North Carolina Central Law Review

Volume 7
Number 1 *Volume 7, Number 1*

Article 17

10-1-1975

Donaldson v. O'Connor: Constitutional Right to Treatment for the Involuntarily Civilly Committed

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tional right; as the Supreme Court of Alaska has shown in *Ravin* where the right to privacy was expanded to even protect the use of marijuana.[58] Therefore, state interest in invading the home to prevent the use of marijuana must be motivated by some perceptible need to protect the public at large or to protect the individual user against a genuine threat to his health and welfare; and no such interest was shown in this case.

In a recent law review article it was suggested that a society that allows its citizens some freedom to pursue sensual happiness with minor harm to themselves might choose a regulatory scheme similar to that used for control of alcohol. It was further stated that

> . . . the preferable solution is no doubt legislative and there are some signs that reform is coming. But until that time close judicial scrutiny of existing laws might at least afford some protection to what many agree is a protectable interest: The right of an individual, in the privacy of his home, to indulge in conduct that is harmful, if at all, only to himself.[59]

The Supreme Court of Alaska should be commended for taking the initial bold step in holding that the right of privacy which surrounds the home is so dear as to protect even the possession and use of marijuana. This opinion can be a model and can serve as a resource guide for writing the privacy argument to include protection of private use of marijuana in other jurisdictions.

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58. 48 N.Y.U.L. REV. at 693.
59. *Id.* at 760.

Donaldson v. O'Connor: Constitutional Right to Treatment for the Involuntarily Civilly Committed

I. INTRODUCTION

The law has deemed it in the best interests of society to commit the mentally ill. In effect, to remove a certain segment of the population that is not able to adequately cope with the realities of day to day living. That segment is so small,[1] and the line of proof between sanity and insanity so nebulous,[2] that the individual liberties guaranteed to each citizen within that group have become jeopardized.

1. In 1972, 404,000 patients were admitted to state mental institutions: 41.8 percent were involuntarily committed. Note, *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193 (1974).
2. The Supreme Court is not sure that "mental illness" can be defined easily: "As-

The case of *Donaldson v. O'Connor*,[3] decided in June of 1975 by the Supreme Court, presented the question of whether or not the fourteenth amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals. The Court held that the Constitution did indeed guarantee such a right, but failed to go further in its deliberations. Nevertheless, the Court resoundingly came down in favor of those persons who were committed against their will, and blew the breath of life into those mental patients who, like Donaldson, may have been forced to stay in state hospitals long after they should have been released.

II. THE CASE

Kenneth Donaldson was civilly committed to the Florida State Hospital at Chattahootchee in January of 1957,[4] diagnosed as a paranoid schizophrenic. There had been a brief hearing before a county judge[5] in Pinellas County, Florida,[6] on the petition of Donaldson's father.[7] Twelve days later he was admitted to the state hospital, where he remained for fourteen and one half years. Throughout that time, Donaldson repeatedly denied that he was mentally ill. He requested release, continually asserted that he was dangerous to no one, including himself, and demanded adequate treatment for his supposed illness.[8] Although he had been committed for "care, maintenance, and treatment,"[9] under Florida Statutes[10] that have since been repealed, the evidence showed

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suming that that term can be given a reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy. . . ." Donaldson v. O'Connor, 43 U.S.L.W. 4930, at 4933 (U.S. June 24, 1975); *See also* Greenwood v. United States, 350 U.S. 366, 375 (1957), concerning the complexities of mental treatment.

Serious questions have also been raised as to what constitutes "mental disease" and "treatment". See Szasz, *The Right to Health*, 57 GEO. L.J. 734 (1969); and Lenismore, Malmquist, and Meehl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75, 93 (1968), for the unsusceptibility to treatment of paranoid schizophrenia.

3. 43 U.S.L.W. 4930 (U.S. June 24, 1975).

