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## Constitutional Law- Confinement of Nondangerous Mentally Ill Capable Of Surviving Safely in Freedom Held to Violate Patient's Right to "Liberty"

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**Constitutional Law—CONFINEMENT OF NONDANGEROUS MENTALLY ILL CAPABLE OF SURVIVING SAFELY IN FREEDOM HELD TO VIOLATE PATIENT'S RIGHT TO "LIBERTY"—*O'Connor v. Donaldson*, 95 S. Ct. 2486 (1975).**

The states have traditionally exercised broad power to commit the mentally ill.<sup>1</sup> Civil commitment of such persons has generally been justified under two premises. First is the concept of *parens patriae* which justifies the involuntary commitment of the mentally ill for their care and treatment or protection from harm.<sup>2</sup> Second is the state's police power under which it may safeguard the public health, safety, welfare and morals.<sup>3</sup> The substantive and procedural limitations upon this power may vary drastically from state to state.<sup>4</sup> Despite the activity of the states in this area, no constitutional mandate exists requiring a state to provide for the mentally ill.<sup>5</sup>

The most fundamental deprivation caused by involuntary civil commitment is the restriction or loss of individual liberty.<sup>6</sup> While it has only

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1. *Jackson v. Indiana*, 406 U.S. 715, 736 (1972), quoting AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 34-59 (rev. ed. 1971); Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAW. 1334 (1973); 41 AM. JUR. 2d *Incompetent Persons* § 33 (1968).

2. Under English law at the time of the settling of the American colonies, the King had the authority to act as "the general guardian of all infants, idiots, and lunatics." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972), quoting 3 W. BLACKSTONE, COMMENTARIES \*47. The Massachusetts Supreme Court incorporated the law of *parens patriae* into its commitment law thus shifting the burden of caring for the mentally ill from the private to the public sphere. *In re Oakes*, 8 Law. Rep. 123 (Mass. 1845). The *parens patriae* power is "inherent in the . . . power of every State . . . and often necessary to be exercised in the interests of humanity. . . ." *Mormon Church v. United States*, 136 U.S. 1, 57 (1890). See also *Higgins v. United States*, 205 F.2d 650, 652-53 (9th Cir. 1953); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-08 (1974); 48 NOTRE DAME LAW., *supra* note 1, at 1334.

3. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905); 87 HARV. L. REV., *supra* note 2, at 1209 n.53, 1222.

4. *Jackson v. Indiana*, 406 U.S. 715 (1972). The Court cited an American Bar Foundation study which indicated that:

[I]n nine States the sole criterion for involuntary commitment is dangerousness to self or others; in 18 other States the patient's need for care or treatment was an alternative basis; the latter was the sole basis in six additional States; a few States had no statutory criteria at all, presumably leaving the determination to judicial discretion. *Id.* at 737 n.19.

Many states mix criteria for commitment so that it may be impossible to determine an exact justification for commitment. See Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1139 n.20 (1967).

5. See *Welsch v. Likins*, 373 F. Supp. 487, 499 (D. Minn. 1974). Cf. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752, 761 (E.D.N.Y. 1973).

6. The loss of individual liberty is obvious when one considers that the state can legally

recently been recognized that such a deprivation of personal liberty violates constitutional safeguards,<sup>7</sup> recent decisions point up the obvious fourteenth amendment issues<sup>8</sup> raised by such a "massive curtailment of liberty."<sup>9</sup> Cases in the past have dealt primarily with the various aspects of the commitment process;<sup>10</sup> thus, there is little case law dealing with the state's obligation to the patient between the time of a justifiable commitment and release and the requirements for release.<sup>11</sup> Considering the number of people affected,<sup>12</sup> it is "remarkable" that the substantive constitutional limitations on this exercise of state power are "not more frequently litigated."<sup>13</sup> 42 U.S.C. § 1983<sup>14</sup> is a means by which the mentally ill have

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remove an individual involuntarily to an institution for treatment despite the fact that he has not violated a criminal statute. See Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059, 1060 (1972).

7. As late as 1960, it was possible for a state supreme court to hold that involuntary civil commitment is not "[s]uch [a] loss of liberty . . . as is within the meaning of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law.'" Prochaska v. Brinegar, 251 Iowa 834, 838, 102 N.W.2d 870, 872 (1960).

