Relief for the Civilly Committed: A Constitutional Right to Treatment

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COMMENTS

RELIEF FOR THE CIVILLY COMMITTED: A CONSTITUTIONAL RIGHT TO TREATMENT

The fact that a person has a mental ailment is not a crime. Therefore, if any one is . . . restrained of his liberty because of a mental ailment the state owes a duty to provide for him reasonable medical attention. If medical attention reasonably well adapted to his needs is not given, the victim is not a patient but is virtually a prisoner.¹

With these words the editors of the American Bar Association Journal hailed, in 1960, what they saw as the genesis of a new right—the right of the involuntarily civilly committed mental patient to receive reasonably adequate treatment for his mental impairment. The impetus for this editorial was an article appearing in the same issue of the American Bar Association Journal, which proposed, for the first time, that the courts recognize and enforce a “right to treatment” based upon “our present concept of due process of law.”² From this rather auspicious beginning, a constitutionally based right to treatment has evolved, albeit rather slowly, to the point where it has now been accorded widespread judicial affirmation.³

This comment will first outline the development of the constitutional right to treatment concept. Subsequent sections will examine the theories upon which this right has been founded. Finally, some of the arguments against recognition of a constitutional right to treatment will be presented and critically evaluated.

I. DEVELOPMENT OF THE RIGHT TO TREATMENT

The earliest cases recognizing the right of the involuntarily civilly committed to treatment based this right upon statutory grounds. The first and most significant of these cases was Rouse v. Cameron, in which the District of Columbia Circuit Court of Appeals considered the issue of "whether a person involuntarily committed to a mental hospital on being acquitted of an offense by reason of insanity has a right to treatment . . . ." Chief Judge Bazelon held that "Congress established a statutory 'right to treatment' in the 1964 Hospitalization of the Mentally Ill Act" which was cognizable in habeas corpus. As a result, the case was remanded to the district court for a factual determination of whether adequate treatment was being provided. In the wake of this

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4 A comprehensive discussion of the civil commitment process is beyond the scope of this comment. However, it is important to recognize the distinction between voluntary and involuntary commitment. A person is voluntarily committed to a mental institution as the result of his own application, or of his acquiescence in an application made on his behalf by another, for admission to the institution. In general, voluntary commitment reflects a desire, or at least some degree of willingness, on the part of the person committed to be a patient in the institution.

A person is involuntarily committed when he is confined to a mental institution, on the basis of his "dangerousness" or his "need" for care and treatment, as the result of initiation of civil commitment proceedings against the person committed. Although a commitment may have originally been voluntary, it may become involuntary if the patient's request for release from the institution is denied by a requisite number of the institution's staff members in accordance with a specified procedure, again on the basis of "dangerousness" or "need" for further care and treatment.


5 373 F.2d 451 (D.C. Cir. 1966).

6 Id. at 452.

7 Id. at 453. This act provides that "[a] person hospitalized in a public hospital for mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment . . . ." D.C. CODE ANN. § 21-562 (Supp. V, 1966).

8 After an evidentiary hearing, the district court found that Mr. Rouse, the petitioner, was receiving adequate treatment. This finding was never subjected to appellate review, however, because Mr. Rouse was released due to defects in his initial commitment. 387 F.2d 241 (D.C. Cir. 1967).
landmark decision, courts have found a statutory right to treatment in civil commitment statutes relating not only to the mentally ill, but also to sexual psychopaths and chronic alcoholics. In addition, statutory bases have been utilized to extend this right to incarcerated drug addicts, juvenile delinquents, and defective delinquents.

