SYSTEMIC AND PERSONALIZED ACCOUNTABILITY TO INDIGENT AND DISENFRANCHISED CHILDREN: A PRAGMATIC LITIGATION VEHICLE FOR LEGAL SERVICES ATTORNEYS

SUB-TITLE

THE DISAFFIRMANCE OF THE RIGHT TO TREATMENT DOCTRINE FOR JUVENILE OFFENDERS

Developed by the Pennsylvania Child Advocate, Inc.

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To Whom It May Concern:

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TABLE OF CONTENTS

INTRODUCTION

The approval of the seventeen volume I.J.A./A.B.A. Juvenile Justice Standards Project by the American Bar Association House of Delegates on February 12, 1979, marks a new era in juvenile justice philosophy. How will approval of these Standards impact upon the "right to treatment" movement for institutionalized juvenile offenders? The following discussion examines the right to treatment phenomenon and factors which have led to its concurrent decline with the juvenile court system. It is advocated that right to treatment litigation be abandoned and that the Standards be adopted as the new vehicle of juvenile justice law reform.

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I. RECOGNITION OF THE RIGHT TO TREATMENT

A. Birnbaum's Baby

A legally enforcible right to treatment was first proclaimed by Dr. Morton Birnbaum in 1960 for the involuntarily confined mentally ill.[1] It was hoped that judicial intervention which integrated a medical model of treatment with the tenets of due process would spur legislative activity to promulgate standards and appropriate monies to adequately care for the involuntarily confined mentally ill.[2]

Birnbaum predicted a span of time between judicial recognition of the proposed right and its eventual implementation.[3] It was envisioned that the courts would first be burdened with an onslaught of litigation and eventually respond with establishment of objective standards of institutional treatment.[4] Birnbaum further invited the use of writs of habeas corpus to enforce the right and advocated release of mentally ill patients who were found to receive inadequate treatment.[5]

This radical but appealing concept received immediate acclaim[6] and was

heralded by the prestigious American Bar Association as significant a doctrine as Marbury v. Madison and Rylans v. Fletcher.[7] Public interest litigators and progressive jurists have since nourished the doctrine in the areas of mental health and juvenile justice as the primary vehicle of reform.[8]

B. Bootstrapping the Right

Rouse v. Cameron is generally credited as the seminal case proclaiming a legal right to treatment for the involuntarily confined mentally ill.[9] Although a few prior cases had entertained fragmented conceptual notions of a treatment "rationale," [10] Rouse was clearly the first instance where a court adopted the right to treatment doctrine. This habeas corpus proceeding held that a person involuntarily confined to a mental hospital as a result of being acquitted of a criminal offense by reason of insanity has a statutory right to treatment. Rouse was charged with carrying a deadly weapon, found not guilty by reason of insanity and summarily committed to St. Elizabeth's Hospital for the treatment of his mental illness. Although the crime

of carrying a deadly weapon was punishable by a maximum sentence of one year, Rouse's non-criminal commitment continued for three years before filing a habeas corpus proceeding alleging no treatment. The lower court denied the petition considering itself without power to determine the adequacy of treatment.[11] Analyzing the facts in light of a recently enacted civil commitment statute, Chief Judge Bazelon found a statutory right to treatment for Rouse.[12] Bazelon went even further by noting in dictum that inadequate treatment for the involuntarily confined mentally ill also raised serious constitutional questions involving due process, equal protection and eighth amendment prohibitions.[13] The court thereupon reversed and remanded the case for a hearing and findings on the adequacy of treatment accorded to the petitioner.[14]

In the per curiam opinion of Creek v. Stone, the District of Columbia Circuit Court of Appeals inferentially discussed a statutory right to treatment for involuntarily confined juveniles.[15] Creek brought a writ of habeas corpus alleging his confinement in the District of Columbia Receiving Home

unlawful because the facilities had no means to afford him psychiatric care. Although the issue was mooted by Creek's subsequent transfer, the court seized upon the opportunity to explore the power of the judiciary to intervene into the operation of juvenile facilities. Interpreting the local juvenile legislation the court held Creek to have a "legal right to custody that is not inconsistent with the parens patriae concept of the law."[16] Creek clearly indicated a willingness of the court to examine the nature of the juvenile dispositional process.[17] Neither Creek nor Rouse, however, developed a constitutional basis for a right to treatment and both were decided upon statutory grounds.

Nason v. Superintendent of Bridgewater State Hospital has been identified as the first case to recognize a constitutional right to treatment for the involutarily confined mentally ill.[18] Nason brought a writ of habeas corpus challenging his confinement and alleging that lack of personnel and facilities at Bridgewater State Hospital resulted in inadequate treatment. As in Rouse, Nason had been committed in lieu of a criminal trial

to a mental institution for a period exceeding the limits of the criminal sanction. The court held that to overcome objections based upon the due process and equal protection clauses of the Constitution, Nason was entitled to a program of appropriate treatment in light of his condition and prognosis. The decision was based upon the conclusion that "[c]onfinement of mentally ill persons, not found guilty of crime, without affording them reasonable treatment...[raises] serious questions of deprivations of liberty without due process of law."[19] The Nason court, however, failed to develop any analytic basis for the new right.

The next significant appearance of the treatment doctrine was the watershed case of Wyatt v. Stickney.[20] In Wyatt the right to treatment was raised in a class action case on behalf of patients at two state hospitals for the mentally ill and one for the mentally retarded. The court expressly held that civilly committed mental patients have a constitutional right to receive adequate treatment.[21] Judge Johnson concluded that patients who are involuntarily confined for mental deficencies without the constitutional protections

afforded adults in criminal actions "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."[22] Absent treatment, the hospital becomes a prison where one can be held "indefinitely for no convicted offense."[23] Additionally, the court's opinion was supported by the defendants' acceptance of standards formulated by the district court.[24]

Wyatt, unlike any post-Rouse case, thrust the court into the uncharted course of implementing the right. The essential conditions to fulfill the right were declared to be a humane psychological and physical environment, qualified staff personnel in significant numbers and individualized treatment plans.[25] Extensive relief was ordered, encompassing medical and constitutional minimums.[26] The comprehensive opinion of Wyatt was to be the vanguard of right to treatment litigation.

Wyatt was immediately adopted in haphazard fashion by Inmates of Boys' Training School v. Affleck which thereupon became the first case to recognize

a constitutional right to treatment for involuntarily confined juveniles.[27] Significant doctrinal victories subsequently followed in the cases of Martarella v. Kelly,[28] Nelson v. Heyne[29] and Morales v. Turman.[30] Unquestionably, the recognition of a right to treatment for the mentally ill and then juveniles was a "bootstrap operation."[31] Judicial gloss had transformed the weak statutory mandate and dictum of Rouse into a full-fledged constitutional right.[32]

II. ORIGINS OF THE RIGHT TO TREATMENT

A legally enforcible right to treatment has been attributed to both statutory and constitutional origins.[33] Statutory origins in turn have generally been traced to Rouse v. Cameron[34] for the involunarily confined mentally ill and Creek v. Stone[35] for involuntarily confined juveniles. Interpreting a right to treatment from statutory schemes presents a simpler task than the creation of a new constitutional right.[36] Kittrie has advocated enactment of legislation, squarely establishing the right as an alternative to the hazards of judicially creating the right.[37] Indeed, many

states have passed such legislation on behalf of juveniles and the mentally ill.[38]

The primary disadvantage of a purely statutory right lies in the fact that it may be divested through subsequent legislation. Thus, a growing number of states who earlier had enacted treatment oriented "purpose clauses" in their juvenile legislation have since amended them to de-emphasize rehabilitative goals and stress deterrence, incapacitation and protection of the community.[39]

Most courts recognizing the right to treatment for involuntarily confined juveniles have interpreted the right to flow from the constitutional maxims of due process, equal protection and prohibitions from cruel and unusual punishment.[40] The fourteenth amendment due process origins have been further refined to encompass both procedural due process and substantive due process bases.[41]

The procedural due process argument was the first to be developed by the courts.[42] The rationale for this proposition is couched in the notion that

since juveniles are confined for therapeutic as opposed to penal reasons, a full battery of procedural due process rights need not be observed.[43] Treatment is therefore viewed as the "quid pro quo" for the relaxation of procedural safeguards.[44] However, this logic has been flatly rejected by Chief Justice Burger in O'Connor v. Donaldson,[45] and the merits of the argument have collapsed under the growing weight of juvenile rights in the post-Gault era.[46] The weakness of the procedural due process argument lies in the erroneous assumption that formality and arbitrariness would continue as the hallmarks in the adjudication of delinquency and incompetency.[47] The "trade-off" of treatment for procedural protections is totally unacceptable, and the trend therefore has been to eliminate procedural informalities rather than declaring a new constitutional right.[48]

The substantive due process argument has been more developed than the procedural due process argument.[49] Although Birnbaum[50] and Bazelon[51] broached the early notion of a substantive due process, it was not until the Fifth Circuit decision of Donaldson v. O'Connor when the right was delineated.[52]

The substantive theory holds that when the state seeks to exercise its parens patriae power to involuntarily confine juveniles and the mentally ill it must first fulfill its parental role by providing treatment. Thus, Donaldson held that a "non-trivial governmental abridgment of freedom must be justified in terms of a permissable governmental goal."[53] The court found that involuntary civil commitment could be justified by the need for treatment, and due process required minimally adequate treatment be provided.[54] In support of the argument the court cited Jackson v. Indiana and the Supreme Court's rule that "at the least, due process requires that the nature and duration of the commitment bears some reasonable relation to the purpose for which the individual is committed."[55] "If," continued the Court of Appeals, "the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of commitment bears no 'reasonable relation' to its 'purpose' and the constitutional rule of Jackson v. Indiana is violated."[56] Under this rationale, confinement without adequate treatment violates the fourteenth amendment.

The key distinction between the procedural and substantive due process theories is that the former looks to how the confinement came about and the latter the reason for the confinement. Stated in terms of the bifurcated juvenile proceeding, procedural due process attaches to the adjudication; substantive due process attaches to the disposition.[57] The substantive due process argument was seriously undermined by Chief Justice Burger's concurring opinion in Donaldson[58] and the Fifth Circuit Court of Appeals' reposturing on the validity of the right to treatment doctrine in Morales.[59] The weakness of the substantive due process theory is analogous to that of the statutory basis of the right to treatment theory. Specifically, both arguments dissipate upon rejection, abandonment or reliance upon another premise other than the rehabilitative rationale.[60]

Equal protection arguments supporting a constitutional right to treatment have taken two major positions.[61] First, it has been held that the commitment of a juvenile without providing treatment violates the equal protection clause if the commitment is indeterminate and the juvenile remains in an institution

longer than an adult convicted of the same offense.[62] This argument requires that the state make institutional placements which do not exceed that of an adult convicted of the same offense without substantial therapeutic justification.[63] There are defects associated with this argument: (1) it fails to require treatment,[64] (2) that a juvenile receiving "treatment" may be confined for longer periods that he or she may be "punished"[65] and, (3) the trend to prohibit confinement of juveniles for periods longer than adults for the same offense neutralizes the theory.[66] Thus, the equal protection theory can best be characterized as more an attack on indeterminate sentencing that a basis for the actual prescription of treatment.[67]

The most recent equal protection argument is observed in the case of Halderman v. Pennhurst State School and Hospital.[68] Halderman involved a a class action on behalf of retarded patients who claimed a "right to habitation."[69] The court concluded that the mentally retarded are a "suspect class" and as such should be treated in ways that are both limited and beneficial.[70] Thereupon, the court held that segregation of the retarded in iso-

lated institutions where they were denied minimally adequate habitation violates the equal protection clause of the fourteenth amendment.[71] This reasoning, however, has not yet been developed with regard to juvenile offenders.

The eighth amendment has also been a popular premise for the right to treatment doctrine and two basic theories have developed. The first argument relies upon the United States Supreme Court case of Robinson v. California.[72] Robinson held that the cruel and unusual punishment clause prohibits conviction and incarceration solely for the "status" of being a narcotics addict.[73] Drawing upon this reasoning it has been argued that detaining juveniles without treatment falls within the Robinson prescription.[74] The argument's weakness is that it assumes that delinquency is a status or condition similar to mental illness or drug addiction. This conception of juvenile delinquency as a status, although possibly applicable to individual juveniles, clearly cannot be applied to juveniles as a class.[75]

A second theory based upon the eighth amendment is attributable to the

contemporary view that prohibitions against the imposition of cruel and unusual punishment also encompass the nature and character of the institutional confinement.[76] This argument has been well received by the judiciary because it draws upon traditional legal principles and does not require the court to become the prescriber of expensive treatment programs.[77] Rather, the thrust of the argument is to enjoin or prohibit certain institutional practices.[78] Thus, this eighth amendment argument actually exists independently of the right to treatment doctrine, and as such has recently been advocated by the Fifth Circuit Court of Appeals in Morales.[79] While doubting a right to treatment for juveniles, the court strongly suggested that the eighth amendment can satisfactorily remedy institutional abuses without embracing the right to treatment doctrine.[80] Although under the traditional theory the eighth amendment cannot serve as a basis for fashioning or prescribing treatment remedies, it appears that this is an improper role for the judiciary in any event.[81]

III. IMPLEMENTATION OF THE RIGHT TO TREATMENT

The role of the judiciary in implementing the right to treatment is best examined from an historical perspective. The parens patriae model for contemporary juvenile justice has been traced to the early Pennsylvania case of Ex Parte Crouse.[82] Mary Ann Crouse had been committed to the Philadelphia House of Refuge by a magistrate on the basis that she was incorrigible and beyond her mother's control. A writ of habeas corpus was brought by her father alleging a denial of due process. Allegations were also made that the administration of the house was punitive and oppressive. The court, however, rejected the father's arguments and adopted a laissez-faire attitude towards the internal administration of the institution.[83] Since Crouse, the judiciary has historically refused to inquire as to the existence of juvenile treatment facilities, or whether such facilities are suitable for treatment purposes.[84] Only recently have progressive courts[85] indicated a willingness to go beyond the perimeters of Crouse and examine the conditions of institutions for prisoners,[86] the mentally ill,[87]

the mentally retarded,[88] and juveniles.[89] Rothman suggests that the first breakthrough came as a result of prison agitation and defiance by Black Muslims.[90] Although suits were first filed upon first amendment grounds of freedom of religion claims against prison officials, the simple pro se complaints quickly crescendoed into broad class actions requesting injunctive relief from cruel and unusual punishment.[91]

Arriving at a definition of a right to treatment has been a prerequisite to implementation. A review of the literature reveals that this task has been problematic. For example, some commentators and jurists have suggested that the right to treatment is non-justicable because the courts are simply incapable of defining treatment.[92] Another issue is whether the criteria for adequate treatment are to be determined from existing community resources, the most advanced programs elsewhere, or by deciding what reasonable parents would have selected for their child had they been able to do so.[93] Szasz has posed the question to whom the right runs and by whom it may be asserted.[94] Case-law developing the right indicates that the definition of treatment, while

not specific, includes certain minimum standards and individualized care and treatment for each youth.[95] Treatment as also been broadly defined as the benefits , assistance and therapeutic programs provided to juveniles who have been adjudicated and institutionalized by state and local governments or by independent organizations and agencies.[96] Finally, it has been suggested that whatever the definition may be, it should not be confused with nor imply the existence of a duty to submit to treatment.[97]

Challenges to the involuntary institutionalization of juveniles include attacks on the legality of the commitment and the conditions of the confinement.[98] The traditional criminal due process model has generally been used to challenge the adjudication of delinquency while specialized statutory and constitutional arguments have been formulated to challenge the disposition of involuntary confinement under the broad banner of the right to treatment.[99] The right to challenge the legality of the commitment has grown rapidly in the post-Gault era as juveniles have acquired many of the procedural safeguards afforded to adults in criminal proceedings.[100] Arguments have been

based upon failure to provide due process in the adjudicatory hearing,[101] adjudication pursuant to an unconstitutional statute,[102] placement in an inappropriate facility[103] and allegations to the effect that the juvenile is no longer in need of treatment and supervision.[104]

Challenges to the conditions of confinement to evaluate the "adequacy" of treatment have been more complex. The most simple remedies in this instance have been to release the juvenile,[105] transfer the juvenile,[106] deny further admissions to a facility,[107] or close a facility.[108] The most popular remedies, however, have been class action suits enjoining certain institutional practices or prescribing individual treatment standards pursuant to the rehabilitative model.[109] Many courts have acknowledged the difficulty of tailoring remedies and have endeavored to steer a "middle course" between the impossible extremes of abstinence and superintending institutions.[110] Courts have responded with the "subjective scrutiny test" and the "objective scrutiny test" to evaluate the "adequacy" of treatment.

