Due Process—Involuntary Civil Confinement: A Right to Rehabilitative Treatment?

I. Introduction

The state is the sovereign guardian over persons under disability, *i.e.*, minors, and insane and incompetent persons. When this guardianship, or *parens patriae* power, of the state is exercised to deprive a disabled person of his liberty, it is done through a civil commitment proceeding in which fewer procedural safeguards are applied than in a deprivation of liberty through a criminal proceeding. The trend among United States courts of appeals and district courts is toward a general constitutional proposition that, while the state may validly exercise this power, the reduction of safeguards at the commitment proceeding must be balanced, *quid pro quo,* by provision of rehabilitative treatment considerably in excess of simple custodial care. Otherwise, civil commitment would constitute a deprivation of liberty without due process of law. The Supreme Court of the United States, when faced with the opportunity in *O'Connor v. Donaldson* [1] to establish the constitutional rule with finality, declined to reach the issue.

Kenneth Donaldson was involuntarily committed to a Florida state mental hospital in 1957, in a civil commitment proceeding initiated by his father. Diagnosed as a paranoid schizophrenic, he remained in the institution for fourteen and one-half years and received little or no psychiatric care or treatment. He successfully brought suit against hospital officials for damages [2] for violation of his alleged constitutional

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1. 422 U.S. 563 (1975). Stewart, J., for unanimous Court. Burger, C.J., concurring in a separate opinion.

2. 42 U.S.C. § 1983 (1970) provides for a civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen . . . to depriva-

right to receive treatment.[3] The defendants appealed to the United States Court of Appeals for the Fifth Circuit, contending that a constitutional right to treatment should not be recognized because such a right cannot be governed by judicially manageable or ascertainable standards, *i.e.*, the duty to treat and therefore its breach defy judicial identity.[4] The court of appeals rejected this contention, and the defendants appealed to the Supreme Court, which did not reach the issue of a right to treatment. The Court held that 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; and since the jury found upon ample evidence that O'Connor, as an agent of the state, knowingly did so confine Donaldson, it properly concluded that Donaldson's constitutional right to freedom had been violated.[5]

This Comment will address the question of whether there are due process reasons for holding, as did the Court of Appeals for the Fifth Circuit in *Donaldson*, that

> a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.[6]

Juveniles and other minors are also subject to involuntary civil commitment, hence they are within the scope of this Comment and will be discussed where appropriate. Because civil commitment entails a "massive curtailment of liberty," [7] the due process clause will regulate

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tion of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. The jury awarded compensatory and punitive damages totalling $38,500. Judgment was rendered on Nov. 29, 1972, in the United States District Court for the Northern District of Florida, Middlebrooks, J., presiding; there was no written opinion. Defendants contested the propriety of jury instructions which defined and explained the federal constitutional right not to be denied or deprived of liberty without due process of law; a showing of such denial or deprivation would constitute one of the four requisite elements to make out a claim under 42 U.S.C. § 1983 (1970).

The trial judge instructed the jury that an involuntarily committed mental hospital patient has a constitutional right to receive "such individual treatment as will give him a realistic opportunity to be cured or to improve his mental condition." Donaldson v. O'Connor, 493 F.2d 507, 518 (5th Cir. 1974). The instructions said the purpose of involuntary hospitalization "is treatment and not mere custodial care or punishment if a patient is not dangerous to himself or others. Without such treatment there is no justification, from a constitutional standpoint, for continued confinement." *Id.* On appeal to the court of appeals, the instructions were held proper to define the constitutional right to treatment within the due process proscription. *Id.*

4. 493 F.2d 507, 525 (5th Cir. 1974) (citation omitted).

5. 422 U.S. at 576.

6. 493 F.2d at 520.

7. Humphrey v. Cady, 405 U.S. 504, 509 (1972); Lynch v. Baxley, 386 F. Supp. 378, 397 (M.D. Ala. 1974).

this discussion. Since all of the conventional limitations on the criminal process are not applied to deprivation of liberty in a civil commitment proceeding, it is argued herein that the government must extend a *quid pro quo* to justify confinement, that is, the provision of rehabilitative treatment. Without such treatment, the hospital is "transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense. . . ." [8]