Although Rouse and its progeny based the right to treatment on statutory provisions, it should be noted that the opinions in several of these cases also suggest that the right could possibly rest on constitutional grounds. In the Rouse opinion, for example, Chief Judge Bazelon wrote:

Absence of treatment "might draw into question the constitutionality of [this] mandatory commitment section as applied." . . . Had appellant been found criminally responsible, he could have been confined a year at most, however dangerous he might have been. He has been confined four years and the end is not in sight. Since this difference rests only on need for treatment, a failure to supply treatment may raise a question of due process of law. It has also been suggested that a failure to supply treatment may violate the equal protection clause. Indefinite commitment without treatment of one who has been found not criminally responsible may be so inhumane as to be "cruel and unusual punishment."

Such dictum in these earlier cases notwithstanding, it was not until 1972 that a constitutionally based right to treatment was recognized. In that year a federal district court in Alabama

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13 In re Elmore, 382 F.2d 125 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106 (D.C. Cir. 1967); In re Tsesmilles, 265 N.E.2d 308 (Ohio Ct. App. 1970).
16 373 F.2d at 453 (footnotes omitted).
expressly held, in Wyatt v. Stickney,\(^\text{17}\) that involuntarily civilly committed mental patients have a constitutional right to treatment. The court relied upon a dual due process theory\(^\text{18}\) in concluding that the involuntarily civilly committed "... unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."\(^\text{19}\)

Despite the obvious significance of the Wyatt decision's affirmation of a constitutional right to treatment, that decision has not served to foreclose continued controversy over this issue. In fact, both Wyatt and the concept of a constitutionally based right to treatment were challenged almost immediately by a decision in another federal district court. Burnham v. Department of Public Health\(^\text{20}\) presented the same basic issue as the Wyatt case, but produced a radically different result. In Burnham the court recognized that persons committed to


\(^{18}\) See text accompanying notes 40-58 infra for discussion and analysis of this dual due process theory.

\(^{19}\) 325 F. Supp. at 784. Wyatt is noteworthy for several reasons in addition to its recognition of a constitutional right to treatment. First, unlike the right to treatment cases which preceded it, Wyatt is a class action rather than an action by an individual seeking habeas corpus relief. This distinction and the deplorable conditions prevailing in Alabama's mental institutions led the court to conclude that the entire Alabama system of mental institutions was failing to provide adequate treatment for the class of persons involuntarily committed.

Second, Wyatt is the first case in which a court has established, and required compliance with, minimum standards for the operation of mental institutions and the treatment programs of patients.

Third, Wyatt extends the right to treatment to the mentally retarded. The court recognized that in the area of the right to treatment "... no viable distinction can be made between the mentally ill and the mentally retarded." Thus, it held that the same due process theories were applicable to both classes of patients, stating that "[p]eople involuntarily committed through noncriminal procedures to institutions for the mentally retarded have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society." 344 F. Supp. at 390. Another recent decision has also held "... that due process requires civil commitment for reasons of mental retardation be accompanied by minimally adequate treatment ... ." Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974). See also Murdock, Civil Rights of the Mentally Retarded: Some Critical Issues, 48 Notre Dame Law. 133 (1972).

Georgia's mental institutions may have a *moral* right to effective treatment, but refused to declare that the state was under a legal obligation to provide such treatment. Judge Smith found the "adequacy of the diagnosis, care, and treatment" afforded patients in the state institutions to be a matter governed by state law. In addition, the court found "no legal precedent" for according the asserted right to treatment constitutional status. The opinion noted *Wyatt* but declared: "This Court respectfully disagrees with the conclusion reached by that court in finding an affirmative federal right to treatment absent a statute so requiring." Finally, Judge Smith remarked that even if there were a constitutional right to treatment, it would be nonjusticiable due to a lack of "specific, judicially ascertainable and manageable standards."

