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The Right to Treatment: Judicial Realism - Judicial Initiative [Note]

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The Right to Treatment: Judicial Realism—Judicial Initiative

INTRODUCTION

The moral right of mental patients to adequate care and treatment has long been recognized in our society. Legal recognition of the same right is still in the nascent stage of development.[1] Subsequent comments in this section[2] suggest constitutional bases and analogies for the right. For purposes of this comment it is assumed that an adequate legal foundation has been established by case law and responsible commentary for recognizing a legally enforceable right to care and treatment.

Assuming a court has a constitutional basis to act in the area, the question remains whether it should act. Is it the best suited agency of government to handle the problem? To what extent, if at all, should the court defer to legislative initiatives in the area? To what extent should a court break new ground on its own? Why must new ground be broken? How should a court view its role vis-à-vis the mentally ill generally? What interests of the mentally ill should a court be most concerned in protecting? These questions, among others, are discussed if not resolved in this comment.

In addition to suggesting why and how new approaches must be taken in the area of right to treatment, it is the purpose of this comment to contrast and analyze inconsistencies in current judicial approaches to the mentally ill. This will be accomplished by examining how at least one court has been selective in the interests of the mentally ill that it deems worthy of protection. Privacy has been recognized by at least one court as deserving of aggressive state protection acting in the role of parens patriae. At the same time the right to adequate care and treatment has not. Under analysis, it is believed that such a distinction cannot, and in a humane society, should not stand.

The first part of this comment attempts to identify the nature of

1. *See* Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).
2. *See* Comment, *The Right to Treatment — Alternative Rationales* 10 DUQ. L. REV. 626 (1972).

the right to care and treatment problem as judicial rather than legislative. It deals with how courts should view the problem, and why they should take on an expanded or aggressive role in trying to solve it.

The second part of the comment attempts to analyze a recent decision protecting the interests in privacy of state mental patients. It quarrels with (or at least seriously questions) the result reached in the particular case but endorses the approach of the court as exemplary of the aggressive civil libertarian role necessary in dealing with problems of the mentally ill. It is believed that such an approach provides an excellent starting point for a court desirous of adopting a constitutional right to care and treatment and in need of precedent and common sense to buttress the right. The aim of this comment then is to provide a rationale for the right in terms of a court's traditional role and within the boundaries of existing case law.

Judicial Realism: A Necessary First Step

> [M]y reaction . . . would border on despair each time I went [to the state hospital in question]. When I would leave I would quickly put the place out of my mind . . . . [T]he film in . . . [a] painful way revived the old feelings of depression and . . . anger at myself for continuing to ignore the problem . . . . [I]n a small way my reactions are a clue to why [such] institutions . . . exist. There are some things we prefer not to know about . . . not too unlike the Germans who live near Dachau.[3]

The psychological truth contained in this quotation serves as both a starting point and a roadblock to subsequent analysis, evaluations, and proposals contained in this comment. It is a major premise of this article that problems of the mentally ill (particularly care and treatment) have and for the foreseeable future will remain "low visibility" problems[4] in terms of public awareness. Precisely for this reason it is believed courts must directly and aggressively concern themselves

3. Commonwealth v. Wiseman, 356 Mass. 251, 349 N.E.2d 610, 614 & n.6 (1969) quoting the remarks of a former director of legal medicine of the Massachusetts State Department of Mental Health.

4. "Low visibility" for purposes of this analysis means outside the public eye, awareness, or consciousness. A "low visibility" problem is one which the bulk of society does not realize exists. This lack of awareness has important consequences for a court in its scope of review. *Cf.* Hobson v. Hansen, 269 F. Supp. 410, 507-08 (D. D.C. 1967). For a discussion of the importance of the *Hobson* case in the mental health area, see note 15 *infra*.

(and regard themselves as the proper forum) with problems of adequate care and treatment of the mentally ill.

The role of the courts and the way they characterize and view mental health problems is a necessary first step to any improvements in the field. If courts are to undertake an expanded and more aggressive role, as is believed imperative, certain realities must be appreciated. The first is: mental health problems cannot realistically be regarded as a matter of political or of primary legislative concern, at least as an original matter.

The Legislature: An Unpromising Forum

One view of what matters are of appropriate legislative concern relates to power, both in terms of raw voting strength and lobbying pressure groups.[5] It is self-evident that mental patients as a class possess neither political power or influence. In many states, commitment to a mental hospital means a suspension of the voting franchise. As a practical matter, commitment results in an effective gutting of the franchise, even where technically available. If it is conceded that as a practical matter, legislative action is most often based on response to political and lobbying power[6] rather than altruistic aims, one must acknowledge that any great faith in the legislature as the sole forum in solving mental health problems is unjustified.[7]

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5. *See, e.g.*, Niebuhr, Moral Man and Immoral Society (1932).

