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RELEASE FROM INVOLUNTARY CUSTODIAL CONFINEMENT

O'Connor v. Donaldson, 422 U.S. 563 (1975)

In *O'Connor v. Donaldson*,[1] the United States Supreme Court unanimously held that involuntary custodial confinement in a state hospital, without treatment, of a mental patient who is not dangerous to himself or others violates the patient's constitutional right to liberty.[2] The holding was a narrow one, but it has far-reaching implications for the administration of mental health laws in many states.[3]

Respondent, Kenneth Donaldson, was civilly committed to the Florida State Hospital at Chattahoochee in 1957 for "care, maintenance, and treatment," pursuant to Florida statutory provisions that have since been repealed.[4] He was confined there for nearly fifteen years. Petitioner, Dr. J. B. O'Connor, was superintendent at Chattahoochee during most of that time.[5] Donaldson repeatedly asked to be released from that facility, claiming that he was dangerous neither to himself, nor to others, that he was not mentally ill, and that, if he was mentally ill, he was receiving no treatment.[6] His requests were repeatedly denied.[7] Then, in February, 1971, Donaldson instituted this suit under 72 U.S.C. § 1983 in the United States District Court for the Northern District of Florida, alleging that O'Connor and other hospital staff members had intentionally and maliciously deprived him of his constitutional right to liberty.[8]

At the trial, uncontradicted testimony indicated that Donaldson had never posed any danger to others, either before or during his confinement.[9] Nor was there any evidence that he had ever been suicidal or thought likely to inflict injury upon himself.[10] His employment record indicated that, both before his confinement and after his release, Donaldson was able to earn his own living outside the hospital.[11]

Donaldson's requests for release were supported by responsible parties willing and able to provide him any care he needed upon release. In 1963, Helping Hands, Inc., a Minnepolis, Minnesota halfway house for mental patients, asked O'Connor to release Donaldson to its care. Its request was supported by the Minneapolis Clinic of Psychiatry and Neurology.[12] O'Connor rejected that offer,

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

[2] *Id.* at 573–76.

[3] Because so much of the opinions in this case deal with the particular factual setting before the courts, it is necessary to set forth the facts in detail.

[4] Donaldson had been adjudged mentally incompetent under section 394.22(1) of the State Public Health Code which provided the following standard for such findings:

> [I]ncompetent by reason of mental illness, sickness, drunkeness, excessive use of drugs, insanity, or other mental or physical condition, so that he is incapable of caring for himself or managing his property, or is likely to dissipate or lose his property or become the victim of designed persons, or inflict harm on himself of others . . . .

1955 Fla. Gen. Laws, ch. 29909, § 3,831 (now Florida Mental Health Act of 1972, FLA. STAT. ANN. § 394.467 (1975)) Donaldson was then judicially committed pursuant to § 394.22(11) 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 394.09, 394.24, 394.25, 394.26, and 394.27, or make such other disposition of him as may be permitted by law.

1955–1956 Fla. Laws Extra. Sess., ch. 31403, § 1,62 (now Florida Mental Health Act of 1972, FLA. STAT. ANN. § 394.467 (1975)). In 1972 Florida revised its mental health laws. The new provisions give the individual a statutory right to receive individual medical treatment. FLA. STAT. ANN. §§ 394.459(2), (4) (1975). *See* 422 U.S. at 566–67 n.2.

[5] 422 U.S. at 564.

[6] *Id.*

[7] Shortly after O'Connor retired as superintendent of Chattahoochee and after the trial of this case began, Donaldson obtained a judicial restoration of his competency and was released at the intiative of the hospital staff. 422 U.S. at 567–68 & n.3.

[8] 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, 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.

[9] 422 U.S. at 568.

[10] *Id.*

[11] This factor was acknowledged by one of O'Connor's codefendants at the trial. *Id.*

[12] One of O'Connor's codefendants conceded at trial that the Minneapolis Clinic of Psychiatry and Neurology was a "good clinic." *Id.*

stating that Donaldson, who was then fifty-five years old, could only be released to his parents.[13] Other requests for Donaldson's release and offers to care for him were made on four separate occasions between 1964 and 1968 by John Lembcke, a college classmate and longtime family friend of Donaldson. O'Connor refused on each of those occasions.[14]

The Supreme Court characterized the evidence regarding Donaldson's treatment at Chattahoochee as showing "a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness."[15] Numerous witnesses testified to the same effect at trial. However, O'Connor described Donaldson's treatment as "milieu therapy."[16] Witnesses from the hospital staff testified that, in Donaldson's case, that term was merely a euphemism for confinement in the milieu of a mental hospital.[17] He spent substantial periods of his commitment in a large, sixty-patient ward which also housed patients under criminal commitment. Donaldson's repeated requests for grounds privileges, occupation therapy, and an opportunity to discuss his case with staff members were denied.[18]