Although the appeals of *Wyatt* and *Burnham* are still pending in the Fifth Circuit Court of Appeals, it appears that the Fifth Circuit has resolved the conflict between these two diametrically opposed decisions in a separate case, *Donaldson v. O'Connor*, decided April 26, 1974. Kenneth Donaldson had been civilly committed in 1957 to a state mental hospital in Florida after being diagnosed as a "paranoid schizophrenic." He remained confined for more than 14 years, during which time he received "little or no psychiatric care or treatment." Following his release, Mr. Donaldson brought an action in federal district court under the Civil Rights Act, contending that he possessed a constitutional right to receive treatment or to be released and seeking damages against certain hospital offi-

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21 Id. at 1339.
22 Id. at 1340.
23 Id. at 1341.
24 These two cases were consolidated on appeal to the Court of Appeals for the Fifth Circuit and were argued in December of 1972. As noted in the text, these appeals are still pending.
26 493 F.2d at 509.
27 Id.
28 42 U.S.C. § 1983 (1970) which provides:
   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
cials who, he alleged, had deprived him of this right. He charged that these officials had "acted in bad faith . . . and with intentional, malicious, and reckless disregard of his constitutional rights." After being instructed that the plaintiff was indeed possessed of a constitutional right to treatment, a jury found that Mr. Donaldson had been denied this right and awarded him $28,500 in compensatory damages and $10,000 in punitive damages.

The defendants appealed to the Fifth Circuit Court of Appeals contending that the district court had erroneously instructed the jury. The Fifth Circuit affirmed the jury's verdict, holding that the instructions were proper and "... that a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." This holding was based upon a "two-part theory" of due process similar to that uti-

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493 F.2d at 513. If, as the facts of the Donaldson case indicate, there was ill-will between Mr. Donaldson and hospital officials, it may have resulted from the former's litigiousness in seeking to obtain his release from the hospital. Dr. Morton Birnbaum has observed:

Acting as his own attorney, Donaldson petitioned the Florida courts for a writ of habeas corpus on the grounds of inadequate care and treatment. His petition was denied. Thereafter, he continued to present his claims to the Florida courts, federal courts, and the United States Supreme Court. Four times the Supreme Court refused to grant certiorari, from 1960 to 1970. . . . As a result of various courts' reluctance to even hear the case, Donaldson remained in Florida State Hospital for almost fifteen years before he was finally released.


It was noted that as a result of these four decisions, the Court refused to consider the issue of a constitutional right to treatment. Id. at 555 n.4. The four decisions referred to are Donaldson v. O'Connor, 400 U.S. 869 (1970); Donaldson v. O'Connor, 390 U.S. 971 (1968); Donaldson v. Florida, 371 U.S. 806 (1962); In re Donaldson, 364 U.S. 608 (1960). On three other occasions the Supreme Court has likewise refused to consider this issue. New York ex rel. Anonymous v. La Burt, 385 U.S. 936 (1966); Stephens v. La Burt, 373 U.S. 928 (1963); New York ex rel. Anonymous v. La Burt, 369 U.S. 428 (1962) (Douglas, J., dissenting).

It should be noted that Donaldson represents the third type of cause of action which can be utilized to secure the right to treatment. Whereas Rouse was an action by an individual seeking habeas corpus relief and Wyatt is a class action seeking injunctive relief, in Donaldson the plaintiff sought and was awarded monetary damages for the deprivation of his constitutional right to treatment.

493 F.2d at 520.

Id.
lized in *Wyatt*. The opinion also cites *Wyatt* with approval,\(^3\) while criticizing, at least impliedly, the rationale of the *Burnham* decision.\(^4\) Thus, it would seem that in *Donaldson* the Fifth Circuit has clearly foreshadowed the ultimate outcome of the *Wyatt* and *Burnham* appeals, thereby effectively under-mining the *Burnham* decision, which had theretofore been the leading case to reject the theory of a constitutional right to treatment. More importantly, however, the *Donaldson* decision represents the most significant precedent to date in "a growing body of law recognizing a constitutional right to treatment."\(^5\)

## II. **THEORETICAL BASES OF A CONSTITUTIONAL RIGHT TO TREATMENT**

In *Rouse v. Cameron*\(^6\) Chief Judge Bazelon suggested that a constitutional right to treatment might be based upon three provisions of the Constitution: the due process clause, the equal protection clause, and the cruel and unusual punishment clause.\(^7\) His insight has proven accurate; theories based upon these provisions (individually and in various combinations) have been developed and refined by both courts\(^8\) and commentators.\(^9\)

\(^3\) *Id.* at 521, 522 n.22, 526.

