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O'CONNOR v. DONALDSON

CONSTITUTIONAL LAW—*Mental Health*—*A state cannot constitutionally confine without more, a nondangerous individual adjudged to be mentally ill.* 95 S. Ct. 2486 (1975).

In 1960, Dr. Morton Birnbaum published an article which advanced the proposition that the Constitution secures a “right to treatment” for mental patients.¹ Soon thereafter, the American Bar Association editorially endorsed the idea.² Paralleling the growing public awareness of the unfortunate conditions in mental institutions, the concept of a right to treatment has gained increasing support. The need for a remedy is manifest as one court recently observed:³

Patients in the hospitals were afforded virtually no privacy: the wards were overcrowded; there was no furniture where patients could keep clothing; there were no partitions between the commodes in the bathrooms. There were severe health and safety problems: patients with open wounds and inadequately treated skin diseases were in imminent danger of infection because of the unsanitary conditions existing in the wards, such as permitting urine and feces to remain on the floor; there was evidence of insect infestation in the kitchen and dining areas. Malnutrition was a problem . . . Aides frequently put patients in seclusion or under physical restraints, including, straitjackets . . . One resident had been regularly confined in a straitjacket for more than nine years . . . Seclusion rooms were large enough for one bed and a coffee can, which served as a toilet. The patients suffered brutality, both at the hands of the aides and at the hands of their fellow patients . . .

Although fifteen years have passed since the concept was first advanced, the case of *O'Connor v. Donaldson*⁴ is the first right to treatment case to reach the Supreme Court.

Kenneth Donaldson, was civilly committed on January 3, 1957, after a brief hearing which was instituted on the petition of his father.⁵ Adjudged a paranoid schizophrenic,⁶ Donaldson was admitted to the Florida State Hospital at Chattahoochee, where

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

2. Editorial, *A New Right*, 46 A.B.A.J. 516 (1960).

3. *Wyatt v. Aderholt*, 503 F.2d 1305, 1310-11 (5th Cir. 1974).

4. 95 S. Ct. 2486 (1975).

5. *Donaldson v. O'Connor*, 493 F.2d 507, 510 (5th Cir. 1974), *vacated on other grounds*, 95 S. Ct. 2486 (1975).

6. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2489 (1975).

he was confined against his will for close to 15 years.⁷ During his confinement, Donaldson sought on numerous occasions to convince state and federal courts that his detention was unlawful.⁸ Finally, in 1971, Donaldson successfully sued⁹ five hospital and state officials in federal district court.¹⁰ He alleged that the defendants had deprived him of his constitutional right to either receive treatment or be released from the hospital.¹¹ The evidence adduced at trial showed that Donaldson was not dangerous and that his confinement was a "simple regime of enforced custodial care."¹² The jury returned a verdict in favor of Donaldson and awarded him a judgment of \$28,500 as compensatory damages and \$10,000 as punitive damages.¹³ The court of appeals affirmed the judgment of the district court and held:¹⁴

[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.

7. *Id.* at 2488.

8. Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752, 775 (1969). The Supreme Court previously denied Donaldson's requests for review four times. See *Donaldson v. O'Connor*, 400 U.S. 869 (1970); *Donaldson v. O'Connor*, 390 U.S. 971 (1968); *Donaldson v. Florida*, 371 U.S. 806 (1963); *In re Donaldson*, 364 U.S. 808 (1960).

9. Donaldson brought suit pursuant to the Civil Rights Act of 1964, 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.

10. *Donaldson v. O'Connor*, No. 1693 (N.D. Fla. Nov. 28, 1972). Originally Donaldson's complaint was filed as a class action while he was still a patient at the state hospital. Donaldson sought damages, habeas corpus relief for himself and the patients in Department C of the hospital, and declaratory and injunctive relief to require the Florida State Hospital at Chattahoochee to provide adequate treatment. Subsequent to the filing of this action, the hospital's superintendent, Dr. O'Connor, retired and at the staff's initiative Donaldson was finally restored to competency and liberty. The district court then dismissed the action as a class suit and Donaldson filed his first amended complaint which sought individual damages and repeated his claims for declaratory and injunctive relief. The request for declaratory and injunctive relief was effectively eliminated before trial when Donaldson dropped his request that a three-judge panel be convened to determine the constitutionality of Florida's civil commitment statutes. *Donaldson v. O'Connor*, 493 F.2d 507, 512-13 (5th Cir. 1974).

11. *Donaldson v. O'Connor*, 493 F.2d 507, 509 (5th Cir. 1974).

12. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2490 (1975).

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

14. *Id.* at 520.

The Supreme Court granted the defendant's petition for certiorari because of the "important constitutional questions seemingly presented."¹⁵ After consideration, however, the Court determined that the "difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture."¹⁶ The *Donaldson* Court issued a very narrow holding and declined to take advantage of the opportunity to decide whether there is a constitutional right to treatment.¹⁷ Instead, the Court viewed the case as raising only the single question of "every man's constitutional right to liberty."¹⁸ Consequently, the Court held only that:¹⁹

[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.

The Court vacated the judgment of the court of appeals and remanded to allow reconsideration of the issue of the defendant's personal liability in light of *Wood v. Strickland*,²⁰ which dealt

15. O'Connor v. Donaldson, 95 S. Ct. 2486, 2489 (1975).

16. *Id.* at 2492.