O'Connor's principal defense at trial was that he had acted in good faith. He argued that state law permitted indefinite custodial confinement of the mentally ill, even if they were not given treatment and their release could harm no one. He allegedly believed that law to be valid and acted in good faith reliance upon it.[19]

The trial judge orally charged the jury in part that in order for Donaldson to prove his claim under the Civil Rights Act he had to establish *inter alia:*

> That [O'Connor] confined [Donaldson] against his will, knowing that he was not mentally ill or dangerous or knowing that if mentally ill he was not receiving treatment for his mental illness.
>
> ....
>
> You are instructed 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 or to improve his mental condition.*
>
> Now, *the purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others.* Without such treatment there is no justification from a constitutional standpoint for continued confinement unless you should also find that Donaldson was dangerous either to himself or others.[20]

On the issue of O'Connor's immunity from damages, the trial judge instructed the jury that O'Connor was immune if he

> reasonably believed in good faith that detention of [Donaldson] was proper for the length of time he was so confined .... However, mere good intentions which do not give rise to a reasonable belief that detention is lawfully required cannot justify [Donaldson's] confinement....[21]

The jury returned a verdict for Donaldson, awarding him compensatory damages of $28,500 and punitive damages of $10,000.[22]

In a broad opinion by Judge Wisdom, the Court of Appeals for the Fifth Circuit affirmed the judg-

[13] O'Connor knew that Donaldson's parents were too elderly to care for him. The rule that a patient could only be released to his parents was apparently of O'Connor's own making. 422 U.S. at 568–69.

[14] The record indicated that Lembcke was able and willing to care for Donaldson. 422 U.S. at 569.

[15] *Id.* The appellate court likewise characterized Donaldson's treatment as "... nothing more than keeping Donaldson in a sheltered hospital 'milieu' with other mental patients ...." Donaldson v. O'Connor, 493 F.2d 507, 511 (5th Cir. 1974).

[16] The underlying premise of "milieu therapy" is that the social and environmental milieu of the patient should be structured so as to give each patient a recognition of his human dignity, facilitate the provision of needed treatment services, and provide a friendly, noninstitutional atmosphere. Cameron, *Nonmedical Judgment of Medical Matters,* 57 GEO. L.J. 716, 731–32 (1969). In the opinion of some mental health professionals, milieu therapy has legitimate value as a form of treatment and is often useful either in conjunction with or as an alternative to other forms of medical or shock treatment. *See* J. FRANK, PERSUASION AND HEALING—A COMPARATIVE STUDY OF PSYCHOTHERAPY (1961); Cameron, *supra* note 16.

[17] 422 U.S. at 569. For the proposition that the term "milieu therapy" is sometimes used as a smoke-screen to cover up the lack of adequate treatment see Halpern, *A Practicing Layer Views the Right to Treatment,* 57 GEO. L.J. 782, 786–87 n.19 (1969).

[18] 422 U.S. at 569. Donaldson, a Christian Scientist, had occasionally refused to take medication which was given to him at the hospital. The trial judge instructed the jury not to award damages for any period during which Donaldson refused treatment. *Id.* at n.4.

[19] *Id.* at 569–70.

[20] *Id.* at 571–72 n.6 (emphasis added).

[21] *Id.* at 571–72.

[22] Donaldson's complaint was filed against five hospital and state mental health officials. The jury returned a verdict against two of them, Dr. O'Connor and Dr. John Gumanis. The latter was Donaldson's attending physician at Chattahoochee from 1959 until 1967. The jury returned a verdict in favor of the other three defendants. Both O'Connor and Gumanis brought appeals of the district court's judgment to the appellate court. Donaldson v. O'Connor, 493 F.2d 507, 510 (5th Cir. 1974). However, only O'Connor petitioned for certiorari. 419 U.S. 894 (1974).

ment of the district court.[23] The appellate court found that on the record as a whole there was ample evidence to support the jury's reaching any or all of the following conclusions:

> A. That defendants unjustifiably withheld from Donaldson specific forms of treatment [*i.e.* grounds privileges, occupational therapy, and consultations with staff psychiatrists and psychologists];[24]
>
> B. That defendants recklessly failed to attend to and treat Donaldson at precisely those junctures when treatment could have most helped [him];[25]
>
> C. That defendants wantonly, maliciously, or oppressively blocked efforts by responsible friends and organizations to have Donaldson released to their custody;[26]
>
> D. That defendants continued to confine Donaldson knowing he was not dangerous, or with reckless disregard for whether he was dangerous;[27] and
>
> E. That defendants did not do the best they could with available resources.[28]