\(^4\) *Id.* at 525-26.


\(^6\) 373 F.2d 451 (D.C. Cir. 1966).

\(^7\) *Id.* at 453. *See* quotation in text accompanying note 16 *supra*.


For a presentation and discussion of the equal protection theory *see* Brief for Amici Curiae *supra*, at 61-67; *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED*, *supra* note 4, at
A. Due Process

The Donaldson and Wyatt decisions utilized an essentially two-fold due process theory in recognizing a constitutional right to treatment. The first part of this theory rests on the premise that the Constitution's guarantee of due process of law requires that "... any nontrivial governmental abridgment of freedom must be justified in terms of some 'permissible governmental goal.'" It is beyond question that civil commitment is a "massive curtailment of liberty," affecting "fundamental rights" such as personal liberty, which is "an interest of transcending value," the right to travel, and the right of free association. Thus, it becomes necessary to identify the "permissible governmental goal" which justifies civil commitment. Although the justification for commitment is often found in the state's police power, here exercised to protect society by confining the mentally impaired person who is deemed to be dangerous, commitment is also frequently justified by the state's role as parens patriae, the goal of which is to provide


For a presentation and discussion of the cruel and unusual punishment theory see Brief for Amici Curiae, supra, at 55-60; Legal Rights of the Mentally Handicapped, supra note 4, at 281; Comment, 86 Harv. L. Rev., supra, at 1291-93; Note, 53 Va. L. Rev., supra, at 1144-45; Note, 77 Yale L.J., supra, at 97-100.

U.S. Const. amend. V, providing: "No person shall ... be deprived of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV, § 1, providing: "No State shall ... deprive any person of life, liberty, or property, without due process of law ...."

5 Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Kent v. Dulles, 357 U.S. 116 (1958) ("Freedom of movement is basic to our scheme of values." Id. at 126.).
7 An enumeration of the police power purposes of involuntary commitment would include at least the following: protection of society and its citizens from (1) physical harm, (2) mental and emotional harm, (3) financial harm, and (4) nuisances caused by mentally ill persons. Legal Rights of the Mentally Handicapped, supra note 4, at 105.
treatment and care for the mentally impaired person. It is with regard to the latter, commitment under the rubric of parens patriae, that this first theory of a due process right to treatment has application.

The basis for that application is the principle, recently established by the Supreme Court, that "at the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed." If a person is committed under the parens patriae rationale, then the purpose of his commitment is treatment and "... the due process clause requires that minimally adequate treatment be provided." Such treatment

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An enumeration of the parens patriae purposes of involuntary commitment would include at least the following: (1) protection of the mentally ill person from self-inflicted physical, mental, and financial harm; (2) treatment of the person committed; (3) "custodial care of the mentally ill who are not treatable under the current 'state of the art'." LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, supra note 4, at 105.

49 The due process issues posed by civil commitment under the police power rationale, which is merely a euphemism for preventive detention, are beyond the scope of this comment. However, as one writer has stated: "... if the state is to confine someone because he is dangerous, with no promise of treatment, it must do so under statutes with clearly defined standards and with procedures approaching those of the criminal process in rigor ... ." Note, 77 YALE L.J., supra note 39, at 102-03. See also Note, 79 HARV. L. REV., supra note 4.

50 Jackson v. Indiana, 406 U.S. 715, 738 (1972). In this case the confinement of a deaf-mute retardeate found incompetent to stand trial and confined to a mental institution where no suitable treatment was provided and where he remained three and one-half years was held to be a violation of due process. Writing for a unanimous Court, Mr. Justice Blackmun stated:

We hold, consequently, that a person charged by a State with a criminal offense who was committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will obtain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.

