1975

O'Connor v. Donaldson: The Death of the Quid Pro Quo Argument for a Right to Treatment

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CASE COMMENT

O'CONNOR V. DONALDSON: THE DEATH OF THE QUID PRO QUO ARGUMENT FOR A RIGHT TO TREATMENT?

ON JUNE 26, 1975, the Supreme Court was confronted with the controversial issue of whether there is a constitutionally guaranteed right to treatment for nondangerous persons who have been involuntarily and civilly committed to mental institutions.[1] The Court avoided this long advocated issue[2] and created the potential for future litigation[3]

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[1] O'Connor v. Donaldson, — U.S. —, 95 S. Ct. 2486 (1975).

[2] The constitutional right to treatment for the mentally ill has been recognized by both federal and state courts. *See* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *standards established*, 334 F. Supp. 1341 (M.D. Ala. 1971), *standards enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part, remanded in part, sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Burnham v. Department of Pub. Health, 503 F.2d 1319 (5th Cir. 1974), *rev'g* (on principles espoused in *Wyatt v. Aderholt*), 349 F. Supp. 1335 (N.D. Ga. 1972); Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); Renelli v. Department of Mental Hygiene, 340 N.Y.S.2d 498 (Sup. Ct. 1973). *See also* Brief for Respondent at 35-37, nn.26-28, O'Connor v. Donaldson, — U.S. —, 95 S. Ct. 2486 (1975). There is also a widening body of precedent holding that there is a constitutional right to treatment for persons incarcerated under "non-penal" statutes for the purpose of care and treatment. *See* Morales v. Turman, 364 F. Supp. 166, 175 (E.D. Tex. 1973) (the failure to provide treatment for juvenile delinquents confined in anti-rehabilitative environments constitutes a violation of due process); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Davy v. Sullivan, 354 F. Supp. 1320, 1328-29 (M.D. Ala. 1973) (involving sexual offenders and defective delinquents); United States v. Pardue, 354 F. Supp. 1377, 1382 (D. Conn. 1973); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974); Martarella v. Kelley, 349 F. Supp. 575, 585, 598-600 (S.D.N.Y. 1972), *standards established*, 359 F. Supp. 478 (S.D.N.Y. 1973); Inmates of the Boys' Training School v. Affleck, 346 F. Supp. 1354, 1364 (D.R.I. 1972); United States v. Walker, 335 F. Supp. 705, 708 (N.D. Cal. 1971); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 612-13, 233 N.E.2d 908, 913-14 (1968) (involving persons incompetent to stand trial); M. v. M., 336 N.Y.S.2d 304 (Fam. Ct. 1972) (involving persons in need of supervision). *But see* New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974) (rejecting a constitutional right to treatment).

Though the constitutional right to treatment for involuntarily committed mental patients is of very recent origin, being first articulated in Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960), it has "received an unusual amount of scholarly discussion and support." Donaldson v. O'Connor, 493 F.2d 507, 519 (5th Cir. 1974), *vacated and remanded*, — U.S. —, 95 S. Ct. 2486 (1975). There have been over forty law review articles written on the subject, most of which support a constitutional right to treatment. *See, e.g.*, Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752 (1969); Birnbaum, *The Right to Treatment-Some Comments on Implementation*, 10 DUQUESNE L. REV. 579 (1972); Birnbaum, *Some Remarks on "The Right to Treatment"*, 23 ALA.

by holding that a state cannot constitutionally confine a nondangerous individual solely for custodial care if such person can live safely in the outside world, without a finding of more than mere mental illness.[4] This comment will discuss the decision in terms of the most volatile and frequently urged constitutional argument — a right to treatment based on a *quid pro quo*[5] concept.

I. THE QUID PRO QUO THEORY

The *quid pro quo* due process theory for a constitutional right to treatment has two distinct rationales. The first is a procedural due process rationale which developed from the premise that since civil commitment proceedings lack the same procedural safeguards accorded criminal proceedings, the absence of such guarantees is constitutionally justified only when the purpose of commitment is treatment that will either cure or improve the mental health of the patient.[6] Here, the *quid* for the

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L. REV. 623 (1971); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972); Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587 (1972); Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 GEO. L.J. 680 (1969); Katz, *The Right to Treatment — An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969); Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133 (1972); Robitscher, *The Right to Psychiatric Treatment: A Social-Legal Approach to the Plight of the State Hospital Patient*, 18 VILL. L. REV. 11 (1972).

[3] The present standards among the majority of states for involuntary commitment do not require a showing of dangerousness to either oneself or others. *See* Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1202-07 (1974) [hereinafter cited as *Developments in the Law*]. Most states have not clearly or precisely identified the type and degree of mental disorder which makes compulsory hospitalization appropriate. *See also* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 39 (S. Brakel & R. Rock eds. rev. 1971). For example, a recently adopted New Hampshire law defines mental illness as "maladaptive behavior and/or recognized emotional symptoms that can be related to psychological, physiological and/or sociologic factors." N.H. REV. STAT. ANN. § 135-B:2 (Supp. 1973). Conceivably, the Court's decision may arouse thousands of nondangerous involuntarily civilly committed mental patients to challenge the statutes under which they have been committed, seeking release via habeas corpus petitions, and possibly damages under 42 U.S.C. § 1983 (1970), *infra* note 32. Procedurally, class actions based on § 1983, are more desirable than individual habeas corpus proceedings where relief is granted to the individual petitioner. *See* Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587, 595 (1972); 46 Miss. L.J. 345, 350 n.36 (1975); *cf.* Knecht v. Gillman, 488 F.2d 1136, 1140 (8th Cir. 1973) (although § 1983 does not specify judicial relief, it does not exclude such relief). *But see* Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (habeas corpus petition treated as a class action when challenging conditions of confinement). *See generally* Comment, *Civil Rights: The Federal Courts and the "Right to Treatment" Under 42 U.S.C. § 1983 (1970)*, 27 OKLA. L. REV. 238 (1974). In 1972, 403,924 persons were admitted to state mental institutions, 41.8% of whom were involuntarily civilly committed. *Developments in the Law*, *supra*, at 1193 n.3; 46 Miss. L.J. 345, 346 n.13 (1975). *See also* N.Y. Times, June 27, 1975, § 1, at 1, col. 5.

