Volume 20 | Issue 1 Article 8

1974

Constitutional Law - Mental Health - A Patient Involuntary Civilly Committed to a State Mental Hospital Has a Constitutional Right to Treatment

Brian S. North

CONSTITUTIONAL LAW — MENTAL HEALTH — A PATIENT INVOLUNTARILY CIVILLY COMMITTED TO A STATE MENTAL HOSPITAL HAS A CONSTITUTIONAL RIGHT TO TREATMENT.

Donaldson v. O'Connor (5th Cir. 1974)

Plaintiff Donaldson, adjudged a paranoid schizophrenic in a civil commitment proceeding,[1] was involuntarily committed to a state mental hospital where he remained confined for over 14 years,[2] "receiving no commonly accepted psychiatric treatment," and only a minimal level of custodial care.[3] On February 24, 1971, before his release, Donaldson filed suit under the Civil Rights Act of 1871[4] (section 1983) against five hospital and state mental health officials, claiming deprivation of what he alleged to be his fourteenth amendment right to be treated or released.[5] A jury trial in the United States District Court for the Southern District of Florida resulted in a judgment of $38,500 in punitive and compensatory damages against the plaintiff's two attending physicians.[6]

The United States Court of Appeals for the Fifth Circuit affirmed, *holding* that a nondangerous patient, involuntarily civilly committed to a

1. Donaldson v. O'Connor, 493 F.2d 507, 509 (5th Cir.), *cert. granted,* 95 S. Ct. 171 (1974) (No. 74-8).

2. As of 1969, Donaldson had unsuccessfully presented his claims for release to state and federal courts 12 times. *See* Birnbaum, *A Rationale for the Right,* 57 GEO. L.J. 752, 775 (1969). The Supreme Court had denied Donaldson habeas corpus relief four times. *See* Donaldson v. O'Connor, 400 U.S. 869 (1970); Donaldson v. O'Connor, 390 U.S. 971 (1968); Donaldson v. Florida, 371 U.S. 806 (1963); *In re* Donaldson, 364 U.S. 808 (1960).

3. 493 F.2d at 509, 511. Donaldson was confined in a room where there were 60 beds and where one-third of the inmates were criminals. *Id.* at 511. During the first 10 years of his confinement, Donaldson received a total of 3 hours of psychiatric counseling. *Id.* at 514. The court concluded:

> Donaldson received only the kind of subsistence level custodial care he would have received in a prison, and perhaps less psychiatric treatment than a criminally committed inmate would have received.

Id. at 512.

4. 42 U.S.C. § 1983 (1970). The Civil Rights Act of 1871 (section 1983) is codified as section 1983 of title 42 of the United States Code and 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 party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

5. 493 F.2d at 509-10. Plaintiff originally brought this suit as a class action on behalf of all the patients in his ward against five hospital and state mental health officials, seeking habeas corpus relief, damages, and injunctive and declaratory relief. *Id.* at 512. After his release on July 31, 1971, and after the dismissal of the suit as a class action, he filed an amended complaint seeking individual damages. *Id.* He alleged that the conduct which deprived him of his constitutional rights was the malicious and willful confining of him against his will, with the knowledge that he was not dangerous to himself or others, that he was not receiving treatment, and that his hospitalization would be prolonged without treatment, and the intentional limitation of his treatment program to custodial care. *Id.* at 513.

6. *Id.* at 510. The opinion of the district court was not reported.

state mental hospital, has a fourteenth amendment right to receive treatment adequate at least to help him to improve his mental condition, and that defendants had violated this right both by denying the plaintiff grounds privileges, occupational therapy, and consultations with his attending psychiatrists, and by preventing other responsible agencies from aiding him in his attempt to secure release. *Donaldson v. O'Connor,* 493 F.2d 507 (5th Cir.), *cert. granted,* 95 S. Ct. 171 (1974) (No. 74–8).

The notion that a mental patient has a right to receive treatment while institutionalized is a recently developed one. Its origin has been credited to an article published in the *American Bar Association Journal* in 1960.[7] Although at that time there existed no case law requiring a public mental hospital to provide adequate psychiatric and medical treatment to a patient whom the state had involuntarily committed,[8] the right to treatment has since developed a substantial legal foundation, initially through statutory interpretation, and more recently through the formation of a constitutional theory.