6. While community mental health associations serve from time to time as legislative lobbying groups, exerting political influence on behalf of the public institutionalized patient does not appear to be one of their primary functions. Also in terms of financing and numbers in the political sphere, mental health associations appear to wield little power.

7. The experience of the proposed right to treatment legislation in Pennsylvania illustrates this fact. Despite dedicated effort on the part of many people, the legislation first proposed in 1968 (S.B. 1274 & H.B. 2118, Pa. Gen. Assembly, 1968 Sess.) remains unenacted. *See The Right to Treatment—Encounter and Synthesis*, 10 Duq. L. Rev. 554, 578 (1972). Senator Sam Ervin summed up the general problem of obtaining legislative attention and results in the area of mental health. Speaking of his experience in trying to obtain additional funds for mental hospitals in the North Carolina State Legislature, Ervin observed:

> I found when I got to the Legislature that it was difficult to make the average legislator understand these basic needs because he had no observation or experience with the problem.
>
> I attribute it in part to the fact that hospitals for the mentally ill, unlike so many educational institutions, have no powerful alumni who are active in politics, and no one to present their cause. The general public really does not have an appreciation of what a serious problem it is, not only to society but to the individuals who happen to be so unfortunate as to be confined under conditions where they get nothing except custodial care.

Hearings on the Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, United States Senate, 91st Con-

In many respects the position of public mental health patients can be analogized to the plight of the blacks in the South in the early part of this century. Both were denied, either formally or practically, the right to vote. Both were denied substantial constitutional and legal protections that are now deemed fundamental. Perhaps as a result neither group possessed adequate funding, training, and access to communications media to make their predicament widely known.

Arguably one reason that the legal and constitutional status of blacks has changed over the past two decades has been the public awareness of racial discrimination problems generated by the communications media. There can be no doubt that changes in public opinion and legislative attitude were at least hastened by the media's influence. A prerequisite to legislative response then would generally seem to be some degree of public awareness.[8]

Similarly it is believed that mental patients must be placed in a "high visibility" position before their problems can ever be adequately defined and addressed by legislative means. So long as mental patients maintain their present "low profile" it is easy for society and legislatures to ignore them. As mentioned previously, mental patients as a voting bloc need not be feared at the polls. Nor, because of the nature of their disability, need society fear that mental patients will engage in demonstrations or acts of civil disobedience on any group basis. It is unlikely, for example, that an articulate leader or spokesman will emerge from the ranks of the mentally ill to publicize various problems and appeal to the public conscience.[9] Under present conditions then, institutional patients are incapable of helping themselves publicize their dilemma.

Since mental patients cannot help themselves, the question arises:

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gress in Washington, D.C., on November 11, 1969, at 60. It has also been observed by Dr. Morton Birnbaum that:

> There are many regressed patients, many elderly patients and many retarded patients who are just sitting around the hospitals doing nothing. They are not complaining loudly, they are not writing letters to newspapers, to their legislators or to their governor and, they are not suing anyone.

Id. at 64.

8. A premise on which this argument is based is that a certain residuum of public empathy exists among the body politic. It is assumed that if the public at large is made aware of substandard institutional conditions, they will register some sort of protest to have those conditions remedied or corrected. For a fuller discussion of this premise and corollaries, see p. 624, *infra*. The premise is not unrealistic as evidenced by the recent furor caused by publication of conditions in a mentally retarded institution in New York. See TIME, February 14, 1972 at 67-69.

9. In the civil rights movement, of course, Martin Luther King filled this role during the 1950's and 1960's. For a report on a nascent trend to organize which may undercut the "leadership void" theory, see PARADE MAGAZINE, Jan. 15, 1972 at 16.

what agency or branch of government should act in the capacity of parens patriae to protect their interests? The legislature, if viewed as a political body primarily responsive to popular electoral passions, cannot generally be relied upon to act effectively in such a capacity. The issue thus reduces to which other branch of government, or what branches in conjunction, will best protect the interests of the institutionalized mental patient.