The subjective scrutiny standard involves massive judicial intervention.[111]

In an early comment, Chief Judge Bazelon compared the judicial role under the subjective analysis to the review of an administrative agency decision and carefully cautioned that the court's function is "not to make independent judgments concerning treatment, but rather to scrutinize the record to ensure that an expert more qualified...has made a responsible exercise of judgment."[112] The limited role envisioned by Bazelon, however, failed to materialize and since Wyatt the courts have become the reluctant prescribers of treatment. The subjective rationale relies heavily upon Rouse and Wyatt demanding that facilities offer individualized treatment, and that upon application, the courts inquire as to whether the treatment is "mere form or substance."[113]

The subjective test has been criticized for a host of reasons.[114] First, it has been argued that the test results in lengthy determinations of the adequacy of treatment.[115] Second, personnel might be unequally distributed to comply with the needs of those who are more aggressive or vocal.[116] Finally, utilization of the subjective scrutiny test may infringe upon legislative and executive responsibilities in the promulgation of standards,[117]

appropriation of monies,[118] institutional administration,[119] and violate the separation of powers doctrine.

The objective or structural approach analyzes the institution at a macroscopic level enveloping such criteria as institution size, recidivism rates, staff-patient ratios, frequency of reports, periodic revision of treatment methodologies and percentage of patients released.[120] Thus, external criteria are reviewed to see if "some" treatment is being provided.[121] Principle criticisms of the objective test include the lack of reliable standards,[122] the potential for the unequal distribution of resources within institutions[123] and that judicial rubber-stamping is inevitable.[124] On the other hand, perhaps the major attraction of the objective approach is the judicial avoidance of the prescription of treatment and the superintendence of institutions.

In summary, the objective scrutiny test involves limited judicial intervention and advocates the review of external criteria in "check-list" fashion. The subjective test involves massive judicial intervention and review beyond

external criteria in "individualized" fashion. The distinction between the two theories, however, has been largely academic due to the lack of external criteria such as institutional standards and nonuniformity in the juvenile justice system. Therefore, courts employing both the subjective and objective approaches ultimately relied heavily upon the use of expert witnesses[125] and amici curiae[126] for styling appropriate remedies.

If implementation of the right has been difficult, then monitoring the right has been virtually impossible. Monitoring involves the retention of jurisdiction to superintend the decree. As such, plaintiffs are provided with a constant forum to enlist the aid of the court in supervising the remedy.[128] Courts have relied upon a mixture of compliance reports and formal appointed monitors such as citizen's committees, expert panels, special masters and ombudsmen.[129] Undeniably, the track records of the courts during the important monitoring stage have been poor as evidenced by Morales and Wyatt which remain in litigation after nearly a decade.[130]

IV. PUBLIC INTEREST LITIGATORS

Public interest litigators first became involved with juvenile right to treatment litigation after initial exposure to prison reform litigation.[131] These litigators quickly appreciated the similarities of the conditions within prisons, training schools and assylums.[132] With the availability of private and public funds special juvenile law projects began to appear on national and local levels.[133] Most right to treatment litigation has been conducted directly or indirectly through the efforts of these research and litigation centers.[134] Conducting right to treatment cases has been a problematic and comprehensive undertaking for public interest lawyers.

Choosing the clients, the cause of action, the forum and remedies have presented complex variables to be weighed by litigators.[135] For example, right to treatment cases have employed both case and class advocacy. Case advocacy, however, has proven too limited to result in any meaningful reform effort.[136] Even where juvenile courts have been granted special remedial powers they have rarely been successful in ordering expensive treatment pro-

grams.[137] On the other hand, class actions provide unlimited reform possibilities because of their flexibility and far reaching impact.[138] Despite technical obstacles, the class action has proven the most popular litigation tool to establish and implement the right to treatment for the involuntarily confined juvenile offender.[139]

An assorted array of litigation vehicles have been employed by imaginative litigators. For example, mandamus,[140] the inherent powers doctrine,[141] and contempt[142] have been utilized with limited success. The extraordinary writ of habeas corpus, however, has been the traditional vehicle used to review the legality of confinement.[143] Prior to the comprehensive undertaking of Wyatt, all right to treatment cases had been limited to case advocacy habeas corpus litigation. As courts became more active in prisoner, juvenile and mental health litigation, the writ was gradually expanded to include challenges to both the adjudication or commitment proceeding and the disposition or conditions of confinement.[144] Thus, both the adjudication and disposition of juvenile matters may be properly reviewed by writs of habeas corpus.[145]

The writ of habeas corpus, however, cannot be used as a substitute for appeal.[146]

Historically, utilization of the writ has been more limited in state court than federal court.[147] For example, a special problem involving the writ of habeas corpus in state juvenile proceedings has been the unusual continuing nature of jurisdiction of the courts and the failure of the remedy under these statutes to ripen.[148] On the other hand, the requirement that state remedies be exhausted as a precondition to federal habeas corpus relief has made the writ inaccessible to most juvenile offenders.[149] Perhaps the most intriguing development in the law of habeas corpus has been the evolution of the class action and its potential use as a remedy for mass deinstitutionalization.[150] The use of writs of habeas corpus, however, are simply no match for the class action civil rights case where exhaustion of remedies is unnecessary.

The class action civil rights action continues to be the most effective litigation vehicle for right to treatment litigation because of its flexibility and scope.[151] Although procedural problems such as abstention, comity, res judicata and the requirement of a three-judge court have arisen, the benefits

conferred by the class action civil rights vehicle have far outweighed any technical obstacles.[152] Furthermore, civil rights actions may seek compensatory and punitive damages as well as injunctive and declaratory relief.[153] Finally, civil rights actions have enabled litigators to obtain detailed consent orders without extended litigation.[154]

Personal injury suits in local civil forums have been suggested as a means of assuring accountability for the care of institutionalized juveniles.[155] Such cases have become increasingly attractive to litigators in recent years because of their relative simplicity and the trend to relax state, local, official and executive immunities.[156] Procedurally, a traditional tort action is far more manageable and economical than a complex civil rights case[157] and courts are more comfortable with common law actions sounding in tort than with protracted litigation and speculative legal theory.[158]

Tort actions can be bolstered by citing obvious violations of state laws and regulations.[159] There is a growing concern that the current trend of deinstitutionalization will make state administrators increasingly vulnerable

targets for the actions and injuries of children entrusted to their care who under pre-existing policies and laws would have been confined to more secure settings.[160] Of course, while damage actions can be used to penalize incompetent administrators amd encourage responsible changes they may also inhibit needed reform.[161] Finally, litigators will have to assess the nuisance value of damage suits in light of the fact that meritorious cases involving high damages are rare.

Securing the most advantageous forum is essential to any litigation effort. Federal courts have generally been viewed by public interest litigators as more progressive than state courts and all of the major right to treatment cases have been litigated in federal courts.[162] The federal forum, of course, offers litigators the class action civil rights suit. Furthermore, it has been suggested that the federal forum is the proper forum to litigate juvenile cases when states have denied juveniles their constitutional rights in the course of proceedings, when juveniles challenge the statutes under which they are charged to be unconstitutional, when juveniles have challenged the

conditions of confinement or when they have challenged the legality of custody.[163]

Juvenile litigation efforts have been conducted on an ad hoc basis without serious goal assessments.[164] While some litigators have pursued right to treatment cases in hopes of dismantling large institutions, others have apparently adopted the rehabilitative model and the concepts of treatment and individualization.[165] However, knowledgeable litigators have pursued deinstitutionalization under the rubric of rehabilitation employing essentially two related litigation strategies. First, is the "crisis tactic," which advocates the disruption of power enclaves within the institutions to make them inoperable.[166] It is maintained that the necessity of up-grading institutions will drive the costs so high that the institutional populations will be reduced as a result of economic chaos. The results of the crisis tactic remain under scrutiny.[167] The second related approach has been the "noble lie" strategem.[168] This tactic concludes that judges will never decide in favor of litigants if the case is presented as a step towards

closing the institution. This theory assumes that courts will be less likely to intervene if the concept of rehabilitation is characterized as a farce. Hence, the noble lie has been preached, although deinstitutionalization remains the primary target of most informed and seasoned litigators.[169]

Unexpected complications have arisen with regard to both concepts which indicate that myopic litigators may have paid a costly price for their stratagem. First, the growing rejection of the rehabilitation model forecasts a troublesome transition period for public interest litigators.[170] The confusion is likely to exist as long as the courts continue to respond to the right to treatment suit.[171] A more serious problem has been the erroneous assumption by many litigators that institutionalization would continue as the primary dispositional setting for most juvenile offenders.[172] There is now concern that broad class actions brought on behalf of involuntarily confined juveniles under the right to treatment litany may have actually served to legitimize the use of institutionalization for a sizable number of juvenile offenders.[173] Thus, the tactical promotion of the rehabilitative

model may have backfired and cemented the structural weaknesses of the institutional conglomerates. The seriousness of the situation is illustrated in the fact that the leading right to treatment cases have clearly defined constitutional rights in institutional terms. Unfortunately, some litigators have been so impressed with their "paper victories" that they have had little time or inclination to ponder the implication of their well-meaning efforts.[174] It is therefore imperitive that litigators reassess their tactics and priorities, especially before conducting litigation forays into the private institutional sector.

V. DISAFFIRMING RIGHT TO TREATMENT LITIGATION: THE SAGA OF THE FIFTH CIRCUIT

The Fifth Circuit Court of Appeals has been the chief proponent of the right to treatment doctrine. The Donaldson-Wyatt-Morales triology therefore presents an excellent vantage point to examine the right to treatment litigation phenomenon.

The first major right to treatment case to reach the Fifth Circuit was prompted through the efforts of Kenneth Donaldson, an involuntarily confined

patient in the Florida State Hospital at Chattahooche.[175] After seeing an editorial in the New York Times supporting the right to treatment, Donaldson contacted Birnbaum and enlisted his aid in seeking judicial review of his confinement.[176] During the following eleven years, fourteen separate attempts were made to various Florida and federal courts, and four to the United States Supreme Court. Donaldson's confinement was challenged on the basis that he was not dangerous, did not require institutionalization and was receiving inadequate treatment. Finally, a civil rights damage action was brought against numerous officials at Chattahooche which alleged that the confinement had constitutionally deprived Donaldson of his liberty because he was non-dangerous, and that he had not been provided with proper therapeutic treatment.[177] The trial court jury found in favor of Donaldson and awarded him $28,500 in compensatory and $10,000 in punitive damages.

The Fifth Circuit Court of Appeals subsequently upheld the verdict of the trial court thus being the first federal appellate court to expressly

and unequivocally recognize the right to treatment as constitutionally required.[178] Further, the court approved the award of damages as a remedy for violation of this right. The culmination of Donaldson came when the United States Supreme Court granted O'Connor's petition for certiorari because of the important constitutional issues presented.[179] Justice Stewart, in writing the narrow opinion for the unanimous court, avoided the broad issues dealt with by the Court of Appeals and viewed the case as raising a "single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty."[180] The majority vacated and remanded the case, holding that a state cannot constitutionally confine, merely for custodial care, a non-dangerous patient without more than a finding of mental illness if the patient is capable of safely surviving in society by himself or with the help of family or friends.[181] The majority did not decide whether a non-dangerously mentally ill person could be confined with treatment or if a dangerously mentally ill person could be confined without treatment. The court proceeded as though Donaldson had

asserted two distinct rights; a right to treatment and a right to liberty. The court chose to protect the latter and avoid the former. In contradistinction, the Fifth Circuit had perceived the right to treatment or release as a unitary right.[182] The neutrality of the majority's opinion was clouded by the unusual note that their "decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect leaving this Court's opinion and judgment as the sole law of the case."[183]

Perhaps the most significant aspect of the case was the concurring opinion filed by Chief Justice Burger.[184] The Donaldson case afforded the Chief Justice a renewed opportunity to speak to the constitutional validity of the right to treatment doctrine.[185] Burger's scathing criticism clearly took the wind from the sails of the right to treatmemt movement. First, the Chief Justice emphasized the majority's apparent disapproval of the Fifth Circuit's reasoning by stating "in light to its importance for future litigation in this area, it should be emphasized that the Court of Appeals' analysis has no basis in the decisions of this Court."[186] Next, Burger discussed

the state parens patriae powers and found them broad enough to encompass numerous circumstances where commitment was justified without the provision of any treatment.[187] Finally, Burger rejected the procedural and substantive due process theories as a basis for a constitutional right to treatment.[188]

The impact of the Supreme Court's holding in Donaldson on the Fifth Circuit has been evidenced in the saga of Morales v. Turman.[189] The history of Morales began in 1970 when attorneys tried to investigate charges that juveniles were being committed to the Texas Youth Council (T.Y.C.) instititions without fair hearings. The case was subsequently expanded into a frontal attack on the entire T.Y.C. system and became the most extensive juvenile right to treatment case ever undertaken.