In the landmark case of *Rouse v. Cameron,*[9] which involved the level of treatment a patient received while confined in a federal mental hospital as a result of his being acquitted of a criminal charge by reason of insanity,[10] the District of Columbia Circuit declared that the petitioner had a right to treatment cognizable in a habeas corpus proceeding.[11] Specifically, the court determined that this right could be satisfied by a bona fide effort to provide treatment which was adequate in the light of present medical knowledge, and suggested that contacts with a psychiatrist and activities with the hospital staff were required.[12] While this right was not constitutionally based, as it was derived from a unique reading of a District of Columbia mental health statute,[13] there was considerable dicta as to a possible constitutional foundation for a patient's right to treatment.[14]

7. Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960). Dr. Birnbaum has been called the "father of the idea of a right to treatment." *See* 493 F.2d at 520.

8. Legal authority at the time was primarily concerned with ensuring that those committed were sufficiently mentally ill to require confinement, and that they were confined in mental rather than penal institutions. *See, e.g.,* Benton v. Reid, 231 F.2d 780 (D.C. Cir. 1956); *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958). *See generally* Birnbaum, *supra* note 7, at 502.

9. 373 F.2d 451 (D.C. Cir. 1966).

10. *Id.* at 452. Petitioner in *Rouse* sought a writ of habeas corpus on the ground that he should be released because he was not being treated. *Id.* For an analysis of the importance of the *Rouse* decision in the judicial development of the right to treatment, *see* Robitscher, *The Right to Psychiatric Treatment,* 18 VILL. L. REV. 11, 14–18 (1972).

11. 373 F.2d at 458–59.

12. *Id.* at 456. If this standard of treatment were not met by the hospital, the court indicated that it could release the petitioner. However, immediate release was not mandated, because the court found that it had the alternative of giving the hospital an opportunity to improve its therapeutic conditions. *Id.* at 458–59.

13. Mentally Ill Act of 1964, D.C. CODE ANN. § 21–562 (1967). Similar wording in statutes in other jurisdictions had never been interpreted to include a right to certain standards of treatment. Robitscher, *supra* note 10, at 17.

14. 373 F.2d at 453. *Rouse* stated that the absence of treatment after commitment raised questions of due process and cruel and unusual punishment. *Id.*

The Supreme Judicial Court of Massachusetts made the next major contribution to the development of a legal right to treatment in *Nason v. Superintendent of Bridgewater State Hosp.*[15] In a situation involving the care an individual was receiving in a public mental institution after having been committed due to his incompetence to stand trial,[16] the *Nason* court stated that confinement of the mentally ill not convicted of a crime would raise a serious question of deprivation of liberty without due process of law if treatment were not provided.[17]

Since *Rouse* and *Nason* concerned only mental patients committed after criminal proceedings, those decisions did not reach the issue of whether a right to treatment existed on behalf of the individuals who were also in need of some legal guarantee of treatment — the patients who were civilly committed.[18] Recently, however, the constitutional rights of a civilly committed mental patient were considered in two cases originating in the federal district courts of the Fifth Circuit, *Wyatt v. Stickney*[19] and *Burnham v. Department of Public Health.*[20]

Relying upon dicta in *Rouse* and *Covington v. Harris,*[21] *Wyatt* held that when a mental patient was committed to a mental institution for treatment purposes, he unquestionably had a constitutional right to receive a level of individual treatment that would give him a realistic opportunity

---

15. 353 Mass. 604, 233 N.E.2d 908 (1968).

16. *Id.* at 605, 233 N.E.2d at 909.

17. *Id.* at 612, 233 N.E.2d at 913. The *Nason* court also raised the possibility that the petitioner's confinement would be a violation of the equal protection clause if treatment were not provided on a reasonable, nondiscriminatory basis. *Id.* at 612, 233 N.E.2d at 913.

