

1976

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Recommended Citation

Shawn M. Wold, *O'Connor v. Donaldson: Due Process and the Involuntarily Civilly Committed Mental Patient*, 11 Tulsa L. J. 604 (2013).

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O'CONNOR v. DONALDSON: DUE PROCESS AND THE INVOLUNTARILY CIVILLY COMMITTED MENTAL PATIENT

INTRODUCTION

Until the decision in *O'Connor v. Donaldson*,¹ there had been no Supreme Court ruling on the due process rights of involuntarily civilly committed mental patients, except in cases involving criminal convictions of mentally ill persons.² Earlier lower court decisions had held that the mentally ill did not have the same constitutional and statutory rights as did other persons.³

The Court in *O'Connor* held that mentally ill persons are entitled to due process. Thus, to confine a person involuntarily violates due process if it cannot be shown that he is dangerous to himself or to others.⁴ This decision will affect most of the patients now in mental institutions who were committed against their will, since very few of them were actually found to be dangerous at the time of their commitment. The purpose of this note is to analyze the decision in *O'Connor* and to consider some of the problems still remaining in the area of involuntary civil commitment.

FACTS

Donaldson was civilly committed in 1957 as a mental patient at a Florida state hospital. During the almost fifteen years of his confinement, he repeatedly demanded his release, claiming that he was not dangerous, that he was not mentally ill, and that the hospital had not provided him with any treatment for his supposed mental illness. His father and a county judge who found Donaldson to be suffering from "paranoid schizophrenia" committed him for "care, maintenance, and

1. 422 U.S. 563 (1975).

2. *Specht v. Patterson*, 386 U.S. 605 (1967).

3. *See Martin v. Beuter*, 79 W. Va. 604, 91 S.E. 452 (1917).

4. "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. at 576.

treatment” under Florida statutory provisions which were later repealed.⁵

The hospital staff had the power to release a patient who was not dangerous, but O'Connor, the hospital administrator, refused to allow that power to be exercised. There was uncontradicted testimony at trial that Donaldson was not and had never been dangerous to others during his confinement.⁶ Donaldson was given no treatment, only custodial care, although there was evidence that occasionally Donaldson, a Christian Scientist, would refuse to take medicine.⁷

Donaldson originally brought his suit as a class action, to include all of the patients in Department C at the hospital. He sought damages, the release of the entire class, and declaratory and injunctive relief to require that the hospital furnish satisfactory treatment. After his action was dismissed as a class suit, Donaldson refiled seeking individual relief alleging that defendants had acted “with intentional, malicious, and reckless disregard of his constitutional rights.”⁸ He asked for \$100,000 in damages. O'Connor claimed as a defense that the state law had authorized indefinite confinement, even if the patients were not dangerous and were not being treated for their illness.

At the trial, O'Connor asked that the jury be instructed that “if defendants acted pursuant to a statute which was not declared unconstitutional at the time they cannot be held to be accountable for such action.”⁹ The district court judge refused to give the instruction and

5. Donaldson was committed pursuant to section 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, and treatment, as provided in sections 384.09, 394.24, 394.25, 394.26 and 394.27, or make such other disposition of him as he may be permitted by law

O'Connor v. Donaldson, 422 U.S. 563, 566 n.2 (1975), *quoting* ch. 31403, § 1, [1955] Fla. Extra. Sess. Laws 62 (repealed 1971).

The Florida statute was not clear as to whether an incompetent person was required to be either dangerous to himself or to others. 422 U.S. at 566 n.2, *quoting* ch. 29902, § 3, [1955] Fla. Gen. Laws 835 (repealed 1971). The only statutory procedure for the release of a person from a mental hospital required a judicial restoration of a patient's “mental competency.” 422 U.S. at 566 n.2, *quoting* ch. 29902, § 3, [1955] Fla. Gen. Laws 935 (repealed 1971).

6. “O'Connor himself conceded that he had no personal or secondhand knowledge that Donaldson had ever committed a dangerous act.” 422 U.S. at 568.

7. The trial judge had instructed the jury not to award damages to Donaldson for any period during which he refused treatment. 422 U.S. at 569 n.4.