17. "We accordingly have no occasion here to decide whether persons committed on grounds of dangerousness enjoy a 'right to treatment.'" *Id.* at 2491 n.6 (1975).

[T]here is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment.

Id. at 2492 (1975).

18. *Id.*

19. *Id.* at 2494.

20. 420 U.S. 308 (1975).

At trial, O'Connor contended that he was acting pursuant to state law which he believed authorized the custodial confinement of mentally ill individuals whether they were dangerous or not. He further contended that he could not reasonably be expected to know that this interpretation of the law was constitutionally invalid. O'Connor's requests to have the jury instructed as such were all denied by the trial judge. The court of appeals did not consider whether it was error on the part of the judge to refuse O'Connor's requested instructions as to the right of the defendant to rely on state law. O'Connor v. Donaldson, 95 S. Ct. 2486, 2491-92 (1975).

The Supreme Court dealt with these questions, in the area of education, in *Wood v. Strickland*, 420 U.S. 308 (1975). Under that holding the appropriate question for the jury in the instant decision was

whether O'Connor "knew or reasonably should have known that the action he took within his scope 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]."

O'Connor v. Donaldson, 95 S. Ct. 2486, 2494 (1975), quoting *Wood v. Strickland*, 420 U.S.

with the scope of the qualified immunity possessed by state officials. Nevertheless, the Supreme Court's decision in *Donaldson* will have important ramifications for the future development of a "right to treatment" and for the power of states to constitutionally confine the mentally ill.

An analysis of the right to treatment must begin with Judge Bazelon's seminal²¹ opinion in *Rouse v. Cameron*.²² The petitioner's situation in that case was significantly different from Donaldson's. Rouse was involuntarily committed to a mental hospital after being acquitted of a criminal offense by reason of insanity. Although Judge Bazelon based the right to treatment in *Rouse* on statutory grounds,²³ the case had great implications for the constitutional right to treatment. The court indicated that it was "[i]mpressed by the considerable constitutional problems that arise"²⁴ from involuntary civil commitment without treatment and suggested that such commitment raises questions of procedural due process, equal protection, and cruel and unusual punishment.²⁵

More recently, several cases have specifically dealt with the right to treatment enjoyed by civilly committed mental patients. Relying on *Rouse*, a district court in *Wyatt v. Stickney*²⁶ held that when individuals are involuntarily civilly committed, "they 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."²⁷ The court stated that the hospital would be transformed into a penitentiary if the state did not provide effective treatment and observed that it is a violation of due process to custodially confine the mentally

308, 322 (1975). Under this test the official does not have to "anticipate unforeseeable constitutional developments." *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2495 (1975).

21. *New York State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 758 (E.D.N.Y. 1973).

22. 373 F.2d 451 (D.C. Cir. 1966).

23. The 1964 Hospitalization of the Mentally Ill Act, D.C. CODE ENCYCL. ANN. § 21-562 (1967) provides:

A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment.

24. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966).

25. *Id.*

26. 325 F. Supp. 781, upon submission of proposed standards by defendants, 334 F. Supp. 1341 (1971), enforced, 344 F. Supp. 373, enforced as to added plaintiffs, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

27. 325 F. Supp. 781, 784 (M.D. Ala. 1971).

ill against their will "upon the altruistic theory that confinement is for humane therapeutic reasons"28

In *Burnham v. Department of Public Health*,²⁹ patients of several mental health institutions operated by the State of Georgia brought a class action asking the court to declare that involuntarily, civilly-committed patients are constitutionally entitled to adequate treatment. The court noted that in order to invoke jurisdiction under the Civil Rights Act,³⁰ the plaintiffs had to show deprivation of a federal right. The court refused to recognize the existence of a constitutional right to treatment, pointing out that there is no legal precedent for such a right. Therefore, the action was dismissed.³¹

The decision of the court of appeals in *Donaldson* is significant for several reasons. Most notably, it was the first time the right to treatment issue was presented to a federal court of appeals. Of secondary importance is the fact that when *Wyatt* and *Burnham* were appealed, those cases were affirmed and reversed, respectively, on the basis of *Donaldson*.³² Because of the heavy reliance placed on *Donaldson* in the other fifth circuit decisions, a detailed analysis of that case is appropriate.

The court of appeals in *Donaldson* stated that the only governmental interests that justify the "massive curtailment of liberty"³³ occasioned by involuntary civil commitment are the need

28. *Id.* at 784-85.

29. 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd per curiam*, 503 F.2d 1319 (5th Cir. 1974).

30. 42 U.S.C. § 1983 (1970). For the text of the Act see note 9 *supra*.

31. The court in *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335, 1340-41 (N.D. Ga. 1972), took notice of the ruling in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971) which declared that there is an affirmative federal right to treatment, and disagreed with that court's conclusion because: (1) it relied on *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) which based the right to treatment on a District of Columbia statute and; (2) because the factual background in *Wyatt* was "substantially different" from the situation in Georgia's hospitals. *Contra*, *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973) (the court dealt with a person confined under the Illinois Sexually Dangerous Persons Act and noted its agreement with *Wyatt* as to the recognition of a constitutional right to treatment).

32. It should be noted that *Wyatt*, *Burnham*, and *Donaldson* are all Fifth Circuit cases. See *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (affirming *Wyatt* on the basis of *Donaldson*); *Burnham v. Department of Public Health*, 503 F.2d 1319 (5th Cir. 1974) (reversing *Burnham* on the basis of *Donaldson* and *Wyatt*).