18. Dr. Birnbaum did not consider *Rouse* an appropriate vehicle for the realization of his concept of the right to treatment because the petitioner in *Rouse* was a sociopath detained for the purpose of imprisonment and was not a typical case of hospital neglect. Robitscher, *supra* note 10, at 15, *citing* Address by Morton Birnbaum, Annual Meeting of American Psychiatric Association, May 8, 1967, at 21.

19. 325 F. Supp. 781 (M.D. Ala.), *upon submission of proposed standards by defendants,* 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced,* 344 F. Supp. 373 (M.D. Ala.), *enforced as to additional plaintiffs,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

20. 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd,* 503 F.2d 1319 (5th Cir. 1974), *petition for cert. filed sub nom.* Department of Human Resources v. Burnham, 43 U.S.L.W. 3417 (U.S. Jan. 22, 1975) (No. 74-904). *Burnham* was a class action brought by several mental patients in a state hospital alleging inadequate treatment and seeking declaratory and injunctive relief under the Civil Rights Acts of 1870 and 1871. 42 U.S.C. §§ 1981, 1983 (1970). 349 F. Supp. at 1336-37. For a discussion of decisions from district courts in other circuits that have considered the issue, *see* notes 52-55 & 61-66 and accompanying text *infra.*

21. 419 F.2d 617 (D.C. Cir. 1969). *Covington,* using as a basis for its decision the same statute used in *Rouse* (*see* note 13 *supra*), limited the review of therapeutic programs to a consideration of whether the hospital administrators had made a reasoned decision by employing the proper criteria without overlooking anything of substantial relevance. 419 F.2d at 621.

to be cured or to improve his mental condition.[22] However, the court failed to offer any supporting rationale.

In *Burnham,* the court rejected *Wyatt,* holding that one has no constitutional right to treatment.[23] It stated that the *Wyatt* court erred in relying upon dicta in *Rouse* and *Covington,* and that the question of a patient's right to treatment was a matter of state law.[24]

While the Supreme Court of the United States has not ruled directly upon the question, in another context it recently adopted the reasoning of the cases which had found a constitutional right to treatment. In *Jackson v. Indiana,*[25] the Court held that confinement based solely upon a lack of capacity to stand trial could last no longer than the period reasonably necessary to determine whether the person confined would attain competence to stand trial in the future.[26] The Court announced that due process required that the nature and duration of confinement of the mentally ill have some reasonable relation to the purpose for which they were committed.[27]

Thus, the *Donaldson* court was the first federal court of appeals to consider the constitutional right of a civilly committed mental patient to treatment and the first to declare unequivocally that such a right existed.[28] As such it is the furthest development in the legal right of mental patients to receive treatment.

At the foundation of the court's analysis was the principle that because civil commitment is such a "massive curtailment of liberty," it brings into play the due process requirements of the fourteenth amendment.[29] Using this basic principle, the *Donaldson* court then developed a two-part theory of a constitutional right to treatment.[30]

First, the court adopted a substantive due process analysis based upon the settled rule that any serious abridgment of a freedom protected by the fourteenth amendment must be justified by some permissible governmental

22. 325 F. Supp. at 784. Two other district courts, relying upon *Wyatt,* have declared that a constitutional right to treatment exists: Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); and Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973).

23. 349 F. Supp. at 1341.

24. *Id.*

25. 406 U.S. 715 (1972). *Jackson* concerned a mentally defective mute who was committed after being determined incompetent to stand trial for criminal charges. *Id.* at 717–19.

26. *Id.* at 738.

27. *Id.*

28. 493 F.2d at 519. The *Wyatt* and *Burnham* cases were affirmed and reversed on appeal, respectively, by the Fifth Circuit to conform with the *Donaldson* decision. *See* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Burnham v. Department of Pub. Health, 503 F.2d 1319 (5th Cir. 1974).

29. 493 F.2d at 520, *citing* Humphrey v. Cady, 405 U.S. 504 (1972). *Humphrey* stated that the nonpenal commitment of a sex offender in lieu of a criminal sentence was a "massive curtailment of liberty." 405 U.S. at 509. *Donaldson* suggested that civil commitment might be a greater abridgment of freedom than penal confinement because of the stigma and the indefinite period which accompany it. 493 F.2d at 520.