The Executive: Practical Roadblocks

What may the mentally ill in various states expect in the way of protection from the executive branch of government, particularly from the office of Attorney General? In recent times Attorney Generals' offices in various states have taken on greater amounts of "public interest" litigation—especially in the fields of consumer and environmental protection.[10] Such is, for example, currently true of much of the operation of the Attorney General's Office in Pennsylvania.[11] While these efforts are to be applauded, it should be noted that for the most part Attorney Generals seem to represent currently popular political positions or causes. This is not surprising since most Attorney Generals are either elected officials or appointed by, and directly responsible to, the governor—the highest elected official in the state.

As noted previously, the mentally ill represent neither a politically visible or popular cause. No votes are to be gained by representing their interests. These considerations apply *mutatis mutandis* to a well intentioned Attorney General (who wishes to take the initiative and act on his own in the mental health area), but whose priorities and use of limited resources are determined to a great degree by political realities.

Another problem in relying on the Attorney General as a protection for the rights of the mentally ill is the potential conflict of interest. In Pennsylvania, for example, the Attorney General must represent the state (or committing administrative agency) against charges that a patient's rights have been violated. The case of *Dixon v. Attorney General of the Commonwealth of Pennsylvania*,[12] illustrates how the office of the Pennsylvania Attorney General may often be on the other side of the adversarial table from the patient.

10. *See, e.g.*, Wall Street Journal, January 7, 1972, at 1, col. 1.
11. *Id.*
12. 325 F. Supp. 966 (M.D. Pa. 1971).

It is believed, therefore, that a new administrative agency should be created to undertake the protection of the involuntarily committed mentally ill. It is unrealistic to expect private guardians or counsel to do an effective job of representation of the mentally ill. It is recognized that creating a Public Defender's office to deal with and protect the rights of the mentally ill is no panacea. There may well be problems of effective representation which will arise. Nevertheless, such a step represents a qualitative improvement, especially when weighed against the alternatives of other institutions or people (other than the courts) representing the mentally ill on a continuing basis.

The Judiciary: Natural Protector of Civil Liberties

What should be a court's role in handling a right to treatment issue raised as a constitutional issue of first impression when a legislature has not acted? The answer to this question in large measure depends on one's judicial philosophy, and whether one views the right to treatment issue as one capable of judicial solution. It has already been suggested that neither the legislature nor the executive will, as a practical matter, address themselves to the right to treatment issue on their own. Should the court fill the vacuum, and if so, how and why? Also, assuming it should act in some capacity, how far should it go in implementing standards and details of the right?

It is believed the court must fill the vacuum created by the legislature's abstinence and indifference. Put simply, there is no other forum to turn to for resolution of the problem. There are reasons, nevertheless, why a court is ideally suited to treat the problem initially. Assuming for the moment that the care and treatment of the mentally ill is a "low visibility" problem because either society rejects, ignores, or is uncomfortable with them, the conclusion is inescapable that the mentally ill do not represent a popular cause. It is precisely for this reason that the problems of the mentally ill should be in court: they are not generally popular. In speaking of the role of a court in our society, it has been said, "The measure of any society is not how it treats those persons whom it admires, but how it treats those whom it despises."[13]

Professor Bickel, commenting on the need for courts (in this case the Supreme Court) to lead and educate said:

13. Address by Dean Ronald Davenport, Duquesne University, November 9, 1971.

> If what is meant is that the Court is restricted to deciding an existing national consensus; that it is to enforce as law only the most widely shared values . . . this would charge the Court with a function to which it is, of all our institutions, least suited. Surely the political institutions are more fitted than the Court to find and express an existing consensus . . . . The Court is a leader of opinion not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.[14]

The Court must act both as a leader and as a conscience in the mental health area. It must serve as the prime protector of individual rights and civil liberties.[15] It must be the main forum on which an ag-

14. BICKEL, THE LEAST DANGEROUS BRANCH 239 (1962).

15. A recent decision of relevance for discussion here held that the Superintendent, and The Board of Education of The District of Columbia, in operation of their public school system unconstitutionally deprived Negro and poor public school children of their right to equal educational opportunity with white and more affluent public school children. Hobson v. Hansen, 269 F. Supp. 410 (D. D.C. 1967).

In *Hobson* Judge Skelly Wright (in the course of a lengthy opinion) addressed himself to the issue of what the proper scope of review is for a court dealing with a de facto segregation problem. He noted that when a critical personal right is involved any classification, must be remitted to a penetrating scope of judicial review in search of adequate justification. The need for investigating justification is strengthened, according to Judge Wright, when the practice though not explicitly singling out for special treatment any of the groups for which the Constitution has a special solicitude, operates in such a way that one such group is harshly and disproportionately disadvantaged.

