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The Right of People (Misfits) to Refuse (Avoid) Treatment (Control) in Medical Facilities (Closed Institutions)

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The Right of People (Misfits) to Refuse (Avoid) Treatment (Control) in Medical Facilities (Closed Institutions)[1]

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I. INTRODUCTION

For nearly a decade, the legal and medical professions have tripped over one another in their earnest effort to rush a right to treatment, either constitutional or statutory, to those they determine to be in need of help.[2] The treatment generally is intended to change a mental condition, state of mind or behavior deemed socially unacceptable.

They have moved hastily, so hastily, in fact, that they have overlooked or minimized:

1) The failure to identify the mental conditions of deviant behavior patterns as "diseases" or "syndromes" susceptible to treatment of a medical or psychiatric nature. For example, is alcoholism a disease? Homosexuality? Running away from home?

2) The inability to find a causal or even strongly correlative link between conditions identified as diseases and behavior patterns or states of mind to be altered. Is there a link between epilepsy and aggression? If certain people are lobotomized will race riots be stopped or curbed?

3) The absolute necessity of curtailing liberty to control conditions deemed unacceptable to persons other than the individual concerned, the cure being inherent in the confinement or "treatment." Heterosexual promiscuity is "cured" by separating persons of the opposite sex from one another on psychiatric wards.

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* Mr. Kaimowitz, a senior staff attorney for the federally-funded Michigan Legal Services Assistance Program, petitioned a Michigan court to prevent the use of psychosurgery on institutionalized persons. *See* Kaimowitz v. Michigan Department of Mental Health, 42 U.S.L.W. 2063 (July 31, 1973), discussed *infra*.

1. The material *outside* the parentheses in the title capsules the traditional view of the problem presented by treatment of persons involuntarily committed to, or held against their will in, public and private medical facilities. The material *within* the parentheses is intended to convey the author's view of both the problem and the solution in terms the author believes to be in keeping with the actual situation.

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

Anticipated physical assaults are prevented by placing people in solitary confinement. Anger is gentled by massive doses of tranquilizers or crippling brain surgery.

4) The interrelationship of environmental, genetic, political, economic, social, chemical, physical, biological and other factors in producing the unacceptable conditions. Can a person's financial poverty be a "symptom" of a "disease"? Can unemployment be overcome by behavior modification? Is alcoholism eradicable by medical care?[3]

The purpose of this article is to demonstrate that people, mostly persons labeled in one way or another as misfits, suffer legally and medically when they are subjected to treatment they have not requested, the benefit of which is dubious; they have a right to avoid the so-called right to treatment and to be free of state intrusion into their liberty and privacy, until it can be shown that their deeds are anti-social to the extent necessary to warrant attention from the criminal law process. Until such time, they should not have to relinquish their liberty to receive unrequested "treatment."[4]

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3. In Powell v. Texas, 392 U.S. 514, 526 (1968), the Supreme Court declared:

> It is one thing to say that if a man is deprived of alchohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.

4. The D.C. Circuit in *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973), considered the state's rationale for both confinement and treatment:

> [Where the] individual poses no danger to society, society's interference must be justified on the basis of the state's status as *parens patriae*. It is clearly recognized that the state may act in this capacity and that relaxed procedures may be justified in certain circumstances . . . and, indeed, it has been suggested that a duty to so act may occasionally exist. . . . It was not until the mid or late nineteenth century that therapy took its place beside detention in the American model. Of even more recent vintage is the realization that substantial deprivation of constitutional rights justified largely on behalf of the individual must be accompanied by a corresponding right to treatment. . . . Without some form of treatment the state justification for acting as *parens patriae* becomes a nullity. Yet even without considering the issue upon which the *parens patriae* rationale must either stand or fall—whether meaningful treatment is available, [citations omitted]—we note several problems in the current statute which seem to undercut the apparent justification. Consider the individual who is untreatable in the present state of medical science. Perhaps all that can be done for him under institutional tutelage is to care for his physical needs and/or subdue him

> One virtue of the criminal process is, at least, that duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom."[5]