30. The finding of a constitutional right was necessary to the adjudication of the section 1983 claim, because only the deprivation of a federal right gives rise to a cause of action under this section. 42 U.S.C. § 1983 (1970). *See* note 4 *supra.*

goal.[31] Having established that civil commitment is an abridgment of freedom within the scope of the due process clause, the court reviewed the three permissible governmental goals traditionally offered to justify civil commitment: commitment for the protection of others, commitment for the protection of self, and commitment for the purpose of treatment.[32]

The court noted that the use of commitment for the purpose of treatment is based upon a parens patriae rationale.[33] This well-established common law doctrine holds the state responsible for the care and custody of all persons incompetent to care for themselves; in exercising this responsibility, the state may utilize involuntary commitments.[34] On the other hand, commitment for the protection of others is an exercise of the state's police power in furthering a societal interest.[35] Both doctrines have different constitutional ramifications, owing to their different theoretical bases.[36]

The court held that when parens patriae is the only rationale asserted to justify confinement, as it was for the plaintiff in the instant case, the due process clause requires that adequate treatment actually be provided.[37] While relying upon *Wyatt* and *Nason* in reaching this conclusion,[38] the court specifically applied the test used by the Supreme Court in *Jackson* which required that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual was committed.[39] The *Donaldson* court reasoned that if the purpose of the commitment were treatment, and treatment were not provided, then the nature of the commitment had no reasonable relation to its purpose, and was

---

31. 493 F.2d at 520, *citing* Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1, 2 (1973). As an analytical doctrine, substantive due process has been condemned by the Supreme Court as a device used by the judiciary to substitute its own social and economic beliefs for the judgment of the legislature. Ferguson v. Skrupa, 372 U.S. 726, 729–31 (1963). However, the doctrine was recently employed by the Supreme Court itself in Roe v. Wade, 410 U.S. 113 (1973). *Donaldson* cited authority to indicate that this doctrine is again gaining respect. 493 F.2d at 520 n.17, *citing, e.g.,* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 935 & n.91.

32. 493 F.2d at 520, *citing* Jackson v. Indiana, 406 U.S. 715, 737.

33. 493 F.2d at 521. The parens patriae power of the state has been recognized since 1845. *See Developments in the Law — Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1209 nn.55–56 (1974) [hereinafter cited as *Developments in the Law*] and cases cited therein.

34. *Developments in the Law, supra* note 33, at 1208.

35. States possess the plenary power to make laws and regulations for the protection of the public health, safety, welfare, and morals. Jacobson v. Massachusetts, 197 U.S. 11, 24–25 (1904). *See Developments in the Law, supra* note 33, at 1222.

36. *Compare* note 40 and accompanying text *infra with* note 41 and accompanying text *infra.*

37. 493 F.2d at 521.

38. *Id.* at 521, *quoting* Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *and* Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 612, 233 N.E.2d 908, 913. The *Wyatt* court had concluded:

> 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.

325 F. Supp. at 785.

39. The text accompanying note 27 *supra.*

thus an arbitrary exercise of governmental power in violation of the due process clause.[40]

This substantive due process analysis is subject to one important limitation. Standing alone, the substantive due process approach is meaningful only when the sole basis for involuntary commitment is the individual's need for treatment. When the protection of society from the danger of the individual is the basis for commitment, treatment would not be required by the court's analysis because incarceration without therapeutic care would fulfill the *Jackson* requirement that the nature of the commitment bear some reasonable relation to its purpose.[41]

Presumably as an attempt to overcome this limitation of the substantive due process theory, the court adopted a quid pro quo theory which, it asserted, is applicable regardless of whether the state's rationale for confinement is parens patriae or its police power.[42] The court noted that long term detention of an individual had been permitted only when the major limitations upon the exercise of government power had been indulged. These limitations number three: First, an individual may be confined only if given a hearing subject to the "rigorous constitutional limitations" of the due process clauses of the fifth and fourteenth amendments. Second, the individual must have been proven to have committed a specific crime against the state. And finally, the period of time for which the state may confine him must be definite.[43] The court stated that when any of these three limitations was not observed, the quid pro quo theory required that the state give the individual something in exchange to justify his confinement,[44] noting that the consideration traditionally recognized as sufficient had been the provision of rehabilitative treatment.[45]

40. 493 F.2d at 521.

41. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1141 (1967).

42. 493 F.2d at 521. Since the basis for the commitment of the appellee in *Donaldson* was his need for treatment, there was no need for the court to formulate a right to treatment applicable when a person is committed because he is considered dangerous. This dictum concerning the quid pro quo theory indicated a concern for supplying a constitutional doctrine to future courts having to rule upon the confinement of a mental patient committed for reasons other than, or in addition to, his need for treatment.

43. *Id.* at 522.

44. *Id.*

45. *Id.* at 522–25. The court cited a wide range of precedent in support of the quid pro quo theory, delineating five major categories illustrative of the development of the concept that treatment must be offered if a person is to be confined without the privileges that precede and accompany penal confinement. The first group had prohibited confinement in a prison when the detention was nonpenal in theory. *See, e.g.*, Benton v. Reid, 231 F.2d 780 (D.C. Cir. 1956); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1958); *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958). The second group had held that when detention was nonpenal in theory, confinement must be in a place where conditions were actually therapeutic. *See, e.g.*, Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960); Sas v. Maryland, 334 F.2d 506, 517, *cert. dismissed as improvidently granted*, 407 U.S. 355 (1972); Commonwealth v. Page, *supra*. The cases in the third category had held that a nonpenal confinement statute could be considered constitutional only if the statutory promise of rehabilitative treatment were realized. *See, e.g.*, Sas v. Maryland, *supra*. The fourth group had held that a mentally ill patient had a right to a hearing of a claim that he was not receiv-

Of the three elements of the quid pro quo analysis, the one most adequately supported by case law is that which requires the state to offer the individual treatment if it is going to confine him without his having committed a specific act. While *Donaldson* did not elaborate upon this point, it did cite *Powell v. Texas*,[46] where the Supreme Court held that before a person may be criminally punished, he must have actually engaged in some behavior society has an interest in preventing, as otherwise his incarceration would be in violation of the eighth and fourteenth amendments' proscription of cruel and unusual punishment.[47] Presumably, the Fifth Circuit relied upon *Powell* for the proposition that if the state were to confine a mentally ill person and provide him with only the custodial care given to a prisoner, as a result of his mental illness he would suffer penal consequences which would constitute cruel and inhuman punishment.[48]

Another Supreme Court decision, neither discussed nor referred to in *Donaldson, Robinson v. California*,[49] lends further support to this aspect of the quid pro quo theory. Holding that a drug addict may not be punished merely for possessing the status of "addict,"[50] the *Robinson* Court declared

ing treatment. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968). The fifth line of cases were class actions seeking declaratory and injunctive relief requiring that adequate treatment be provided in state institutions. *See, e.g.*, Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). *Contra*, Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *petition for cert. filed sub nom.* Department of Human Resources v. Burnham, 43 U.S.L.W. 3417 (U.S. Jan. 22, 1975) (No. 74-904). An illustrative example of the cases cited is Commonwealth v. Page, *supra*. There, the Supreme Judicial Court of Massachusetts recognized that because a statute providing for the treatment of the mentally ill was nonpenal, a jury trial was not constitutionally required. 339 Mass. at 316, 159 N.E.2d at 85. The court declared that if treatment were not offered, the statute could not be sustained as a nonpenal statute. *Id.* at 317, 159 N.E.2d at 85. Thus, the *Page* court recognized that the constitutionality of a commitment statute not providing for the rigorous proceedings of a criminal trial rested upon the quid pro quo of treatment's being offered.

After giving the right to treatment a constitutional basis, *Donaldson* secured this right by its disposition of the lesser issues involved in the appeal. The court declared that there was only a qualified official immunity for conduct giving rise to a cause of action under section 1983. *See* note 74 *infra*. Following many of the cases that have recognized a legal right to treatment, the Fifth Circuit also held that the lack of facilities and personnel did not justify a deprivation of this legal right. *Id.* at 527. *See* Welsch v. Likins, 373 F. Supp. 487, 497-98 (D. Minn. 1974); Rouse v. Covington, 373 F.2d 451, 457 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). The *Donaldson* court did, however, imply that the lack of resources should be considered when the decision is made whether or not to continue the confinement of the patient committed under the parens patriae principle. 493 F.2d at 527. The court also disposed of several other collateral issues not relevant to the impact of a constitutional right to treatment. *Id.* at 525-31.