Judge Wright explained the policy reasons behind the need for a stricter standard of judicial review:

> The explanation for this additional scrutiny of practices . . . relates to the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and or racial minorities are involved. *For these groups are not always assured of a full and fair hearing through the ordinary political processes,* not so much because of the chance of outright bias, but *because of the abiding danger the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority.* (Emphasis added).

Id. at 508. Such considerations, the court concluded, compel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. *Id.* at 507-08. *See* Note, 81 HARV. L. REV. 1511 (1967) for a full exposition and criticism of the "stricter" standard. While the stricter standard is put forward in an equal protection decision (*i.e., Hobson*), it is believed that it should apply with equal force where a substantial due process claim is raised by a group, such as the mentally ill or other disadvantaged minorities, lacking effective access to the legislature. *Cf.* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 740 (1968-69). Karst in discussing discrimination against a disadvantaged group, observes that the easy cases involve discrimination against a racial minority written into law. He goes on to note, however, that discrimination need not necessarily be made an explicit part of state policy but may result from a formally non-discriminatory classification. *Id.* Since most legislation has differential effects on various groups, discrimination (resulting from a non-discriminatory classification) can be found in almost anything government does or fails to do. Karst raises the question what groups can be called "disadvantaged" and notes that in addition to race and indigency, other likely candidates for inclusion are women and students. *Id.* at 740-41. It is hard to see in comparison to such groups, how the mentally ill should not be considered "disadvantaged." *Cf.* Coons, Clune, Sugarman,

grieved mental patient can rely if his rights have been abused during commitment or confinement.

A Supreme Court which rendered a *Brown v. Board of Education*[16] and an *In re Gault*[17] decision (causing revolutionary rethinking in civil rights and juvenile law) has ample precedent for issuing a seminal case law ruling in the mental health field.[18] The forces set in motion by the *Brown* decision illustrate the potential impact of a Supreme Court decision. It also illustrates how, if it does not abuse the power, the Supreme Court may lead and shape public opinion on certain matters. It is at least time that the Court grant certiorari and deal with the important due process issue of first impression that have been continually presented to it during the past decade. Although the above comments are directed at the United States Supreme Court, they are equally applicable to progressive state appellate courts. Little current authority prevents them from rethinking the problems of the mentally ill.[19]

Possible Objections

It is necessary to anticipate certain arguments that may be put forward against courts involving themselves as leaders and primary protectors of the rights of the mentally ill. For the most part these arguments are jurisprudential—relating to a different philosophy of the judicial process than is suggested by this comment.

One argument of the critics is likely to be something like the follow-

Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 CAL. L. REV. 305, 389 (1969), wherein the problem of disadvantaged children and their ethical claim to preferred treatment is discussed.

16. 347 U.S. 483 (1954).

17. 387 U.S. 1 (1967).

18. This is not to say that either *Brown* or *Gault* did not develop against a backdrop of related cases that had evolved at lower and higher appellate levels. With respect to *Brown*, *see e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Wilson v. Bd. of Supervisors, 92 F. Supp. 986 (E.D. La. 1950), *motion to affirm granted*, 340 U.S. 909 (1951). The argument put forward is that there has been sufficient litigation of the right to treatment issue by lower federal courts and state appellate courts to at least warrant Supreme Court review of the substantial constitutional issues presented. *Cf. The Right To Treatment—Encounter and Synthesis*, *supra* note 7, at 554; Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 635 & n.26.

19. Unlike the *Brown* situation a court need not worry about upsetting any established legal doctrine, as for example, was involved in overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896). Any reliance or disturbed expectations on the part of state officials from a change arises solely from prior apathy, not legal doctrine. An argument of administrative inconvenience loses its force in light of Supreme Court decisions in the right to counsel and school busing areas. *See, e.g.*, Swann v. Charlotte-Mechlenberg Bd. of Educ., 402 U.S. 1 (1971); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964).

ing: the proper rule of courts generally is the reasoned application of established principles to specific cases.[20] In the process of carrying out that function, courts necessarily have to develop the implications of general principles and adapt them to varying and new circumstances. Generally the principles are well articulated within a body of law. Sometimes courts seek to establish that a right was implicit in preexisting law. The step involved in such a situation, according to commentators, is much larger than the usual case of common law adaptation.[21]

Such a philosophy argues that the acceptance of such a large step (in this instance a court's recognition of a constitutional right to treatment) depends upon the idea that the actions against which the new judicial sanctions are sought represent conduct which violates community standards of propriety. In other words, the argument goes, before a new principle is recognized, it should represent established community standards before it can properly be adopted. The simple answer to this argument is that current care and treatment of the mentally ill constitutes a national scandal and would, if widely known, violate any community standard of propriety.

