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## Right to Treatment-A Fabled Right Receives Judicial Recognition in Missouri, The The

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Bargaining units comprised solely of RNs are appropriate under the traditional community of interest test as well as under the *St. Francis* disparity of interest test, if it means taking into account public interest in avoiding undue proliferation of bargaining units. RN only units should be presumptively appropriate to discourage unnecessary delay and expense in litigation. If a disparity of interest or public interest factor is to be added to the Board's determinations of appropriate units in the health care industry, the Supreme Court needs to direct the Board to use such a test, after explaining what it is, and how to use it. The present disagreement between the Board and the courts of appeal is harmful to employees, employers, and the public they serve; it benefits only labor lawyers.

JACQULYN K. GIDEON

## THE RIGHT TO TREATMENT—A “FABLED” RIGHT RECEIVES JUDICIAL RECOGNITION IN MISSOURI

*Eckerhart v. Hensley*<sup>1</sup>

Nineteen years after doctor-lawyer Morton Birnbaum first urged recognition of a constitutional right to treatment for involuntarily hospitalized mental patients,<sup>2</sup> that right has received judicial endorsement in Missouri. In *Eckerhart v. Hensley*, Judge Elmo Hunter of the Western District of Missouri Federal Court held that there does exist such a right.<sup>3</sup> This holding is significant because *Eckerhart* is one of few cases declaring the existence of this constitutional right after the United States Supreme Court declined to pass upon its existence.<sup>4</sup> In addition, *Eckerhart* extends the right to a class of patients (those found to be dangerous) who generally had been regarded as outside its reach;<sup>5</sup> it sets up a potential conflict with Missouri state courts;<sup>6</sup> and the court appears to have

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course, one union may well represent more than one unit, but combined negotiations are likely in such a situation. FEDERAL MEDIATION AND CONCILIATION SERVICE, IMPACT OF THE 1974 HEALTH CARE AMENDMENT TO THE NLRA ON COLLECTIVE BARGAINING IN THE HEALTH CARE INDUSTRY 477 (1979).

1. 475 F. Supp. 908 (W.D. Mo. 1979).

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

3. 475 F. Supp. at 915.

4. See *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975).

5. See, e.g., *Wyatt v. Aderholt*, 503 F.2d 1305, 1306 (5th Cir. 1974); Birnbaum, *supra* note 2, at 503.

6. See notes 95 & 96 and accompanying text *infra*.

successfully avoided many of the problems encountered in previous attempts to implement the right.<sup>7</sup>

Patients of the forensic unit at Fulton State Hospital filed a class action suit against administrators of the Missouri Department of Mental Health and alleged they were being confined in violation of the fourteenth amendment to the United States Constitution by being denied their constitutional right to adequate treatment.<sup>8</sup> They sought declaratory and injunctive relief. The forensic unit of Fulton State Hospital includes a maximum security unit known as the Marion O. Biggs Building for the Criminally Insane and a less restrictive area known as the Rehabilitation Unit.<sup>9</sup> Patients housed in both buildings have been determined to represent a danger to themselves or others.<sup>10</sup> Pursuant to regulations of the Department of Mental Health, all patients within the class represented<sup>11</sup> who resided in the Biggs building were required to have had an administrative hearing to determine their need for maximum security either before or immediately after their placement there.<sup>12</sup>

The court ruled that a constitutional right to treatment exists under the fourteenth amendment and that this right extends to these patients who had been found to be dangerous. Acknowledging that the Constitution does not mandate "optimal" or "good" treatment, the court said:

The patient committed against his will has a constitutional right only to that treatment as is minimally adequate to provide him a reasonable opportunity to be cured or to improve his mental con-

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7. The problems encountered in implementing the right in one case are discussed in Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1373-79 (1975). Such problems caused one of its champions, Chief Judge David Bazelon, to refer to it as a "fabled" right. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743 (1969). See also note 22 *infra*.

8. 475 F. Supp. at 912. Plaintiffs also presented a claim based on the eighth amendment, alleging they were being subjected to cruel and unusual punishment, but the court did not reach this claim. *Id.* at 915 n.16.

The author was employed as a psychiatric social worker in the forensic unit during five years of this eight-year litigation.

9. *Id.* at 911.

10. *Id.*

11. Voluntary patients and those committed to the forensic unit for pre-trial psychiatric examination were excluded from the class. *Id.* n.1.