46. 392 U.S. 514 (1968).

47. *Id.* at 533. *See* U.S. CONST. amends. VIII, XIV § 1.

48. A state might attempt to justify this confinement upon the basis of the necessity for confinement to prevent the patient from committing future acts against the state. By definition, this theory of detention is punitive, not therapeutic. *Symposium — The Right to Treatment*, 57 GEO. L.J. 673, 694 (1969).

49. 370 U.S. 660 (1961).

50. *Id.* at 666-67.

in a dictum that while a state may confine the mentally ill for treatment, it would be an infliction of cruel and unusual punishment for a state to make mental illness a criminal offense.[51] By virtue of the same analysis, it would seem to follow that if a mental patient were confined solely because he was mentally ill, an argument could be made that he, like the drug addict in *Robinson,* was being punished for his status.

Donaldson is not the first case to apply the eighth amendment rationale to the civil commitment of the mentally ill. The court in *Welsch v. Likins,*[52] a class action brought against Minnesota state hospitals by several mentally retarded patients for the purpose of having their treatment rights declared and enforced under the Civil Rights Act of 1871, took this approach.[53] *Welsch* held that patients had a constitutional right to treatment[54] and based this right partially upon the *Robinson* proscription of punishing a person for his status.[55]

Of the cases refusing to recognize a constitutional right to treatment, the one closest in point to *Donaldson* is *Burnham v. Department of Public Health,*[56] in which the District Court for the Northern District of Georgia held that there was no right to treatment conferred by the Constitution because, while the fourteenth amendment guaranteed equal protection of the law, it gave rise to no rights in itself.[57] Admitting that the state had set up institutions for the purpose of treating the mentally ill,[58] the court declared further that not every government service gave rise to individual rights.[59] However, this approach may be unsound because it ignores the application of the due process clause to deprivations of liberty which result from involuntary commitments.[60]

Another recent case declining to recognize a constitutional right to treatment, *New York State Association for Retarded Children v. Rockefeller*[61] (*NYSARC*) involved an action, brought on behalf of the residents of a state institution for the mentally retarded, which sought to force the

---

51. *Id.* at 666.

52. 373 F. Supp. 487 (D. Minn. 1974).

53. *Id.* at 496.

54. *Id.* at 499.

55. *Id.* at 496. In *Welsch* the court observed that patients who were civilly committed were not criminals but victims of an uncontrollable status. *Id.*

56. 349 F. Supp. 1335 (N.D. Ga. 1972). *See* notes 23 & 24 and accompanying text *supra,* and note 28 *supra.*

57. 349 F. Supp. at 1339. The *Burnham* court also dismissed the class action because of its lack of jurisdiction due to the eleventh amendment, the nonjusticiable character of the concept of adequate treatment, and the existence of adequate remedies at law. *Id.*

58. *Id.* at 1338.

59. *Id.* at 1339. The court analogized the statutory provision for treatment to that for education, and quoted Fleming v. Adams, 377 F.2d 975, 977 (10th Cir.), *cert. denied,* 389 U.S. 898 (1967), which indicated that a state is not constitutionally required to provide education for its citizens. 349 F. Supp. at 1339.

60. The Fifth Circuit reversed *Burnham* on appeal. *See* note 28 *supra.*

61. 357 F. Supp. 752 (E.D.N.Y. 1973).

state to provide better treatment for the residents.[62] *NYSARC,* like *Burnham,* found that there was no specific constitutional provision which imposed a duty upon a state to provide services to its citizens.[63] However, *NYSARC* declared in dicta that when a person was committed by the operation of a statute which expressed the purpose of treatment, as was the case in *Donaldson,*[64] the person would have the right to be released if treatment were not given.[65]

Unlike the plaintiffs in *NYSARC,* Donaldson had been denied release several times during his confinement.[66] This factual distinction is significant, because if the confined patient is given release upon request, his confinement is not the same massive curtailment of liberty that the patient's was in *Donaldson.*

Thus, in light of *Powell, Robinson,* and *Welsch,* the *Donaldson* conclusion that the state must offer the civilly committed person something in addition to mere custodial confinement appears sound. The narrow scope of the *Burnham* analysis and the factual distinction in *NYSARC* would seem to indicate that these cases do not operate to undermine the *Donaldson* analysis.