Even assuming arguendo, that community standards are not violated by current treatment methods, the argument can be limited and distinguished. And even in limited situations it would appear the principle is not dispositive (it is subject to and often outweighed by countervailing consideration). For instance, the principle by its own terms is limited to situations where the adoption of the new principle is substantially in dispute within the community. *Query*, whether the adoption of a right to treatment is the subject of any controversy within the community? And even if it is, it should be noted that courts often have decided such questions—as, for example, in the desegregation and criminal procedure areas.[22]

Another questionable assumption underlying the theory that major changes in the law should not be made by judges, is that it operates most strongly where a legal doctrine has become well-established.[23] In the right to treatment situation it is difficult to find any entrenched legal doctrine as one would, for example, in the area of charitable immunity. If there has been any reliance, it is the result of apathy and

20. MISHKIN AND MORRIS, ON LAW IN COURTS 121 (1965).
21. *Id.*
22. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Miranda v. Arizona, 384 U.S. 436 (1966).
23. MISHKIN AND MORRIS, *supra* note 20, at 257-58.

lack of concern. No legal doctrine, however archaic, need be threatened or destroyed by the recognition of a right to treatment.

Finally, what the "go slow with major changes in the law theory" overlooks is the role of law as a dispenser of justice. One need only consider the effect of denying relief to one who has been injured by actions generally acknowledged to be improper, to appreciate the importance of this function of law. Denial of redress for someone who asserts what is seen as a just claim tends to weaken this view of law by defeating the expectations it arouses.[24]

What is also ignored by the "go slow" theory is that legislatures cannot be relied on to act on every problem which comes up, even after the need has arisen. It would seem essential then, that courts be authorized to grant relief in the "unprovided-for"[25] (unforeseen) case of violation of community standards. Such a role has been described as one of responding to the complaint of a "one man lobby" after he has been injured.[26] Under such a view the fact the legislature might also be able to act on the same kind of issue is irrelevant. The assumption is that in certain areas the jurisdiction of legislatures and courts overlap, and there is nothing improper in one forum acting before the other. This is especially true in the unprovided-for case.

COMMONWEALTH v. WISEMAN: RIGHT APPROACH, WRONG RESULT

If courts are to take on a larger role in adopting the recognition of a right to treatment they will need some guidance in terms of approach. A recent case, *Commonwealth v. Wiseman*,[27] in the privacy area exhibits a commendable affirmative approach in regards to looking after the interests of the mentally ill in a parens patriae capacity. While *Wiseman* can be faulted in some respects, it is necessary first to understand the contribution it makes as precedent to the mental health area.

In *Wiseman*, the court held that the showing of a film to a general audience on a commercial basis about a state mental hospital in which identifiable inmates were naked or exhibited painful aspects of mental disease could be enjoined as an invasion of the inmates' right to pri-

24. *Id.* at 122.
25. *Id.* The unforeseen case arises 1) because it is impossible to ordain comprehensive rules in advance, and 2) because legislatures as a practical matter cannot be relied upon to act on every problem which comes up—even after an awareness of a particular need has arisen.
26. *Id.*
27. 356 Mass. 251, 249 N.E.2d 610 (1969).

vacy.[28] Although the case was decided on alternative grounds,[29] the important point for our purposes is that the court held the Commonwealth had standing and a duty to protect reasonably, and in a manner consistent with other public interests, the inmates from any invasions of their privacy.

By virtue of the general power of the legislature in its capacity as parens patriae to make suitable provisions for (care and custody of) mental patients, the court reasoned, certain duties devolve upon the state. One is the duty to exercise proper controls over the persons confined and the conditions of their custody. Another is to afford the inmates protection and kindness[30] consistent with the terms and rehabilitative purposes of their commitments.

The *Wiseman* court, based on this affirmative duty of protection and kindness, held that hospital officials under reasonable standards of custodial conduct, could not permit merely curious members of the public access to the hospital to directly view many of the activities in the film. The court thought it equally inconsistent with the same official's custodial duties to permit the general public (as opposed members of groups with a legitimate, significant interest) to view films showing inmates naked or exhibiting painful aspects of mental disease.