12. These regulations were promulgated in settlement of prior litigation in the same court by patients against administrators of the forensic unit. See *Barnes v. Hill*, No. 1821 (W.D. Mo., Dec. 3, 1973); *Williams v. Hill*, No. 1827 (W.D. Mo., Dec. 3, 1973). Cf. *Baxtrom v. Herold*, 383 U.S. 107 (1966) (Supreme Court found unconstitutional a New York law permitting automatic assignment to a maximum security facility for a mentally ill convict at the expiration of his sentence).

Half of the patients in the forensic unit had been committed after being found not guilty by reason of mental disease or defect, and the other half consisted of patients committed under a variety of criminal and civil procedures, including civil commitments by probate court, commitment for pre-trial psychiatric examination, criminal sexual psychopath commitments, incompetent to proceed with trial commitments, transfers from the Missouri Department of Corrections, and a few juvenile court and voluntary commitments. 475 F. Supp. at 912.

dition . . . Essential elements of minimally adequate treatment include a humane physical and psychological treatment environment, sufficient numbers of qualified staff, and an individualized treatment plan for each patient.<sup>13</sup>

The court went on to find that this minimal standard was not met in the forensic unit except as to staff. The court ruled constitutionally inadequate several aspects of the physical environment of the Biggs building.<sup>14</sup> It stated that throughout the forensic unit treatment plans in existence were minimally adequate, but found there were impermissible delays in the preparation and review of treatment plans.<sup>15</sup> The court made additional findings of constitutional violations, and although it could have linked these to the right to treatment, it did not explicitly do so.<sup>16</sup> These violations included a failure to transfer patients promptly to a less restrictive environment after they were approved for such a transfer,<sup>17</sup> visiting and telephone policies in the Biggs building so restrictive as to amount to punishment,<sup>18</sup> and seclusion sometimes being used in the forensic unit for disciplinary rather than therapeutic reasons.<sup>19</sup>

To fashion a remedy for the constitutional violations found, the *Eckerhart* court retained jurisdiction and ordered a conference at which defendants were to submit a plan to correct the deficiencies.<sup>20</sup> In so doing, the court admitted it was "ill-equipped to deal with the complex problems of administering the maximum security unit of a state mental hospital"<sup>21</sup> and acknowledged an obligation to defer whenever possible to the administrators of such facilities.<sup>22</sup>

13. 475 F. Supp. at 915.

14. The deficiencies found were in: climate control; privacy provisions in the lavatories, bathrooms, and dormitories; protection from assault in the dormitories; furnishings; and arrangements for patients to keep and display personal belongings. *Id.* at 917-19.

15. *Id.* at 922.

16. *See, e.g.,* Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972), wherein all the violations found in *Eckerhart* were among those listed as falling within the right to treatment.

17. 475 F. Supp. at 922. The court found that a patient could remain in the Biggs building for up to eight months after being recommended for transfer out. *Id.* *See also* Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

18. 475 F. Supp. at 925.

19. The court did not forbid the use of seclusion for disciplinary reasons, but imposed minimal procedural requirements for such use, following the guidelines given by the Supreme Court in the prison case of Wolff v. McDonnell, 418 U.S. 539 (1974). 475 F. Supp. at 928.

All of the court's findings of constitutional violations rested on the fourteenth amendment. The scope of the new right is unclear and likely to remain so pending further litigation. This article will focus on the question of its existence rather than on its scope.

20. 475 F. Supp. at 928.

21. *Id.* at 915.

22. *Id.* Judge Hunter used a very similar restrained approach recently when asked to pass upon the constitutionality of conditions at the Missouri State Penitentiary. For this moderation he received praise from the Eighth Circuit Court of Appeals. *See* Burks v. Walsh, 461 F. Supp. 454 (W.D. Mo. 1978), *aff'd sub nom.*

Judicial reluctance to embrace the "new,"<sup>23</sup> "fabled,"<sup>24</sup> and "nascent"<sup>25</sup> right to treatment has been caused in part by criticism that courts would be invading an area outside their competence.<sup>26</sup> It has been argued that psychiatry itself has not reached agreement about treatment methods,<sup>27</sup> and that identifying treatment as a constitutionally mandated right would inappropriately substitute moral judgments of the judiciary for legal requirements.<sup>28</sup> Society's ambivalent attitude toward the mentally ill has complicated the matter.<sup>29</sup>

Birnbaum's original proposal that a constitutional right to treatment be recognized was apparently limited to civilly committed mental patients.<sup>30</sup> The rationale suggested was substantive due process as per Justice Frankfurter's dissenting opinion in *Solesbee v. Balkcom*:<sup>31</sup>

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.