While the helping professions have argued among themselves about everything from identification of "illnesses" to the reality of the "cures," they have held the misfits who are the objects of attention under control, primarily through institutionalization and medication. Thus they have made complex a proposition historically regarded as simple under the concepts of the United States Constitution—that no one can be deprived of liberty by the state unless provably dangerous to the persons or property of others, or subject to a required presence by the state, *e.g.*, the army. Unfortunately, now it is seen as necessary to discuss at the highest judicial levels whether persons can be so deprived of liberty for their own good, to receive the benefits of an amorphous right to treatment.[6]

Until the 1960's, the state was relatively free to shuffle around the helpless, the misfits, the oppressed, from one authority to another, and from one institution to another. With the coming of the civil rights movement, oppressed sectors of our society (racial minorities, the poor, women) began to successfully assert themselves through civil disobedience, and the courts listened. Advocates for the civil rights suits of the 60's soon became accustomed to speaking for such oppressed persons, and it was only a logical step to assume the same posture toward prisoners, mental patients, and institutionalized

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through use of drugs. Unless the right to treatment be interpreted to include ineffective treatment, an anomaly in itself, the *parens patriae* rationale would seemingly fail and indeterminate institutionalization would necessarily be a purely custodial function and justifiable only by other considerations.

The author agrees in substance with the problems raised by this analysis, but not with their solutions, since release, rather than "effective" right to treatment, in most instances, is the author's suggested "cure."

5. Powell v. Texas, 392 U.S. 514, 529 (1968).

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

children—those unable to reach neither the streets nor the courts. These misfits, deemed unable to speak for themselves, were made to appear incompetent due to physical, mental, emotional or environmental handicaps. Unfortunately, not only did the authority figures accept the labels placed on institutionalized persons, but their advocates did as well.[7] Instead of concentrating on the abuses and stigma these individuals suffered as a result of the various labels and institutional placements, the treatment advocates sought to help the misfits who were presumed unable to help themselves.

As a result, one offshoot of the advocacy of the civil rights movement was a judicially created right to treatment. Unfortunately, however, civil rights advocates who readily understood what was wrong with treating "niggers like children" cannot now see what is wrong with treating "children like niggers."[8] Had age, mental state, or institutional status been marked in a moral, if not legal sense, as a "badge of slavery," just as race is, treatment advocates would have championed the position of children or institutionalized persons as they had that of the blacks. They would have argued that the institutionalized can only be helped by fundamental societal change, rather than by the attempted adjustment of these individuals to an expected norm. Had treatment advocates looked more closely, they would have discerned that society plagues the "misfit" in many of the same ways and for many of the same reasons—dissent and deviancy—that it oppresses blacks and women.[9]

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7. *See* CLASSIFICATION OF EXCEPTIONAL CHILDREN (N. Hobbs ed, 1974); N. HOBBS, THE FUTURE OF CHILDREN (1975) (multi-volume study about the classification and labeling of children). *See also* Braginsky & Braginsky, *The Mentally Retarded: Society's Hansels and Gretals*, PSYCHOLOGY TODAY, Mar., 1974, at 18; Braginsky & Braginsky, *Psychologists: High Priests of the Middle Class*, PSYCHOLOGY TODAY, Dec., 1973, at 142, where the authors assert their belief that the entire social system classification of human beings is designed to favor the professionals over the lower socio-economic strata of society:

> (T)he entire system within which psychologists and psychiatrists operate is sociopolitical. The entire system of psychological classification, and labelling, and diagnosis is faulty . . . unreliable, but so are the general distinctions between the mad and the sane, the stupid and the smart.

Id. at 142.

8. *See, e.g.*, the change in position of Marian Wright Edleman, from the time when, as the only black woman attorney in Mississippi, she sought the integration of Jackson, Miss. schools in 1964, to her present posture vis-à-vis children as expressed in *Drive for the Rights of Children*, U.S. NEWS & WORLD REPORT, Aug. 5, 1974, at 42. *Cf.* J. FARBER, THE STUDENT AS NIGGER (Pocket Book ed. 1972).