Litigation began in Morales as a class action suit on behalf of juvenile inmates under jurisdiction of the T.Y.C. seeking and obtaining a preliminary injunction that prohibited T.Y.C. officials and their agents from interfering with the inmate's right to confer in privacy with counsel.[190] A year later,

the complaint was amended into a broad right to treatment suit encompassing the entire T.Y.C. system throughout the State of Texas. The suit had as its class of plaintiffs all juveniles who were presently, had been in the past, or would be in the future adjudicated delinquent and involuntarily committed to one of the six training schools of the T.Y.C. system. The plaintiffs were supported by the U. S. Justice Department Civil Rights Division and other prestigious amici curiae.[191] An order was subsequently issued enjoining practices found to be in violation of the eighth amendment and held that institutionalized juveniles have both a statutory and constitutional right to treatment based upon the fourteenth amendment.[192] The next order issued by Judge Justice established minimum professional and constitutional standards which the parties were to follow in devising a detailed treatment plan.[193] Morales set standards for the following: the assessment and placement of juveniles in various schools of the T.Y.C.,[194] for academic education,[195] vocational education,[196] institutional life,[197] medical and psychiatric care,[198] casework and child care,[199] and institutional confine-

ment.[200] The effect of Morales was to establish minimum standards through the use of experts and then to superintend the system. In establishing the right to treatment for juveniles Judge Justice relied heavily upon the Fifth Circuit's decision in Donaldson.[201]

Finally, Morales noted that "the continued incarceration of juveniles in large, rural institutions raises serious constitutional questions."[202] The court adopted the view of some experts that institutions may have an anti-rehabilitative effect on juveniles.[203] Expert testimony at the trial established that not all juveniles committed to T.Y.C. custody need to be institutionalized.[204] Consequently, the court found that a necessary component of the right to treatment was the juvenile's right to "the least restrictive alternative treatment that is consistent with the purpose of his custody."[205] Judge Justice recognized that although the T.Y.C. had specific statutory authority to develop community-based programs to treat juvenile offenders, it had ignored the statute and allowed institutionalization to become the sole alternative.[206] Under the doctrine of the least restrictive

alternative, this practice was constitutionally unacceptable.[207] The court found that "[t]he state may not circumvent the Constitution by simply refusing to create any alternatives to incarceration," and ordered the state to develop new programs to accomodate the needs of those juvenile offenders who do not require institutionalization.[208]

On appeal to the Fifth Circuit, the case was remanded on the technicality that a three-judge court should have been convened and that the Court of Appeals was without jurisdiction to consider the issues raised by appeal.[209] This decision clearly indicated that a retrenchment had taken place in regards to the future of the right to treatment doctrine. In forboding terms, the court indicated that the three-judge court was warranted because of the lower court's "thoroughgoing disruption of a state's autonomous implementation of its own legislative and administrative policies.[210] No mention was made of the right to treatment concept or the fate of Donaldson.

Morales was subsequently dispatched back to the reluctant Fifth Circuit by the United States Supreme Court in reversing and remanding the decision

that a three-judge court should have been convened.[211] The second Morales opinion clearly adopted the posture of Chief Justice Burger in Donaldson and succinctly noted that a right to treatment was doubtful.[212] Moreover, the court emphasized that the arguments to establish a right to treatment for juveniles were even less persuasive than for the mentally ill because many detained juveniles pose a threat to society.[213] The Fifth Circuit Court of Appeals also seized the opportunity to challenge the role of the judiciary assuming the validity of the right to treatment. Thus, the district court was admonished that "it was not in the position to monitor day to day changes that effect rehabilitation programs insofar as new treatment techniques inevitably develop."[214]

Finally, the court went further to note in dictum that institutional abuses could be corrected without embracing the right to treatment doctrine and that the eighth amendment prohibition against cruel and unusual punishment could adequately remedy the conditions in the T.Y.C. institutions.[215] While conceding that the eighth amendment would not require the state to pro-

vide extensive vocational training, detailed personality assessments or coeducational facilities, the court continued its barrage on right to treatment litigation by stressing the fact that the choice of providing these services properly remained with the State of Texas and not the district court.[216] In summary, the subjective due process rationale had been rejected, the subjective scrutiny test discounted and the right to treatment doctrine disaffirmed.[217]

VI. THE DECLINE OF THE JUVENILE COURT SYSTEM

The juvenile court system is now under siege.[218] This phenomenon is clearly related to the growing disenchantment with the right to treatment doctrine. An examination of factors contributing to the continuing decline of juvenile courts is therefore necessary to fully appreciate the disaffirmance of the rehabilitative model.

A. Cracks in the Foundation

Revisionist historians have revealed serious cracks in the foundation of the juvenile court movement. It is now maintained that the parens

patriae format has really been an ex post facto rationalization for a separate juvenile court and the justification for the involuntary confinement of juveniles has been questioned.[219] Even the "juvenile justice philosophy" has been characterized as more benign statements of judges, corrections administrators and legislators than a true philosophy.[220] Of course, parens patriae is not the sole justification for having a separate juvenile justice system. But factors such as maintaining institutional environments less harsh that those for adult offenders,[221] avoidance of criminal records[222] and the concept of confidentiality are also eroding.[223] While rehabilitation has been the articulated goal of juvenile justice, the true thrust of intervention remains deterrence, incapacitation and protection of the community.[224] Further, it has been argued that racism and classism have debilitated the courts.[225] Many commentators have therefore suggested that the juvenile justice system has been constructed upon myths and illusions.[226]

B. Overly Broad Jurisdictional Criteria.

Overly broad jurisdictional criteria have been identified as another structural weakness of the juvenile court system. It has been argued that broad jurisdictional criteria invites abuse of discretion in the apprehension, adjudication and disposition of juvenile offenders.[227] Juvenile court jurisdiction over status offenders has therefore become a controversial issue.[228] Although federal efforts to deinstitutionalize status offenders have ostensibly yielded positive results,[229] only state legislatures possess the power to abolish jurisdiction over non-delinquents. There is, however, a movement to remove status offenders from the jurisdiction of the juvenile courts.[230] The removal of status offenders is clearly related to the failure of the rehabilitative model and the misunderstanding of adolescent behavioral patterns.

C. Overestimating the Behavioral Sciences

The juvenile court was originally designed as a "laboratory" for the behavioral sciences.[231] The confidence of early reformers, however, has vanished with the general inability to discover and isolate the causes and

cures of delinquency. No single cause has been indentified as the source of delinquency.[232] Similarly, despite the many treatment modalities and therapies that have developed in recent years, no one theory has emerged as effective in treating delinquency.[233] A review of the treatment literature in the area of delinquency leads to the ultimate conclusion that the only truly effective treatment component is the development of personal relationships with juvenile offenders.[234] Youthful offenders are simply not amenable to treatment oriented programs.[235] It is therefore not surprising that juvenile court activity has typically been limited to naive intervention and institutionalization.[236]

D. Narrowing Judicial Discretion

The broad discretion traditionally afforded juvenile court judges is being narrowed in both the adjudicatory and dispositional phases of the bifurcated process. The adjudicatory phase is now approaching approximate parity with the criminal justice model and the post-Gault era has evidenced the willingness of courts to expand procedural safeguards for juveniles.[237]

Commentators have even begun to reexamine McKeiver v. Pennsylvania and have renewed arguments for jury trials in juvenile proceedings.[238]

The dispositional powers of juvenile court judges are also being curtailed.[239] Problems with the dispositional phase have been attributed to the failure of the behavioral sciences,[240] the lack of alternatives to institutionalization,[241] the lack of communications between social service agencies[242] and the rarity of trained juvenile judges.[243] The indeterminate sentence has been the primary structural component of juvenile court dispositions.[244] As such, sentencing has come under growing criticism from a broad spectrum of political opinion[245] and constitutional challenges have been made.[246] In response to perceived increases in juvenile crime rates and disenchantment with the theme of rehabilitation, a number of states have recently adopted juvenile offender classification systems or designated felony statutes.[247]

E. Deinstitutionalization

The failure of institutionalization has been identified as yet another

crack in the foundation of the juvenile court system. There is a growing body of authority that believes large, isolated, undifferentiated training schools incapable of rehabilitation.[248] Furthermore, it has been argued that even the abundance of resources fail to enhance rehabilitation capabilities.[249] Institutions that are run on the obedience and coersion model emphasizing regimentation are unlikely to encourage the rehabilitative ideal of individualization.[250] There is also evidence that institutionalization causes an increase in crime rates among juvenile offenders.[251] Moreover, there is substantial documentation that the educational systems in most institutions are inferior to that of community public schools.[252] Clearly, too many children are abused by the institutional system itself.[253]

Recent years have witnessed an extraordinary emphasis on the use of community-based facilties and placements for juveniles.[254] The concept of deinstitutionalization first became popularized through the efforts of Dr. Jerome Miller and his publicized efforts in Massachusetts, Illinois and Pennsylvania.[255] Since the passage of the Juvenile Justice and Delinquency

Prevention Act of 1974, and its most recent amendments, the federal government has been aggressively pursuing deinstitutionalization.[256] The thrust of the Act has been to develop programs and services away from the traditional juvenile justice setting and to combat delinquency. Attractive fiscal incentives have been the key to transformation of state policies condusive to deinstitutionalization efforts. States which submit detailed plans through the statutory regulatory framework for funding must, in turn, prohibit the pre-trial detention and post-trial commitment of status offenders and delinquents where they have regular contact with adults charged with or convicted of crimes.[257] The Act further requires states to refrain from institutionalizing status offenders.[258] Although a number of states have reportedly balked at compliance requirements[259] and many have faltered with rigid monitoring guidelines,[260] recent statistics indicate that government efforts to reduce the population of juvenile institutions have ostensibly worked.[261]

Deinstitutionalization efforts have come under criticism from a number

of sources and for divergent reasons. For example, some commentators have questioned the sincerity of the federal government for moving too slowly to deinstitutionalize status offenders and delinquents.[262] Conversely, others have expressed concern that deinstitutionalization has been proceed- irresponsibly fast[263] and that it has led to profiteering and scandal.[264] Moreover, the statistical decline in the juvenile institutional population has been attributed to reasons other than government victories. There is some concern that recent statistics are misleading and related more to demography and overall decline of the American juvenile population.[265] Another serious criticism has been the allegation that juveniles are being laterally transferred from state operated training schools to private institutions that are not subject to the monitoring efforts of the Office of Juvenile Justice and Delinquency Prevention.[266] Further, the cost of institutionalization as opposed to the costs of community-based alternatives remains unanswered and under debate.[267]

The most significant obstacle to deinstitutionalization efforts has been

the complex institutional conglomerates.[268] Institutions clearly do not act autonomously. Moving juveniles from large institutions to smaller community-based facilities frequently means the elimination of many unskilled institutional jobs and unions may object.[269] In addition, relatives of institutionalized juveniles may enter the protest[270] and community groups in the vicinities of the proposed neighborhoods may legally challenge their creation through zoning litigation.[271] New staff may have to be recruited and trained, and existing staff may have to be retrained, replaced or relocated.[272] Finally, deinstitutionalization may require radical changes in the administrative structure of the organization on local and state levels. Thus, when the courts respond to right to treatment litigation and order institutions to increase their budget, double their staff, reduce institutional populations and restructure internal administrative patterns, success on all fronts should not be expected.[273]

F. Rejection of the Rehabilitative Model

The rehabilitation model has been the heart of the juvenile court move-

ment and the logical development of the parens patriae philosophy.[274] In fact, the rehabilitative model and the right to treatment may be the final pretext for the maintenance of a separate juvenile justice system.[275] However, the juvenile justice system was never designed for treatment.[276] This model was clearly misappropriated from the medical community and has perpetuated the myth that delinquency is an "illness" which requires treatment.[277] The rehabilitation model is also naive in that it ignores the social, political and economic issues relating to institutionalization.[278] Although rehabilitation is an appealing goal, it is also a potentially dangerous notion and simply legitimates too much.[279] Thus, commentators are now calling for rejection or abandonment of the rehabilitative model.[280]

Although Justice Fortas once noted that the "idea of crime and punishment was to be abandoned" in the juvenile justice system,[281] there is a growing public interest in a greater emphasis on punishment.[282] The term "punishment," however, has been redefined by juvenile justice scholars. Fox is credited with coining the term "right to punishment" as a semantically

fitting rejection of the traditional philosophy of treatment and rehabilitation and to imply a radical restructuring of the juvenile justice system.[283] Thus, the right to punishment is not synonymous with the concept of punishment in its usual sense.

Another definition of the right to punishment has been stated as the "right to be free of the juvenile justice system to the extent that it poses greater losses of personal liberty that does the adult system and does not or cannot provide the treatment which has purported justification for that greater loss of freedom."[284] The right to punishment has also been equated with notions such as the "right not to be treated," the "right to be left alone," and the "right to non-institutionalization." All of these philosophies represent the increasing disillusionment with the present juvenile justice system and recognize that treatment, if existent, must be consential and non-coerced.

The fundamental difference between the right to treatment and the right to punishment is that the latter implies limitations while the former does not.[285]

Under the rehabilitative model a juvenile may be detained indefinitely while various treatment modalities are explored to treat the youth. The right to punishment rejects the rehabilitative model and its corollaries of indeterminancy[286] and individualization.[287] The treatment rationale has also evoked much concern with the possible excesses of "treatment" and has be characterized in the bizarre imagery of psycho-civilized juveniles.[288] Thus, since treatment is for the benefit of the child it makes little difference what techniques are used or how long they take.[289] Where institutional programs tend to degrade, dehumanize or humiliate they cannot be condoned merely because they are labeled treatment.[290] Further, punishment is viewed as the last resort in order to protect society and unlike the rehabilitative model counsels that the smallest number of children be admitted into the system and not the largest. Punishment, as opposed to treatment, should cause us to pause and evoke concern for restraint and care in its imposition.[291]

The rejection of the rehabilitation model does not necessarily imply

wholesale rejection of the substantive due process rationale.[292] On the contrary, recent decisions indicate that courts will continue to scrutinize the dispositional process of delinquency and the involuntary confinement of juvenile offenders.[293] The significant development lies in the fact that the United States Supreme Court has chosen to reject the right to treatment doctrine and instead has chosen to focus upon the more familiar element of liberty.[294] It appears that the "least restrictive alternative" theory may evolve as the primary maxim of substantive due process as reliance upon the right to treatment wanes.[295] The least restrictive alternative conservatively focuses upon liberty as the essential ingredient of substantive due process and can therefore exist independently of the right to treatment doctrine.[296] The question remains, however, whether the rejection of the rehabilitation model removes the rationale for the existence of separate juvenile courts.[297]

VII. CONCLUSION: A NEW LITIGATION VEHICLE

Chief Judge Bazelon once observed:

> The courts have no choice but to pursue the course of self-initiated constitutional remedies to make society and its representatives aware of the failure of its promises so thay they can make an honest choice to take constructive action or withdraw the promises. 298

The right to treatment movement serves as an excellent illustration of the uses and limitations of "social engineering" by progressive elements of the judiciary.[299] While juvenile treatment litigation has helped to reshape attitudes towards the care and commitment of children and corrected glaring institutional abuses,[300] it has also exposed the myth of rehabilitation and other cracks in the foundation of the juvenile court system.[301] Indeed, the promise of rehabilitation is being "withdrawn" and the right to treatment doctrine is approaching the threshold of rejection.