[4] ___ U.S. ___, 95 S. Ct. 2486 (1975).

[5] "What for what; something for something. Used in the law for the giving of one valuable thing for another." BLACK'S LAW DICTIONARY 415 (4th rev. ed. 1968).

[6] Donaldson v. O'Connor, 493 F.2d 507, 522 (5th Cir. 1974), *vacated and remanded*,

lack of guaranteed procedural safeguards available to persons incarcerated via the criminal process (the *quo*), is treatment.

Judge Wisdom, writing for the court of appeals in *Donaldson v. O'Connor*,[7] distinguished this "procedural *quid pro quo*" theory from a "substantive *quid pro quo*" rationale.[8] The "substantive *quid pro quo*," espoused by Judge Wisdom, states that when the central limitations on the government's power to detain are inapplicable,[9] as in the case of a nondangerous involuntarily committed patient, there must be a *quid pro quo* extended by the government in the form of treatment.[10] When the state seeks to exercise its *parens patriae* authority[11] it must fulfill its parental role by providing treatment. Thus, effective treatment must be the *quid* for the state's right to exercise its *parens patriae* controls (the *quo*).[12] The key distinction seems to be that the substantive *quid pro quo* theory looks at the reason for confinement, whereas the procedural theory looks only at how the confinement came about.

Prior to Judge Wisdom's differentiation of the procedural and substantive rationales, the *quid pro quo* language had been used as shorthand

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— U.S. —, 95 S. Ct. 2486 (1975); Ragsdale v. Overholser, 281 F.2d 943, 949 (D.C. Cir. 1960) (Fahy, J., concurring); Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974); Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971). *See also* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 761 (E.D.N.Y. 1973); Inmates of the Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); *cf.* McKeiver v. Pennsylvania, 403 U.S. 528, 552 (1971) (White, J., concurring); Knecht v. Gillman, 488 F.2d 1136, 1138 (8th Cir. 1973).

[7] 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, — U.S. —, 95 S. Ct. 2486 (1975).

[8] *Id.* at 522 nn. 21 & 22. The court cited Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile System?*, 57 GEO. L.J. 848, 870 (1969) for the proposition that

> a new concept of substantive due process is evolving in [this] therapeutic realm. This concept is founded upon a recognition of the concurrency between the state's exercise of sanctioning powers [police powers] and its assumption of the duties of social responsibility. Its implication is that effective treatment must be the *quid pro quo* for society's right to exercise its *parens patriae* controls.

[9] The limitations referred to are: that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed. In civil commitment proceedings, the limitations which seem inapplicable are: that confinement is not in retribution for a specific offense, and that it is not limited to a fixed term because of the difficulty of determining what effect the treatment will have on the individual. *See* note 59 *infra*.

[10] 493 F.2d at 522.

[11] The *parens patriae* doctrine is founded upon an individual's need for care and treatment and his inability to make a rational determination regarding his own hospitalization. The *parens patriae* function has been viewed as a power which the members of the community have granted the state for the protection of their future well-being. For further discussion of this power and its use as the basis of laws providing for the involuntary commitment of the mentally ill, see N. KITTRIE, THE RIGHT TO BE DIFFERENT (1971); Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 155 (1972); Note, *Developments in the Law*, *supra* note 3, at 1208; 46 MISS. L.J. 345 n.3 (1975).

[12] Donaldson v. O'Connor, 493 F.2d 507, 522 n.22 (5th Cir. 1974), *vacated and remanded*, — U.S. —, 95 S. Ct. 2486 (1975). *See also* Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1974).

for the idea that due process requires that the governmental means of abridging a person's protected liberties must, at least, bear a rational relation to the purpose of the abridgement, and that the resulting commitment, which abridges the individual's fundamental due process right to be free from physical restraint, must be based on a legitimate compelling state interest. This shorthand analysis tends to obscure the difference between confinement of the dangerous versus the nondangerous mentally ill person and the voluntarily versus the involuntarily committed individual. This in turn tends to blur the distinction between *parens patriae* and the state's police powers.