9. *See* P. CHESLER, WOMEN AND MADNESS (1972); Mason, *Brain Surgery to Control Behavior*, EBONY, Feb., 1973, at 63; *cf.* Roth, Dayley & Lerner, *Into the Abyss: Psychiatric*

II. Judicial Right to Treatment

In less than a decade, the right to treatment concept has taken such a firm foothold in several lower courts that many judges now speak comfortably of such a right—as if it had always existed. As early as 1966, Judge David Bazelon declared that civil commitment without treatment would raise considerable constitutional problems under the due process, equal protection, and cruel and unusual punishment clauses of the Constitution.[10] Although the courts have recognized that commitment involves a "massive curtailment of liberty," even when done for a worthy purpose, they have rationalized this curtailment through a judically created right to treatment.[11]

The United States Supreme Court has been somewhat more cautious than the lower courts in their zest to supplant liberty with "treatment." Incarceration is to be limited for the most part to punishment and confinement for acts considered dangerous and offensive to society. In *Powell v. Texas*,[12] by the narrowest margin, the Court stood opposed to the labeling of closed institutions as "hospitals" simply to justify the long-term incarceration of individuals labeled "alcoholics." But more recently in *Wolff v. McDonnell*,[13] the Supreme Court showed itself susceptible to allowing "treatment" and "corrections" to erode substantive and proce-

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Reliability and Emergency Commitment Statutes, 13 Santa Clara Lawyer 400, 410 (1973) [hereinafter cited as Roth].

In 1899, Michigan barred women from being public prosecutors over a biting dissent complaining that women thereby were being treated as incompetents, akin to children, idiots and lunatics. Attorney General v. Abbott, 121 Mich. 540, 80 N.W. 372 (1899). In 1973, a Michigan woman was barred from seeking office on a local board of education, because she was only 15 years old. Human Rights Party v. Secretary of State for Michigan, 370 F. Supp. 921 (E.D. Mich. 1973), *aff'd*, 414 U.S. 1058 (1973). In its brief to the United States Supreme Court, the Michigan Attorney General, in support of his motion to dismiss or affirm the *Human Rights Party* case, relied on *Abbott* to justify keeping the young woman off the ballot.

10. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). Judge David Bazelon, a pioneer in the bridging of psychiatry and the law, apparently has become increasingly disillusioned about the contribution of psychiatry to the rendering of legal decisions. *See* Bazelon, *Psychiatry and the Adversary Process*, Scientific American, June, 1974, at 8.

11. *See* O'Conner v. Donaldson, 422 U.S. 563 (1975); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D. N.Y. 1973); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Nason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E.2d 908 (1968); Silvers v. People, 22 Mich. App. 1, 176 N.W.2d 702 (1970).

12. 392 U.S. 514 (1968). *See* note 3 *supra*.

13. 418 U.S. 539 (1974).

dural due process when it considered the rights of prisoners facing disciplinary hearings. The Court opted for "swift and sure . . . discipline" of prisoners alleged to be malcontents, grounding its decision on principles of behavior modification (B.F. Skinner) to justify denying full procedural due process to those who "would merely disrupt and exploit the disciplinary process for their own ends."[14] Clearly, the court did this for "the good of" the disrupters and disturbed inmates, as well as for the institution.[15] Justice Douglas in his dissent saw the obvious tenor as well as implications of the Court's position. Such a position is tenable only if incarcerated individuals are declared "nonpersons" not entitled to specific constitutional safeguards, but who remain eligible for some beneficence and sympathy from the rest of us.

> Every prisoner's liberty is, of course, circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards.[16]

This article hypothesizes that the fostering of a concept of a legal right to treatment endangers the personality, integrity, and humanity of every individual who by status or condition finds herself[17] rendered helpless and completely open to the whim of authority, be it benign or malignant. Before the coming of a "right to treatment,"[18] institutionalized persons should have or could have been protected by the enunciated and established freedom from state action and intrusion, particularly the first, fifth and fourteenth amendments. At law, as "persons," their allies should have been attorneys, not social workers, psychiatrists, psychologists and educators. Now, instead, they are to be protected from themselves by attorneys acting in concert with the so-called "helping" professionals. The impetus in this direction came from the 1967 Supreme

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14. *Id.* at 563.
15. *Id.*
16. *Id.* at 594 (Douglas, J., dissenting).
17. The author intends to use the feminine throughout this article when referring to woman or man generically.
18. *See* Goodman, *The Constitution v. the Snakepit*, N.Y. Times, Mar. 17, 1974, § 6 (Magazine), at 20 for an analysis of treatment advocates in the mental health field.

