

NOTES

A RIGHT TO TREATMENT FOR JUVENILES?

I. INTRODUCTION

Prior to the twentieth century, juveniles were handled within the same legal process as adults.¹ The first juvenile court, founded in 1899,² was designed as a separate legal process to handle juveniles apart from the adult criminal system. Its underlying premises were that children require special handling and care,³ and that the juvenile court judge was to provide the juvenile with sensitive, wise guidance. Underlying this approach was the concept of *parens patriae*⁴—a phi-

1. Several early English cases can be found in which juveniles were sentenced as harshly as adults, although children below the age of seven were conclusively presumed incapable of possessing criminal intent. See generally R. PERKINS, PERKINS ON CRIMINAL LAW 837-40 (2d ed. 1969); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

2. For history of the first juvenile court, see R. PERKINS, *supra* note 1, at 837-40; Glueck, *Some "Unfinished Business" of the Management of Juvenile Delinquency*, 15 SYRACUSE L. REV. 628 n.2 (1964). Even before the establishment of a separate legal system for juveniles, however, separate places of juvenile incarceration existed. See Mack, *supra* note 1, at 106; Mennel, *Origins of the Juvenile Court*, 18 CRIME AND DELINQUENCY 68, 70-77 (1972). See also PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, U.S. TASK FORCE: JUVENILE DELINQUENCY AND YOUTH CRIME REPORT 3 (1967) [hereinafter cited as TASK FORCE: JUVENILE DELINQUENCY]. One commentator has summed up the impact of the juvenile court system to be that the children charged with crimes were not to be treated as criminals but rather as dependent and neglected children. Ketcham, *The Unfulfilled Promise of the Juvenile Courts*, 7 CRIME AND DELINQUENCY 97, 99 (1961).

3. See *In re Gault*, 387 U.S. 1, 15-16 (1967); *Kent v. U.S.*, 383 U.S. 541, 554-55 (1966); *In re Holmes*, 379 Pa. 599, 600, 109 A.2d 523, 525 (1954), *cert. denied*, 348 U.S. 793 (1955); Mack, *supra* note 1, at 104-07; Cooley, *Court Control Over Treatment of Juvenile Offenders*, 9 DUQUESNE L. REV. 613, 614 (1971). But see Langley, Graves, Norris, *The Juvenile Court and Individualized Treatment*, 18 CRIME AND DELINQUENCY 79 (1972) (authors statistically endeavor to show that the goal of individualized handling is far from being achieved).

4. *Parens patriae* literally translates as "Father of the Country." Its origins date back to the feudal Chancery Court. Its jurisdiction was exercised on behalf of minors whose property rights were jeopardized, on the theory that the state could protect the minors who otherwise were impoverished and neglected. Once this notion was transplanted into the United States, protective jurisdiction was extended to include personal injuries as well, but was limited to neglected and dependent children. Eventually, al-

losophy based on the belief that the state has a duty to take any needed affirmative action on behalf of its wards. The due process safeguards of the adult criminal system were generally deemed incompatible⁵ with *parens patriae*. Since 1966, however, the Supreme Court has initiated a re-examination of the juvenile adjudication phase, and has held that certain due process controls are constitutionally required in juvenile delinquency hearings.⁶ One rationale behind these decisions is that the juvenile was getting the "worst of both worlds,"⁷ being accorded neither due process safeguards nor substantial treatment benefits. The proposition that juveniles are constitutionally entitled to a "right to treatment," however, would enable the juvenile to have the "best of both worlds."

This note will examine whether the Constitution requires the judiciary to recognize a medically and psychiatrically oriented juvenile right to treatment. To assist in this analysis, the closely related concept of a right to treatment in the mental health⁸ area will be relied upon. This intermixing of the mental health and juvenile definitions of a right to treatment, however, is not a strained one. The juvenile justice proc-

though the precise reason for the expansion is unclear, it was extended to children accused of criminal law violations. See *In re Gault*, 387 U.S. 1, 16-17 (1967); TASK FORCE: JUVENILE DELINQUENCY, *supra* note 2, at 2. See also Mack, *supra* note 1, at 104-09.

5. See *In re Gault*, 387 U.S. 1, 15-17 (1967); TASK FORCE: JUVENILE DELINQUENCY, *supra* note 2, at 3.

6. In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court held that a waiver by the District of Columbia juvenile court over "the exclusive jurisdiction" of a juvenile could properly occur only with the assistance of counsel after a hearing. *In re Gault*, 387 U.S. 1 (1967), established that adequate and timely notice of a proceeding and the nature of the charges against the juvenile must be filed. The juvenile has a right to have counsel appointed and present at a delinquency hearing. And if there is no confession by the juvenile, he has the right to confrontation and cross-examination. The Court, in the case of *In re Winship*, 397 U.S. 558 (1970), held that the standard proof to be applied to delinquency adjudications must be the same as in criminal trials—beyond a reasonable doubt. However, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court's majority held that a jury trial is not constitutionally required in state juvenile delinquency proceedings, since jury trials are not essential to accurate fact-finding. For a review of the legislative response to these cases, see Speca & White, *Variations and Trends in Proposed Legislation on Juvenile Courts*, 40 U.M.K.C.L. REV. 129 (1972).

7. *Kent v. United States*, 383 U.S. 541, 556 (1966). See also *In re Contreras*, 109 Cal. App. 2d 787, 241 P.2d 631, 633 (1952), in which the court noted the adverse impact a juvenile court adjudication can have on the juvenile regarding employment and military service.

8. See notes 19-23 *infra* and accompanying text for a discussion of the development of the right to treatment in the mental health process.

ess" can be understood to be a hybrid between the criminal system and the mental health process. Like the criminal system, the juvenile process is concerned with the apprehension and appropriate disposition of criminal law violators. Similarities can be seen in the arrest, charging, and hearing stages. But the juvenile process is also like the mental health process. Nonpolice¹⁰ and noncriminal¹¹ referrals may occur in

9. Whether the label is "process" or "system" really makes little difference in the context of this article, since little variance in legal consequences results from selection of either label. A "system" implies some unity of purpose between the three component parts, which include law enforcement, the judicial and corrections processes. In a "process" these individual components function independently of each other. See FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 149 (1969).

10. A person may come into contact with both the juvenile and mental health processes by referrals from other than the police. In the mental health process, voluntary admissions to institutions comprise forty percent of the mental health commitments. See S. BRAKEL & R. ROCK, *THE MENTALLY DISABLED AND THE LAW* 17 (1970) [hereinafter cited as BRAKEL]. Two general criteria for voluntary admissions are that space will be available and that the prospective patient will benefit from treatment. There is no absolute right to hospitalization or to treatment. Voluntary submissions are viewed favorably because the patient will be more cooperative in the treatment effort. Whenever a parent places a minor in a mental institution it is regarded as a voluntary commitment regardless of the state of mind of the child. *Id.* at 17-22.

In the juvenile process referrals may come from other than the police: parents, social agencies, and others have direct recourse to the courts. TASK FORCE: JUVENILE DELINQUENCY, *supra* note 2, at 5, 14. However, voluntary submissions may not be given any consideration in the juvenile correctional process. See *People v. Lynn*, 17 Mich. App. 117, 169 N.W.2d 185 (1969) (voluntary preconviction commitment to a state rehabilitation program did not bar a subsequent conviction and sentence for the offense which had been "served").

11. In the juvenile process, the juvenile court may assume jurisdiction without the juvenile having committed a criminal offense. The number of children in this category of non-delinquents (persons in need of supervision) compose twenty-five to thirty percent of the children appearing before juvenile courts and in juvenile institutions. TASK FORCE: JUVENILE DELINQUENCY, *supra* note 2, at 4; Kittrie, *Can a Right to Treatment Remedy the Ills of the Juvenile Process*, 57 GEO. L.J. 848, 858 n.40 (1969). There has been criticism that laws allowing jurisdiction of juveniles are too vague. See *Gesicki v. Oswald*, 336 F. Supp. 371 (S.D.N.Y. 1971) (New York's "wayward minor" law unconstitutionally vague). *Contra*, *Commonwealth v. Brasher*, — Mass. —, 270 N.E.2d 389 (1971). In the mental health process, one may be institutionalized voluntarily because of a mental illness without a violation of criminal laws as a requisite. BRAKEL, *supra* note 10, at 17-26.

For an article which deals with non-delinquent juveniles and a right to treatment, see Gough, *The Beyond-Control Child and The Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS U.L.J. 182 (1972). For an article that approaches the right to treatment from an analogy to the adult prison system, see Note, *The Courts, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 35 (1972).

both, and the dispositional philosophy espouses treatment as an overriding end.¹² Also, unlike the criminal system, in which a conviction leads to an automatic and permanent denial of certain civil rights,¹³ there is no equivalent consequence in either the mental health¹⁴ or the juvenile process.¹⁵ Finally, the arguments for the right to treatment in both processes rely heavily upon the medical sciences, especially psychiatry and psychology. If the mental health definition for a right to treatment¹⁶ were subsumed into the juvenile process, each youth would be entitled to "such individual treatment and care as will give . . . [him] a realistic opportunity to be cured and to improve his or her mental condition,"¹⁷ thus helping him become a mature and law-abiding citizen.

12. The philosophy of treatment as a prime objective in selecting an appropriate disposition of each individual in both the juvenile and mental health system is similar. This can be seen in cases which uphold juvenile court acts and mental health laws. For cases upholding the former, *see, e.g.*, *Lindsay v. Lindsay*, 257 Ill. 328, 100 N.E. 892 (1913); *Wissenberg v. Bradley*, 209 Iowa 813, 229 N.W. 205 (1929). For a case upholding sexual psychopath laws, *see Pearson v. Probate Court*, 309 U.S. 270 (1940).

13. A person convicted of a crime automatically and permanently loses the right to vote, to hold office, and to act as a trustee. Other civil rights may be suspended during incarceration or parole. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, U.S. TASK FORCE: CORRECTIONS REPORT 88-92 (1967) [hereinafter cited as TASK FORCE: CORRECTIONS]; Milligan, *California's Parole Rules*, 15 CRIME & DELINQUENCY 275 (1969).

14. *Cf. BRAKEL, supra* note 10, at 21-22, 303-13, 250-65.

15. *Cf. In re Gault*, 387 U.S. 1, 24 (1967); *In re Smith*, 637 Misc. 2d 198, 310 N.Y.S.2d 617 (Fam. Ct. 1970).

16. An often quoted definition of a right to treatment for juveniles was proposed by Judge Ketcham. *See Ketcham, The Unfulfilled Promise of the Juvenile Courts*, 7 CRIME AND DELINQUENCY 97, 101 (1961) (emphasis added):

The state, through its juvenile courts, must demonstrate that it is conscientiously striving to achieve the rehabilitation it promises, and that (though it makes no promise to actually bring about the reformation of the child) it will seek to employ the best institutional, probationary, *medical, psychiatric*, and other techniques in providing for each child to develop into a mature and law-abiding citizen.

Cf. Faust, Implementing the Juvenile's Right to Treatment, 6 CLEARINGHOUSE REVIEW 256 (1970).

A second reason the definition of juvenile treatment was drawn from the mental health definition is that the prior judicial handling of "treatment" is not helpful to our inquiry. The word "treatment" has received attention in contexts unrelated to the present inquiry. *See, e.g.*, *Fason v. State*, 19 Ala. 533, 98 So. 702 (1924) (minimum activity to bring one within criminal malpractice acts); *El Rio Oils v. Chase*, 95 Cal. App. 2d 402, 212 P.2d 929 (1949) (to define a chemical reagent process); *Berle v. Travelers Protective Ass'n*, 135 Mo. App. 629, 135 S.W.2d 497 (1940) (to determine the coverage of insurance policies).

17. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). *Accord, Rouse v.*

The mental health right to treatment cases deal with institutionalized individuals. For this note, the same definition will also be applied to non-institutional settings. This is because juveniles, as a result of formal adjudications, may be placed in various institutions,¹⁸ such as detention centers, work camps, training schools, and medium and maximum security facilities. In reference to this type of disposition the right to treatment will be labeled the *right to institutional treatment*. Or the juveniles may be formally or informally placed in the community on probation or in aftercare programs. Right to treatment in this community framework will be called the *right to noninstitutional treatment*.

II. THE RIGHT TO INSTITUTIONAL TREATMENT AND ITS DEVELOPMENT IN THE MENTAL HEALTH PROCESS

The concept of a right to treatment emerged as a due process argument designed to enable courts to force state legislatures to appropriate needed funds to provide adequate psychiatric and medical care for the mentally ill.¹⁹ To date, few courts have indicated an acceptance of the constitutional arguments,²⁰ and only one court has found the right to be a statutory requisite.²¹ Legislative provisions for

Cameron, 373 F.2d 451, 456 (D.C. Cir. 1967). For the purposes of this note, however, the definition of treatment will exclude both routine medical attention and medical care needed for the removal of physical scars or emergency blood transfusion. *See, e.g.*, Application of the President and Directors of Georgetown College, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (blood transfusion); *People v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952) (blood transfusion); *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955) (correcting hairlip); *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970) (correcting facial scar).

18. For the variety of institutions in which a juvenile may be placed by the juvenile authorities, *see, e.g.*, CAL. WELF. & INST'NS CODE § 880 *et seq.* (Deering 1966). However, there are some limitations on the use of these institutions. *See In re E.M.D.*, 490 P.2d 658 (Alas. 1971) (a child in need of supervision may not be placed in a juvenile institution); *In re P.* (Anonymous), 34 App. Div. 2d 661, 310 N.Y.S.2d 125 (1970) (institutionalization was not proper when the juvenile was diagnosed as a "bad risk" for institutionalization); *In re Braun*, 145 N.W.2d 482 (N.D. 1966) (pregnant unwed girl not to be institutionalized when there are no facilities for child care and when the child's father wishes to marry the girl).

19. *See Birnbaum, The Right to Treatment*, 46 A.B.A.J. 499 (1960); Editorial, *A New Right*, *id.* at 516.

20. *See Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (due process); *Ramsey v. Ciccone*, 310 F. Supp. 600, 604-06 (W.D. Mo. 1970) (cruel and unusual punishment).

21. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (statutory right to treatment for persons committed on a verdict of not guilty by reason of insanity); *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1967) (statutory right to treatment for sexual psychopaths).

a right to treatment have also been rare. Although eleven states have adopted "humane care and treatment" provisions,²² these statutes have proved to be of limited utility. The one specific legislative attempt to enact an explicit, effective, enforceable right to treatment failed.²³

Numerous constitutional arguments have been advanced in court and by commentators for a mental health right to treatment. Reliance on these arguments by advocates of a constitutional right to treatment for juveniles necessitates a review of the possible constitutional arguments for a mental health right to treatment.