Although the ultimate disaffirmance of the right to treatment doctrine by the Fifth Circuit Court of Appeals should have been a sobering and fortuitous event, courts have continued to respond to treatment litigation.[302] Litigators have therefore been reluctant to abandon the "noble lie" stratagem.[303] Nevertheless, caution and good sense dictate that a moratorium be imposed on

all suits employing the rehabilitative model and that future litigation be confined to enjoining practices prohibited by the eighth amendment.[304] Meanwhile, the final process of weaning litigators from the right to treatment rubric should be encouraged by policy-makers and funding sources.

As the litigation transition continues a new reform vehicle will ultimately emerge. Although the right to punishment appears the prima facie alternative, the label is worrisome. It is well documented that the use of slogans and the psychology of labeling have historically hampered the development of a unified juvenile justice philosophy.[305] The slogan of a right to punishment is too easily misunderstood and threatens to exact more fearful consequences than those envisioned through abuse of the treatment rationale.[306] Succinctly stated, the epitomization of punishment as the goal of the American juvenile justice system is unwise, unjustified and unacceptable.

The timely approval of the I.J.A./A.B.A. Juvenile Justice Standards Project by the American Bar Association presents an excellent opportunity to

promote reform without further reliance upon the right to treatment doctrine.[307] The hallmark of the Standards is the rejection of the rehabilitative model and its corollaries of the indeterminate sentence and individualization.[308] While the right to treatment is disaffirmed, a "safe, humane and caring environment" is assured in a juvenile corrections system that is keyed to reducing juvenile crime while recognizing the unique characteristics and needs of juveniles.[309] The Standards categorically reject the prevailing philosophy of indeterminate sentencing and instead propose that a legislatively determined maxiumum be set for each offense with the court imposing sanctions within these set maxima appropriate to the offense.[310] The Standards also adopt the principle that all coercive sanctions are punishment and that no treatment can be given without express consent.[311] Furthermore, the Standards utilize the essential substantive due process component of the least restrictive alternative.[312] In conclusion, the Standards generally codify the reform goals of most public interest and legal services attorneys and as such can conveniently serve as the new litigation vehicle to strive for systemic and

disenfranchised children caught within the juvenile justice system and its institutions.[313]

FOOTNOTES

1. Birnbaum, The Right to Treatment, 46 A.B.A.J. 499 (1960). Also see Birnbaum, Some Comments on the "Right to Treatment," 13 Arch. Gen. Psychiatry 34 (1965) and Birnbaum, The Right to Treatment: Some Comments on its Development, in Medical, Moral and Legal Issues in Mental Health Care 97 (F. Ayd, Jr. ed. 1974).

2. Id.

3. Id. at 504.

4. Id.

5. Id.

6. The new right received an unusual amount of scholarly support. For a list of early commentary see Shepherd, Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment, 21 St. Louis U. L. J. 12, 22 n. 57 (1977).

7. Editorial, A New Right, 46 A.B.A.J. 516, 517 (1960).

8. See public interest litigators infra note 131 and progressive jurists infra note 85.

9. Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1966), reheard, 387 F. 2d 241 (D.C. Cir. 1967) (en banc).

10. See Miller v. Overholser, 206 F. 2d 415, 420 (D.C. Cir. 1953), establishing the propriety of habeas corpus to "test not only the fact of confinement but also the place of confinement."; White v. Reid, 125 F. Supp.

647 (D.D.C. 1954), where a juvenile successfully challenged detention in an adult facility as being contrary to statute and the parens patriae philosophy of the courts; Commonwealth v. Page, 339 Mass. 313, 159 N.E. 2d 82 (1959), establishing the requirement of separate facilities to validate the commitment through statutory interpretation; Sas v. Maryland, 334 F. 2d 506 (4th Cir. 1964), questioning the constitutional justification of indeterminate sentencing of "defective delinquents" without proper treatment; and Patuxent v. Daniels, 243 Md. 16, 221 A.2d 397 (1966), holding the availability of treatment elevating confinement above mere penal detention and obviating any constitutional criticism. For a more detailed examination of pre-Rouse cases see generally: A Comparative Analysis of Standards and State Practices, Juvenile Dispositions and Corrections, Vol. IX, National Institute for Juvenile Justice and Delinquency Prevention, Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U. S. Department of Justice (1978)[hereinafter Comparative Analysis]; Kittrie, Can the Right to Treatment Remedy the Ills of the Juvenile Process?, 57 Geo. L. J. 848, 866-71 (1969); and Stone, Overview: The Right to Treatment: Comments on the Law and its Impact, 132 Amer. J. Psych. 1125, 1126-32 (1975).

11. During the Rouse hearings, Judge Holtzoff noted: "My jurisdiction is limited to determining whether he has recovered his sanity. I don't think I have a right to consider whether he is getting enough treatment...[or] whether he should be in one pavillion rather than in another." Rouse v. Cameron, 373 F. 2d 451, 461 (D.C. Cir. 1966) (Fany, J., dissenting), quoting Holtzoff.

12. The decision was based upon a federal statute regulating mental hospitals in the District of Columbia. D.C. Code Ann. § 21-562 (1967).

13. Bazelon noted: "Had appellant been found criminally responsible he could have been confined a year, at most, however dangerous he might have been. He has been confined four years and the end is not in sight. Since this difference rests only on a need for treatment, a failure to supply treatment may raise a question of due process of law. It has also been suggested that a failure to supply treatment may violate the equal protection clause. Indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.'" Rouse v. Cameron, 372 F. 2d 451, 453 (D.C. Cir. 1966).

14. During the appeals Rouse remained in St. Elizabeth's Hospital. See Note, A Right to Treatment for Juveniles?, 1973 Wash. U. L. Q. 157, 184 (1973)[hereinafter A Right to Treatment for Juveniles?].

15. Creek v. Stone, 379 F. 2d 106 (D.C. Cir. 1967).

16. Id. at 111.

17. Also see In re Elmore, 382 F. 2d 125 (D.C. Cir. 1967), where a juvenile specifically found to be in need of psychological and psychiatric care was "provided no treatment at all," resulting in a remand to the juvenile court for evaluation of his confinement in light of the goal of rehabilitation provided in the local statute.

18. 253 Mass. 604, 233 N.E. 2d 908 (1968). For a discussion of Nason

see Birnbaum, A Rationale for the Right, 57 Geo. L. J. 752, 762 (1969)

19. 353 Mass. at 610, 233 N.E. 2d at 914.

20. Wyatt v. Stickney, 325 F. Supp. 781, on submission of proposed standards by defendants, 334 F. Supp. 1341 (M.D. Ala. 1971); standards enforced, 344 F. Supp. 373 (M.D. Ala. 1972), affirmed in part, reversed in part, remanded in part sub nom., Wyatt v. Aderholt, 503 F. 2d 1305 (5th Cir. 1974), memorandum filed by plaintiffs alleging non-compliance sub nom. Wyatt v. Harden, C.A. No. 3195-N (M.D. Ala. filed Sept. 10, 1977). Rouse was the primary support for Wyatt. See Bailey & Pyfer, Deprivation of Liberty and the Right to Treatment, 9 Clearinghouse Review 519, 524 (1974).

21. The court stated that: "To deprive any citizen of his or her liberty upon the altrustic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." 325 F. 2d at 374-375.

22. 325 F. Supp. at 784. Also see Note, Wyatt v. Stickney: A Constitutional Right for the Mentally Ill, 34 U. Pitt. L. Rev. 79 (1972).

23. 325 F. Supp. at 784.

24. 503 F. 2d at 1307. The defendant state officials admitted that "...if there is a constitutional right to treatment enforcible by a suit for injunctive relief in federal court, those standards accurately reflect what would be required to ensure the provision of adequate treatment."

25. 334 F. Supp. at 1343.

26. 344 F. Supp. at 379-86. The court had earlier ordered the defendants to prepare and file a specific plan whereby "appropriate and adequate

treatment" would be provided to the patients of mental institutions "who, from a medical standpoint, might be responsive to mental health treatment." 325 F. Supp. at 785-76. The court further noted, "...that the unavailability of neither funds, nor staff and facilities would justify a default by defendants in the provision of suitable treatment for the mentally ill." 344 F. Supp. at 376.

27. 346 F. Supp. 1354, 1364 (D.R.I. 1972). While not expressly articulating a constitutional right to treatment, the Affleck court implicitly recognized such a right under the due process clause of the fourteenth amendment. Affleck offered no analysis of the origins or perimeters of the doctrine other than bare citation to Wyatt.

28. 349 F. Supp. 575 (S.D.N.Y. 1972), enforced, 359 F. Supp. 478 (S.D.N.Y. 1973). Martarella was a class action brought on behalf of juveniles classified as Persons in Need of Supervision (P.I.N.S.). The juveniles alleged violations of the due process and equal protection clauses of the fourteenth amendment and violation of the eighth amendment ban against cruel and unusual punishment. The court found the existence of a general right to treatment citing Wyatt for the proposition that to deny liberty for therapeutic purposes and then to deny the promised treatment constitutes a denial of due process. 349 F. Supp. at 586, 600.

29. 355 F. Supp. 451 (N.D. Ind. 1972), affirmed, 491 F. 2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). The Seventh Circuit remanded to the district court to determine the minimum treatment required to comport to due process. The district court enjoined practices relating to

corporal punishment, drugs, solitary confinement and inspection of mail. See Note, Constitutional Right to Treatment for Juveniles Adjudicated to be Delinquent, 12 Amer. Crim. L. Rev. 193 (1974).

30. See note 189 supra.

31. See Shepherd, supra note 6 at 27. Several courts have rejected the notion of a constitutional right to treatment. See New York State Ass'n. for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) and Burnham v. Department of Public Health of the State of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), reversed, 503 F. 2d 1319 (5th Cir. 1974), cert. den., 422 U.S. 1057.

32. See Birnbaum, supra note 18 at 758 where he asserts that "the court of appeals' holding in Rouse that the 1964 revision contained a statutory right to treatment seems somewhat contrived. The language chosen is similar to that used in public mental hospitals of ten other jurisdictions; in none of these other jurisdictions has this precatory phrasing been interpreted to mean that there exists a recognized enforcible right to treatment."

33. Some courts have simultaneously recognized a statutory and a constitutional right to treatment. See Morales v. Turman, 346 F. Supp. 166, 175 (E.D. Tex. 1973), Tex. Rev. Stat. Ann. art. 5143(d) § 1 (1971) and Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), Burns Ind. Stat. Ann. § 9-3201, I.C. 1971, 31-5-7-1.

34. Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1966), reheard, 387 F. 2d 241 (D.C. Cir. 1967) (en banc).

35. Creek v. Stone, 397 F. 2d 106, 109 (D.C. Cir. 1967).

36. See Comparative Analysis, supra note 10 at 59-60.

37. See Kittrie, supra note 10 at 862 citing "The Right to Treatment Law of 1968," which was introduced in the Pennsylvania General Assembly but never passed.

38. For a list of states recognizing a statutory right to treatment see Comparative Analysis, supra note 10 at 57. In the years between Rouse and Donaldson, 1966-1975, it has been estimated that 50% of the states have passed some form of treatment legislation. See Grant, Donaldson, Dangerousness and the Right to Treatment, 3 Hastings Con. L. Q. 599, 604 (1976).

39. See generally Recent Reaction to Juvenile Crime: Are State Legislators "Getting Tough" With Teenage Delinquents?, Children's Rights Report, Vol. II, No. 4 (Dec. 1977- Jan. 1978) [hereinafter Getting Tough].

40. One commentator has suggested a ninth amendment origin. See Pyfer, The Juvenile's Right to Receive Treatment, 6 Fam. L. Q. 279, 315-318 (1972).

41. Kittrie, supra note 10 at 864 asserts that the distinction between procedural due process and substantive due process is blurred in parens patriae proceedings developed for the therapeutic model. But see Donaldson v. O'Connor, 493 F. 2d 507, 522 nn. 21-22 (5th Cir. 1974).

42. See Dans, Rights of Juveniles, The Juvenile Justice System, p. 170 (Clark Boardman, ed. 1974).

43. See Comparative Analysis, supra note 10 at 62-63.

44. See Comment, O'Connor v. Donaldson: The Death of the Quid Pro Quo Argument for a Right to Treatment?, 24 Clev. St. L. Rev. 557, 558-59 (1976).

45. See note 188 infra.

46. In re Gault, 387 U.S. 1 (1967). Gault held that juveniles charged with a crime were entitled to the rights of counsel, id. at 41; confrontation, id. at 57; notice of charges, id. at 33-34; and to the privilege against self-incrimination, id. at 55. Also see generally proposed standards of adjudication drafted by the Institute of Judicial Administration and the American Bar Association Joint Commission on Juvenile Justice Standards Project [hereinafter Standards] in Standards Relating to Adjudication and Law and Tactics (3rd. ed. 1977), a Project of the National Juvenile Law Center [hereinafter Law and Tactics].

47. Id.

48. See note 188 infra.

49. For an excellent discussion on the development of substantive due process see Friedman, Legal Regulation of Applied Behavior Analysis in Mental Institutions and Prisons, 17 Ariz. L. Rev. 39, 65 (1975).

50. See Birnbaum, supra note 1.

51. See note 13 supra. Actually, a better definition was reformulated by Judge Bazelon's law clerk: "What Chief Judge Bazelon was saying, in essence is tautological: There must be a justification for every deprivation without due process of law." Goodman, Right to Treatment: Responsibility of the Courts, 57 Geo. L. J. 680, 690 (1969).

52. 493 F. 2d 507, 520 (5th Cir. 1974). The Fifth Circuit reasoned that any voluntary commitment constituted a "massive curtailment of liberty" which can only be justified in terms of some "permissable governmental goal."

For a discussion of other cases employing the substantive due process rationale see Comparative Analysis, supra note 10 at 61-62.

53. 493 F. 2d at 521.

54. Id.

55. 406 U.S. 715, 738 (1972).

56. 493 F. 2d at 521.

57. This is a generalization for purposes of simplification and does not imply the absence of procedural due process during the confinement. See e.g. Silbert and Sussman, The Rights of Juveniles Confined in Training Schools and the Experience of a Training School Ombudsman, 40 Brooklyn L. Rev. 605 (1974), for rights afforded institutionalized juveniles.