4. Donaldson v. O'Connor, 493 F.2d 504, at 509 (1974).

5. The committing judge told Donaldson that he was being sent to the hospital for "a few weeks", to "take some of this new medication", after which he was certain that Donaldson would be "all right" and would "come back here". *Id.* at 510.

6. Donaldson v. O'Connor, *supra* note 4.

7. Donaldson had come to visit his parents over Christmas and had made statements that led his father to believe that Donaldson was suffering from delusions.

8. Donaldson v. O'Connor, *supra* note 3, at 4930.

9. *Id.*

10. The judicial commitment proceedings were pursuant to § 394.22(11) of the State Public Health Code which provided:

> Whenever any person who has been adjudged mentally incompetent requires confinement or restraint to prevent self-injury or violence to others, the said judge shall direct that such person be forthwith delivered to a superintendent of a Florida state hospital for the mentally ill, after admission has been authorized under regulations approved by the board of commissioners of state institutions for care, maintenance

that his confinement was merely enforced custodial care.[11]

Dr. J. B. O'Connor was the hospital's superintendent during most of Donaldson's confinement, and was his attending physician for 18 months.[12] He described Donaldson's care as *milieu therapy*,[13] but witnesses from the hospital staff conceded that such treatment, in Donaldson's case, consisted of confinement in the "milieu" of a mental hospital.[14]

The patient had been kept in a ward with 60 others, with barely enough room to walk between the beds.[15] Many patients were under criminal commitment.[16] Donaldson requested ground privileges, occupational training,[17] and an opportunity to discuss his case with O'Connor or other staff members. These requests were all denied.[18]

During his confinement, Donaldson had posed no threat to the other patients, nor had he shown any signs of suicidal tendencies. It was also acknowledged by one of O'Connor's codefendants that Donaldson could have earned a living outside the hospital;[19] and responsible persons had offered to provide him with any necessary care he might need upon his release.[20]

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and treatment, as provided in sections 394.00, 394.24, 394.25, 394.26, or make such other disposition of him as he may be permitted by law. . . .

FLA. LAWS EXTRA SESSION, c.31403, § 1 (1955-1956).

11. Donaldson v. O'Connor, *supra* note 3, at 4931.

12. Donaldson v. O'Connor, *supra* note 4, at 514.

13. *See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782 (1969), in which he raises questions about milieu therapy.

14. Justice Burger, in his concurring opinion, offered soothing words for the practitioners of milieu therapy:

> True, it is capable of being used simply to cloak official indifference, but the reality is that some mental abnormalities respond to no known treatment. Also some mental patients respond, as do persons suffering from a variety of physiological ailments, to what is loosely called 'milieu treatment,' i.e., keeping them comfortable, well-nourished, and in a protected environment. It is not for us to say in the baffling field of psychiatry that 'milieu therapy' is always a pretense.

Donaldson v. O'Connor, *supra* note 3, at 4934.

15. A third of the patients in the ward were criminals.

16. Donaldson v. O'Connor, *supra* note 4, at 511.

17. According to Donaldson, Dr. Gumanis did not want him to go into occupational therapy, because Gumanis feared that he would learn touch-typing and would use this skill, in Donaldson's words, to "write writs", that is, to prepare habeas corpus petitions. *Id.* at 514.

18. Donaldson v. O'Connor, *supra* note 3, at 4931.

19. He had worked for some fourteen years prior to his commitment. After release, he obtained a responsible job in hotel administration.

20. In 1963, a halfway house for mental patients, Helping Hands, Inc., asked O'Connor to release Donaldson to its care. A supporting letter was also sent by the Minneapolis Clinic of Psychiatry and Neurology. O'Connor refused, stating that the patient could only be released to his parents. At the time, Donaldson was fifty-five, and his parents were too elderly to take responsibility for him. Even so, O'Connor never informed Donaldson's parents of the offer.