While the *Wiseman* court may be applauded for its aggressive approach, the interest it deemed worthy of protection can be viewed suspiciously. The privacy of mental patients in institutions may be important —that is, the public disclosure of private facts may offend us. At the same time it should be noted that protecting this interest also serves to protect the interest of public officials connected with mental hospitals who may be doing an incompetent job. As a practical matter this consideration has weighed heavily with courts in other contexts.[31]

The problem then in holding that the patient's right to privacy outweighs the public's right to know is that the public will probably never know of certain conditions that exist in mental hospitals.[32] To the extent that such conditions are the result of official inaction or in-

28. *Id.* at 252, 249 N.E.2d at 610.

29. The alternative basis for the decision rested on the failure of the producers of the film to obtain properly executed releases before depicting patients on the screen. *Id.* at 259, 249 N.E.2d at 617.

30. *Id.* at 258, 249 N.E.2d at 616.

31. *Cf.* New York Times Co. v. United States, 403 U.S. 713 (1971).

32. The problem is exacerbated by the fact that too few people already know too little about the plight of the mentally ill—especially with regard to inadequate care and treatment. See notes 4-7 *supra* and accompanying text. The *Wiseman* holding represents the worst possible answer to the general problem of "low visibility."

competence, the situation will never be remedied because it can never be brought to the public's attention.

In striking the balance in favor of privacy the court observed that the record did not indicate that any inmate shown in the film, by reason of past conduct, had any special news interests as an individual.[33] The court found the case to be distinguishable from decisions which have permitted publication of newsworthy events where the public interest in the reasonable dissemination of news has been treated as more significant than private interests in privacy.[34] The court did not articulate why and how the privacy of mental patients was distinguishable and subsequent cases in related areas may have seriously undermined any balance that might be struck in favor of privacy.

For instance, *Rosenbloom v. Metromedia, Inc.*[35] held that a libel action by a private individual against a radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of the truth. The importance of the decision for our purposes is that it extends the *New York Times* rule[36] to private persons who become involved in an event of public or general concern. While the Court did not provide criteria to determine how and when something becomes a matter of public or general concern the following language suggests that the category is a broad one:

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . Whether the

33. Commonwealth v. Wiseman, 356 Mass. 251, 259, 249 N.E.2d 610, 617 (1969).

34. *Id.* The principal privacy decision cited and distinguished by the court was *Time, Inc. v. Hill*, 385 U.S. 374 (1967). *Time, Inc.* involved the publicity of the experience certain victims of a crime endured many years before. The publicity was thought to be newsworthy because a play based on that event was concurrently showing on Broadway. Although the *Wiseman* court enjoined general distribution of the film partly because it feared a lurid or morbid interest in the plight of mental patients, it is hard to see how *Time, Inc.* is distinguishable. It also focused on a rather morbid public interest and involved presenting individuals in a false light in the public eye. Yet these factors did not dissuade the Court from a finding of newsworthiness and consequently allowing publication.

35. 403 U.S. 29 (1971).

36. 376 U.S. 254 (1964).

> person involved is a famous large scale magazine distributor or a "private" businessman running a corner newstand has no relevance in ascertaining whether the public has an interest in the issue.[37]

Although the court left itself an out[38] and was purposefully vague on what made *Rosenbloom* a newsworthy person of general or public concern,[39] the decision is important insofar as it narrows the concept of what may properly be regarded as "private." And despite talk of the constitutional right to privacy, *Griswold v. Connecticut*[40] may be read narrowly as relating to marital privacy and confined to its facts.

What makes *Rosenbloom* fairly persuasive authority in the privacy area is the Court's suggestion that libel law protects two separate interests of the individual: first, his desire to preserve a certain privacy around his personality from unwarranted intrusion and, second a desire to preserve his public good name and reputation.[41] The majority of the Court went on to say that the first interest—unwarranted intrusion—was not involved in *Rosenbloom* since, by hypothesis the individual was involved in matters of public or general concern.

The *Rosenbloom* Court appears to have been purposefully ambiguous in telling us how to determine what a newsworthy event is generally, or how they determine it in this particular case. The important point for our purposes is that if *Rosenbloom* is taken at face value and not strictly confined to its facts, it has an impact on the privacy interest asserted and found paramount in *Wiseman*. Who is to say, after *Rosenbloom*, that depiction of the care and treatment that mental patients receive in state hospitals is not a matter of public or general interest? Who is to say that because of the patient's disease and the right of the public to know of conditions in state institutions, mental patients have not been involuntarily "thrust into the limelight" as was Rosenbloom?