In light of these factual conclusions and the defendant's challenge to the trial judge's instructions to the jury on the question of treatment, the appellate court stated the issue before it as follows: "[W]hether the Fourteenth Amendment guarantees a right to treatment to persons involuntarily civilly committed to state mental hospitals."[29] Then, using a two-part theory, the court of appeals held that the due process clause of the fourteenth amendment guarantees a right to "such individual treatment as will give the patient a reasonable opportunity to be cured or to improve his mental condition."[30]

The first part of the appellate court's theory started with the proposition that any significant governmental abridgement of the liberty which the fourteenth amendment says shall not be denied without due process of law must be justified by some permissible governmental goal.[31] The court then noted three justifications for civil commitment generally recognized in state statutes: danger to others, a police power rationale;[32] need for treatment, a *parens patriae* rationale;[33] and danger to self, combining elements of both the police power and *parens patriae* rationales.[34] The court found, apparently on the basis of the factual conclusions which it imputed to the jury's verdict and the record, that the justification for Donaldson's confinement was the *parens patriae* rationale that the patient was in need of treatment.[35] The court then quoted with approval from *Wyatt v. Stickney*[36] as follows:

> To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.[37]

The court stated that the due process clause requires that minimally adequate treatment actually be pro-

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

[24]*Id.* at 513–14.

[25]*Id.* at 514–15.

[26]*Id.* at 515–17.

[27]*Id.* at 517.

[28]*Id.* at 518.

[29]*Id.* at 509.

[30]*Id.* at 520.

[31]*Id. See* Tribe, *Forward—Toward a Model of Roles in the Due Process of Life and Law*, 86 HARV. L. REV. 1, 17 (1973).

[32]Dangerousness to others is a legal basis for commitment in a majority of states. It is similar to criminal confinement in that in both cases the state decides that deprivation of the individual's liberty is necessary for the protection of society at large. Unlike criminal imprisonment, confinement under this justification may be based on a mere prediction that the individual is likely to commit a dangerous act. Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1289–93 (1966) [hereinafter cited as *Civil Commitment*].

[33]This basis for commitment is generally said to have been first articulated in this country in *In re* Oakes, 8 Law Rep. 122 (Mass. 1845). The standard applied there by the Massachusetts Supreme Judicial Court in affirming a denial of a habeas corpus petition was stated to be "whether restraint is necessary for [the patient's] restoration, or will be conducive thereto." *Id.* at 125. The theory regards the government as the guardian of those members of society unable to care for themselves. *Civil Commitment*, *supra* note 32, at 1295.

[34]The justification that the patient is dangerous to himself involves the *parens patriae* notion that government must look after the individual who is incapable of looking after himself. A police power justification comes into play in much the same way as it does when government makes attempted suicide a crime. *Civil Commitment*, *supra* note 32, at 1293–94.

[35]*See* notes 9–11, 27 and accompanying text *supra*.

[36]493 F.2d at 521.

[37]325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *Wyatt* was a class action brought by the guardians of patients, most of whom were involuntarily civilly committed, at an Alabama state hospital for the mentally ill. They sought a determination of the adequacy of treatment provided at the facility in light of severe cut-backs in hospital personnel due to a shortage of state revenues. The district court held that the patients had a due process right to receive such individual treatment as would give each of them a realistic opportunity to be cured or to improve their mental condition. It found the unit-team approach in use at the hospital to be scientifically and medically inadequate for that purpose. State officials were, therefore, ordered to formulate a conforming plan. The appellate court affirmed.

vided.[38] Since it had not, in fact, been provided in Donaldson's case, the nature of the commitment bore no rational relation to its purpose and constituted a deprivation of liberty without due process of law.[39]

The second part of the appellate court's theory did not distinguish between commitments under the *parens patriae* rationale and those under the police power rationale.[40] It was termed a *quid pro quo* theory and was based on this principle:

> [W]hen the three central limitations on the government's power to detain—that detention be in retribution for a specific offense; that it be limited to a fixed term; and that it be permitted after a proceeding where fundamental procedural safeguards are observed—are absent, there must be a *quid pro quo* extended by the government to justify confinement. (citation omitted)[41]

The court noted that the *quid pro quo* most commonly recognized is the provision of rehabilitative treatment, or, where rehabilitation is impossible, "minimally adequate habilitation and care beyond the subsistence level custodial care that would be provided in a penitentiary."[42] Finding that Donaldson had been provided with neither, the court of appeals saw no justification for his continued confinement. Therefore, it affirmed the judgment of the district court.

