COMMENT

O'CONNOR v. DONALDSON: DUE PROCESS RIGHTS OF MENTAL PATIENTS IN STATE HOSPITALS

I
INTRODUCTION

Following the Warren Court's expansion of protections against unjust deprivations of liberty by the states in the criminal justice process,[1] federal courts have become increasingly aware of less visible but equally pernicious violations of liberty through state civil commitment processes. The Supreme Court has declared that this form of confinement constitutes a "massive curtailment of liberty"[2] which must be accompanied by procedural and substantive safeguards against its unjust application. One court observed that the use of this process to suppress dissidence or nonconformity in some instances is as real a possibility in this country as it is commonly thought to be in the Soviet Union:

> Although we are reasonably certain that the shocking story revealed in *The Gulag Archipelago*[3] could not take place in this country, the facts of Roy Schuster's case are reminiscent of Solzhenitsyn's treatise. . . . [We have] described the appalling sequence of events in which Schuster —convicted of second degree murder and sentenced . . . to a term of 25 years to life—was transferred in 1941 from Clinton State Prison to Dannemora State Hospital for the Criminally Insane in apparent retaliation for his efforts to expose prison corruption. . . . Now 70 years old and languishing at Green Haven Correctional Facility, he remains incarcerated 44 years after conviction of a crime for which the average time of imprisonment before parole is 15 years.[4]

This recognition of the grave deprivations of liberty which may accrue from the commitment process has resulted in attempts by courts and litigants to restrict state commitment power by narrowing the range of acceptable justifications for such confinements and by imposing affirmative duties on the state when such confinements occur, particularly a duty to provide treatment. These issues, however, did not reach the Supreme Court until very recently.

In *O'Connor v. Donaldson*,[5] the Supreme Court enunciated fourteenth amendment/due process restrictions on involuntary commitment of persons in

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1. *E.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial); Malloy v. Hogan, 378 U.S. 1 (1964) (right against self-incrimination); Gideon v. Wainright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (protection against unreasonable search and seizure).
2. Humphrey v. Cady, 405 U.S. 504, 509 (1972).
3. 1 A. SOLZHENITSYN, THE GULAG ARCHIPELAGO (1974).
4. United States *ex rel.* Schuster v. Vincent, 524 F.2d 153, 154 (2d Cir. 1975).
5. 422 U.S. 563 (1975).

state mental hospitals which call into question the constitutionality of many presently existing state commitment statutes. The Court formulated these restrictions while expressly avoiding a "right to treatment" issue which had been raised by the plaintiff and which formed the basis of the decision in the Fifth Circuit.[6] The case therefore represents a mixed result for patients' rights advocates: a success in gaining some potentially significant delineations of the right to liberty in this area, but a failure insofar as the Court declined to endorse "right to treatment" case law developed in the lower federal courts.

II
FACTS OF *DONALDSON*[7]

Plaintiff Kenneth Donaldson was committed to Florida State Hospital at Chattahoochee in 1957 for "care, maintenance, and treatment"[8] upon the application of his father and the finding by a county judge that he was suffering from "paranoid schizophrenia."[9] The judge informed Donaldson that he was being sent to the hospital for a few weeks to take some medication, after which he would be released.[10] Donaldson remained in the hospital for over a decade, until he finally secured his release in July 1971.[11]

The commitment was pursuant to a Florida statute[12] which allowed confinement "to prevent self-injury or violence to others" or to provide treatment.[13] The judge did not specifically find that Donaldson was dangerous, but instead said he required confinement to prevent violence *or* to insure proper treatment.[14]

Donaldson was confined in a ward with a patient population that was one-third criminal, and he testified that "[t]he entire operation of the ward[s] I was on was geared to the criminal patients."[15] The department in which he lived consisted of approximately sixty beds very close to one another, some of them touching.[16] All windows were locked with padlocks, no places were available for safekeeping of personal possessions, and there were no places for a patient to enjoy personal privacy.[17] Donaldson testified that he did not sleep well because other patients had fits during the night and because of "the fear, always the fear you have in your mind . . . when you go to sleep that maybe some-

6. 493 F.2d 507 (5th Cir. 1974).

7. Donaldson himself gives a fascinating account of his commitment, confinement, and eventual release in K. DONALDSON, INSANITY INSIDE OUT (1976).

8. 422 U.S. at 565-66.

9. *Id.* at 565.

10. 493 F.2d at 510-11.

11. *Id.* at 511.

12. Law of Aug. 1, 1955, ch. 29909, § 2(2), Fla. Gen. Laws 1955 (repealed 1971). For current provisions, see F.S.A. § 394.467 (Supp. 1976).

13. 422 U.S. at 566 n.2.

14. *Id.* The constitutionality of the initial commitment procedure and of the statute was not challenged by Donaldson, who was concerned in this suit only with his continued confinement by the hospital staff. *Id.* at 567.

15. 493 F.2d at 511 & n.5.

16. *Id.* at 511.

17. *Id.* at 512 n.5.

body will jump on you during the night."[18]

During his first ten years of confinement, when he was under the care of defendants Dr. J.B. O'Connor and later Dr. John Gumanis, Donaldson talked with them for a total of less than three hours,[19] and was denied grounds privileges and occupational training.[20] The denial of the training was partly motivated by Gumanis' belief that Donaldson would utilize his access to a typewriter to prepare habeas corpus petitions.[21] In 1967 he was transferred to the care of Dr. Israel Hanenson, who promptly accorded him grounds privileges and assigned him to occupational therapy and who, despite an even more unfavorable patient-doctor ratio than had been the case in Gumanis' ward, found time to speak to Donaldson at least once a week.[22]

During the early part of his confinement his treatment consisted mainly of "milieu therapy,"[23] which involves keeping the patient "comfortable, well nourished, and in a protected environment."[24] In addition to this, the hospital staff sought to administer medication, which Donaldson, a Christian Scientist, regularly refused both on religious grounds and on the ground that he was not mentally ill.[25]