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Burks v. Teasdale, 603 F.2d 59 (8th Cir. 1979). In declining to issue a detailed injunction to remedy the constitutional deficiencies in the forensic unit, Judge Hunter has shown a reluctance to follow the course taken by Judge Frank Johnson in *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), upon which Judge Hunter relied heavily to find that a constitutional right to treatment does exist.

23. Editorial, *A New Right*, 46 A.B.A.J. 516 (1960).

24. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 743 (1969).

25. Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967).

26. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 588 (1975) (Burger, C.J., concurring); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1341-43 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975); *Position Statement on the Question of Adequacy of Treatment*, 123 AM. J. PSYCH. 1458 (1967). *But see Position Statement on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded*, 134 AM. J. PSYCH. 354 (1977), wherein the American Psychiatric Association reversed its earlier position and endorsed the idea of a constitutional right to treatment.

27. See *O'Connor v. Donaldson*, 422 U.S. 563, 588 (1975) (Burger, C.J., concurring); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1341-43 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). Also, the very existence of a medical phenomenon of mental illness has been questioned in recent years. See Szasz, *The Right to Health*, 57 GEO. L.J. 734 (1969).

28. See *O'Connor v. Donaldson*, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring).

29. "Opposing wishes to neglect and to care, to protect and to abandon, can be identified in involuntary commitment proceedings; therefore, no conflict-free resolution of the problems inherent in such deprivations of liberty is possible." Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755, 755 (1969).

30. Birnbaum, *supra* note 2, at 503.

31. 339 U.S. 9 (1950).

But respect for them is of the very essence of the Due Process Clause.<sup>32</sup>

The first case to recognize a right to treatment did so on statutory grounds. *Rouse v. Cameron*<sup>33</sup> was a habeas corpus proceeding by a patient who had been committed after being found not guilty by reason of insanity of carrying a dangerous weapon. Chief Judge Bazelon's opinion recognized a statutory right to treatment under the District of Columbia Code,<sup>34</sup> but in dicta noted that failure to provide treatment raised constitutional questions of due process, equal protection, and cruel and unusual punishment.<sup>35</sup> The court, in defining the right, stated, "The hospital need not show that the treatment will cure or improve him, but only that there is a bona fide effort to do so . . . . The effort should be to provide treatment which is adequate in light of present knowledge."<sup>36</sup> The case was remanded to the district court for a determination of whether patient Rouse was receiving adequate treatment, and the court of appeals suggested that release be considered "if it appears that the opportunity for treatment has been exhausted or treatment is otherwise inappropriate."<sup>37</sup> Other guidelines expressed by the court, that continued confinement must depend on the patient's mental condition and not dangerousness alone,<sup>38</sup> and that failure to provide suitable and adequate treatment could not be justified by lack of staff or facilities,<sup>39</sup> were explicitly based on statutory provisions, as was the application of this right to a criminally committed patient.<sup>40</sup>

The first<sup>41</sup> case to recognize a constitutional right to treatment was *Wyatt v. Stickney*.<sup>42</sup> This lengthy litigation unfolded over a period of several years and represents the highwater mark in development of a constitutional right to treatment. Judge Frank Johnson of the Alabama

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32. *Id.* at 16 (Frankfurter, J., dissenting), quoted in Birnbaum, *supra* note 2, at 503. Birnbaum suggested that the courts use standards set by the American Psychiatric Association as guides in reviewing the adequacy of treatment. Birnbaum, *supra* note 2, at 504. To enforce the right to treatment, he recommended the courts order the release of patients found not to be receiving adequate treatment. *Id.* at 503. He also discussed the possibility of a patient seeking damages for being denied this right. *Id.* at 503-04 n.28.

A variety of rationales for the right to treatment have been advanced since Birnbaum's original proposal. See generally *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1324-33 (1974).

33. 373 F.2d 451 (D.C. Cir. 1966).

34. *Id.* at 453-54.

