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Constitutional Law: Right to Adequate Psychiatric Treatment--An Illusory Guarantee for the Dangerous Patient

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illustrate that it has fulfilled its proclaimed object with mathematical precision. Such a test would promote equality of the sexes and would categorically reject presumptions based on sex alone. It would demand that compensatory programs be designed so that the benefited class coincides exactly with the disadvantaged class. Finally, the strict scrutiny test would oversee the elimination of the abuses and the adverse effects of classes defined on the basis of sex alone.

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CONSTITUTIONAL LAW: RIGHT TO ADEQUATE PSYCHIATRIC TREATMENT – AN ILLUSORY GUARANTEE FOR THE DANGEROUS PATIENT

Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974)

In January 1957, Kenneth Donaldson, plaintiff-appellee, was involuntarily civilly committed to the Florida State Mental Hospital.[1] Fourteen years later he secured his release through a habeas corpus proceeding,[2] claiming a constitutional right to receive treatment or be released.[3] Additionally, he alleged damages resulting from a deprivation of that right and concomitant bad faith detainment by his attending physicians.[4] Guided by the instruction of the

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stricter standard of review that will assert equality and permit gender-based compensatory statutes to stand only if narrowly drawn. 94 S. Ct. at 1737 (Brennan, J., dissenting).

1. Donaldson was diagnosed as a "paranoid schizophrenic," 493 F.2d 507, 509 (5th Cir.), *cert. granted,* 95 S. Ct. 171 (1974).

2. The action was filed pursuant to 42 U.S.C. §1983 (1970), which 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."

3. The original complaint, filed as a class action on behalf of all patients on Donaldson's ward, sought: damages to plaintiff and the class, habeas corpus relief for the entire class, and declaratory and injunctive relief requiring the hospital to provide adequate treatment. Subsequent to Donaldson's release and dismissal of the class action by the district court, the complaint was first amended praying for damages and injunctive relief to enjoin enforcement of Florida's civil commitment statutes. The prayer for injunctive relief was subsequently abandoned and the action resulted in a complaint for damages only. 493 F.2d at 512.

4. Appellants, against whom judgments were rendered, were Dr. Gumanis, plaintiff's attending physician from 1959 until 1967, and Dr. O'Connor, plaintiff's attending physician from 1957 until 1963 and superintendent until his retirement February 1, 1971. Jury verdicts were also returned in favor of three others: Dr. Francis G. Walls, acting superintendent after O'Connor's retirement; Dr. Milton J. Hirschberg, who succeeded O'Connor as permanent superintendent in June 1971; and Emmett S. Roberts, Secretary of the Florida Department of Health and Rehabilitative Services when Donaldson filed his first amended complaint. 493 F.2d at 510 n.2.

district court judge, which stated that plaintiff had a constitutional right to treatment,[5] the jury returned a verdit for the appellee.[6] On appeal, the Court of Appeals for the Fifth Circuit affirmed and HELD, the due process clause of the fourteenth amendment guarantees a right to treatment to nondangerous involuntarily civilly committed mental patients.[7]

Traditionally, laws regarding the mentally ill have reflected the current state of medical knowledge and sense of community responsibility.[8] Prior to the evolution of public mental institutions, developed collaterally with the increasing need for involuntary commitments,[9] the noncriminal[10] mentally ill were entrusted to the family or to public guardians.[11] Since concern centered on the potential danger to the community from the individual, few rights of the mentally ill were recognized.[12] Changing societal attitudes regarding the mentally ill, however, were reflected in a Massachusetts case indicating that the propriety of detention must be determined on an individual basis, balancing the community's need for safety with the massive encroachment detention thrusts upon the individual's liberty.[13] Following this judicial recognition of minimum due process rights of an involuntarily committed individual, justifi-

5. *Id.* at 518. Florida also has a statutory right to treatment, but it is difficult to determine from the statute the degree of adequate treatment required. The statute merely says: "Each patient in a facility shall receive treatment suited to his needs, which shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community." FLA. STAT. §394.459(4)(a) (1973). This provision, however, was not the basis of the Fifth Circuit's opinion. 493 F.2d at 507.