8. U.S. CONST. amend. XIV, § 1:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

9. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). See *In re Ballay*, 482 F.2d 648, 655 (D.C. Cir. 1973), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) which states "[t]here can no longer be any doubt that the nature of the interests involved when a person . . . [is] involuntarily committed . . . is 'one within the liberty and property language of the Fourteenth Amendment.'"

10. See note 24 *infra*. Numerous other cases have been dismissed based upon the immunity doctrine. See note 41 *infra*.

11. This lack of case law can perhaps be attributed to the fact that most mental patients are confined for only short periods of time. 87 HARV. L. REV., *supra* note 2, at 1376-77.

Judge Bazelon notes that "[i]t makes little sense to guard zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors." *Covington v. Harris*, 419 F.2d 617, 623-24 (D.C. Cir. 1969). The Report of the Subcommittee on Constitutional Rights of the Committee on the Judiciary notes that the legal profession is too often concerned with the procedures by which the mentally ill are committed, but once hospitalized, like attention is not given to protecting the patient's rights. 110 CONG. REC. 14553 (1964).

12. In 1961, an estimated 90% of the approximately 800,000 patients in mental hospitals had been placed there through involuntary commitment. *Jackson v. Indiana*, 406 U.S. 715, 737 n.22 (1972).

13. 406 U.S. at 737.

14. 42 U.S.C. § 1983 (1970) (originated in Klu Klux Klan Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13) reads as follows:

[E]very 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

sought to insure the protection of their constitutional rights from state encroachment. While this 1871 legislation was clearly not motivated by the needs of the mentally ill, section 1983 covers a wider spectrum than the redressing of instances of racial discrimination,<sup>15</sup> and has recently assumed considerable importance through the protection of all individual fourteenth amendment rights.<sup>16</sup>

In the recent case of *O'Connor v. Donaldson*,<sup>17</sup> the Supreme Court was faced with the issue of a mental patient's rights subsequent to commitment. Donaldson, a former mental patient who had been involuntarily committed under civil commitment procedures to a state mental hospital,<sup>18</sup> instituted an action under section 1983<sup>19</sup> against the hospital's superintendent, O'Connor, and members of the hospital staff alleging that defendants had intentionally and maliciously deprived him of his constitutional right to liberty.<sup>20</sup> The evidence indicated that O'Connor had rejected Donaldson's frequent requests for release despite Donaldson's apparent ability to earn a living outside the hospital and responsible persons' willingness to provide him any help necessary on release.<sup>21</sup> The trial court found Donaldson dangerous neither to himself nor to others, and, if mentally ill, to have received no appreciable psychiatric treatment.<sup>22</sup>

The Court framed the issue as whether "a State [can] constitutionally

to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15. The author of the Civil Rights Act of 1871 asserted that the act was intended to include more than racial discrimination. See CONG. GLOBE, 42d Cong., 1st Sess. app. at 68 (1871) (remarks of Rep. Shellabarger). While supporters of the bill did not define its scope, opponents repeatedly referred during debate to its all-inclusive nature. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 364-66 (remarks of Rep. Arthur), 384-85 (remarks of Rep. Lewis) (1871); *Id.* at 216-17 (remarks of Sen. Thurman), 260 (remarks of Rep. Eldridge and Rep. Holman) (1871). See also Note, *The Doctrine of Official Immunity Under the Civil Rights Act*, 68 HARV. L. REV. 1229, 1232 (1955).

16. For historical development of section 1983 see *Monroe v. Pape*, 365 U.S. 167, 171 (1961); Note, *The Civil Rights Act of 1871: Continuing Vitality*, 40 NOTRE DAME LAW. 70 (1964). For development of section 1983 in the mental health area see Annot., 16 A.L.R. Fed. 440 (1973).

17. 95 S. Ct. 2486 (1975).

18. Donaldson had been civilly confined to a state mental hospital on *parens patriae* grounds and kept in custody against his will for over fourteen years.

19. 42 U.S.C. § 1983 (1970). See note 14 *supra*.

20. Donaldson originally filed his complaint as a class action on behalf of all his fellow patients. However, after Donaldson's release, the district court dismissed the class action aspect of the suit. 95 S. Ct. at 2488.

21. *Id.* at 2490.

