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The minority shareholder in a modern corporation is essentially without a voice in the management of the corporation.<sup>24</sup> The one remaining device with which he can protect his investment from the self-dealing of those in control is through a shareholders derivative action on behalf of the corporation. Through such an action he can enforce the fiduciary duties owed by the management. The courts, by permitting the expansion of the business judgment rule into the traditional enclave of the director's "duty of loyalty," are removing a substantial portion of this protection. In most situations where directors enter into such a transaction, they will be able to put forth plausible business reasons in its support, but they may not always be able to satisfy the demands of undivided loyalty.

REED JOHNSTON, JR.

#### Criminal Law—Committed Patient's Right to Treatment in Public Mental Hospitals

Nineteenth century attitudes toward insanity were responsible for the conception of a lunatic asylum as an institution for the public safety. The conditions in the asylums reflected the wild beast notion of mental illness<sup>1</sup>—the essential function of the asylum was

*Id.* at 677.

In the analogous situation where the directors contract with their own corporation, or where corporations with common directors contract together, the majority rule calls for close scrutiny of the contract to insure its fairness. See *Bank of United States v. Cuthbertson*, 67 F.2d 182 (4th Cir. 1933), *cert. denied* 291 U.S. 665 (1933); *Guaranty Trust Co. v. United States*, 44 F. Supp. 417 (E.D. Wash. 1942), *aff'd* 139 F.2d 69 (9th Cir. 1942); *Tucson Federal Sav. & Loan Ass'n v. Aetna Inv. Corp.*, 74 Ariz. 163, 245 P.2d 423 (1952); *Kennedy v. Emerald Coal & Coke Co.*, 28 Del. Ch. 405, 42 A.2d 398 (1944); *Everett v. Phillips*, 288 N.Y. 227, 43 N.E.2d 18 (1942).

<sup>24</sup>The modern large American corporation enjoys almost complete independence from its stockholders, the principal source of external interference. While lip service is always paid to democratic control by the owners, it is recognized in practice that any extensive and effective interference by stockholders in management would be exceedingly damaging.

GALBRAITH, *ECONOMIC DEVELOPMENT IN PERSPECTIVE*, 65-66 (1962).

Ownership of wealth without appreciable control and control of wealth without appreciable ownership appear to be the logical outcome of corporate development.

BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY*, 69 (1933).

<sup>1</sup> *Rex v. Arnold*, 16 How. St. Tr. 695, 764 (1742).

custody, the doctor was the keeper. However, a recent case questions the custody-function theory and poses a dilemma over the civil rights of patients in public mental hospitals: may the state involuntarily commit an individual and yet neglect to provide therapy in the hospital, or, if overcrowding and understaffing make therapy impractical, is the patient entitled to his liberty in spite of danger to himself or the community? In *Rouse v. Cameron*<sup>2</sup> the Court of Appeals for the District of Columbia held that a patient involuntarily committed after being acquitted by reason of insanity on a misdemeanor charge has a *right to treatment*, on the basis of a District of Columbia statute which provides: "a person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."<sup>3</sup>

Rouse had been committed to St. Elizabeth's Hospital. Four years<sup>4</sup> passed and he brought habeas corpus proceedings in the district court, contending that he was receiving no treatment, or alternatively, that he had recovered his mental health and was entitled to release. The district court refused to hear the treatment issue on the ground of lack of subject-matter jurisdiction. The Court of Appeals remanded for a hearing, holding that if Rouse was not receiving treatment, he was in custody in violation of a federal statute and was entitled to habeas corpus relief.<sup>5</sup> Appropriate relief, the court indicated, might be to remand the patient to custody and

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<sup>2</sup> 373 F.2d 451 (D.C. Cir. 1966).

<sup>3</sup> D.C. CODE § 21-562 (Supp. V. 1966).

<sup>4</sup> He was acquitted of carrying a dangerous weapon, a misdemeanor carrying a maximum sentence of *one* year. D.C. CODE ANN. § 22-3215 (1961).