Id.

is required because without treatment there is no "reasonable relation" between the "nature" and "purposes" of the person's commitment. In essence, the theory is, as stated in Wyatt, 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."\(^{52}\)

The second of the due process grounds for a constitutional right to treatment begins with the proposition that, generally, due process requires that a person can be deprived of his liberty only if (1) he has committed a specific act previously described as a crime, and (2) he has an opportunity, provided by a criminal trial, with all of its attendant procedural protections for the accused, to contest the allegations against him.\(^{53}\) When a person is deprived of his liberty without such procedural safeguards, as he is in the civil commitment process,\(^{54}\) "... there must be a quid pro quo extended by the government to justify confinement."\(^{55}\) This quid pro quo is the availability of reasonably adequate and effective treatment for the person committed.\(^{56}\) Thus, a person who is involuntarily committed has a constitutional right to treatment under the due process clause, because failure to provide such treatment eliminates the quid pro quo which made his civil commitment constitutionally permissible in the first place.\(^{57}\)

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\(^{52}\) 325 F. Supp. at 785.

\(^{53}\) See Powell v. Texas, 392 U.S. 514, 537 (1968) (Black, J., concurring opinion).

\(^{54}\) A discussion of the procedural aspects of the civil commitment process is beyond the scope of this comment. For a discussion of the procedural due process requirements of civil commitment see Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). See also AMERICAN BAR FOUNDATION, supra note 4; Note, 79 HARV. L. REV., supra note 4.


The *Wyatt* court expressed this theory in less specific, but nonetheless cogent, terms:

When patients are so committed [involuntarily, through noncriminal proceedings, and without the constitutional protections afforded criminal defendants] for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions . . . .

**B. Equal Protection**

A second constitutional provision which has been asserted as the basis of a constitutional right to treatment is the equal protection clause. The equal protection clause requires scrutiny of the standards by which a state makes classifications among citizens. At a minimum, it demands that "the state's action . . . be rationally based and free from invidious discrimination." Equal protection does not require that all persons be dealt with identically, but it does require that if a state treats citizens dissimilarly, the classification created must "bear some reasonable relationship to a legitimate state purpose."

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> The proposition that the *quid pro quo* for commitment in lieu of criminal incarceration must be treatment is not really radical. Expanding that proposition, however, into a constitutional right to habilitation owed by the State of New York to mentally retarded children resident at Willowbrook is more than the next logical step in an inexorable sequence.

*Id.* at 759.

325 F. Supp. at 784 (citations omitted).

U.S. CONST. amend. XIV, § 1, providing: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."


In addition, if a classification affects "fundamental rights," the "state action" must be subjected to "close constitutional scrutiny." Such scrutiny places a heavy burden on the state to justify its classification and requires that the classification be "necessary to promote a compelling state interest." Since the classification of [a person] as mentally impaired and civilly committable drastically impinges on fundamental rights . . . ," this classification must be scrutinized under the "compelling state interest" test, as well as the "rational relation" test.

In applying the "rational relation" standard of equal protection to involuntary civil commitment, it is necessary to determine whether the classification of a person as mentally impaired and in need of commitment bears a reasonable relationship to any legitimate state purpose. As discussed in the preceding section, the justification for involuntary civil commitment is found in the state's police power, which allows commitment for the protection of society, or the state's role as parens patriae, which allows commitment for treatment purposes, or a combination of both. However, the legitimacy of commitment based on dangerousness to society—preventive detention—is open to serious question in view of the lack of empirical data correlating mental impairment with future dangerous conduct. Furthermore, while the parens patriae rationale for commitment does articulate a legitimate state purpose, the action of classifying a person as mentally impaired and in need of commitment for treatment is reasonable only if such treatment is in fact provided. Thus, it has been asserted that under the "rational relation" test of equal protection, a person