8. Donaldson v. O'Connor, 493 F.2d 507, 513 (5th Cir. 1974).

9. 422 U.S. at 570 n.5.

Donaldson prevailed at trial, being awarded damages of \$38,500, including \$10,000 in punitive damages. The Fifth Circuit Court of Appeals affirmed on the grounds that the fourteenth amendment guarantees a right to treatment to involuntarily civilly committed mental patients.¹⁰

The Supreme Court held that Donaldson's constitutional right to freedom was violated since O'Connor had confined Donaldson while knowing that he was not dangerous.¹¹ In the Court's view, the only issue raised by the case was that of a person's constitutional right to liberty.¹² *O'Connor* held that there is no constitutional basis for the compulsory confinement of persons who are not dangerous to anyone.¹³ Justice Stewart's majority opinion left open the question whether those confined for the purpose of treatment, or those who were involuntarily committed because they were dangerous to themselves or to others had a right to treatment.¹⁴ In a concurring opinion, Chief Justice Burger stated:

There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law. . . . Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist.¹⁵

The Fifth Circuit's judgment was vacated, however, and the case remanded for the purpose of determining whether the jury instructions were inadequate under *Wood v. Strickland*¹⁶ since they did not take into

10. 493 F.2d 507, 509, 520-21 (5th Cir. 1974).

11. 422 U.S. at 576.

12. *Id.* at 573.

13. *Id.* at 575.

14. *Id.* at 573.

15. *Id.* at 580 (Burger, C.J., concurring) (citation omitted).

16. 420 U.S. 308 (1975). In *Wood*, which dealt with the qualified immunity of school officials, the Supreme Court said:

[I]n the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

account O'Connor's claimed reliance on state law.¹⁷ In light of *Wood*, in order to hold O'Connor personally liable for monetary damages, the jury would have had to find that O'Connor knew that his action would result in the violation of Donaldson's constitutional rights, or that O'Connor had a malicious intention to deprive Donaldson of his constitutional rights.¹⁸

WHAT IS "DANGEROUS"?

If an individual is found to be dangerous prior to his commitment, there is less likelihood of a due process violation. However, a major problem when dealing with mental health statutes is defining the term "dangerous."¹⁹ Statutes and case law provide that a person who is committed involuntarily must be found to be dangerous to himself or to others.²⁰ The insanity must be of such a caliber that the person would be a danger to persons or property if allowed to remain at large.²¹

A person can be committed under the doctrine of *parens patriae* if he is dangerous to himself and under the state's police power if he is dangerous to others. How can it be determined that a person might be dangerous to others if he has committed no crime? How can it possibly be determined whether a person is dangerous to himself? Most of the existing involuntary commitment statutes do allow mentally ill persons who are not dangerous to themselves to be confined even though there is

Id. at 322. This decision affects not only school officials but all state officials who raise the defense of immunity to the issues of liability and the extent of any monetary damages.

17. 422 U.S. at 577. The issue of immunity of state officials was raised since O'Connor's principal defense was that he acted in good faith under what he believed was valid state law. In *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Court stated:

[S]ince *Ex parte Young*, 209 U.S. 123 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law.

416 U.S. at 237.

18. 422 U.S. at 577. On remand, the Fifth Circuit Court of Appeals reversed that part of the lower court's decision which held defendants liable for money damages. There was error in denying the instruction concerning O'Connor's claimed reliance on state law, and the lower court's instructions were inadequate in regard to the scope of qualified immunity possessed by state officials. *Donaldson v. O'Connor*, 519 F.2d 59 (5th Cir. 1975).

19. BLACK'S LAW DICTIONARY 479 (rev. 4th ed. 1968) defines "dangerous" as "attended with risk; perilous; hazardous, unsafe."

20. See *Jackson v. Indiana*, 406 U.S. 715 (1972), which held that a mentally incompetent individual must be found to be dangerous before he can be committed for an indefinite length of time.