"[We] have now established that the right to treatment arises as a matter of federal constitutional law under the due process clause of the Fourteenth Amendment." *Wyatt v. Aderholt*, 503 F.2d 1305, 1314 (5th Cir. 1974).

33. *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

for care and treatment and the danger to self or others.³⁴ The court further reasoned that there are consequently two bases for the right to treatment. If the rationale for the individual's confinement is treatment, the court concluded that treatment must follow or due process would be denied.³⁵ Looking to the second governmental interest—dangerousness of the individual—the court recognized that long-term detention under our system of law is subject to three due process requirements: (1) the individual must be brought to trial and afforded rigorous procedural safeguards; (2) the state must prove beyond a reasonable doubt that the individual committed a specific illegal act; and (3) the individual must then be given a fixed period of time for confinement. Where these three due process requirements are not present—as in involuntary civil commitment—the court proposed that “there must be a *quid pro quo* extended by the government to justify confinement. And the *quid pro quo* . . . is the provision of . . . treatment”³⁶

Expressing his disapproval with the court of appeals' twofold analysis for the right to treatment, Chief Justice Burger observed in his concurring opinion in *Donaldson*:³⁷

As the Court points out . . . the District Court [in *Donaldson*] instructed the jury in part 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,” (emphasis added) and the Court of Appeals unequivocally approved this phrase, standing alone, as a correct statement of the law [I]n light of its importance for future litigation in this area, it should be emphasized that the Court of Appeals analysis has no basis in the decisions of this Court. [Citations omitted.]

Because the jury found that Donaldson was neither dangerous nor receiving treatment, the Supreme Court considered it unnecessary to determine whether the generally advanced statutory rationales for confinement—dangerousness and treatment—were valid justifications for his confinement.³⁸ The Court instead identified and subsequently rejected all other possible justifications for commitment. First, the Court indicated that it would not be

34. *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974).

35. *Id.* at 521.

36. *Id.* at 522.

37. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2496 (1975) (emphasis added).

38. *Id.* at 2492-93.

constitutional for the committing authorities to simply assert that the state law authorizes commitment of the nondangerous mentally ill. This aspect of the Court's opinion reflected a view aptly expressed in *Sas v. Maryland*:³⁹

[A] statute though "fair on its face and impartial in appearance" may be fraught with the possibility of abuse in that if not administered in the spirit in which it is conceived it can become a mere device for warehousing the obnoxious and antisocial elements of society.

The *Donaldson* Court posited that even if the original confinement of a mentally ill individual were based on a constitutional statute, confinement could not continue once the original basis for such confinement had been eliminated.⁴⁰ Insofar as the mentally ill are committed because of their status—not because of the commission of a violent act—it appears that routine review of the patient's condition by a psychiatrist is mandated to insure that the original basis for the confinement is still existent.⁴¹

A finding of "mental illness," alone, was deemed by the Court to be an inadequate justification for the involuntary commitment of an individual.⁴² As a distinguished commentator has noted, "the loss of freedom, of property, and of civil and personal rights solely because of mental illness is a process which should disturb every American concerned with the blessings of liberty."⁴³ Nevertheless, mental illness is the sole criterion for commitment in some states.⁴⁴ The Medical Director of the Minnesota Department of Public Welfare illustrated the dangers inherent in such a standard in recounting the following:⁴⁵

39. 334 F.2d 506, 516 (4th Cir. 1964) (suit to have Maryland Defective Delinquent Act, under which the plaintiffs were confined, declared unconstitutional).

40. O'Connor v. Donaldson, 95 S. Ct. 2486, 2493 (1975).

41. Donaldson requested to speak with the doctors in charge of his case many times but his requests were denied. Donaldson testified that he spoke with O'Connor 6 times in the 18 months that O'Connor was his attending physician, before being promoted, and that all 6 times combined did not even add up to an hour. Donaldson further testified that while Dr. Gumanis was his physician for 8-½ years, he did not speak with him for more than a total of 2 hours—"an average of about 14 minutes a year." Donaldson v. O'Connor, 493 F.2d 507, 514 (5th Cir. 1974).

42. O'Connor v. Donaldson, 95 S. Ct. 2486, 2493 (1975).

43. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2nd Sess. 1 (1969-1970) (opening statement of Senator Sam J. Ervin, chairman) [hereinafter cited as *1969 Hearings*].

44. See, e.g., N. J. STAT. ANN. § 30:4-58 (Supp. 1975).

45. *1969 Hearings* 71.

One of our probate judges in Minnesota was angry at the hospital staff or [sic] what he saw as releasing a patient too soon. He said: "What it boils down to is this: Is this guy going to be crazy in my town or in your hospital?"

The *Donaldson* Court rejected the notion that civil commitment may be viewed as a means of improving the living standard of a mentally ill person. The state has an interest in caring for the unfortunate, but a mentally ill individual has the right to prefer home over hospital.⁴⁶ As Justice Brandeis observed:⁴⁷

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent
 The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding.

Thus, if the individual can survive safely in freedom—on his or her own, or with the help of friends and relatives—confinement in a mental hospital would be highly objectionable if its only purpose is to raise the individual's standard of living.⁴⁸

The conclusion of the Court on this issue is consistent with its reasoning in *Shelton v. Tucker*:⁴⁹

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Perhaps the clearest application of this doctrine to the area of involuntary civil commitment is in *Lessard v. Schmidt*,⁵⁰ where a three-judge district court expressed the view that full-time, involuntary hospitalization is justified only as a last resort. Mentally ill individuals who have committed no crime cannot be confined if there is a less drastic means of attaining the goals of hospitalization. The authority that recommends commitment must, the court said, "bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not

46. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2493 (1975).