Throughout the period of his confinement it was clear to the hospital staff that Donaldson was neither dangerous to himself nor to others,[26] although at the end of a 1964 staff meeting O'Connor said that the consensus of opinion was that Donaldson was "considered to be dangerous to others."[27] At the trial Gumanis testified that this opinion was solely O'Connor's and not a consensus at all. O'Connor admitted that his opinion was not based on personal knowledge, and the records of the meeting show that O'Connor was the only one at the meeting to describe Donaldson as dangerous.[28]

Several times during the course of his confinement, Donaldson attempted to secure his release, both through court action[29] and by appeal to the hospital staff's discretionary power to release its patients.[30] One of the latter attempts

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18. *Id.*

19. *Id.* at 514; Brief for Appellee at 11, O'Connor v. Donaldson, 493 F.2d 507 (5th Cir. 1974) [hereinafter cited as Brief for Appellee]. Gumanis' progress notes were also very far apart in time, and usually said only "continue custodial care," even though the first of them indicated that Donaldson was in remission, which should have targeted him for release. *See* text accompanying notes 65-66 *infra*. Brief for Appellee at 6-7, 26-27; 493 F.2d at 514-15.

20. Brief for Appellee at 9-10.

21. 493 F.2d at 514; Brief for Appellee at 10.

22. 493 F.2d at 514; Brief for Appellee at 11.

23. 422 U.S. at 569, 578 n.2; 493 F.2d at 511.

24. 422 U.S. at 578 n.2.

25. *Id.* at 569 n.4, 578.

26. *Id.* at 568; 493 F.2d at 517; Brief for Appellee at 4-6.

27. Brief for Appellee at 22.

28. *Id.*

29. *See, e.g.*, Donaldson v. O'Connor, 390 U.S. 971 (1968) (certiorari denied); *In re* Donaldson, 371 U.S. 806 (1962) (motion for leave to file petition for habeas corpus denied); *In re* Donaldson, 364 U.S. 808 (1960) (motion for leave to file petition for habeas corpus denied); Donaldson v. O'Connor, 234 So.2d 114 (Fla. 1969) (appeal dismissed without opinion), *cert. denied*, 400 U.S. 869 (1970).

30. 422 U.S. at 567. This power included the power to initiate judicial proceedings for reinstatement of competency, Law of Aug. 1, 1955, ch. 29909, § 2(5), Fla. Gen. Laws 1955 (repealed 1971), as well as the hospital's own procedures for releasing patients for "trial visits," "home visits," "furloughs," and "out of state discharges," without a judicial restoration of competency.

involved Helping Hands, Inc., which operated a Minneapolis halfway house for mental patients.[31] In June 1963 this organization inquired into the possibility of obtaining Donaldson's release and taking him in as a resident. This inquiry was accompanied by a detailed description of the organization and a letter of recommendation from the Minneapolis Clinic of Psychiatry and Neurology. The hospital responded, in a letter drafted by Gumanis and signed by O'Connor,[32] that Donaldson was mentally incompetent at that time, that he would require strict supervision "which he would not tolerate," that such a release could only be to his parents (who were in their 70's at the time), and that there were "no prospects of his release to any third party at any time in the near future."[33] In correspondence with Donaldson's parents a few days thereafter, O'Connor made no mention of the Helping Hands offer.[34] Gumanis later admitted the suitability of this offer,[35] and at the trial each of the defendants tried to shift the blame onto the other for the rejection of this offer.[36]

Further attempts to obtain Donaldson's release were undertaken by John H. Lembcke, a certified public accountant in Binghamton, New York, and a former college classmate of Donaldson's.[37] The first of these attempts involved an offer by Lembcke in July 1964 to take Donaldson to New York. O'Connor, who had been promoted the previous year to superintendent of the hospital, commented in a note to Gumanis that "[t]his man must not be well himself to want to get involved with someone like this patient . . . ."[38] The hospital responded that Donaldson had "shown no particular changes mentally" and that if released would "require complete supervision."[39] Lembcke's second attempt involved a similar request to the hospital in November 1964 to care for Donaldson. This request was denied because, according to a note from O'Connor to Gumanis, 1) parental consent would be required; 2) the patient "would not stay with the party mentioned;" and 3) "we don't know anything about [the] party" (although Lembcke had offered to provide any information the hospital should request).[40] These reasons, however, were not set out in the hospital's response to Lembcke, which advised him only that the patient would "require further hospitalization."[41] Lembecke made a third inquiry in December 1965, to which the hospital responded that Donaldson could be released on the conditions that Lembcke secure the permission of Donaldson's parents for his moving from Florida to New York, and that Lembcke give him "adequate supervision" so that the release would not be detrimental to his mental health.[42] Lembcke subsequently travelled to Florida, secured the permission of

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These temporary releases often became permanent. 422 U.S. at 567 n.3. *See also* Brief for Appellee at 18.

31. 493 F.2d at 515.
32. Brief for Appellee at 16.
33. 493 F.2d at 515.
34. 422 U.S. at 569; Brief for Appellee at 23-24.
35. Brief for Appellee at 17.
36. *Id.*; 493 F.2d at 515.
37. 493 F.2d at 516.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*

Donaldson's parents, and met with Gumanis and O'Connor, but this effort did not result in Donaldson's release for reasons which are unclear from the trial record.[43]