21. See *Crawford v. Brown*, 312 Ill. 305, 151 N.E. 911 (1926); *Maxwell v. Maxwell*, 189 Iowa 7, 177 N.W. 541 (1920).

no showing of whether the person lacks the capacity to evaluate the desirability of such a restraint.²² The court in *Lynch v. Baxley*²³ said:

Although he does not threaten actual violence to himself, a person may be properly committable under the dangerousness standard if it can be shown that he is mentally ill, that his mental illness manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well-being, and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable.²⁴

Related to dangerousness is the idea of preventive detention, which has been justified as securing both the interests of the patient and society.²⁵ Society's interests, however, are based on the idea that all persons who are mentally ill are dangerous to others and should be preventively detained.²⁶ Preventive detention should only be utilized, if at all, when there is a substantial likelihood that future harmful conduct will result.²⁷

PARENS PATRIAE AND INCAPACITY

The *parens patriae* power allows a state to act as "the general guardian of all infants, idiots, and lunatics"²⁸ The valid exercise of *parens patriae* assumes legal incompetence.²⁹ *Parens patriae* authority is not immune from constitutional due process, however, merely because the state has a benevolent motive. It is still required that there be a reasonable relation between state action and a valid state objective.³⁰

In choosing the most advisable alternative available, one must consider whether to compel psychiatric treatment or to force hospitaliza-

22. In dictum, the District of Columbia Circuit Court of Appeals noted that the only justification for commitments to protect an individual was "on the basis of the state's status as *parens patriae*." *In re Ballay*, 482 F.2d 648, 658 (D. C. Cir. 1973).

23. 386 F. Supp. 378 (M.D. Ala. 1974).

24. *Id.* at 391.

25. Katz, *The Right to Treatment—An Enchanting Legal Fiction?*, 36 U. CHI. L. REV. 755, 758 (1969).

26. *Id.*

27. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 749 (1969).

28. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972), quoting 3 W. BLACKSTONE, COMMENTARIES *47.

29. *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

30. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

tion.³¹ The state as substitute decision maker must look at those options which may be utilized and choose the one that is in the best interests of the individual.³² Because of the stigma attached to even short-term commitment³³ and the deprivation of a person's liberty, it should be essential that there be a material anticipated benefit in order to allow involuntary commitment.³⁴

A person with a mental disorder which does not threaten his physical health or materially damage his capacity to act in society should seldom be forcibly hospitalized.³⁵ The state must establish that a person does not have the capacity to make a decision as to what benefits might occur if he is hospitalized.³⁶

There would be no due process argument against *parens patriae* commitments if all mental illnesses automatically made a person incompetent to make reasonable decisions concerning the desirability of institutionalization.³⁷ There is both medical and legal acknowledgment of the difference between mental illness and incapacity.³⁸ Therefore, in order to supply the connection between statutory means and ends necessitated by due process, it seems that *parens patriae* commitments should be limited to those who are both mentally ill and unable to judge the need for psychiatric care.³⁹

A mentally ill person may be just as able to judge the need for acquiring medical treatment as a person who is physically ill.⁴⁰ *Parens*

31. Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1220 (1974) [hereinafter cited as *Civil Commitment*].

32. *Id.*

33. *Cf. Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972) (Burger, C.J. concurring in the result); *Baldwin v. New York*, 399 U.S. 66, 73 (1970) (short term criminal confinement).

34. *Cf. Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (dictum); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

35. *Civil Commitment*, *supra* note 31, at 1221.

36. *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

37. *Civil Commitment*, *supra* note 31, at 1124.

38. BLACK'S LAW DICTIONARY 1137 (rev. 4th ed. 1968) defines mental incapacity as being "[e]stablished when there is found to exist an essential privation of reasoning faculties, or when a person is incapable of understanding and acting with discretion in the ordinary affairs of life."

39. Several commentators have suggested that incapacity rather than mental illness be used as the standard for *parens patriae* commitments. *See Dix, Hospitalization of the Mentally Ill in Wisconsin: A Need for a Reexamination*, 51 MARQ. L. REV. 1, 26-27 (1967); Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1, 33-37 (1971).