Between 1964 and 1968, a college classmate of Donaldson's, John Lembcke, requested on four occasions that he be allowed to take custody of Donaldson. The record shows that Lembcke was a serious and responsible person and quite able to take care of Donaldson; nevertheless, his requests were refused.

In 1971 Donaldson brought a class action on behalf of all the patients in his ward, seeking damages under the fourteenth amendment[21] and § 1983,[22] and habeas corpus for the release of himself and of the class, and also seeking an injunction requiring the hospital to provide treatment. Donaldson was released shortly thereafter; but the district court dismissed the class action[23] and only considered the prayer for damages[24] against his attending physicians.[25] The jury was instructed that the plaintiff had a constitutional right to treatment, and it returned a verdict against two of the defendants.[26]

On appeal, the Court of Appeals for the Fifth Circuit affirmed the district court, and held: "Where a nondangerous patient is involuntarily civilly committed to a [sic] State mental hospital, there is a constitutional right to receive treatment as will accord a reasonable opportunity to be cured or to improve the patient's mental condition."[27]

The Supreme Court decided that such treatment was indeed constitutionally required, but restricted the application of its ruling to those patients deemed nondangerous to others or to themselves.[28] In so doing, the Court took some effort to analyze the justification behind confinement of the mentally ill. A finding of "mental illness" alone will not justify mere custodial care, nor will it sanction confinement in order to provide a better living standard.[29]

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21. U.S. CONST. amend. XIV, § 1.

22. 42 U.S.C. § 1983 (1970) 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.

23. Donaldson v. O'Connor, *supra* note 4, at 512-513.

24. The trial judge had instructed the jury that punitive damages should be given only if the act or omission of the defendant was maliciously or wantonly or oppressively done.

25. Originally five defendants were named in the suit. Three were dismissed from the action: Dr. Francis G. Walls, who became Acting Superintendent of the Hospital when O'Connor retired from that position in February, 1971; Dr. Milton J. Hirschberg, who became permanent Superintendent, succeeding O'Connor in June, 1971; and Emmett S. Roberts, Secretary of the Department of Health and Rehabilitative Service in Florida at the time Donaldson filed his first amended complaint, August 30, 1971.

26. $28,500 was awarded for compensatory damages and $10,000 for punitive damages against Dr. J.B. O'Connor and Dr. John Gumanis.

27. Donaldson v. O'Connor, *supra* note 4, at 520.

28. The Court stated that the decision of the court of appeals was too broad, and that this case did not present the difficult issues of constitutional law handled by that court. Specifically, the court of appeals had implied that it is constitutionally permissible for a state to confine a mentally ill person against his will in order to treat his illness, regardless of whether his illness renders him dangerous to himself or others. Donaldson v. O'Connor, *supra* note 3, at 4932.

29. Shelton v. Tucker, 364 U.S. 479, 488-490 (1960).

Furthermore, the harmless mentally ill cannot be incarcerated in order to protect others from their eccentricities.[30] As the Court stated:

> In short, a state cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.[31]

Having quickly resolved the constitutionality of treatment for the mentally ill, the Court turned its attention to the damages aspect of the case. O'Connor contended that he should not be held personally liable because he believed that he was acting under state law that authorized such confinement. He claimed that he could not reasonably have been expected to know that the state law was invalid. Rejecting this contention, the trial court refused to issue an instruction to this effect.[32]

The Court said that in the recent decision of *Wood v. Strickland*,[33] the scope of qualified immunity possessed by state officials under 42 U.S.C. §1983 was discussed, and the proper question for the jury was whether O'Connor:

> . . . knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].[34]

An official under these circumstances has no duty to anticipate unforseeable constitutional developments.[35]

Since the court of appeals did not consider whether it was error for the trial judge to refuse to instruct the jury on O'Connor's reliance on

30. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24-26 (1971); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Street v. New York, 394 U.S. 576, 592 (1969); *cf.* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

31. Donaldson v. O'Connor, *supra* note 3, at 4933.

32. The trial judge did, however, instruct the jury that monetary damages could not be assessed against the defendant if he had believed reasonably and in good faith that Donaldson's confinement was proper.