47. *Olmstead v. United States*, 277 U.S. 438, 479 (1928)(Brandeis, J., dissenting).

48. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2493-94 (1975).

49. 364 U.S. 479, 488-90 (1960).

50. 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473, *order reissued*, 379 F. Supp. 1376 (E.D. Wis. 1974).

deemed suitable.”⁵¹ The alternatives to hospital confinement are numerous; the *Lessard* court suggested, as examples, out-patient treatment, day or night treatment in a hospital, nursing home placement, custody by friend or relative, and referral to a community mental health clinic.⁵²

Finally, the Supreme Court in *Donaldson* concluded that it is impermissible to confine the mentally ill just because their ways are different. The state cannot confine those who are physically unattractive just to put society at ease, nor can public animosity toward such persons serve as a basis for their commitment.⁵³ Legislatures may act to protect the economic, physical, psychic, or esthetic interests of society.⁵⁴ Thus, ugly billboards may be prohibited because they are offensive. Legislatures may not, however, quarantine ugly people for the same reason.⁵⁵ The necessity of segregating the social nuisance is, most assuredly, one of the underlying reasons for today’s commitment statutes.⁵⁶ Most people feel uneasy in the presence of an aberrant person regardless of whether a threat of danger is actually posed.⁵⁷ This discomfort results from the fear of difference. Society places labels on such persons—misfit, delinquent, addict, mentally ill—which primarily connote difference.⁵⁸ To promote the highest degree of comfort the individual is banished to an institution. But in order to insure that comfort, society represses the real reason for such banishment⁵⁹ and declares it to be for the good of the individual. The power to commit may be abused as a means to segregate those who are simply different.⁶⁰

51. *Id.* at 1096. Some legislatures have enacted laws embodying the “least restrictive alternative.” See, e.g., VA. CODE ANN. § 37.1-67.1 (Supp. 1975).

52. Helping Hands, Inc., a Minneapolis organization that has homes for the mentally ill, sought to secure Donaldson’s release and take him in as a “resident” but Dr. O’Connor thwarted these attempts. John Lembcke, a college friend of Donaldson’s, offered to take the responsibility of care for Donaldson on four separate occasions but the hospital denied all such requests made by him. *Donaldson v. O’Connor*, 493 F.2d 507, 515-17 (5th Cir. 1974).

53. *O’Connor v. Donaldson*, 95 S. Ct. 2486, 2494 (1975).

54. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954); *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969).

55. See *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969).

56. *Livermore, Malmquist, & Meehl, On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 86 (1968).

57. *Id.* at 87.

58. *Id.* at 78.

59. *Id.* at 87.

60. See *In re Sealy*, 218 So.2d 765. (Dist. Ct. App. Fla. 1969) where appellant was a “hippie” who believed in free love, non-violence, atheism, and the use of hallucinogenic

Eliminating the foregoing rationales for civil commitment, the Court in *Donaldson* left as the only two possible justifications for confining the mentally ill those which were accepted as justifications by the court of appeals below—treatment and dangerousness.⁶¹ In his concurring opinion, Chief Justice Burger noted that the court of appeals had reasoned that non-dangerous patients must be provided with treatment since there is no other valid basis for their involuntary confinement.⁶² The Chief Justice criticized this approach and observed that the court of appeals' rationale would find no support in either prior decisions of the Court or in the majority's opinion in *Donaldson*. He argued that this "proposition is surely not descriptive of the power traditionally exercised by the States in this area" and that "there is no historical basis for imposing the [right to treatment] limitation on state power."⁶³ A careful analysis of Supreme Court decisions, however, reveals abundant support for the court of appeals' two-fold analysis. The court of appeals first reasoned that if treatment is the rationale for confinement, then treatment must actually be provided. The Supreme Court's language in *Jackson v. Indiana*⁶⁴ lends support to this position. The Court in *Jackson* stated that:⁶⁵

At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

There is no reasonable relationship between custodial confinement and treatment. Accordingly, if the purpose of commitment is treatment, then the nature of the commitment cannot be custodial confinement. Involuntary commitment for treatment must

drugs. Two medical doctors examined him and diagnosed him as incompetent and dangerously, mentally ill. A qualified psychologist testified at the commitment proceedings that appellant was "sane and rational in all respects." *Id.* at 768. The County Judge ordered hospitalization but the appeals court disagreed:

The fact that he elected to lead the kind of life, entertain beliefs and engage in conduct which was offensive, repulsive, and objectionable to others does not necessarily indicate mental incompetence, nor does it justify confining him in a mental institution primarily in order to alleviate the . . . embarrassment he was causing [his parents].

Id. at 768.

61. See note 38 *supra* and accompanying text.

62. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2497 (1975).

63. *Id.* Justice Burger discussed in detail how the states have traditionally exercised the *parens patriae* power in order to give custodial care to the mentally ill. *But see* note 46 *supra* and accompanying text.

64. 406 U.S. 715 (1972).