II. The Development of the Quid Pro Quo Theory

The *quid pro quo* argument for the right to treatment is of very recent origin, being first articulated in 1960 by Dr. Morton Birnbaum.[13] In this seminal article, Dr. Birnbaum, who is also an attorney, contended that a state which purposely restrains an individual and deprives him of his freedom because of a determination that he is mentally ill, owes that person a duty to provide adequate medical treatment, otherwise the mental hospital becomes a prison.[14] Dr. Birnbaum's proposal went unrecognized by the courts until *Rouse v. Cameron*.[15] In *Rouse*, the petitioner, who had been involuntarily and civilly committed to a mental institution following acquittal of a misdemeanor by reason of insanity, filed a habeas corpus petition alleging that he was not receiving treatment.[16] Despite the fact that the Court of Appeals for the District of Columbia recognized a statutory, rather than constitutional, right to treatment,[17] the opinion is most celebrated for its dictum in which Chief Judge Bazelon suggested the possibility of a constitutional right to treatment. He stated that such a right might be derived from the due process clause, the equal protection clause, or the cruel and unusual punishment clause of the eighth amendment.[18]

The *quid pro quo* argument for the constitutional right to treatment was first used as an actual basis of decision in *Wyatt v. Stickney*.[19]

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

[14] *Id.* at 503. *See also* Editorial, *A New Right*, 46 A.B.A.J. 516, 517 (1960).

[15] 373 F.2d 451 (D.C. Cir. 1966). Prior cases had held that the purpose of nonpenal confinement was to provide treatment without specifically recognizing treatment as a constitutional right. *See, e.g.*, Sas v. Maryland, 334 F.2d 506, 513 (4th Cir. 1964), *petition for cert. dismissed*, 407 U.S. 355 (1972); Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy J., concurring). *See also* 46 Miss. L.J. 345, 347 n.18 (1975).

[16] Charles Rouse was charged with carrying a concealed weapon, a misdemeanor with a maximum prison sentence of one year. After four years in St. Elizabeth Hospital, Rouse filed his petition on grounds that he was receiving no treatment and was no longer insane.

[17] D.C. Code Ann. § 21-562 (1973) (a person hospitalized in a public hospital for a mental illness shall be entitled to medical and psychiatric care and treatment).

[18] 373 F.2d at 453.

[19] 325 F. Supp. 781 (M.D. Ala. 1971), *standards established*, 334 F. Supp. 1341 (M.D.

Wyatt was a class action in which a group of patients and employees at Bryce Hospital in Tuscaloosa, Alabama successfully challenged the adequacy of care being provided. The *Wyatt* court stated:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then to fail to provide adequate treatment violates the very fundamentals of due process.[20]

The court held that the only constitutional justification for civil commitment is treatment, such that each patient would have a realistic opportunity to improve.[21] Thus, the *quid* for the deprivation of a civilly committed mental patient's liberty (the *quo*) is treatment. In the wake of *Wyatt*, other courts have recognized a constitutionally guaranteed right to treatment based on the *quid pro quo* rationale.[22]

Although the Supreme Court has never squarely dealt with the issue of a right to treatment,[23] and therefore has not ruled upon the validity of the *quid pro quo* due process argument, the Court held in *Jackson v. Indiana*,[24] that when an individual is confined under commitment proceedings involving abridged procedural and substantive protections, "[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."[25] *Jackson* involved a mentally defective deaf mute who was committed after the court determined that he was incompetent to stand trial for two petty robberies. Since the mental and physical defects which were the cause of his inability were not likely to improve during his confinement, the Supreme Court ruled that the state

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Ala. 1971), *standards enforced*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, rev'd in part, remanded in part, sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[20] 325 F. Supp. at 785. *See also Brief of Amici Curiae on Appeal to the Fifth Circuit in Wyatt v. Stickney* (Aderholt), as reprinted in 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 335, 393-400 (B. Ennis & P. Friedman eds. 1974).

[21] 325 F. Supp. at 785.

[22] *See, e.g.*, Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Burchett v. Bower, 355 F. Supp. 1278 (D. Ariz. 1973); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973). *Contra*, New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (procedural due process is not a foundation on which to base a constitutional right to treatment). *See also* 2 FORDHAM URBAN L.J. 363 (1974); 46 MISS. L.J. 345, 351 n.42 (1975).

[23] The closest the Supreme Court came to speaking on the *quid pro quo* rationale was in *In re* Gault, 387 U.S. 1 (1967), in which the Court, in the context of juvenile confinement, wrote:

> [I]t should be noted that to the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*. *Id.* at 22 n.30.

There the Court seemed to be discussing the procedural aspect of the *quid pro quo* theory.

[24] 406 U.S. 715 (1972).

[25] *Id.* at 738.

could only detain him for a reasonable period of time to determine if improvement was possible so that he could stand trial in the forseeable future. Otherwise, in order to confine him indefinitely, the state would be required to proceed under civil commitment provisions.

The holding lends support to the *quid pro quo* rationale in that if the purpose for confinement is treatment, then, absent treatment, the nature of confinement bears no reasonable relation to the purpose of such confinement and therefore violates the due process rule of *Jackson*.[26] In effect, there has been no treatment administered for the right to exercise the state's *parens patriae* powers, or to justify the absence and inapplicability of the criminal process procedural safeguards.[27]

III. The Donaldson Case and Quid Pro Quo

Kenneth Donaldson, a former mental patient[28] who was confined on *parens patriae* grounds[29] for fourteen and one-half years in Florida State Hospital, brought an action for damages under the fourteenth amendment and 42 U.S.C. § 1983[30] against Dr. J. B. O'Connor, the hospital's superintendent, and other staff members,[31] alleging that they

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[26] Brief for Respondent at 57, O'Connor v. Donaldson, ___ U.S. ___, 95 S. Ct. 2486 (1975). *See also* Murel v. Baltimore City Criminal Ct., 407 U.S. 355, 357-58 (1972) (the commitment of a "defective delinquent" should be reviewed in terms of the "criteria, procedures and treatment provided"); McNeil v. Director, Patuxent Institution, 407 U.S. 245, 248-50 (1972) (applying this principle to an individual held for psychiatric observations after the expiration of a prison sentence); Humphrey v. Cady, 405 U.S. 504, 514 (1972) (indefinitely committed sex offender's allegation that he was receiving no treatment was a "substantial constitutional claim").