58. See note 188 infra.

59. See text and notes 211-217 infra.

60. See note 39 supra.

61. For general discussions of the equal protection arguments and less developed theories see Shepherd, supra note 6 at 24-25; Kittrie, supra note 10 at 864-65; Goodman, supra note 51 at 690-91; Comparative Analysis, supra note 10 at 63-65; Law and Tactics, supra note 46 at 323-26; and Pyfer, supra note 40 at 301-06.

62. See In re Wilson, 438 Pa. 425, 264 A. 2d 614 (1970). For discussion of Wilson see Pyfer, supra note 40 at 304-05.

63. See A Right to Treatment for Juveniles?, supra note 14 at 175-76.

64. This is not necessarily a negative argument. See e.g. text and notes 77-81 supra.

65. See note 208 infra.

66. The Federal Youth Corrections Act has recently been amended so that juveniles in the federal system may not be incarcerated for periods in excess of the maximum set by law for adult violations. 18 U.S.C. § 5037(b) (1974).

67. See text and notes 239-247 infra.

68. 446 F. Supp. 1295 (E.D. Pa. 1978).

69. Id. at 1316-17. The court distinguished the "right to habitation" from the "right to treatment" stating that the former applied exclusively to the mentally retarded and the latter to the mentally ill. This artificial distinction in terminology is an apparent effort to avoid the problems associated with the right to treatment doctrine since Donaldson. See text and notes 179-188 infra.

70. Id. at 1321.

71. Id. at 1322. "We are convinced that the same equal protection principles enunciated by the court in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), prohibit the segregation of the retarded in an isolated institution such as Pennhurst where habitation does not measure up to the minimally adequate standards. As we have heretofore discussed in this opinion, the retarded at Pennhurst have been segregated in an institution in which they have been and are being denied minimally adequate habitation. Thus, on the basis of this record we find that the retarded at Pennhurst have been and presently are being denied their Equal Protection Rights as guaranteed by the Fourteenth Amendment to the Constitution."

73. Id.

74. See A Right to Treatment for Juveniles?, supra note 14 at 177-78 and Comparative Analysis, supra note 10 at 64-65. Rouse, with bare citation to Robinson, held that indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be cruel and unusual punishment. Rouse v. Cameron, 373 F. 2d 451, 453 (D.C. Cir. 1966).

75. Id.

76. In Holt v. Sarver , 309 F. Supp. 362 (E.D. Ark. 1970), affirmed, 442 F. 2d 304 (8th Cir. 1971), it was held that the prohibition of the eighth amendment was not limited to instances in which the inmate was subjected to punishment directed against him as an individual but could include confinement in an institution if the conditions and practices are of such a repulsive character as to shock the conscience of a reasonably civilized people.

77. See generally Nelson v. Heyne, supra note 29; Inmates of Boys' Training School v. Affleck, supra note 27; Martarella v. Kelly, supra note 28; and Comparative Analysis, supra note 10 at 64-65.

78. See e.g. Lollis v. New York State Department of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970), modified 328 F. Supp. 1115 (S.D.N.Y. 1971), which held that the conditions of isolating juveniles in strip cells to be cruel and unusual punishment and defeating rehabilitative goals. See Pyfer, supra note 40 at 307-15, for an excellent discussion of eighth amendment cases. Also see Note, An Important Step Towards Recognition of a Constitutional Right to Treatment: Lollis v. New York State Department of Social Services, 16 St. Louis U. L. J. 340 (1971).

79. See text and notes 212-17 infra.

80. Id.

81. Id.

82. 4 Whart. 9 (Pa. 1838). See McNulty & White, The Juvenile's Right to Treatment: Panacea or Pandora's Box?, 16 Santa Clara L. Rev. 745, 746 (1976). The court in Crouse took the view that the state has almost unlimited power to intervene in relationships between children and their parents. Also see Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970).

83. See Fox, supra note 82 at 1195 n. 43.

84. See e.g. Miller v. Overholser, 206 F. 2d 415, 419 (D.C. Cir. 1953); In re Ragan, 125 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 951 (1966).

85. For discussions of the role of the progressive judge see Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Johnson, The Constitution and the Federal District Judge, 54 Tex. L. Rev. 465 (1976); and Frankel, The Search for the Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031 (1975). Also see R. Kennedy, Judge Frank M. Johnson, Jr., A Biography (1978).

86. See e.g. Cruz v. Beto, 405 U.S. 379 (1972) and Johnson v. Avery, 393 U.S. 483 (1969). Also see Note, Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal In-

stitutions, 23 Hastings L. J. 1111 (1972) and Cohen, The Discovery of Prison Reform, 21 Buffalo L. Rev. 863 (1972).

87. See e.g. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972), vacated on other grounds, 414 U.S. 473 (1974) and Woe v. Matthews, 408 F. Supp. 419, 428 (E.D.N.Y. 1976) remanded in part, dismissed in part sub nom. Woe v. Weinberger, 556 F. 2d 563 (2d Cir. 1977).

88. See e.g. Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), affirmed in part, vacated and remanded in part, 550 F. 2d 1122 (8th Cir. 1977) and Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1978).

89. See notes 27-30 supra.

90. Rothman, Decarcerating Prisoners and Patients, 1973 Civil Liberties Rev. 8, 12-13 (1973).

91. Id. Also see note 76 supra.

92. See Cameron, Nonmedical Judgment of Medical Matters, 57 Geo. L. J. 716 (1969); Note, Developments in the Law: Civil Commitment and the Mentally Ill, 87 Harv. L. Rev. 1190, 1333 (1974); Note, Civil Restraint, Mental Illness, and the Right to Treatment, 53 Va. L. Rev. 1134, 1148-55 (1967). For example, Rouse was soundly criticized for usurping matters of medical determination. American Psychiatric Ass'n., A Position Statement on the Question of Adequacy of Treatment, 123 Am. J. Psych. 1458 (1967). Also see Burnham v. Department of Public Health of the State of Georgia, 349 F. Supp. 1335, 1340-44 (N.D. Ga. 1972). In Kent v. United States, 384 U.S. 541, 543 (1966), Mr. Justice Fortas, speaking for the court, stated:

"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 police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses."

93. See Kittrie, supra note 10 at 88. Rouse held that the minimum requirements for treatment was a bona fide effort to provide individualized care and periodic inquiries into needs that were to be adequate in the light of present knowledge. Rouse v. Cameron, 373 F. 2d 451, 456 (D.C. Cir. 1966). On the other hand, it does not require the provision of the best possible services. See Martarella v. Kelly, 359 F. Supp. 478, 481 (S.D.N.Y. 1973).

94. The application of the right to treatment doctrine in juvenile matters, and particularly in cases where the child is allegedly incorrigible or beyond parental control, is further compounded by the problem of to whom the right runs. Can it be asserted by the child against the parent's satisfaction with an existing program? Or can the right be "waived" by the child when he or she does not wish to be treated at all? See Szasz, The Right to Health, 57 Geo. L. J. 734, 746 (1969), quoting Krinsky and Jennings, The Management and Treatment of Acting-Out Adolescents in a Separate Unit, 19 Hosp. & Community Psych. 72 (1968).

95. See Silbert and Sussman, supra note 57 at 612, noting that the term treatment usually, while not specific, includes at a minimum adequate food, shelter, clothing; academic, vocational and physical education; medical care; social services; psychiatric services; supervision by trained child care staff; recreation and opportunity for phone calls and visits. Also see

Law and Tactics, supra note 46 at 329-33 and Martarella v. Kelly, 359 F. Supp. 478, 484 (S.D.N.Y. 1973).

96. See Comparative Analysis, supra note 10 at 59.

97. See Katz, The Right to Treatment: An Enchanting Legal Fiction?, 36 U. Chi. L. Rev. 755, 763 (1969). Also see note 288 infra.

98. See generally Law and Tactics, supra note 46 at 611-62 and Silbert and Sussman, supra note 57 at 606-610.

99. See text and notes 33-81 supra.

100. See note 46 supra.

101. See A Right to Treatment for Juveniles?, supra note 14 at 187-88.

102. See e.g. Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971) and Gonzales v. Maillard, No. 50424 (N.D. Cal. filed Feb. 9, 1974), vacated and remanded, 416 U.S. 918 (1974), affirmed, No. 50424 (N.D. Cal., Aug. 28, 1975.)

103. See e.g. Pirsig, The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions, 54 Minn. L. Rev. 101 (1969); Comment, Transfer of Juveniles to Adult Correctional Institutions, 1966 Wisc. L. Rev. 886 (1966) and Comment, Facts and Law of Inter-Institutional Transfer of Juveniles, 20 Me. L. Rev. 93 (1968). A juvenile may be in an inappropriate facility such as an adult prison. See White v. Reid, 125 F. Supp. 647 (D.D.C. 1954). Compare, Murray v. Owens, 465 F. 2d 289 (2d Cir. 1972). Also see note 103 supra.

104. See Silbert and Sussman, supra note 57 at 608, arguing that since

the purpose of confinement is treatment and not punishment, once it is determined that the child requires no further treatment he or she should be released even if the time period has not expired.

105. See e.g. In re I, 64 Misc. 2d 878, 316 N.Y. 2d 356 (Fam. Ct. 1970). Few cases have actually ordered the release of the mentally ill, which questions the effectiveness of the right to treatment suit. Judge Bazelon's standard for determining the release of those who have not received treatment would be the length of time without adequate treatment, the degree of danger to the community, and the prospect for successful treatment. Bazelon, The Right of Mental Patients to Treatment and Renumeration 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).

106. See note 105 supra.

107. In the case of In re Savoy, 98 Wash. L. Rep. 1937 (Oct. 30, 1970), a juvenile court judge in the District of Columbia refused to allow commitment of a juvenile to a facility which the court found inadequately equipped to provide treatment.

108. See note 208 infra.

109. Suits challenging the conditions of institutions have been equated to both prison and mental health litigation. The conditions issues most resemble prison reform cases where ingredients are solitary confinement, mail censorship and deprivations of personal liberties. The treatment or rehabilitative program is more an off-shoot of the mental health litigation area.

See Law and Tactics, supra note 46 at 613.

110. "The Court is not unmindful of the very great burden it confronts in fashioning a specific remedy pursuant to these general findings...The Court sees its present function as steering a middle course between the indefensible extreme of abstinence and the impossible extreme of superintending the system." Nelson v. Heyne, 355 F. Supp. 451, 461 (N.D. Ind. 1972). Also see Martarella v. Kelly, 349 F. Supp. 575, 585 (S.D.N.Y. 1972), noting: "While decisions... clearly pronounce the Constitutional right of 'treatment' as a quid pro quo for the exercise of the state's rights as parens patriae, they offer little guidance as to the standards for determining the adequacy of treatment." Birnbaum, supra note 18 at 752, listed reasons for lack of an effective right to treatment as : (1) the basis upon which the different courts have recognized the right is vague; (2) the standards by which adequate treatment may be evaluated are too vague; and (3) those remedies which could be used to enforce violations of this right have not been clearly set forth. Also see generally Bazelon, Foreword: A Symposium, A Right to Treatment, 57 Geo. L. J. 676 (1969).

111. For an excellent discussion of the subjective theory and cases see Bailey and Pyfer, supra note 20 at 526-27. Wyatt's lengthy Appendix setting forth minimum constitutional standards for the adequate treatment of the mentally ill has been cited as a perfect illustration of the subjective scrutiny test. Wyatt v. Stickney, 344 F. Supp. 373, 384 (M.D. Ala. 1972).

112. See Bazelon, supra note 112 at 678.

113. See Nelson v. Heyne, 491 F. 2d 352 (7th Cir. 1974). Perhaps the best illustrations of the subjective test have been the individual cases argued

before juvenile and family courts. See notes 136-37 infra. Also see Judge Cohill's opinion in In re Joyce Z., 123 P.L.J. 181 (C.P. Allegh. Co. 1975).

114. Birnbaum strongly disapproved of the subjective test employed by Bazelon in Rouse. See Birnbaum, supra note 18 at 753.

115. Id.

116. Id. at 756.

117. Courts have justified their incursion into the legislative province by citing the failure of legislatures to provide minimum standards. See e.g. Martarella v. Kelly, 359 F. Supp. 478, 482 (S.D.N.Y. 1973) and Holt v. Sarver, 442 F. 2d 304, 309 (8th Cir. 1971).

118. The Supreme Court has noted that the federal judiciary can compel governmental agencies of the state to spend monies to meet constitutional re-requirements. See Griffin v. Illinois, 351 U.S. 12 (1956) and Jackson v. Bishop, 404 F. 2d 571, 580 (8th Cir. 1968). A state's lack of resources is not justification for a state's violation of constititional rights. See Holt v. Sarver, 442 F. 2d 304, 306-07 (8th Cir. 1971). But a state may refuse to fund treatment programs. In Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974), affirmed in part, vacated and remanded in part, 550 F. 2d 1122 (8th Cir. 1977), the district court ordered state officials to spend unappropriated monies to implement the decree involving the mentally retarded, but the Court of Appeals vacated to give the legislature a second opportunity to appropriate monies. It is possible that 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). Also see Morales v. Turman, 383 F. Supp. 53, 59-60 (E.D. Tex. 1973), stating that "inadequate resources can never be an adequate justification for depriving any person of his constitutional rights." However, since legislatures are ultimately vested with the right to public purses, absent legislative appropriation the right to treatment will suffer from lack of nourishment. See Kittrie, supra note 10 at 880.

119. Shepherd, supra note 6 at 40, criticizes Morales because it "unduly stresses such matters as the educational requirements for professional staff, the ratio of the number of psychologists and psychiatrists to the number of juveniles, the specific type of psychological tests, and similarly specific mandates in other areas. This sort of specificity places too detailed a judicial imprimatur on a particular treatment modality or set of modalities. In the absence of such a court order, if a treatment program is administratively adopted and implemented and the promised results do not occur, an administrative decision to discard and dissolve the program can be made relatively quickly, despite bureaucratic inertia. If such a program is judicially mandated by the court order, however, this sort of facile modification or dissolution of the program is practically impossible." This view has been subsequently adopted by the Fifth Circuit: "Since the proper treatment of juveniles is a matter of dispute, the standards set forth by the District Court cannot be said to be the only constitutional method for rehabilitating juveniles." Morales v. Turman, 562 F. 2d 993, 997 (5th Cir. 1977).

120. See generally Schwitzgebel, Right to Treatment for the Mentally Disabled, 18 Harv. Civ. Rights - Civ. Liberties Rev. 513, 523-28 (1973); Comparative Analysis, supra note 10 at 66-67; Bailey & Pyfer, supra note 20 at 526-27. Birnbaum, supra note 18 at 754 suggests enforcement of the right to treatment through standards promulgated by the American Psychiatric Association. However, Schwitzgebel notes at 523 that the A.P.A. no longer recommends staff/patient ratios as a criterion for evaluating the adequacy of treatment.