In March 1968 the general staff, at a meeting attended by Gumanis and Hanenson but not by O'Connor, recommended Donaldson's release on a trial visit, or out-of-state discharge.[44] Shortly thereafter Lembcke offered a fourth time to take the patient to New York. The hospital responded by imposing the conditions that 1) Lembcke be willing to come to Florida to get Donaldson; 2) that he supervise him; and 3) that he be willing to take him to a psychiatrist if he needed treatment.[45] After Lembcke agreed to these conditions the hospital imposed the additional conditions that Lembcke furnish a detailed statement concerning the home supervision Donaldson would be given and a written authorization from Donaldson's parents for the release.[46] Concerned about the delay in this process, Donaldson wrote in June 1968 to the state director of mental health, asking him if anything could be done to expedite the process.[47] This letter was forwarded to O'Connor, who up to that point had been unaware of the arrangements being made to release Donaldson and who, after making an inquiry into them, pencilled the remark to Hanenson that "the record will show, I believe, we have been through this before and decided Mr. Lembcke would not properly supervise the patient."[48] O'Connor did not specify when this "decision" had been made and was later unable to locate any record of it in the hospital files.[49] Later the Fifth Circuit noted that "there were suggestions in the record that Dr. O'Connor's conduct, in this and other respects, was influenced by his knowlege of Donaldson's history of writing letters to the press and to outside officials."[50] In September, Lembcke sent the hospital a copy of the notarized letter of consent from Donaldson's parents which he had obtained in his previous attempt to secure Donaldson's release. The hospital responded that Donaldson "still express[ed] delusional thinking," that "it would not be fair to you or to him to release him from the hospital at this time without adequate planning," and that in any case a more recent authorization from Donaldson's nearest relative would be required.[51] At that point Lembcke gave up, frustrated that, as he put it, "after requirements were met, requirements were increased."[52] There was evidence that the outcome of this episode was entirely or primarily the result of O'Connor's intervention.[53]

In July 1971, following O'Connor's retirement and the initiation of this lawsuit, Donaldson was released[54] by decision of the hospital staff.[55]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Brief for Appellee at 20. The Fifth Circuit said this letter was to the division director of the hospital. 493 F.2d at 517. It is unclear whether this is a reference to the same official.
48. 493 F.2d at 517.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at 511.
55. 422 U.S. at 567 n.3.

III
THE CASE IN THE LOWER COURTS

A. The District Court

In February 1971 Donaldson filed a class action suit in the United States District Court for the Northern District of Florida on behalf of all of the patients in the hospital's Department C. Donaldson sought damages for himself and for the class, habeas corpus relief directing the release of the entire class, and broad declaratory and injunctive relief requiring the hospital to provide adequate psychiatric treatment.[56] Donaldson was subsequently released and his class action suit was dismissed. He filed his first amended complaint in August 1971 seeking individual damages, renewing his prayers for declaratory and injunctive relief to restrain the enforcement of Florida's civil commitment statutes unless Florida provided adequate treatment for its civilly committed mental patients, and petitioning the court to convene a three-judge district court panel to consider the constitutionality of Florida's commitment statutes as they then operated.[57] In November 1971 the requests for declaratory and injunctive relief and for the convening of a three-judge court were abandoned.

Donaldson filed a second amended complaint[58] in April 1972 under 42 U.S.C. § 1983, seeking damages of $100,000 from five individual defendants, including O'Connor and Gumanis.[59] This complaint alleged that the defendants had deprived Donaldson of his liberty in violation of the due process clause of the fourteenth amendment by continuing to confine him even though they knew that he was not dangerous and was receiving only custodial care in the hospital, and by arbitrarily and maliciously blocking his release to the custody of responsible friends and outside organizations.[60] He contended that under these circumstances the defendants had a duty either to provide him with treatment or to release him, and that they had not met this duty. In addition to presenting evidence of the facts set out in section II of this Comment, the plaintiff relied primarily on the expert testimony of Dr. Walter Fox, Director of the Arizona Mental Health Department and former president of the Association of Medical Superintendents of Mental Hospitals.[61] After reviewing Donaldson's hospital records, Dr. Fox testified that he did not believe that Donaldson was dangerous,[62] that keeping him in a locked building with no opportunity for grounds privileges was not consistent with any treatment plan for a patient with Donaldson's history, and that it would have been "standard psychiatric prac-

56. 493 F.2d at 512.

57. *Id.* at 512-13.

58. *Id.* at 513. The first amended complaint named only O'Connor and Dr. Francis G. Walls, acting superintendent of the hospital following O'Connor's retirement in February 1971 until June 1971, as defendants.

59. *Id.* at 510 n.2. The other three defendants in the second amended complaint were Dr. Francis G. Walls, Dr. Milton J. Hirschfield, who became permanent superintendent in June 1971, and Emmett S. Roberts, Secretary of the Florida Department of Health and Rehabilitative Services.

60. *Id.* at 513.

61. *Id.* Dr. Fox's testimony is set out in greater detail in Brief for Appellee at 4, 6, 9-12, 14, 22, 28.

62. 493 F.2d at 517.

tice" to extend grounds privileges to a patient of his background, condition, and "social history."[63] Dr. Fox testified further that the defendants did not do the best they could with the available resources,[64] that Donaldson's hospital records themselves were inadequate, progress notes on his condition too infrequent, and that there was no evidence of an individualized treatment plan.[65] According to Dr. Fox, given Donaldson's history, he should have been pegged for an early discharge.[66] Dr. Fox characterized the attitude taken by the defendants to Donaldson's discharge as progressing from "indifference" to "more than just indifference" and finally to "actual resistance."[67]

The defendants contended that they were immune from personal liability under section 1983 because they acted in good faith since they believed their actions in confining Donaldson were authorized by a constitutionally valid state law.[68] Some of them also contended, citing *Baker v. Carr*, [69] that the issue of treatment was nonjusticiable because of the unavailability of judicially manageable standards. This argument was impliedly rejected by the district court, and later expressly rejected by the Fifth Circuit and the Supreme Court.[70]

After a four-day trial, the district judge instructed the jury that:

> [T]he 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 to either himself or others.[71]

The right to treatment was defined in the instructions as being the right to "such treatment as will give [the patient] a realistic opportunity to be cured or to improve his mental condition."[72]

The jury found that Donaldson was not dangerous, and if mentally ill had not received treatment.[73] It returned verdicts against O'Connor and Gumanis and awarded damages totaling $28,500 in compensatory damages and $10,000 in punitive damages.[74] The jury returned verdicts in favor of the other three defendants.