[27] *Supra* note 12.

[28] Donaldson was committed January 3, 1957, on the petition of his father and after a brief hearing before county Judge Jack F. White of Pinellas County, Florida. He was admitted to the Florida State Hospital twelve days later where he was diagnosed as a "paranoid schizophrenic." The committing judge told Donaldson that he would be sent to Florida State Hospital for "a few weeks rest" after which he would be all right and would come back soon. Donaldson was not released until July 31, 1971. For a more thorough and frightening account of the facts, see B. Ennis, Prisoners of Psychiatry 83 (1972); Birnbaum, *A Rational for the Right*, 57 Geo. L.J. 752, 774 (1969). *See also* Donaldson v. O'Connor, 493 F.2d 507, 513 (5th Cir. 1974).

[29] *Supra* note 11.

[30] 42 U.S.C. § 1983 (1970) provides:

> 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 other party injured in an action at law, suit in equity, or other proper proceedings for redress.

[31] Originally, Donaldson had filed a class action on behalf of himself and all other patients in Florida State Hospital. Two weeks before the pretrial conference the hospital director certified that Donaldson was no longer incompetent and released him. The petition was then dismissed by the court because Donaldson was no longer a bona fide representative of the patients still in the hospital. An amended complaint sought compensatory and punitive damages on Donaldson's behalf and sought broad declaratory and injunctive relief, but the request for the latter relief was abandoned prior to trial. 493 F.2d at 512-13.

had intentionally and maliciously deprived him of his constitutional right to either receive treatment or be released from the hospital. The evidence showed that Donaldson, whose frequent requests for release had been rejected by Dr. O'Connor, was dangerous neither to himself nor to others, and if mentally ill, had not received treatment. Dr. O'Connor contended that he had acted in good faith, relying on the state law which authorized indefinite custodial confinement of the "sick" even if they were not treated and were not harmful to themselves or others. A jury found the attending physicians liable[32] and the district court held that it was unconstitutional to prolong confinement without treatment of a patient who was neither dangerous to himself nor to anyone else.[33] Defendants on appeal, challenged the sufficiency of the evidence to support the jury verdict and denied the existence of any constitutionally guaranteed right to treatment for mental patients involuntarily committed. The Court of Appeals for the Fifth Circuit affirmed the district court's judgment and held that a nondangerous person, involuntarily committed under civil commitment procedures to a state mental hospital, has a due process right to receive such individual treatment as will accord a reasonable opportunity to be cured or to improve his mental condition.[34] The Supreme Court granted Dr. O'Connor's petition for certiorari because of the important constitutional questions presented.[35]

A. *The Supreme Court — The Majority Opinion*

Justice Potter Stewart, in writing the narrow opinion for the unanimous Court, avoided the broad issues dealt with by the court of appeals and viewed the case as raising a "single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty."[36] The Court refused to decide two related constitutional ques-

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[32] Judgment was rendered on the jury's verdict of $28,500 in compensatory damages, and $10,000 in punitive damages against defendants-appellants, Dr. J.B. O'Connor, Donaldson's attending physician from 1957 until mid-1959, Clinical Director of the hospital from mid-1959 until 1963, and Superintendent thereafter until his retirement in 1971, and Dr. John Gumanis, Donaldson's attending physician from the fall of 1959 until the spring of 1967. 493 F.2d at 512-13.

[33] Excerpts from trial judge's charge to the jury, as summarized in 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, 611, 618 (B. Ennis & P. Friedman eds. 1974).

[34] 493 F.2d at 520.

[35] 419 U.S. 894 (1974).

[36] __ U.S. at __, 95 S. Ct. at 2492. The Court stated:

> We have concluded that the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous mentally ill individual for the purpose of treatment . . . . We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally to justify involuntary confinement of such a person — to prevent injury to the public, to ensure his own survival or safety, or to alleviate

tions adjudicated by the court of appeals: whether the dangerous mentally ill person has a constitutional right to treatment when involuntarily committed and whether the state may involuntarily confine a nondangerous mentally ill person in order to give him treatment.[37] The majority opinion, therefore, did not confront the *quid pro quo* argument for the right to treatment. The Court unanimously vacated and remanded the case, holding that a state cannot constitutionally confine, merely for custodial care, a nondangerous patient without more than a finding of mental illness if the patient is capable of safely surviving in society by himself or with the help of family or friends.[38]

The Court reasoned that given the findings of the jury,[39] there was no justification for Donaldson's continued confinement. Although the question of whether Donaldson's initial confinement was constitutionally permissible was not in issue, the Court observed that even if it were permissible, the state could not constitutionally continue confinement after the basis for the original commitment no longer existed.[40] The Court further stated:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. . . . [T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[41]

The Court sidestepped the *quid pro quo* argument for a constitutional right to treatment and held instead that mere custodial care is not a

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> or cure his illness . . . . For the jury found that none of the above grounds for confinement was present in Donaldson's case. *Id.* at __, 95 S. Ct. at 2492-93 (footnotes omitted).