The inclusion of the quid pro quo doctrine was essential to the formation of an effective right to treatment for *all* involuntarily civilly committed patients. Although the plaintiff in the instant case had been committed upon the basis of his need for treatment and, therefore, was protected under the court's substantive due process approach, others committed upon the grounds that they were dangerous to others would not be so protected in the absence of a quid pro quo theory.[67]

The addition of the latter theory is especially significant in view of the fact that fear of the dangerousness of the mentally ill is a factor involved in many state involuntary commitment procedures. Dangerousness is an express concern in many statutes, and the most recent statutory enactments indicate a trend toward making it the *only* basis for involuntary civil commitments.[68] Even where the statutory basis for commitment is the need for treatment, the fear of the dangerousness of the mentally ill is often an unexpressed factor in the decision to confine.[69]

---

62. *Id.* at 755. The plaintiffs sought to require the implementation of programs which would raise to national accreditation standards the conditions at a state school for the mentally retarded. *Id.*

63. *Id.* at 761, *citing* Dandridge v. Williams, 397 U.S. 471, 487 (1970).

64. 493 F.2d at 521.

65. 357 F. Supp. at 762. The court held that while no right to state services could be enforced in a federal court, a right to release could be. *Id.*

66. 493 F.2d at 515–17. *See* note 2 *supra.*

67. *See* notes 41–42 and accompanying text *supra.*

68. *Developments in the Law, supra* note 33, at 1203–05. *See, e.g.,* LA. REV. STAT. ANN. §§ 28:52–53 (Supp. 1974); MONT. REV. CODES ANN. § 38–208 (1961); N.H. REV. STAT. ANN. § 135–B:26 (Supp. 1973); N.C. GEN. STAT. § 122–58.6 (1974).

69. R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 6–7 (1968). This American Bar Foundation survey found that the standard of dangerousness is widely observed in practice if not in theory. *Id. See* N. KITTRIE, THE RIGHT TO BE DIFFERENT 80 (1971). Involuntary commitments serve multiple purposes: the

The widespread failure to require a finding of incapacity prior to the involuntary commitment proceeding also indicates an overriding interest in the protection of society.[70] If a state were concerned primarily with the welfare of the mentally ill, it would let the individual make a voluntary decision to commit himself.[71] In contrast, an involuntary commitment would be permissible only if the subject thereof were incapable of making the decision. However, only a minority of the states require a finding of incapacity prior to involuntary commitment.[72]

It is clear that a theory limited in its application to commitments based solely upon the individual's need for treatment would have a concomitantly limited effect. However, when the substantive due process approach is considered in conjunction with the second part of the *Donaldson* due process analysis, the quid pro quo theory, the right to treatment exists regardless of whether the basis for confinement is concern for the welfare of the individual or for the protection of society.[73]

Once a right to treatment was found to exist, the court had the means of finding that hospital officials were liable under section 1983 for deprivation of that right, thereby providing the patient with an important means of recourse for the inadequate care he had received.[74] The court's holding implied that an official's personal liability extends to a broad range of activities.[75] However, if the decision is read in relation to the narrow facts of the case, such a conclusion as to officials' liability may not be reached. The court declared that the jury could have concluded that plain-

prevention of harm to others, the provision of treatment to those who need it, and the relief of troubled families having the burden of disabled members. In essence, the mentally ill are confined basically as a quarantine measure. *Id.* at 80.

70. For recent review of the theoretical bases for confinement contained in statutes, *see Developments in the Law, supra* note 33, at 1212.

71. If the concern is solely for the welfare of the individual, and if the subject is capable of determining whether or not treatment is in his own best interest, there would be no reason for the state to make the commitment decision. *See* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures,* 79 HARV. L. REV. 1288, 1295 (1966).