Court momentous leap forward to expand constitutional rights to juveniles. *In re Gault*[19] recognized that children were persons under the law and that the Constitution was for their benefit and protection as well as for their adult counterparts. Had the "treatment movement" then marshalled itself behind the fundamental concept that all persons in this country are entitled to the same constitutional rights and liabilities—no less and no more—the walls to many closed institutions would have come down. Instead, the walls have been strengthened, with the aid of treatment advocates, to perpetuate the confinement of misfits and deviants, persons believed to require something other than constitutional protection.[20] The anomaly created by the courts and treatment advocates should be obvious—the people believed to be in need of the most protection are to receive the least constitutional benefit.

III. Case Analysis

The remaining sections of this article will evaluate and consider several lower court opinions which have seen the clearcut connection between the Supreme Court's view expressed in *Gault* and the status of persons involuntarily detained in total institutions. The discussion to follow will be limited to those persons in total institutions where an "inherently coercive atmosphere" is found to thoroughly restrict one's potential for choice.[21] In such total institutions,

19. 387 U.S. 1 (1967).

20. Since the advocates themselves had trouble viewing misfits as people, it is not surprising that the Supreme Court soon veered from *Gault*'s promise in the more recent case of McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In *McKeiver*, the Court denied children a constitutional right to a jury trial in situations where one would have been afforded to adults. Children were not given their full panoply of rights in large measure because even their advocates did not consider them people at law—they should have had more assurance of constitutional protection rather than less.

21. There are, however, a few lower court decisions which have recognized the obvious connection between the Court's early position in *Gault* and the status of institutionalized persons confined for mental deficiences. *See* Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) and Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. & W.D. Mich. 1974). In these cases, the former concerning a juvenile mental defective, the latter two women alleged to be mentally ill, lower federal courts readily applied *Gault* to situations which concerned confinement for treatment rather than rehabilitation for waywardness. *See also* E. Goffman, Asylums (1961) for a comprehensive study of total institutions. In a Letter Opinion, Michigan Attorney General, Feb. 19, 1974, written in response to a lawsuit filed to halt medical research and experimentation on institutionalized children, Jobes v. Department of Mental Health, Civil No. 74-004-130-DC (Cir. Ct. Wayne Co., Mich., filed Jan. 19, 1974) the Attorney Gene-

confined individuals are never free from the state's authority, unlike the school child playing in the field or the soldier home on leave. They are under perpetual state control even if temporarily released to a halfway house, or placed on probation or parole, for they can generally be returned to the institution at the whim of public authority, and therefore, must constantly bend to avoid displeasing those in charge.[22]

A. *Stowers v. Wolodzko*[23]

In *Stowers v. Wolodzko*, a woman was placed under court order in a private mental health facility in Michigan after psychiatrists had her committed at the request of her husband. She was unwillingly transported to the hospital and forcibly injected with medication. The defendant-physician argued that his treatment of the plaintiff was required regardless of her failure to consent because of the contract he had made with the plaintiff's husband to provide medical care.[24] Although the court proceeded to focus the issue—whether a patient, once admitted to the hospital pursuant to (law), may be given treatment by the doctor without the patient's consent?—it never resolved the question. Instead the court avoided the issue by relying on a Michigan statutory provision which permitted treatment at *state* mental health facilities, prior to an adjudication of mental illness, but which permitted only detention, and not treatment, at *private* hospitals. Since Mrs. Stowers had been confined in a *private* hospital she received $40,000 in damages, but the *state* mental health facilities remained unaffected by the court's opinion.[25]

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ral confessed "that persons confined to institutions, particularly children, may not be able to give truly voluntary consent in such matters."

22. The author has corresponded with the State Department of Mental Health in Michigan to object to the summary return of retardates from halfway houses to institutions. I have met with the response that the Department does not have sufficient funds to conduct hearings before the transfers are made, a position discounted by the United States Supreme Court in Shapiro v. Thompson, 394 U.S. 618 (1969).

23. 386 Mich. 119, 191 N.W.2d 355 (1971).

24. *Id.* at 128-29, 191 N.W.2d at 359.