22. *Id.* at 2492. It is possible that the trial jury determined Donaldson not only to be nondangerous but also not mentally ill at all. However, the jury's verdict was not construed in this fashion.

confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with help of willing and responsible family members and friends."<sup>23</sup> In finding such confinement unconstitutional, the Court narrowly construed the issue and refused to address the question of whether, when, or by what procedure a mentally ill person may be confined by the state.<sup>24</sup> However, the Court noted that even had the initial commitment been permissible, "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."<sup>25</sup>

Regarding purely custodial confinement, *O'Connor* is significant since it offered the Supreme Court its first opportunity to address the "right to treatment" issue. The Fifth Circuit Court of Appeals<sup>26</sup> in a far-reaching opinion recognized such a right of individuals who are involuntarily civilly committed to state mental hospitals guaranteed by the due process clause of the fourteenth amendment.<sup>27</sup> The discovery of a right to treatment doctrine is attributed to an article published in 1960.<sup>28</sup> The doctrine first attained judicial recognition in *Rouse v. Cameron*<sup>29</sup> in which Judge Baze-

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23. *Id.* at 2494.

24. The Court deemed the issue of state commitment procedure irrelevant because Donaldson was not contesting his initial commitment, but rather his continued confinement subsequent to commitment. However, the Court did point out that the Florida statutory provisions were less than clear in specifying the grounds necessary for commitment, and the record was scanty as to Donaldson's condition upon commitment. *Id.* at 2489.

While the Supreme Court has never explicitly considered the impact of due process on civil commitment procedures, it has ruled on challenges in closely related areas. *See, e.g.,* McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) (confinement that is indeterminate violates due process when based upon procedures designed to authorize brief period of observation); Jackson v. Indiana, 406 U.S. 715 (1972) (indefinite commitment of a criminal solely on account of his incompetency to stand trial violates due process when there is little probability of recovery); *In re Gault*, 387 U.S. 1 (1967) (due process requires certain procedural safeguards akin to those traditional in criminal law despite the civil nature of the proceedings and their benign intent); Specht v. Patterson, 386 U.S. 605 (1967) (when definite sentence of sex offender is converted into indefinite confinement, due process requires such procedural safeguards as right to counsel and right to be heard and confront witnesses).

25. 95 S. Ct. at 2493.

26. Donaldson v. O'Conner, 493 F.2d 507 (5th Cir. 1974).

27. The Fifth Circuit Court of Appeals held that a nondangerous person who is involuntarily civilly committed to a state mental hospital has "a constitutional right to such treatment as will help him to be cured or to improve his mental condition." *Id.* at 527.

This constitutional right to treatment was based on a two-part rationale. First, the court reasoned that where the basis for commitment was treatment, then the fundamentals of due process were violated if treatment was in fact not provided. *Id.* at 521. Secondly, the court held that due process required the state to extend treatment as the *quid pro quo* for its right to deprive an individual of his liberty. *Id.* at 522.

28. Bimbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

29. 373 F.2d 451 (D.C. Cir. 1966). There are numerous subsequent decisions supporting the

lon stated that "[a]bsent treatment, the hospital is 'transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense . . . .'"<sup>30</sup>

The circuit court had held that where the justification of commitment was treatment, as under the *parens patriae* doctrine, then fundamental due process requires treatment.<sup>31</sup> While the Supreme Court chose to evade this issue noting that the posture of the case did not justify such broad constitutional analysis,<sup>32</sup> dicta in the instant case and other recent cases appear to lend some support to the circuit court's reasoning. The *O'Connor* decision pointed out that confinement could not "constitutionally continue after [the] . . . basis [for commitment] no longer existed."<sup>33</sup> The Court further noted that where treatment was the state's only ground for depriving the patient of his liberty, the court could determine if treatment was in fact being provided.<sup>34</sup> The Supreme Court in two earlier cases stated that due process required that the nature and duration of commitment bear some reasonable relation to "the purpose for which the individual is committed."<sup>35</sup> Even though Chief Justice Burger emphasized in his concurring opinion that there was no correlation between a patient's constitutional right not to be confined without due process of law and a constitutional right to treatment,<sup>36</sup> the majority's failure to specifically deal with this issue is not likely to dissuade those courts which have adopted the constitutional right to treatment doctrine.