121. This is similar to the early standards suggested by Chief Justice Burger. See note 185 infra.

122. Standards have now been developed. For example, the Commission on Accreditation for Corrections of the American Correctional Association recently released a Manual of Standards for Juvenile Probation and Aftercare Services and a Manual of Standards for Juvenile Detention Facilities and Services (1978). Also see Standards, supra note 46.

123. See Comparative Analysis, supra note 10 at 67.

124. It has been argued that courts abdicate their responsibilities by accepting numerical standards as conclusive proof of treatment. See Halpern, A Practicing Lawyer Views the Right to Treatment, 57 Geo. L. J. 782, 792 (1969). External criteria are feared by Rothman, supra note 90 at 25, who believes that the objective approach may legitimize total institutions. Also see note 173 infra.

125. The court in Morales permitted experts to live with institutionalized juvenile offenders for several weeks. Morales v. Turman, 59 F.R.D. 159

(E.D. Tex. 1972). The heavy reliance upon experts has been criticized as more appropriate to the development of statutory rights rather than constitutional rights. See Eager and Logemann, Juvenile Justice, 1974/1975 Annual Survey of American Law at 572. Typically, however, expert witnesses are difficult to recruit and prove expensive. See Halpern, supra note 124 at 796.

126. For an excellent discussion on the uses of amici curiae see Wald and Schwartz, Trying a Juvenile Right to Treatment Suit: Pointers and Pitfalls for Plaintiffs, 12 Amer. Crim. L. Rev. 125 (1974).

127. See generally Lottman, Enforcement of Judicial Decrees: Now Comes the Hard Part, 1 Mental Disability L. Rptr. 69 (1976); Nejelski and LaPook, Monitoring the Juvenile Justice System: How Can You Tell Where You Are Going If You Don't Know Where You Are?, 12 Amer. Crim. L. Rev. 9 (1974); and Harrs and Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings (1976).

128. See Harvard Law Review, Mental Health Litigation: Implementing Institutional Reform, 2 Mental Disability L. Rptr. 221, 225 (1977) [hereinafter Implementing Institutional Reform].

129. See Implementing Institutional Reform, supra note 128 at 228-32.

130. Morales, see note 216 infra; Wyatt, see note 20 supra.

131. Rothman, supra note 90 at 14-15, traces the activism from early civil rights and draft resister cases. He hypothesizes that public interest lawyers in a sense followed their clients into jails and were subsequently attracted by inmates to prison conditions. Insights were gained from intellectuals and civil rights leaders who were exposed to the rigors of prison life.

132. Id. at 16. Prisoners were the first to complain about their conditions insofar as juveniles and assylum inmates were less likely to create public and institutional agitation.

133. Some major projects include the Youth Law Center, San Francisco; the National Juvenile Law Center, St. Louis (these have recently combined into the National Center for Youth Law); the American Civil Liberties Union Foundation, Juvenile Rights Project, New York City; and the Children's Defense Fund, New York City. In additional, there has been a proliferation of special litigation projects under short term grants. The federal government has also participated in litigation, but governmental authority may be limited to that of amicus curiae or plaintiff-intervenor. For example, the Fourth Circuit Court of Appeals has held that the United States Attorney General, without specific statutory authority, may not bring suit against state officials for redress of alleged violations of the rights of the institutionally mentally retarded. See United States v. Solomon, 419 F. Supp. 358 (D.Md. 1976), affirmed, 563 F. 2d 1121 (4th Cir. 1977).

134. The National Center for Youth Law is a designated "back-up" center for attorneys of the National Legal Services Corporation. The Center may appear in the role of plaintiff. intervenor plaintiff or amicus curiae to local legal services programs and supply research and litigation expertise.

135. See generally Wald and Schwartz, supra note 126; Law and Tactics, supra note 46 at 666-81; and Ennis, Litigation: Strategies and Techniques, Vol. 3, Legal Rights of the Mentally Handicapped, p. 124 (P.L.I. 1973). At 144, Wald and Schwartz note that one of the first things a litigator must de-

cide is whether to negotiate or litigate, for not all right to treatment cases need to be tried.

136. If the case involves only one individual it may be mooted by a release or tranfer. See Creek v. Stone, supra note 15; Guy v. Ciccone, 439 F. 2d 400 (8th Cir. 1971); and Solomon v. Cameron, 377 F. 2d 170 (D.C. Cir. 1970).

137. See McNulty and White, supra note 82 at 769-77. The New York Family Court Act gives the family judge special powers to fashion treatment remedies. See N.Y. Family Court Act, § 255 (McKinney 1975). See e.g. In re Leopoldo Z., 78 Misc. 2d 866, 358 N.Y.S. 2d 811 (Fam. Ct. 1974); In re David M., 77 Misc. 2d 491, 354 N.Y.S. 2d 80 (Fam. Ct. 1974); and In re Carlos P., 78 Misc. 2d 851, 358 N.Y.S. 2d 608 (Fam. Ct. 1974).

138. See generally Law and Tactics, supra note 46 at 679-81.

139. See generally Wald and Schwartz, supra note 126 at 141-42.

140. Appropriation of funds is a legislative matter. But see Ray v. South, 176 Ohio St. 241, 198 N.E. 2d 919 (1964), upholding a mandamus suit brought by a juvenile judge against county officials to expend monies required by a state statute for the salary and expenses of the juvenile court judge and court for a detention facility. See also note 112 supra.

141. For an excellent discussion on the inherent powers of juvenile courts see McNulty and White, supra note 82 at 777-79 and N. Weinstein, Inherent Powers of the Court, Juvenile Justice Textbook Series (1978).

142. See e.g. Janet D. v. Carros, 362 A. 2d 1060 (Pa. Sup.Ct. 1976), for an unsuccessful attempt to hold a child welfare administrator in contempt

for allowing a juvenile needing special attention to abscond from a shelter facility on numerous occasions. "Contempt is purely a sanction, and a blunt one at that. It is viewed as a serious a troubling punishment by administrators even when unaccompanied by fines or imprisonment. In the Willowbrook case, for example, where organizational complexity has caused major delays in implementation, a recent contempt motion appears to have expedited bargaining by the administrators. The publicity and opprobrium accompanying contempt is damaging to public officials, and the defendants typically seek to vacate the contempt order quickly." See Implementing Institutional Reform, supra note 128 at 228.

143. Habeas corpus, the extraordinary great writ of personal liberty in Anglo-American jurisprudence, has been traditionally viewed as a remedy whereby one who detains another is commanded to produce the body of the detained at a designated time and place to inquire into the legality of detention. It is not ordinarily a remedy to review errors in proceedings when direct appeal is available and is regarded as a collateral remedy. See Note, State Habeas Corpus for Juvenile Delinquents in Texas, 12 Houston L. Rev. 1126, 1132 (1975). It has long been held that habeas corpus is proper for attacking custody determinations. See e.g. New York Foundling Hospital v. Gatti, 203 U.S. 429 (1906). Generally, for a thorough treatment of habeas corpus see Law and Tactics, supra note 46 at 413-13. Also see Miller v. Overholser, 206 F. 2d 415, 419 (D.C. Cir. 1953) and Trimble v. Stone, 187 F. Supp. 483 (D.D.C. 1960).

144. Id. Also see Garland, Collateral Attack on Juvenile Court Delin-

quency Decisions, 57 J. Crim. L.C. & P.S. 136 (1966); A Right to Treatment for Juveniles?, supra note 14 at 166; and Hickey, Habeas Corpus and Juvenile Courts, 15 Juv. Ct. Judges J. 7 (1964).

145. In Lake v. Cameron, 364 F. 2d 657, 660 (D.C. Cir. 1966), the traditional limits of habeas corpus were expanded by holding the court has the duty to review and exhaust the available resources of the community in order to provide the best care to the mentally ill individual. However, Chief Justice Burger dissented from this opinion on the grounds that the court is not equipped to carry out a search for a judicially approved course of treatment and that the burden should be placed upon the petitioner to show the existence of alternate forms of treatment. Id. at 663-64.

146. See note 143 supra.

147. See Note, State Habeas Corpus for Juvenile Delinquents in Texas, 12 Houston L. Rev. 1126, 1140 (1975).

148. A juvenile court's power to rehear and modify a decree at any time limits the use of the writ to attack the decree. In other words, the court's power to rehear and modify an order at any time serves to extend the time of its continuing jurisdiction, and a juvenile seeking state habeas corpus might be deemed to have an adequate type of appellate remedy by modification that would preclude obtaining a writ of habeas corpus. See Garland, supra note 144 at 1140.

149. See Law and Tactics, supra note 46 at 412-13. However, it has been held that a petitioner need only exhaust those state remedies available to him at the time of his petition and that strict adherence to state proce-

dural rules is not necessarily a prerequisite to federal habeas corpus review. See Fay v. Noia, 372 U.S. 391 (1963). Also see Comment, Federal Habeas Corpus: The Concept of Custody and Access to Federal Court, 43 J. Urban L. 61 (1975).

150. See Law and Tactics, supra note 46 at 679-81. Also see Nguyen Dayen v. Kissinger, 328 F. 2d 1194 (9th Cir. 1975) and Note, Multiparty Habeas Corpus, 81 Harv. L. Rev. 1182 (1968).

151. See Law and Tactics, supra note 46 at 679-81 and A Right to Treatment for Juveniles?, supra note 14 at 166-67. Historically, Wyatt v. Stickney, supra note 20, was the first such case brought on behalf of the mentally ill, and Inmates of Boys' Training School v. Affleck, supra note 27, was the first case attacking the conditions of institutionalized juvenile offenders.

152. See Law and Tactics, supra note 46 at 669-72 and generally Antieau, Federal Civil Rights Acts (1978 Supp.)

153. Id.

154. See Wald and Schwartz, supra note 126 at 144-45 and note 302 infra.

155. See e.g. Levine, Social Worker Malpractice: A New Approach Toward Accountability in the Juvenile Justice System, 1 J. Juvenile L. 101 (1977).

156. See generally Scheuer v. Rhodes, 416 U.S. 235 (1974); Wood v. Strickland, 420 U.S. 308 (1975); and Monell v. Department of Social Services of the City of New York, ___U.S.___(1978) for recent federal cases involving state and local officials. For discussions on state immunities see e.g. Snyder v. Mouser, 149 Ind. App. 334, 272 N.E. 2d 627 (1971) (foster-parent killed by foster-child) and Vonner v. State Department of Public Welfare, 273 D. 2d 252

(La. 1973) (foster-child murdered by foster-parent).

157. See Schwitzgebel, supra note 120 at 530-34.

158. Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S. 2d 486 (Ct.Cl. 1968), levied monetary damages upon a state for wrongful confinement in a treatment setting. Found incompetent to stand trial, Whitree had been committed for an indefinite period to the Mattewan State Hospital and failed to receive adequate treatment for a period of six years and was awarded $300,000 in consequential damages. Also see Morgan v. State, 319 N.Y.S. 2f 151 (Ct.Cl. 1970) and O'Neil v. State, 66 Misc. 2d 936, 323 N.Y.S. 2d 56 (Ct.Cl. 1971). For extensive citations on damage suits against institutions see A Right to Treatment for Juveniles?, supra note 14 at 192-195.

159. See notes 24-25 supra.

160. See A Right to Treatment for Juveniles?, supra note 14 at 191-92. Also see Eldredge v. Kamp Kachess Youth Services, Inc., 583 P. 2d 626 (Wash. Sup. Ct. 1978) (en banc), holding a group child care facility that contracts with the state to provide temporary health care for dependent children referred from juvenile courts or the state is not entitled to sovereign immunity from tort liability for improper supervision of children.

161. For a discussion on the prima facie glamour normally associated with child advocacy and its myths see Levine, Child Advocacy and the Psychotherapist, 13 Voices: J. Amer. Academy of Psychotherapists 77 (1977).

162. See A Right to Treatment for Juveniles?, supra note 14 at 167.

163. See Law and Tactics, supra note 46 at 665.

164. "Over the last decade and a half, however, the growing commitment

to litigation has sometimes obscured the larger issue of the ultimate aims of reform. Lawyers have often resembled politicians on the campaign trail, moving from crisis to crisis with little time to think more than one step ahead." See Rothman, supra note 90 at 19.

165. Id. at 19-21.

166. "Once a guard is required to answer to an inmate and defend the reasons for his action, once a prisoner is freed from discretionary abuse, then prisons will be unable to function. Since terror and arbitrariness are at the heart of the system, granting rights to prisoners is the best way to empty the institutions. And emptying the institutions, decarcerating the inmates, they say, should be the ultimate goal of reform." Id. at 20. This concept has been applied in another form involving the mentally disabled. Litigators have brought suits against assylums alleging violation of the thirteenth amendment prohibition against involuntary servitude and requesting that patients be paid for their labor. It is argued that this will drive the costs of the instititions upward and reduce their populations. See e.g. Jobson v. Henne, 355 F. 2d 129 (2nd Cir. 1965). Also see Bazelon, The Right of Mental Patients to Treatment and Renumeration for Institutional Work, 39 Pa. Bar Ass'n. Q. 543 (1968).

167. See Implementing Institutional Reform, supra note 128 at 223 n. 31, citing Perlman, "The Workers' Perspective" and Bloom, "Facing the Fiscal Dilemma" in Paper Victories and Hard Realities: The Implementation of the Legal and Constitutional Rights of the Mentally Disabled, 39, 85-86 (V. Bradley & G. Clarke, eds. 1976) [hereinafter Paper Victories], noting that the consent order concerning the Willowbrook State School in New York mandated that the

institutional population be reduced from 3,000 to 250 in six years. As a result, the budget for each resident increased from $4,600 to an estimated $26,300. Estimated implementation costs in the first fiscal year were an additional $15,000,000 in capital construction and $14,000,000 in operating expenses.

168. See Rothman, supra note 90 at 21.

169. For example, Swanger has observed: "The right to treatment claim, however, is not employed to obtain relief in the form of a 'bigger and better' institution with a complex 'treatment' program and staff. Instead, the right to treatment and its corollary, the right to treatment in the least restrictive alternative setting, can be used as convenient legal entrees to other broader and more important issues such as deinstitutionalization and community and individualized treatment services for children and their families." Swanger, Juvenile Institutional Litigation, 11 Clearinghouse Rev. 219 (1977).

170. See text and notes 274-297 infra.

171. See note 302 infra.

172. See A Right to Treatment for Juveniles?, supra note 14 at 169.

173. See Swanger, supra note 169 at 219; Rothman, supra note 90 at 22-30; and Miller, Editorial, Vol. 1, No. 9, Institutions, Etc. (Sept. 1978). Law and Tactics, supra note 46 at 623-61 and Silbert and Sussman, supra note 57 at 607-20 list the many rights, privileges and programs that have been secured for institutionalized juveniles. Even co-educational living may be on the horizon. See Anderson, Co-Corections, 4 Corrections Magazine 32 (1978) and Silbert and Sussman at 616-17. There are fears that the "perfect" institution

may be unassailable. Also see Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974), where the state of Minnesota was placed in the position of up-grading an institution it had planned to close.