25. The court relied on MICH. STAT. ANN. § 14.811 (1969), *repealed by* Act of Aug. 6, 1974, Pub. Act No. 258, § 718. The Michigan Department of Mental Health specifically has defied the position of the state Attorney General in the past. The Director of the Department of Mental Health took the position that to prevent treatment of involuntarily committed persons until they finally were adjudged mentally ill would make hospitals little more than jails or prisons, and he could not assent to their use merely as detention centers, so he was

The *Stowers* court did, however, specifically refer with approval to an earlier Attorney General's opinion[26] which stated that all superintendents of hospitals, private or state, might be liable for assault or trespass for any treatment administered to persons prior to a final adjudication of mental illness "without the consent of the patient, other than that necessary to keep him on the premises and to prevent his injuring himself or others. . . ."[27]

B. *Winters v. Miller*[28]

Although *Stowers* recognized the issue and raised the right question, it remained unanswered by the Michigan court. In contrast, a recent Second Circuit opinion produced the right answer but by asking the wrong question. In *Winters v. Miller*, the Second Circuit in a divided opinion reversed the dismissal of a complaint for damages brought by a Christian Scientist who complained of being subjected to forced medication in violation of her first amendment rights. The court determined that the primary question was whether the appellant's constitutional rights under the free exercise clause were being violated when psychiatric medication was administered to her over her objections, which were religious in nature.[29] The religious issue then was employed by the Second Circuit to compel the defendant public authorities to bear a greater burden to justify the imposition of treatment, and the court found that the state had failed to meet its burden:

> [T]here is no evidence in the record that would indicate that in forcing the unwanted medication on Miss Winters the state was in any way protecting the interest of society or even any third party.[30]

This statement by the court indicates that the state may not rely on the doctrine of *parens patriae* to justify the treatment it imposed on Miss Winters, because it had never found her incompetent, nor

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informing superintendents that they could continue treatment. Letter of Dr. E. G. Udashkin to the Michigan Attorney General, Mar. 8, 1973. *Cf.* Powell v. Texas, 392 U.S. 514 (1968).

26. 2 Op. Att'y Gen. 1955-56, No. 2847, at 693 (1956), *cited in* Stowers v. Wolodzko, 386 Mich. 119, 132, 191 N.W.2d 355, 362 (1971).

27. *Id.*

28. 446 F.2d 65 (2d Cir. 1971).

29. *Id.* at 68.

30. *Id.* at 70.

given her the judicial opportunity to prove she was not mentally ill.

The Second Circuit majority in effect reiterated the right to refuse treatment based on religious grounds which had been articulated earlier by the Illinois Supreme Court in *In re Brooks' Estate*.[31] Both courts saw the matter in light of a refusal of treatment by a person with certain religious convictions and a prior history of practice in that religion. But clearly the burden was on the individual to prove both the religious conviction and its depth in order to avoid forced treatment. The reasoning employed in *Winters* leaves the disquieting impression that any person without religious convictions in opposition to medication, and certainly anyone adjudged legally incompetent, must tolerate and accept the treatment as administered by the institution. Fortunately, other courts have recently come to a different conclusion, at least in part.

C. *Bell v. Wayne County General Hospital*[32]

The psychiatric profession and related fields have long accepted the "necessity" of subjecting some persons to treatment against their will largely on the basis that these subjects are too disturbed to know what is good for them, and are therefore incapable of consenting to treatment even if they desire it.[33] The *Bell/Dalimonte* decision cut right into the heart of that premise. These consolidated cases were aimed in support of a right to refuse all treatments which physically intrude on the person of the patient, as well as the right

31. 32 Ill. App. 2d 361, 205 N.E.2d 435 (1965).

32. 384 F. Supp. 1085 (E.D. & W.D. Mich. 1974).

33. Refusal to "volunteer" for hospitalization, *i.e.*, requiring the state to hold one against one's will, perhaps constitutes the strongest statement a person can make against unwanted treatment. More than 4,000 of the 10,000 people held in Michigan in 1973, were held involuntarily, LINK, July 11, 1974 (a Michigan State Department of Mental Health Bulletin). Of the remaining 6,000, many undoubtedly were minors who had been "volunteered" for treatment by parents or guardians, and therefore ought to be regarded as persons involuntarily detained since they are deemed incapable of giving consent to their own hospitalization. Psychiatrists apparently are not adverse to treating people against their will, be they adults or children. A survey of one out of every six psychiatrists in the United States was undertaken by Roche Laboratories in 1973; it demonstrated that the profession as a whole does not object to coerced treatment, including forced hospitalization. Some 88% of those surveyed favored involuntary hospitalization; 70% favored further research in psychosurgical techniques and enforced use of psychiatric techniques for prisoners with antisocial personality disorders. Interestingly, the psychiatrists showed their "humanity" by standing 75% square with the establishment of a legal "right to treatment." Szasz, *Psychiatry: A Clear and Present Danger*, 58 MENTAL HYGIENE 17, 19 (Spring 1974).