Several arguments are premised on the due process clause of the fifth or fourteenth amendments. The first due process argument for the right is that treatment must be supplied in exchange for the lack of full procedural safeguards.²⁴ The second due process argument is that institutionalization without treatment would deprive the patient of the implied promise of commitment law (*i.e.* that adequate treatment will be provided), and to allow that promise to be unfulfilled violates

22. For a recent collection of these statutes, see Comment, *Juvenile Law—An Important Step Toward Recognition of the Constitutional Right to Treatment*, 16 ST. LOUIS U.L.J. 340, 344 n.8 (1972). It is not clear that these humane care and treatment provisions truly evidence a legislative intention for a right to treatment. These statutes, such as Mo. REV. STAT. § 202.840 (1969) (emphasis added), generally provide:

Every patient shall be entitled to humane care and treatment, and, to the extent that facilities, equipment and personnel are available, to medical care and treatment in accordance with the highest standards accepted in medical practices.

The italicized portion of the statute severely limits its effectiveness as a practical matter. If the statute omitted such language (*see* TEX. REV. CIV. STAT. ANN. § 547-70 (1958)), the argument that an effective, enforceable right to treatment is the legislative intention would be stronger. A second problem with these statutes is that the term "medical" treatment or care does not necessarily include psychiatric treatment. *But cf.* TEX. REV. CIV. STAT. ANN. § 547-70 (1958).

23. A proposed Pennsylvania Right to Treatment Law, which is set out in full at 57 GEO. L.J. 811-17 (1969), and discussed in Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752, 763-65 (1969); Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 806-11 (1969), is an example of a clear statutory grant of a right to treatment, but it failed enactment.

24. *See* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (sentencing scheme whereby incarceration automatically results seen as providing less protection to defendants than civil commitment procedures); Nason v. Superintendent of Bridgewater, 353 Mass. 604, 612, 233 N.E.2d 908, 913 (1968); Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 GEO. L.J. 680, 687-88 (1969) (comparing the lack of safeguards in mandatory and civil commitments vis-à-vis the criminal systems procedural protections). The procedural due process argument can be forcefully asserted when mandatory sentencing schemes are used. *See* Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). *But see* Sas v. Maryland, 334 F.2d 506, 515 (4th Cir. 1964) (upholding the procedural commitment process to the Patuxent Institution).

substantive due process.²⁵ A third due process argument, very similar to the second, is that it is morally reprehensible and a denial of fundamental fairness to refuse patients treatment they need.²⁶

There are four possible arguments based on equal protection. First, some criminals who are institutionalized are afforded more procedural protections in the commitment process than others who are institutionalized. To justify this inequality, some rational justification, such as the provision of intensive treatment to the less fully protected group, must be found.²⁷ Secondly, since a person committed to an institution under mental health laws may be confined for a longer period than if sentenced under criminal statutes, the justification for longer incarceration must be the provision of treatment.²⁸ Thirdly, because treatment of particular cases is to be related to "varying circumstances,"²⁹ treatment must be individualized. Therefore, indiscriminate mixing of incarcerated persons without the maintenance of separate treatment programs designed for each individual would violate the equal protection clause.³⁰ The final equal protection argument combines the funda-

25. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). See Goodman, *supra* note 24, at 689-90; Kittrie, *supra* note 11, at 870. One interpretation of the attitude of some courts indicates that if a right to treatment were to be based on substantive due process, what is "substantively due" may well depend on the reason the person is in the institution. Those convicted of a crime would be entitled to less treatment since traditional notions justifying incarceration or incapacitation and deterrence would dilute the treatment "owed" by the state to the incarcerated person. For example, if both X and Y suffer from the same mental illness, and X commits a crime and Y does not, Y would be "owed" more treatment by the state. See *Dobson v. Cameron*, 383 F.2d 519, 523-24 (D.C. Cir. 1967) (Burger, J., concurring); *State v. Pooley*, 278 Minn. 67, 73, 153 N.W.2d 143, 146 (1967); *In re Jones*, 432 Pa. 44, 246 A.2d 356 (1968).

26. *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). See Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960); Kittrie, *supra* note 11, at 864. This moral indignation argument is also expressed more forcefully in terms of the prohibition against cruel and unusual punishment. See notes 34-35 *infra* and accompanying text. See also Bassiouni, *The Right to the Mentally Ill to Care and Treatment: Medical Due Process*, 15 DEPAUL L. REV. 291, 310-11 (1965).

27. This argument is really the procedural due process argument couched in equal protection terms. See *Sas v. Maryland*, 334 F.2d 506, 509 (4th Cir. 1964); Kittrie, *supra* note 11, at 864; note 24 *supra*.

28. See *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966); Kittrie, *supra* note 11, at 864. If treatment is rendered, indeterminate sentences may be needed to encourage the patient to cooperate in the treatment process. See *Daniels v. Director of Patuxent Institution*, 243 Md. 16, 39-40, 221 A.2d 397, 410-11 (1966).

29. *Nason v. Superintendent of Bridgewater*, 353 Mass. 604, 612, 233 N.E.2d 908, 913 (1968).

30. The premise of "varying circumstances" and "individualized treatment" springs

mental interest³¹ and the "wealth"³² equal protection cases. If "mental sanity" is a fundamental interest, the state cannot discriminate against enjoyment of that interest and is required to provide the treatment that wealthier people could afford privately.³³

Two arguments stem from the cruel and unusual punishment provision of the Constitution. First, because mental illness is a condition, it cannot, following the reasoning of *Robinson v. California*,³⁴ be crimi-

from the reason that one is institutionalized. The "varying circumstances" could refer to merely whether one has committed a crime, or to the medical-psychiatric rationale used to accomplish institutionalization (such as whether one was "incompetent to stand trial" or a sex offender). Once this reference is established, the equal protection argument against intermixing would follow. This argument can be seen in *Nason v. Superintendent of Bridgewater*, 353 Mass. 604, 233 N.E.2d 908 (1968); *Commonwealth v. Mogan*, 341 Mass. 372, 170 N.E.2d 327 (1960); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959). By "individualized treatment," personal psychotherapy is not demanded, but rather the treatment which is rendered must be geared to the needs of that particular group. *Cf.* *State v. McCauley*, 50 Wis. 2d 597, 608, 184 N.W.2d 908, 914 (1971).

The Massachusetts Supreme Judicial Court has also intimated that state hospitals where people are involuntarily confined must have equal facilities. *See Nason v. Superintendent of Bridgewater*, 353 Mass. 604, 233 N.E.2d 908, 913 (1968). *But see McLamore v. State*, — S.C. —, —, 185 S.E.2d 250, 256 (1972) (no equal protection violation in some prisons having rehabilitation facilities while others do not have such facilities). The difficulty with the Massachusetts approach is that the facilities may be equally terrible.

31. The Supreme Court has indicated that certain fundamental interests exist. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (right of illegitimate children to recover under workmen's compensation); *Shapiro v. Thompson*, 394 U.S. 681 (1969) (interstate travel); *Levy v. Louisiana*, 391 U.S. 68 (1968) (tort recovery of illegitimates); *Harper v. Board of Elections*, 383 U.S. 663 (1966) (voting); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation). *See Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (education). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1120-31 (1969).

32. Some Supreme Court cases have indicated that discrimination based on one's wealth violates equal protection. *Anders v. California*, 386 U.S. 738, 745 (1967); *Harper v. Board of Elections*, 383 U.S. 663, 666 (1966); *Douglas v. California*, 372 U.S. 353, 357 (1964); *Griffin v. Illinois*, 352 U.S. 12, 16 (1956).

33. *Cf. Haziel v. United States*, 404 F.2d 1275, 1280 (D.C. Cir. 1968). *But see Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (en banc). This argument is one that has not clearly been enunciated by a court or commentator. Nevertheless, the seeds of the argument have clearly been planted. *See note 90 infra*.

34. 370 U.S. 660 (1962). The Court also stated, in dictum, at 666:

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 venereal disease. A state might determine that the general health and welfare 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 doubtlessly be uni-

nally punished, and incarcerations can be justified only by the provision of adequate treatment. Secondly, indefinite confinement without treatment of one not found to be criminally responsible is so inhumane as to amount to cruel and unusual punishment.³⁵

Whatever the ultimate fate of these arguments in determining the existence of a right to treatment in the mental health process, it is their applicability and validity in the juvenile justice process that must be estimated.

III. INSTITUTIONAL TREATMENT IN THE JUVENILE JUSTICE PROCESS

The constitutional arguments advanced in the mental health process can also be advanced in the juvenile process. But even without a mental health right to treatment, the arguments for a juvenile right to institutional treatment may be advanced on two grounds. First, because juveniles are at an impressionable stage of development, adequate and proper treatment would be effective;³⁶ and second, a right to institutional treatment in the juvenile process would improve the conditions of institutional living.³⁷

A. *The Requisite Judicial Attitude*

To foster the creation of a juvenile right to institutional treatment, the judicial outlook toward the function of the judiciary in juvenile corrections will have to change. In early cases the judiciary refused to inquire as to the existence of juvenile treatment facilities or into a facility's suitability for treatment purposes.³⁸ However, the courts have moved

versally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

35. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). *Accord*, *Ramsey v. Ciccone*, 310 F. Supp. 600, 604-05 (W.D. Mo. 1970) (emphasis original): "[T]here is a constitutional duty to provide needed medical treatment to a prisoner because the intentional denial to a prisoner of needed medical treatment is cruel and unusual punishment, and violates the Eighth Amendment to the Constitution of the United States."

36. Further, the recent procedural safeguards extended to juveniles at the adjudicatory stage can be squared with a right to treatment concept. Implementation of the procedural guarantees will lead the youth to believe that he is being fairly treated, and will therefore respond more positively to treatment efforts. *See Cooley, supra* note 3, at 617; Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile System*, 49 B.U.L. REV. 62, 65 (1969).

37. *See Note, The Courts, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 35, 49-62 (1972).

38. *Miller v. Overholser*, 206 F.2d 415, 419 (D.C. Cir. 1953); *In re Ragan*, 125

from the traditional deference to correctional authorities toward an increased willingness to examine the physical conditions, practices, and facilities of the place of confinement, as indicated in recent mental health,³⁹ prison,⁴⁰ and juvenile cases.⁴¹ The writ of habeas corpus⁴² and the Civil Rights Act of 1871⁴³ have been two prominent methods to initiate such inquiries.⁴⁴

La. 121, 51 So. 89 (1910); *State ex rel. Sowder v. Superior Court*, 195 Wash. 684, 179 P.2d 951 (1919). See also *Gault v. Board of Directors*, 103 Ariz. App. 397, 442 P.2d 844, 847 (1968); *In re Wiggins*, 425 P.2d 1004 (Okla. 1967); *Carter v. Montoya*, 75 N.M. 730, 410 P.2d 951 (1966).

39. See, e.g., *Tippet v. Maryland*, 436 F.2d 1153 (4th Cir. 1971); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *McCray v. State*, 10 CRIM. L. REP. 2132 (Md. Cir. Ct. Nov. 11, 1971).

40. See, e.g., *Cruz v. Beto*, 405 U.S. 379 (1972); *Johnson v. Avery*, 393 U.S. 483 (1969); *Cunningham v. Wingo*, 443 F.2d 195 (6th Cir. 1971); *Newman v. State*, 349 F. Supp. 278 (M.D. Ala. 1972); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Hamilton v. Love*, 329 F. Supp. 1182 (E.D. Ark. 1971); *Sawyer v. Sigler*, 320 F. Supp. 690 (D. Neb.), *aff'd*, 445 F.2d 818 (8th Cir. 1971); *Jackson v. Hendricks*, 11 CRIM. L. REP. 2088 (Pa. C.P. April 7, 1972).

41. See notes 114, 117 *infra*.

42. Habeas corpus has been used most frequently to challenge the inadequacy of the "place of confinement." *In re Bonner*, 151 U.S. 242, 258-60 (1894); *Dixon v. Jacobs*, 427 F.2d 589, 597-600 (D.C. Cir. 1970); *Creek v. Stone*, 379 F.2d 106, 110 (D.C. Cir. 1967); *Tribby v. Cameron*, 379 F.2d 104, 105 (D.C. Cir. 1967); *Rouse v. Cameron*, 373 F.2d 451, 458-59 (D.C. Cir. 1966); *Miller v. Overholser*, 206 F.2d 415, 419-21 (D.C. Cir. 1953); *White v. Reid*, 125 F. Supp. 647, 649 (D.D.C. 1954). *But see* *Lake v. Cameron*, 364 F.2d 657, 663-64 (D.C. Cir. 1966) (Burger, J., dissenting), in which Judge Burger argued that habeas should be limited to the original purpose of the writ—testing the legality of confinement. See generally *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1072-87 (1970).

43. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), 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.

This provision may be used in class action form. See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969). One commentator has suggested that overreliance on § 1983 may lead to the requirement of exhaustion of state remedies or the application of the abstention doctrines. Angel, *Some Procedural Problems Involved in Bringing a Right to Treatment Suit* 23 (unpublished manuscript of an address delivered at Georgetown University, June 1, 1971, and on file in the offices of the *Washington University Law Quarterly*). *But see* *Wilwording v. Swenson*, 404 U.S. 249 (1971) (prisoners' claim for relief under 1983 not subject to exhaustion requirement); *Gilliam v. City of Omaha*, 459 F.2d 63 (8th Cir. 1972) (exhaustion requirement not applicable to 1983 actions).