33. 43 U.S.L.W. 4294 (U.S. Feb. 25, 1975). In *Strickland*, some Arkansas high school students who had been expelled for violating a school regulation prohibiting the use or possession of intoxicating beverages at school, brought suit under 42 U.S.C. § 1983 against the school officials, claiming that such expulsions infringed their rights to due process and seeking damages and injunctive relief. The district court directed verdicts for the officials on the ground that they were immune from damage suits absent proof of malice in the sense of ill will toward the students. The court of appeals, finding that the facts showed a violation of the students' rights to "substantive due process," since the decisions to expel them were made on the basis of no evidence that the regulation had been violated, reversed, and remanded the decision of the district court. The Supreme Court remanded to the court of appeals to decide, in light of its holding, whether there had been a violation of due process.

34. *Id.*; *see also* Scheuer v. Rhodes, 416 U.S. 232, 247-248 (1974).

35. Wood v. Strickland, *supra* note 32.

state law, the Court vacated the judgment and remanded the case[36] so that it could be considered in light of *Wood v. Strickland*.

Justice Burger, in his concurring opinion, first addressed himself to the immunity issue. He pointed out the difficulty and uncertainty of treating the mentally disturbed, and remarked that an uncooperative patient is a hinderance to treatment. He stated that the first step toward recovery is the acknowledgement by the patient that he has an illness.[37] But Donaldson consistently refused treatment that was offered to him,[38] claiming that he was not mentally ill and needed no treatment. In light of the circumstances, Burger said this factor should be considered when weighing O'Connor's good-faith defense.

Also, Donaldson had frequently sought his release through the Florida state courts, and had repeatedly been denied relief. The last such proceeding had terminated just shortly before the present case was initiated.[39] Burger argues that the attending physicians would have been justified in considering those decisions as an approval of continued confinement,[40] and such a factor should be considered by the lower court.

The Chief Justice then refuted the analysis of the lower court and its holding,[41] and pointed out that the court of appeals' analysis had no basis in the decision of the Court.[42] Specifically, Burger was somewhat alarmed at the conclusion drawn by the lower courts: that the rationale for confinement was treatment. The Florida statutes in effect at the time of Donaldson's confinement had no requirement that a person so confined must either be given psychiatric treatment or released, and there was no such condition in the original order of commitment. To Burger, the lower court decision held that the state had no power to

36. By vacating the judgment of the court of appeals, that court's decision was stripped of precedential value, and the Supreme Court's opinion is the sole law of this case. *See* United States v. Munsingwear, 340 U.S. 36 (1950).

37. *See, e.g.*, Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 768-769 (1969).

38. Donaldson was a Christian Scientist and on some occasions refused to take medication. He also refused electroshock treatment. The trial judge instructed the jury not to award damages for any period of confinement during which Donaldson had declined treatment.

39. Donaldson v. O'Connor, 234 So.2d 114 (1970), *cert. denied*, 400 U.S. 869 (1970).

40. The defendants' counsel did not raise this issue, and O'Connor gave no evidence that he relied on such rulings as an approval for confinement. However, Justice Burger said that it should be no bar in the consideration of immunity in light of the Court's holding that the defense was preserved for appellate review.

41. The holding was that ". . . a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such treatment as will give him a realistic opportunity to be cured." Donaldson v. O'Connor, *supra* note 4, at 520.

42. *See* note 36, *supra*.

confine the nondangerous mentally ill except for the purpose of treatment. He could not accept this conclusion.