35. *Id.* at 453.

36. *Id.* at 456.

37. *Id.* at 458-59.

38. *Id.* at 459.

39. *Id.* at 457.

40. *Id.* at 454.

41. It is not clear whether the earlier case of *Nason v. Superintendent of Bridgewater State Hosp.*, 353 Mass. 604, 233 N.E.2d 908 (1968), was based on constitutional or statutory grounds. See Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 624 n.4 (1971).

42. 325 F. Supp. 781 (M.D. Ala. 1971).

Middle District Federal Court issued four separate opinions in the case during 1971 and 1972.<sup>43</sup> The Fifth Circuit, in a 1974 opinion, affirmed all of the essential parts of Judge Johnson's rulings.<sup>44</sup> *Wyatt* was a class action suit brought against various Alabama officials on behalf of patients in three Alabama mental institutions.<sup>45</sup> The patients involved were committed involuntarily through noncriminal procedures.<sup>46</sup> Without acknowledging the statutory basis for the holding in *Rouse*, the *Wyatt* court relied primarily on that case in ruling that treatment is "the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions."<sup>47</sup>

The second *Wyatt* opinion is the source of the three "essential elements of minimally adequate treatment" identified in *Echerhart*.<sup>48</sup> With the help of several distinguished amici<sup>49</sup> the court identified as necessary for any adequate treatment program in a public mental institution: "(1) a humane psychological and physical environment, (2) qualified staff in numbers sufficient to administer adequate treatment and (3) individualized treatment plans."<sup>50</sup> The defendants subsequently failed to submit a satisfactory plan or make satisfactory progress toward protecting the patients' right to treatment and, after a further hearing, the court issued and ordered implementation of very detailed standards. The order specified size requirements for rooms, temperature requirements for the buildings, nutritional standards for hospital food, staff-to-patient ratios for all disciplines, and requirements for written treatment plans.<sup>51</sup>

*Wyatt* was appealed to the Fifth Circuit where the existence of a constitutional right to treatment was contested. Appellants had conceded

43. *Wyatt v. Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972); *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

44. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

45. When the first opinion was issued, Alabama ranked fiftieth among the states in per patient expenditures. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

46. *Id.*; *Wyatt v. Aderholt*, 503 F.2d 1305, 1306 (5th Cir. 1974).

47. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). Judge Johnson stated the rationale for this constitutional right to treatment thus: "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." *Id.* at 785.

48. See text accompanying note 13 *supra*.

49. The United States, the American Psychological Association, the American Orthopsychiatric Association, and the American Civil Liberties Union had joined the case as amici. When the last district court opinions were issued, the American Association on Mental Deficiency also had joined. *Wyatt v. Stickney*, 344 F. Supp. 373, 375 n.4 (M.D. Ala. 1972). Also, the plaintiffs had retained Morton Birnbaum. *Id.* at 374.

50. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1343 (M.D. Ala. 1971).

51. *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972). For mentally retarded patients at one of the hospitals, the court found an analogous "right to habilitation," *Wyatt v. Stickney*, 344 F. Supp. 387, 390 (M.D. Ala. 1972), and issued closely parallel standards. *Id.* at 395-407. This right, however, was not actively contested. *Id.* at 390.

that should such a right be found, the standards set by the district court were appropriate.<sup>52</sup> The Fifth Circuit explicitly based its resolution of the constitutional issue on its decision earlier the same year in *Donaldson v. O'Connor*,<sup>53</sup> and held that "the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment."<sup>54</sup> This holding was limited to civilly committed patients,<sup>55</sup> and the court explained its findings thus: "Our express holding in *Donaldson* and here rests on the *quid pro quo* concept of 'rehabilitative treatment, or where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary.'"<sup>56</sup>

*Donaldson* is the only right to treatment case to reach the Supreme Court. In *O'Connor v. Donaldson*,<sup>57</sup> the Court declined to pass upon the existence of a constitutional right to treatment, saying the case did not raise the constitutional issues addressed by the Fifth Circuit.<sup>58</sup> Instead, the Court disposed of the case on the basis of a violation of Donaldson's constitutional right to liberty.<sup>59</sup> Donaldson was civilly committed to a Florida state hospital and remained there involuntarily for fifteen years with a diagnosis of paranoid schizophrenia. Uncontradicted evidence established that he was not and had never been dangerous,<sup>60</sup> that his confinement was simple custodial care without treatment,<sup>61</sup> and that "responsible persons [were] willing to provide him any care he might need on release."<sup>62</sup> The hospital superintendent, however, had refused to allow his release.<sup>63</sup> The action reviewed by the Supreme Court was a suit for damages under