174. See Paper Victories, supra note 167. Rothman, supra note 90 at 21, states: "Lawyers in both camps have had little time or inclination to ponder implications of their daily decisions and impressive courtroom victories have satisfied many reformers. Those who think rehabilitation possible can look forward to the implementation of Judge Johnson's standards [Wyatt v. Stickney]; those more determined to see the wards empty note gleefully that the entire State of Alabama has fewer licensed psychiatrists than are needed to carry out the judicial order."

175. Donaldson v. O'Connor, 493 F. 2d 507 (5th Cir. 1974), vacated and remanded sub. nom. O'Connor v. Donaldson, 422 U.S. 563 (1975), rehearing denied, 423 U.S. 885 (1975), on remand, 519 F. 2d 59 (1975) (per curiam). See Grant, Donaldson, Dangerousness and the Right to Treatment, 3 Hastings Con. L. Q. 599 (1976) and Comment, The Death of the Quid Pro Quo Argument for a Right to Treatment?, 24 Cleve. St. L. Rev. 557 (1976).

176. See Grant, supra note 175 at 601.

177. 493 F. 2d 507 (5th Cir. 1974).

178. Id.

179. 422 U.S. 463 (1975).

180. 422 U.S. at 573.

181. Id. at 576.

182. 493 F. 2d at 509.

183. 422 U.S. at 578 n. 12.

184. Id. at 578. (Burger, C.J., concurring).

185. A review of Chief Justice Burger's opinions while a judge with the Circuit Court for the District of Columbia indicates a predictable posture in Donaldson. In Dobson v. Cameron, 383 F. 2d 519, 525 (D.C. Cir. 1967) (en banc) (Burger, J., concurring), Burger referred to the Rouse case as entirely dictum and that judicial review is mandated in those situations only when "one challenges he is being detained without any treatment." (emphasis original) In Lake v. Cameron, 364 F. 2d 657, 663 (1966) (en banc) (Burger, Danaher and Tamm, J.J., dissenting), urged, "[T]hese functions are normally reserved to social agencies...Neither this Court nor the District Court is equipped to carry out the broad geriatric inquiry proposed or to resolve the social and economic issues involved [in civil commitments]...A United States Court in our legal system is not set up to initiate inquiries and direct studies of social welfare facilities or other social problems...[The statute] does not transmute the United States District Court for the District of Columbia into an administrative agency for proceedings involving the mentally ill." Also see note 145 supra.

186. 422 U.S. at 580.

187. Id. at 581-589. For a more detailed discussion see Grant, supra note 175.

188. The Chief Justice disapproved of the quid pro quo theory arguing that the converse would be unacceptable; to permit commitment procedures to fall

short of due process merely because treatment is be provided to the person detained. "Our concepts of due process would not tolerate such a 'trade-off'." Id. at 589. While the substantive due process theory was not directly discussed, the portents of the concurring opinion undermine the concept. The fact that rehabilitation need not be the sole basis for confinement of the mentally ill counters arguments for a constitutional right. See text and note 60 supra. For an opinion that the Chief Justice "missed" the distinction between the procedural and substantive due process theories see Comment, Constitutional Law - Simple Custodial Confinement of Civilly Committed Nondangerously Mentally Ill Violates Constitutional Right to Freedom, 10 Suffolk U. L. Rev. 10, 88-89 (1975). Also see Comment, The Supreme Court Sidesteps the Right to Treatment Question, 47 U. Colo. L. Rev. 299 (1976). See text and notes 42-60 supra for a discussion of the fourteenth amendment origins of the right to treatment.

189. Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973), 383 F. Supp. 53 (E.D. Tex. 1974), vacated and remanded, 535 F. 2d 864 (5th Cir. 1976), reversed and remanded, 430 U.S. 322 (1977), remanded for further hearing, 562 F. 2d 993 (5th Cir. 1977), rehearing denied, 565 F. 2d 1215 (5th Cir. 1977).

190. Morales v. Turman, 326 F. Supp. 677 (E.D. Tex. 1971).

191. The listed amici included the American Orthopsychiatric Association and the Civil Rights Division of the U. S. Justice Department. See note 126 supra.

192. 364 F. Supp. 166.

193. 383 F. Supp. 53.

194. Id. at 85-88.

195. Id. at 88-91.

196. Id. at 91-92.

197. Id. at 93-100.

198. Id. at 101-05.

199. Id. at 105-20.

200. Id. at 121-26.

201. Id. at 70-71.

202. Id. at 122.

203. Id. at 122-23.

204. Id. at 125.

205. Id. at 124.

206. Id. at 125.

207. Id.

208. Id. Although the plaintiffs had requested that all of the rural T.Y.C. institutions be closed the court ordered that two of the institutions be abandoned as soon as possible.

209. 535 F. 2d 864 (5th Cir. 1976). Judge Wisdom, who had authored Donaldson and Wyatt was absent from the panel in Morales.

210. Id. at 873.

211. 430 U.S. 322 (1977).

212. 562 F. 2d 993 (5th Cir. 1977).

213. Id. at 998.

214. Id. at 999.

215. Id. at 998-99.

216. Id.

217. For a suggestion that Wyatt is still good law despite Donaldson, see "What More": A Constitutional Right to Treatment?, 22 Loyola L. Rev. 373, 383 (1976). See Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295, 1316 n. 52 (E.D. Pa. 1978), where Judge Broderick argues that "it should be noted that four days after deciding Donaldson, the Supreme Court denied certiorari in yet another Fifth Circuit right to treatment case. The Department of Human Resources of the State of Georgia v. Burnham, 422 U.S. 1057 (1975). In Burnham, the district court had found there there was no constitutional right to treatment, 349 F. Supp. 1335 (N.D. Ga. 1972). The Fifth Circuit reversed on the basis of its Donaldson and Aderholt decisions, 503 F. 2d 1319 (5th Cir. 1974). Even though the Supreme Court had vacated the Donaldson decision only four days before it denied certiorari in Burnham, apparently allowing Aderholt, with its holding of a constitutional right to treatment to remain as the law of the Fifth Circuit."

218. "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections afforded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. United States, 383 U.S. 541, 555-56 (1966). There is now a movement to abolish the separate existence of the juvenile court. Senator Edward M. Kennedy has been quoted as stating: "The idea of independent juvenile courts... has backfired." Vol. VIII, No. 5, Juvenile and Family Court Newsletter (Oct.

1978). A number of writers have suggested that the jurisdiction of the juvenile court be transferred to adult criminal court or combined with a unified family court. See e.g. Fox, Abolishing the Juvenile Court, 28 Harv. L. Sch. Bull. 22 (1977); McCarthy, Should Delinquency Be Abolished?, 23 Crime & Delinq. 196 (1977); Wizner & Keller, The Penal Model of Juvenile Justice: Is Juvenile Court Jurisdiction Obsolete?, 22 N.Y.U. L. Rev. 1120 (1977); and Guggenheim, A Call to Abolish the Juvenile Justice System, Vol. II, No. 9, Children's Rights Report (June 1978). Also, Standards Relating to Court Organization and Administration, supra note 46, at 1.1 and 1.2, call for juvenile court jurisdiction to be included in a family court division of the highest court of general jurisdiction and that the juvenile intake function, juvenile probation services, and juvenile detention programs be administered by the executive branch of government.

219. For an early account of the development of the juvenile court see Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909). Kittrie, supra note 10 at 849 cites the legendary Dean Roscoe Pound as hailing the establishment of the juvenile court as one of the most significant advances in the administration of justice since the Magna Charta. See Shepherd, supra note 6 at 14-17. Also see revisionist histories in Law and Tactics, supra note 46 at 3-7; Fox, Juvenile Justice Reform: An Historical Perspective, 22 Stan. L. Rev. 1187 (1970); and A. Platt, The Child Savers (1969).

220. See Fox, Philosophy and the Principles of Punishment in the Juvenile Court, 8 Fam. L. Q. 373, 379 (1974).

221. Many juvenile institutions have been comparable to adult prisons

and claims of "therapeutic" or "rehabilitative" environments have not been the case. See text and notes 72-81 supra.

222. Despite the avoidance of criminal records, employers, schools and the armed forces continue to view delinquents as "junior criminals." See Builhuisen and Dijksterhuss, Delinquency and Stigmatization, 11 Brit. J. Criminology 185 (1971) and Mahoney, Effect of Labelling Upon Youths, 8 Law and Soc'y. Rev. 583, 600 (1974).

223. There is a distinct trend to make juvenile court hearings public and for the names of juveniles to be released to the news media under certain conditions. See e.g. Howard, Grisso & Neems, Publicity and Juvenile Court Proceedings, 11 Clearinghouse Rev. 203 (1977); Gardner, Publicity and Juvenile Delinquents, 15 Juv. Ct. Judges J. 29 (1964); and Brucker, Right to Know About Juvenile Delinquents, 15 Juv. Ct. Judges J. 16 (1964).

224. See F. Allen, Borderland of Criminal Justice 51-53 (1964); H. Lou, Juvenile Courts in the United States 144 (1926); and Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 388-90 (1961). Also see Burger, No Man Is An Island, 56 A.B.A.J. 325, 326 (1970), noting: "Even though 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."

225. See Bazelon, Racism, Classism and the Juvenile Court Process, 53 Judicature 373, 377 (1970).

226. For a classic example of the myths of the juvenile court system

see the jargon specially adopted for court use in President's Commission of Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency & Youth Crime 2 (1967), cited in Shepherd, supra note 6 at 18. A juvenile justice system that resorts to incarceration masquerading as rehabilitation serves only to increase the already critical juvenile crime problem. See Juvenile Justice Amendments of 1977, Report of the Committee on the Judiciary of the United States Senate, p. 34 (May, 14, 1977) [hereinafter Juvenile Justice Amendments of 1977: Report]. "One of the most dangerous tendancies in the juvenile justice field is over-dependence on pseudo-scientific diagnostic and classification typologies...Phrases like 'better self-image,' 'needs to stop manipulating authority figures,' 'needs to adjust to peers,' 'needs a new value system,' 'has poor impulse control,' 'needs a sheltered environment,' appear with depressing frequency." See Wald and Schwartz, supra note 126 at 127.

227. Kittrie, supra note 10 at 885.

228. See e.g. Stiller, PINS - A Concept in Need of Supervision, 12 Amer. Crim. L. Rev. 33 (1974) and Sheridan, Juveniles Who Commit Non-Criminal Acts: Why Treat Them in a Correctional System?, 31 Fed. Prob. 26 (1967).

229. See text and notes 248-273 infra.

230. See note 228 supra.

231. See Shepherd, supra note 6 at 17.

232. See generally Simpson, Rehabilitation as the Justification of a Separate Juvenile Justice System, 64 Calif. L. Rev. 984 (1976), for numerous

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1 OF 2

citation to the various theories to the causations of delinquency. "At least as part of the unequal distribution of crime can be traced to the idleness of many children. The rate of unemployment among teenagers is at a record high. Amoung minority teenagers it is an incredible 50 percent. Teenagers are at the bottom rung of the employment ladder. Street crime has become a surrogate for unemployment for many, and vandalism a release from boredom." See Juvenile Justice Amendments of 1977: Report, supra note 226 at 34. But see Podboy and Mallory, The Diagnosis of Specific Learning Disabilities in a Juvenile Delinquent Population, 42 Fed. Prob. 26 (1978).

233. Law and Tactics, supra note 46 at 569-608, gives a concise review of various popular treatment modalities such as group work, social casework, guided group interaction (positive peer culture), behavioral modification, relaity therapy and transactional analysis. In Nelson v. Heyne, 491 F. 2d 352, 360 (7th Cir. 1974), the court rejected the classification of juveniles under the Quay System which attempted to identify certain behavioral types for the purposes of grouping juveniles with common types in cottages. Also see O'Connor v. Donaldson, 422 U.S. 563, 569 (1975), acknowledging "milieu therapy" to be a euphemism for simple custodial care.

234. For citations and discussion see Shepherd, supra note 6 at 34.

235. See e.g. A. Hirsch, Doing Justice 11-18 (1976) and American Friends Service Committee, Struggle for Justice (1971).

236. See e.g. Kittrie, supra note 10 at 858. But it has been argued that juvenile courts have never been given the personnel, facilities, services, and operating funds necessary to implement the rehabilitative ideal. See

Midonick, Children, Parents and the Courts: Juvenile Delinquency, Ungovernability and Neglect at 163 (1972).

237. See note 46 supra.

238. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). McKeiver represents a reflective pause by the Supreme Court to consider the wisdom of further imposing procedural protections. Justice Blackmun hinted in his plurality opinion that the court may eventually decide that there are insufficient benefits from a separate juvenile justice system. "If the formalities of the criminal adjudication process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come some day, but for the moment we are disinclined to give impetus to it." Id. at 551. For arguments concerning implementation of the right see Note, Jury Trials for Juveniles: Rhetoric and Reality, 8 Pacific L. J. 811 (1977). Also see Standards, Relating to Adjudication, supra note 46 at 4.1 calling for the right to a jury trial for juvenile offenders.

239. Juvenile court critics have suggested that the powers of judges be limited exclusively to adjudicatory duties. See Kittrie, supra note 10 at 857. Meanwhile, European models are being examined by scholars for possible alternatives to the present system. See e.g. Fox, Juvenile Justice Reform: Innovation in Scotland, 12 Amer. Crim. L. Rev. 61 (1974).

240. See text and notes 231-36 supra.

241. See text and notes 248-73 infra.

242. See Kittrie, supra note 10 at 851-53.

243. See e.g. McCune and Skoler, Juvenile Court Judges in the United

States, Part I: A National Profile, 11 Crime & Delinquency 121 (1965).

244. For the history of indeterminate sentencing of juveniles see Fox, supra note 220 at 377-78. Also see generally Cohen, Juvenile Offenders: Proportionality vs. Treatment, Vol. II, No. 8, Children's Rights Report (May 1978).

245. Indeterminate sentencing is a "favorite target from both the Left and the Right; the former sees indeterminancy as the visitation of unnecessary suffering, while the latter, seeing primarily things like furlough programs and escapes, to the exclusion what actually goes on in institutions, sizes up indeterminancy as the opportunity for soft-headed administrators and paroling authorities to let loose a lot of dangerous kids who ought to be locked a good deal longer. Punishment, not being tied to the treatment requirement indeterminancy, is a safe haven for all." See Fox, The Reform of Juvenile Justice: The Child's Right to Punishment, 25 Juvenile Justice 2, 7 (1974).