40. Courts have stressed that the difference in the ways the physically and mentally ill are treated implies that a standard of incapacity is necessary to meet the requirements of equal protection. *See Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972) (dictum), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

patriae commitments would be valid only as long as the patient was not competent to make a decision regarding treatment, but once a person became capable of making a treatment decision, he could no longer be confined against his will except upon a finding of dangerousness.⁴¹

Those commitment statutes which employ mental illness as the criterion dividing the committable from the noncommittable would not be able to furnish even a rational basis for such a divergence in treatment.⁴² If the term "mental illness" is to be used as the criterion for committing a person against his will, the term must communicate an adequate legal meaning so as not to be held unconstitutionally vague.⁴³ A statute that allows too much discretion in deciding whether a person is mentally ill will be open to attack.⁴⁴

All fifty states and the District of Columbia have statutes pertaining to involuntary civil commitment to mental institutions.⁴⁵ Although

41. *Civil Commitment*, *supra* note 31, at 1391.

42. *See* note 39 *supra*.

43. *Civil Commitment*, *supra* note 31, at 1256.

44. Several commitment statutes have been challenged as being unconstitutionally vague. *See* *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270, 274 (1940); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

45. Eighteen jurisdictions authorize commitment only if the individual is mentally ill and dangerous to himself or to others, or is unable to care for his physical needs. *See* ARIZ. REV. STAT. ANN. §§ 36-520 *et seq.* (1974); CAL. WELF. & INST'NS CODE §§ 5260, 5300 (West 1972); COLO. REV. STAT. ANN. § 27-10-106 (1973); D.C. CODE ANN. § 21-545 (1967); GA. CODE ANN. §§ 88.506.4-507.1 (1971); IDAHO CODE § 66-329 (Supp. 1975); ILL. ANN. STAT. ch. 91½, § 1-11 (Smith-Hurd Supp. 1976); IND. ANN. STAT. § 16-14-9.1-10(d) (Burns Supp. 1975); LA. REV. STAT. ANN. § 28:52 (1975); ME. REV. STAT. ANN. tit. 34, § 2334 (Supp. 1975-76); MD. ANN. CODE art. 59, § 12 (1972); MASS. GEN. LAWS ANN. ch. 123, §§ 1, 8 (Supp. 1975); MICH. COMP. LAWS ANN. § 330.1401 (1975); NEV. REV. STAT. § 433A.310 (1975); N.H. REV. STAT. ANN. § 135-B:26 (Supp. 1975); N.C. GEN. STAT. § 122.58.7 (Supp. 1975); WASH. REV. CODE ANN. § 71.05.150 (1975); W. VA. CODE ANN. § 27-5-4 (Supp. 1975).

Fourteen states require a person to be dangerous or in need of care or treatment. *See* ALASKA STAT. § 47.30.070 (1971); ARK. STAT. ANN. § 59-408 (1971); DEL. CODE ANN. tit. 16, § 5125 (Supp. 1974); FLA. STAT. ANN. § 394.467 (Supp. 1975); IOWA CODE ANN. § 229.1 (Supp. 1976); KY. REV. STAT. ANN. § 202.135 (1972); MISS. CODE ANN. § 41-21-71 (Supp. 1975); N.M. STAT. ANN. § 34-2-5 (Supp. 1975); N.D. CENT. CODE § 25-03-11 (Supp. 1975); S.C. CODE ANN. § 32-955 (Supp. 1974); TENN. CODE ANN. § 33-604 (Supp. 1975); UTAH CODE ANN. § 64-7-36 (Supp. 1975); VT. STAT. ANN. tit. 18, § 7607 (1968); WYO. STAT. ANN. § 25-60 (1967).

Five states require that a person be committed for the protection of his welfare or the welfare of others. *See* CONN. GEN. STAT. ANN. § 17-176 (1975); MINN. STAT. ANN. § 253A.07 (Supp. 1976); OKLA. STAT. tit. 43A, § 3 (1971); TEX. REV. CIV. STAT. ANN. art. 5547-52 (1958); WIS. STAT. ANN. §§ 51.001, 51.75 (Supp. 1975-76).