52. *Wyatt v. Aderholt*, 503 F.2d 1305, 1307, 1310 (5th Cir. 1974). The court later stated:

[T]he parties and amici stipulated to a number of specific conditions they agreed were necessary for a constitutionally acceptable minimum treatment program. Because of these stipulations, we need not and do not reach decision as to whether the standards prescribed by the district court are constitutionally minimum requirements, or whether it is within the province of a federal district court . . . to prescribe standards as distinguished from enjoining the operation of such institutions while constitutional rights are being violated.

*Id.* at 1316-17.

53. 493 F.2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975). Morton Birnbaum also served as attorney for the plaintiff in this case. *See id.* at 509; Birnbaum, *supra* note 41, at 635-37 n.26.

54. *Wyatt v. Aderholt*, 503 F.2d 1305, 1314 (5th Cir. 1974).

55. *Id.* at 1313.

56. *Id.* at 1314 (quoting *Donaldson v. O'Connor*, 493 F.2d 507, 522 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975)).

57. 422 U.S. 563 (1975).

58. *Id.* at 573.

59. *Id.*

60. *Id.* at 567-68.

61. *Id.* at 568.

62. *Id.* at 569.

63. *Id.*



42 U.S.C. § 1983. At the trial court level the jury had awarded Donaldson \$38,500, including \$10,000 in punitive damages.<sup>64</sup>

The Fifth Circuit affirmed this judgment, finding a constitutional right to treatment based on fourteenth amendment due process.<sup>65</sup> In an exhaustive opinion, the court identified three recognized grounds for involuntary civil commitment: danger to others ("police power" commitment); need for care or treatment (*parens patriae* commitment); and danger to self (mixed "police power" and *parens patriae* commitment).<sup>66</sup> The court identified two parts to the theory of a constitutional right to treatment. The first part is that if a commitment is on *parens patriae* grounds, the Constitution requires that minimally adequate treatment be given.<sup>67</sup> The second part, which does not distinguish between *parens patriae* and police power grounds for commitment, is that when detention is not for retributive purposes, is not limited to a fixed term, and fundamental procedural safeguards are not observed, there must be a *quid pro quo* extended by the government to justify confinement.<sup>68</sup> This *quid pro quo*, the court said, was "the provision of rehabilitative treatment, or where rehabilitation is impossible, minimally adequate habilitation and care."<sup>69</sup> The Supreme Court, however, unanimously vacated the Fifth Circuit's judgment on executive immunity grounds<sup>70</sup> and explicitly deprived that court's opinion of any precedential effect.<sup>71</sup> The Court did not disturb the jury's finding that Donaldson's constitutional right to freedom had been violated,<sup>72</sup> and specifically declined to rule on the existence of a constitutional right to treatment or to determine upon what grounds a mentally ill person may be confined.<sup>73</sup> The Court stated its constitutional holding thus: "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom . . . ."<sup>74</sup>

In a concurrence to *O'Connor*, Chief Justice Burger pointed out that

64. *Id.* at 572. *Cf.* *Whitree v. State*, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968) (patient hospitalized for more than 12 years received award of \$300,000 in suit for medical malpractice based on allegations of failure to provide treatment, false imprisonment, and injuries from beatings by employees and other patients).

65. *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975).

66. *Id.* at 520-21.

67. *Id.* at 521.

68. *Id.* at 522.

69. *Id.*

70. 422 U.S. at 577. The Court remanded so it could be determined whether *O'Connor* reasonably should have known he was violating Donaldson's constitutional rights. *See Wood v. Strickland*, 420 U.S. 308 (1975).

71. *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975).

72. *Id.* at 576.

73. *Id.* at 573-75.