<sup>5</sup> The statute created a right to therapy. Therefore mere custodial care is unlawful. The court indicated that the statute required only that the patient receive some therapy representing a good faith effort at individualized treatment of his disorder. Whether so called milieu therapy—mere presence in the controlled environment of the hospital—complies with the statute, depends, the court said, upon its suitability to individual patient needs. 373 F.2d at 459. It should be noted that the standards of proof in establishing the inadequacy of particular therapy will be similar to those used in medical malpractice suits, with which the courts are familiar. Whether individual patients will be able to bring these standards to bear on their situations, however, may depend upon their financial resources. It is to be presumed that hospital psychiatrists will be predisposed to testify that milieu therapy is adequate in a given case. The patient then must come forward with his own expert testimony, which will involve a private diagnosis. Quære whether the court will be inclined to rubber stamp the judgment of the hospital psychiatrist in cases where the patient is unable to put on his own expert testimony?

direct the hospital to begin treatment, or, if the opportunity for treatment had been exhausted, to release the patient conditionally or unconditionally.<sup>6</sup>

Since the decision rested on a statute, rather than on constitutional grounds,<sup>7</sup> its implications beyond the District of Columbia depend in a formal sense on the existence of a similar statute wherever the issue may be litigated. While, apparently, there is no statute in other federal jurisdictions,<sup>8</sup> the statutes of thirteen states expressly recognize a right to treatment, and in twenty-four additional states the statutes could be construed to permit the result reached in *Rouse*.<sup>9</sup> With regard to judicial decisions, *Rouse* is a case of first impression.

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<sup>6</sup> *Id.* at 458.

<sup>7</sup> An exhaustive treatment of the constitutional issues is beyond the scope of this note, but a few observations can be made. The court in *Rouse* noted that there were serious constitutional objections to confinement without therapy, but decided the case on the basis of the statute. The constitutional justification for compulsory commitment is grounded in two concepts: the general police power of the state to protect society against breaches of the peace, and the doctrine of the state as *parens patriae*. See Ross, *Commitment of the Mentally Ill*, 56 MICH. L. REV. 945, 955 (1959). Summary commitment on a verdict of not guilty by reason of insanity does *not* rest on a finding of present insanity, or dangerousness, and therefore cannot be predicated on the police power. See *Lynch v. Overholser*, 369 U.S. 705 (1962). The theoretical basis is the *parens patriae* concept, which requires that *only* the interests of the defendant be taken into account. And only therapy, not mere custody, is in the defendant's interests.

The argument can be made that absent therapy involuntary hospitalization is tantamount to imprisonment, which the court could not constitutionally impose on a not guilty verdict. *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960). Second, the argument can be made that any involuntary hospitalization without the benefit of therapy represents incarceration because of a status—being mentally ill—and as such is a cruel and unusual punishment forbidden by the eighth amendment under the doctrine of *Robinson v. California*, 370 U.S. 660 (1960). See *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966); *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966). See 44 N.C.L. REV. 818 (1966).

<sup>8</sup> Senator Robert Kennedy has introduced a bill applicable to federal jurisdictions other than the District of Columbia which includes a provision identical to the *Rouse* statute. S. 3689, 89th Cong., 2d Sess. § 4249(b) (1966).

<sup>9</sup> Least typical (two states) and most like the District of Columbia statute, are the statutes which create an unqualified right to treatment. ILL. REV. STAT. ch. 91½, § 100-7 (1966); OKLA. STAT. ANN. tit. 43A, § 2 (1954). A second group of statutes (eleven states) expressly recognizes a right to treatment, but with the qualification stated in, for example, the Ohio statute: "Every patient shall be entitled . . . to the extent that facilities, equipment and personnel are available, to medical care and treatment." OHIO REV. CODE ANN. § 5122.27 (Supp. 1966). See also GA. CODE ANN. § 88-1614 (1963); IDAHO CODE ANN. § 66-344 (Supp. 1965); ME. REV. STAT. ANN. tit. 34, § 2252 (1965); MO. ANN. STAT. § 202.840 (1962); N.J. REV. STAT. § 30:4-24.1 (Supp. 1966); N.M. STAT. ANN. § 34-2-13 (1954); N.D.