The Supreme Court, in an opinion by Justice Stewart,[43] took a much more narrow view of the case than did the court of appeals. The Court began the substance of its opinion by stating that the jury had found that Donaldson was dangerous neither to himself nor to others, and also that, if mentally ill, he had received no treatment.[44] That verdict gave the Court no occasion to consider whether, when, or by what procedures a mentally ill individual may be confined on any of the grounds typically advanced by state statutes—danger to self, danger to others, and cure or treatment.[45] Since the jury had found that none of those grounds for continued confinement were present in Donaldson's case, the Court had no occasion to consider whether, if present, they were constitutionally valid.[46]

O'Connor had argued that, despite the jury's verdict, the Court must assume that Donaldson was receiving adequate treatment. His position was essentially that, if a right to treatment were recognized by the Court, an assumption he opposed, it could not be effectively applied because judges and juries, untrained in medicine and psychiatry, cannot "second guess" the judgment of mental health professionals.[47] Thus, he argued that the question of whether a patient was receiving adequate treatment was a nonjusticiable question that must be left to professionals.[48]

The Court rejected O'Connor's argument on that score, treating it only briefly in a footnote.[49] It stated:

> 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.[50]

The Court then noted that neither party had objected to the trial judge's instruction to the jury defining "treatment."[51] That factor, coupled with the jury's verdict that no treatment had in fact been provided, obviated consideration of whether the provision of any treatment, standing alone, could ever constitutionally justify confinement.[52] Likewise, the even more difficult questions of how much and what kind of treatment would be constitutionally permissible grounds for confinement were not presented by the posture of the case. Once the Court adopted this narrow view of the issue before it, the difficult

[38] 493 F.2d at 521.

[39] *Id., citing* Jackson v. Indiana, 406 U.S. 715, 738 (1972).

[40] 493 F.2d at 521–25.

[41] *Id.* at 522 & n.22.

[42] *Id.* at 522.

[43] 422 U.S. 563 (1975).

[44] *Id.* at 573 & n.8.

[45] *See* McNeil v. Director, 407 U.S. 245, 246–49 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504, 509 (1972); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1319–24 (1974).

[46] The Court pointed out that the case involved no challenge to Donaldson's initial commitment. Rather, the Court was focusing on his continued confinement. 422 U.S. at 565–67.

[47] Brief for Petitioner at 25–45, O'Connor v. Donaldson, 422 U.S. 563 (1975).

[48] On the difficulty of medical judgments in the mental health field and the particular problems they pose for the courts see, *e.g.*, Greenwood v. United States, 350 U.S. 366 (1956); United States v. Klein, 325 F.2d 283 (2d Cir. 1963); J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND THE LAW (1967); R. SLOVENKO, PSYCHIATRY AND LAW (1973); Cameron, *Nonmedical Judgment of Medical Matters*, 57 GEO. L. J. 716 (1969); Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969); Szasz, *The Right to Psychiatric Treatment: Rhetoric and Reality*, 57 GEO. L.J. 740 (1969); Note, *Guaranteeing Treatment for the Mental Patient: The Troubled Enforcement of an Elusive Right*, 32 MD. L. REV. 42 (1972).

[49] 422 U.S. at 574 n.10.

[50] *Id., citing* Jackson v. Indiana, 406 U.S. 715 (1972).

[51] 422 U.S. at 570–71 n.6.

[52] *See* notes 20–22 and accompanying text *supra*.

problems inherent in judicial examination of the propriety of professional judgment in this field did not arise.[53]

Up to this point, the Court seemed to be dealing with justifications for involuntary confinement in a general sense. Its next step was to recognize a distinction between a constitutionally adequate basis for initial confinement on the one hand, and for continued involuntary confinement on the other. The Court found Florida law and the record unclear as to the precise basis for Donaldson's initial commitment. However, it regarded those factors as irrelevant because the case involved no challenge to the initial commitment, but rather the constitutional adequacy of the continued confinement.[54] Although Donaldson's initial confinement may have had a permissible basis, it could not continue once the basis no longer existed. The Court did not elaborate on the foundation for this distinction, but its references to *Jackson v. Indiana*[55] and *McNeil v. Director*,[56] indicate that it was contemplating a due process issue.[57] As the Court has previously held, the due process clause of the fourteenth amendment requires that when government abridges protected liberties for some constitutionally permissible purpose, the means of that abridgement must bear a rational relation to the purpose.[58] In *Jackson,* the Court stated the rule:

> 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.[59]