74. *Id.* at 576. The Court also 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." *Id.* at 575.

the Court's opinion gave no approval to the existence of a constitutional right to treatment and asserted that such a finding had no basis in the decisions of the Supreme Court.<sup>75</sup> Burger was harshly critical of the Fifth Circuit's *quid pro quo* rationale, saying it was "a sharp departure from, and cannot coexist with, due process principles."<sup>76</sup> Rather, said Burger, "[t]here 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."<sup>77</sup>

In *Eckerhart*, Judge Hunter relied heavily on *Rouse* and *Wyatt*, and gave consideration to the Fifth Circuit's opinion in *Donaldson* in concluding that a constitutional right to treatment exists.<sup>78</sup> As demonstrated, however, these cases do not have substantial precedential weight after the Supreme Court's opinion in *O'Connor*: *Rouse* was based on statute; *Wyatt*'s affirmance was based on *Donaldson*; and *Donaldson* was vacated. Also, neither Birnbaum's original proposal nor any of these major cases provides support for extending this right, if it exists at all, to dangerous patients.

*Eckerhart* relied heavily on the 1977 Eighth Circuit opinion in *Welsch v. Likins*,<sup>79</sup> which also provides only weak support for a constitutional right to treatment. The issue of the existence of such a right did not reach the Eighth Circuit, but the court accepted the unchallenged declaration by the trial court that a federal constitutional right to treatment existed for the mentally retarded patients who were plaintiffs.<sup>80</sup> The trial court had followed the pattern set by Judge Johnson in *Wyatt*, and had issued a detailed order setting twenty-seven specific requirements and prohibitions for the hospital involved.<sup>81</sup> In a footnote, the Eighth Circuit opinion asserted that "the constitutional right of a noncriminal committed to a mental institution to be treated for his condition is probably clearer" than when the trial court's unchallenged declaration of such a right was issued in 1974.<sup>82</sup> As demonstrated in the preceding paragraph, however, this assertion is questionable. Moreover, the facts in *Welsch* differ significantly from those in *Eckerhart*. In *Welsch* only noncriminal retardees were

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75. *Id.* at 580 (Burger, C.J., concurring). The Court's opinion, however, does not compel this conclusion. Four days after *O'Connor* was decided, the Court denied certiorari in the *Burnham* case. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975). In *Burnham*, the Fifth Circuit had reversed the district court's refusal to find a constitutional right to treatment, basing that action on the authority of its decisions in *Donaldson* and *Wyatt*. 503 F.2d at 1319.

76. *O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring).

77. *Id.* at 582-83.

78. 475 F. Supp. at 912-13.

79. 550 F.2d 1122 (8th Cir. 1977).

80. *Id.* at 1125-26.

81. *Id.* at 1126.

82. *Id.* n.6, *quoted in Eckerhart v. Hensley*, 475 F. Supp. at 913 n.13.

involved, whereas criminally committed mentally ill patients constituted the bulk of the plaintiff class in *Eckerhart*.<sup>83</sup>

In its extension of the right to treatment to dangerous patients, *Eckerhart* found support in an Ohio case which applied the right to a remarkably similar plaintiff class. In that case, however, the existence of the right was not contested, and the case has not received appellate review. The residents of Ohio's maximum security mental institution sued administrators for injunctive and declaratory relief. In a 1974 opinion, an Ohio federal district court announced recognition of a constitutional right to treatment for the patients there involved. Both sides took the position that such a right existed, however, and merely asked the court to define its parameters.<sup>84</sup> The court, explicitly following Judge Johnson's lead in *Wyatt*,<sup>85</sup> proceeded to issue detailed standards for operation of the hospital.<sup>86</sup> In a later enforcing order the court noted that the patients involved were committed under a variety of criminal and civil proceedings<sup>87</sup> and acknowledged their dangerousness.<sup>88</sup>

Although limited additional lower court support exists for the holding in *Eckerhart*,<sup>89</sup> no strong appellate precedent exists. For this reason, because the existence of a constitutional right to treatment was vigorously contested in *Eckerhart*, and because it extended the right to dangerous patients, *Eckerhart* is properly seen as being at the very forefront of the development of this significant doctrine. The opinion's presentation of itself as resting on precedent obscures this position. Because of its position in constitutional evolution, the case must be analyzed with regard to the current need for such a development.

During the halting progress of the right to treatment, a simultaneous liberalization of mental health commitment laws has weakened the rationale for its existence. Some states, including Missouri, have eliminated purely *parens patriae* involuntary civil commitments, requiring that dan-

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83. 475 F. Supp. at 912. The Eighth Circuit also has ruled that a petition alleging lack of adequate medical treatment at St. Louis State School and Hospital states a claim under 42 U.S.C. § 1983. *Goodman v. Parwatarikar*, 570 F.2d 801 (8th Cir. 1978).