[37] *Id.*

[38] *Id.* Might the "help" not come from social and welfare agencies since some confined individuals may not have any living family members or friends outside the hospital, or none which would be willing to help? *See* N.Y. Times, Aug. 17, 1975 at 1, col. 5. An issue raised by the petitioner and dealt with by the Court, involved the scope of the qualified immunity possessed by state officials under 42 U.S.C. § 1983. Citing Wood v. Strickland, 420 U.S. 308 (1975), the Court held the relevant question for the jury to be whether O'Connor

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson] or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson]. __ U.S. at __, 95 S. Ct. at 2494.

The only issue to be determined on remand was whether O'Connor was to be held liable for monetary damages for violating Donaldson's constitutional right to liberty. *Id.* at n.12. *See also* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

[39] The jury found that Donaldson was neither dangerous to himself nor dangerous to others, and that if Donaldson was mentally ill, he had not received treatment. The jury was also aware that while confined, Donaldson had written and published a law review article describing the conditions under which he was committed and the lack of any treatment. Patient No. A-25738, *The Right to Treatment Inside Out*, 57 GEO. L.J. 886 (1969).

[40] To support this statement the Court cited Jackson v. Indiana, 406 U.S. 715, 738 (1972). *See also* text accompanying notes 23-27 *supra*.

[41] __ U.S. at __, 95 S. Ct. at 2493.

permissible purpose for involuntary confinement of the mentally ill. Although the Court did not decide by what procedures or upon what grounds a state may constitutionally confine a mentally ill person,[42] the opinion held that the existence of state law authorizing such commitment, of itself, does not establish an adequate constitutional purpose.[43] Furthermore, a determination of "mental illness" without a finding of dangerousness or the inability to live safely in society, and without the provision of treatment, cannot justify involuntary confinement.[44] Thus, the Supreme Court concluded that the "in need of care or assistance" standard, promulgated by the *parens patriae* rationale of most state legislatures,[45] has no valid constitutional basis if a person is nondangerous

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[42] *Id.* at __, 95 S. Ct. at 2492. The Court pointed out that the grounds generally advanced by most state legislatures to justify involuntary commitment are: danger to others, danger to oneself or in need of care, treatment, or supervision. These grounds have been analytically conceived as falling into the categories of the police power rationale for commitment or the *parens patriae* rationale; danger to others is a function of the police power rationale, in need of care or treatment is a function of the *parens patriae* rationale, danger to oneself combines elements of both. Donaldson v. O'Connor, 493 F. 2d 507, 522 (5th Cir. 1974), *vacated and remanded*, __ U.S. __, 95 S. Ct. 2486 (1975). *See* Jackson v. Indiana, 406 U.S. 715, 737 (1972); *Developments in the Law*, *supra* note 3, at 1203; Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1289-97 (1966); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138-39 (1967); *see also* Brief for Respondent at 48, O'Connor v. Donaldson, __ U.S. __, 95 S. Ct. 2486 (1975).

[43] __ U.S. at __, 95 S. Ct. at 2493.

[44] *Id.* The issue of the state's exercise of its police power in a given circumstance has been a matter of much scholarly discussion particularly surrounding the determination of dangerousness. *See, e.g., Developments in the Law*, *supra* note 3, at 1236-53; Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1141-43 (1967). *See generally* B. ENNIS, PRISONERS OF PSYCHIATRY (1972); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES (1963); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Court Room*, 62 CALIF. L. REV. 693 (1974).

[45] At the present time, fourteen states have provisions for involuntary commitment of an individual if he is dangerous or in need of treatment; fifteen others permit compulsory hospitalization based on a mental illness which renders the individual in need of care and treatment or a fit subject for hospitalization. Seven others require that commitment be necessary to protect the welfare of the individual or others. *See Developments in the Law*, *supra* note 3, at 1203-04 nn. 12-14. The commitment statute in Ohio defines a mentally ill person as

> an individual having an illness which substantially impairs the capacity of the person to use self-control, judgment, and discretion in the conduct of his affairs and social relations. . . . OHIO REV. CODE ANN. § 5122.01 (A) (Page 1972).

The Ohio legislature is currently considering a bill which, if passed, would change this definition and provide that:

> (B) Mentally ill person subject to hospitalization by court order means a mentally ill person who, because of his illness:
>
> (1) Represents a substantial risk of physical harm to himself . . . ;
>
> (2) Represents a substantial risk of physical harm to others . . . ;
>
> (3) Represents a substantial and immediate risk of physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs . . . ;
>
> (4) Could benefit from treatment in a hospital . . . and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial right of others or himself. H.B. 244, 111th General Assembly, Reg. Sess. § 5122.01 (B) (1975-76).

See also, AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 66-71 (rev. ed. S. Brakel & R. Rock eds. 1971).

and able to survive outside the hospital's walls.[46] Although Justice Stewart, writing for the majority, conceded that a state has a legitimate interest in providing care and assistance for the mentally ill,[47] he further stated:

> [I]ncarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.[48]

Whereas the full impact of the Court's present holding is yet to be felt,[49] the *parens patriae* "need for care" standard for commitment can no longer be a justification for confinement of those nondangerous individuals who are capable of surviving alone or with help. It thereby makes the *quid pro quo* argument for the right to treatment inapplicable to such individuals because the state can no longer exchange the "comforts" of an institution for the power to exercise its *parens patriae* controls for the purpose of simple custodial confinement.