44. There are three other ways the issue of a right to treatment may be raised: mandamus; original appeal; and injunction. In the choice of a procedural vehicle,

Before a court can analytically reach the merits of the constitutional arguments and be amenable to the handling of treatment as a right, it will have to adopt a stance, explicitly or implicitly, regarding the professionals and sciences involved in the institutional treatment process. Whatever stance is assumed, it will also reflect a determination by the court of the proper role of the judiciary in the treatment process. If a court lacks confidence in the efficacy of the treatment sciences and in their application by the professionals involved, it would most likely guide youths away from post-adjudication institutional processing, except for that institutionalization which is absolutely required by law. A second stance for a court is that, because the treatment sciences cannot presently fulfill the promise of actual cure despite the court's confidence in the individual professionals,⁴⁵ the presently established means of handling individuals will be continued. This is the position that the Supreme Court has apparently adopted.⁴⁶ If a court has confidence in

several factors must be considered. First, if the case involves only one individual, the case may be mooted by a release or transfer of the individual. *Guy v. Ciccone*, 439 F.2d 400 (8th Cir. 1971); *Solomon v. Cameron*, 377 F.2d 170 (D.C. Cir. 1970). See Angel, *supra* note 43, at 19; Halpern, *supra* note 23, at 799-800. This problem of mootness may be avoided by a class action. Compare *Valvano v. McGrath*, 325 F. Supp. 408 (E.D.N.Y. 1971) (allowing class action), with *Inmates of Milwaukee County Jail v. Peterson*, 51 F.R.D. 540 (E.D. Wis. 1971) (class action by inmates of Milwaukee jail disallowed). Also bearing on the issue of the availability of a class action is the similarity of the class members' needs. Compare *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (allowing class action by Arkansas prison inmates), with *Lollis v. Social Services*, 322 F. Supp. 473, 483 (S.D.N.Y. 1970) (disallowing at that time a class action on behalf of all those subjected to solitary confinement). A second factor is the relief that is ultimately sought. A court will be more willing to prohibit certain practices rather than order expensive treatment. The third consideration is whether to file in state or federal courts. Federal courts, although generally considered more progressive, will probably be hesitant to order expensive treatment when the state will have to bear the cost of treatment. See Angel, *supra* note 43, at 17-23. Two practical problems in bringing treatment suits are money, especially in discovery costs, and an enormous time needed for trial preparation. See Faust, *Implementing the Juvenile's Right to Treatment*, 6 CLEARINGHOUSE REVIEW 256 (1972).

45. The problems involved in a right to treatment are interdisciplinary, and the evidence is not conclusive whether the treatment sciences can or cannot effectively treat individuals. See J. CONRAD, *EUROPEAN CORRECTIONS* 18 (1966); S. WHEELER & L. COATRELL, *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* 3 (1966); LeVine & Bornstein, *Is the Sociopath Treatable? The Contribution of Psychiatry to a Legal Dilemma*, 1972 WASH. U.L.Q. 693.

46. The Supreme Court has apparently adopted the attitude that, at the present time, the treatment sciences cannot effectively accomplish actual treatment. Two lines of cases support this conclusion. First is the *Kent-Gault-Winship-McKeiver* quartet, which seems to indicate that the Supreme Court is going to force the juvenile courts to make sure that at an adjudication hearing that the "accused" juvenile really

both the efficacy of the treatment sciences and its application by the professionals, however, it would not need to be directly involved, since the court would consider that the individuals are receiving the necessary treatment. In this third outlook the judicial involvement would be only peripheral, with judicial review limited to examining administrative intra-institutional decisions.⁴⁷ Finally if a court has confidence in the sciences of treatment, but less confidence in the professionals involved, the degree of court involvement becomes the crucial issue. If a court desires a passive role, it might establish an advisory panel of experts⁴⁸ and follow its recommendations. But if a court desires an active role, the right to institutional treatment would provide the vehicle to accomplish that involvement most readily. This would then enable the courts to participate in the actual treatment decisions as well as influence the crucial questions of resource allocation.

B. *Three Assumptions Underlying the Possible Constitutional Arguments*

Before reaching the merits of the constitutional arguments, it is necessary to identify and examine the three assumptions upon which the right to institutional treatment depends. The manner in which courts handle these assumptions will determine whether the constitutional arguments

was the one who committed the anti-social act. If the Court had been convinced of the ability of the treatment sciences involved, and in their application, the Court would probably not have required procedural safeguards at the adjudication phase, because the juvenile would not then be receiving "the worst of both worlds." *But cf.* Faust, *Implementing the Juvenile's Right to Receive Treatment*, 6 CLEARINGHOUSE REVIEW 256 (1972). The second supporting case is *Powell v. Texas*, 392 U.S. 506 (1968), in which the Court took a hard line realistic approach to the realities of the ineffectiveness of treatment facilities and sciences regarding alcoholism, 392 U.S. at 527-29, and concluded that the criminal sanction at the present time was the best alternative. *See also* *Salzman v. United States*, 405 F.2d 358, 366 n.8 (D.C. Cir. 1968) (Wright, J., concurring) (before a disease may be a defense to a criminal charge, certain operative facts—the existence of treatment methods and facilities—must exist). *Cf.* *Robinson v. California*, 370 U.S. 660 (1962).

47. *Rouse v. Cameron*, 373 F.2d 451, 456 n.22 (D.C. Cir. 1967). For a discussion of what procedures must be followed in intra-institutional decision-making, *see* *Jones v. Robinson*, 440 F.2d 249 (D.C. Cir. 1971); *United States v. MacNeil*, 434 F.2d 502 (D.C. Cir. 1970); *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970). This judicial position is the most compatible with the concept of a "right to treatment" in helping to establish treatment as a right. But once established, the courts would "lay back," and intervene only occasionally. This position then is in direct conflict with the sound position—doubting the efficacy of the sciences—adopted by the Supreme Court. *See* note 46 *supra*.

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

can effectively be advanced. If these three assumptions are valid, then there would be no theoretical difficulty with otherwise sound constitutional arguments. If these assumptions cannot validly be made, then the foundation on which the constitutional arguments depend would be unsound.

The first assumption is that the present institutionally centered correctional system will continue. This assumption is reflected in the reliance upon due process⁴⁹ and cruel and unusual punishment⁵⁰ arguments to establish the right. These arguments are based on concepts of deprivations of liberty which presume that an institutional setting is present.⁵¹ Although the juvenile correction system is presently centered around institutions,⁵² there are strong indications that the trend is away from confining juveniles in institutions and toward placing them in community-based programs.⁵³ One reason for this shift to community

49. See notes 24-25 *supra* and accompanying text. See also notes 27, 29-30 *supra* and accompanying text for the companion equal protection arguments.

50. See notes 34-35 *supra* and accompanying text.

51. The due process and cruel and unusual punishment provisions of the Constitution clearly apply to an institutional setting since one's liberty is so clearly curtailed. These provisions obviously can be applied to noninstitutional settings as well. As a practical matter, however, whatever boundaries are established by these constitutional mandates rarely are exceeded in a noninstitutional setting. When they are exceeded, the courts will intervene. Examples of overreaching noninstitutional action are *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971) (involuntary sterilization had been ordered); *In re Bushman*, 1 Cal. 3d 767, 463 P.2d 727, 83 Cal. Rptr. 375 (1970) (suspension of collegiate athletic activities ordered for marijuana user).

52. Nationally, sixty-seven percent of the funds and eighty-five percent of the personnel involved in juvenile corrections are allocated to institutions. TASK FORCE: CORRECTIONS, *supra* note 13, at 5-6. The emphasis on institutions is also demonstrated further by the realization that the massive percentage of funds and personnel allocated to institutions is for only thirty-three percent of the juvenile offenders. *Id.* The custodial emphasis can also be seen in an examination of detention facilities: custodial personnel outnumber treatment and education personnel by five and one-half to one. *Id.* at 120.

53. See, e.g., A. BREED, THE SIGNIFICANCE OF CLASSIFICATION PROCEDURES TO THE FIELD OF CORRECTIONS 2 (1966); R. MCGEE & E. REIMER, THE FEDERAL GOVERNMENT'S ROLE IN CORRECTIONS 13 (1966); TASK FORCE: CORRECTIONS, *supra* note 13, at 38-44, 56-57 (1967); TASK FORCE: JUVENILE DELINQUENCY, *supra* note 2, at 19-21, 41-56 (1967); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, U.S. TASK FORCE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 83-84, 165-79 (1967); S. WHEELER & L. COATRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 4 (1966); TIME, July 24, 1972, at 54-56; St. Louis Post Dispatch, July 28, 1972, § C, at 3, col. 1.

For field reports on two programs, see CALIFORNIA YOUTH AUTHORITY, LOS ANGELES COMMUNITY DELINQUENT CONTROL PROJECT: AN EXPERIMENT WITH REHABILITATION IN THE URBAN COMMUNITY (1970); D. KNIGHT, THE MARSHALL PROGRAM: ASSESS-

treatment programs is that institutional procedures have not been effective.⁵⁴ Moreover, they cost more than a community-based program.⁵⁵ Another possible reason that the present institutional emphasis may change is that a statutory scheme may require the primary juvenile disposition to be with parents in the community.⁵⁶ Therefore, although the underlying assumption that treatment will be set in an institutional setting is presently correct, it may be invalid in the future.⁵⁷

MENT OF A SHORT TERM INSTITUTIONAL PROGRAM (1969). See also St. Louis Post Dispatch, Feb. 16, 1972, § A, at 8, col. 1; *id.* April 21, 1972, § A, at 3, col. 4.

Several states have adopted Youth Authorities, which are designed to coordinate all state activities for the handling of juveniles. See, e.g., TEX. REV. CIV. STAT. ANN. § 5143(d) (1965). See also R. PERKINS, *supra* note 1, at 849-50. This development does not necessarily mean a movement towards community treatment programs. In fact, institutional dispositions may increase under a Youth Authority plan. See S. RUBIN, CRIME AND JUVENILE DELINQUENCY 104-105 (1970).

For a discussion of the European trends, which appear to be away from institutions generally, see J. CONRAD, TRENDS IN EUROPEAN CORRECTIONS (1966). For the development of community treatment programs in the mental health process, see BRAKEL, *supra* note 10, at 8-13; St. Louis Post Dispatch, July 28, 1972, § D, at 4, col. 1.

54. Institutional treatment and rehabilitation has not proven to be very successful. Recidivism rates run fifty percent and more. See *In re Gault*, 387 U.S. 1, 21-22 (1967); KENTUCKY COMM'N ON LAW ENFORCEMENT AND CRIME PREVENTION, DELINQUENCY IN KENTUCKY 15 (1969); H. MACKAY, SUBSEQUENT ARRESTS, CONVICTIONS AND COMMITMENTS AMONG FORMER DELINQUENTS (1966); TIME, July 24, 1972, at 54; St. Louis Post Dispatch, Feb. 13, 1972, § IV, at 1, col. 1.

At the very least, the present institutional system is being misused. TASK FORCE: CORRECTIONS, *supra* note 13, at 143, states:

In theory, training schools are specialized facilities for changing children relatively hardened on delinquency. In practice, as the survey shows, they house a nonselective population and are primarily used in ways which make the serving of their theoretical purpose, that of "change," besides the point. . . .

[T]he effects of the diverse elements cited contribute to training facilities wherein no one is best served and most are served in default.

Cf. Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1289 (1966).

55. See TASK FORCE: CORRECTIONS, *supra* note 13, at 28, 38-42 (1967); TIME, July 24, 1972, at 54; St. Louis Post Dispatch, Feb. 13, 1972, § IV, at 1, col. 1.

56. For cases that indicate a strong judicial policy of placing the child with his parents whenever possible rather than ordering institutionalization, see *In re Gault*, 387 U.S. 1, 28 (1967); *People v. Grieve*, 131 Ill. App. 2d 1078, 267 N.E.2d 19 (1971); *In re Johnson*, 30 Ill. App. 2d 439, 174 N.E.2d 907 (1961); *In re Roberts*, 13 Md. App. 644, 284 A.2d 621 (1971); *In re Walter*, 172 N.W.2d 603 (N.D. 1969); *Hill v. State*, 454 S.W.2d 429 (Tex. Ct. Civ. App. 1970). Examples of statutes reflecting a similar policy: MO. REV. STAT. § 211.011 (1969); STANDARD JUVENILE CT. ACT § 1 (1959). The Standard Juvenile Court Act is a proposed model statute prepared by the National Council on Crime and Delinquency. The 1959 draft was the sixth revision.

57. It is probable that institutions will never be done away with entirely. When Massachusetts recently closed down its juvenile institutions, which had housed about 1,100 juveniles, twenty juveniles were retained on the grounds of dangerousness. St.

The second assumption is that the major purpose of juvenile institutionalization is treatment. This is evident in arguments which assert that the state has a moral obligation⁵⁸ to provide the treatment, and that the substance of the law demands that treatment be provided.⁵⁹ This assumption cannot validly be made. Although treatment goals are avowed, juvenile commitments can serve other valid goals, such as deterrence, retribution and incapacitation.⁶⁰ In fact, if a legislature were to totally redraft commitment laws, basing them solely on the youth's dangerousness to society, and excluding any treatment language, an argument based on a substantive promise of treatment could no longer be made.⁶¹ It is clear that statutory references regarding treatment for juveniles do not have to be made at all.⁶² Additionally, in light of the present juvenile court practice, the assumption that juvenile commitments are oriented towards treatment is probably illusory.⁶³

Louis Post Dispatch, Feb. 13, 1972, § IV, at 1, col. 1. But if clearly authorized by statute, juveniles could be confined solely on the grounds of dangerousness to the public. See *In re W.*, 5 Cal. 2d 296, 302, 486 P.2d 1201, 1206, 96 Cal. Rptr. 1, 6 (1971); *Barnes v. Director of Patuxent*, 240 Md. 32, 212 A.2d 465 (1965). This would negate notions of the state's obligations to provide treatment.

58. See note 25 *supra* and accompanying text.

59. See note 24 *supra* and accompanying text.

60. See F. ALLEN, *BORDERLAND OF CRIMINAL JUSTICE* 51-53 (1964); H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 144 (1927); Antieau, *Constitutional Rights in Juvenile Courts*, 46 *CORNELL L.Q.* 387, 388-90 (1961). See also Burger, *No Man Is An Island*, 56 *A.B.A.J.* 325, 326 (1970): "Even when we profess rehabilitation and correction as objectives, we probably know that to all of us some of the time and some of us all of the time punishment and retribution are factors."

61. See the "law of the land theory" discussion, *infra* at notes 75-76 and accompanying text. See also Note, *Civil Commitments of the Mentally Ill, Theories and Procedures*, 79 *HARV. L. REV.* 1288, 1289-95 (1966), for a discussion of the various rationales of civil commitments.

62. Statutes could be drafted to authorize confinement solely on the grounds of dangerousness to the public or to the individual himself. See *In re W.*, 5 Cal. 2d 296, 302, 486 P.2d 1201, 1206, 96 Cal. Rptr. 1, 6 (1971); *Barnes v. Director of Patuxent*, 240 Md. 32, 212 A.2d 465 (1965).