One of the most "perplexing problems" faced in recent cases arising under the civil rights statutes concerns the extent to which state officials

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right to treatment. *See, e.g.*, *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Negron v. Preiser*, 382 F. Supp. 535 (S.D.N.Y. 1974); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). *Contra*, *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973); *Burnham v. Department of Pub. Health*, 349 F. Supp. 1335 (N.D. Ga. 1972). *See also* Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); 87 HARV. L. REV., *supra* note 2, at 1325; Note, *Civil Rights: The Federal Courts and the "Right to Treatment" Under 42 U.S.C. § 1983 (1970)*, 27 OKLA. L. REV. 238 (1974); 53 VA. L. REV., *supra* note 4, at 1134; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967); 27 FLA. L. REV. 295 (1974); 23 KAN. L. REV. 188 (1974); 35 LA. L. REV. 563 (1975); 46 MISS. L.J. 345 (1975). *See generally* *Mental Health Law Bibliography*, 6 TOLEDO L. REV. 314, 333 (1974).

30. 373 F.2d at 453.

31. 493 F.2d at 521.

32. 95 S. Ct. at 2492.

33. *Id.* at 2493.

34. *Id.* n.10.

35. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *McNeil v. Director, Patuxent Institution*, 407 U.S. 245, 250 (1972).

36. 95 S. Ct. at 2500.

by reason of their office should be immune from liability under those laws.<sup>37</sup> The inherent conflicts of extending the common-law doctrine of immunity to section 1983 are obvious considering that the statute makes liable "every person"<sup>38</sup> who under color of state law deprives another of his civil rights.<sup>39</sup> The Supreme Court has ruled that the traditional immunity afforded to legislators,<sup>40</sup> judges,<sup>41</sup> and executive officers<sup>42</sup> was not abrogated by the Civil Rights Act, but extension of immunity to subordinate officers remained an open question<sup>43</sup> until *Wood v. Strickland*.<sup>44</sup>

In *Wood*, the Court extended to school board members a qualified good faith immunity from liability for damages under section 1983.<sup>45</sup> However, the potential nullifying effect which the ruling could have on the Civil Rights Act was tempered to a large extent by the heavy burden placed upon the official.<sup>46</sup> The official was held not only to a standard of good faith

37. 68 HARV. L. REV., *supra* note 15.

38. 42 U.S.C. § 1983 (1970). *See* note 14 *supra*.

39. A series of Second Circuit cases outline the perils of applying immunity to the Civil Rights Acts. *Dale v. Hahn*, 440 F.2d 633, 637 (2d Cir. 1971) ("[T]he defense of official immunity should be used sparingly in suits brought under § 1983."); *Jobson v. Henne*, 355 F.2d 129, 133-34 (2d Cir. 1966) ("It should be equally clear that both the language and the purpose of the Civil Rights Acts are inconsistent with the application of common law notions of official immunity. . . ." To give state officials this immunity under section 1983 "would practically constitute a repeal of the Civil Rights Acts."); *Birnbaum v. Trussell*, 347 F.2d 86, 88-89 (2d Cir. 1965) ("It would nullify the whole purpose of the civil rights statutes to permit all governmental officers to resort to the doctrine of official immunity."). *See generally* *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961) ("Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State . . . whether they act in accordance with their authority or misuse it.").

40. *Tenney v. Brandhove*, 341 U.S. 367 (1951).

41. *Pierson v. Ray*, 386 U.S. 547 (1967).

42. *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

43. Several lower courts have recognized varying degrees of immunity for subordinate officials. *See, e.g., Joyce v. Ferrazzi*, 323 F.2d 931 (1st Cir. 1963); *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959) (hospital superintendent in deciding when patient was ready for release was exercising discretionary function and thus was immune); *Kenney v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956) ("Institutional doctors should not be expected or even permitted to go behind a court order of commitment."); *Francis v. Lyman*, 216 F.2d 583 (1st Cir. 1954); *Ferenc v. McGuire*, 353 F. Supp. 951 (E.D. Pa. 1972) (any public official is immune if acting pursuant to court discretion); *Campbell v. Glenwood Hills Hosp., Inc.*, 224 F. Supp. 27 (D.Minn. 1963); *Miller v. Director, Middletown State Hosp.*, 146 F. Supp. 674 (S.D.N.Y. 1956). *But see* note 37 *supra*.

44. 420 U.S. 308 (1975).

45. The test set forth in *Wood* is whether the state official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of [an individual], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury . . ." *Id.* at 322.