B. *Chief Justice Burger — Concurring*

In his concurring opinion, Chief Justice Burger appraised the *quid pro quo* theory described and adopted by Judge Wisdom in *Donaldson v. O'Connor*:[50]

> [A] due process right to treatment is based on the principle that when the three central limitations on the government's power to detain . . . are absent, there must be a *quid pro quo* extended . . . to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment.[51]

The Chief Justice then pointed out what he considered to be defects inherent in this rationale. First, it would seem to permit a state to confine an individual, regardless of such person's ability to survive safely in society,[52] thus raising the "gravest of constitutional problems."[53] Sec-

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[46] __ U.S. at __, 95 S. Ct. at 2493.

[47] *Id.* This is a restatement of the state's *parens patriae* power. For a discussion of the *parens patriae* power, see note 11 *supra*. *But see* Note, *Parens Patriae and Statutory Vagueness in the Juvenile Court*, 82 YALE L.J. 745, 748 (1973).

[48] __ U.S. at __, 95 S. Ct. at 2494. The Court cited Shelton v. Tucker, 364 U.S. 479 (1960) for the proposition that:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved . . . where legislative abridgement of "fundamental personal rights and liberties" is asserted, "the courts should be astute to examine the effect of the challenged legislation." 364 U.S. at 488-89, *citing in part*, Schneider v. State, 308 U.S. 147, 161 (1939).

[49] *See* text accompanying notes 77-81 *infra*.

[50] 493 F.2d 507, 522 (5th Cir. 1974).

[51] 493 F.2d at 522.

[52] __ U.S. at __, 95 S. Ct. at 2499.

[53] The Chief Justice did not explicitly state what constitutional problems were raised, but a reading of his opinion concomitantly with the majority opinion indicates his

ondly, the *quid pro quo* theory incorrectly presupposes that essentially the same interests are involved in every situation where a state seeks to confine an individual.[54] Finally, the theory accepts the absence of procedural safeguards and insists that the state provide benefits (treatment) as compensation or as justification for confinement, thus equating an involuntary mental patient's constitutional right not to be confined without due process of law with a constitutional right to treatment.[55] In concluding, the Chief Justice stated: "[o]ur concepts of due process would not tolerate such a 'trade-off'."[56]

Justice Burger noted that the *quid pro quo* rationale is vulnerable to other criticisms.[57] The rationale seems to imply that if procedural safeguards, commensurate with those accorded in criminal proceedings, are provided in civil commitment proceedings, there would be no due process basis for a constitutional right to treatment. Similarly, individuals committed under the police power rationale would not be guaranteed a right to treatment.[58] Moreover, a state could assert that since treatment is in fact being provided[59] adequate procedural safeguards are not necessary.[60]

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concern with whether treatment represents a valid and legitimate reason for a state to confine a nondangerous individual. The Chief Justice stated:

> Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be "candidly appraised." *Id.*, *citing*, *In re* Gault, 387 U.S. 1, 21, 27-29 (1967).

This is the identical constitutional issue from which the majority abstained.

[54] __ U.S. at __, 95 S. Ct. at 2499. Chief Justice Burger observed:

> [I]t would be incongruous to apply the same limitations when quarantine is imposed by the state to protect the public from a highly communicable disease. *Id.*

[55] *Id.*

[56] __ U.S. at __, 95 S. Ct. at 2500.

[57] __ U.S. at __ n.8, 95 S. Ct. at 2499 n.8.

[58] *Developments in the Law*, *supra* note 3, at 1325 n.39. *See generally*, Katz, *The Right to Treatment — An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755 (1969); 2 FORDHAM URBAN L.J. 363 (1974).

[59] There has been much discussion of the ability of the court to provide intelligible and enforceable standards for adequate treatment. *See*, *e.g.*, Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936 (1974); Schwitzgebel, *Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 513 (1973); *Developments in the Law*, *supra* note 3, at 1333-43; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87, 107-14 (1967). *See generally*, *Symposium, Mental Disability and the Law*, 62 CALIF. L. REV. 669 (1974); *Symposium, The Right to Treatment*, 57 GEO. L.J. 673 (1969); *Symposium, Mentally Ill and the Law*, 13 SANTA CLARA LAW. 367 (1973); *Symposium, The Mentally Ill and the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1148-55 (1967).

In defining the right to treatment, courts have used a number of modifications with the term "treatment." *See*, *e.g.*, *Developments in the Law*, *supra* note 3, at 1333 n.80. It has also been asserted that the right to treatment is nonjusticiable because courts are incapable of defining treatment, defining the affirmative duty of the state, or framing enforceable remedies. *Developments in the Law*, *supra* note 3, at 1333; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87, 107-14 (1967).

[60] *Developments in the Law*, *supra* note 3, at 1325 n.39. *See also* Szasz, *Right to Health*,

Another alleged troublesome feature of the *quid pro quo* concept is that the court of appeals in *Donaldson* did not provide a sufficient basis for its statement that a specific act must have been committed against a state before police power confinement without treatment can be justified.[61] Chief Justice Burger strongly countered this suggestion in his statement:

> There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.[62]

Thus, it seems that the heart of the *quid pro quo* due process argument for a constitutional right to treatment has been removed.