The Court applied that reasoning by stating that a finding of "mental illness" alone, assuming that that term can satisfactorily be defined and that "mentally ill" individuals can be identified with some accuracy,[60] did not provide a permissible basis for indefinite confinement with merely custodial care.[61] The Court had earlier interpreted the jury's verdict as comprehending the following conclusions: Donaldson was not dangerous to others; he was not dangerous to himself; and, if he was mentally ill, he had received no treatment.[62] Therefore, none of the traditional justifications for continued confinement were present. The Court summarized the rule it laid out in these terms:

> [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.[63]

Since O'Connor, acting as an agent of the state, did so confine Donaldson, the jury properly concluded that O'Connor violated Donaldson's constitutional right to liberty.[64]

Such a finding, however, was not enough to impose monetary liability upon O'Connor under 42 U.S.C. § 1983. O'Connor had argued that he had acted in good faith reliance on state law which he believed authorized indefinite confinement of the non-dangerous mentally ill.[65] His position was that

[53] *See* note 45 *supra.*

[54] 422 U.S. at 565–67 n.2.

[55] 406 U.S. 715 (1972). *Jackson* involved a mentally defective deaf mute who was confined after being found incompetent to stand trial for robbery. In the opinion of experts, it was unlikely that his condition would ever improve, and, therefore, he would probably never become competent to stand trial. The Court held that Indiana's indefinite commitment of a criminal defendant solely on account of the lack of capacity to stand trial violated the due process clause. The state was told that it could only confine him under its "competency to stand trial" statutes for a reasonable time to determine if he could go to trial. If improvement in his condition was not possible, the state could only confine him after civil commitment if it intended to hold him indefinitely. By subjecting him to a more lenient commitment standard under the criminal provisions and to a more stringent standard of release than those generally applicable to all other persons not charged with offenses, Indiana had deprived him of equal protection.

[56] 407 U.S. 245 (1972). In *McNeil,* petitioner was given a five-year sentence after conviction for two assaults. Instead of committing him to prison, the sentencing court referred him under an *ex parte* order to the Patuxent Institution for examination to determine whether he should be committed for an indefinite term as a defective delinquent. His sentence expired before that determination was made, yet his confinement continued. In a proceeding for post-conviction relief, he challenged his confinement after expiration of his sentence as violative of due process. The trial court denied relief. The Supreme Court reversed, holding that, in the circumstances of the case, it was a denial of due process to continue to hold the petitioner on the basis of an *ex parte* order committing him to observation without the procedural safeguards commensurate with a long-term commitment.

[57] This was Donaldson's view as well. *See* Brief for Respondent at 56–59, O'Connor v. Donaldson, 422 U.S. 563 (1975). *See also* Murel v. Baltimore City Crim. Ct., 407 U.S. 355 (1972); Humphrey v. Cady, 405 U.S. 504 (1972).

[58] *See* Vlandis v. Kline, 412 U.S. 441 (1973); Nebbia v. New York, 291 U.S. 502 (1934); Meyer v. Nebraska, 262 U.S. 390 (1923).

[59] 406 U.S. at 738 (emphasis added).

[60] *Cf.* Szasz, *The Right to Health,* 57 GEO. L.J. 734, 741 (1969).

[61] 422 U.S. at 575.

[62] *See* note 44 and accompanying text *supra.*

[63] 422 U.S. at 576.

[64] *Id.*

[65] The Court stated that the fact that state law might have authorized this confinement was not itself a constitutionally adequate purpose for the confinement 422 U.S. at 574–75.

since he could not be expected to anticipate the constitutional invalidity of that law,[66] he could not be liable for monetary damages under section 1983.[67] The district court had denied a requested instruction to that effect.[68] It instructed the jury instead that compensatory damages could not be awarded to Donaldson if O'Connor reasonably believed, in good faith, that continued confinement was "proper" and that punitive damages could not be awarded unless O'Connor had acted "maliciously or wantonly or oppressively."[69] The court of appeals approved the instructions which were given, but did not consider whether the trial judge erred in refusing the proffered instruction regarding O'Connor's claimed reliance on state law.[70]

Furthermore, the Supreme Court's most recent decision on the scope of state officials' qualified immunity under 42 U.S.C. § 1983, *Wood v. Strickland*,[71] was rendered after the decisions below in this case. The Court felt that the adequacy of the trial judge's instructions should be considered in light of *Wood*.[72] Quoting from that opinion, the Court stated that the proper standard for the jury was whether O'Connor

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [Donaldson], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to [Donaldson].[73]

This standard would appear to give O'Connor considerably more immunity from monetary liability than did the district court's standard.