Fourteen states require a person to be mentally ill to the extent that he needs care and treatment. *See* ALA. CODE tit. 45, § 205 (1959); HAWAII REV. STAT. § 334-53 (1968); IOWA CODE ANN. § 229.19 (1969); KAN. STAT. ANN. § 59-2902 (Supp. 1975); MD. ANN. STAT. §§ 202.797, 202.807 (Vernon 1972); MONT. REV. CODES ANN. §§ 38-1201 to -1202 (Supp. 1975) (requiring a person to be "developmentally disabled" and

mental illness is required by all statutes to warrant involuntary hospitalization, most either fail to define the term or contain only a vague definition.⁴⁶

Unlike a standard of mental illness, an incapacity standard would differentiate between the committable and the noncommittable on the basis of a person's need to have someone else make decisions for him and act as *parens patriae* in the state's interest.⁴⁷ Subsequent to the meeting of the requirement of incapacity, the state would be able to act as *parens patriae* for the person.⁴⁸

TREATMENT

If an individual is confined for the purpose of treatment, society's right to deprive him of his liberty depends upon whether or not treatment is actually provided.⁴⁹ When care is custodial only, society must be certain beyond a reasonable doubt that the individual is not capable of caring for himself.⁵⁰

*Rouse v. Cameron*⁵¹ upheld a right to treatment, as did the court of appeals in *O'Connor v. Donaldson*.⁵² *Rouse* held that treatment, not

needing treatment instead of "mentally ill" and needing treatment); NEB. REV. STAT. § 83-828 (1971); N.J. STAT. ANN. § 30:4-30 (Supp. 1975-76); N.Y. MENTAL HYGIENE LAW §§ 31.01, 31.27 (McKinney Supp. 1975-76); OHIO REV. CODE ANN. § 5122.15 (1974); ORE. REV. STAT. § 426.120 (1973); PA. STAT. ANN. tit. 50, § 4406 (1969); R.I. GEN. LAWS ANN. § 26-2-8 (Supp. 1975); S.D. COMP. LAWS ANN. § 27-7-13.1 (Supp. 1975); VA. CODE ANN. § 37.1-67.1 (Supp. 1975).

46. "Many statutes define mental illness as a condition which makes commitment appropriate and then authorize the commitment of the mentally ill. Such definitions of mental illness add nothing to the other statutory criteria." *Civil Commitment*, *supra* note 31, at 1202 n.5.

47. *See* note 34 *supra*.

48. *Civil Commitment*, *supra* note 31, at 1220.

49. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742, 748 (1969).

50. *Id.*

51. 373 F.2d 451, 452 (D.C. Cir. 1966). The court held that the Hospitalization of the Mentally Ill Act, D.C. CODE ANN. § 21-501 (1967), created a statutory right to treatment.

52. 493 F.2d 507 (5th Cir. 1974). *See* *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards by defendants*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). In *Wyatt* the district court held that involuntarily committed patients "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition." 325 F. Supp. at 784.

On appeal, Circuit Judge Wisdom (who also wrote the opinion of the court of appeals in *O'Connor*) stated that there was no constitutional justification for civil commitment on the grounds that there is a "need to care" for the mentally ill and to take this burden off families, friends, or guardians. 503 F.2d at 1313.

punishment, is the purpose of involuntary confinement.⁵³ A hospital does not have to show that treatment will actually help a patient but only that there is an effort made to do so.⁵⁴

Statutory provisions for the treatment of the mentally ill are not consistent.⁵⁵ In *Rouse* the patient argued that he should not be confined since he was receiving no treatment.⁵⁶ Some states have passed new mental health statutes setting out the civilly committed patient's rights in regard to treatment.⁵⁷ Many states, however, have not changed their treatment provisions and probably will not do so until the Supreme Court decides whether there is a constitutional right to treatment.⁵⁸

The Florida statutes in effect at the time of Donaldson's commitment did not require that a person must be treated or released. Chief Justice Burger, in his concurring opinion in *O'Connor*, concluded that there was no historical basis supporting the view that a person must be treated if he is confined to a mental institution.⁵⁹ States have the power of *parens patriae* which includes the duty to protect "persons under legal disabilities to act for themselves."⁶⁰

The Fifth Circuit decided *O'Connor* on the issue of whether involuntary civilly committed mental patients had a guaranteed right to treatment under the fourteenth amendment. The court held that there was a constitutional right to treatment, and that Donaldson had been deprived of treatment,⁶¹ having been given only "milieu therapy,"⁶² which amounted to nothing more than custodial care.