72. *Developments in the Law, supra* note 33, at 1212. For examples of statutes requiring a finding of incapacity, *see, e.g.,* ALASKA STAT. § 47.30.070 (1971); DEL. CODE ANN. tit. 16, § 5125 (Cum. Supp. 1970); FLA. STAT. ANN. § 394.467 (Supp. 1974).

73. 493 F.2d at 521. *See* note 42 *supra.*

74. In holding the appellee's attending physicians personally liable for the deprivation of the constitutional right to treatment, the *Donaldson* court rejected the contention that the discretionary nature of the physicians' function conferred upon them absolute immunity in their capacity as state officials. *Id.* at 529–30. Announcing that granting state officials absolute immunity would emasculate section 1983 since state officials are its primary targets, the court recognized a qualified immunity, applicable only when acts were done in good faith in the exercise of an official's discretionary function. 493 F.2d at 530, *quoting* Adamian v. University of Nev., 359 F. Supp. 825, 834 (D. Nev. 1973). *See* Scheuer v. Rhodes, 416 U.S. 232 (1974).

75. The court declared:

> In summary, we hold that where a nondangerous patient is involuntarily civilly committed to a state mental hopsital, the only constitutionally permissible purpose of confinement is to provide treatment, and that such a patient has a constitutional right to such treatment as will help him to be cured or to improve his mental condition.

493 F.2d at 527.

tiff's constitutional rights had been violated by actions of the defendants which obstructed his release,[76] thereby implying that the decision may not be rested solely upon the lack of treatment. In the future, if a mental patient with a similar status were to bring a section 1983 action against hospital administrators, relying solely upon their failure to provide adequate treatment as the predicate for the action, he may not be able to base his allegations squarely upon *Donaldson* because of this factual distinction.

Further, a section 1983 action for damages undertaken by an individual or small group of patients on their own behalves, as in *Donaldson,* will bring relief only to those patients involved in the suit. As such, the action taken by an individual patient against his hospital officials will aid only those patients capable of undertaking such litigation, or fortunate enough to have someone initiate litigation on their behalves.[77] Such a limited class of plaintiffs is not likely to bring any major improvements in the overall system of public mental health care.

In addition, individual damage actions against hospital staff may impede the improvement of the care that the multitude of state mental patients receive, their threat discouraging qualified medical personnel from working in public mental institutions.[78] Holding hospital officials individually liable for the lack of treatment can only exacerbate the staffing problems of the state institutions.

The major impact of the *Donaldson* decision will be its role in establishing a theoretical basis upon which actions designed to raise the level of treatment received by all of the patients in state mental institutions can proceed. The need for such relief is widely recognized and needs no further elaboration here.[79] As to the fulfilling of this need, commentators upon the legal right to treatment agree that any meaningful change in the plight of state mental patients will have to come from the legislature.[80]

Cases undertaken in the future such as *Whitree v. State,*[81] where a mental patient was awarded $300,000 in damages against the State of New York, may use the *Donaldson* analysis in support of an absolute

---

76. *Id.* at 526.

77. Bazelon, *Implementing the Right to Treatment,* 36 U. CHI. L. REV. 742, 751 (1969). Many mental patients are unaware of any right to treatment, while those that are aware of their rights can rarely afford a lawyer. *Id.* For general problems involved in tort litigation undertaken by mental patients, *see* Birnbaum, *A Rationale for the Right,* 57 GEO. L.J. 752, 756–57 n.20 (1969).

78. There is a need to get more qualified personnel by making public mental health practice financially competitive with private practice. *See* Birnbaum, *supra* note 79, at 773. *See also* Rouse v. Cameron, 373 F.2d 451, 458 (D.C. Cir. 1966).

79. For a detailed analysis of the present state of public mental health facilities, *see generally* R. ROCK, *supra* note 69; F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW (rev. ed. 1971).

80. For example, one writer has argued that the basic problem is the allocation of insufficient resources by the legislature, a problem which the courts are helpless to remedy. Bazelon, *Foreword — Symposium — The Right to Treatment,* 57 GEO. L.J. 673, 676 (1969).

81. 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. N.Y. 1968).