II. THE CIVIL COMMITMENT POWER

There are basically two sources of the state power to confine an individual against his will in a civil proceeding: 1) exercise of the police power to protect society from the danger of significant antisocial acts or communicable disease;[9] and 2) exercise of the *parens patriae* power with the state as guardian of "persons under legal disabilities [unable] to act for themselves," [10] including the general guardianship of "all infants, idiots, and lunatics. . . ." [11] The *parens patriae* power is asserted when the state determines that an individual is in need of care or treatment. Some courts have distinguished between the two sources in deciding whether or not there is a right to treatment and have inferred that where the danger to society rationale is used there is no right; but that where the *parens patriae* theory is used as the basis for commitment the need for care and treatment is the reason for confinement, and thus to deny treatment is to deny due process.[12]

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8. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (citation omitted). *Rouse* is generally regarded as the leading case on the right to treatment issue. Rouse was involuntarily committed to a mental hospital after acquittal of a misdemeanor by reason of insanity. While basing its decision on a statutory right to treatment, D.C. CODE § 21-562 (Supp. V. 1966), the court discussed the reasons for the statutory enactment as based on constitutional grounds and held the right cognizable in federal habeas corpus. Later District of Columbia cases have reinforced the idea of the constitutional right hinted at in *Rouse*, 373 F.2d at 453, *e.g.*, *In re* Curry, 452 F.2d 1360 (D.C. Cir. 1971). *See* Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967), for an analysis of the *Rouse* decision.

9. 422 U.S. at 582-83 (Burger, C.J., concurring). *See also* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138-39 (1967).

10. Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972) (citation omitted).

11. *Id.*, *quoting* 3 W. BLACKSTONE, COMMENTARIES * 47. The concept developed in feudal England. Upon the organization of state government in this country, the state as political sovereign succeeded to all the rights and duties of the Crown, including *parens patriae* responsibilities. Dodge v. Cole, 97 Ill. 338 (1881). A concise and interesting report tracing the origins of the *parens patriae* power to the United States, and a discussion of whether the power allows a court to order sale of a lunatic's land to pay expenses, appears at 97 Ill. at 354-64.

12. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966). *See* Donaldson v. O'Connor, 493 F.2d 507, 521-22 (5th Cir. 1974) (discussion of the two rationales, forming the theory of a due process right to treatment). But the word "dangerous" has been given various arbitrary definitions and has been interpreted to mean little more than "in need of treatment." Under such an interpretation the justification for

Most courts which have dealt with the issue, however, have made no such distinction; rather, the trend among federal courts is to insist upon adequate treatment as a constitutional prerequisite to detention of the mentally ill, juveniles, and children in need of supervision, all of whom are subject to involuntary civil confinement, regardless of the theory of the source of commitment power.[13]

The basis for the constitutional right is most often couched in terms of a *quid pro quo*,[14] *i.e.*, the treatment or remedial aspect of confinement is what the individual gets in return for having been deprived of liberty pursuant to a civil proceeding which does not afford the various procedural safeguards constitutionally required in a criminal proceeding.[15] The closest the Supreme Court has come to recognizing a right to treatment was in In re *Gault*, where the Court cited with

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separate theories of confinement disappears. Note, *The Nascent Right to Treatment*, *supra* note 9, at 1139-40. The author contrasts danger, and its projection to possible future conduct, with past conduct as a basis for confinement under the criminal law, questioning the constitutionality of confinement for dangerousness on due process grounds and under the eighth amendment's prohibition against cruel and unusual punishment. *Id.* at 1141-42.

13. The constitutional right to treatment was recognized in: Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental patients); Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), *aff'g* 355 F. Supp. 451 (N.D. Ind. 1972), *cert. denied*, 417 U.S. 976 (1974) (juveniles), *noted in* 60 VA. L. REV. 864 (May 1974); Long v. Powell, 388 F. Supp. 422 (N.D. Ga. 1975) (juveniles); Swansey v. Elrod, 386 F. Supp. 1138 (N.D. Ill. 1975) (juveniles); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (insane persons); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974) (mental patients); Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974) (juveniles); Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974) (mentally retarded); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973) (mental patients); Martarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973), *enforcing* 349 F. Supp. 575 (S.D.N.Y. 1972) (children in need of supervision); United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part on other grounds, sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (mental patients). *Cf.* Marshall v. Parker, 470 F.2d 34 (9th Cir. 1973), *aff'd sub nom.* Marshall v. United States, 414 U.S. 417 (1974). The court of appeals recognized the right generally in dicta, 470 F.2d at 38. Marshall, a convicted felon, had moved to vacate a prison sentence on grounds he was denied equal protection in being excluded from treatment under the Narcotic Addict Rehabilitation Act, 42 U.S.C. §§ 3411-26 (1970). The Supreme Court held that when Congress undertakes to provide such a treatment program it is constitutionally permissible to limit treatment to certain classes of addicts, *i.e.*, those with less than two felony convictions, who were deemed to be more promising prospects for rehabilitation than those with more lengthy criminal records.