65. *Id.* at 738.

provide treatment if it is to satisfy the demands of due process.⁶⁶

Jackson dealt with the pretrial commitment of a defendant found incompetent to stand trial, but its principle should apply in all civil commitment cases. Arguably, the failure to extend *Jackson* to all such cases would be violative of the equal protection clause of the fourteenth amendment. The *Jackson* Court relied on *Baxtrom v. Herold*,⁶⁷ where it was held that a state procedure which provided for the civil commitment of convicted criminals, without requiring a jury trial for such commitment, violated equal protection since all other persons had the right to have a jury evaluate the factual issues underlying a proposed civil commitment. Specifically, the *Baxtrom* Court stated that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."⁶⁸ The Court in *Jackson* thus reasoned that if a defendant who has been convicted of a crime is entitled to the safeguards of civil commitment available to non-criminals, then the individual who has merely been accused of a crime is certainly entitled to as much. Extending the *Baxtrom-Jackson* rationale, there is no basis for distinguishing between the commitment of a defendant charged with a crime and the commitment of an individual merely alleged to be mentally ill. If the defendant who is committed because he is incompetent to stand trial has the due process right to have his commitment bear a reasonable relation to the purpose for such commitment, so does the individual who is civilly committed. Courts should be as protective of the rights of one not charged with a crime.

It can be further argued that even if a "mentally ill" individual is confined because he or she is dangerous,⁶⁹ that individual still enjoys the right to treatment under the *Jackson* rationale. *Jackson* had been committed because he was incompetent to stand trial. The Court held that, "if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."⁷⁰ In confining a mentally ill individual because he is dangerous, ad-

66. Many lower federal courts have relied on this interpretation of *Jackson* to support a right to treatment. See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507, 521 (5th Cir. 1974); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974).

67. 383 U.S. 107 (1966).

68. *Id.* at 111-12.

69. See note 95 *infra*.

70. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

mittedly the goal is to protect the individual and society. The Supreme Court would obviously not rule that there must be a substantial probability that the individual will be cured of his dangerous propensities or else he must be released. A state may certainly exercise its police power to protect its citizens; however, it is also a goal to attempt to cure the individual of his disease in order to make him a nondangerous and productive citizen.⁷¹ The individual's continued confinement cannot be justified without at least affording him some treatment.

The court of appeals also reasoned that treatment is a quid pro quo for the loss of liberty suffered by involuntary mental patients. Support is given to this theory by decisions of the Supreme Court. In *Robinson v. California*,⁷² the Court held that a statute which criminalized the status of being a drug addict violated the eighth amendment prohibition against cruel and unusual punishment.⁷³ To custodially confine a person for the status of being "mentally ill" is to impose a cruel and unusual punishment under the rationale of *Robinson*.⁷⁴ Although the confinement may be labeled "civil,"⁷⁵ if distinguishable from criminal detention at all, it is because it is more oppressive. The individual is confined without having been found guilty of committing an illegal act. The individual is, in many instances, given what amounts to a life sentence.⁷⁶ Furthermore, the privileges afforded to the patient while confined in the hospital are frequently comparable to, or even less than, those given to prisoners who are confined in penitentiaries.⁷⁷ The civil deprivations that follow

71. *Lynch v. Overholser*, 369 U.S. 705, 724 (1962)(Clark, J., dissenting)("We have long recognized that persons who because of mental illness are dangerous to themselves or to others may be restrained against their will in the interest of public safety and to seek their rehabilitation . . .").

72. 370 U.S. 660 (1962).

73. *Id.* at 667.

74. See N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 400-04 (Therapeutic Bill of Rights #4).

75. See *Powell v. Texas*, 392 U.S. 514, 529 (1968)("[N]othing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse."); *In re Gault*, 387 U.S. 1, 49-50 (1967)("civil" label-of-convenience attached to juvenile proceedings).

76. *Jackson v. Indiana*, 406 U.S. 715, 719, 730 (1972)(condemning defendant, in effect, to permanent institutionalization); *Powell v. Texas*, 392 U.S. 514, 529 (1968).

77. See *United States ex rel. Shuster v. Herold*, 410 F.2d 1071, 1090-91 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969)(appendix citing table from J. KATZ, J. GOLDSTEIN & A. DER-SHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 700-02 (1967)). See generally *Donaldson v. O'Connor*, 493 F.2d 507, 511-12 n.5 (5th Cir. 1974)(testimony of Donaldson before the district court); ABF, *THE MENTALLY DISABLED AND THE LAW* 155-72 (S. Brakel & R. Rock eds. rev. ed. 1971).

civil commitment are often more serious than those that follow criminal conviction. In many states persons pronounced mentally ill are restricted in their right to make contracts, to sue and be sued, to vote, and to drive.⁷⁸ Moreover, the stigma which attaches to civil commitment is enormous.⁷⁹

It has been argued that "the primary concern of any mental hygiene law is to empower physicians to imprison innocent citizens, under the rubric of 'civil commitment.'"⁸⁰ Assuming, then, that civil commitment is a cruel and unusual punishment under these conditions, the quid pro quo theorists view the provision of treatment as the only way such confinement can pass constitutional muster. The Supreme Court noted in *Robinson*:⁸¹

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill A State might determine that the . . . victims of [this] and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. [Citation omitted.]