As he goes on to explain, historically, custodial care was the only care initially available,[43] and *curing* the person sent to the mental hospital was of secondary importance. Also, there was no known cure for a number of mental illnesses, and custodial care was really all that could be done. Hence, treatment was not even considered in the reasoning for confinement.[44]

The police power may be used to confine individuals in order to protect the society from significant antisocial acts or communicable diseases,[45] and under the *parens patriae* power the state has the duty to protect "persons under legal disabilities to act for themselves."[46] The procedural methods used by the legislatures to envoke this power must reflect the best interests of the afflicted class, and procedural safeguards are necessary.[47] But that does not mean that the procedural safeguards limit the power to confine only if the purpose of the confinement is treatment. Burger again refers to the "stubborn fact" that some forms of mental illness are incurable, and no treatment is possible.[48] Mere custodial care may be necessary in some instances,[49] and Burger believes that a state legislature has the power to make that kind of decision.

Burger next approached the *quid pro quo* theory[50] advanced by the court of appeals, which in essence says that when procedural safeguards are lacking, and the government has taken away certain rights (i.e. the right not to be confined), the government must give some consideration in return. The consideration here is treatment. Burger says

43. *See* A. DEUTSCH, THE MENTALLY ILL IN AMERICA, 38-54, 114-131 (2d ed. 1949).

44. *Id.* at 98-113. *See also*, D. ROTHMAN, THE DISCOVERY OF THE ASYLUM, 264-295 (1971).

45. *Cf.* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 1, 25-29 (1905).

46. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); *see also* Mormon Church v. United States, 136 U.S. 1, 56-58 (1890).

47. *Id.*

48. *See* Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936, 941-948 (1974); Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 697-719 (1974).

49. *See, e.g.*, Lake v. Cameron, 364 F.2d 657, 663-664 (1966).

50. The court of appeals described this theory as follows:

> [A] due process right to treatment is based on the principle that when the three central limitations on the government's power to detain—that detention be retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where the fundamental procedural safeguards are observed—are absent, there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment.

Donaldson v. O'Connor, *supra* note 4, at 522.

this can be argued in reverse. That is, under this theory, the state would have the power to confine an individual simply because the state is willing to provide treatment, regardless of the individual's ability to function in society.

He points out that due process is a flexible concept, and reflects the best interests of society and of the individual.[51] The Court looks "candidly" at departures from procedural and substantive safeguards when the state says the departures are for the best interest of the individual;[52] but at the same time, "judges are not free to read their private notions of public policy into the Constitution."[53] In light of these due process principles, Burger believes that the *quid pro quo* theory cannot stand.

The theory assumes that the rationale for confinement would apply equally to all situations, but in fact, different interests are involved. He compares criminal activity[54] to that of quarantine[55] to show the diversity of interests, and says that the procedural aspects should not be, and are not, the same.

Also, Burger is worried that the *quid pro quo* theory has transferred a procedural matter into a new substantive constitutional right. The theory assumes a lack of procedural safeguards (i.e. periodic determinations of the patients' condition, and strict standards of proof for commitment), and insists that the state provide benefits to compensate for confinement. The courts should be confined to reviewing procedural devices for confinement, and allow the legislature to make public policy concerning the public welfare.[56]

In summary, Justice Burger concludes that the analysis of the court of appeals would allow two results: (1) the state's power to confine the mentally ill would rest upon the condition of adequate treatment, and (2) the state may justify confinement, and the resulting deprivation of liberty, solely by providing treatment. Since some patients cannot be treated, to limit the power of the state to confine upon the condition of treatment would be a severe handicap, and the concepts of due process reject the trade-off theory behind the *quid pro quo* argument.[57]

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51. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 480-484 (1972); McNeil v. Director, Patuxent Institution, 407 U.S. 245, at 249-250; McKeiner v. Pennsylvania, 403 U.S. 528, 545-555 (1971).

52. *In Re* Gault, 387 U.S. 1, at 21, 27-29 (1967).

53. Olsen v. Nebraska, 313 U.S. 236, 246-247 (1941).

54. *See* Powell v. Texas, 392 U.S. 514, 541-544 (1968).