84. *Davis v. Watkins*, 384 F. Supp. 1196, 1197 (N.D. Ohio 1974).

85. *Id.*

86. *Id.* at 1203-12.

87. *Davis v. Balson*, 461 F. Supp. 842, 849-50 (N.D. Ohio 1978).

88. *Id.* at 856. Extending the right to treatment to mentally ill criminals was advocated in Morris, "Criminality" and the Right to Treatment, 36 U. CHI. L. REV. 784, 798 (1969), but the author acknowledged that such a proposal raised serious questions about the appropriateness of any institutionalization. *Id.* at 801.

89. See, e.g., *United States v. Pardue*, 354 F. Supp. 1377, 1382 (D. Conn. 1973) (cursory discussion); *Davy v. Sullivan*, 354 F. Supp. 1320, 1329-30 (M.D. Ala. 1973) (dicta); *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973) (dicta). Although cited in *Eckerhart*, 475 F. Supp. at 914, for the proposition that the right to treatment had been recognized for patients similar to the plaintiffs, *Pardue* and *Davy* are addressed to an untreatable patient's right to liberty, and *Stachulak* was merely a pre-trial discovery order.

gerousness in some form be found as a prerequisite to commitment.<sup>90</sup> Some states, again including Missouri, have by statute adopted some form of a right to treatment in their civil commitment laws.<sup>91</sup> For criminal commitments, some states have eliminated, either by statute or by court decision, automatic commitments for persons found not guilty by reason of insanity, and require additional findings of current mental illness and dangerousness before commitment is allowed.<sup>92</sup> Missouri has not done so.<sup>93</sup> In Missouri and elsewhere when a statutory right to treatment has been enacted, it generally has not been made applicable to criminally committed or dangerous patients.<sup>94</sup> In states where this has occurred, therefore, it is in the area of police power or criminal commitments that there remains a possible need for a judicially protectible right to treatment. *Eckerhart's* ruling operates in precisely this area.

The holding in *Eckerhart* sets up a potential conflict with Missouri state courts. Missouri courts have repeatedly refused release to patients considered not to be mentally ill who were committed under the police power.<sup>95</sup> In so doing the courts have aligned themselves with Chief Justice

90. See, e.g., KAN. STAT. ANN. § 59-2902 (1976); RSMo §§ 202.123.2, 135.5, 137.1, 145.1 (1978). But see ARK. STAT. ANN. §§ 59-1401 (A), (B), (C), -1409, -1410 (Supp. 1979) (allowing involuntary hospitalization of those found to be "homicidal," "suicidal," or "gravely disabled," but for the "gravely disabled" limiting the commitment to 30 days); ILL. ANN. STAT. ch. 91½, § 1-119 (Smith-Hurd Supp. 1979); IOWA CODE ANN. §§ 229.1 (2), .13 (West Supp. 1979).

91. See, e.g., IOWA CODE ANN. § 229.23 (West Supp. 1979); KAN. STAT. ANN. §§ 59-2927, -2929 (1979); RSMo §§ 202.205 to .215 (1978).

92. See generally Note, *Criminal Procedure—Automatic Commitment of Defendants Found Not Guilty by Reason of Insanity*, 41 MO. L. REV. 439 (1976).

93. RSMo § 552.040 (1) (1978), which provides for automatic commitment, has remained virtually unchanged since it was enacted in 1963. In *State v. Kee*, 510 S.W.2d 477 (Mo. En Banc 1974), the Missouri Supreme Court upheld § 552.040 (1) against a constitutional challenge.

94. Missouri's new statutory right to treatment is a part of the civil commitment statutes. See RSMo § 202.205 (1978). The criminal commitment statute, RSMo ch. 552 (1978), contains no such provision. The wording of § 202.205, however, might allow it to be interpreted as applying to criminally committed patients. Cf. KAN. STAT. ANN. § 59-2937 (1976) (explicitly makes the provisions of that civil commitment statute, including a "Right to Humane Treatment," *id.* § 59-2927, inapplicable to persons in custody on a criminal charge). Kansas' criminal commitment statutes contain no standards for treatment of patients committed thereunder. See KAN. STAT. ANN. §§ 22-3428 to -3428a (Supp. 1979), and §§ 22-3429 to -3431 (1974).