The mental institution is transformed into a penitentiary in the absence of treatment. Treatment is, therefore, constitutionally required.⁸²

The Supreme Court impliedly gave support to the quid pro quo theory in *In re Gault*.⁸³ At issue in *Gault* was the validity of certain juvenile court procedures. The Court observed that the disparity between the rights afforded adults and those afforded juveniles is defended in light of the "special consideration and treatment" given to the latter. The Court found it unnecessary to decide whether this defense was adequate because it doubted whether juveniles "always receive the benefits of such a quid pro

78. T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 40 (1968). See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078, 1088-90 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974). *Contra*, *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

79. *THE MENTALLY ILL AND THE RIGHT TO TREATMENT* vii (G. Morris ed. 1970).

80. Szasz, *The Right to Health*, 57 *Geo. L.J.* 734, 742 (1969).

81. 370 U.S. 660, 666 (1962)(dictum).

82. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

83. 387 U.S. 1 (1967).

quo.”⁸⁴ The Court cited several lower court decisions⁸⁵ which indicated that a juvenile can attack court-ordered confinement on the ground that treatment was not provided. These decisions suggest that adequate and effective treatment is essential to the validity of such confinement.

In his concurring opinion in *Donaldson*, Chief Justice Burger criticized the quid pro quo theory because it created a new substantive constitutional right out of the absence of a procedural right.⁸⁶ This view appears to be inconsistent with the position he took while sitting as circuit judge in *Cross v. Harris*.⁸⁷ In that case, he argued in dissent:⁸⁸

A civil commitment statute is not rendered constitutionally suspect . . . simply because in a given case the civil confinement may exceed the sentence which could be imposed under a criminal statute for the same acts. The possible disparity of confinement . . . may reasonably be justified by the social desirability and public necessity of providing the patient with therapy.

Chief Justice Burger was, therefore, apparently wrong when he stated that the Supreme Court’s decisions provide no support for the court of appeals’ twofold analysis.⁸⁹ He was, however, correct when he further posited that:⁹⁰

The Court’s opinion [today] plainly gives no approval to that holding and makes clear that it binds neither the parties to this case nor the courts of the Fifth Circuit.

Of initial importance is the fact that in a footnote, the Supreme Court stated that its decision, in vacating the judgment below, of necessity destroys any precedential effect that that opinion might have had.⁹¹

The Supreme Court seems to have made it clear by this comment that it was giving no approval to the court of appeals’

84. *Id.* at 22-23, n.30; *see id.* at 18, n.23.

85. *See cases cited in In re Gault*, 387 U.S. 1, 23 n.30 (1967).

86. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2499 (1975). *See also Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1325, n.39 (1974).

87. 418 F.2d 1095 (D.C. Cir. 1969).

88. *Id.* at 1109.

89. *See note 66 supra*. Many lower federal courts have also relied on *Robinson and In re Gault* to declare a right to treatment. *See, e.g., Donaldson v. O'Connor*, 493 F.2d 507, 524 & n.33 (5th Cir. 1974)(citing *In re Gault*); *Welsch v. Likins*, 373 F. Supp. 487, 497 (D. Minn. 1974)(citing *Robinson*).

90. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2496 (1975).

91. *Id.* at 2495, n.12.

recognition of a "right to treatment." The Court explicitly held that "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."⁹² While it is perhaps quixotic to attempt to give meaning to what the Court did not say, the language limiting the holding⁹³ in *Donaldson* appears to be of greater potential significance than the holding itself. The Court's conclusion may be read as sanctioning confinement without "more" if the patient is alleged to be dangerous, and confinement of the nondangerous if "more" is provided. Although one might speculate why the Court was at a loss for words, "more" can only mean treatment.

It is submitted that a rule which would limit a constitutional right to treatment to nondangerous patients would be without support of reason. It has been noted that "no criteria for 'dangerousness' have been precisely articulated."⁹⁴ Many states authorize involuntary hospitalization upon a finding of "potential dangerousness."⁹⁵ The Supreme Court has defined "dangerous to himself" not only as including the "foreseeability of self-injury or suicide" but also as encompassing any individual who "for physical or other reasons . . . is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends."⁹⁶ This definition is inadequate. It is so broad that it renders the phrase meaningless in practical effect.⁹⁷

92. *Id.* at 2494 (emphasis added).

93. See note 17 *supra*.

94. Goldstein & Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 *YALE L.J.* 225, 235 (1960).

95. See, e.g., ARIZ. REV. STAT. ANN. § 36-531(B)(1974); NEV. REV. STAT. § 433.695(2)(1973).

To deny a constitutional right on the basis of a dangerous "propensity" is to punish one on the basis of his or her status. *Cross v. Harris*, 418 F.2d 1095, 1101-02 (D.C. Cir. 1969). This contravenes the reasoning of the *Robinson* Court. It cannot be denied that there are dangerous people in this society, but under our system of law, dangerousness is "supposed to be an inference drawn from the fact that a person has committed a violent act that is illegal, has been charged with it, tried for it, and found guilty of it." Szasz, *On Involuntary Psychiatry*, *N.Y. Times*, Aug. 4, 1975, at 19, col. 2.

In order to constitutionally confine a mentally ill individual because he or she is dangerous, a strict test should be adopted. Essentially, the state should be required to prove beyond a reasonable doubt that the individual will commit a dangerous act if he is not confined. KITTRIE, *THE RIGHT TO BE DIFFERENT* 400-04 (Therapeutic Bill of Rights, #1 and #7. Under this test, dangerousness would have to be based on a finding of a "recent overt act, attempt or threat" to commit a violent act. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

96. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2493 n.9 (1975).