B. The Fifth Circuit

The Fifth Circuit agreed that the right to treatment does in fact exist as contended by Donaldson and reflected in the trial judge's instruction, while

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63. *Id.* at 513.
64. *Id.* at 518.
65. Brief for Appellee at 6.
66. 493 F.2d at 514.
67. Brief for Appellee at 28.
68. 422 U.S. at 569-70; 493 F.2d at 527, 529-30.
69. 369 U.S. 186, 198 (1962).
70. 422 U.S. at 574 n.10; 493 F.2d at 525-26. For a discussion of the manner in which the Supreme Court reached this issue while not deciding the right to treatment issue itself, see text accompanying note 157 *infra*.
71. 422 U.S. at 570; 493 F.2d at 518.
72. 422 U.S. at 570 n.6; 493 F.2d at 518.
73. 422 U.S. at 573.
74. *Id.* at 572; 493 F.2d at 510.

acknowledging the novelty of the issue.[75] The court relied on two arguments in support of this right. The first is that when a state commits a person under its *parens patriae* power of confinement,[76] and justifies its action on the basis that a patient is in need of treatment and is incapable of obtaining it for himself, it must in fact give treatment if the exercise of this power is not to be arbitrary. The court declared that "at least for the nondangerous patient, constitutionally minimum standards of treatment [must] be established and enforced."[77]

The second argument the court relied on is the *quid pro quo* or "tradeoff" argument, which holds that since confinement, like imprisonment, is a "massive curtailment of liberty,"[78] and since the procedural protections for a subject of the commitment process are not as strong as those for a criminal defendant,[79] there must be a *quid pro quo* for this lowering of safeguards. The court concluded that "the *quid pro quo* most commonly recognized is the provision for rehabilitative treatment, or, where rehabilitation is impossible, [the provision for] minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary."[80]

IV
THE SUPREME COURT DECISION

A. Opinion of the Court

Justice Stewart, writing for the Court, declared at the outset that the Fifth Circuit unnecessarily decided the right to treatment issue since the jury had found that Donaldson had not received treatment and that he was not dangerous. The threshold issue, Justice Stewart reasoned, is whether continued confinement is justified under due process standards. The right to treatment issue arises only after a valid justification for the confinement is found.[81] Since the Court was unable to find as a threshold matter such a justification, it vacated the Fifth Circuit's holdings with regard to Donaldson's right to treatment.[82] The jury findings also prevented the Court from reaching the issue of whether a state could constitutionally confine a person merely to provide treatment. Since treatment had not in fact been provided, this justification for confinement, even if constitutionally sufficient, was not available to the defendants.[83]

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75. 493 F.2d at 509, 518-20.

76. For a discussion of the *parens patriae* power, see text accompanying notes 97-98 and 127-36 *infra*.

77. 493 F.2d at 521.

78. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

79. For a discussion of the procedural aspects of civil commitment, see Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383 (1962).

80. 493 F.2d at 522.

81. 422 U.S. at 573-74.

82. Although the Court held that Donaldson's rights had been violated, it remanded the case for reconsideration in light of Wood v. Strickland, 420 U.S. 308 (1975), on the issue of personal liability. 422 U.S. at 576-77. The Fifth Circuit subsequently held that the district court erred in denying the defendants' requested instruction as to good faith reliance on state law and remanded for further proceedings. 519 F.2d 59 (1975).

83. 422 U.S. at 573-74.

In looking for possible justifications for confinement in this case, the Court indicated that certain justifications would *not* be constitutionally acceptable. First, a finding of mental illness alone would not be sufficient justification for confinement, regardless of how precisely this term were defined.[84] The Court said "there is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[85] Second, the Court declared that confinement could not be justified by the claim that it would raise the subject's standard of living.[86] Steps taken to achieve this goal would be subject to the "less drastic means" analysis set out in *Shelton v. Tucker*,[87] according to which the state would have to use that means which least stifles personal liberties in carrying out its legislative purposes where there are alternatives available.[88] Finally, the Court said that nonconformity which might be disturbing or distasteful to the general public would not be a sufficient ground for confinement. Here Justice Stewart cited three free speech cases dealing with the problem of adverse listener reaction,[89] and an equal protection case involving the denial of food stamps to members of "hippie communes."[90]

Summarizing these specific restrictions, the Court held that a state cannot 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."[91] The Court gave no indication of what the "more" might be that would justify confinement in these circumstances.

B. Chief Justice Burger's Concurrence

Chief Justice Burger joined the Court's opinion, but emphasized in a separate concurrence that the Court took no position on the right to treatment issue and that the Fifth Circuit's ruling on this point was not binding as precedent or as law of the case.[92] Despite this disclaimer, the Chief Justice proceeded to examine the weaknesses of the right to treatment rationale relied on by the Fifth Circuit, which based its decision primarily on the *quid pro quo* argument.[93]

1. Traditional Justifications of Confinement

Chief Justice Burger first noted that confinement traditionally has been justified on grounds other than treatment. He argued that historically confinement and custodial care have had primacy over rehabilitation as goals of the asylum

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84. *Id.* at 575.
85. *Id.*
86. *Id.*
87. 364 U.S. 479, 488-90 (1960), *cited in* 422 U.S. at 575.
88. 364 U.S. at 488.
89. Cohen v. California, 403 U.S. 15, 24-26 (1971); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971); Street v. New York, 394 U.S. 576, 592 (1969); *cited in* 422 U.S. at 575-76.
90. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 534 (1973), *cited in* 422 U.S. at 576.
91. 422 U.S. at 576 (emphasis added).
92. *Id.* at 580.
93. *See* text accompanying notes 78-80 *supra*.

system,[94] and that it may be necessary to invoke the power to protect in cases where there is no known treatment or cure for an illness.[95] One justification has been the police power of the state, invoked to protect the public from antisocial acts and communicable diseases.[96] The second traditional justification has been the *parens patriae* power of a state to act on behalf of its citizens.[97] The latter power, the Chief Justice conceded, has been subject to due process limitations in that the scheme of protection "must rest upon a legislative determination that it is compatible with the best interests of the affected class and that its members are unable to act for themselves."[98] Each alternative form of protection must be justified in terms of its own purposes and techniques, and "the justifications for one may not be invoked to rationalize another."[99] However, he argued, these restrictions do not imply that the *only* reason a state may confine a person is to treat or cure that person.