63. There are three facts that support this proposition. First, juvenile institutions are understaffed in treatment and educational personnel. *TASK FORCE: CORRECTIONS*, *supra* note 13, at 145; *St. Louis Post Dispatch*, March 12, 1972, § C, at 12, col. 1. It would be astounding if juvenile judges professed ignorance of this shortage. And since commitments of juveniles to institutions still continue, even though institutions are understaffed, misused and ineffective, one can conclude that the treatment objective is not primary. Second, the average stay in a juvenile institution averages only nine months or less. *TASK FORCE: CORRECTIONS*, *supra* note 13, at 144. See *United States v. Alsbrook*, 336 F. Supp. 973, 976 (D.D.C. 1971). This indicates that little substantial treatment occurs. At best, institutional stays are designed for their "shock

The third assumption is that the *parens patriae* philosophy will remain the theme of the juvenile system: If treatment were a right, the state would be able to decide which treatment is appropriate. There are two indications, however, that the *parens patriae* philosophy will not remain the basic theme underlying the juvenile justice system: first, recent Supreme Court decisions, although limited to the adjudication phase, have severely undercut the doctrine's viability;⁶⁴ and secondly, recent legislative activity calls for processing juveniles in a manner similar to adult offenders.⁶⁵

Because these three assumptions, which are necessary to support a right to institutional treatment, are not sustainable, there is not a sufficient foundation for the constitutional arguments. The upshot of this assessment is obvious: without institutions, any argument for a right to *institutional* treatment would be rendered moot; and, similarly, without treatment and without some concept such as *parens patriae*, arguments for a right to institutional *treatment* would be mooted. Therefore, without institutions, without treatment as the legislative goal and without *parens patriae*, there cannot be a right to institutional treatment. Only if all these assumptions are ignored or assessed as viable⁶⁶ could

value," which means such sentences serve a deterrence function. Third, the experience of St. Louis also supports this assertion. Juvenile Judge Gary Gaertner advocates a tough line approach, which places a heavy reliance on institutions and detention centers. See St. Louis Post Dispatch, Feb. 13, 1972, § A, at 30, col. 1; *id.*, March 26, 1972, § A, at 8, col. 1; *id.*, March 26, 1972, § A, at 8, col. 1; *id.*, Sept. 8, 1972, § A, at 4, col. 1. See also *id.*, March 21, 1972, § C, at 2, col. 3, in which the following editorial appeared:

The whole approach of the new judge seems to be to fit tough punishment to the gravity of the offense rather than to follow the modern juvenile justice philosophy of trying to prevent further delinquency by removing youthful offenders from the family and social conditions which led to a run-in with the law. The most deplorable aspect of Judge Gaertner's approach is that it has already been tried and found ineffective.

64. See *In re Gault*, 387 U.S. 1, 16-21 (1967); *Kent v. United States*, 383 U.S. 541, 555-56 (1966). Accord, *In re Holmes*, 379 Pa. 599, 610, 109 A.2d 523, 528 (1951) (Musamanno, J., dissenting). The continuing viability of *parens patriae* can be questioned because it has been proven to be in practice not at all like the theory (see notes 1-5 *supra* and accompanying text) envisioned it to be. Moreover, Mr. Justice Fortas, in *Gault*, questioned how and why this doctrine was even incorporated into the juvenile justice system. *In re Gault*, 387 U.S. 1, 16 (1967).

65. See Speca & White, *Variations and Trends in Proposed Legislation on Juvenile Courts*, 40 U.M.K.C.L. REV. 129, 168-69 (1972); St. Louis Post Dispatch, March 10, 1972, § C, at 1, col. 5.

66. These three underlying assumptions, if approached differently, could be viewed as valid. For instance, it can be argued that, whatever may happen in the future, institutions are part of the correctional process today, and that the right to institutional

there be a sufficient foundation upon which to press constitutional arguments.

C. *The Constitution and the Arguments for a Right to Treatment*

The next inquiry is whether, in light of the assumptions discussed above, the constitutional arguments which can be advanced for institutional treatment are sound. One due process⁶⁷ and one equal protection⁶⁸ argument stress that treatment must be provided to juveniles because they receive less than the full procedural safeguards afforded in other commitment systems.⁶⁹ The weakness of these arguments in the juvenile context is that they ignore recent Supreme Court cases which hold that the standard for judging procedures at the adjudication

treatment is a present right. See *Rouse v. Cameron*, 373 F.2d 451, 458 (D.C. Cir. 1966). It can further be argued that institutions will probably remain if only to house those dangerous to society, and that those institutionalized would still be entitled to a right to institutional treatment. The second assumption that is made, that treatment is the purpose of the juvenile court acts, is harder to justify as viable. One could argue that the legislatures may redraft statutes to provide explicitly for a right to treatment. But if a legislature redrafted the laws, funded treatment efforts, and defined the scope of judicial review, it could settle for that state the issue whether there is an inherent constitutional right to treatment. See note 75-76 *infra* and accompanying text. Support for the proposition of *parens patriae* can be found in one interpretation of *Gault*. The Court's attack, since it was limited to the adjudication stage, left untouched the correctional process. Further, the Court's citation in footnote 30 of the "right to treatment" cases implies that the Court views those decisions favorably. Also, one could draw additional support from *McKeiver*, which has language which indicates a hope for rehabilitation. For a case that uses *Gault* and especially *McKeiver* in this fashion, see *Inmates of Boy's Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).

67. See note 24 *supra* and accompanying text.

68. See note 27 *supra* and accompanying text.

69. Some courts have held *Rouse* to be inapplicable to proceedings other than mandatory involuntary hospitalization under criminal statutes. *State v. Pooley*, 278 Minn. 67, 153 N.W.2d 143 (1967) (*Rouse* inapplicable to one actually convicted of commission of a crime); *In re Jones*, 433 Pa. 44, 60, 246 A.2d 356, 365 (1968). Cf. *Dobson v. Cameron*, 383 F.2d 519, 525 (D.C. Cir. 1967) (en banc) (Burger, J., concurring) (suggesting that courts may have authority to examine only conditions of civil commitments, not the *Rouse* situation.) In the juvenile context, therefore, there is the initial issue as to the classification of juvenile dispositional proceedings as either "criminal" or "civil." With *In re Gault*, the Court indicated that mere labels would not control such a determination, but rather the nature of the proceeding. If *Gault* is read to make juvenile proceedings truly "criminal," *Rouse* may not be applicable. However, *Gault* and *McKeiver* could be read to limit the "criminal" label to only the adjudicatory stage, hence leaving disposition a "civil" matter, and nevertheless, *Rouse* may still not apply. However, the proposition for treatment as a right for juveniles can be advanced in general terms that it must be provided in exchange for procedural guarantees, whether judged by the civil or criminal safeguards. Cf. note 24 *supra*.

stage is "fundamental fairness."⁷⁰ It does not follow that there are corresponding treatment rights merely because use of a fundamental fairness standard allows less than the full panoply of procedural criminal safeguards.⁷¹ The second due process argument⁷² is that to institutionalize a juvenile without treatment deprives him of the substantive promise of treatment that is implicit in the statutes. The success of this argument will depend on a court's willingness⁷³ to construe unclear language⁷⁴ in an unequivocal way. If a court was willing to find that the legislature intended to require treatment, and if that court accepted Mr. Justice Black's "Law of the Land" theory⁷⁵ that to deprive a person of a statutory right once a statute clearly establishes that right violates due process of law,⁷⁶ only then would there be a due process right to

70. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971); *In re Gault*, 387 U.S. 1, 65, 72 (1967) (Harlan, J., concurring).

71. See *United States ex rel. Murray v. Owens*, 465 F.2d 289 (2d Cir. 1972) (upholding commitment of a fifteen year old juvenile without jury trial to an adult prison on theory that no special treatment rights are required because the juvenile receives other benefits, e.g., trial without delay, by being handled as an adult). Courts could similarly stress the special juvenile rights, such as confidentiality and no permanent automatic loss of civil rights rather than treatment, as what juveniles receive for being accorded less than the full criminal safeguards. *But see* *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *Ketcham*, *supra* note 2, at 100-01. See also Note, *The Court, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 33, 36-37 (1972), in which the author argues that the logic of *In re Rich*, 125 Vt. 373, 216 A.2d 266 (1966), requires a trade-off: the "social compact" made for the special handling of juveniles in exchange for some constitutional rights requires that the courts provide other rights, such as the right to treatment.

72. See note 25 *supra* and accompanying text.

73. Cf. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

74. Two writers have cited the same eleven statutes to illustrate a legislative intention of a right to treatment. See *Kittrie*, *supra* note 11, at 862 n.62 (1969); Comment, *Juvenile Law—An Important Step Toward Recognition of the Constitutional Right to Treatment*, 16 ST. LOUIS U.L.J. 340, 344 n.8 (1972). As recognized by these authors, these statutes apply to a right to humane care and treatment for the mentally ill. See note 22 *supra*. These statutes do not apply to support a right to institutional treatment for juveniles in the juvenile correctional process. This is because state statutes provide for mentally disturbed juveniles to be diverted from the juvenile correctional process to the mental health process. See, e.g., ARIZ. STAT. ANN. § 8-242 (1970); CAL. WELF. AND INST'NS CODE §§ 703-705 (Deering 1966); MO. REV. STAT. § 211.201 (1969). If no such statute existed, however, then an argument could be advanced that these human care and treatment provisions do apply within the juvenile process to those juveniles who are mentally ill. However, the weakness of the argument is that a mentally ill juvenile would be handled as a mentally ill person, not specifically as a juvenile. Cf. *Donovan, The Juvenile Courts and The Mentally Disabled Juvenile*, 16 N.D.L. REV. 222 (1968).

75. See *Griffin v. Illinois*, 351 U.S. 12 (1956).

76. In *Griffin*, the Court also found a violation of equal protection. An unsettled

treatment. The third due process argument⁷⁷ is simply that the state ought to provide treatment. The weakness of this proposition is that such matters are usually left to legislative discretion.⁷⁸

One equal protection argument⁷⁹ is that the justification for allowing statutes to authorize longer periods of incarceration for juveniles than for adults who commit the same offense is that treatment is provided to juveniles.⁸⁰ The cases dealing with this argument conflict. Some language in these cases indicates that if a juvenile is incarcerated without treatment there could be no justification for longer sentences.⁸¹ However, longer detentions could be justified under the equal protection clause if the juvenile is to receive treatment,⁸² if the juvenile court act is rehabilitative in nature,⁸³ or if the juvenile is capable of being rehabilitated.⁸⁴ Reliance on equal protection, however, cannot be car-

issue of *Griffin* is whether a subsequent repeal of the statute from which the constitutional right sprang would undermine the constitutional basis for that right. If the legislature could undo the constitutional right by merely repealing the statute, the strength of any due process argument which is based on statutes and their construction is severely diluted by this practical limitation.

77. See note 25 *supra* and accompanying text.

78. *In re Jones*, 432 Pa. 44, 60, 246 A.2d 356, 364 (1968).

79. See note 28 *supra* and accompanying text.

80. See *In re Gault*, 387 U.S. 1, 8-9 (1967). Gault faced the possibility of six years in confinement whereas an adult who had committed the same offense would have faced a maximum of two months and a fine of five to fifty dollars. However, the actual average stay of the juvenile is relatively short. *United States v. Alsbrook*, 336 F. Supp. 973, 976 (D.D.C. 1971); TASK FORCE: CORRECTIONS, *supra* note 13, at 144.

81. See *Lamb v. Brown*, 456 F.2d 18 (10th Cir. 1972) (male and female offenders must be accorded similar handling); *In re Wilson*, 138 Pa. 425, 264 A.2d 614 (1970) (violation of due process if longer sentences for juveniles when juveniles and adults contained in the same institution); *In re Rich*, 125 Vt. 373, 216 A.2d 266 (1966) ("The validity of the whole juvenile system is dependent upon its adherence to its protective rather than its punitive aspects.").

82. *In re Wilson*, 438 Pa. 425, 432, 264 A.2d 614, 618 (1970).

83. See *Harvin v. United States*, 445 F.2d 675, 696 (D.C. Cir. 1971) (en banc) (Tamm, J., concurring and dissenting) (upholding the use of indeterminate sentences as useful for rehabilitation); *Rawls v. United States*, 331 F.2d 21, 27 (8th Cir. 1964); *Carter v. United States*, 306 F.2d 283, 285 (D.C. Cir. 1962); *State v. Pinkerton*, 186 Neb. 225, 182 N.W.2d 199 (1970); *Smith v. State*, 441 S.W.2d 941 (Tex. Ct. Civ. App. 1969).

84. *People ex rel. Thompson v. Noble*, 231 F. Supp. 188 (S.D.N.Y. 1964) (rebuttable presumption of being amenable to treatment); *State v. Pitt*, 28 Conn. Supp. 137, 140, 253 A.2d 671, 673 (Sup. Ct. 1969); *People ex rel. Meltsner v. Follette*, 32 App. Div. 2d 389, 390-91, 302 N.Y.S.2d 624, 625-26 (1969). See also *People ex rel. Meyer v. Follette*, 254 F. Supp. 887 (S.D.N.Y. 1966) (court found no difficulty in transferring those who fail to respond to rehabilitation from a reformatory to prison).

Another possible basis for distinguishing among classification of juveniles and the length of their detention is whether the juvenile needs to remain for a long or short

ried further than that point. The thrust of equal protection does not force the state to provide treatment; rather it requires that the state make institutional placements which are not disparate without substantial rational justifications. A second equal protection argument⁸⁵ made in the mental health context is that indiscriminate intermixing of incarcerated juveniles would deprive each juvenile of the opportunity to receive individualized treatment. This argument, however, is not applicable to the juvenile correctional process for several reasons. First, the premise of individualized treatment stems from the initial reason for institutionalization. Unlike the mental health area, in which there are several classifications⁸⁶ of commitment schemes, juveniles are all sentenced under the same statutory scheme.⁸⁷ This difference undermines the premise of individualized treatment. Secondly, because impermissible intermixing can only occur in an institution, the validity of this equal protection argument depends on the continued use of the institutions, which is an unsustainable assumption.⁸⁸ Thirdly, even if the proposition of individualized treatment and of a ban on intermixing were sound, an application of equal protection to a situation in which impermissible intermixing was occurring would require only an end to that intermixing, not the provision of treatment. The third equal protection argument is a combination of the fundamental personal interests cases and wealth cases.⁸⁹ The argument is that an individual's en-

term. See *Maratella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), citing *Jackson v. Indiana*, 406 U.S. 715 (1972). Such a classification scheme, which presupposes treatment, would not violate the equal protection clause.