6. The verdict awarded Donaldson $17,000 in compensatory damages and $5,000 in punitive damages against O'Connor; $11,500 in compensatory damages and $5,000 in punitive damages against Gumanis. 493 F.2d at 513.

7. 493 F.2d at 527. The court was not consistent in its use of the term "nondangerous." At one point the court said: "We turn now to the novel and important question whether civilly committed mental patients have a constitutional right to treatment." *Id.* at 518. Elsewhere the opinion read: "We hold that a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." *Id.* at 520. In summary, however, the court held: "[W]here a *nondangerous* patient is involuntarily civilly committed to a state mental hospital, the only constitutionally permissible purpose of confinement is to provide treatment, and . . . 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 (emphasis added).

8. F. LINDMAN & D. MCINTYRE, THE MENTALLY DISABLED AND THE LAW 10 (1961).

9. *See* 1 B. ENNIS & P. FRIEDMAN, LEGAL RIGHTS OF THE MENTALLY HANDCAPPED 38 (1973).

10. See Morris, *"Criminality" and the Right to Treatment,* 36 U. CHI. L. REV. 784, 786 (1969), for the contention that a person committed following acquittal by reason of insanity and a criminal developing mental illness while serving his sentence should receive the same treatment as involuntarily civilly committed individuals.

11. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 8 (1971).

12. *See generally* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures,* 79 HARV. L. REV. 1288 (1966).

13. Matter of Josiah Oakes, 8 Law Rep. 122, 125 (Mass. 1845). In conformity with its recognition of due process standards for the mentally ill, the court indicated that detention for therapy as well as for the protection of society is justifiable.

cation for commitment began to reflect an attitude based on the concept of *parens patriae*,[14] which is characteristically more sensitive to an individual's well-being.[15] Although community attitudes continued to stress the dangerousness of a mental patient,[16] individuals began to be afforded due process rights regarding notice and a fair hearing,[17] relief from illegal confinement,[18] a right to counsel,[19] and detention in a more therapeutic atmosphere than a prison affords.[20] The right to treatment, however, was not a current issue until a 1960 article[21] recommended judicial adoption of that right.[22] The author asserted that involuntary civil confinement without adequate treatment is similar to confinement for criminal activity, in the sense that both provide little more than custodial care.[23]

This plea for judicial recognition of a constitutional right to treatment, however, went unheeded. Following initial statutory establishment of a right to treatment,[24] courts not only endorsed that statutory right, but hesitantly

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14. *Parens patriae* conceives of the state as the proper guardian to supply treatment, custody, and care for mentally and physically incapacitated individuals. *See* Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 956-60 (1959).

15. Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140-41 (1967).

16. Concern centered more on fear of the mentally ill regarding community safety than on the individual's need for treatment and rehabilitation. This fear was indigenous to inadequate knowledge of the mentally insane. F. LINDMAN & D. MCINTYRE, *supra* note 8.

17. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972) (state civil commitment procedures constitutionally invalid for failing to require, *inter alia*, effective notice of charge and right to jury trial); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971) (statute devoid of due process requirements for commitment is unconstitutional); State *ex rel.* Fuller v. Mullinex, 364 Mo. 858, 269 S.W.2d 72 (1954) (notice and hearing prior to commitment required by due process of law).

18. Matter of Josiah Oakes, 8 Law Rep. 122 (Mass. 1845).

19. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

20. *See, e.g.*, Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1959); *In re* Maddox, 351 Mich. 358, 88 N.W.2d 470 (1958).

21. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960). For a discussion of the current law regarding right to treatment, see Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1316-58 (1974).

22. Birnbaum, *supra* note 21, at 503.

23. *Id.* at 502. Implicitly passive in nature, custodial care similar to that given a criminal is insufficient to effect a cure of the mentally ill, whose sickness is not and should not be considered criminal. Cure or improvement in one's mental condition is accomplished by adjusting, through affirmative action, an individual's current mental state. Adequate treatment is the logical affirmative action to engender such a change.

24. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967). *Rouse* involved a habeas corpus action challenging the propriety, without treatment, of an involuntary civil commitment following acquittal by reason of insanity, pursuant to D.C. CODE ANN. §24-301 (Supp. V, 1972). The court based its decision that the petitioner was entitled to adequate treatment on the narrow statutory grounds presented in the 1964 Hospitalization of the Mentally Ill Act, providing: "[A] person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment. The administrator of each public hospital shall keep records detailing all medical and psychiatric care and treatment received by a person hospitalized for a mental illness and the records shall be made available, upon that person's written authorization, to his attorney or personal physician." D.C. CODE ANN. §21-562 (1967). *Rouse* signaled a trend toward estab-

indicated the possible existence of a constitutional right to treatment.[25] This trend culminated in the Alabama district court case of *Wyatt v. Stickney*,[26] which held for the first time that patients involuntarily civilly committed to an institution for treatment have a constitutional right to treatment effectuating a realistic opportunity for improvement.[27] Three other district courts have directly addressed this issue. Two have reaffirmed the right to treatment,[28] with another finding to the contrary.[29]

The instant case presented a case of first impression for a United States Circuit Court of Appeals.[30] Reiterating the distinction between commitment based on a police power rationale and one based on a *parens patriae* theory,[31] the court followed the *Wyatt* rationale in classifying commitment for non-dangerous individuals[32] as a logical exercise of the *parens patriae* authority of the state. To adopt, then subsequently abandon this magnanimous theory by failing to supply treatment to those deprived of their liberty by involuntary civil commitment, the court reasoned, vitiates the very fundamentals of due process.[33] Modern societal theories justifying commitment turn on the need to

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lishment of a constitutional right to treatment when the court asserted in dicta that a right to treatment probably exists on broader constitutional grounds. 373 F.2d at 451, 453, 455.

25. *E.g., In re* Curry, 452 F.2d 1360 (D.C. Cir. 1971); Dobson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967); Tribby v. Cameron, 379 F.2d 109 (D.C. Cir. 1967) (all remanding for a determination of the adequacy of treatment); Nason v. Superintendent, 353 Mass. 604, 233 N.E.2d 908 (1968) (indicating that confinement without treatment may violate equal protection and due process rights).

26. 325 F. Supp. 781 (M.D. Ala. 1971).

27. *Wyatt* presented a class action initiated by guardians of patients committed to Bryce Hospital, Tuscaloosa, Alabama. In determining that inadequate treatment deprived patients of their constitutional rights, the court withheld judgment, allowing state and hospital officials six months to implement an adequate treatment program. *Id.* at 785. Upon expiration of the six-month period, the court, assisted by numerous amici, determined that defendants had failed to promulgate and implement an adequate treatment program and established minimum constitutional standards for adequate treatment of the mentally ill. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

28. One case was factually similar to *Wyatt*. Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973) (agreeing with *Wyatt* that a constitutional right to treatment exists for civilly committed mental patients). The other decision held that civilly committed mentally retarded individuals have a right to treatment. Welsch v. Likens, F. Supp. (D. Minn. 1974).

29. Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972). The court's decision turned and was ultimately decided, however, on the basis that it was brought as a class action, since the court was unwilling to prescribe treatment standards equally applicable to all hospitalized, mentally ill individuals. *Id.* at 1343-44.

30. The Fifth Circuit faced the resolution of prior conflicting views within the circuit. *Compare* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *with* Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

31. Three distinct bases for commitment have been recognized: (1) danger to self; (2) danger to others; (3) need for treatment. The police power rationale encompasses danger to others, need for treatment is a *parens patriae* rationale, and danger to self contains aspects of both rationales. *See* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L .REV. 1288 (1966).

32. *See* note 7 *supra*.

