* the absence of a specific offense and the limitation of a fixed term. The *Welsh* rationale is vulnerable since it could be argued that if procedural safeguards commensurate with criminal confinement were established, the right to treatment could cease to exist. Since at least one of the two limitations on criminal commitment, *i.e.*, for a specific offense and a definite term, will always be absent in civil commitment, the right to treatment does not dissipate when stricter procedural safeguards are established.[28] The *Donaldson quid pro quo* theory does not differentiate between those confined under the *parens patriae* or police power rationale, thereby establishing a right to treatment for *all* civilly confined persons.

The court addressed itself to the question of whether the denial of treatment presented a reviewing court with a justiciable claim. First, *assuming arguendo* that courts are incapable of formulating standards of adequate treatment in the abstract, there will be cases in which it is possible to determine that treatment has in fact been lacking. Numerous cases are cited in which the determination of whether individual patients have received treatment has been made.[29] Secondly, *Wyatt v. Stickney* is cited for the proposition that courts are capable of formulating institution-wide standards of adequacy.[30] In *Wyatt* there was agreement among the parties on almost all minimum standards, which were supported and supplemented by numerous expert witnesses with a "striking degree of consensus among the experts."[31]

II. The Supreme Court's Majority Opinion

The Supreme Court's majority opinion is perhaps most impor-

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25. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967).
26. 373 F. Supp. 487 (D. Minn. 1974); see 493 F.2d 503 n. 21.
27. 373 F. Supp. at 496.
28. *See* 23 U. Kan. L. Rev. 188, 197-99 (1974).
29. 493 F.2d 503 n. 47.
30. *Id.* at 525-27.
31. *Id.* at 526.

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tant for what it does not say. Rather than face the issues presented by the court of appeals, the Court circumvents the treatment question by analyzing the case in terms of deprivation of liberty.[32] "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[33] Thus, a substantive right to treatment has not been established.

The Court may have skirted this important question because of the breadth of the court of appeals' decision. If the *Jackson* rationale had been the only one postulated and the establishing of a constitutional right had been limited to non-dangerous patients, perhaps the Court would have been willing to recognize such a right. However, this was not the case.

In addition, the Court seemed to be troubled by what they interpreted as a possible implication of the *quid pro quo* theory. They envisaged the theory as implying that a state could constitutionally confine a non-dangerous mental patient for the purpose of treating him.[34] However, it does not logically follow that because a state *must* treat a patient as a justification for confinement, the state *may* then confine and offer treatment as a justification for that confinement. The Court itself states that "there is still *no constitutional basis* for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[35] Indeed, such a deprivation of liberty cannot be seriously countenanced. Thus, rejection of the *quid pro quo* theory for this reason appears unjustified.

An optimistic note in the Court's opinion is the fact that it does not suggest, as does Chief Justice Burger's concurring opinion, that the determination of whether treatment is in fact being provided is a non-justiciable issue. Contrarily, it stated that:

> O'Connor argues that, despite the jury's verdict, the Court must assume that Donaldson was receiving treatment sufficient to justify his confinement, because the adequacy of treatment is a "nonjusticiable" question that must be left to the discretion of the psychiatric profession. That argument is unpersuasive. Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine

32. See note 15 *supra*.
33. 422 U.S. at 576.
34. 422 U.S. at 572-73; 422 U.S. 563, 585 (Burger, C.J., concurring).
35. *Id.* at 563.

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whether the asserted ground is present. See *Jackson v. Indiana*, ...[36]

The justiciability issue has been considered a major stumbling block by some commentators.[37] A significant inroad in establishing a substantive right to treatment, therefore, has been made if the Court maintains its current posture.

III. CHIEF JUSTICE BURGER'S CONCURRING OPINION

Chief Justice Burger was the only member of the Court to directly confront the court of appeals' proposition that a substantive right to treatment was grounded in the fourteenth amendment.[38] Chief Justice Burger disagreed with the fundamental premise upon which the court of appeals' rationale was based, *i.e.*, that with respect to non-dangerous persons a state has no power to confine except for the sole purpose of providing treatment. He based his opinion on the fact that the concept of treatment is of relatively recent origin and without historical basis.[39]

History is an important source for determining when a right is implicit in our American scheme of justice.[40] Nevertheless, history is not the sole factor to be considered in determining what rights are vested in the people through the due process clause. Justice Frankfurter's definition of due process is exemplary:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause. In enforcing them this Court does not translate personal views into constitutional limitations. In applying such a large, untechnical concept as "due process," the Court enforces those permanent and pervasive feelings of our society as to which there is compelling evidence of the kind relevant to judgments on social institutions.[41]

Further evidence justifying the interpretation surfaces when one

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36. 422 U.S. 563 n. 10.
37. *See* Szasz, *The Right to Health*, 57 GEO. L.J. 734 (1969).
38. Chief Justice Burger has assumed a conservative posture regarding the rights of the mentally confined in the past. *See, e.g.*, Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960).
39. 422 U.S. 563, 581-83.
40. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).
41. Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

analyzes the transformation that the due process clause itself has undergone.[42] It is submitted that Chief Justice Burger's reliance on the lack of historical precedent appears unfounded.