85. See notes 29-30 *supra* and accompanying text. The prevention of intermixing of juveniles with adult offenders is an approved practice. *In re Gault*, 387 U.S. 1, 28 (1967); *Guy v. Ciccone*, 439 F.2d 400, 402-03 (8th Cir. 1971) (Bright, J., concurring); *In re F.*, 69 Misc. 2d 932, 934, 331 N.Y.S.2d 685, 687 (Fam. Ct. 1971); *In re Tsesmiles*, 24 Ohio App. 2d 153, 156, 265 N.E.2d 308, 310 (1971). Cf. *Vann v. Scott*, 467 F.2d 1235 (7th Cir. 1972) (no violation of equal protection by grouping juvenile runaways with other juveniles who had committed crimes).

86. Some of the classifications include: not guilty by reason of insanity; incompetent to stand trial; mental defective; defective delinquent; and sexual psychopath.

87. But as a juvenile commitment scheme becomes differentiated among juveniles in need of supervision, neglected, dependent and delinquent children, one could argue that the premise of individualized treatment would be applicable to the juvenile process. Also supporting this interpretation is *United States v. Alsbrook*, 336 F. Supp. 973 (D.D.C. 1971), which, if it became the dominant rule, would require dispositions based on psychological classifications. Cf. *State v. Fisher*, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969). See generally Pryer, *The Juvenile's Right to Receive Treatment*, 6 FAMILY L.Q. 279, 301-06 (1972).

88. See notes 51-57 *supra* and accompanying text.

89. See notes 31-32 *supra* and accompanying text.

joyment of a fundamental interest, a "child's fair start in life,"⁹⁰ cannot be discriminated against by state statute, and that the state would be obligated to provide to all children the equivalent "fair start," including "treatment," which wealthy people could offer their children.⁹¹ The first constitutional difficulty with this argument is whether a "fair start in life" qualifies as a fundamental interest. Although the fundamental interest cases are hard to classify, they all arose out of a state statutory scheme which denied the right in issue. Even assuming a fair start is a fundamental interest, it is difficult to imagine a state statutory scheme that would put "a child's fair start" into precise focus.⁹² The second difficulty with this argument is that state discrimination against a personal fundamental interest would be more difficult to establish in the case of treatment than it has been in the other fundamental interests cases. This is because the mere disproportionate handling of ghetto youths, for instance, would not be the same as discrimination which appears on the face of the statute. Finally, this argument suffers from the simplistic delusion that such a fundamental interest could be administered, let alone be defined.

The first argument based on the cruel and unusual punishment clause of the eighth amendment stems from *Robinson v. California*,⁹³ and suggests that confinement for a status or condition without treatment amounts to punishment. Thus, juveniles could not constitutionally be imprisoned without treatment.⁹⁴ The argument's weakness is that it assumes that delinquency is a status or condition similar to mental illness, drug addiction or other medical afflictions. This conception of juvenile delinquency as a status, although possibly applicable to in-

90. Bazelon, *Racism, Classism, and the Juvenile Process*, 63 JUDICATURE 373, 378 (1970): "It is difficult to imagine what more basic right there could be than a child's fair start in life."

91. *Cf. Haziel v. United States*, 404 F.2d 1275, 1280 (D.C. Cir. 1968). *But cf. Lake v. Cameron*, 364 F.2d 657, 660 (D.C. Cir. 1966) (en banc).

92. A different version of the fundamental interest argument is conceivable. Rather than approaching the issue as whether there is a right to treatment, one could argue that once a juvenile is committed for any treatment-related purpose, that juvenile would have a fundamental interest in that treatment. This argument is different in two respects. First, the fundamental personal interest would be in the treatment itself, not the right to have treatment. Secondly, this argument would depend on a twist of the normal fundamental interest concept and on the constitutional recognition of treatment, which then runs to the individual, whereas the other fundamental interest cases seem to be that an individual has a fundamental personal interest, which then is said to be of constitutional magnitude.

93. 370 U.S. 660 (1962).

94. *See* note 34 *supra* and accompanying text.

dividual juveniles, cannot be applied to juveniles as a class.⁹⁵ The second argument based on the eighth amendment,⁹⁶ and perhaps the strongest, is that indeterminate confinement without treatment of those not criminally responsible is itself a violation of the eighth amendment. Juveniles can be said to qualify as those not criminally responsible because the goal of the original juvenile court acts was partially to absolve juveniles of criminal responsibility.⁹⁷ The weakness of this proposition lies not in the argument, but rather in the practical limitations of the eighth amendment itself. That constitutional provision was designed to curtail the use of certain practices—its thrust being essentially negative. It has not been applied positively; that is, as a means to implement radically new treatment programs.

D. *The Right to Treatment and the Courts*

If the courts were to adjudicate a constitutional right to treatment, it would have a tremendous impact on the juvenile justice process. The initial question is at which stages of detention⁹⁸ and institutionalization would it apply. It would clearly be applicable to the post-adjudication institutional placement, for that is the stage where the treatment and rehabilitation of the youth supposedly occurs.⁹⁹ However, the applica-

95. See Note, *The Courts, The Constitution and Juvenile Institutional Reform*, 52 B.U.L. REV. 35, 45-46 (1972). *But cf.* *United States v. Alsbrook*, 336 F. Supp. 973, 976 (D.D.C. 1971) (court noted that eighty percent of the juveniles institutionalized had some sort of drug problem). If that phenomenon were universally true, then the validity of a *Robinson*-based defense would appear to be applicable. However, the practical upshot of such an argument is that the state might choose not to institutionalize such youths, which would deprive them of treatment, or the state could commit youths on the grounds of dangerousness.

96. See note 35 *supra* and accompanying text.

97. See S. FOX, *THE JUVENILE COURTS: ITS CONTENT, PROBLEMS AND OPPORTUNITIES*, 11-13 (1966); Pryer, *The Juvenile's Right to Receive Treatment*, 6 FAMILY L.Q. 279, 291 (1972).

Pryer has even advanced an argument for a right to treatment based on the ninth amendment: Since *parens patriae* has "traditionally been supported by law, religion, morality and custom, it can be argued that the Ninth Amendment forbids the state to deprive the delinquent of his family life if it then fails to provide the juvenile with the same adequate care, custody and protection which the child had a right to demand from his parents." Pryer, *supra* at 315.

98. Detention is defined as the "practice of holding children of juvenile court age for court disposition." TASK FORCE: CORRECTIONS, *supra* note 13, at 119. Another type of detention is "shelter care," which is used in neglect and dependency cases. *Id.*

99. See *In re Elmore*, 382 F.2d 125 (D.C. Cir. 1967). See also *Clayton v. Stone*, 358 F.2d 548 (D.C. Cir. 1966) (Bazelon, C.J., concurring); *Elmore v. Stone*, 355 F.2d 841 (D.C. Cir. 1966) (Bazelon, C.J., concurring).

bility of the right under the various justifications for detention is less clear.¹⁰⁰ Detention may be authorized for several reasons:¹⁰¹ (1) protection of the juvenile and/or the community; (2) psychiatric observation and diagnosis; (3) guaranteeing appearance at adjudication; and (4) compensating for the lack of a suitable home environment. One could argue for the application of the right to treatment at the detention stage under any of these justifications on the ground that the juvenile is "affected" from the moment juvenile court jurisdiction is assumed and that, therefore, treatment is required to begin at this time to prevent adverse affects.¹⁰² This reasoning is not acceptable, however, because it alters the definition of treatment,¹⁰³ and ignores the realities of detention.¹⁰⁴ Therefore, the crucial issue in determining to which type of detention the right would be applicable depends upon its duration and the real purposes of detention. Generally, the shorter the detention, the less compelling the need to apply the right, since the purpose of the shorter detention is primarily the physical retention of the child.¹⁰⁵ The longer the period of incarceration, the more reason

100 *But see* *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967), in which the Court of Appeals for the District of Columbia indicated that it would hear substantial complaints as to the adequacy of the care during an interim period of detention. The court stated that when presented with a substantial complaint, such as the denial of needed psychiatric care, the court should inquire whether the statutory criteria regarding detention facilities have been met.

101. *See generally* TASK FORCE: CORRECTIONS, *supra* note 13, at 119-30; Mora, *Juvenile Detention: A Constitutional Problem Affecting Local Government*, 1 URBAN LAW 189 (1969); Schmidt, *The Juvenile Court—Salvation or Damnation For Youthful Offenders*, 41 MICH. ST. BAR. J. 24, 27 (1962). For a collection of statutes dealing with pre-trial detentions, *see* Note, *The Right to Bail and the Pre-"Trial" Detention of Juveniles Accused of Crime*, 18 VAND. L. REV. 2096 (1965). Some of these detention statutes are drafted to authorize emergency detentions for the well-being of the child. *See, e.g.*, ALASKA STAT. ANN. § 47.10.123 (1962).

102. Gough, *supra* note 11, at 194.

103. *See* notes 16-17 *supra* and accompanying text.

104. *See* Mora, *supra* note 101, at 190-202. Despite standards against such practices, in ninety-three percent of the juvenile court jurisdictions the only facility for juvenile detention is the local jail, some of which are not even deemed suitable for federal adult prisoners. Less than half of the detention centers have psychiatric personnel available. TASK FORCE: CORRECTIONS, *supra* note 13, at 122. But when psychiatric help is extensively provided, the effective counseling is minimal and is used to "cover up" the custodial function. *See* Mora, *supra* note 101, at 196. *See also* St. Louis Post Dispatch, June 15, 1972, § A, at 2, col. 1, detailing the overcrowded conditions at the St. Louis detention facility: the detention center population, although designed for eighty, was housing one hundred fifty-six juveniles. Some of the juveniles were detained for as long as eight months.

105. *Cf.* Mora, *supra* note 101, at 196-97.

there would be to apply the right. It would seem that the right would apply to detention for psychiatric observation and diagnosis,¹⁰⁶ because such a detention marks the beginning of the actual treatment process.

The impact on the courts of a right to institutional treatment would be seen in three areas—selection of a dispositional alternative, judicial supervision of institutions, and the nature of judicial review. If there were a right to institutional treatment, a court, in selecting an appropriate disposition, would be required to explore all possible sentencing alternatives,¹⁰⁷ to prevent misclassification of juveniles,¹⁰⁸ to rely on

106. See *United States v. Alsbrook*, 336 F. Supp. 973 (D.D.C. 1971); *In re Curry*, 452 F.2d 1360, 1363 n.3 (D.C. Cir. 1971): "The overall therapeutic process—which begins with observation and diagnosis to determine whether treatment is required—must be initiated as soon as the period of involuntary hospitalization begins." Cf. *United Commercial Travelers v. Shane*, 64 F.2d 55 (8th Cir. 1933); *Stephens v. Williams*, 226 Ala. 534, 147 So. 608 (1933); *Lutman v. American Shoe Machine Co.*, 155 S.W.2d 701 (Mo. App. 1941), for cases including diagnosis within the definition of treatment for insurance liability purposes.

In *United States v. Alsbrook*, *supra*, the court held that under the Federal Youth Corrections Act, 18 U.S.C. § 5010(e) (1969), immediate steps must be taken to provide space for the observation of juveniles who may be amenable to treatment, but were being handled as adults due to the lack of facilities. The court ordered more facilities to be utilized for psychiatric observation and diagnosis. 336 F. Supp. at 978-83. The *Alsbrook* result was prompted by *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970), where the court construed the sentencing scheme in the Federal Youth Corrections Act, 18 U.S.C. § 5010 (1969), to require that 18-22 year olds be found incorrigible or unamenable to treatment efforts before they can be sentenced as "adults" (those over 26). 437 F.2d at 727. The *Waters* court also concluded that it was the congressional intent to establish the priority in sentencing of achieving rehabilitation. 437 F.2d at 726. *Accord*, *United States v. Ward*, 454 F.2d 992 (D.C. Cir. 1971).

Contra, *United States v. Lowrey*, 335 F. Supp. 519 (D.D.C. 1971), decided just ten days after *Alsbrook*, in which another District of Columbia judge rejected the *Alsbrook* sentencing guidelines (see note 109 *infra*) and procedures as unnecessary and unreasonable. 335 F. Supp. at 521-23. See *Mora*, *supra* note 101, at 193-97, where it is argued that treatment ought not to be applied during detention because the selection process cannot be accurate, treatment cannot be administered or achieved, the staffs of juvenile courts are not properly trained, and the time involved is very short.

107. See *In re Elmore*, 382 F.2d 125 (D.C. Cir. 1967); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967). *Accord*, *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (en banc). Cf. *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971) (juvenile judge liable under a § 1983 action for exceeding his authority in ordering the sterilization of feeble-minded juvenile); *In re Smith*, 12 CRIM. L. REP. 2061 (Md. Ct. Spec. App. Sept. 22, 1972) (juvenile court without authority to order sixteen year old girl to obtain an abortion because the girl's mother wished her daughter to terminate the pregnancy).

108. See *Gough*, *supra* note 11, at 194-95.

psychiatric diagnoses¹⁰⁹ and to avoid a routine use of waiver to the criminal process.¹¹⁰ The courts would also be required to decide whether the original institutionalization was improper,¹¹¹ whether to release those who are not receiving treatment,¹¹² whether the institution has sufficiently provided the needed treatment to allow the state to collect support costs from the parents,¹¹³ and whether to order specific

109. In *United States v. Alsbrook*, 336 F. Supp. 973, 979-80 (D.D.C. 1971), discussed in note 106 *supra*, Judge Gesell established new sentencing guidelines to determine whether a youth offender is amenable to treatment under the Federal Youth Corrections Act, 18 U.S.C. § 5010 (1969):

(1) No defendant shall be so committed under the Youth Corrections Act without a 5010(e) study.

(2) In the event that the study indicates that the correction authorities consider the defendant amenable to final commitment under the Youth Corrections Act, the Court shall require as part of the 5010(e) report a precise statement by the correction authorities of the plan of treatment and the approximate time it is contemplated that the defendant will be in custody before release to a half-way house, including goals that will be set for him prior to release.

(3) No defendant shall be committed under the Youth Corrections Act unless the Attorney General certifies in advance as to each defendant that a facility is available to provide the type of program and adequate period of treatment contemplated in the particular 5010(e) report.

(4) Under appropriate circumstances, the Court shall commit all offenders under U.S. Code offenses for 5010(e) studies and ultimate incarceration at other Youth Centers around the country.

Needless to say, such a procedure places a tremendous burden on the correctional officials as well as the court. For a criticism of those procedures, see *United States v. Lowrey*, 335 F. Supp. 519, 521-23 (D.D.C. 1971).