Assuming the substantive law recognizes a right to therapy on statutory or constitutional grounds, there is the question of choice of remedy. Causes alleging illegal or abusive confinement are typically litigated on habeas corpus or in an action under the federal civil rights statute. The issue in *Rouse* was presented in a petition for habeas corpus. The relief which the District of Columbia court indicated could be given on remand reflects its policy of treating a petition for habeas corpus according to its substantive merit—if it substantively merits injunctive relief, for example, it will be treated as a petition for an injunction.<sup>10</sup> On the other hand, the weight of the federal cases follow the common law rule that habeas corpus will only issue to procure *release* of the petitioner from confinement.<sup>11</sup> This would preclude relief in the form of compulsory processes against the hospital. In between these polar extremes are several federal courts which have developed a special circumstances

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CENT. CODE § 25-03-18 (1960); TENN. CODE ANN. § 33-306 (Supp. 1966); UTAH CODE ANN. § 64-7-46 (1961); WYO. STAT. ANN. § 25-70 (Supp. 1965). A third group (eighteen states) creates a duty on the part of responsible authorities to provide therapy, rather than creating a patient right. ALASKA STAT. § 47.30.010 (1962); ARIZ. REV. STAT. ANN. § 36-521 (Supp. 1966); ARK. STAT. ANN. § 59-229 (Supp. 1965); CONN. GEN. STAT. REV. § 17-211 (1960); IOWA CODE ANN. § 225.15 (1949); KAN. GEN. STAT. ANN. § 59-2927 (Supp. 1965); KY. REV. STAT. § 210.040(4) (1962); MD. ANN. CODE art. 59, § 18 (1957); MICH. STAT. ANN. § 14.802 (Supp. 1966); MINN. STAT. ANN. § 246.012 (1959); MONT. REV. CODES ANN. § 38-103 (1961); NEB. REV. STAT. § 83-307 (1958); N.H. REV. STAT. ANN. § 135:6(a) (1964); N.Y. MENTAL HYGIENE LAW § 22; S.C. CODE ANN. § 32-922 (1962); S.D. CODE § 30.0202 (1960); TEX. REV. CIV. STAT. ANN. art. 5547-70 (1958); VT. STAT. ANN. tit. 18 § 2503 (Supp. 1965). North Carolina provides that it is the duty of "duly constituted authorities of the State Hospitals . . . for the mentally ill to receive all such mentally ill persons as shall be committed to said institutions . . . and to treat and care properly for the same until discharged." N.C. GEN. STAT. § 122-89 (1964). A fourth group of statutes (six states) state that the maintenance of adequate medical care is either the state policy or is the purpose in establishing institutions such as the state mental hospital. COL. REV. STAT. ANN. § 71-1-23 (1964); IND. ANN. STAT. § 60-1359 (1961); ORE. REV. STAT. § 426.010 (1965); R.I. GEN. LAWS ANN. § 26-1-1 (1957); W. VA. CODE ANN. § 27-1A-1 (1966); WIS. STAT. ANN. § 51.005 (1957). In addition, three states charge the responsible authorities with the duty of making a periodic inquiry into the medical care being received by mental patients. CALIF. WELFARE AND INST. CODE § 6621; HAWAII REV. LAWS § 81-13 (1955); MISS. CODE ANN. § 6902 (1953).

<sup>10</sup> *E.g.*, *Miller v. Overhouser*, 206 F.2d 415, 421 (D.C. Cir. 1953). In accord is the Court of Appeals for the Fourth Circuit. *E.g.*, *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963).