53. 373 F.2d at 452.

54. *Id.* at 456.

55. Some statutes do not provide for treatment while others only have vague references to treatment. See MISS. CODE ANN. § 41-17-5 (1972); PA. STAT. ANN. tit. 50, §§ 4201, 4423 (1969). There are also statutes providing for treatment to the extent that funds and facilities are available. See OKLA. STAT. tit. 43A, § 91 (1971).

56. Chief Judge Bazelon found that Rouse could not be forced to remain in confinement unless he was provided with "adequate" treatment. 373 F.2d at 456.

57. See N.H. REV. STAT. ANN. §§ 135-B:42 to -44 (Supp. 1975); GA. CODE ANN. § 88-502.3(a) (1971). The Florida mental health statutes were revised in 1971, and amended in 1973 and 1974. Section 394.459 is concerned with the rights of patients, including the right to individual dignity, right to treatment, and quality of treatment. The criteria for involuntary hospitalization has been changed as well from the one contained in the statute which was in force at the time of Donaldson's commitment.

58. *Civil Commitment*, *supra* note 31, at 1323.

59. 422 U.S. at 582 (Burger, C.J., concurring).

60. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (footnote omitted).

61. Three kinds of treatment were withheld from Donaldson. He was denied grounds privileges, occupational therapy, and the right to talk to a psychiatrist. 493 F.2d at 513-14.

62. Milieu therapy is where "the hospital administration tries to make the total

Civil commitment is only justified if the individual is dangerous to himself or to others, or for the care and treatment of the individual.⁶³ When danger was not a factor and treatment was the only reason for commitment, due process is violated if treatment is not provided. Treatment must be provided as the *quid pro quo* paid by society for depriving an individual of his liberty in order to provide more safety to society.⁶⁴

CONCLUSION

O'Connor v. Donaldson was decided at a time when the rights of mental patients were becoming an issue of growing importance. As a result of this Supreme Court decision a person cannot be confined in a mental institution involuntarily if he is not found to be dangerous to himself or to others. A confinement of this sort would be a denial of the individual's right to due process since he would be deprived of his right to liberty.

This note has attempted to show some of the problems that still exist in the area of involuntary civil commitments. Most mental health statutes are still worded vaguely, even those that now set out the patient's rights in regard to treatment. Statutes using vague terms that are not adequately defined, such as "mental illness" and "dangerousness," create problems as to what is necessary before a person can be committed against his will.

The abolishment of involuntary commitment would not be a solution, since those individuals otherwise subject to *parens patriae* commitments would not be able to make rational decisions in regard to treatment or care that might be beneficial to them.⁶⁵

living experience of the patient therapeutic." G. DAVISON & J. NEALE, *ABNORMAL PSYCHOLOGY: AN EXPERIMENTAL CLINICAL APPROACH* 544 (1974).

63. 493 F.2d at 520.

64. *Id.* at 522. Three of the four federal district courts which considered this issue held that there is a constitutional right to treatment. Two cases held that civilly committed mental patients have a right to treatment. *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *on submission of proposed standards by defendants*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373, 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

One case held that civilly committed mentally retarded patients have a right to treatment. *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974).

Another case held that there was no right to treatment, but the holding was reversed without opinion after the Fifth Circuit's decision in *O'Connor v. Donaldson*. *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974).

65. *Civil Commitment*, *supra* note 31, at 1401.

If society continues to commit persons using the criterion of "dangerousness," assuming that a point can actually be determined where dangerousness to oneself begins, then under *O'Connor* actual dangerousness would have to be found before commitment in order not to deprive a person of due process. Changing the standard to one of "incapacity" would allow the state in its role as *parens patriae* to commit those persons who are incapable of any rational decision making, while allowing to those individuals who are mentally ill but still capable of making decisions the right not to be committed. Treatment would have to be provided, however, to those committed, so that they might possibly recover sufficiently to be able to care for themselves and be released.

The question whether there is a constitutional right to treatment still remains unanswered. Mental health issues are very much in focus today, and it is regrettable that the Supreme Court did not decide the right to treatment issue when it had the opportunity to do so in *O'Connor*.

Shawn M. Wold