97. Under this broad definition of "dangerousness," hospital authorities could proba-

The accuracy of psychiatric predictions of dangerousness is questionable.⁹⁸ The prediction of a highly specific, infrequently occurring human event such as suicide cannot be done accurately as of yet.⁹⁹ Even if an "exceptionally accurate test" were devised to predict homicide, such a test would necessitate committing many individuals who would not kill in order to confine the ones who would.¹⁰⁰

The problem is compounded by the fact that psychiatrists, in determining whether an individual is likely to commit a dangerous act in the future, often base their determination, not on expertise, but on their "own personal preference for safety or liberty."¹⁰¹ The psychiatrist does not usually learn about his faulty predictions of violence because, in those cases, the patients are confined. The psychiatrist does, however, learn about his faulty predictions of nonviolence because these patients are released; it weighs heavily on him when one of them commits a violent act. Because it is more visible to the psychiatrist when he mistakenly releases the individual who really is dangerous, there is a tendency for psychiatrists to overestimate dangerousness and request hospitalization.¹⁰²

Another problem with the standard is that innocent acts of the mentally ill are perceived as threatening and may form the basis of a finding of dangerousness. This stereotypical view of the mentally ill derives from the tendency to dub people who engage in aggressive or violent acts as mentally ill.¹⁰³ Ghetto residents,

bly rediagnose most of their present population as dangerous. See note 131 *infra* and accompanying text.

98. Dershowitz, *On "Preventive Detention,"* 12 N.Y. REVIEW OF BOOKS 22, 26 (March 1969); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 711-16 (1974).

99. Diggory, *Predicting Suicide: Will-O-the-Wisp or Reasonable Challenge?*, in THE PREDICTION OF SUICIDE 59 (1974).

100. Livermore, Malmquist, & Meehl, *supra* note 56, at 84.

Assume . . . that an exceptionally accurate test is created which differentiates with ninety-five per cent effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people.

Id.

101. *Cross v. Harris*, 418 F.2d 1095, 1101 (D.C. Cir. 1969), quoting "Psychiatry in the Legal Process: 'A Knife that Cuts Both Ways,'" Address by A. Dershowitz, Harvard Law School Sesquicentennial Celebration, Sept. 22, 1967.

102. See Dershowitz, *supra* note 98.

103. Szasz, *supra* note 78, at 144.

teenage males, and ex-felons are all more likely to engage in acts of violence than the "average" member of society. Yet, these groups retain their liberty, whereas the mentally ill are confined as a preventive detention measure to insure the public safety. Furthermore, out of all of the above-mentioned groups, the mentally ill are probably the least dangerous.¹⁰⁴ "Why should society confine a person if he is dangerous and mentally ill but not if he is dangerous and sane?"¹⁰⁵

Due to the foregoing analysis concerning the varied problems inherent in the category of "dangerousness," it becomes apparent that this standard is illusory at best. It is, therefore, irrational to condition the applicability of a constitutional right to treatment on whether the individual is nondangerous. The dangerous should enjoy the right to treatment to the same extent as the nondangerous.¹⁰⁶

The *Donaldson* Court impliedly condoned the provision of treatment as an appropriate justification for the involuntary hospitalization of the nondangerous mentally ill. Many states confine the mentally ill solely on a showing that they need treatment.¹⁰⁷ Nevertheless, it is certainly true that most people could benefit from a little "psychological rewiring" at different stages in their development.¹⁰⁸ Yet if the state were to tamper with any individual's mind whenever it was deemed to be beneficial, society would rise up in opposition.¹⁰⁹ Why, then, are the "mentally ill" singled out for treatment? Perhaps the most important reason is that it is generally thought that mental illness is equivalent to incompetence and that, therefore, the decision to hospitalize must be made for the mentally ill.¹¹⁰ This is a fallacious view.

There is growing recognition that mental illness and incompetence are not synonymous, and that many of the mentally ill are entirely competent to make rational and important decisions

104. 1969 *Hearings* 263 (testimony of Bruce J. Ennis, American Civil Liberties Union, New York City); Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282, 1294 (1973).

105. 1969 *Hearings* 263 (testimony of Bruce J. Ennis).

106. See text accompanying notes 69-71 *supra*.

107. See, e.g., MICH. COMP. LAWS ANN. § 330.1468 (1975); PA. STAT. ANN. tit. 50, § 4406 (1969).

108. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972); Livermore, Malmquist, & Meehl, *supra* note 56, at 77.

109. Livermore, Malmquist, & Meehl, *supra* note 56, at 77-78.

110. *Id.* at 88.

concerning their affairs, including the decision to accept or reject hospital treatment.¹¹¹

The mentally ill individual may even be correct when he chooses liberty instead of hospitalization.¹¹² Not only are many forms of mental illness untreatable to date, but even where effective methods of therapy have been devised, rates of cure in mental institutions are despairingly low.¹¹³ Furthermore, everyone has the right to choose those things which, when taken in the light of all relevant factors, may not have been the best of the alternatives. It can only be harmful to select the mentally ill as a group that does not have the ability to define its own interests.¹¹⁴

Although the *Donaldson* decision implies that treatment is a valid justification for confinement, the Supreme Court has not ruled directly on this issue.¹¹⁵ The Supreme Court's decisions in the analogous area of compulsory education may have some bearing on how the Supreme Court would rule if directly presented with this question. The Court has accepted Thomas Jefferson's proposition that in order to prepare citizens to effectively and intelligently participate in our political system, some form of compulsory education is necessary. The Court has also accepted the proposition that compulsory education develops self-reliance and self-sufficiency.¹¹⁶ Compulsory education helps the individual adjust normally to his environment and is an essential foundation of good citizenship.¹¹⁷ Thus, one might argue that involuntary hospitalization is justified on the grounds that the individual needs treatment so as to enable him to become an effective participant in our society. The Court indicated, however, that no matter how important the state's interest is in compulsory education, it is not absolute to the exclusion of all other interests, but calls for a balancing test when fundamental rights are infringed.¹¹⁸ The right to liberty is such a fundamental right.¹¹⁹ Thus, the mentally ill should not be confined against their wishes

111. 1969 *Hearings* 262 (testimony of Bruce J. Ennis).