246. See text and notes 33-81 supra.

247. See generally Getting Tough, supra note 39, which reports that nineteen states have revised their juvenile legislation during an eighteen month period. Changes include amending purpose clauses from treating children to protecting the community, mandatory sentencing and making adult certification procedures more liberal. The cental virtue of the designated felony is that the decision about punishment is a matter of public debate. See Fox, supra note 28 at 8. Also see Shepherd, supra note 6 at 13, for statistics on juvenile crime.

248. See generally A Right to Treatment for Juveniles?, supra note 14 at 168-70. For an interesting discussion on the growth of large institutions

in Pennsylvania see Packel, The History of Pennsylvania's Juvenile Institutions: A Sesquicentennial Review, 22 Villanova L. Rev. 83 (1977). But see Mack, The Juvenile Court, 23 Harv. L. Rev. 104, 113 (1909).

249. See Wald and Schwartz, supra note 126 at 131 and Simpson, supra note 232 at 990, citing Palmer, The Youth Authority's Community Treatment Project, 38 Fed. Prob. 3, 12 (1974). Judge Tamilia, however, argues that we must recognize that not all children can be cared for in community based alternatives. He asserts that: "Many children are so far out of control and are in need of structure and physical management that only a relatively closed setting can provide it. We are deluding ourselves if we believe open settings even with overwhelming saturation of services, can manage these cases...Many children can be helped by open community programs if they can first be maintained in the structure controlled setting." See Tamilia, Toward a More Credible Juvenile Justice System in the United States, 27 Juvenile Justice 3, 7 (1976). Also, see Amos, Failure of Juvenile Institutions, 32 Fed. Prob. 4 (1968).

250. These models fail to foster individual independence required for community existence. See Kittrie, supra note 10 at 860. Also see Opton, Institutional Behavior Modification as a Fraud and Sham, 17 Ariz. L. Rev. 20, 23 (1975), defining the "total institution" as a "society in which the equilibrium of power has been severely disrupted: virtually all power to the keepers, virtually none to the kept. To attain and maintain this unbalanced distribution of power requires a continuous struggle, a struggle for power common to all institutions. Total institutions run counter to human desires for autonomy and dignity. The central fact of such institutions is that power over important and

even trivial aspects of institutional life flows from above and never from below. This is hopelessly at odds with the ideas of freedom and dignity, the felt natural rights of members of society." Further, see Miller and Dinitz, Measuring Institutional Impact: A Follow-Up, 11 Criminology 417 (1973) and Culbertson, Effect on Institutionalization on the Delinquent Inmate's Self-Concept, 66 J. Crime & Criminology 88 (1975).

251. See Juvenile Justice Amendments of 1977: Report, supra note 226 at 33-43.

252. See Shepherd, supra note 6 at 32.

253. See text and notes 72-81 supra.

254. For bibliography see Law and Tactics, supra note 46 at 551-67 and Shepherd, supra note 6 at 33. Also see Standards, Relating to Corrections Administration, supra note 46 at 6.2 and 7.2, requiring that secure confinement is permissable only for the most serious crimes and for a maximum of twenty-four months; while a twenty bed limit is placed on any single facility. This would eliminate most institutions with the exception of group homes.

255. See Dr. Miller's version of the Massachusetts saga in Vol. I, No. 11, Institutions, Etc., at 14. Also see Coates, Miller and Ohlin, Diversity in a Youth Correctional System (1978).

256. 42 U.S.C. §§ 5601 et seq. (1978 Supp). See Juvenile Justice Amendments of 1977: Report, supra note 226 at 13-31. Also, for an excellent treatment of the legislation see Rector, Juvenile Justice and Delinquency Prevention Act of 1974, 50 L.A.B. Bull. 151 (1975).

257. 42 U.S.C. § 5633(a)(13).

258. 42 U.S.C. § 5633(a)(12). Hunter Hurst, Executive Director of the National Center for Juvenile Justice, has noted that a survey conducted by them indicates that at least 21 states now prohibit the detention of status offenders, ans 35 prohibit the commitment of such offenders to correctional institutions. See Wilson, Juvenile Inmates: The Long-Term Trend is Down, Vol. IV, No. 3, Corrections Magazine at 8-9 (Sept. 1978).

259. Moskowitz, The New Flexible 'J.D. Act', Vol. IV, No. 3, Corrections Magazine at 29-31 (Sept. 1978), discusses states which have opted not to participate in the Act because deinstitutionalization was "beyond their reach" or that the money offered was inadequate to justify major reform efforts. Also see The Deinstitutionalization of Status Offenders: Is the Government Committed to Its Own Goal?, Vol. II, No. 10, Children's Rights Report (July-August 1978) [hereinafter Is the Government Committed to Its Own Goal?].

260. See Juvenile Justice Amendments of 1977: Report, supra note 226 at 43, noting that the "Committee is aware of difficulties experienced in assuring states meet monitoring requirements of § 223(a)(14) [42 U.S.C. § 5633(a)(14)]. Most states did not present data to indicate progress towards deinstitutionalization."

261. See Wilson, supra note 258 at 5, where it is explained that in 1960 the number of juveniles incarcerated was 40,000, 37,000 in 1970, 28,298 in 1975, and 26,000 on January 1, 1978. However, the number of juvenile offenders in institutions has been declining for ten years.

262. See e.g. Is the Government Committed to Its Own Goal?, supra note 259.

263. See e.g. Rothman, supra note 90 at 23 and Stone, supra note 10 at

1133, who notes that patients released from hospitals to reduce overcrowding have received worse care than before.

264. Tamilia, supra note 249 at 6, believes that the concept of deinstitutionalization is seductive and promises reduced costs, more humane treatment and lower recidivism. He argues that these policies are a marriage of convenience between state agencies who want to cut their budgets and private operators who want to make fast money. For some skeptical remarks on myths perpetuated by administrators see O'Brien, A Multicomponent Approach to Achieving Failure in Deinstitutionalization: A Planner's Guide to Prevention, Vol. I, No. 4, Institutions, Etc., at 6 (April 1978).

265. See Wilson, supra note 258 at 10.

266. Id.

267. See e.g. Is the Government Committed to Its Own Goal?, supra note 259.

268. The following discussion draws upon Implementing Institutional Reform, supra note 128.

269. In Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973), a union representing institutional employees joined the parents of some of the residents in opposing the consent decree's adoption of a deinstitutionalization policy. See Brief of the Mental Retardation Ass'n. of America, Horacek v. Exon, No. CV 72-L-299 (D. Neb. Oct. 31, 1975).

270. Id.

271. See e.g. Y.W.C.A. of Summit v. Board of Adjustment, 341 A. 2d 355 (N.J. Super. Ct. 1975).

272. Training and recruitment programs are often critical to the success of institutional reforms. See e.g. Johnson and Wood, Judicial, Legislative and Administrative Competence in Setting Institutional Standards, in the President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law at 528, 535-40.

273. See generally Paper Victories, supra note 167.

274. See Simpson, supra note 232 at 985-90 for an excellent discussion on the portents of the rehabilitative model.

275. See note 218 supra and note 297 infra.

276. "It is not a valid criticism that the juvenile justice system fails to cure or rehabilitate children. It has neither the design, the wisdom nor the implementing resources to do any such thing, although it is a matter of concern that the juvenile justice system often pretends that it does." See Fox, supra note 220 at 375.

277. Most delinquents are not "ill in any medically definable way. Many suffer from the general malaise of poverty, with its attendant dislocation of families and inadequate education and vocational opportunities." See E. Shur, Radical Non-Intervention 46-51 (1973).

278. See Szasz, supra note 94 at 740.

279. See Rothman, supra note 90 at 22.

280. See Comparative Analysis, supra note 10 at 57-58, for a summary of positions recommended by standards groups.

281. The child was to be treated and rehabilitated and the proceedings

from apprehension through institutionalization were to be clinical rather than punitive. See In re Gault, 387 U.S. 1, 15-16 (1967). But Mr. Justice Fortas relied upon historians prior to Fox and Platt. See note 219 supra.

282. See e.g. Shepherd, supra note 6 at 13; Simpson, supra note 232; and Fox, Juvenile Justice in America: Philosophical Reforms, 5 Human Rights 63 (1975). Also see note 224 supra.

283. The term "right to punishment" was first used by Professor Sanford J. Fox in a speech presented at the New England Juvenile Justice Institute, held April 18-20, 1974, at Williamstown, Massachusetts. See Fox, The Reform of Juvenile Justice: The Child's Right to Punishment, 25 Juv. Just. 2, 7 (1974).

284. See Shepherd, supra note 6 at 28.

285. Punishment is limited by the eighth amendment. See text and notes 72-81 supra.

286. See text and notes 239-246 supra.

287. See Langley, Graves & Norris, The Juvenile Court and Individualized Treatment, 18 Crime & Delinq. 79 (1972), where the authors statistically prove that individualized handling is far from being achieved. Also, Fox, supra note 283 at 4, comments: "[I]ndividualization has become the proverbial four lane highway leading to a cow pasture. In diagnosis, for example, who has not read ad nauseum psychiatric reports that speak more of the needs of the pyschiatrist or the hospital than to the matter of treating the child? What legitimate purpose, moreoever, is served by an elaborate predisposition report which amounts

to an opinion that this child should start his life all over again with another set of parents in different social, economic and ethnic circumstances? If diagnosis is made in order to illumine the way to treatment, is it not sufficiently clear, at least to juvenile court judges, that this medical model cannot be harnessed to the justice system for the undoing of life's individualized tragedies."

288. See e.g. N. Kittrie, The Right to Be Different: Deviance and Enforced Therapy (1971); J. Delgado, Physical Control of the Mind: Towards a Psycho-civilized Society (1969). For a brilliant series of articles in symposium fashion see Viewpoints on Behavioral Issues in Closed Institutions, 17 Ariz. L. Rev. 1 (1975). Also see Mitchell, Experimentation on Minors, 13 Duques. L. Rev. 919 (1975).

289. The rehabilitative model treats children who do not necessarily require it. See McNulty and White, supra note 82 at 363.

290. See Silbert and Sussman, supra note 57 at 613.

291. See Cohen, supra note 244 at 5.

292. See text and notes 49-60 supra.

293. See note 302 infra.

294. See e.g. O'Connor v. Donaldon, 422 U.S. 563 (1975).

295. For discussions on the development of the "least restrictive alternative" theory see Wald and Schwartz, supra note 126 at 132; Law and Tactics, supra note 46 at 546-47; and Legal Issues in State Mental Health Care: Proposals for Change, 2 Mental Disability L. Rptr. 114-17 (1977). Also see Friedman, Legal Regulation of Applied Behavioral Analysis in Mental Institutions and

Prisons, 17 Ariz. L. Rev. 39, 72-74 (1975).

296. For example, the Juvenile Justice Standards Project adopts the least restrictive alternative and classifies dispositions in terms of graduated infringements upon the liberty of adjudicated juveniles. See Standards, Relating to Corrections Administration, supra note 46 at 7.1.

297. Cohen, supra note 224 at 3, argues that the removal of the treatment rationale does not necessarily destroy the premise for a separate juvenile court system. Fox, supra note 220 at 373-74, 384, criticizes the National Council of Juvenile Court and Family Judges for their 19th century philosophies. See note 308 infra.

298. Bazelon, Forward, The Right to Treatment Symposium, 57 Geo. L. J. 676, 679 (1969).

299. "The courts of law are well qualified and respected as finders-of-fact, as solvers of direct conflicts based upon existing laws, and as the guardians against the tyranny of 'experts.' They are not well qualified or respected as 'strategic intervenors' or social manipulators exercising super-legislative and executive powers." See Kittrie, supra note 10 at 883.

300. Shepherd, supra note 6 at 29, maintains: "Despite the progressive nature of the right to treatment decisions, the effect of the rulings has been primarily cosmetic. The courts have attempted to correct the most glaring defects of the rehabilitative model without examining the question of whether rehabilitation is even possible within the existing system."

301. See text and notes 219-226 supra.

302. For an exhaustive listing of recent and many unreported cases see

Santana v. Collazo, Nos. 75-1187, 75-1213, 75-1466 (D.P.R. 1978), Joint Memorandum in Support of Motion to Approve Settlement Agreement (Sept. 1978), submitted by the National Center for Youth Law, Puerto Rico Legal Services Corporation, Civil Rights Division of the U. S. Department of Justice and the Industrial School of Mayaguez and Juvenile Camp at Maricao, Puerto Rico.

303. See e.g. Swanger, supra note 169.

304. See text and notes 72-81 supra. Also see Implementing Institutional Reform, supra note 128 at 233, where it is urged that institutional litigation not be abandoned as an ineffective means of social change, for slow and partial results are better than none. Moreover, public interest litigation often allows people with few resources to create enough public pressure to spur legislative or executive response. For example, the litigation in Wyatt v. Stickney has had an impact far beyond the State of Alabama and the Department of Health, Education and Welfare has drawn upon Wyatt's standards in establishing requirements for Medicaid eligibility of psychiatric facilities. See Stone, supra note 10 at 1127.

305. See generally W. Grove, The Labeling of Deviance (1975); N. Hobbs, Issues in the Classification of Children: A Sourcebook on Categories, Labels and Their Consequences (1975); Ward, The Labeling Theory: A Critical Analysis, 9 Criminology 269 (1971); and Gitchoff, The Dilemma of the Delinquent: A Satirical Comment on Definition and Jargon, 11 Criminology 115 (1973). Also see note 226 supra.

306. The concept of a "right to punishment" assumes a sophistication with

philosophical nuance. Further, the hysteria generated by reports of alarming rates of juvenile crime indicates a volatile ambience for such a "right."

307. The American Bar Association House of Delegates approved the seventeen volume I.J.A./A.B.A. Juvenile Justice Standards Project, supra note 46, on February 12, 1979. The Standards will serve as a blueprint for state legislatures in rewriting juvenile laws. The National Council of Juvenile and Family Court Judges allied with the American Psychiatric Association strongly opposed the Standards and had attempted a concerted campaign to delay vote by the House of Delegates unitil August of 1980. See Vol. III, No. 6, Juvenile and Family Court Newsletter (Dec. 1978). Also see generally: McCathren, Critique of the IJA/ABA Juvenile Justice Standards, 11 Clearinghouse Rev. 723 (1978); McCarthy, Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale, 52 B.U. L. Rev. 617 (1977); and Ketcham, National Standards for Juvenile Justice, 63 Va. L. Rev. 201 (1977).

308. Id.

309. See Standards, Relating to Corrections Administration, supra note 46 at 4.9. A "humane environment" was a component of Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

310. See note 317 supra.

311. See Standards, Relating to Dispositions, supra note 46 at 4.1-4.3.

312. Id. at 2.1.

313. See Swanger, supra note 169 at 221.

END