1. *Analysis of the Concurring Opinion*

In his criticism of the *quid pro quo* rationale, Chief Justice Burger did not distinguish between the procedural and substantive aspects of the theory. His first concern, that the *quid pro quo* theory may be understood to allow a state to confine an individual under the auspices of its willingness to provide treatment, was noted by Donaldson's counsel who urged the Court not to hold that the provision of treatment justifies involuntary confinement of a nondangerous mental patient.[63] Thereafter, counsel demonstrated to the Court the substantive nature of the *quid pro quo* due process rationale.[64] Counsel argued that the *quid pro quo* substantive due process rationale recognizes that due process requires that the means by which the government abridges a person's protected liber-

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57 GEO. L.J. 734 (1969). Dr. Szasz' fears of a psychiatric-defined norm being forced upon our citizens through the vehicle of state mental institutions and the threat of commitment are expressed in more detail in T. SZASZ, AGE OF MADNESS (1974); T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); T. SZASZ, IDEOLOGY AND INSANITY (1970). *But see* Felix, *The Image of the Psychiatrist: Past, Present and Future*, 121 AM. J. PSYCHIAT. 318 (Oct. 1964); Slovenko, *The Psychiatric Patient: Liberty and the Law*, 121 AM. J. PSYCHIAT. 534 (Dec. 1964).

[61] *Developments in the Law*, *supra* note 3, at 1325 n.39. The issue of the state's exercise of police power in a given circumstance has been a matter of much scholarly discussion particularly surrounding the determination of dangerousness. *See generally*, LAW, LIBERTY AND PSYCHIATRY, *supra* note 60; B. ENNIS, PRISONERS OF PSYCHIATRY (1972); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Court Room*, 62 CALIF. L. REV. 693 (1974); *Developments in the Law*, *supra* note 3, at 1236-53; Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1141-43 (1967).

[62] ___ U.S. at ___, 95 S. Ct. at 2497.

[63] Brief for Respondent at 54. Counsel urged that the complex question need not, and should not be decided without a full briefing based upon a full record confronting the following issues: is the justification for the respondent's need for treatment a compelling state interest; is the "need for treatment" standard impermissibly vague; does the nature of the civilly commited person's interest in liberty require that no commitment can be for an indefinite period; is involuntary confinement in a state mental hospital the least restrictive alternative for accomplishing a permissible state purpose? *Id.* at 54 n.55.

[64] *Id.* at 56-59.

ties must bear a rational relation to the state's purpose for abridgement,[65] and that the nature and duration of commitment must also bear some reasonable relation to the purpose of commitment.[66] Counsel's position in the context of the substantive aspect of the *quid pro quo* rationale was that should the Court decide that a state has a constitutionally valid interest in committing a nondangerous individual who has committed no antisocial acts,[67] the only conceivable purpose of such confinement would be the patient's restoration to liberty through treatment. "Thus, under *Jackson*, absent treatment, the nature of confinement bore no reasonable relation to the purpose of . . . confinement . . . ."[68]

The majority opinion, holding that a state has no constitutionally valid interest in confining a nondangerous individual who is capable of surviving in freedom for the sole purpose of providing mere custodial care, lends support to the *quid pro quo* theory advanced by counsel. If custodial care is not a valid purpose for confining a harmless individual, and if such an individual is able to survive safely, then the only other legitimate purpose a state could have for such confinement is the patient's restoration to liberty through treatment.[69]

Justice Burger's second stated defect in the theory advanced by counsel is that it incorrectly presupposes that essentially the same interests are involved when a state seeks to confine an individual. The Chief Justice conspicuously observed that the purpose of confinement is not always treatment and cited *Jacobson v. Massachusetts*[70] as an example of the imposition of quarantine as a proper exercise of police power. In this example, there can be no doubt that a compelling interest exists,[71]

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[65] *Id.* at 56, *citing* Nebbia v. New York, 291 U.S. 502 (1934) and Meyer v. Nebraska, 262 U.S. 390 (1923).

[66] *Id.* at 56, *citing* Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[67] Counsel for respondent stated that:

> Even when confinement is not justified solely under the *parens patriae* power but also under the police power and the individual has committed a criminal act, this Court has suggested that involuntarily confined individuals have a right to treatment. *See McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972); *Humphrey v. Cady*, 405 U.S. 504, 514 (1972) (indefinitely committed sex offender's allegation that he was receiving no treatment was a "substantial constitutional claim"); *Murel v. Baltimore City Criminal Ct.*, 407 U.S. 355, 357-58 (1972) (the commitment of a "defective delinquent" should be reviewed in terms of the "criteria, procedures and treatment provided").

Brief for Respondent at 57 n.58.

[68] *Id.* at 57.

[69] *Id.*

[70] 197 U.S. 11 (1905) (it is within the police power of the state to enact a compulsory vaccination law). The *Jacobson* Court, made this analogy:

> An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection . . . that the danger of the spread of the disease among the community at large has disappeared. *Id.* at 29.

A question that arises is if the threat of disease has disappeared, may the citizen still be quarantined, or if he has such disease, *must* he be treated?