112. *Id.*

113. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2498 (1975) (Burger, C.J., concurring).

114. Szasz, *supra* note 78, at 240.

115. *Robinson v. California*, 370 U.S. 660, 666 (1962) (dictum) ("A State might determine that the . . . victims of [mental illness] be dealt with by compulsory treatment . . .").

116. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

117. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (dictum).

118. *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972).

119. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2492 (1975).

on the theory that they need treatment in order to become good citizens.¹²⁰

It is clear that persons who have physical ailments are allowed to exercise the choice of whether they will undergo hospitalization,¹²¹ and that hospital authorities, for the most part, have no right to impose compulsory medical treatment on a patient.¹²² More specifically, a competent adult cannot be forced to submit to medical treatment¹²³ whereas that same individual can be forced to submit to medical treatment if the illness has rendered him or her incompetent.¹²⁴

The same standards should apply to mental illness. Unless there is a specific finding of incompetence, the mentally ill should not be hospitalized for treatment purposes.¹²⁵ "The stereotype of the raving lunatic, bereft of reason, should not guide legislation in 20th-Century America."¹²⁶ Several states have finally recognized the fact that mental illness is not equivalent to incompetence, and have enacted legislation which requires a finding of incompetence before the mentally ill can be confined for treatment.¹²⁷ One would do well to remember the oft-repeated words of John Stuart Mill:¹²⁸

The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it. Each

120. The Court ruled that the state cannot custodially confine the mentally ill solely to ensure them a higher standard of living. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2493. This does not rule out the possibility that a state may confine the mentally ill for treatment in order to develop better citizenship.

121. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972). See, e.g., N.Y. PUB. HEALTH LAW § 2403 (McKinney 1971) (the state cannot compel individual suffering from cancer to submit to medical supervision).

122. *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971).

123. See *Erickson v. Dilgard*, 44 Misc. 2d 27, 28, 252 N.Y.S.2d 705, 706 (Sup. Ct. Nassau County 1962).

124. See *Application of the President & Directors of Georgetown College, Inc.*, 331 F.2d 1010, *rehearing denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). "Mrs. Jones was *in extremis* and hardly *compos mentis* at the time in question; she was as little able competently to decide for herself as any child would be." *Id.* at 1008.

125. *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971) (where state forced treatment on mentally ill plaintiff without first seeking a judicial determination of incompetence, the plaintiff has stated a claim on which relief may be granted); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972) (no involuntary hospitalization unless the State can prove that the person is unable to make a decision about hospitalization due to his illness).

126. 1969 *Hearings* 262 (testimony of Bruce J. Ennis).

127. See, e.g., ALASKA STAT. § 47.30.070 (i)(2) (1971); DEL. CODE ANN. tit. 16, § 5125(a)(1) (Supp. 1974).

128. J.S. MILL, *ON LIBERTY* 16-17 (Library of Liberal Arts ed. 1956) (emphasis in original).

is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

In light of the emerging body of federal case law recognizing a "right to treatment," it is surprising that on this occasion the Supreme Court chose to issue a narrow holding and completely avoid the issue.¹²⁹ By declaring that "a State cannot constitutionally confine without more a nondangerous individual," the Court only slightly weakened the institution of involuntary commitment, while providing substantial support for it.¹³⁰ At first glance, the Court seems to have taken a significant step by calling for the release of all nondangerous patients who are only custodially confined. Yet it remains to be seen how many patients will actually be released. It would not be very difficult for state hospital officials to rediagnose most, if not all, of their patients as dangerous,¹³¹ and thereby short circuit any effect the Supreme Court's decision would have had in triggering the release of many "nondangerous" mentally ill patients. On the other hand, the Court strengthened involuntary commitment by *implicitly* holding that a state can custodially confine the dangerous, mentally ill individual and that the State can confine a mentally ill person solely on the grounds that it is willing to give him treatment.

The Court's decision has left many questions unanswered. Can the State confine the dangerous, mentally ill without making any effort to cure such individuals of their dangerous propensities? Can the state confine the mentally ill for treatment purposes? And, most importantly, is there a right to treatment? Hopefully the answers to these questions will be forthcoming.

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129. In the last decade, the Supreme Court has denied certiorari in cases dealing with the right to treatment at least seven times, four of which were Donaldson's cases. See Birnbaum, *Some Remarks on "The Right to Treatment,"* 23 ALA. L. REV. 623, 635-36 n.26 (1971). See also note 8 *supra*.

130. Szasz, *On Involuntary Psychiatry*, N.Y. Times, Aug. 4, 1975, at 19, col. 2.

131. Cf. *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), quoting Livermore, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968).