14. This theory is effectively propounded as applicable both to juveniles and the mentally ill in an examination of judicial recognition of the right in Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L. J. 848, 865-71 (1969). *See* Pyfer, *The Juvenile's Right to Receive Treatment*, 6 FAM. L.Q. 279, 283-84 (1972).

15. Basic procedural practices are vastly different in civil commitment proceedings than in criminal ones, *e.g.*, D.C. CODE § 21-542 (1973) (administrative hearing on the issue of mental illness is to be held in an "informal a manner as may be consistent with orderly procedure"); *id.* § 21-545 (permits hospitalization for an indeterminate period). Under the criminal justice system, long-term detention for a

apparent approval a number of cases which held, based upon the *quid pro quo* reasoning, that a right to treatment exists where juveniles are civilly committed under the state's *parens patriae* power.[16] One district court[17] found hints of the right to treatment in *Robinson v. California*,[18] in which the Supreme Court held that a California statute declaring drug addiction to be a crime was unconstitutional in the absence of rehabilitative treatment. As the district court interpreted *Robinson:*

> This was punishment for a *status*, rather than a crime; and although the State might legally detain non-criminals for compulsory treatment or other legitimate purposes which protected society or the person in custody, detention for mere illness—without a curative program—would be impermissible.[19]

Another Supreme Court case has been interpreted to mandate a right to treatment, at least where the theory of civil commitment is *parens patriae*.[20] In *Jackson v. Indiana*,[21] the Supreme Court established the

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period of time explicitly fixed by sentence (except life sentences) is permitted only when an individual is 1) proved, in a proceeding subject to rigorous constitutional limitations of the due process clause and the Bill of Rights, 2) to have committed a specific act defined as an offense against the state. *Cf.* Powell v. Texas, 392 U.S. 514, 533, 542-43 (1968) (Black, J., concurring).

Procedures are also different for juveniles and adults. *Compare, e.g.*, D.C. CODE §§ 16-2310-12 (1973) (detention of a child after arrest) *with id.* § 23-1322 (setting a much higher standard for detention of an adult prior to trial).

16. 387 U.S. 1, 22 n.30 (1967). The Court cited cases which held that a juvenile may challenge the validity of his custody on the ground that he is not, in fact, receiving any special treatment, and remarked:

> [T]o the extent that the special procedures for juveniles are thought to be justified by the special consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a quid pro quo.

17. Martarella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972). Class action on behalf of children statutorily classified as persons in need of supervision, generally defined as a minor who has not committed any criminal act but who is a habitual truant, incorrigible, ungovernable, or habitually disobedient. Fam. Ct. Act N.Y. § 732 (McKinney Supp. 1973). The court found the right to treatment based on due process and the eighth amendment. In subsequent proceedings, the district court ordered compliance with specific standards, Martarella v. Kelley, 359 F. Supp. 478, 483-86 (S.D.N.Y. 1973).

18. 370 U.S. 660 (1962).

19. Martarella v. Kelley, 349 F. Supp. at 599.

20. Psychiatrists estimate that about 90 per cent of all mental hospital patients are harmless and in no way threaten the community in which they reside. Council of the American Psychiatric Association, *Position Statement on the Question of Adequacy of Treatment*, 123 AMER. J. PSYCHIAT. 1457 (1967).

21. 406 U.S. 715 (1972). Jackson, a mentally defective deaf mute, was adjudged incompetent to make a defense to robbery and was committed to the Indiana Department of Mental Health until found sane, which was in effect an indeterminate sentence. The Supreme Court held that Indiana could not constitutionally commit a person for an indefinite period simply on account of incompetency to stand trial, because the standard for determining whether a person is able to stand trial differs from the standard for civil commitment as mentally ill for danger to oneself or others or inability

rule that "[a]t 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." [22] Under this rule, if the "purpose" of commitment is treatment, and treatment is not provided, then the "nature" of the commitment bears no "reasonable relation" to its "purpose" and the constitutional rule of *Jackson* is violated.[23]

III. DONALDSON'S RIGHT TO LIBERTY

The Supreme Court in *O'Connor v. Donaldson* did little either to advance or to retard the concept of a constitutional right to treatment. Donaldson was dangerous neither to himself nor to others, could live safely in freedom, and was able to hold down a job. Upon these facts, the Court said, "this case raises a single, relatively simple . . . question concerning every man's constitutional right to liberty." [24] By couching its decision in terms of the right to liberty, rather than a right to treatment, the Supreme Court sidestepped the issue presented by the court of appeals' holding that due process mandates a right to treatment for the involuntarily civilly committed.[25] Rather, it was held that, at the threshold, there was no constitutional justification for Donaldson's continued confinement. The Court's opinion would have to be read for negative implication in order to find any expression of the right to treatment.