to refuse hospitalization.[34] The therapies considered by the *Bell* decision were two commonly accepted modes of treatment—electroshock therapy and chemotherapy. Electroshock therapy is apparently easier for the medical profession to relinquish as a tool to "treat" or "control" persons alleged to be mentally ill, than is chemotherapy. Since electroshock therapy frequently results in serious negative side effects which can be easily linked to the therapy, physicians are less inclined to employ it without fully informing the patient of its risks and benefits.

> A common injury of the psychiatric patient is fracture of a vertebra in electric shock treatment. The fact that such injury occurs in as many as 30 percent of the cases makes it mandatory that the psychiatrist apprise the patient of the danger.[35]

A far more wide-spread and insidious form of treatment is chemotherapy, upon which the psychiatric profession relies so heavily.[36] Chemotherapy, is equally objectionable as electroshock therapy, but for different reasons. First, the state of the science is so immature that the effectiveness of this procedure is doubtful at best and negative at worst. In a recent study by a group of west coast psychologists it was found that drug therapy frequently causes many more

34. The action was directed at the procedures and standards for determining which individuals are to be subjected to institutionalization as allegedly mentally ill persons. Neither emergency commitment of those shown to be homicidally dangerous to public safety, nor permanent commitment of those found to be mentally ill after full hearing, was challenged in *Bell*. The target was the provision permitting temporary commitment of nondangerous, as well as of dangerous persons, in the belief that most of the people involuntarily held in state mental health facilities are treated as temporary commitments under the since-repealed MICH. STAT. ANN. § 14.811 (1969) *repealed by* Act of Aug. 6, 1974, Pub. Act No. 258, § 718. The *Bell* case, like Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), now provides safeguards to permit mental patients the opportunity to protest against their being confined in mental hospitals, without fear that they will lose their constitutional rights in the process.

35. Feld, *Mental Health and the Law: The Psychiatrist's Liability for Malpractice, Mental Health Digest*, reprint from 3 NATIONAL CLEARINGHOUSE FOR MENTAL HEALTH INFORMATION 59 (Sept. 1971).

36. *See* Morris & Luby, *Civil Commitment in a Suburban County: An Investigation by Law Students*, 13 SANTA CLARA LAWYER 518 (1973) [hereinafter cited as Morris & Luby]. For a more extensive discussion of the legal issues concerning different forms of therapies see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972). In a study in one Michigan county it was found that electroshock therapy was used as treatment in only 4% of the cases, while chemotherapy was employed in 50% of the cases. Morris & Luby, *supra* at 527. In nearly 40% of the other cases studied, no data were available on the form of treatment but it could be presumed that in many of those instances chemotherapy was employed.

problems than it solves. Second, no two patients appear to react alike to a particular psychotropic drug.

> The hope that subtypes of schizophrenics might be defined on the basis of their specific response to drugs seems rather remote, at least if one considers responses among various types of phenothiazines. Until we know more about the fate of these drugs in the body, and what this may mean in regard to clinical outcome, clinicians must continue to use these drugs largely on an empirical basis.[37]

Finally, it is left to one of the leading advocates of psychosurgery to make the strongest case against the use of chemotherapy, especially when it is applied contrary to the desires of the patient. Dr. Vernon H. Mark has this to say about chemotherapy:

> Although a single dose of any antipsychotic drug is seldom dangerous, the administration of these agents over a period of weeks or months may cause a number of side effects and complications. A syndrome resembling Parkinson's disease is common and some of the drugs may occasionally produce a fatal leukopenia.[38]

Indeed, it would seem that a person would have to be "crazy" to pay the price described by Dr. Mark for prolonged chemotherapy.[39]

What the Michigan court did in *Bell* was recognize that at least until proven mentally ill, a patient ought to have the right to avoid such treatment and untoward side effects if she wishes to do so. Both petitioners, Annette Bell and Gloria Dalimonte, had been hospitalized on numerous occasions; neither had ever been finally adju-

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37. Hollister, *Specific Indications for Different Classes of Phenothiazines*, 30 ARCH. GEN. PSYCHIAT. 94 (1974).