Accordingly, the Supreme Court vacated the judgment of the court of appeals and remanded the case. Upon remand the appellate court was to consider only the question of O'Connor's liability under the *Wood* standard for damages for violating Donaldson's constitutional right to liberty. Since the jury's finding that O'Connor had deprived Donaldson of his constitutional right to liberty was, in the Court's opinion, based on substantial evidence and adequate instructions, that issue could not be considered further on remand.[74]

Chief Justice Burger filed a concurring opinion in the case.[75] At the outset, he emphasized two factors going to the issue of O'Connor's official immunity which he thought merited more attention than the Court's opinion had given them. First was the evidence that Donaldson, a Christian Scientist, had, as Chief Justice Burger put it, "consistently refused treatment that was offered to him."[76] Second, and more significant in Chief Justice Burger's opinion, was that on numerous occasions Donaldson had unsuccessfully sought his release in the state courts of Florida.[77] Chief Justice Burger saw these factors as favorable to O'Connor's good faith defense and, therefore, favorable to his immunity claim.

Next, Chief Justice Burger attacked the district court's instruction to the jury that persons involuntarily civilly committed have a *constitutional right* to such treatment as will give them a realistic opportunity for cure, and the court of appeals' approval of that instruction.[78] He acknowledged that the majority's opinion lent no support to the right to treatment holdings of the lower courts,[79] but then detailed his own disagreement with the lower courts. The district court judge's instructions to the jury did not, he believed, require the jury to make any findings regarding the specific grounds for Donaldson's confinement. Therefore, Chief Justice Burger concluded that the first part of the court of appeals' theory assumed, at least with respect to nondangerous individuals, that the provision of treatment was the only justifiable basis for confinement by the state.[80] He disagreed with the validity of that presumption.

Chief Justice Burger's historical analysis led him to conclude that the right to treatment theory is a relatively new concept,[81] with no historical basis.

[66] The Court's decision did not hold the Florida statutes to be unconstitutional. In fact, the statutes upon which O'Connor allegedly relied were totally revamped prior to the argument of this case. *See* note 4 and accompanying text *supra*.

[67] 422 U.S. at 576. *See* Wood v. Strickland, 420 U.S. 308 (1975).

[68] 422 U.S. at 570 n.5.

[69] *Id.* at 576–77.

[70] 493 F.2d at 527–28.

[71] 420 U.S. 308 (1975).

[72] 422 U.S. at 577.

[73] 420 U.S. at 322. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974). *See also* text accompanying note 21 *supra*.

[74] 422 U.S. at 577–78 n.12.

[75] *Id.* at 578.

[76] *Id.* A majority of the Court had characterized the frequency of Donaldson's refusal as "on occasion." 422 U.S. at 569 n.4.

[77] 422 U.S. at 579 (Burger, C.J., concurring). *See* Donaldson v. O'Connor, 234 So.2d 114 (Fla. 1969), *cert. denied*, 400 U.S. 869 (1970).

[78] 422 U.S. at 580–89 (Burger, C.J., concurring). *See* notes 40–42 and accompanying text *supra*.

[79] *See* 422 U.S. at 577–78 n.12. *See also* United States v. Musingwear, Inc., 340 U.S. 36 (1950).

[80] 422 U.S. at 581–82 (Burger, C. J., concurring).

[81] The seminal article dealing with this theory was Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499

Conversely, he found that the states have historically been vested with the *parens patriae* power.[82] In Chief Justice Burger's opinion, that power could legitimately be exercised within due process limitations to confine those individuals whose mental illnesses are "untreatable in the sense that no effective therapy has yet been discovered for them, and that rates of 'cure' are generally low."[83] The Chief Justice also felt that Donaldson's illness, diagnosed as paranoid schizohrenia, fell into the "untreatable" category.[84] At the least, he would leave the decision of whether to exercise the power to provide custodial care with the state legislature.[85]

The Chief Justice also disapproved of the *quid pro quo* theory employed by the court of appeals. He feared that it could be read to permit a state to confine an individual solely on the ground that the state was willing to provide treatment, without regard to the individual's ability to function safely in freedom, thus raising "the gravest of constitutional problems."[86] Such an approach was too inflexible to comport with due process requirements.[87] Furthermore, Chief Justice Burger saw the *quid pro quo* theory as elevating a concern for essentially procedural safe-guards to a new substantive constitutional right. The wide divergence of medical opinion in this field presented special problems which he thought could not be squared with the principle that courts cannot substitute their own views of the public welfare for those of the legislatures.[88] He did think that the adequacy of a state's procedures and the continuation of particular confinements were questions ultimately for the courts, aided by expert opinion. He did not, however, believe that it was within the traditional scope of judicial review for courts to tell the states that the provision of certain benefits was adequate "compensation" for confinement.[89]