\[\text{Dunn v. Blumstein, 405 U.S. 330, 335 (1972).}\]

\[\text{Id. at 337.}\]

\[\text{Brief for Amici Curiae, supra note 39, at 62. For discussion of the effect of commitment upon fundamental rights, see text accompanying and authorities cited notes 42-46 supra. See also Comment, 86 HARV. L. REV., supra note 39, at 1293-96 (wherein it is asserted that classification based on mental impairment may constitute a "suspect classification").}\]

\[\text{See text accompanying and authorities cited notes 47-48 supra.}\]

involuntarily civilly committed has a right to treatment.\textsuperscript{67}

When the foregoing analysis of the justification and purposes of involuntary civil commitment is subjected to scrutiny under the "compelling state interest" test, the argument that such commitment unaccompanied by treatment violates equal protection is even more persuasive. Applying this demanding equal protection standard to the police power rationale, the use of involuntary commitment for preventive detention is, at least arguably, constitutionally deficient. The absence of data connecting mental impairment with dangerousness may not only preclude this rationale for commitment from being considered a compelling state interest, but, in addition, it may render preventive detention an unnecessary exercise of the police power.\textsuperscript{8} The parens patriae justification for commitment, on the other hand, seems to represent a compelling state interest. But classification of a person as civilly committable under this rationale cannot be viewed as necessary to promote the interest of providing treatment unless commitment is in fact accompanied by treatment. Thus, it can be asserted that "[m]ental impairment is a constitutionally permissible basis for a classification which affects fundamental rights only if the state provides persons in this class with suitable treatment to alleviate their mental condition and permit them to function more effectively and return to the community."\textsuperscript{69}

C. Cruel and Unusual Punishment

The Constitution's ban on the imposition of "cruel and unusual punishment"\textsuperscript{70} forms the basis of a third theory in support of a constitutional right to treatment. In discussing the meaning of the cruel and unusual punishment clause, Chief Justice Warren wrote:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has

\textsuperscript{67} See Brief for Amici Curiae, supra note 39, at 61-67; \textsc{legal rights of the mentally handicapped}, supra note 4, at 282; Comment, 86 \textsc{Harv. L. Rev.}, supra note 39, at 1293-96; Note, 53 \textsc{Va. L. Rev.}, supra note 39, at 1145-46.

\textsuperscript{68} See Comment, 86 \textsc{Harv. L. Rev.}, supra note 39, at 1289-90 nn. 43-44, 1293-94.

\textsuperscript{69} Brief for Amici Curiae, supra note 39, at 63.

\textsuperscript{70} U.S. Const. amend. VIII, providing: "... [c]ruel and unusual punishments [shall not be] inflicted."
the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.71

The "primary purpose" of this clause has been " . . . directed at the method or kind of punishment imposed for the violation of criminal statutes."72 However, " . . . any deprivation of liberty, incarceration, or physical detention is, in reality, a form of punishment."73 Thus, the manner in which the civilly committed are confined is also subject to review under the constitutional standards of cruel and unusual punishment.74

The underlying principle of the cruel and unusual punishment theory of a constitutional right to treatment is derived from the case of Robinson v. California.75 In this case the Supreme Court declared unconstitutional a California statute making it a misdemeanor, subject to a mandatory jail term of not less than 90 days, for a person to be addicted to the use of narcotics.76 The Court found this statute to be an unconstitutional imposition of a cruel and unusual punishment because it made "the status of narcotics addiction a criminal offense"77 even if the addict "has never touched any narcotic drug within the State or been guilty of any irregular behavior."78 The basic principle is that punishment for an illness, a condition beyond a person's control, is an unconstitutional violation of the cruel and unusual punishment clause. This principle is made clear by the distinction drawn in the opinion between such punishment and confinement for "compulsory treatment" which is constitutionally permissible:

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare

74 Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972).
76 Id.
77 Id. at 666.
78 Id. at 667.
require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.79