Chief Justice Burger acknowledges that when commitment is effected under the *parens patriae* rationale, certain due process limitations exist. He asserts that it does not follow from these limitations that treatment can be the *sole* legitimate purpose of commitment. To justify this position, he states that many forms of illness are not understood; that for others there is no effective therapy; and, furthermore, that the cure rate in some areas is very low. Chief Justice Burger also notes that basic psychiatric principles establish that a patient must acknowledge his illness and accept treatment before therapy can be effective.[43]

This argument misses the point. No one would deny the existence of the above factors. Their presence, however, does not justify the conclusion that minimally adequate treatment should not at least be offered. Furthermore, the court of appeals' decision expressly recognizes that treatment may in fact be impossible. In such a case, the state would be required to provide "minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary."[44] This statement implicitly takes into account the inherent limitations of psychiatric treatment.

The most forceful attack by Chief Justice Burger's concurring opinion was directed towards the *quid pro quo* theory. Chief Justice Burger states that "the *quid pro quo* theory is a sharp departure from, and cannot coexist with, due process principles."[45] He interprets the theory as implying that the same interests are involved in all state confinements.

However, the Chief Justice ignores the fact that the *quid pro quo* theory acknowledges that the interests of the state may vary. The lowest common denominator that should remain constant for all those confined is treatment. When treatment is in fact provided, the balancing of state interests in determining whether a patient should be released remains unaffected. Only when there is an absence of treatment will the equilibrium between various state interests and the right to liberty be upset.

The crux of Chief Justice Burger's disdain for the *quid pro quo*

42. *See* Palko v. Connecticut, 302 U.S. 319 (1937) and its progeny.
43. 422 U.S. 563, 584.
44. 493 F.2d at 522.
45. 422 U.S. 563, 586.

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theory is that it "elevates a concern for essentially procedural safeguards into a new substantive constitutional right."[46] Burger implies that proponents of the *quid pro quo* theory are misguided and that they would fare better if they channelled their energies towards the improvement of primarily procedural safeguards. He states that the *quid pro quo* theory "accepts" the absence of procedural safeguards.[47] However, the theory does not accept their absence. It recognizes their absence as part and parcel of our system of justice. Because the *theory* concerns itself with substantive rights it does not follow that the *persons* advocating it are indifferent to or accept the absence of procedural safeguards.

Finally, Chief Justice Burger rejects the right to treatment theories *in toto* because courts would then be presented with nonjusticiable claims. He bases this determination upon the fact that medical opinion regarding diagnosis and therapy is diverse.[48]

It is submitted that what is subject to dispute is not the fact that conflict exists but rather where the conflict is centered. The focus of most of the controversy has been on whether a given treatment is the *optimum* one, not on whether minimally adequate treatment can be defined.[49] As the court of appeals noted, it is difficult to assert that it was beyond the ability of the court to determine that Donaldson had not received treatment.[50]

This is not a case where the court is substituting its judgment for that of the legislature. Legislators have either been unconcerned with or ineffective in defending the rights of the mentally confined. Abhorent conditions, present in many mental institutions, speak for themselves.[51]

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46. *Id.* at 587. The rubric of equal protection has been favored by the Court because of the disrepute into which substantive due process has fallen. Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41-42 (1972). *But see*, Roe v. Wade, 410 U.S. 113, 167-68 (1973) (Stewart, J., concurring) (doctrine of substantive due process is the basis of many constitutional rights). Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1326 and n. 40 (1974).

47. 422 U.S. 563, 587.

48. *Id.*at 587.

49. *See, e.g.*, Humphrey v. Cade, 405 U.S. 504 (1972); *In re* Curry, 452 F.2d 1360 (D.C. Cir. 1971); United States v. Waters, 437 F.2d 722 (D.C. Cir. 1970). *But see* Szasz, *The Right to Psychiatric Treatment: Rhetoric and Reality*, 57 GEO. L.J. 740 (1969); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

50. 493 F.2d at 526.

51. *See, e.g.*, N.Y. Times, Apr. 24, 1975 at 36, col. 2; N.Y. Times, Apr. 30, 1975 at 15, col. 5; N.Y. Times, Apr. 30, 1975 at 88, col. 5.

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CONCLUSION

The right to treatment for the civilly confined has been the subject of controversy since its conception in 1960. Case law, legislative fiat and scholarly commentary have contributed to the maturation of this right. Justice Cardozo once wrote:

> The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces . . . .[52]

Whether the Constitution embodies a substantive right to treatment for the civilly confined will have to await future adjudication by the Court.

Anthony J. Sposaro

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52. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921).

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