The Court noted three grounds which are generally used to justify involuntary confinement: to prevent injury to the public, to ensure a person's own survival or safety, or to alleviate or cure a person's illness.[26] On the last of these, where cure is used as the reason for confinement, there would appear to be little rational argument but that some form of treatment must be provided to satisfy due process. The first two are essentially the dangerousness grounds.[27] Without distinguishing between the grounds for confinement, the Court said:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial con-

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properly to care for oneself. By subjecting the defendant to a more stringent standard of release and a more lenient commitment standard than those generally applicable for commitment of the mentally ill, Indiana deprived him of equal protection of the laws.

22. *Id.* at 738.

23. This was part of the reasoning of the court of appeals in *Donaldson*, 493 F.2d 507, 521 (5th Cir. 1974). *See* Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973), which interpreted *Jackson* as requiring the state to "either justify continued confinement by therapeutic progress, or release the patient." *Id.* at 687.

24. 422 U.S. at 573.

25. 493 F.2d at 520.

26. 422 U.S. at 573-74.

27. *See* discussion, *supra* note 12.

> finement. . . . [T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.[28]

Thus, the harmless mentally ill have a constitutional right to freedom, regardless of any treatment issue. The Court's holding was that a state cannot confine "without more" a nondangerous individual capable of surviving safely in freedom.[29] The "without more" undoubtedly refers to the absence of traditional grounds to justify civil commitment. The particular reason for finding that Donaldson's right to freedom was violated was not based upon alleviation or cure of illness, but on lack of danger to himself or others.

The Court did, however, rebut the defendant's argument that adequacy of treatment is a nonjusticiable question.

> Where "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.[30]

This statement in the majority opinion also rebuts in large part the reasons given for disallowing the *quid pro quo* concept in Chief Justice Burger's concurring opinion.[31] He found the concept inadequate

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28. 422 U.S. at 575.

29. *Id.* at 576.

30. *Id.* at 574 n.10. The statement supports the court of appeals' answer to the justiciability issue, which referenced several cases where courts have undertaken to determine adequacy of treatment. Donaldson v. O'Connor, 493 F.2d 507, 526 n.47 (5th Cir. 1974). Furthermore, some courts have undertaken to oversee development and implementation of specific minimum constitutional standards for adequate treatment. *See* Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part, sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). In *Wyatt*, the district court concluded that state facilities were grossly deficient and failed to satisfy minimum medical and constitutional standards for treatment. The parties and amici experts submitted proposed standards, and the court, after a formal hearing, issued detailed minimum standards for adequate treatment of the mentally ill. These included basic human rights, numbers of staff personnel, adequacy of facilities and treatment, and individual treatment plans, each with specific requirements. 344 F. Supp. at 379-86. Alabama Governor Wallace appealed the order, contending that the standards were not binding on him or the state legislature. The court of appeals reserved decision on the scope of judicial power in implementing the right, 503 F.2d at 1316-17. The court affirmed that part of the district court's order recognizing the constitutional right to treatment, *id.* at 1318, but recognized that the financial outlay for accomplishing the standards as stipulated is within the province of the state legislature and noted jurisdictional problems raised by a proposal that state lands be sold or the state budget appropriations be reallocated to raise the needed funds. *Id.* Federal decrees ordering state expenditures are rare but not unprecedented in cases involving equal protection and cruel and unusual punishment. *See id.* at 1317 n.11 and authorities cited.

See Martarella v. Kelley, 359 F. Supp. 478, 483-86 (S.D.N.Y. 1973), *enforcing* 349 F. Supp. 575 (S.D.N.Y. 1972).

31. 422 U.S. at 578.