The principles enunciated in *Robinson* are applicable to the issue of a constitutional right to treatment because "... absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'"80 That is, it can be argued that confinement resulting from civil commitment is, in the absence of treatment, merely punishment for the condition or status of mental impairment and that under the principles of *Robinson* such punishment is proscribed. Therefore, it has been contended that if confinement pursuant to involuntary civil commitment is to satisfy the requirements of the cruel and unusual punishment clause, such confinement must be accompanied by treatment.81

III. ARGUMENTS AGAINST THE RIGHT TO TREATMENT:
THE JUSTICIABILITY ISSUE

The principal arguments directed against the concept of a constitutionally based right to treatment do not directly challenge the theories in support of such a right outlined in the preceding section.82 Instead, opponents of the constitutional right to treatment primarily have focused on the justiciability of the right to treatment issue.83 The two most important as-

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79 *Id.* at 666.

The reference in this quote to the eighth and fourteenth amendments is significant because in addition to the aspects of this case discussed in the text, *Robinson* held, for the first time, that the eighth amendment is applicable to the states by incorporation into the fourteenth amendment.


82 It should be noted, however, that in *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), the court confronted and rejected the due process theory advanced in support of the asserted right to treatment. *See note 54 supra.*

83 *See* Donaldson v. O'Connor, 493 F.2d 507, 525 (5th Cir.), *cert. granted*, 95 S.
pects of this criticism appear to be (1) the asserted lack of "specific, judicially ascertainable and manageable standards," and (2) the asserted impropriety of the courts, particularly the federal courts, acting to enforce this right.

A. Formulation of Standards

It has been noted previously that Burnham v. Department of Public Health represents the leading case rejecting the concept of a constitutional right to treatment. One reason given for the decision in that case was that the claimed right to treatment presented a nonjusticiable controversy. The court stated the test of justiciability as whether "the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." Finding the meaning of "treatment" to be ambiguous, and consensus within the medical profession as to the proper manner of treatment to be lacking, the court concluded that "the claimed 'duty' (i.e. to 'adequately' or 'constitutionally treat') defies judicial identity and therefore prohibits its breach from being judicially defined."

The problems of implementing the right to treatment and of setting appropriate standards for minimally adequate treatment have occasioned a voluminous amount of commentary.


10 See Legal Rights of the Mentally Handicapped, supra note 4, at 283-88; Baze- lon, Implementing the Right to Treatment, 36 U. Chi. L. Rev. 742 (1969); Bazelon, Forward to Symposium: The Right to Treatment, 57 Geo. L.J. 676 (1969); Birnbaum, Some Remarks on 'The Right to Treatment', 23 Ala. L. Rev. 623 (1971); Birnbaum,
Therefore, a detailed exposition of these problems and proposed solutions to them is not necessary here. However, the response to this issue by the Court of Appeals for the Fifth Circuit, in *Donaldson v. O'Connor*,⁹¹ is noteworthy because it indicates that, although there may be problems in defining and implementing the right to treatment, these problems will not preclude recognition and enforcement of the right.

In *Donaldson* the court first expressed its hesitation to reject the right to treatment merely on the basis of the difficulty involved in defining "adequate treatment." It stated: "[W]e doubt whether, even if we were to concede that courts are incapable of formulating standards of adequate treatment in the abstract, we could or should for that reason alone hold that no right to treatment can be recognized or enforced."¹² The

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⁹¹ 493 F.2d 507 (5th Cir.), cert. granted, 95 S. Ct. 171 (1974).

¹² 493 F.2d at 525-26.
opinion went on to note that in many cases, including the one at hand, "... it will be possible to make determination whether a given individual has been denied his right to treatment without formulating in the abstract what constitutes 'adequate' treatment."