38. Mark, *Psychosurgery v. Anti-Psychiatry*, 54 B.U.L. REV. 217, 226 (1974). Dr. Mark then went on to quote a Special Report of an FDA Task Force which found:

> Because of the lack of adequate substitutes for the neuroleptic drugs in the treatment of psychosis, tardive dyskinesia has been accepted as an undesirable but occasionally unavoidable price to be paid for the benefits of prolonged neuroleptic therapy.

Id. at 226, *quoting* American College of Neuropsychopharmacology—FDA Task Force Report, *Neurological Syndromes Associated with Antipsychotic Drug Use: A Special Report*, 28 ARCH. OF GEN. PSYCHIAT. 463, 465 (1973).

39. In Joseph Heller's novel, *Catch 22*, combat pilots who say they are too crazy to fly are judged sane and sent aloft again, because they rationally have reasoned that a person has to be insane to fly combat missions. Of course, if the individual does not complain, he continues to fly combat missions—either way the pilots continue to fly. Undoubtedly, Catch 23 is the situation described in the text.

dicated mentally ill, and both had been subjected to intrusive medical therapies against their will, Bell to chemotherapy and Dalimonte to electroshock therapy. Although the *Bell* court recognized that Michigan law permits involuntary treatment in state hospitals during pre-hearing detention and temporary commitment, it realized the danger of leaving definitions of "treatment" open to the whim of medical imagination:

> The term "treatment" is undefined in the act, thus its scope is potentially unlimited.[20] ***Until a recent Michigan state court decision psychosurgery, the most grotesquely intrusive form of treatment, was considered within its purview. Kaimowitz v. State Department of Mental Health 42 L.W. 2063 (July 31, 1973).[40]

The *Bell* court placed in focus, without citation to precedent, the basis for an individual's right to refuse involuntary treatment. The Court found that on its face the Michigan statute[41] clearly implied that one temporarily committed could be forcibly subjected to physically intrusive methods of treatment extending to electroshock therapy as well as chemotherapy. Since the language of the statute expressly prohibited coercive treatment for emergency detentions, but ignored other forms of commitment, the court reasoned that this obvious silence as to temporary commitments was an effective endorsement of coercive therapies for such commitments. In this implication the court found:

> [a] sufficient basis to declare the pre-hearing detention and temporary commitment provisions of M.C.L.A. § 330.21 violative of the constitutional right to privacy and due process of law insofar as they permit involuntary treatment of a physically intrusive nature.[42]

Unfortunately for the rights of persons subjected to involuntary commitment in Michigan, the state legislature did not receive the constitutional message of the *Bell* court. The new mental health code, passed without opposition in both houses, permits involuntary treatment in the form of chemotherapy *after* a preliminary hearing to determine whether there is probable cause to believe a person is

40. 384 F. Supp. at 1100 & n.20.

41. MICH. STAT. ANN. § 14,811 (1969), *repealed by* Act of Aug. 6, 1974, Pub. Act No. 258, § 718.

42. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1100 (W.D. & E.D. Mich. 1974).

mentally ill and in need of treatment under the act.[43] Such "treatment" is permitted *before a full adjudication* to determine whether a person is in fact subject to involuntary commitment.[44] The Michigan legislature made no attempt to conform to the constitutional interpretation made by the *Bell* court.

IV. Conclusions

Perhaps the greatest need for people figuratively or literally behind a wall is to feel they are in touch with a real world, an outside world, a world trying to understand. That was and is the one valid offering an "outsider" can make to an oppressed person, a white to a black, a man to a woman, an adult to a child. Surely it is more difficult for the institutionalized to share that feeling as long as they are under observation 24 hours a day by the very authorities who are hauled into court for oppressing them. But they need not be additionally betrayed by advocates who won't help tear down the walls, but instead only promise to make them prettier.