95. In *State v. James*, 534 S.W.2d 41 (Mo. 1976), the Missouri Supreme Court unanimously recognized that the patient-appellant who had been committed to the Biggs building as a criminal sexual psychopath possibly could not be cured, but ruled that his continued involuntary confinement was not unconstitutional.

In *State v. Davee*, 558 S.W.2d 335 (Mo. App., D. Spr. 1977), the hospital superintendent had petitioned the court for the release of a patient who had been acquitted because of insanity; psychiatrists testified that the patient "does not need any active treatment for mental illness" and that he was "not presently suffering from an overt psychosis." *Id.* at 339. The court of appeals, however, quoted Burger's concurrence in *O'Connor*, *id.* at 340, and against a constitutional argument upheld and applied the two requirements of RSMo § 552.040 (1969), that release be granted only if the patient is shown to be both free from mental illness and not dangerous to himself or others. 558 S.W.2d at 339.

Burger's position in *O'Connor*, twice quoting his statement that "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."<sup>96</sup> This potential conflict may be avoided if the Missouri cases are read as dealing with patients described by Judge Hunter as "not reasonably likely to benefit from treatment" but still dangerous, for whom he said involuntary hospitalization is not unconstitutional.<sup>97</sup> The rationale of *Eckerhart*,<sup>98</sup> however, bears a close resemblance to the *quid pro quo* rationale which Burger was criticizing and a real disagreement over the proper role of the courts appears to exist. Missouri courts have shown an unwillingness to expand mental patients' rights absent legislative action, especially for criminally committed patients.<sup>99</sup> Resolving this difference over the proper role of courts in this area would seem to require action by the Supreme Court.

At some future date the Supreme Court may pronounce that after years of labor, the nascent right to treatment has been stillborn. Given the limited progress made thus far by this right, such a pronouncement would seem justified. Pending such a pronouncement, however, when petitioned by neglected mental patients who are without statutory protection from neglect, the courts remain free to offer their protection. The *Eckerhart* court found unacceptably inadequate treatment in Missouri's mental health system and moved to correct the situation by declaring that a

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The Court of Appeals, St. Louis District, has ruled that neither improper treatment nor maximum benefit from hospitalization suffices to warrant release of a patient committed after being found not guilty by reason of insanity. *State v. Pertuisot*, 547 S.W.2d 192, 193 (Mo. App., D. St. L. 1977). While affirming the denial of a hospital request for permission to release a patient who had remained free of psychosis for the last seven of the fourteen years since his commitment as not guilty by reason of insanity, the same court stated, "proof that the condition which originally caused the commitment has been cured does not *per se* entitle the defendant to be released." *State v. Montague*, 510 S.W.2d 776, 778 (Mo. App., D. St. L. 1974).

A common thread in these Missouri cases is that the burden of establishing facts to support his release is on the confined patient. *State v. Davee*, 558 S.W.2d 335, 338 (Mo. App., D. Spr. 1977); *State v. Pertuisot*, 547 S.W.2d 192, 193 (Mo. App., D. St. L. 1977); *State v. Montague*, 510 S.W.2d 776, 778 (Mo. App., D. St. L. 1974).

96. *State v. James*, 534 S.W.2d 41, 44 (Mo. 1976); *State v. Davee*, 558 S.W.2d 335, 340 (Mo. App., D. Spr. 1977) (quoting *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C. J. concurring)).

97. 475 F. Supp. at 914-15.

98. Judge Hunter's rationale is that "[c]onfinement in a state mental hospital absolutely forecloses receipt of any treatment except that which the state chooses to provide . . . . To withhold all opportunity for treatment may condemn [the mental patient] to a lifetime of hopeless mental illness." *Id.* at 914. In addition, "[t]he fact that plaintiffs have been deemed dangerous does not deprive them of a constitutional right to treatment. . . . On the contrary, if a mental patient is involuntarily confined because he is dangerous, due process requires a specific focus to the treatment which is his right." *Id.* at 915.

99. See *State v. Kee*, 510 S.W.2d 477 (Mo. En Banc 1974); Note, *supra* note 92; cases discussed in note 95 *supra*.