2. *Criticism of the* Quid Pro Quo *Theory*

a. An Unconstitutional Tradeoff—Chief Justice Burger argued next that the *quid pro quo* theory cited by the Fifth Circuit as mandating treatment is inconsistent with due process, because the willingness to provide treatment is by itself a poor justification for confinement or for the lowering of safeguards. He found that:

> To the extent that this theory may be read to permit a state to confine an individual simply because it is willing to provide treatment, regardless of the subject's ability to function in the society, it raises the gravest of constitutional problems, and I have no doubt the Court of Appeals would agree with me on this score. . . . Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that [such claims] be 'candidly appraised.' "[100]

b. Criminal Commitment as a Spurious Comparison—The Chief Justice also stressed that as an initial matter there is no valid basis for comparing the criminal and civil commitment processes because they involve different in-

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94. 422 U.S. at 581-82, *citing* A. DEUTSCH, THE MENTALLY ILL IN AMERICA 38-54, 98-113, 114-31, 228-71 (2d ed. 1949) *and* D. ROTHMAN, THE DISCOVERY OF THE ASYLUM 264-95 (1971).

95. 422 U.S. at 583-84. However, some lower courts have recognized that even in cases where patients are suffering from the most severe mental disabilities, education and training programs can have a significant beneficial effect. Welsch v. Likins, 373 F. Supp. 487, 495 (D. Minn. 1974); Pennsylvania Ass'n for Retarded Children v. Pennsylvania 334 F. Supp. 1257, 1259 (E.D. Pa. 1971).

96. 422 U.S. at 582-83, *citing* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 25-29 (1905).

97. 422 U.S. at 583. For a discussion of the *parens patriae* power, see text accompanying notes 127-36 *infra*.

98. 422 U.S. at 583.

99. *Id.*

100. *Id.* at 585-86, *quoting In re* Gault, 387 U.S. 1, 21, 27-29 (1967).

terests.[101] For example, he wrote, it would not be logical to expect that criminal justice procedural standards apply to the imposition of a quarantine. On the other hand, it can be argued that the unique nature of the civil commitment process imposes some procedural requirements of its own, such as that of periodic redeterminations of a patient's fitness, which are not applicable to the criminal process.

3. Judicial Restraint

During his discussion of the *quid pro quo* theory, Chief Justice Burger twice expressed fears that acceptance of the right to treatment would lead to judicial intrusion into nonjudicial areas of public health policy.[102] He warned against courts' substituting their public policy judgments for those of legislatures, and speculated that recognition of the right to treatment would put courts into a quagmire of attempting to enforce rights in an area in which standards would be extremely difficult to establish.[103]

V

ANALYSIS AND ARGUMENT

The Court's opinion emphasizes that among all of the rights of state mental patients that have been recognized or proposed, the right to be free from unjustified confinement is primary.[104] By declining to reach the right to treatment issue, however, the Court neither approved nor disapproved it, and in effect let stand recent right to treatment precedents[105] until the issue should be properly presented by the facts of a case. This section will discuss when a state may be obliged to release a patient from confinement or to provide treatment.

For analytical purposes, Chief Justice Burger's finding that liberty and treatment issues are independent due process issues which must be considered separately should be accepted. The *quid pro quo* theory, which mixes these two matters has the rather ominous corollary that a state may diminish basic constitutional rights as long as it does so for benevolent purposes, a corollary which the Chief Justice rightly finds unacceptable.[106] In order to preserve the independence of these separate due process rights in cases involving a diminution of personal liberty, three separate constitutional matters must be consid-

101. 422 U.S. at 586.

102. *Id.* at 586, 587.

103. *Id.* at 584-85, 587. For a discussion of the problem of setting standards, see text accompanying notes 156-63 *infra*.

104. 422 U.S. at 573, 575.

105. *E.g.*, Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); *cf.* Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 *and* 344 F. Supp. 387 (1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966) (construing a statute; *but see id.* at 453 regarding constitutional ramifications). *Contra*, Burnham v. Department of Public Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) (mentally retarded patients).

106. 422 U.S. at 589.

ered independently: (1) whether the subject has a substantive right not to have his or her freedom curtailed; (2) whether proper procedures were followed in adjudicating this right; and (3) whether a person deprived of liberty gains some special rights enforceable against the state, not as a tradeoff for her or his liberty, but because some element of the confinement situation requires that these rights be recognized. Accordingly, this section will explore first the conditions under which a person may be confined involuntarily in a state mental institution, and then the question as to whether a right to treatment exists for persons so confined.

A. Due Process and the Right to Liberty

1. Background

The area of civil commitments, like so many other areas of due process law, entails both substantive and procedural issues. Over the past three decades commitment procedures[107] have evolved from nonjudicial certifications or summary or *ex parte* proceedings, which sometimes involved arrest and confinement of the subject in a jail pending the outcome of the commitment proceeding, into systems in which fundamental procedural rights such as notice, right to counsel, right to be present at the proceeding and to confront witnesses, and right to transcripts of the proceedings, are generally guaranteed.[108] In *Donaldson*, however, the Court was faced not with issues relating to the procedural validity of the initial commitment hearing,[109] but rather with the substantive issue of what reasons justify depriving a person of liberty in this manner.

The Supreme Court recently has begun to set limitations on the circumstances under which a person may be involuntarily confined in a state mental institution. In *Jackson v. Indiana*,[110] the Court held that the duration of commitment must bear a reasonable relationship to the purpose for which the individual is committed.[111] In his *Donaldson* concurrence Chief Justice Burger noted that different types, and presumably degrees, of confinement may require different justifications.[112] In *Donaldson* the Court stated that findings of nonconformity disturbing to the general public, of mental illness alone, or that confinement would raise the subject's standard of living were not adequate justifications of confinement.[113] As discussed previously,[114] however, the Court did not decide whether a willingness on the part of the state to provide treatment would justify confinement, or whether any other constitutionally valid

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107. For a discussion of the procedural aspects of civil commitment, see Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383 (1962).

108. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); *cf. In re* Gault, 387 U.S. 1 (1967). The Supreme Court will face these issues again in Kremens v. Bartley, No. 75-1064, *prob. juris. noted*, 96 S. Ct. 1457 (1976), lower court opinion at 44 U.S.L.W. 2063 (E.D. Pa. July 24, 1975). For an examination of earlier law, see Note, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178, 1190-96 (1947).

109. 422 U.S. at 567.

110. 406 U.S. 715 (1972).

111. *Id.* at 738.

112. 422 U.S. at 583.

113. *Id.* at 575-76.

114. *See* text accompanying note 83 *supra*.

justifications for it existed other than the dangerousness of the subject or the subject's inability to survive outside of the institution.

2. *Effects of* Donaldson

a. On State Statutes—Present state statutes vary widely in setting criteria for confinement.[115] Twenty jurisdictions require a finding that the subject be mentally ill and either dangerous or unable to care for his or her own needs.[116] Thirteen states allow confinement when they find that the subject needs treatment and is unable to make a reasonable decision as to treatment on his or her own.[117] Six states allow confinement to protect the welfare of the individual or of others.[118] One state allows confinement on the sole ground that the individual needs treatment.[119] Finally, eleven states allow confinement upon a finding that the subject needs treatment or is a fit subject for hospitalization.[120] As the statutory grounds for confinement expand beyond the "dangerousness" and "survival" criteria, the chances are greater that the statute will run afoul of the due process limitations set out in *Donaldson*.

b. On Traditional Justifications for Confinement—Although the issue was not presented in *Donaldson*, there is nothing in the majority or concurring opinions indicating a retreat from long-established case law permitting confinement of dangerous mentally ill persons under the state's police power. Historically this power has been an outgrowth of the recognized powers of the state to protect its citizens, exemplified by the long-recognized power to establish quarantines to prevent the spread of disease.[121] In the mental health area this power has been recognized where there is danger of serious violence[122] or of grossly antisocial behavior[123] on the part of the subject, where the subject is psychopathic,[124] or generally where the protection of the public requires that the person be confined.[125] The Court's emphasis on the absence of dangerousness in the *Donaldson* case indicates, against the background of these precedents, that it is not inclined to diminish state power in this area.[126]

Similarly, the *parens patriae* power of confinement has been upheld, although its scope has been narrowed. *Parens patriae* has been defined as the

115. For a complete listing and discussion of state commitment statutes, see *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-07 (1974).

116. *E.g.*, CAL. WELF. & INST'NS CODE §§ 5260, 5300 (West 1972); ILL. REV. STAT. ch. 91½, §§ 1-11 (1973); MASS. GEN. LAWS ANN. ch. 123, §§ 1, 8 (Supp. 1976).

117. *E.g.*, KY. REV. STAT. ANN. § 202A.010 (Cum. Supp. 1976); N.D. CENT. CODE § 25-03-11 (Supp. 1975); TENN. CODE ANN. § 33-604 (Supp. 1975).

118. *E.g.*, COLO. REV. STAT. § 27-9-102 (1973); CONN. GEN. STAT. ANN. § 17-176 (Supp. 1975); MINN. STAT. ANN. § 253A.07 (Supp. 1975).

119. ARK. STAT. ANN. § 59-408 (1971).

120. *E.g.*, N.Y. MENTAL HYGIENE LAW § 31.01 (McKinney Supp. 1975); OHIO REV. CODE ANN. § 5122.15 (Page 1970); VA. CODE ANN. § 37.1-67.1 (Supp. 1975).

121. Jacobson v. Massachusetts, 197 U.S. 11, 29-30 (1905)(dictum).

122. *E.g.*, Lynch v. Baxley, 386 F. Supp. 378, 390-92 (M.D. Ala. 1974); *cf.* Lynch v. Overholser, 369 U.S. 705, 714 (1962).

123. *Cf.* Clatterbuck v. Overholser, 278 F.2d 20 (D.C. Cir. 1960).

124. Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); Carter v. United States, 283 F.2d 200, 203 (D.C. Cir. 1960).

125. *E.g.*, Wells v. United States, 201 F.2d 556, 559 (10th Cir. 1953).

126. The Court might be inclined to diminish state power, however, as a means of *enforcing* (as opposed to establishing) a right to treatment by ordering the release of persons for whom treatment has not been provided. *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960).

power of a state to act on behalf of those of its citizens who are under a legal disabilty to act for themselves,[127] and has long been recognized as empowering the state to confine persons unable to care for themselves.[128] First, *Donaldson* narrows the means by which this power may be exercised. Relying on the "less drastic means" analysis of *Shelton v. Tucker*,[129] the Court said that "incarceration is rarely if ever a necessary condition for raising the standards of those capable of surviving safely in freedom, on their own or with the help of family or friends."[130] The exercise of this state power will now be subject to judicial means-ends scrutiny to determine whether civil commitment is the means that will least stifle the individual's personal liberty, rather than allowing a state broad discretion to effect its objective of protecting the subject in any manner it should choose.[131] This will further encourage the current trend towards community oriented outpatient clinics and neighborhood home approaches to treatment[132] as less drastic alternatives to confinement.

More importantly, *Donaldson* also narrows the class of people who properly may be subject to *parens patriae* confinement. The Court's statement that a mere finding of mental illness will not by itself justify confinement strongly suggests that those statutes which allow commitment upon a simple finding that a person is a fit subject for hospitalization are unconstitutional.[133] *Donaldson*'s effect is less certain when the statutory basis and the proposed constitutional justification for the confinement are that the subject is in need of treatment.[134] Although the Court avoided this issue, Chief Justice Burger rejected outright the *quid pro quo* theory of right to treatment, and properly warned against the concept of a tradeoff of due process rights for special benefits to be conferred by the state. Whether a willingness to provide treatment will supply the "more" which the majority of the Court says is necessary to justify confinement of a nondangerous and reasonably self-sufficient individual[135] will depend

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

128. Wells v. United States, 201 F.2d 556, 559 (10th Cir. 1953); United States *ex rel.* Eggleston v. Snow, 219 F. Supp. 417 (S.D.N.Y. 1963); Williams v. Shovlin, 207 F. Supp. 634 (M.D. Pa. 1962); Hammon v. Hill, 228 F. 999 (W.D. Pa. 1915); Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 NW. U.L. REV. 383, 394 (1962).