110. See *Haziel v. United States*, 404 F.2d 1275 (D.C. Cir. 1968) (a waiver of juvenile court jurisdiction based solely on a letter and telephone call held improper); cf. *United States v. Alsbrook*, 336 F. Supp. 973, 976 (D.D.C. 1971) (court critical that forty-three "treatable" juveniles had been handled as adults because sufficient facilities not available). In *Haziel* Judge Bazelon indicated that the juvenile court's assertion that "there are no reasonable prospects of rehabilitating the juvenile by the use of facilities presently available to the Juvenile Court" was an inadequate inquiry into dispositional alternatives and an insufficient grounds for waiver. The court in dictum stated that it would not "ignore the mockery of a benevolent statute unbacked by adequate facilities." 404 F.2d at 1280.

111. See *In re E.M.D.*, 490 P.2d 658 (Alas. 1971) (a child in need of supervision may not be placed in a juvenile institution); *In re P.* (anonymous), 34 App. Div. 2d 661, 310 N.Y.S.2d 124 (1970) (institutionalization was not proper when the juvenile was diagnosed as a "bad risk" for institutionalization); *In re Braun*, 145 N.W.2d 482 (N.D. 1966) (a pregnant unwed girl should not have been institutionalized when there were no facilities for child care and when the child's father wished to marry the girl).

112. See *In re I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct. 1970) (committing court ordered release of a fifteen year old girl in need of supervision when the institution refused to provide psychiatric care). For a discussion of the use of the technique of release, see note 121 *infra* and accompanying text.

113. See *Adoptive Parents v. Superior Court*, 105 Ariz. 438, 466 P.2d 732 (1970)

treatment when needed.¹¹⁴ Finally, the right to treatment would affect institutions, which would have to be designed to provide treatment and which would be required to provide it in fact.¹¹⁵ Courts would

(parents not liable for costs when the state failed to provide the child with needed psychiatric care); cf. *Ginn v. Superior Court*, 3 Ariz. App. 240, 413 P.2d 571 (1966) (upholding an assessment for support). *Ginn and Adoptive Parents* were decided under a statute similar to the current ARIZ. REV. STAT. ANN. § 8-243 (Supp. 1972):

If a child is to be awarded or committed to the state department of corrections or other state department or institution, the juvenile court shall inquire into the ability of the child, his estate or parent, guardian or person who has custody of such child to bear the charge, expense and maintenance of such child while committed to the custody of the state department of corrections or other public or private institution or agency, or private person or persons. If the court is satisfied that the child, his estate or parent, guardian or person who has custody of such child can bear such charges, expense and maintenance or any portion of them, the juvenile court shall fix the amount thereof and direct that the child, his estate or parent, guardian or person who has custody of such child pay such amount monthly to the state department of corrections or other public or private institution or agency, or private person or persons to which the child is awarded or committed. The state department of corrections or other public or private institution or agency, or private person or persons shall acknowledge the receipt of the money received to the person paying the same. The state department of corrections or other state institution or agency shall transmit such money as it receives monthly to the state treasurer to be deposited in the state general fund. The juvenile court shall transmit a copy of its orders concerning payment along with its order of commitment.

For a collection of statutes providing for cost sharing in the mental health process, see BRAKEL, *supra* note 10, at 129-32. *But cf.* *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964) (constitutionality of such acts questioned). In *Kirchner* the California Supreme Court held that the California statute constituted an arbitrary assessment against one class and hence violated equal protection. The United States Supreme Court vacated, 380 U.S. 194 (1965), but the original decision was reaffirmed, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

114. The willingness of courts to actually order treatment has to date been very limited. An Illinois juvenile court held that the 430-day confinement of a sixteen year old deaf-mute boy without treatment constituted cruel and unusual punishment and violated due process. The court ordered that either treatment be provided at the institution or the youth be transported to a special school. *In re Harris*, 2 CRIM. L. REP. 2412 (Cook County Juv. Ct. Dec. 22, 1967). In *Creek v. Stone*, 379 F.2d 106, 110 (D.C. Cir. 1967), the court noted in dictum that the lower courts have the power to order hospital or psychiatric care in appropriate cases. *In re Owens*, 9 CRIM. L. REP. 2415 (Cook County Cir. Ct. July 9, 1971), required that counseling be given after any stay in solitary confinement exceeding five days in length and after injections of tranquilizing medication. *In re Savoy*, No. 70-4808 (D.C. Juv. Ct., Oct. 13, 1970) ordered that the District of Columbia detention home end overcrowding, provide additional reading materials, reshape the recreation program, and provide a more equal educational program.

115. *Harvin v. United States*, 445 F.2d 675, 693 (D.C. Cir. 1971) (Tamm, J., concurring and dissenting). The court in *Harvin* faced the issue of whether a nineteen

have to review the conditions of confinement,¹¹⁶ the appropriateness of certain "treatment" practices,¹¹⁷ and control administrative transfers of juveniles to adult prisons.¹¹⁸

year old convicted by a bench trial on an information for a misdemeanor could be sentenced for six years under the Federal Youth Corrections Act. In responding affirmatively, the court found one justification to be that a FYCA sentence was to be served in "an institution where the confinement is consistent with the purposes of the Act to afford treatment and rehabilitation." 445 F.2d at 682. However, the dissenting judges would interpret the Act's definition of treatment, in 18 U.S.C. 5006(a) (1969), which provides that "treatment means corrective and preventive guidance and training designed to protect the public by correcting the anti-social tendencies of youth offenders," to require that a sentence under the FYCA to an institution "must not only be designed for treatment and rehabilitation, it must in fact provide these benefits." *Id.* at 693 (emphasis original). The dissenters thought it important to define "treatment" in a precise manner when "defining the parameters of a constitutional right." *Id.*

If an institution failed to provide in fact the needed treatment, and if treatment becomes a constitutional right, then courts may be forced to close the institution. This is the thrust of *Maratella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), in which the court found a center for housing girls to be maintained in violation of the eighth amendment and ordered the institution closed.

116. *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972); *In re Savoy*, No. 70-4808 (D.C. Juv. Ct., Oct. 13, 1970) (District of Columbia receiving home an unsuitable place of detention); *Juvenile Detention Center-Baltimore City Jail*, CCH Pov. L. REP. 13,641 (Supreme Bench of Baltimore City Aug. 3, 1971) (conditions of detention so "miserable" as to constitute cruel and unusual punishment, conditions ordered improved; ordered that facility not be used as a place of juvenile detention after August 2, 1972); *Stockton v. Alabama Industrial School for Negro Children*, Civil No. 2834-N (M.D. Ala., filed July 23, 1971).

There are two approaches other than constitutionally based arguments which have been used to correct the conditions of prison. *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972) (alleging an unintentional failure to provide prison inmates with heat states a § 1983 claim); *Harris v. Fitzpatrick*, 11 CRIM. L. REP. 2279 (Wayne County, Mich., Cir. Ct. May 18, 1972) (minimum housing code standards applicable to the local jail).

117. *Lollis v. Social Services*, 322 F. Supp. 473 (S.D.N.Y. 1970); *In re Owens*, 9 CRIM. L. REP. 2415 (Cook County Juv. Ct. July 9, 1971). In *Lollis*, the court held that the confinement of a fourteen year old girl in an isolated strip cell for two weeks for fighting while at training school was cruel and unusual punishment. The court ordered her release and further ordered the defendants to submit to the court proposed standards relating to future use of isolation cells. 322 F. Supp. at 483. For other cases dealing with the use of solitary confinement and strip cells in prisons, see *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), noted 1972 WASH. U.L.Q. 347; *Davis v. Lindsay*, 321 F. Supp. 1134 (S.D.N.Y. 1970); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970); *Krist v. Smith*, 309 F. Supp. 497 (S.D. Ga. 1970); *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966). The court in *Owens* placed limits on the use of solitary confinement and tranquilizers.

118. Some courts have already reached the conclusion that such administrative transfers of juveniles are prohibited on the general theory that such transfers are incompatible with the goals of treatment and rehabilitation. *Huff v. O'Bryant*, 121 F.2d 890

If the courts declare that a constitutional right to treatment exists, numerous practical difficulties may be encountered. A severe limitation on any implementation of this right is the inability of courts to assure adequate funding.¹¹⁹ If courts order large-scale, expensive institutional treatment, effective funding would have to be provided; otherwise the mandate would be meaningless.¹²⁰ The court's primary

(D.C. Cir. 1941); *Kauter v. Reid*, 183 F. Supp. 352 (D.D.C. 1960); *United States v. Hegstrom*, 178 F. Supp. 17 (D. Conn. 1959); *White v. Reid*, 125 F. Supp. 647 (D.D.C. 1953); *In re Rich*, 125 Vt. 373, 216 A.2d 266 (1966). Other courts have prohibited such administrative institutional transfers by another means. These courts reason that, since no statutory authority exists for such administrative transfers, they cannot be made. *Cruz v. State Department of Corrections*, 8 Ariz. App. 349, 446 P.2d 253 (1968); *Boone v. Danforth*, 463 S.W.2d 825 (Mo. 1971); *State ex rel. Edwards v. McCauley*, 50 Wis. 2d 597, 184 N.W.2d 908 (1971). Other cases, however, have upheld the validity of such transfers. *Sonneberg v. Markeley*, 289 F.2d 126 (7th Cir. 1961); *Arkadiele v. Markeley*, 186 F. Supp. 586 (S.D. Ind. 1960); *Wilson v. Coughlin*, 259 Iowa 113, 147 N.W.2d 175 (1966); *Brown v. State*, 274 A.2d 717 (Me. 1971); *Shone v. State*, 237 A.2d 412 (Me. 1968). See generally *Pryer, The Juvenile's Right to Receive Treatment*, 6 FAMILY L.Q. 279, 286-93 (1972).

See also *Patterson v. Hopkins*, 350 F. Supp. 676 (N.D. Miss. 1972) (restrictive use of the town's adult jail as a substitute juvenile detention center approved).

It is informative to look at the actual results of the leading right to treatment cases—*Rouse v. Cameron*, *Creek v. Stone*, *In re Elmore* and *Wyatt v. Stickney*. It is obvious that, despite their sweeping language, their practical impact has been minimal. After a remand to the trial court, *Rouse* was again reheard by the District of Columbia Circuit Court. *Rouse v. Cameron*, 387 F.2d 241 (D.C. Cir. 1967) (en banc). Once again the court ordered the case remanded after a finding that the petitioner did not acquiesce in his insanity defense. Meanwhile, during all these appeals, *Rouse* remained in St. Elizabeths Hospital. Judge, now Chief Justice, Burger has referred to the landmark (first) *Rouse* case as "entirely dictum." *Dobson v. Cameron*, 383 F.2d 519, 525 (D.C. Cir. 1967) (en banc) (Burger, J., concurring). In *Creek*, the entire case was dictum, since the child in question had already been released from the interim detention facilities. The result of *In re Elmore* was a mere remand, not an order of specific treatment which the child had alleged he needed. In *Wyatt*, the court subsequently found the new treatment process to be inadequate, and ordered new efforts to develop an adequate treatment program. This opinion was followed by subsequent judicial action, reported at 344 F. Supp. 373, and 344 F. Supp. 387, where the court ordered far-ranging, exact standards as minimally required by the Constitution. At the time this note went to press, the degree of compliance with that order was unknown.

119. Appropriations of funds is a legislative matter. The courts do not have the power to order the legislature to appropriate funds. *But cf. Ray v. South*, 176 Ohio St. 241, 198 N.E.2d 919 (1964) (upholding a mandamus suit brought by a juvenile court judge against county officials to expend monies required by state statute for the salary and expenses of the juvenile court judge and court and for a detention facility). See also *St. Louis Post Dispatch*, Sept. 9, 1972, § A, at 3, col. 1. Furthermore, it is possible courts can raise needed funds by either directing the sale of assets owned by the institution or enjoining the state treasurer. *Wyatt v. Stickney*, 344 F. Supp. 373, 377 (M.D. Ala. 1972).

120. The type of problem that will result is indicated by *Schwartz v. Haines*, 172

method to assure adequate funds is persuasion. If that fails, courts could release,¹²¹ or threaten to release, all youths who allege that their confinement is without treatment. The courts could also set an arbitrary date after which no more commitments would be ordered.¹²² If the legislatures failed to respond, the result might be the closing of inadequate institutions and the release of highly dangerous individuals into society. Even if unlimited financial resources were available, however, there is a strong possibility that there would not be enough trained personnel to implement the treatment mandate.¹²³

The court that declares a constitutional right to institutional treatment will also have to define its own review function. Several methods are possible. Judge Bazelon, the principle architect of a right to institutional treatment, indicated that a subjective standard¹²⁴ is to be

Ohio St. 572, 179 N.E.2d 46 (1962), where the court upheld a commitment order of a mentally deficient juvenile to a state mental health institution over the objections of the institution's director that no space was available. An over-crowded institution would obviously not be able to provide adequate treatment.

121. See, e.g., *In re I.*, 64 Misc. 2d 878, 316 N.Y.S.2d 356 (Fam. Ct. 1970). Few cases have actually ordered the release of a mentally ill person, which shows the ineffectiveness of a treatment suit. In *Daniels v. Director of Patuxent Institution*, 243 Md. 16, 221 A.2d 397 (1966), the release of Daniels was upheld because he never should have been institutionalized in the first place. Judge Bazelon's standard for determining the release of those who have not received treatment would be: (1) the length of time without adequate treatment; (2) the degree of danger to the community; and (3) prospect for successful treatment. Bazelon, *The Right of Mental Patients to Treatment and Remuneration for Institutional Work*, 39 PA. BAR ASS'N Q. 543, 547 (1968). For Bazelon's definition of dangerousness, see *Dixon v. Jacobs*, 427 F.2d 589, 595 n.17 (D.C. Cir. 1970).

122. See, e.g., *In re Savoy*, No. 70-4808 (D.C. Juv. Ct., Oct. 13, 1970).

123. *Powell v. Texas*, 393 U.S. 516, 528 n.22 (1968); TASK FORCE: CORRECTIONS, *supra* note 13, at 145. This problem was recognized in *Rouse*, where it is stated that, even though the problem could not be remedied immediately, "indefinite delay cannot be approved. The rights here asserted are present rights . . . and, unless there is an overwhelming reason, they are to be promptly fulfilled." 373 F.2d at 458 (emphasis original). Two commentators have suggested different solutions for this personnel problem. One suggests that since many people presently institutionalized do not need psychiatric care, and only better custodial care, more trained people in the custodial function could be supplied. Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 753, 773 (1969). But see *Wyatt v. Stickney*, 334 F. Supp. 1341, 1343 (M.D. Ala. 1972). Another commentator has suggested that the medical licensure requirements be changed. See Szaz, *The Right to Health*, 57 GEO. L.J. 734 (1969).