55. *See* Jacobson v. Massachusetts, 197 U.S. 1, at 29-30 (1905).

56. *In Re* Gault, *supra* note 52, at 71.

57. Justice Burger emphasizes that advocates of the *quid pro quo* theory have even criticized the theory on this ground. *E.g.* Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV., 1190, 1325, n.39 (1974).

III. BACKGROUND

Traditionally, the power to confine has been based on two theories: (1) the police power, and (2) the *parens patriae* doctrine.[58] Under these theories state statutes have been passed which allow confinement on three grounds: danger to self; danger to others; and need for treatment, or for "care," "custody," or "supervision."[59]

The police power covers the patient who is dangerous to others. The *parens patriae* doctrine covers those patients who are in need of care, and where danger to self is involved, both theories exert jurisdiction. In the present case the *parens patriae* doctrine is the applicable theory, since Donaldson was concededly not dangerous to himself or others.[60] By whatever rationale, however, due process demands that certain requirements be met before the state can take away constitutionally guaranteed liberties.[61] A right to treatment was the main requirement proposed where persons were involuntarily committed.

Historically, mental patients were denied a guarantee that they would receive treatment.[62] The state often did not know how to treat the patient anyway, and merely confined the insane to keep them out of harm. Dr. Martin Birnbaum first proposed a constitutional right to treatment in an article published in 1960,[63] but the first judicial recognition of this theory did not come until 1966, in the case of *Rouse v. Cameron*.[64]

In *Rouse*, the petitioner alleged that he was not receiving treatment, and the court said that since the purpose of confinement is treatment and not punishment,[65] the hospital must make a bona fide effort to provide such treatment. However, the court failed to set guidelines to assure enforcement of the right to treatment,[66] and no clear path was established for other jurisdictions. Some even completely refused to recognize the doctrine.[67]

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58. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138-1139 (1967).

59. Jackson v. Indiana, 406 U.S. 715, 737 (1972); *see* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HAR. L. REV. 1288, 1289-1297 (1966).

60. Donaldson v. O'Connor, *supra* note 4, at 517.

61. Jackson v. Indiana, *supra* note 59.

62. *See* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW (rev. ed. 1971).

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

64. 373 F.2d 451 (D.C. Cir. 1966). Prior to this time, procedural safeguards had been the center of debate. *See generally* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1960); Williams v. United States, 250 F.2d 19, 26 (D.C. Cir. 1957); Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940).

65. Rouse v. Cameron, 373 F.2d 451, at 455 (D.C. Cir. 1966).

66. Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587, 592 (1971).

67. *See* New York State Ass'n For Retarded Children v. Rockefeller, 357 F. Supp.

Nevertheless, subsequent decisions[68] increasingly followed the *Rouse* case. The main thrust behind these decisions was the fear of creating de facto penal institutions[69] out of mental hospitals. Since the rationale for confinement was not custodial care or punishment, the only constitutional justification for civil commitment was treatment.[70]

The *quid pro quo* rationale sprang from similar considerations. Federal courts have reasoned that since civil commitment proceedings lack the same procedural safeguards accorded in criminal proceedings, the absence of such guarantees is justified only through the promise of treatment, in order that the individual may return to society or at least improve his mental health.[71]

The case of *Jackson v. Indiana*[72] held that the nature of commitment must bear a reasonable relation to the purpose of commitment. Under the *parens patriae* doctrine the purpose of commitment is based upon the individual's need for treatment and not because he presents a threat to society. Therefore, if treatment is denied, due process is violated because the nature of the commitment bears no relation to its purpose.[73]

In order to decide whether or not treatment had been withheld, "treatment" would have to be defined, and this problem has vexed the courts. Without such a definition standards are difficult to formulate, and without standards the right to treatment has been considered nonjusticiable by at least one court.[74] It has been suggested that the Burger Court might reject the right to treatment on just such a basis.[75]

In *Robinson v. California*[76] the Supreme Court held that the cruel and unusual punishment clause of the eighth amendment barred penal incarceration for mere status. The argument has been made that the eighth amendment would prohibit the incarceration of the mentally ill wihout actual treatment, because such confinement would take the form of penal incarceration. The patient would have been institutionalized

752 (E.D.N.Y.1973); Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

68. *E.g.*, Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966).