129. 364 U.S. 479, 488-90 (1960).

130. 422 U.S. at 575.

131. For previous case law, *see, e.g., In re* Ryan, 47 F. Supp. 10, 12 (E.D. Pa. 1942); United States *ex rel.* Grove v. Jackson, 16 F. Supp. 126, 129 (M.D. Pa. 1936).

132. *See, e.g.*, Comment, *Progress in Involuntary Commitment*, 49 WASH. L. REV. 617, 624, 641-42 (1974); Comment, *Release Procedure Under the Pennsylvania Mental Health and Mental Retardation Act of 1966*, 5 DUQUESNE U.L. REV. 496, 505 n.44-45 (1967); *cf.* Kressel, *The Community Residence Movement: Land Use Conflicts and Planning Imperatives*, 5 N.Y.U. REV. L. & SOC. CHANGE 137 (1975). Such an agency was involved in one of Donaldson's attempts to gain release. *See* text accompanying notes 31-36 *supra*.

133. *See* note 120 *supra*, and accompanying text.

134. *See* note 119 *supra*, and accompanying text.

135. The Court's statement that "[a]ssuming . . . the 'mentally ill' can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom," 422 U.S. at 575, appears to be inconsistent with the earlier declaration, *id.* at 573-74, that the issue of whether a mentally ill person may be confined solely for the purpose of treatment would not be reached. The former statement seems to forbid the confinement for whatever reason of anyone who is nondangerous and capable of surviving outside of the institution. However, the Court backed away from such a

upon the severity of the asserted need for treatment and the type and amount of treatment which the state actually provides. The possibility that the justification that a person needs treatment will be found constitutionally sufficient is increased when it is coupled with the contention that the subject is unable to make a reasonable treatment decision on her or his own.[136] Even in this instance, however, the sufficiency of the justification will probably depend upon the same factors—*i.e.*, the severity of the need for treatment and the type and amount of treatment the state actually provides. In any case, it is clear from *Donaldson* that the "need for treatment" justification will not be entertained where treatment is not actually provided.[137]

A final category of persons subject to the *parens patriae* power of confinement are those incapable of surviving outside of an institution. The power of the state to act on behalf of these persons is unaffected by *Donaldson*, except that this power too will be subjected to the "less drastic means" analysis.

B. The Right to Treatment

1. State of the Law After Donaldson

As previously discussed,[138] the Court avoided the right to treatment issue. Chief Justice Burger, concurring, repeatedly expressed his preference for judicial noninterventionism,[139] and raised doubts as to whether such a right should be recognized.

First proposed in 1960,[140] the right to treatment has recently gained recognition in many federal jurisdictions. The first case to arise, *Rouse v. Cameron*,[141] construed a state commitment statute to require treatment, and noted that without such a requirement the statute might be constitutionally defective.[142] *Rouse* was followed by several district court decisions[143] proclaiming the right to treatment as a constitutional matter. On the appellate level, the Fifth Circuit reversed a district court decision to the contrary, and has thereby effectively reinstated its *Donaldson* holding as to this right in a decision which the Supreme Court declined to review.[144] Similar rights have been upheld for state-confined mentally retarded persons.[145]

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sweeping declaration later in the opinion by adding the "without more" qualifier to its holding. *Id.* at 576. *See* text accompanying note 91 *supra*.

136. *See* note 117 *supra*, and accompanying text.

137. 422 U.S. at 573-74.

138. *See* text accompanying notes 81-82 *supra*.

139. 422 U.S. at 586, 587. For a sampling of the Chief Justice's previous pronouncements against judicial interventionism, *see, e.g.*, Lake v. Cameron, 364 F.2d 657, 663-64 (D.C. Cir. 1966) (dissenting opinion) *cert. denied*, 382 U.S. 863 (1965); *cf.* Coleman v. Alabama, 399 U.S. 1, 22-23 (1970) (dissenting opinion).

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

141. 373 F.2d 451 (D.C. Cir. 1966).

142. *Id.* at 453.

143. *E.g.*, Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 *and* 344 F. Supp. 387 (1972), *modified sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

144. Burnham v. Department of Public Health, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975), *rev'g* 349 F. Supp. 1335 (N.D. Ga. 1972).

145. Welsch v. Likins, 373 F. Supp. 487, 496 (D. Minn. 1974); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259-60 (E.D. Pa. 1971).

In light of the defects of the *quid pro quo* theory pointed out by Chief Justice Burger in *Donaldson*,[146] however, the right to treatment rationale needs to be re-examined and reformulated. This section presents a constitutional argument for the right which does not rely on the *quid pro quo* theory, and briefly examines the problem of setting standards.

There is, of course, a special case in which the right to treatment argument is very strong and in which the liberty and treatment considerations are unavoidably mixed. This occurs when the confinement is sought to be justified on the ground that the patient needs treatment. According to the *Donaldson* Court, this presents the strongest case that treatment must actually be provided in order for the justification to be entertained.[147] In taking this approach the Court impliedly endorsed the view of a lower federal court that "[t]o 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."[148]

A more difficult problem arises when the patient is committed on the basis of a clearly recognized independent policy consideration, such as protecting the public or ensuring the subject's physical survival. Without reference to the *quid pro quo* theory, the right to treatment also exists in these cases because whenever state policy concerns gain precedence over the otherwise primary right of the individual to liberty, the state incurs a certain duty toward that individual. Contrary to the *quid pro quo* argument, this duty is not incurred as a tradeoff for the liberty, but is incurred because in depriving the individual of liberty, the state has isolated the individual from the opportunity to obtain some necessity (in this case, treatment) from other sources[149] and has perhaps even exacerbated the need for it. The state thus incurs a duty to provide that necessity, and that duty is particularly critical in this instance since, under the circumstances, the only realistic hope of regaining one's liberty lies in getting adequate treatment. Under this rationale the right to treatment applies regardless of the justification for the confinement since it is the confinement situation itself, not its justification, that gives rise to the duty and the corresponding right.[150]

This rationale is similar to the "gratuitous undertaking" doctrine of common law tort,[151] which states that an affirmative duty is incurred by a person whose actions have deprived another person of the possibility of obtaining a necessity from other sources. Similar duties have been imposed upon jailors

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146. *See* text accompanying notes 100-01 *supra*.