The posture in which this case reached the Court facilitated the narrow ground of the decision. Several factors contributed to this. First, this was not a case seeking institution-wide relief for a class.[90] If it had, it could have presented difficult problems of the availability of state resources that might have been required to administer a remedy. Second, and even more basic, the plaintiff-respondent was not seeking the provision of affirmative treatment. Rather, he claimed that he had a right either to treatment *or* release.[91] Thus, Donaldson was not asking the Court to decide whether the provision of treatment alone could constitutionally justify confinement. Third, the case did not present the question of whether a particular type or level of treatment was permissible, since the jury's verdict was interpreted by both the appellate court and the Supreme Court as finding that Donaldson had received no treatment at all.[92] In light of these factors, the Court and Chief Justice Burger were justified in their criticism of the overbreadth of the appellate court's decision.

As the decision stands, it offers little precedent, either pro or con, for a right to treatment argument. The Court specifically stated that it was not reaching that issue.[93] Rather, the main significance of this case appears to lie in its holding that a state mental health

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

[82] For an historical overview see generally A. DEUTSCH, THE MENTALLY ILL IN AMERICA (2d ed. 1949); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971).

[83] 422 U.S. at 584 (Burger, C.J., concurring). *See* Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 CALIF. L. REV. 693, 697–719 (1974); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment,* 117 U. PA. L. REV. 75, 93 & n.52 (1968); Schwitzgebel, *The Right to Effective Mental Treatment,* 62 CALIF. L. REV. 936, 941–48 (1974).

[84] 422 U.S. at 584 n.6 (Burger, C. J., concurring).

[85] 422 U.S. at 584–85 (Burger, C.J., concurring).

[86] *Id.* at 585.

[87] Past decisions of the Court have emphasized the flexibility of the due process requirement and the need to identify and accommodate the competing interests involved in any given factual situation. *See, e.g.,* Morrissey v. Brewer, 408 U.S. 471, 480–84 (1972); McNeil v. Director, 407 U.S. 245, 249–50 (1972); McKeiver v. Pennsylvania, 403 U.S. 528, 545–55 (1971).

[88] 422 U.S. at 587 (Burger, C.J., concurring), *citing* Olsen v. Nebraska *ex rel.* Western Reference & Bond Ass'n, 313 U.S. 236 (1941).

[89] 422 U.S. at 587 (Burger, C.J., concurring).

[90] Donaldson's original complaint was filed as a class action on behalf of himself and all other patients in a department of the Florida State Hospital at Chattahoochee. The original complaint sought habeas corpus relief as well as damages for all members of the class. It also sought declaratory and injunctive relief requiring the hospital to provide treatment. After Donaldson's release, the district court dismissed the case as a class action. Donaldson then filed an amended complaint on his own behalf and eliminated his request for declaratory and injunctive relief prior to trial. *See* 422 U.S. at 565 n.1. For cases that did involve claims for institution-wide relief see Welsch v. Likins, 373 F. Supp. 487(D. Minn. 1974); Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Comment, *Wyatt v. Stickney and the Right of Civilly Commited Mental Patients to Adequate Treatment,* 86 HARV. L. REV. 1282 (1972).

[91] Brief for Respondent at 33–41, O'Connor v. Donaldson, 422 U.S. 563 (1975).

[92] *See* notes 41–42 and accompanying text *supra.*

[93] 422 U.S. at 573–74.

official who merely confines a non-dangerous patient who is capable of surviving safely in freedom, without treating him, can be held liable for damages under 42 U.S.C. § 1983. It should be emphasized that this was not a case of hospital personnel committing an affirmative act, such as abusing a patient, which resulted in the imposition of liability. Rather, O'Connor's passive refusal to release Donaldson was the basis of his liability. However, in light of the rather broad immunity rule of *Wood v. Strickland*[94] which the Court applied, it appears that the state official does not lose his qualified immunity unless he acts with the malicious intention to deprive the patient of his constitutional rights. Viewed in that light, the decision may be requiring conduct tantamount to an affirmative act as a prerequisite of liability. Hopefully, the ultimate disposition of the liability issue upon remand will clarify this point.