33. 493 F.2d at 521.

rehabilitate the mentally ill, enabling them to assume productive roles in society.[34] Legislation has been enacted nationwide consonant with this objective.[35] Confinement, however, involves a considerable curtailment of a person's liberty, for which due process requires justification.[36] Allowing the government to retain the authority to confine an individual not criminally punishable requires that the individual receive a benefit sufficient to justify his confinement.[37] Considering the purpose of commitment, the logical *quid pro quo* is adequate treatment. Therefore, absent treatment adequate to comport with the due process requirement that application of state legislation bear a rational nexus to its intended purpose, involuntary commitment is constitutionally proscribed.[38] Donaldson's rights coupled with the restraint on his liberty[39] override the state's interest in decreasing hospital expenditures by providing mere custodial care. Consequently, involuntary confinement of the mentally ill can be justified only by concurrently guaranteeing rehabilitative treatment.[40]

However, the court's summary holding that a *nondangerous* involuntarily civilly committed patient has a constitutional right to treatment, creates a dichotomy[41] that could effectively permit the state to avoid providing treatment merely by showing that a patient is dangerous.[42] Therefore, whether the court intended to limit the application of the instant case to nondangerous patients is critical. Interpreting the principal case in light of *Wyatt*,[43] future

34. This is reflected in the curent advancement of general standards of treatment and extra-hospital facilities designed to reintroduce the patient into society gradually and effectively. *See* Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623 (1971).

35. S. BRAKEL & R. ROCK, *supra* note 11, at 66-154.

36. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

37. *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L. J. 848, 865-70 (1969), for a formulation of the *quid pro quo* theory applicable to civil commitment of the mentally ill.

38. "At the least due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972) (holding that an individual acquitted by reason of insanity may not be detained beyond a reasonable time without initiating civil commitment procedures in lieu of release). In dicta, however, the Court noted that the purpose of commitment is to aid the individual in obtaining competency through custodial care or compulsory treatment. *Id.* at 738. Although the issue has never been directly considered, by asserting that provision of either custodial care or treatment will satisfy the reasonableness test of commitment the Court implied that a constitutional right to treatment does not exist. This follows, since custodial care is substantially insufficient to effect a cure and be regarded as treatment. See note 23 *supra.*

39. Paraphrasing the Supreme Court in Humphrey v. Cady, 405 U.S. 504, 509 (1972), the present court noted: "[T]he indisputable fact that civil commitment entails a 'massive curtailment of liberty' in the constitutional sense." 493 F.2d at 520.

40. "The purpose of involuntary hospitalization is treatment, not punishment." Rouse v. Cameron, 373 F.2d 451, 452 (D.C. Cir. 1966).

41. *See* note 7 *supra.*

42. Donaldson himself was not dangerous. 493 F.2d at 520-21.

43. The Fifth Circuit depended heavily on the reasoning of the *Wyatt* court regarding minimally established institution-wide standards of adequate treatment. Therefore, because

courts could justifiably conclude that the insertion of the term "nondangerous" is applicable solely to a determination of the appropriateness of release. Thus interpreted, the dangerous-nondangerous dichotomy would not be a consideration in determining the existence of a right to adequate treatment. Instead, the dangerousness or nondangerousness of a patient would become relevant only when applied to a determination of the desirability of release from confinement. The instant court based liability of the defendants primarily on their numerous refusals to release Donaldson,[44] indicating an alternative due process requirement of release in the absence of treatment.[45] Therefore, conditioning a right to release, rather than a right to treatment, on a dangerous-nondangerous determinative is more consistent with the present court's implicit affirmance of *Wyatt*. Holding otherwise, a *dangerous* involuntarily civilly committed mental patient would be accorded a substantially weaker standard of due process, because of the indefiniteness of his sentence, than an imprisoned criminal.[46]

Therefore, without treatment, a hospital, like a prison, would serve only the public's interest in restraining dangerous persons. The state, however, is not justified in predicating indefinite confinement of the mentally ill merely upon an individual's dangerousness, since maximum sentences are set for criminal offenses after which even a dangerous person must be released.[47] Clearly then, indeterminate commitment without treatment for persons not criminally liable is irreconcilable with concepts of fundamental fairness.[48]

Wyatt was a class action, implicit in the present court's advocation of judicially established minimum standards of treatment for all is the inescapable fact that dangerous as well as nondangerous patients should be entitled to the same minimal level of adequate treatment. 493 F.2d at 519 n.9, 521, 522 n.22, 526.

44. Appellee's argument asserted that affirmance of the trial court order would not create a constitutional right to treatment. Instead, appellee contended that because Donaldson was not dangerous, failure to release him in lieu of providing treatment adequate to comport with the purpose of his commitment amounted to a violation of due process. Brief for Appellee at 34-35.