147. 422 U.S. at 573-74.

148. Wyatt v. Stickney, 325 F. Supp. 781, 785 (M.D. Ala. 1971).

149. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring) (suggesting that in cases in which the government removes certain persons, such as prisoners or armed forces personnel, from opportunities to exercise their religious beliefs, it incurs a constitutional duty to provide these opportunities for these persons).

150. This is exemplified by the extension of the right to treatment to mentally retarded confinees, although some of them have been confined solely to ensure their survival. *See* note 146 *supra*, and accompanying text.

151. *See generally* W. PROSSER, THE LAW OF TORTS § 56 (4th ed. 1971), especially at 347 n.22, 348 n.32, and cases cited therein.

toward their prisoners[152] and schools toward their pupils.[153] If this rationale were merely a matter of common law, the duty to treat could be removed by legislation. The constitutional guarantee of liberty, however, is based on a scheme of allowing individuals a maximum amount of freedom to enable them to provide for their own welfare.[154] The duty which a governmental body incurs when it curtails that freedom is therefore a duty of constitutional dimensions.[155]

2. Setting Standards for Treatment

A major objection to the right to treatment is that setting and enforcing standards of treatment is too difficult a task for a judicial body.[156] This objection, however, was specifically rejected by all three courts in *Donaldson*, with the Supreme Court holding that there were sufficient standards available to make justiciable the jury question of whether treatment was provided in this case.[157] The minimum standard,[158] whether the patient were being given sufficient basic psychiatric attention, would apply regardless of whether there were a known treatment for the patient's specific illness. Applying this standard would consist mainly of calculating staff-patient ratios and the amount of time spent with the patient. This standard has a right to liberty ramification in that the reasonable relationship standard of the duration of confinement to the purpose for which the individual is committed, required by *Jackson v. Indiana*,[159] necessarily requires that sufficient staff be present to make possible periodic re-examinations of each patient.[160] In promulgating this standard, the courts should avail themselves, as some already have, of the guidelines set by the American Psychiatric Association, and related professional groups.[161]

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152. *Id.* at 342 n.76; *cf.* Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974) (holding it cruel and unusual punishment in violation of the eighth amendment not to provide treatment to prisoners).

153. PROSSER, *supra* note 151, at 342 n.77.

154. This concept was the basis for many decisions under the "old" substantive due process doctrine, in whose name the Supreme Court imposed very extensive restrictions on state power to regulate commerce. The Court upheld the due process freedom of an individual "to enter into those contracts . . . which may seem appropriate or necessary for the support of himself and his family." Lochner v. New York, 198 U.S. 45, 56 (1905). Although the laissez-faire doctrines of this case and its contemporaries have long since been discarded, and more sophisticated economic theories have found their way into judicial reasoning, the idea that the Constitution guarantees to the individual the freedom to provide for his or her basic needs has retained its vitality. *See* Roe v. Wade, 410 U.S. 113, 209-15 (1973) (Douglas, J., concurring), *cf.* Morrisey v. Brewer, 408 U.S. 471, 482 (1972).

155. *Cf.* Abington School Dist. v. Schempp, 374 U.S. 203, 296-98 (1963).

156. *See, e.g.*, 422 U.S. at 584 (Burger, C.J., concurring).

157. *Id.* at 574 n.10. *See* text accompanying notes 69-70 *supra*.

158. For discussion of possible standards, see Brief for the American Psychiatric Association as Amicus Curiae at 21-24, O'Connor v. Donaldson, 422 U.S. 563 (1975) [hereinafter cited as Amicus Brief]; AMERICAN PSYCHIATRIC ASSOCIATION, EMERGING PATTERNS OF ADMINISTRATION IN PSYCHIATRIC FACILITIES (1964); AMERICAN PSYCHIATRIC ASSOCIATION, STANDARDS FOR HOSPITALS AND CLINICS (rev. ed. 1958); Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

159. 406 U.S. 715, 738 (1972).

160. Recall text accompanying note 19 *supra*, that in the present case Donaldson was attended by staff psychiatrists for a total of only three hours during his first ten years of confinement. 493 F.2d at 514; Brief for Appellee at 11.

161. *See* note 158 *supra*; Rouse v. Cameron, 373 F.2d 451, 457 n.33 (D.C. Cir. 1966); *cf.* Wyatt

With regard to an individualized treatment plan, more discretion must be allowed, but the plan should be required to exist for each patient, taking into account "the situation, needs, and prognosis of the individual patient."[162] Different schools of practice should be judged by their own reasonable standards, as they are in medical malpractice cases.[163]

VI
CONCLUSION

O'Connor v. Donaldson is a landmark case in the area of the due process right to freedom from involuntary confinement, as it enunciates specific restrictions on a state's power to confine the mentally ill. However, the case leaves open the status of the right to treatment doctrine developed in the lower federal courts.[164] Ultimately, the acceptance of this theory by the Supreme Court will depend not on whether an argument for it is made on the basis of a tradeoff theory, but whether an argument is formulated on the basis of the characteristics of the confinement situation itself, for it is the latter which mandates the imposition on the state of a duty to treat, since the state has isolated the patient from all other sources of treatment.

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v. Stickney, 344 F. Supp. 373, 375 n.3, 344 F. Supp. 387, 390 n.4 (M.D. Ala. 1972); Amicus Brief at 22.

162. Amicus Brief at 22.

163. *Id.* at 22-23.

164. *See* text accompanying notes 141-45 *supra*.