[71] *Id.* at 39.

but if continued quarantine proves unnecessary in that there is no danger to the community at large, due process would demand that the person be released.[72] If counsel's *quid pro quo* incorporates the concepts of substantive due process established in *Jackson v. Indiana*[73] and followed in *McNeil v. Director, Patuxent Institution*,[74] then, when the purpose of confinement is not treatment (as in the quarantine analogy) the nature of confinement must bear a reasonable relation to the purpose of confinement and the state must still demonstrate a legitimate state interest.[75]

The third major criticism, that the *quid pro quo* concept accepts the absence of procedural safeguards in exchange for treatment, is a defect of the "procedural tradeoff" *quid pro quo* rationale, but has little effect on the substantive *quid pro quo* adopted by the appeals court and advanced by counsel. The real significance of this criticism is that it clearly demonstrates that the *quid pro quo* "procedural tradeoff" theory has been rejected by the Court. In regard to the substantive due process *quid pro quo* theory, the effect of the Chief Justice's opinion remains uncertain. It is clear, however, that the Chief Justice has rejected the reasoning of the court of appeals and that he can find no constitutional basis to equate a right to treatment with a mental patient's due process rights.[76]

IV. Quid Pro Quo — Prospectively

If the analysis of the *quid pro quo* theory as presented by Chief Justice Burger in his concurring opinion is in fact shared by the majority of the Court, then the distinction between the procedural-substantive aspects of this rationale will, in reality, be purely academic. Its vitality will have ceased, and from this point on, it will exist only in an environment of academic legal distinctions.

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[72] *Id.* at 38. The Court stated:

> [T]hat the police power of a State . . . may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. *Id.*

[73] 406 U.S. 715 (1972).

[74] 407 U.S. 245 (1972).

[75] *See* text accompanying notes 36-49 *supra*. This *quid pro quo* theory purportedly follows the line of Supreme Court decisions holding that commitment must be justified on the basis of a legitimate state interest. The reasons for commitment must be established at an appropriate proceeding and any confinement must cease when those reasons no longer exist. *See* McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249-50 (1970); Jackson v. Indiana, 406 U.S. 715, 738 (1972); Humphrey v. Cady, 405 U.S. 504 (1972).

[76] ___ U.S. at ___, 95 S. Ct. at 2500. Although the *quid pro quo* theory has been rejected, there are other grounds which have been advanced to support a constitutional right to treatment. In the alternative, counsel contended that a right to treatment exists under the equal protection clause of the fourteenth amendment and under the cruel and unusual punishment prohibition of the eighth amendment. Brief for Respondent at 52. *See also* Friedman & Halpern, *The Right to Treatment*, 1 Legal Rights of the Mentally Handicapped 273, 281-82 (B. Ennis & P. Friedman eds. 1974). *See generally*, Note, *The Right to Treatment — Alternative Rationales*, 10 Duquesne L. Rev. 626 (1972) (analogy of right to counsel and right to education to the right to treatment).

Attorneys specializing in psychiatric matters, however, have viewed as highly significant the fact that only the Chief Justice stated that a right to treatment does not exist.[77] The majority of the Court left the question of a right to treatment, and the respective *quid pro quo* argument, unresolved. Justice Stewart has suggested that Kenneth Donaldson's confinement might have been valid if he had received treatment rather than mere custodial care. If it is determined that a state may constitutionally confine an involuntary, nondangerous, mentally ill person for treatment, then the substantive due process *quid pro quo* argument, in light of the Court's ruling in *Jackson*, is still valid. It will retain its vitality as a constitutional argument, asserted to ensure that the state provide treatment to such persons under its *parens patriae* powers.

The real impact of the Supreme Court's decision in *O'Connor v. Donaldson* cannot yet be fully ascertained, but it will most certainly have a great effect on the present methods and standards of civil commitment. Some possible effects include an updating of current state commitment statutes; greater focus on the problems in defining and predicting dangerousness, including a clearer determination of the type and degree of proof necessary; a clarification by the legal and medical professions of the definition of "treatment" and the establishment of more suitable and judicially enforceable standards of treatment; an unequivocal explanation by the courts or the legislatures as to what classifies a person as being capable of "surviving safely in freedom"; stricter scrutiny by the courts regarding voluntary commitment procedures; a determination of the grounds and procedures by which a state may convert a voluntary patient to an involuntary patient; and a clarification regarding what rights a voluntary patient has in terms of treatment or the refusal of treatment and release.

The probable result of the Court's holding is the outright release of thousands of mental patients from psychiatric hospitals,[78] but to date no such wholesale release has occurred.[79] More than likely, additional releases in the near future will depend on whether the petitioning patients and their attorneys can show that the *Donaldson* decision applies to them.[80] Although the present decision may be less than a landmark,[81] it has great significance in confronting and defining the constitutional rights of the mentally ill.

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[77] N.Y. Times, Aug. 17, 1975, at 34, col. 1.

[78] N.Y. Times, June 27, 1975, at 1, col. 5. *But see* N.Y. Times, Aug. 17, 1975, at 1, col. 5.

[79] N.Y. Times, Aug. 17, 1975, at 1, col. 5. Another possible result is the state's release of patients allegedly because of the *O'Connor* decision but in reality because of economic considerations, raising the issue of whether the state has an affirmative duty to provide a facility for treatment of the mentally ill.

[80] *Id.* at 24, col. 1.

[81] A criticism of the decision is that the Court's ruling is imprecise and unclear, thus permitting most mental health agencies to say that it does not apply to their patients. *Id.*