The court then attacked the basic nonjusticiability premise itself, refusing to "... concede that determining what constitutes adequate treatment is beyond the competence of the judiciary." Citing the "... many cases where courts have undertaken to determine whether treatment in an individual case is adequate or have ordered that determination to be made by a trial court," the court pointed to "the experience of the Wyatt case" as proof that the courts are capable of establishing and enforcing minimum standards for the operation of mental institutions and the treatment programs of patients. In Wyatt the parties agreed upon and submitted to the court such minimal standards. These stipulated standards, in turn, were supported and supplemented by testimony from expert witnesses. The Donaldson court concluded that this procedure not only revealed "... a striking degree of consensus among the experts ... as to the minimum standards for adequate treatment" but also demonstrated the capability of the judiciary to develop appropriate standards with which to enforce the right to treatment. Thus, it seems that, at least in the eyes of one court, the nonjusticiability challenge to the constitutional right to treatment has neither theoretical nor practical merit.

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10 Id. at 526.
11 Id.
13 493 F.2d at 526.
15 493 F.2d at 526.
B. Propriety of Judicial Enforcement of the Right: Separation of Powers and Federalism

Opponents of the right to treatment have also objected to recognition of the right by questioning the propriety of judicial intervention (particularly by federal courts) to enforce the right to treatment. First, it has been asserted that the real issue is allocation of financial resources, which is properly a legislative, not judicial, function. The argument here is that implementation of the right to treatment requires the expenditure of resources (in order to provide the necessary facilities, personnel, etc.) and that decisions concerning allocation and expenditure of public resources are uniquely within the province of the legislative branch. Thus, it has been asserted that by recognizing and enforcing the right to treatment, and thereby necessitating the expenditure of resources, the courts violate the principle of separation of powers.

Adherents of the right to treatment respond to this argument by asserting that allocation of resources is not the issue. Instead, they argue, the issue is the recognition and enforcement of a constitutional right—the right to treatment. Furthermore, there are numerous decisions in which the implementation of a constitutional right has required a reallocation of resources because "[i]nadequate resources can never be an adequate justification for the state's depriving any person..."

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10 See note 99 supra.

11 See Brief for Amici Curiae, supra note 39, at 67-72; LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, supra note 4, at 289; Comment, 86 HARV. L. REV., supra note 39, at 1296-1306.

of his constitutional rights."\textsuperscript{103}

Second, opponents of the right to treatment have invoked the doctrine of federalism to assert that recognition and enforcement of this right by the federal courts is improper. Based upon this precept, it is argued that enforcement of the right to treatment by the federal judiciary not only infringes on the power of a state to allocate and expend its resources as it may see fit, but also unduly interferes with the operation of state agencies and institutions.\textsuperscript{104} The rejoinder to this argument, however, is that again constitutional rights are at issue. The deference which the federal courts usually accord state legislatures and agencies must therefore give way to judicial intervention in order to safeguard and implement the constitutional right to treatment.\textsuperscript{105}

IV. CONCLUSION

Having traced the development and theoretical underpinnings of the constitutional right to treatment, it seems appropriate to conclude by briefly considering the actual effect of recognition of this right. The most obvious effect is the impact of this newly recognized right on the substantive law. One commentator who addressed this aspect of the right to treatment issue has remarked:

In the field of mental hospitalization, the traditional primary concern of substantive law involves what is basically a two dimensional inquiry: (1) Is the person mentally ill; and (2) if


so, should he be hospitalized, or continue to be hospitalized, either voluntarily or involuntarily, or should he be placed in extra-hospital facility . . . . The innovative feature brought on by recognition of the concept of a right to treatment is that the additional question of adequate care is implanted as an item of primary concern. 104

Even more significant, however, is the possible effect which recognition of the right to treatment could have on the conditions under which the civilly committed are confined. It is apparent that the entire right to treatment controversy has arisen as a direct result of the deplorable conditions which exist in all too many mental institutions. One may hope that recognition of a constitutional right to treatment will also prompt society to accept its moral responsibility to rectify these conditions and provide proper care and suitable treatment for those who, because of mental afflictions, are civilly committed.

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