> [i]n light of the wide divergence of medical opinion regarding the diagnosis of and proper therapy for mental abnormalities. . . . I am not persuaded that we should abandon the traditional limitations on the scope of judicial review.[32]

The Chief Justice's reasoning in this aspect is contra to that of his brethren, who agreed in *Donaldson* that adequacy of treatment is, at least, a justiciable question.[33]

Conceptualizing the *quid pro quo* theory as regarding treatment as "compensation" for confinement,[34] Chief Justice Burger said the theory suffers from serious constitutional defects as a justification for the right to treatment because due process requires only that state actions be "candidly appraised" [35] and that, where the *parens patriae* power is invoked, it must not be invoked indiscriminately.[36] Where civil commitment is claimed to be in the best interests of the individual, does this justify the reduced procedural and substantive safeguards for a civil deprivation of liberty? The Chief Justice would answer that this reduction of safeguards, from the level required in a criminal confinement, does not give rise to any constitutional duty of the state to provide care and treatment:

> The *quid pro quo* theory is a sharp departure from, and cannot coexist with, these due process principles. . . . It is elementary that the justification for the criminal process and the unique deprivation of liberty which it can impose requires that it be invoked only for commission of a specific offense prohibited by legislative enactment.
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> A more troublesome feature of the *quid pro quo* theory is that it elevates a concern for essentially procedural safeguards into a new substantive constitutional right.[37]

But, in the area of the constitutional right to liberty, due process safeguards must be more than a mere "concern." It is essential to the substantive right of liberty that there be strict procedural safeguards to ensure against its arbitrary loss. "The history of liberty has largely been the history of observance of procedural safeguards." [38]

The Chief Justice asserted that the theory accepts the absence of strict due process by providing "compensation" in the form of treatment, and that our concepts of due process would not tolerate such

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32. *Id.* at 587.
33. *Id.* at 574 n.10. *See* note 30, *supra,* and cases cited therein.
34. *Id.* at 587.
35. *Id.* at 586, *quoting In re* Gault, 387 U.S. 1, 21, 27-29 (1967).
36. 422 U.S. at 583.
37. *Id.* at 586-87.
38. McNabb v. United States, 318 U.S. 332, 347 (1943).

a "trade-off."[39] If due process of law is flexible enough to allow civil confinement without fulfillment of the *parens patriae* promise of guidance, care, and rehabilitation, as the Chief Justice argues, then the question posed in the Supreme Court's opinion in *O'Connor v. Donaldson* can probably, and lamentably, be answered in the affirmative:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric.[40]

The future of the constitutional right to treatment depends upon whether at least four of the Chief Justice's brethren will succumb to his reasoning. Whether the case which ultimately decides the issue is based upon the civil commitment of juveniles, the mentally ill, or other persons subject to this commitment power,[41] it will determine the right's existence for all such classes of persons. In the meantime, based upon the many holdings of lower federal courts, there is a foundation for the right in cases which have *not* lost their precedential effect.

In vacating the decision of the court of appeals and remanding the case on the issue of O'Connor's immunity from damages as a state official, the Court made clear that the holding of the circuit court was not the law of the case: "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect. . . ."[42] However, the courts in the Fifth Circuit are bound by the precedential effect of the *quid pro quo* reasoning through a similar case decided about six months after Donaldson. In *Wyatt v. Aderholt*,[43] the court of appeals again held, based upon its reasoning in *Donaldson*, that

> civilly committed mental patients have a constitutional right to such individual treatment. . . . [W]here the justification for commitment was treatment [in *Donaldson*], it offended the fundamentals of due process if treatment were not in fact provided. . . . [T]reatment had to be provided as the *quid pro quo* society had to pay as the price of the extra safety it derived from the denial of individuals' liberty.[44]

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39. 422 U.S. at 589.

40. *Id.* at 575.

41. Donaldson v. O'Connor, 493 F.2d 507, 524-25 (5th Cir. 1974). Those with a heavy *parens patriae* emphasis are the mentally ill and retarded, and juveniles, including delinquents and children in need of supervision who have committed no criminal offense. Others are sex offenders, defective delinquents, persons acquitted by reason of insanity, persons held incompetent to stand trial, and narcotics addicts.

42. 422 U.S. at 578 n.12.

43. 503 F.2d 1305 (5th Cir. 1974).