<sup>11</sup> *E.g.*, *Miller v. Gladden*, 341 F.2d 972 (9th Cir. 1965); *Haskins v. U.S.*, 292 F.2d 265 (2d Cir. 1961); *McGann v. Taylor*, 289 F.2d 820 (10th Cir. 1961); *Williams v. Steele*, 194 F.2d 32 (8th Cir. 1952); *Sarshik v. Sanford*, 142 F.2d 676 (5th Cir. 1944).

rule.<sup>12</sup> The problem of limited usage of habeas corpus can be avoided entirely, however, by bringing an action under the federal civil rights statute,<sup>13</sup> in which Congress has expressly provided that the federal court may grant any relief available under federal law, and any relief available under the law of the forum state if federal relief is found to be inadequate.<sup>14</sup> The only necessary allegation is that the patient is being denied a federally protected civil right by persons acting under color of state or territorial law.<sup>15</sup> In a number of

<sup>12</sup> *E.g.*, *Harris v. Settle*, 322 F.2d 908 (8th Cir. 1963). In this case it was held that compulsory processes would issue on habeas corpus against prison officials only when the alleged mistreatment amounted to a cruel and unusual punishment. In *McNally v. Hill*, 293 U.S. 131 (1934), the United States Supreme Court followed the common law rule, holding that the writ of habeas corpus would only issue when a resolution favorable to the petitioner would result in his release from confinement. This view was reaffirmed in *Parker v. Ellis*, 362 U.S. 574 (1959), with four justices dissenting. There is reason to believe that the present Court would overrule *McNally* if given the opportunity to do so. One member of the *Ellis* majority (the majority opinion was per curiam) has been replaced by Justice Fortas, who normally votes with the four Justice *Ellis* minority. The dissenters in *Ellis* argued strongly for a more flexible approach to the use of habeas corpus. *Id.* at 577, 595. Since *McNally* the Court has taken an increasingly liberal view of the latitude allowable to a litigant on habeas corpus. See 44 N.C.L. REV. 844 (1966). At the Court of Appeals level, *McNally* was not followed by the Sixth Circuit Court of Appeals in *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944), where it was held that compulsory processes would issue on habeas corpus in the case of abusive, but lawful, detention of prisoners. The Court of Appeals for the Fourth Circuit and the Court of Appeals for the District of Columbia later developed their own rules. See note 10 *supra* and accompanying text. The position of the courts which do not follow the *McNally* view is based on the language of 28 U.S.C. § 2243 (1959), which provides that on a habeas corpus petition the "court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

<sup>13</sup> REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964).

<sup>14</sup> REV. STAT. § 722 (1875), 42 U.S.C. § 1988 (1964). See, *e.g.*, *Sherrod v. Pink Hat Cafe*, 250 F. Supp. 516 (N.D. Miss. 1965).

<sup>15</sup> REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1964). Several courts hold that this section may not be used to circumvent the exhaustion of state remedies requirement of habeas corpus. *E.g.*, *Johnson v. Walker*, 317 F.2d 418 (5th Cir. 1963). Other courts hold that state remedies need not be exhausted as a condition precedent to bringing suit. *E.g.*, *Cooper v. Hutchinson*, 184 F.2d 119 (3rd Cir. 1950). Another view is that state administrative remedies must be exhausted. *E.g.*, *McKissick v. Durham*, 176 F. Supp. 3 (M.D.N.C. 1959). It would seem that the same considerations of comity which underlie the habeas corpus exhaustion of state remedies requirement would apply to suits under this section. A novel view is to permit a Section 1983 claim for denial of a civil right to be brought up on a habeas corpus petition. *U.S. ex. rel. McCode v. Pennsylvania*, 246 F. Supp. 801 (E.D. Pa. 1965). Only one court has expressly held that a habeas corpus petition cannot be converted into a Section 1983 claim. *U.S. v. Bibb*, 249 F.2d 839 (7th Cir. 1957). Note that the District of Columbia is a territory

actions brought under this section, prisoners denied medical treatment by prison authorities have secured injunctive relief.<sup>16</sup>