46. Mr. Justice Powell, with whom Chief Justice Burger and Justices Blackmun and

“but also [to] knowledge of the basic, unquestioned constitutional rights of his charges.”<sup>47</sup> The Court’s rigid standard requires knowledge of “settled, indisputable law;”<sup>48</sup> ignorance of such law is equated with “actual malice.”<sup>49</sup> The Court in *O’Connor* vacated the circuit court opinion and remanded the case for further consideration in light of *Wood*.<sup>50</sup> Dr. O’Connor will be hard-pressed to meet this onerous standard especially in light of the trial court’s finding that he knowingly confined Donaldson and thereby violated his constitutional right to freedom.<sup>51</sup>

Although it firmly recognizes the fourteenth amendment right to liberty of a nondangerous mental patient who has been involuntarily committed, *O’Connor* opens the door to a series of unanswered questions. In narrowly framing the issue, the Court refused to decide whether the state may compulsorily confine a nondangerous mentally ill person for treatment<sup>52</sup> or whether the dangerous mentally ill person has a right to treatment upon compulsory confinement by the state.<sup>53</sup> Absence of litigation leaves the boundaries of these rights largely undefined.

In questioning the state’s authority to confine the harmless mentally ill, the Court signals judicial intervention in an area that has traditionally been left to the legislature and administrative agencies. The dangerous-nondangerous dichotomy suggests a possible substantive due process limitation on the state’s power to commit its mentally ill citizens.<sup>54</sup> The ade-

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Rehnquist joined, dissented as to the harsh standard of care placed upon the state official. The dissenting justices advocated the lesser good faith standard set forth in *Scheuer* (see note 42 *supra*) which is based on “the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances . . . .” *Id.* at 330, quoting 416 U.S. at 247-48.

47. *Id.* at 322.

48. *Id.* at 321.

49. *Id.*

50. 95 S. Ct. at 2495.

51. *Id.*

52. Chief Justice Burger states, in his concurring opinion, that a state can not justify confinement solely by providing treatment since due process will not permit such a “trade-off.” *Id.* at 2500.

The majority noted that where treatment is the only ground for confining an individual, the courts need not rely on the discretion of the psychiatric profession but may determine if treatment is in fact being provided. *Id.* at 2493 n.10.

53. Involuntary civil commitment would presumably be no less a curtailment of liberty for the dangerous patient than the nondangerous. Yet, traditionally, the rationale behind commitment of the dangerous mentally ill has been prevention of dangerous acts, not rehabilitative treatment. Thus, reading the *O’Connor* opinion narrowly, the dangerous mentally ill patient could be confined in simple, custodial confinement so long as the basis for commitment remained, or in short, until the patient ceased to be dangerous to himself or others.

54. Dicta in two recent cases lend support to this contention. In *Jackson v. Indiana*, 406 U.S. 715, 728 (1972), the Court required a finding of dangerousness in its construction of a

quacy of the *parens patriae* justification for involuntarily committing the harmless mentally ill for simple custodial confinement is apparently without constitutional basis even though state law may have authorized such confinement.<sup>55</sup> Even assuming that the basis for commitment is constitutionally adequate, involuntary confinement may not constitutionally continue after that basis no longer exists.<sup>56</sup> The Court is reluctant to deal explicitly with the adequacy of state commitment and confinement standards in this opinion, but such standards are brought into question in dicta, which could have far-reaching consequences on the state's traditional power to commit and confine. It seems inevitable that these issues will be put before the Court in future litigation.<sup>57</sup>

G. C. H.

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state detention statute in the interest of the "welfare of such persons." In *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), the Court construed a similar statute as requiring a "social and legal judgment that [the mentally ill individual's] potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty."

55. 95 S. Ct. at 2493. The Court specifically noted other instances when confinement would not be justifiable. The state may not confine the harmless mentally ill for the purpose of providing them a higher standard of living than they would enjoy outside the institution. Nor may the state confine the harmless mentally ill merely to protect the public from exposure to those whose ways may be different. Deprivation of a person's physical liberty may not be constitutionally justified based on the intolerance or animosity of the public. *Id.* at 2493-94.

56. *Id.* It would follow that if the dangerous mentally ill individual committed under the police power ceases to be dangerous or if the individual unable to care for himself attains the ability to live safely in freedom, then the state's authority to confine would cease to exist.

57. The potential for a flood of litigation exists since much of the care provided by mental institutions is "merely custodial." 77 *YALE L.J.*, *supra* note 29, at 88.