124. *Rouse v. Cameron*, 373 F.2d 451, 456 (D.C. Cir. 1966). The court stated (emphasis added):

The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so. This requires the hospital to show initial and periodic inquiries are made into the needs and conditions of the patient with a view towards providing suitable treatment for him, and that

adopted. Under this standard, the court would inquire whether a suitable treatment effort was being provided for that particular individual. On the other hand, a court could employ a more objective approach by comparing the institution's staff-patient ratio, expenses, facilities, and treatment methods with an accepted norm.¹²⁵ If the institution complied with these quantifiable criteria, the inmate's petition would automatically fail. Another approach to review would be for the institution to establish an intra-institutional panel, with the court receiving "appeals."¹²⁶ A final approach, probably the one most adaptable to the juvenile system, would require courts to evaluate whether the treatment provided was as nearly as possible the equivalent of that which would be provided by the youth's parents.¹²⁷

Difficulties exist with all these alternatives. Underlying these alternatives is the issue of how the courts will assess the adequacy of the

the program provided is suited to his particular needs.

For an application of this standard, see *Eidnoff v. Connally*, 281 F. Supp. 191 (W.D. Tex. 1968). Another subjective standard that has been suggested is an "Is he improving?" test. See Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 108 (1967).

125. One such proposed standard for juvenile institutions for the personnel requirement has the following criteria:

- 1 psychiatrist for each 150 children
- 1 psychologist for each 150 children
- 1 social case worker for each 30 children
- 1 trained recreation person for every 50 children
- 1 supervisor for each 8-10 cottage staff members
- 1 registered nurse during working hours
- 1 teacher for each 15 children with ability sixth grade or above
- 1 teacher for each 10 children with ability fifth grade or below
- 1 teacher for each child with below third grade ability
- 1 full time librarian for each institution.

TASK FORCE: CORRECTIONS, *supra* note 13, at 212. For cases imposing an objective standard, see *Wyatt v. Stickney*, 344 F. Supp. 373, 376, 379-86 (M.D. Ala. 1972) (mental health hospital); *Wyatt v. Stickney*, 344 F. Supp. 387, 395-407 (M.D. Ala. 1972) (institution for mentally retarded).

A serious problem with objective standards is that they may be set so high that no institution can meet the standards. *Rouse v. Cameron*, 373 F.2d 451, 458 (D.C. Cir. 1966). Another difficulty is that "some less conscientious states may desire to abandon all pretense of providing public treatment and confine their mental health program to preventive detention of the dangerous . . . [or] use habitual offender statutes to accomplish the same end." Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 112 (1967).

126. See note 47 *supra*.

127. See *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); MO. REV. STAT. § 211.201 (1969); R.I. GEN. LAWS ANN. § 14-1-2 (1970); STANDARD JUVENILE COURT ACT, § 1 (1959).

treatment.¹²⁸ A subjective approach would force the courts to deal with highly divergent, complex psychiatric and medical theories. In *Rouse v. Cameron*¹²⁹ Judge Bazelon suggested that courts already deal with such complexities in medical malpractice suits.¹³⁰ But the adequacy and effectiveness of medical *treatment* traditionally are not the issues courts most effectively handle.¹³¹ The adoption of a subjective standard would also tend to crowd the dockets, since each case would have to be resolved individually. An objective approach, however, may discourage judicial review. Once the review process established that an institution complied with the established standards, subsequent challenges would receive rubber stamp rejection.¹³² A possible deficiency of intra-institutional boards is that the inmates might be afraid to

128. See generally Birnbaum, *A Rationale for the Right*, 57 GEO. L.J. 752, 753-57 (1969); Halpern, *supra* note 23, at 782, 790-94. Treatment may be "adequate" even though it is not the very best possible. See Note, *Civil Restraint, The Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 113-14 (1967). Judge Johnson, in *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971), stated three criteria needed for adequate treatment: (1) a humane psychological and physical environment; (2) qualified staff in sufficient numbers; and (3) individualized treatment plans. 334 F. Supp. at 1343.

129. 373 F.2d 451 (D.C. Cir. 1966).

130. *Id.* at 457 n.30. One commentator has pointed out that this analogy is weak, since a determination of adequacy does not involve the legal concept of negligence. Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 110 (1972).

131. In *Kent v. United States*, 383 U.S. 541, 543 (1966), Mr. Justice Fortas, speaking for the Court, stated (emphasis added):

Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, *some of which are not within judicial competence*, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses.

Accord, *Glasco v. Brassard*, 94 Idaho 162, 166, 483 P.2d 924, 927 (1971). BRAKEL, *supra* note 10, at 60, quoting from an ABA study on civil commitment procedures, states that "The judge has neither the objective legal criteria nor the technical training to decide the treatment issues at stake."

One way to avoid having the courts directly determine the adequacy issue is to use masters, as juvenile courts have done in neglect hearings. See, e.g., *In re E.M.D.*, 490 P.2d 658, 659 (Alas. 1971). Another device is to use a panel of experts to oversee any treatment process a court orders to be implemented. See *Wyatt v. Stickney*, 344 F. Supp. 373, 376 (M.D. Ala. 1972).

132. The view of Judge, now Chief Justice, Burger is that he may authorize judicial review in civil commitment cases when "one alleges he is being detained *without any treatment*." *Dobson v. Cameron*, 383 F.2d 519, 525 (D.C. Cir. 1967) (Burger, J., concurring) (emphasis original). See also *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971) (court review only to the extent to ascertain whether the treatment program being utilized was medically acceptable).

complain for fear of reprisal or denial of release.¹³³ Finally, the deficiency of the parental care standard is that the courts will be forced to make extremely subjective evaluations as to what treatment and care a youth would be provided at home.¹³⁴

The selection of a standard of judicial review and the approach adopted to assess the adequacy of treatment will have a significant impact on the right to institutional treatment. If courts restrict their inquiry only to whether *some* treatment is being provided,¹³⁵ the juvenile's constitutional right to institutional treatment would be ineffective, since almost any institutional program could be defended as treatment.¹³⁶ If, on the other hand, the standard required that the treatment be "effective,"¹³⁷ courts could become prescribers of medical treatment, something clearly beyond judicial competence. Furthermore, if judicial review allows the courts to order specific and perhaps expensive treatment, this could have a disastrous effect on the allocation of resources for both the treatment needs of others and the non-

133. However, one problem eliminated by administrative review would be the burden on the courts caused by habeas corpus suits. Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 114 (1967). An administrative review procedure would be the best among these alternatives. Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 738, 742-45 (1969).

134. Mora, *supra* note 101, at 198. This standard does not mean that the state would provide precisely the same parental care the child had been receiving in the home. This is because the deficiency in the home environment is one reason for the juvenile courts to assume jurisdiction and also a possible cause of the child's delinquency. See, e.g., *In re Tillston*, 225 La. 573, 73 So. 2d 466 (1954) (mother allowed male friend to have intercourse with fourteen year old daughter). The conclusion, therefore, is that if the standard of review for juveniles were "as nearly as possible" to that received at home, then courts will necessarily have to decide what the parents ought to have been providing. This sort of evaluation makes this standard, without specific legislative or administrative guidelines, a very subjective and unmanageable one. *But see* *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972), where the court used this logic to condemn practices regarding exercise, medical needs, education and solitary confinement at a state institution in order to prevent action by the state which, if done by a parent, would justify juvenile court intervention.

135. See note 132 *supra*.

136. For a summary of various psychiatric theories, see L. BOVET, *PSYCHIATRIC TREATMENT OF JUVENILE DELINQUENTS* (1952); Cameron, *Nonmedical Judgments of Medical Matters*, 57 GEO. L.J. 716 (1969). Cf. Note, *Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey*, 110 U. PA. L. REV. 78, 86 (1961), where correctional authorities defend a prison-like atmosphere as treatment. *But see* *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (court found treatment program to be "scientifically and medically inadequate").

137. See LeVine & Bornstein, *Is the Sociopath Treatable? The Contribution of Psychiatry to a Legal Dilemma*, 1972 WASH. U.L.Q. 693 (authors state that "adequate" to doctors means "effective" treatment).

treatment needs (such as laundry services and food) of the individual petitioners.

Since the judicial review process will require the institution's staff to testify, it may hamper the institution's ability to provide treatment.¹³⁸ It may also breed hostility between staff workers and inmates, since the staff is being forced to defend their practices. A problem also arises as to the youth's presence at trial. The revelation of diagnostic information in open court to determine whether the action of the institution's authorities was justified may be psychiatrically detrimental to the youth. This difficulty is not overcome by a suggestion of *in camera* disclosure, since the youth may not then believe he is being dealt with fairly because all the facts upon which the court bases its decision are not revealed to him.

If a right to treatment exists, what is to be done for those who are untreatable?¹³⁹ One solution would be to completely release these juveniles. The attractiveness of this alternative, however, depends upon the dangerousness of the youth. Another solution is to keep the youth confined while requiring continuing treatment efforts on the part of the institution.¹⁴⁰

Finally, if a right to treatment is declared, would there also be a converse right not to be treated?¹⁴¹ If there were a right to refuse treatment,¹⁴² and a juvenile exercised this alternative, the court would then

138. This is because much staff time would be used in this type of suit. *Cf.* *Dobson v. Cameron*, 383 F.2d 519, 522-23 (D.C. Cir. 1967) (Danaher, J., concurring).

139. *See generally* Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 760, 766-67 (1969); Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 113-14 (1967). Part of the issue of being "untreatable" stems from patients who are uncooperative. For a discussion of this problem, see Halpern, *supra* note 23, at 800-02; Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 112-13 (1967).

140. *See* Katz, *supra* note 139, at 775-78. A collateral problem for those youths who remain in confinement is the issue of professional experimentation. To control experimentation of new techniques, the court could require professionals to obtain court permission before proceeding. If the courts were to pass on the issue, they would be making, at best, an educated guess at its success, as well as its propriety. To ignore this issue, however, may be even worse.

141. For the issues raised by the problem of state coercion in the treatment process, *see generally* Katz, *supra* note 139, at 767-83.

142. *See* *United States v. Carroll*, 436 F.2d 272 (D.C. Cir. 1970) (due process does not require consent of the offender before the offender may be sentenced under the Narcotics Addict Rehabilitation Act); *Watson v. United States*, 406 F.2d 521 (D.C. Cir. 1968), *modified on rehearing*, 439 F.2d 442 (D.C. Cir. 1970). Several state statutes require that consent be given before mental health treatment efforts will begin.

have to permit either a "warehousing" of the juvenile until his majority or release him; and, if the former alternative is chosen, to somehow reconcile that disposition with the doctrine of *parens patriae*.

E. *The Reaction of the Juvenile Justice Process to a Right to Treatment*

When examining the wisdom of establishing a new constitutional right, it is important to gauge the possible impact of that right upon the system within which it will operate. If the impact is likely to be adverse, or if implementation of other procedures by those authorities affected by the right would tend to negate its impact, then it is wise not to judicially create such a constitutional right.

The application of the right to juvenile treatment could be undermined by two possible responses in other phases of the juvenile process. There may be an increase in the informal, nonjudicial settlement of cases at both the police and the juvenile court intake stages, and an enhanced tendency¹⁴³ to waive jurisdiction over juveniles who commit criminal offenses. If either of these reactions occurred, the right to treatment would be undermined by the diversion of juveniles away from the juvenile process.

If a right to treatment were held applicable to the juvenile process, it could have several undesirable consequences in the correctional phase. Since the courts would be defining institutional treatment in constitutional language, this would inextricably interweave the constitutional right to treatment to perpetuate institutions. This could have the immediate effect of impeding experimentation and development of intracommunity rehabilitation programs and de-emphasizing the efforts being made by other professionals to deal with juveniles by detecting

See, e.g., ALASKA STAT. ANN. § 47.30.130 (1969); CAL. WELF. & INST'NS CODE § 7104 (Deering 1969). There is an additional problem in the concept of consent by juveniles; namely, their ability to give consent itself. *Cf. In re Gault*, 387 U.S. 1, 41, 55 (1967) (discussion of the consent and waiver problem in the right to counsel context).

143. *See* *United States v. Alsbrook*, 336 F. Supp. 973, 976 (D.D.C. 1971) (noting that forty-three "treatable" juveniles had been waived to the adult courts during a three month period because of the lack of juvenile facilities); Bazelon, *Racism, Classism and the Juvenile Process*, 63 JUDICATURE 373 (1970); Goodman, *supra* note 24, at 695-96. However, Goodman points out that theoretically this possible "backfire" should be blocked by *Kent v. United States* and *Hazel v. United States*. *Id.* at 696-98. Another possible effect of finding a right to institutional treatment would be in the opposite direction—a massive effort to develop noninstitutional programs, stimulated by a desire to curtail the high costs of custodial care.

delinquency in its early states¹⁴⁴ and by matching personality traits to dispositions.¹⁴⁵ A second undesirable effect at this stage might be that many juveniles may not need "treatment";¹⁴⁶ and yet because institutions would be geared to psychiatric treatment, the juvenile may come to believe he needs "treatment."¹⁴⁷ A third potential undesirable consequence could be that the institution will aim at only maintaining the treatment level required by the Constitution and become inflexible to providing additional treatment for the special needs of particular juveniles.¹⁴⁸

An additional potential impact could be state¹⁴⁹ liability¹⁵⁰ for the

144. See A. BREED, *THE SIGNIFICANCE OF CLASSIFICATION TO THE FIELD OF CORRECTIONS* (1966); H. HILL, *A GENERAL PLAN FOR THE DEVELOPMENT OF AN OFFENDER DISPOSITION SYSTEM* (1966); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, U.S. TASK FORCE: SCIENCE AND TECHNOLOGY REPORT 47 (1967); M. WARREN, *CLASSIFICATION OF OFFENDERS AS AN AID TO EFFICIENT MANAGEMENT AND EFFECTIVE TREATMENT* (1966).

145. See S. RUBENFIELD, *IMPLICATIONS OF PSYCHOLOGICAL THEORIES AND RESEARCH FOR CRIME PREVENTION AND CONTROL* (1966); TASK FORCE: JUVENILE DELINQUENCY, *supra* note 3, at 411-19; S. WHEELER & L. COATRELL, *JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL* (1966).

146. State statutes seem to recognize this and provide that mentally ill juveniles are to be diverted to the mental health system. See, e.g., ARIZ. STAT. § 8-244 (1970). See also J. CONRAD, *TRENDS IN EUROPEAN CORRECTIONS* 16 (1966); note 74 *supra*.