Assuming that *Rosenbloom* as a defamation case is not dispositive

37. 403 U.S. at 43.

38. *Id.* at 44 & n.12. The Court said:

> We are not to be understood as implying that no area of a person's activities falls outside the area of public or general interest. We expressly leave open the question of what constitutional standard . . . controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest.

39. While noting that the public's primary interest was in the "event" (*Id.* at 43), the Court never identified what constituted the "event" in *Rosenbloom*. Although it is probable that Rosenbloom's arrest was the "event" that made him a public figure, it is not clearly articulated.

40. 381 U.S. 479 (1965). This reading of *Griswold* was put forward in a lecture by Professor Sheldon Nahmod, Duquesne University School of Law, February 8, 1972.

41. 403 U.S. at 48.

on the privacy issue, one must examine the privacy line of precedent that may bear on the question. For purposes of this analysis it will be assumed that the scope of free speech should be narrower than it is in the defamation area.[42] Whether the scope of free speech should vary according to the nature of the privacy interest that is invaded remains an open question which is discussed, if not resolved, below.[43]

For discussion purposes, Prosser's analytical breakdown of privacy is not one tort but a complex of four. They are:

(1) Appropriation for defendant's benefit, or advantage of plaintiff's name or likeness.[44]
(2) Intrusion upon plaintiff's physical solitude or seclusion as by invading his home or other quarters or an illegal search of his shopping bag in a store.[45]
(3) Public disclosure of private facts consisting of the publicity of a highly objectionable kind, given to private information about the plaintiff (it is true so no action would be for defamation).[46]
(4) Presenting in a false light in the public eye, this private tort closely resembles defamation.[47]

While the *Wiseman* court did not identify or discuss which aspects of the right of privacy were violated, the tort arguably involved elements of appropriation (although not for advertising purposes), intrusion, and public disclosure of private facts. Case precedents from the intrusion and public disclosure of private facts area would seem to be in point. For example, it has been held that when a plaintiff is confined to a hospital bed[48] or in the seclusion of his home,[49] the making of a photograph constitutes an invasion of privacy (intrusion) for which he is entitled to complain. Decisions in the public disclosure of

42. At least two reasons may underly such a notion: 1) people generally have a better sense of what compromises a person's privacy than what constitutes falsehood or defamation; and 2) a rebuttal remedy is for the most part counterproductive and ineffective in a privacy context—especially where the public disclosure of private facts is involved (assuming the facts are true). Lecture by Professor Sheldon Nahmod, Duquesne University School of Law, February 8, 1972.

43. It is arguable, for example, that no legitimate first amendment value is to be served by the public disclosure of private facts. *See, e.g.*, A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960) wherein the distinction is made between public and private speech. The former category is thought to warrant much more first amendment protection.

44. W. PROSSER, TORTS § 117 at 804 (4th ed. 1971).

45. *Id.* at 807.

46. *Id.* at 809.

47. *Id.* at 812.

48. Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942); *Cf.* Clayman v. Bernstein, 38 Pa. D. & C. 543 (Philadelphia County 1940) (picture of semi-conscious patient taken by physician).

49. Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968).

private facts area prohibiting public distribution have included medical pictures of more intimate anatomy[50] and embarassing details of a woman's masculine characteristics and eccentric behavior.[51]

The crucial question to which the *Wiseman* court failed to address itself was: what first amendment values would be served by the general dissemination of the film showing conditions in Bridgewater State Mental Hospital? If Meiklejohn's theory[52] of the purposes behind the first amendment is accepted, the court's reasoning in *Wiseman* becomes less than convincing. According to Meiklejohn, the central purpose behind the first amendment is self-government.[53] Free expression is a means by which people can become better informed on public issues so they can better (more intelligently) govern themselves. Clearly this purpose is not served by a decision which restricts dissemination of information about conditions in state mental hospitals to certain interested professional groups.