44. *Id.* at 1312. This is unquestionably the law of the Fifth Circuit. *See* Burnham v. Dep't of Public Health of Georgia, 503 F.2d 1319 (5th Cir. 1974) (per curiam),

The Supreme Court, in *O'Connor v. Donaldson,* had an opportunity to define the rights of those unfortunates who are, against their will, made wards of the state. But the Court declined to establish that the civilly committed have a constitutionally required *quid pro quo* right to rehabilitative treatment, neglecting even to recognize it as an issue of the case. Thus, the Court has done nothing to negate the view that the legal status of the mentally ill is one of the most neglected areas of American law—neglected by the courts, by most private citizens, and generally by politicians; this is so despite the fact that one out of every dozen children born in the United States will at some time during his life be "treated" in an institution, and even a larger number will receive some type of mental care.[45] Many of these will be involuntarily committed.

IV. To Find a Statutory Right to Treatment

The involuntarily civilly confined persons who are receiving inadequate treatment are not without grounds for relief, despite the Supreme Court's failure to establish a constitutional right to such treatment on an individual basis as will enable them to return to society. Language conferring such a right may be found in many statutes, state and federal, and they should be carefully read for such language as: "A person hospitalized . . . for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."[46] A statement of state policy in the statute relating to mental health and hygiene may authorize confinement for "care and treatment" or relate to general preservation of the mental health of its citizens.[47] Continued confinement under such a statute may be contrary to public policy if adequate care is not, in fact, provided. Some statutes will define the state's basis for involuntary confinement as "mentally ill and in need of hospitalization."[48] If the basis for confinement is need for care, and care is not provided, continued confinement without treatment may be attacked as arbitrary and a denial of due process. Some states, as Virginia, have progressive statutes which detail the rights of mental pa-

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cert. denied, 422 U.S. 1057 (1975), which was decided on the strength of *Donaldson* and *Wyatt.*

45. *In re* Ballay, 482 F.2d 648, 653-54 (D.C. Cir. 1973) (citation omitted). The *Ballay* case established the standard of proof in District of Columbia civil commitment proceedings to be beyond a reasonable doubt. The prior standard was by a preponderance of evidence, *e.g.,* Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

46. D.C. Code § 21-562 (1973).

47. Ann. Code of Md. art. 59, § 2 (Cum. Supp. 1975). Maryland provides a strong statutory right to individualized treatment, *id.* art. 59, § 3A.

48. Code of Va. § 37.1-67.1 (Cum. Supp. 1975).

tients, including the right to be accorded human dignity and to receive "prompt evaluation and treatment or training."[49] Similar language may prove useful in obtaining the right to rehabilitative treatment for the other large class of persons subject to involuntary civil confinement under the *parens patriae* power: juveniles.[50]

V. CONCLUSION

Since the seminal article on the right to treatment appeared in 1960,[51] legal scholars have argued with some force that the civil commitment process, being without all of the constitutional procedural safeguards required in criminal trials, requires the provision of adequate rehabilitative treatment on an individual basis to satisfy the requirements of due process.[52] Many courts have adopted the *quid pro quo* concept for the *parens patriae* deprivation of liberty. Short of the Supreme Court, the national trend is to recognize rehabilitative treatment as a constitutional requirement of due process for those who are civilly committed against their will. Since courts of law are ultimately responsible for sociological-jurisprudential controls in the name of *parens patriae*, their duty is to act as "social engineers" to ensure due process by demanding that a civilly committed individual be given the help he needs, by providing at least minimal standards for treatment.[53] The Supreme Court had, but abrogated, the duty to state these standards in *O'Connor v. Donaldson* and to establish with finality the constitutional right. The social welfare philosophy of our nation and the *parens patriae* responsibility mandate the provision of rehabilitative opportunities as part of the fundamental fairness doctrine of due process.

—L.J. Vermillion

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49. *Id.* § 37.1-84.1.

50. Juveniles retained in federal custody have a right to treatment under the Federal Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415 (Sept. 7, 1974), 88 Stat. 1109, 1133-38. State statutes should be carefully read for legislative purpose in maintaining the juvenile justice system. For example, while in Virginia there is no clear statutory right to treatment for juveniles, the authority vested in the State Board of Corrections for children committed to it by the courts is for "the care, supervision and study of children," CODE OF VA. § 63.1-239 (Cum. Supp. 1975), and discretion is left with the court to order such support, care and treatment according to the "best interests of the child. . . ." *Id.* § 16.1-178.

51. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960), arguing that due process is not limited to determination of mental illness and compliance with commitment procedures but extends to the actual receipt of adequate treatment. This postulation was endorsed in Editorial, *A New Right*, 46 A.B.A.J. 516 (1960).

52. *E.g.*, Kittrie and Pyfer, *supra* note 14.

53. Kittrie, *supra* note 14, at 876.