147. Cf. L. BOVET, *PSYCHIATRIC ASPECTS OF JUVENILE DELINQUENCY* 9 (1951), where the author states that, although juveniles as individuals are psychiatrically unique, once juveniles are processed by the juvenile justice system they become psychologically homogenous with all other juveniles that have been similarly processed. However, this analysis seems at odds with common sense. It seems that psychologically distinct individuals will react differently to a uniform stimulus; that is, being processed. Moreover, not all juveniles are processed in exactly the same manner.

The other dangers implicit in an emphasis on psychiatric institutional treatment, which would result from a right to institutional treatment, are that other factors in the rehabilitation process, such as employment once back in the community, may be downplayed. J. CONRAD, *TRENDS IN EUROPEAN CORRECTIONS* 15-16 (1966). Also, because of the subjective and "arbitrary nature" of psychiatric recommendations for release, the therapist's acceptance by both the (prison) inmates and administrative staffs will tend to be limited. *Id.* at 17. This phenomenon may also develop in juvenile institutions if a right to institutional treatment were applied to juveniles.

148. See *Wyatt v. Stickney*, 344 F. Supp. 373, 376 (M.D. Ala. 1972).

149. One commentator has suggested that the federal government assume the responsibility for those juveniles who need institutional psychiatric attention. It was felt that better staffing would result. R. MCGEE & E. REIMER, *THE FEDERAL GOVERNMENT'S ROLE IN CORRECTIONS* 24 (1966). If the federal government were to assume the responsibility for treatment, the potential liability that may have existed for the state would run to the federal government, unless blocked by assertion of the doctrine of sovereign immunity.

150. In addition to liability, the right to treatment would presumably enable the

failure of its institutions to provide needed treatment. This may be an unexpected surprise for a state that declares a constitutional right to treatment, but two lines of cases intimate the possibility of state liability. States have been held liable for foreseeable physical injuries¹⁵¹ which occurred to inmates of its institutions, and have also been denied reimbursement from the parents for failure of state institutions to provide treatment.¹⁵² It is possible to conclude that states would be liable in tort or false imprisonment for failure to provide treatment.¹⁵³ Fi-

parents of children who need treatment *sua sponte* to force the government to make extra expenditures for their child's treatment. See *Leitner v. County of Westchester*, 38 App. Div. 2d 554, 328 N.Y.S.2d 237 (1971).

Furthermore, in addition to state liability towards inmates for undue incarcerations, the state may also have to pay attorney fees in bringing the suit. See *Newman v. State*, 349 F. Supp. 278 (M.D. Ala. 1972) (\$12,000 awarded to attorneys in suit challenging medical conditions and treatment in state prisons); *Wyatt v. Stickney*, 344 F. Supp. 373, 378, 408-10 (M.D. Ala. 1972) (awarding approximately \$36,000 to three attorneys involved in the case for plaintiffs).

151. *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1971) (recovery allowable against warden for shotgun wounds; court also stated that the eighth amendment is a springboard for personal tort recovery); *Lewis v. State*, 176 So. 2d 718 (La. Ct. App. 1965) (state liable for death of a juvenile caused by a flogging administered by state training school officials); *McBride v. State*, 52 Misc. 2d 880, 277 N.Y.S.2d 80 (Ct. Cl. 1967) (state liable for suicide committed at state training school). See also *Green v. State*, 30 Mich. App. 648, 186 N.W.2d 792 (1971) (adult prisoner can recover from the state for an injury sustained while operating machinery at a state prison); *Scolvino v. State*, 297 N.Y. 460, 74 N.E.2d 174 (1947) (state liable for an attack by one mental patient on another patient). But see *Flaherty v. State*, 296 N.Y. 342, 73 N.E.2d 543 (1947) (state not liable for one juvenile pouring fire extinguisher acid on another juvenile). A second theory that has been used to impose liability upon the state is false imprisonment. *Whitree v. State*, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968) (due to negligent psychiatric care, plaintiff detained for an overly long period of time in a state mental hospital). It also should be noted that such unexplainable long detentions are not infrequent. See *Birnbaum, A Rationale for the Right*, 57 GEO. L.J. 752, 774-78 (1969); *Rosenberg, Treatment Denied: The Case of Arnold Marman*, 57 GEO. L.J. 702 (1969). It is unlikely, however, that such long detentions could occur in the juvenile process, since the juvenile court's jurisdiction is usually only until the youth's majority. But the principle of tort recovery based on a theory of false imprisonment would be the same if a right to treatment were imposed on the juvenile correctional process.

A right to treatment may also unexpectedly impose on the institution's staff not only civil, but also criminal liability. *People v. McMillian*, 45 Cal. App. 2d 740, 114 P.2d 440 (1941) (director of the state training school criminally liable for corporeal punishment of inmates, which was prohibited by statute; convicted on three counts of assault and battery).

152. See note 113 *supra*.

153. The amount of damages recoverable may be small, as has been the general rule in cases when a juvenile commits suicide in a juvenile institution. Damages are determined by the pecuniary loss to the family, which involves proof that the juvenile would

nally, if a juvenile right to treatment were declared, other groups may be deprived of adequate attention because of the demand on funds, space and personnel which would be required for the treatment of juveniles.¹⁵⁴

These probable effects would tend to negate the practicality and wisdom of the judiciary alone trying to implement a constitutional right to institutional treatment for juveniles.

IV. NONINSTITUTIONAL TREATMENT IN THE JUVENILE CORRECTION PROCESS

The juvenile correctional process involves more than institutions; it involves processing juveniles in the community, including probation,¹⁵⁵ aftercare,¹⁵⁶ and informal settlements.¹⁵⁷ The same two initial questions that were discussed regarding the institutional phase—the requisite judicial outlook and the underlying assumptions¹⁵⁸—emerge again in the noninstitutional phase.

In assessing the validity of possible constitutional arguments,¹⁵⁹ they

have been gainfully employed, aided his parents, and remained out of institutions. See *McBride v. State*, 52 Misc. 2d 880, 277 N.Y.S.2d 80 (Ct. Cl. 1967). *But cf.* *Whitree v. State*, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968) (award of \$300,000).

154. The specter of this problem was raised in *United States v. Alsbrook*, 336 F. Supp. 973, 979 (D.D.C. 1971), where the court suggested that the center for alcoholics be converted into a youth detention center. This suggestion was not adopted, however. *Id.* at 981-83.

155. See generally TASK FORCE: CORRECTIONS, *supra* note 13, at 130-41; Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 116 (1909).

156. See generally TASK FORCE: CORRECTIONS, *supra* note 13, at 149-54.

157. For a description of the informal settlement process by the police, see Note, *Juvenile Delinquents: The Police, State Courts and Individualized Justice*, 79 HARV. L. REV. 775, 776-85 (1966). For a discussion of informal settlements at the juvenile court intake stage, see Note, *Informal Disposition of Delinquency Cases: Survey and Comparison of Court Delegation of Decision Making*, 1965 WASH. U.L.Q. 258. Because of the low visibility of informal settlements, they are considered only peripherally here.

158. See notes 38-65 *supra* and accompanying text. In the noninstitutional phase, the assumption that treatment is the legislative purpose is theoretically stronger than in the institutional phase. This is because such justifications behind institutionalization as deterrence, incapacitation, and dangerousness are inapplicable when the juvenile is kept in the community. The underlying assumption of *parens patriae* and of continuation of institutions are not directly relevant in the noninstitutional phase.

159. In considering whether there is a right to noninstitutional treatment, three lines of constitutional arguments which were advanced for institutional treatment may be eliminated. Due process arguments are generally inappropriate because no confinement is involved, and it is in confinement that "deprivations of liberty" can most readily be found. However, due process and cruel and unusual punishment arguments have been applied to determine which conditions of probation and aftercare are permissible. See

first must be balanced against the constitutional right of privacy.¹⁶⁰ Unlike institutional treatment, in which only the privacy of the juvenile is affected, noninstitutional treatment would necessarily involve third parties, such as the juvenile's peers, family, employer, and teachers. It is the privacy of these third parties that is the crucial issue.¹⁶¹ It is unknown to what degree the necessary governmental involvement in a full-blown right to noninstitutional treatment will directly interfere with the privacy, freedom, and social attitude of those with whom the juvenile comes into contact. Because this is an unknown factor, a balancing of the constitutional right to privacy against possible arguments for a right to noninstitutional treatment can not be made in the absence of a specific factual context. But, assuming that the privacy issue is not presented, the merits of the conceivable constitutional arguments can be analyzed.

There are only two constitutional arguments, independent of a right to institutional treatment, which could be advanced for a constitutional right to noninstitutional treatment. First is the "fair start in life" argument which, for the reasons discussed earlier, is not convincing.¹⁶² The second argument is that, if a juvenile needed treatment but was denied it, that denial would somehow constitute either punishment¹⁶³ or violate the fundamental fairness test.¹⁶⁴ This argument is weak because the denial of treatment to one *not* institutionalized cannot be classified as "punishment,"¹⁶⁵ or as a "deprivation of liberty" amount-

generally Note, *Juvenile Probation, Restrictions, Rights and Rehabilitation*, 16 St. Louis U.L.J. 276, 279-90 (1972). But as a practical matter, the conditions of probation and aftercare will always be subject to the limitations imposed by the Constitution. Second, an argument could not be made on the basis of Mr. Justice Black's law of the land theory, *see* notes 75-76 *supra*, since the statutory guidelines for probation and aftercare are unclear. Third, arguments based on equal protection, *see* notes 27, 29-30 *supra*, and due process, *see* notes 24-25 *supra*, are concerned with procedures and practices of confinement. Hence they are obviously inapplicable, since there is no institutional confinement in this context.

160. *See* *Griswold v. Connecticut*, 381 U.S. 479 (1964). *Cf.* *Wyman v. James*, 403 U.S. 503 (1970).

161. The privacy of the juvenile is not crucial even in the noninstitutional context since the judicial conception of probation is of "an act of grace." *See* *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935).

162. *See* notes 90-92 *supra* and accompanying text.

163. *See* notes 34-35 *supra* and accompanying text.

164. *See* note 25 *supra* and accompanying text.

165. Even if such a denial is punishment, the logic of *Robinson v. California*, 360 U.S. 660 (1962), is that if one is not institutionalized, then no treatment has to be provided.

ing to a violation of due process. An argument which is dependent upon a constitutional right to institutional treatment is that in order to prevent a relapse¹⁶⁶ and to assure continuing juvenile court jurisdiction,¹⁶⁷ there should be a corollary right to noninstitutional treatment. The weakness of this last argument is that, even if a right to treatment was required for the institutional phase, it would not constitutionally justify an automatic carryover into the noninstitutional phase. This is especially true if, in deciding that the right to institutional treatment existed, the courts relied upon a theory relating to the manner and process of one's confinement in an institution.

If it is concluded that there is a right to noninstitutionalized treatment, one additional practical difficulty¹⁶⁸ would confront the courts. Unlike institutional treatment, in which the courts have the power to order the directors of institutions (because they are governmental officials) to take certain steps, the courts in dealing with noninstitutional treatment cannot order a community to accept out-patient delinquents, order employers to hire delinquents, or enjoin educators to develop or to staff special programs.

There are four probable effects¹⁶⁹ of judicially declaring a right to noninstitutional treatment in the juvenile process. First, there will be an increase in the number of settlements at informal police and juvenile courts intake. Secondly, without a corollary right to institutional treatment, there could easily be an increase in the number of juvenile commitments or waivers to the criminal process. Thirdly, a state may be liable for acts committed by juveniles under its supervision while living in the community.¹⁷⁰ Fourthly, since urban areas have more trained personnel than rural areas, it is logical to conclude a disparity in the exercise of a right to noninstitutional rehabilitation would result.

166. Cf. BRAKEL, *supra* note 10, at 134.

167. The probation and aftercare periods are, of course, already within the continuing jurisdiction of the juvenile court. However, this concept of continuing jurisdiction is important, since it enables privately run services to receive state funds. See *In re Proposal C*, 384 Mich. 390, 185 N.W.2d 9, 24 (1971); BRAKEL, *supra* note 10, at 135.

168. See notes 98-142 *supra* and accompanying text for a discussion of other difficulties in the application of the right in the context of institutional treatment.

169. See notes 143-54 *supra* and accompanying text.

170. Compare *Geiger v. Department of Inst'ns*, 242 So. 2d 606 (La. Ct. App. 1970) (state liable for act of forcible rape committed by training school escapees), with *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965) (no state liability for the conduct of an escapee of a state institution in setting fire to a church).

These effects would tend to negate the effectiveness of a right to noninstitutional treatment.

V. CONCLUSION

A juvenile right to treatment¹⁷¹ should not be judicially created and is inappropriate to the juvenile justice process.¹⁷² It would force the courts: to adopt an untenable judicial attitude;¹⁷³ to base arguments upon faulty assumptions;¹⁷⁴ to rely on weak constitutional arguments;¹⁷⁵ to create insurmountable problems for judicial management;¹⁷⁶ and to possibly cause an unfavorable chain reaction within the juvenile justice process.¹⁷⁷ This conclusion, however, should not preclude the judiciary from intervening in the juvenile correctional process.¹⁷⁸ The courts can narrow juvenile court jurisdiction, limit the availability of institutions as a place of commitment, require proper classifications of juveniles within the system, continue to supervise the conditions and practices of institutions, and advocate legislative action.

171. If a right to treatment were incorporated into the juvenile process, the first question would be whether the definition and concept is to be broadened to include more than a medical-psychiatric phase. Additional treatment phases might be education and adjusting social values and family life. If a broadening of the definition of the right to treatment occurred and included more than a psychiatric basis, the issues discussed in this note would be magnified in two areas—defining (and administering) such a right and the protection of third party privacy.

172. This note has dealt with whether the judiciary must recognize a juvenile right to treatment. Note, however, that a statutory right to treatment created by the legislatures, although avoiding constitutional problems, would encounter the same practical problems as a judicially established right. Such difficulties would include state liability for improper treatment, inadequacy of facilities, lack of trained personnel, lack of workable standards of judicial review, inadequate sources of funding, and, finally, possible technical insufficiency of the psychiatric disciplines. It is questionable if legislative drafting can dispose of all these problems at this time.

173. See notes 38-48 *supra* and accompanying text.

174. See notes 49-66, 158 *supra* and accompanying text.

175. See notes 67-97, 159-67 *supra* and accompanying text.

176. See notes 119-42, 168 *supra* and accompanying text.

177. See notes 143-54, 169-70 *supra* and accompanying text.

178. Cf. cases cited 107-18 *supra*, which begin to accomplish major objectives of right to treatment without actually adjudicating a constitutional right.