In light of first amendment purposes, then, one must quarrel with the finding contained in *Wiseman* that no inmate shown in the film, by reason of past conduct, had any special news interest as an individual.[54] One cannot be so certain, as the *Wiseman* court was, that decisions treating the public interest in the reasonable dissemination of news as more significant than the private interests in privacy and thus allowing publication of newsworthy events are so easily distinguishable.[55]

The argument for general distribution of the film is reinforced if one reflects upon the observation that the mentally ill constitute a "low visibility" problem. Under the *Wiseman* decision the mentally ill will always retain a "low visibility" profile. According to *Wiseman* the general public need not know of conditions in public mental hospitals, and state officials in charge of these institutions need never account to the public for the care and treatment (or lack of it) they provide. So long as *Wiseman* remains good law the public will never, and can never, appreciate the need for mental health reform in terms of im-

50. Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D. N.Y. 1939) (X-rays of a woman's pelvic region); Feeney v. Young, 191 App. Div. 501, 181 N.Y.S. 481 (1920) (public exhibition of films of caesarian operation); Griffin v. Medical Society, 11 N.Y.S.2d 109 (Sup. Ct. Spec. Term, N.Y. County 1939) (deformed nose).

51. Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1945), *second appeal*, 159 Fla. 31, 30 So. 2d 635 (1947).

52. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).

53. *Id.* at 75.

54. 356 Mass. 251, 259, 249 N.E.2d 610, 617 (1969).

55. *Id.*

proving conditions and providing better care and treatment. Certainly any hope of a legislative response to the problem is precluded by the *Wiseman* decision.

The paradox contained in *Wiseman* is this: the court concerned itself with protecting the privacy and anonymity of mental patients. The problem is that mental patients as a whole are already too anonymous—*i.e.*, they are either a forgotten, rejected, or unknown class.

Admittedly the argument proposed in this comment against the *Wiseman* result contains some underlying optimistic premises. They are:

(1) The public as a whole can be educated to understand, appreciate, and sympathize with the problems of the mentally ill insofar as they relate to proper care and treatment.
(2) Contrary to the court's fears,[56] it is not thought the viewing public will exhibit either a morbid interest or immature reaction to a depiction of conditions in a mental institution unless the mode of presentation is extreme.
(3) If anything it is believed the public's humanitarian instincts will be triggered and at least certain members of the community who come into contact with this information (however harsh and unpleasant) will try to improve conditions as a result.

This is not to say, of course, that some people will not exhibit any or all of the above negative reactions. Some, instead of responding to the problem, will try to forget it by putting it at the back of their minds —but that is where it is anyway and it is hard to see how the publication of conditions would exacerbate the current sad state of affairs.

In conclusion, the likelihood of the humiliation suffered by identifiable inmates in the film, it is submitted, is outweighed by the benefit of showing the same film to general audiences. And the humiliation suffered by mental patients should be kept in perspective. Endemic to our society is a widespread "rejection mechanism"[57] of the mentally ill and their problems. Legislatures, courts, and people in general have all done their share of humiliating and/or rejecting the mentally ill.[58]

As a theoretical matter it may be asked which is more important to the institutionalized patient: the right to adequate care and treatment or the right to be free from humiliation of which he is not even aware?

56. *Id.* at 260, 249 N.E.2d at 618.
57. Discussions with Dr. Morton Birnbaum, Duquesne Law Review offices, November 18, 1971.
58. *See, e.g., The Right To Treatment—Encounter and Synthesis, supra* note 7, at 558.

The answer would seem to be self-evident. And one might ask further: how can damage to reputation be suffered by a group that is already held in generally low esteem by many members of society?

Conclusion

If conditions in mental hospitals are to be materially improved, and patients guaranteed adequate care and treatment, courts must be bold, aggressive, and inquisitive. Reflection and action must go hand in hand. Courts must first recognize that the right to treatment issue is one that they and not the legislature is most competent and best equipped to deal with initially. Second, they must be aware of existing approaches that have been taken by courts genuinely interested in protecting the interests of the mentally ill. They must have not only a sense of their primary duties as parens patriae to the mentally ill, but also a sense of priorities in terms of what is most important for the mentally ill. The court may only act insofar as issues are brought before it—but it is important for a court to appreciate priorities if more than one issue is raised, or if different interests much be weighed and balanced. In addition a court must understand certain social and psychological realities that often condition the effectiveness of the legal process in coming to grips with mental health problems.

It has been the endeavor of this comment to give a progressive court guidance, when and if confronted with the constitutional right to treatment issue. Undoubtedly substantial problems will confront a court in terms of implementation and enforcement even after recognition of the right occurs. Such problems are beyond the scope of this comment. This comment has only attempted to show why and how a court must act initially in the area, what its priorities should be, and how any action it takes need not be inconsistent with responsible views of the functions of the judicial process. The ultimate goal of adequate care and treatment for the institutionalized mentally ill may remain distant—but recognition and judicial awareness remains a necessary first step to improvement of conditions. After being so long ignored, even first steps constitute important improvements for the legal status of the mentally ill.

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