69. Wyatt v. Stickney, 325 F. Supp. 781, at 785 (M.D. Ala. 1971); *see* Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960); Tribby v. Cameron, 379 F.2d 104 (D.C. Cir. 1967); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969).

70. Wyatt v. Stickney, *supra* note 69.

71. Welsch v. Likens, 373 F. Supp. 487, 496 (D. Minn. 1974); *see* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966); New York State Ass'n For Retarded Children v. Rockefeller, 357 F. Supp. 752, 761 (E.D.N.Y. 1973).

72. 406 U.S. 715 (1972).

73. *See* Welsch v. Likens, 373 F. Supp. 487, 496 (D. Minn. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974); *In re* Ballay, 482 F.2d 648, 659 (D.C. Cir. 1973).

74. Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

75. *See* 46 MISS. L.J. 345, at 358 (1975).

76. 370 U.S. 660 (1962).

(penalized) for mere status (insanity). This argument has been followed by several courts,[77] but was passed up by the Fifth Circuit in *Donaldson*, probably because it would apply to dangerous patients as well as non-dangerous ones.

At any rate, courts have invariably recognized several remedies where a right to treatment has been found. Included among them are habeas corpus proceedings,[78] actions for damages under civil rights statutes,[79] tort actions for false imprisonment or malpractice,[80] and actions for declaratory and injunctive relief.[81]

IV. SIGNIFICANCE OF THE CASE

The *Donaldson* decision holds that those persons who are civilly committed to state mental hosptials against their will are guaranteed treatment. If they do not receive treatment they may be released. Theoretically, if this right to treatment had been in effect when Donaldson was committed, he would not have been confined fourteen and one half years, which was much longer than the judge who committed him anticipated.[82]

The Court narrowed its decision to the involuntarily confined, and the question remains whether any right to treatment exists for the patient who voluntarily requests confinement, or for the criminally confined mental patient. If the same rationale is used (*i.e.*, that since the justification for confinement is treatment, one cannot be confined without treatment), then the decision would indicate that the voluntarily committed patient would also have this right. It would be hard for the state to justify continued confinement just because the patient originally chose to enter a state hospital, rather than the state forcing him to enter.

The criminally confined are incarcerated to protect the public under the police power. Likewise, the dangerous mentally ill can be confined under this power. Should a different standard of treatment be used for dangerous patients? The Court did not directly address itself to the problem, but by restricting its ruling to the non-dangerous the implication is that a different standard should apply—the reasoning being that in order to protect society the state may legitimately confine a mentally

77. *See* Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

78. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Stachulak v. Coughlin, 364 F. Supp. 636 (N.D. Ill. 1973).

79. 42 U.S.C. § 1983 (1970). *See* Note, 27 OKLA. L. REV. 238 (1974).

80. *E.g.*, Whitree v. State, 290 N.Y.S.2d 486, 502 (C.C.N.Y. 1968); *cf.* Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972).

81. *See* note 78, *supra.*

82. *See* note 5, *supra.*

ill dangerous person without giving him treatment. This reasoning would show a willingness by the Court to accept the proposition that the hospital could in fact be a penal institution. But if it is a de facto penitentiary, why have the patient in a hospital in the first place? Has his dangerousness lessened because he is in a mental institution?