Whichever procedure is employed, if *release* from the hospital on the basis of lack of therapy is sought, the court must face a perplexing problem. It would seem that the real power to force change in the policies of institutions such as St. Elizabeth's lies in the court's authority to order the release of patients whose presence in the community is unwanted.<sup>17</sup> That a maximum effective use of judicial power comprehends thwarting a basic objective of the criminal law—the segregation of dangerous persons—is reflected in the cases in which the United States Supreme Court has asserted its control over state criminal procedure. The Court's ever increasing use of the exclusionary rule in reversing state convictions figuratively raised the spectre of emptying the prisons. The states' response was to require that police respect the federal constitution as least so far as their practices related to the admissibility of evidence. This response was gradual and in proportion to the stringency of the exclusionary rule ordained at a given time. A classic example is the events surrounding the line of cases dealing with the admissibility of confessions, running from *Brown v. Mississippi*<sup>18</sup> to *Miranda v. Arizona*.<sup>19</sup> It is accurate to say that only through the

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within the meaning of Section 1983. *E.g.*, *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

<sup>16</sup> *E.g.*, *Edwards v. Duncan*, 355 F.2d 933 (6th Cir. 1966); *Talley v. Stephens*, 247 F. Supp 683 (D. Ark. 1965). The textual discussion is not intended to be an exhaustive treatment of the remedies open to patients denied therapy. There are a number of possibilities: (1) state habeas corpus, where available, based on the state statute, or state or federal constitution; (2) federal habeas corpus, based on a federal statute or the federal constitution; (3) where the patient is in a federal or territorial hospital, an action under Section 1983, or a Section 1985 action for money damages; (4) a petition for an injunction or mandamus under 28 U.S.C. § 1651 (1948); (5) tort suits for money damages against state or federal officials. *E.g.*, *U.S. v. Munz*, 374 U.S. 150 (1963). For federal jurisdiction over Section 1983 claims see 28 U.S.C. § 1343 (1962).

<sup>17</sup> See Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

<sup>18</sup> 297 U.S. 436 (1936).

<sup>19</sup> 384 U.S. 436 (1966). The confession exclusionary rule moved from an initial reliance on factual unreliability, *e.g.*, *Ward v. Texas*, 316 U.S. 547 (1941), to an abandonment of any causal requirement between police conduct and the voluntariness of the confession, *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). Yet twenty-four years after the Court had, in *Brown v. Mississippi*, 297 U.S. 436 (1936), established the principle that physical abuse was ground for exclusion, the Court in *Reck v. Pate*, 367 U.S. 433 (1960), found it necessary to reverse because the suspect had been deprived of sleep. *Escobedo v. Illinois*, 378 U.S. 478 (1963), abandoned the voluntariness rule altogether, and in *Miranda v. Arizona*, 384 U.S. 436 (1966),

power to haunt the public mind with freed criminals—however tragic the consequences—could the Court have had any impact at all on state practices.<sup>20</sup> So too, it seems that the most effective route, perhaps the only effective route, to achieving policy changes in public mental hospitals by judicial leverage is simply to order the release of patients who are confined without therapy.

As it was not material to disposition of the issue at hand, the *Rouse* decision did not specify when the District of Columbia court would consider release appropriate relief for patients denied therapy. The commitment and release of persons acquitted of a crime on the basis of insanity is governed by statutory standards in the District of Columbia.<sup>21</sup> Commitment is mandatory and summary; when release is sought the statute puts the burden on the patient to prove that he has recovered his mental health, and will not in the reasonably foreseeable future be dangerous to himself or others. The court has interpreted the dangerous propensity element to mean dangerousness which is related to a mental illness.<sup>22</sup> In analyzing the statute, Professors Goldstein and Katz have stated that the optimum allocation of decision making power, as between the psychiatrist and the court, is for the psychiatrist to determine whether the patient's mental health has been restored, and what propensities he has, and for the court to determine if such propensities are sufficiently dangerous to warrant further hospitalization.<sup>23</sup> Their position is that the court is better equipped than the psychiatrist