While this decision may prove to be useful as the basis for analogy in other types of due process cases involving involuntary confinement,[95] the specific holding is narrow indeed. The Court neither upheld a right to treatment for patients in Donaldson's situation, nor a duty on the part of state officials to provide treatment. It should be noted, however, that several of the statements in Chief Justice Burger's concurrence, which was considerably broader in scope than the majority opinion, are not inevitable implications of the Court's opinion. In particular, the majority might not agree with his analysis of the constitutionally permissible scope of the state's *parens patriae* power.[96]

In summary neither the factors which contributed to the narrow ground of this decision nor the traditional limitations on the scope of judicial review[97] should have prevented the Court from offering more guidance on the right to treatment issue. The Court plainly viewed the issue of whether treatment was provided as a justiciable question.[98] And other courts that have considered this issue have successfully avoided enmeshing themselves in the intricacies of assessing the relative merits of various courses of treatment.[99] The respondent's brief ex-

[94] 420 U.S. 308 (1975).

[95] For example, criminal law practitioners might attempt to add *O'Connor* to their arsenal of civil liberties victories. It must be emphasized at the outset, however, that both the appellate court and the Supreme Court in this case interpreted the jury's verdict as finding that Donaldson was dangerous neither to himself nor to others. In that situation, the *parens patriae* rationale alone is insufficient to justify continued confinement. On the other hand, where the mentally ill individual is dangerous, the police power rationale provides a traditional basis for confinement apart from the provision of treatment, although perhaps not indefinitely, without subjecting the confinement to a due process attack. After all, the state should not be able to do civilly what it could not do criminally, *viz.*, incarcerate for an extended period of time a person who has committed no crime. Nevertheless, an argument for a criminal defendant based on *O'Connor*, where the asserted justification for confinement seems to be the *parens patriae* rationale, *i.e.*, that the individual is in need of treatment, might be inappropriate. This is especially true where the criminal defendant has been found to be dangerous to others. *Cf.* Jackson v. Indiana, 406 U.S. 715, 736–37 (1971).

However, even in the criminal context, there are situations in which the need for treatment is at least a partial basis for confinement. Sexual psychopath laws and defective delinquency laws which provide for confinement in mental institutions under certain circumstances and commitment of persons acquitted by reason of insanity are examples. In those situations persons who might otherwise be confined in jails are hospitalized, or at least segregated into particular types of confinement facilities, presumably because they are in need of some type of treatment. This certainly resembles the *parens patriae* justification. It frequently happens that the time an individual spends in a facility for defective deliquents, for example, exceeds the time that the same individual would have spent in jail had he not been deemed in need of mental health services. *See, e.g.*, McNeil v. Director, 407 U.S. 245 (1972). In such cases it might effectively be argued that custodial confinement, without treatment, unconstitutionally prolongs the time during which the individual is deprived of his liberty beyond that time he would have served in the absence of the mental disorder. To minimize the possibility of this happening, court-supervised procedures need to be established which provide for frequent evaluation of the person's mental condition.

The question remains whether, once a criminal defendant is adjudged to have a mental disorder and is removed to a mental institution, the *parens patriae* rationale then supercedes the police power rationale, and the "patient" then must be treated immediately or returned to prison. Since prisons also serve as a place of confinement for dangerous individuals under the police power rationale, perhaps the "patient" should either have the option to select the institution in which he is to serve his sentence, or to be given such treatment as will "give him a realistic opportunity to be cured or to improve his mental condition." *See* note 20 *supra*. In the absence of treatment, there seems to be no logical reason for confining the dangerous "patient" in a mental institution prior to the completion of his term of incarceration.

[96] *Cf. In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967).

[97] *Cf. In re* Gault 387 U.S. 1 (1967).

[98] 422 U.S. at 574 n.10.

[99] *See, e.g.*, Tribby v Cameron, 379 F.2d 104 (D.C. Cir. 1967); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Wyatt v. Stickney, 334 F. supp. 1341 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate*

tracted a number of valuable guidelines from both individual and class actions in this area.[100] The brief stated one such guideline:

> Judicial enforcement of the right to treatment has not, thus far, required doctors to demonstrate that a particular course of treatment would cure or improve the patient's mental condition, but only to show that there was a *bona fide* effort and a reasonable opportunity to cure or improve that condition.[101]

The application of this guideline could use objective professional standards to establish a threshold level of constitutionally required treatment, while still leaving substantial discretion with mental health professionals to pick and choose among acceptable alternatives available to them.[102] This approach could at least minimize the difficulties of administering a right to treatment which so concerned the petitioner and Chief Justice Burger in this case.

Treatment, 86 HARV. L. REV. 1282 (1973); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967).

[100] Brief for Respondent at 65–68, O'Connor v. Donaldson, 422 U.S. 563 (1975).

[101] *Id.* at 65–66.

[102] In Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), the district court permitted representatives of the parties to that class action to fashion their own remedy and then reviewed its reasonableness. This would appear to be a particularly useful judicial technique.