The walls can come tumbling down, as did some of the walls of segregation after the United States Supreme Court recognized that black children were being denied equal educational opportunity as long as a state could hide behind the legal fiction that blacks were getting separate but equal treatment.[45] From that time on, attorneys especially shared in the pleasure of tearing down needless legal barriers which stood in the way of blacks, women, poor, Indians, and Latinos. It is hardly surprising, then, that almost all of the cases cited and discussed herein, concerning the kind of care and treatment people are afforded behind real walls and fences, burgeoned *some time after* the start of the movement to clear needless figurative fences between neighbors.

At the start of that movement to tear down the barriers between various classifications and groupings of people—when Rosa Parks

43. Act of Aug. 6, 1974, Pub. Act No. 258, § 718(1) which reads:
Chemotherapy shall not be administered to an individual who has been hospitalized by medical certification or by petition pursuant to chapter 4 or 5 until after the preliminary court hearing has been held unless the individual consents to such chemotherapy or unless the administration of such chemotherapy is necessary to prevent physical injury to the individual or others.

44. *Id.*

45. Plessy v. Ferguson, 163 U.S. 537 (1896), *rev'd by* Brown v. Board of Educ., 347 U.S. 483 (1954).

refused to go to the back of that bus in Montgomery, Alabama—the direction clearly was toward rights, and away from *parens patriae* protection such as that afforded to blacks in the South. No one advocating for them doubted that the black children in *Brown v. Board of Education*[46] were entitled to rights, not protections.

But by the 1967 *Gault* decision, the United States Supreme Court was becoming worried that children *as such* were not getting enough protection. Some lower courts and the Supreme Court itself in *Kent v. United States*[47] showed concern earlier, but did not fully articulate their position. In *Gault*, however, the Supreme Court, under the guise of granting rights to children, actually limited them by considering children as "persons" only for some purposes under the umbrella of the United States Constitution. Instead, children were to be promised better protection than they had received before. By the time the United States Supreme Court decided that children were not constitutionally entitled to a jury trial when they faced incarceration,[49] the legal path to be taken for this group of misfits was made clear—more protection, rather than more rights.

The treatment advocates accommodated. Instead of the rights they sought for blacks or women or poor people, whose representative organizations never would have stood for more *protection*, they traded the "liberty" of their new clients for a "right" to "treatment," manufactured out of whole cloth, albeit not constitutional material. The advocates did not have to see, hear or speak the evil; as a matter of fact, because of the difficulty of access, they often did not have to see, hear or speak to their clients either.

This article has suggested that it may be more important in the long run for people behind walls—the lame, the halt, the blind, the too young and the too old, the defective and the deviant—to come fully under the Constitution and be recognized as persons for all purposes in courts of law—at least legally unstigmatized by such labels as "infants" and "incompetents."[50] It has recommended that the newly discovered "oppressed" people, by refusing treatment,

46. 347 U.S. 483 (1954).

47. 383 U.S. 541 (1966).

48. 387 U.S. 1 (1967).

49. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

50. *See, e.g.*, FED. R. CIV. P. 17(c) which treats incompetents and infants alike, and requires them to appear in court by next of friend or guardian, vesting full power, including the selection of counsel, in the individual guardian and in the court. *But see* Buckholz v. Leveille, 37 Mich. App. 166, 194 N.W.2d 427 (1971).

could trigger access into courts without having their position undermined by guardians, parents or agencies ostensibly present to assist them.

If they are accorded the full benefit of the Constitution, they will not need the "right to treatment," nor "privilege" as it should more properly be denoted. Instead, like all other people they will have the liberty guaranteed to them by the Constitution, perhaps to use in ways that are no more pleasing to their advocates than to their overseers, but theirs to use nonetheless.

In effect, it is recommended that the institutionalized refuse the handout called "treatment" granted to them under, what is for them already, a therapeutic state, and strive legally to get that to which they are entitled by and under law. Their "health" will be weighed and measured by society—to the extent that they are able to establish their entitlement to rights long ago accorded to the rest of us, *e.g.*, to be free from state intrusion into their minds and bodies, to be free from cruel and unusual punishment even when it is disguised as treatment, to be free from assault, battery and false imprisonment.

Misfits must be recognized as persons and given full access to courts to have *their* claims heard. And only when the law is fully willing to hear what *they* express as being good for them, instead of what others—state or parent, authority or advocate—say must be provided, will the fourteenth amendment to the United States Constitution come to fruition for all people in this nation—those who fit, as well as those who don't.