45. The principal court held the district court's instructions No. 37 and No. 38 valid. Instruction No. 38 read: "The purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is *not dangerous to himself or others*. Without such treatment there is *no justification*, from a constitutional standpoint, *for continued confinement*." 493 F.2d at 518 (emphasis added).

46. It should also be noted that an imprisoned criminal who is determined mentally ill may be indefinitely confined, subject to certain due process rights. *See* Morris, *The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFFALO L. REV. 393, 394 (1969).

47. That a criminal is dangerous at expiration of his sentence is not relevant to his release, since he has theoretically expunged his debt to society by serving the required sentence. If, however, he is considered mentally ill and dangerous when his sentence expires, a prisoner is entitled to a jury review to determine his sanity before he can be involuntarily civilly committed beyond his original criminal sentence. Baxstrom v. Herold, 383 U.S. 107 (1966).

48. *See generally* Robinson v. California, 370 U.S. 660 (1962), equating confinement of the ill without treatment with punishment. Because the court stated that confinement without treatment constitutes punishment, if a state does not give adequate treatment the only other alternative to negative the statement would be to release the patient. However, re-

Additionally, indeterminate commitment is not justified for the civilly committed mentally ill on grounds of dangerousness alone, for a dangerous criminally committed patient must be released if his dangerousness is not a result of this mental deficiency.[49]

In consequence of the applicability of the instant holding to nondangerous patients, determining the factual circumstances ambiguously embraced by the instant court will require judicial clarification. The *Wyatt* court labored to develop minimal standards, which were set forth in a sequal to *Wyatt*.[50] These standards of the adequacy of treatment applied to all mental patients; no distinction was drawn in the standards to account for a patient's dangerous tendencies.[51] Noting the *Wyatt* court's reasoning, a Georgia court in *Burnham v. Department of Public Health*,[52] disagreed and held that determining general standards of adequate treatment was beyond judicial competence.[53] In the wake of these contrary decisions the present court's resolution of the issue is unclear and as a result, highly limited.[54] A restrictive interpretation of the principal holding indicates that it implicitly condones the dispensing of mere custodial care to a dangerous patient, with little hope of rehabilitation substantial enough to warrant a return to the community. The practical effect would be to expand the discretionary use of police power to maintain control of the mentally ill. A state would simply be required to demonstrate a patient's proclivity toward dangerous behavior; an aspect indigenous to the sane as well as insane. Once shown, a state could legitimately restrain an individual in the name of public welfare, while withholding treatment necessary to effect a cure or improvement in the patient's mental condition.

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leasing the patient would burden society's economic structure twofold: (1) the individual would remain substantially unproductive, and therefore (2) society's cost would increase through simultaneous economic support for the individual and loss of his productivity contribution. Consequently, the only feasible alternative to satisfy *Robinson's* command and the public welfare is to provide adequate treatment for a sick person involuntarily civilly committed. *See, e.g.*, Powell v. Texas, 392 U.S. 514, 566-69 (1968) (dissenting opinion); Robinson v. California, 370 U.S. 660, 675-77 (concurring opinion).

49. Overholser v. O'Bierne, 302 F.2d 852 (D.C. Cir. 1961); Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959) (both cases stating that continued statutory confinement based upon dangerous propensities is warranted only if those propensities are related to or arise out of abnormal mental condition).

50. Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972), setting forth comprehensive minimum standards to be implemented pursuant to the court's previous order in Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).

51. Because the court permitted a class action, presumably representing some dangerous patients as well as nondangerous ones, 325 F. Supp. at 781-82, it is logical that the court would make no distinction between a dangerous and nondangerous patient in setting forth minimum standards of adequate treatment. Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972).

52. 349 F. Supp. 1335 (N.D. Ga. 1972).

53. *Id.* at 1343. The court, however, suggested that a determination of adequacy of treatment on an individual basis could be countenanced. *Id.*

54. The principal court, however, appeared to concur in the standards set forth in Wyatt v. Stickney, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972), which required the same degree of treatment for dangerous as well as nondangerous patients. 493 F.2d at 527.