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the Court made it impossible for the states to admit any confession unless a detailed procedure had been first followed in the police station. So the Court has moved from a concern with prejudice to the rights to particular defendants to laying down a code of criminal procedure for the states to follow. Query whether the Court would have tread the same path had all reports of police station physical abuse, for example, ceased after *Brown v. Mississippi*, 297 U.S. 436 (1936). The point is that the Court has found it necessary to take extreme measures to achieve minimum objectives.

<sup>20</sup> Consider, for example, that in New York it is a misdemeanor for a public officer to delay taking a person under arrest before a magistrate N.Y. PEN. LAW § 1844. The statute has been in effect for eighty-six years, yet not a *single* prosecution has been reported under it. On the other hand, *immediately* after the *Miranda* exclusionary rule was decided, police officers in Los Angeles County, California, were instructed to warn all criminal suspects of their rights before questioning them. YOUNGER, DORADO-MIRANDA SURVEY (1966).

<sup>21</sup> D.C. CODE ANN. §§ 24-301(d), (e) (1961).

<sup>22</sup> *Overholser v. O'Beirne*, 302 F.2d 853 (D.C. Cir. 1962).

<sup>23</sup> Goldstein and Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 227, 231 (1960).

to sense the needs of the community with respect to the risks the community is willing to take.

What will result when *Rouse v. Cameron* is superimposed on this commitment-release scheme is unforeseeable. It seems unlikely that a court can force basic policy changes by the use of compulsory processes against the hospital authorities on a case by case basis. The money, personnel and facilities necessary for therapy are simply not available.<sup>24</sup> And an order to the director of St. Elizabeth's requiring him to provide individualized treatment for the entire patient population would clearly be beyond the realistic limits of judicial power. Unless there is legislative initiative, it seems that a court will be faced with the knowledge that the only way to realize results—as the experience of the U.S. Supreme Court with the exclusionary rule demonstrates—is to turn patients denied therapy loose on the community. Presumably, in individual cases, the court will make a determination of dangerousness, and go through some process of balancing the interests involved.

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### Income Tax—Original Issue Discount

In a never-articulated effort to prevent tax avoidance,<sup>1</sup> the courts have engrafted a number of judicial concepts on the statutory definition of capital assets in spite of the all-inclusive language used by Congress.<sup>2</sup> By far the most famous, or infamous, of these is the assignment of income doctrine<sup>3</sup> which had its true beginning in

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<sup>24</sup> The opinion of the American Psychiatric Association is that no tax-supported institution in the United States can be considered adequately staffed. U.S. SURGEON GENERAL'S AD HOC COMMITTEE ON PLANNING FOR MENTAL HEALTH FACILITIES, PLANNING OF FACILITIES FOR MENTAL HEALTH SERVICES 39 (1961).

<sup>1</sup> Bowden, *Assignment of Income Reconsidered*, 20 TAXES 67 (1942).

<sup>2</sup> The Int. Rev. Code of 1954, § 1221, defines a capital asset as all property unless it falls within one of five specifically excluded groups. Some courts have limited the class of preferred capital gains property by straining to find an exclusionary category satisfied. See, e.g., *Hollis v. United States*, 121 F. Supp 191 (N.D. Ohio 1954).

<sup>3</sup> See generally, Lyon & Eustice, *Assignment of Income*, 17 TAX L. REV. 293 (1962). Another equally clear area of judicial legislation was established by *Corn Prods. Ref. Co. v. Commissioner*, 350 U.S. 46 (1955). There the Court conceded that futures contracts which were "an integral part of its [the company's] business" did not come within the exclusionary clauses