It seems logical that the reason he is in the hospital is to receive treatment and care, otherwise he would be in a penal institution. Going back to the reasoning of the Court (majority opinion), since the justification for confinement is treatment he must be treated or else he is deprived of due process. Under the police power the state would have the power to confine him since he is dangerous, but it seems incongruous that he would be in a hospital if the real purpose behind confinement was to prevent harm. Once transferred to a hospital, or committed to one, the *parens patriae* doctrine would supersede the police power and a constitutional right to treatment would arise. That does not mean that he should be released if no treatment were made available. Rather, he should be sent to a penitentiary and cancel the illusion of *care* being given by the state.

Justice Burger is upset with this rationale. His theory is that the state has reasons other than treatment that would justify confinement, but he includes the dangerous and the non-dangerous, the voluntary and the involuntary, in one lump sum. The police power is always there to justify confinement for purposes other than treatment. The *parens patriae* doctrine, however, is the focal point behind the Court's decision and is a separate rationale from the police power.

It is important to note that the ruling of the lower court, which Justice Burger cannot accept, holds that a person so confined has a constitutional right to receive "treatment as will accord a *reasonable opportunity to be cured or to improve the patient's mental condition*"[83] (emphasis added). The last phrase is an attempt to limit the broad scope of "treatment".

Under this limited scope, treatment has been offered to mental patients from the earliest times. Since so little was known about *curing* the insane, the only viable remedy was custodial care. In itself, it was a form of treatment because it was the only reasonable opportunity for cure available. There were no other reasonable opportunities. In later years, custody and treatment became two entirely separate concepts.

Under the *Donaldson* ruling, custody, without more, cannot be a basis for confining an individual who is capable of surviving by himself or with the help of others.[84] If he is not capable of surviving safely, custody is permissible under the ruling because custody would then be

83. *See* p. 178 *supra.*
84. *Supra,* note 31.

the only treatment available. That is, there is no reasonable opportunity to be cured, and the state may confine the individual under the *parens patriae* doctrine, or under the police power, or both.

Justice Burger also fears the possibility that the state may confine an individual solely because the state will offer treatment. However, the due process principles that the Chief Justice refers to himself[85] would prevent that from happening, and there is no suggestion by the lower court or the majority that such a situation would or could exist.

It is interesting that Justice Burger points to the factor that Donaldson continually asserted that he was not mentally ill, and since acknowledgement of mental illness is the first step toward recovery,[86] the courts should be reluctant to blame the attending physicians for their conduct. This seems to be the *Catch-22* of Donaldson's predicament. Hopefully the majority decision has destroyed it. If Donaldson has no right to treatment, once he was admitted he could be continuously held captive by the state, regardless of the condition of his sanity.

According to Burger's analysis, to be sane, Donaldson should have feigned mental illness when in fact he believed he was not. Once insanity was admitted the doctors would have that on the record as an acknowledgement, and only then could recovery begin. In short, not to admit insanity was to be insane. As a result, Kenneth Donaldson spent fourteen and one half years of his life in a mental institution. Most of that time was spent unsuccessfully trying to get out. If this decision does anything, hopefully it will prevent the future occurrence of similar situations.

V. CONCLUSION

It seems inevitable that state mental hospitals will have to increase their expenditures[87] considerably, and that the state legislatures are going to have to increase appropriations for mental institutions so that adequate care will be given to patients.[88]

If no care is forthcoming, harmless patients who can survive outside the hospital will be released. However, under the present ruling, if they cannot survive by themselves or with friends they will not be released, even though they now have a constitutional right to treatment. In effect, the state can withhold treatment upon a showing that the patient cannot so survive. In this sense the decision is a hollow one.

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85. *See* p. 181 *supra.*

86. *Supra*, note 37.

87. *See* NATIONAL INSTITUTE OF MENTAL HEALTH, *Financing Mental Health Care in the United States: A Study and Assessment of Issues and Arrangements* 137 (1973).

88. *See* Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974), *aff'd*, 40 U.S.L.W. 2696 (Nov. 8, 1974).