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RIGHT TO TREATMENT: CASE DEVELOPMENTS IN JUVENILE LAW

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Momentous changes have occurred in the juvenile justice system in the last decade. In particular, there has been a change in the basic outlook toward juvenile rights. The *parens patriae* philosophy that gave rise to the system has steadily given way to demands for due process. Nearly all due process rights that adult criminal defendants enjoy are now also accorded to juveniles. Further, demands to eliminate many of the remaining differences between the adult and juvenile system continue.

While the cry for increased due process continues, other aspects of the system have experienced less structured scrutiny. One of the most interesting of these is the concept of a right to treatment for juveniles found to have committed delinquent acts. It is interesting for two reasons: 1) it has no parallel in the adult criminal system, but arises instead from the area of mental health; 2) it has had its genesis in the same climate that gave rise to the increase in due process rights for juveniles, yet has had an erratic history that does not parallel that systematic, steady development of due process rights.

This article seeks to trace the development of the right to treatment in the juvenile justice system from its origins to the present. This exposition does not represent an in-depth analysis of the concept. Instead it seeks to acquaint the reader with how the right has been interpreted as being applicable to various phases of the juvenile system. This is accomplished through a summary of individual cases.

The author does not intend to posit her views on the future role the right to treatment will play in the juvenile justice system or the influence that it will have on decision makers. Whether the right will be part of the vocabulary of the system in ten years is uncertain. Indeed, we are, perhaps, now at the turning point where the idea will be either totally rejected or accepted as an integral part of the juvenile justice system.

THE ORIGINS OF THE RIGHT TO TREATMENT

The concept of a right to treatment is one that arouse in conjunction with adults deprived of their liberty because of mental impairments.

According to the concept originally conceived in 1960 by Morton Birnbaum,[1] a person who is deprived of liberty because of a mental illness so serious as to result in involuntary commitment to a mental institution is entitled to treatment. If that treatment is not provided, that person is, or should be entitled to release. Birnbaum postulated that a right to treatment derived from the constitution. Recognition of the concept would mean that "substantive due process of law (would not) allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison."[2] Thus, due process would not be limited to procedural safeguards aimed at guaranteeing a fair commitment procedure but would also assure that continued confinement conform to fundamental fairness.

In the years between Dr. Birnbaum's articulation of the concept and the present, his theories have become reality as courts have recognized that a right to treatment does exist. Just as the concept first arose in conjunction with the adult mentally ill, the first court decisions recognizing it were the result of litigation in that field.

In *Rouse v Cameron,*[3] a defendant in Washington, D.C., charged with possession of a gun and ammunition, was found not guilty by reason of insanity. Although the charge, a misdemeanor, could have resulted in only a one year sentence, Rouse was involuntarily committed to a mental institution for a period that ultimately lasted much longer. *Rouse* is an important right to treatment decision for many reasons, not the least of which is that it identifies the sources of the right. Although the decision was based upon a right to treatment stemming from a statute, the 1964 Hospitalization of the Mentally Ill Act, the court implied that it could have reached the same conclusion on constitutional grounds. As Chief Judge Bazelon stated:

> Had appellant been found criminally responsible, he could have been confined a year, at most, however dangerous he might have been. He has been confined four years and the end is not in sight. Since this difference rests only on need for treatment, a failure to supply treatment may raise a question of due process of law. It has also been suggested that a failure to supply treatment may violate the equal protection clause. . . Indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be "cruel and unusual punishment."[4]

Since the decision in *Rouse,* a number of other courts have recognized the right of the civilly committed to receive treatment.[5] The Supreme Court, however, has consistently rejected any opportunity to rule on the issue as it pertains to the mentally ill. In *O'Connor v. Donaldson,*[6] the court specifically concluded:

> [T]he difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment.[7]

Although the Court also stated that its decision vacating the judgment of the Fifth Circuit "deprives that Court's opinion of precedential effect. . ."[8] it subsequently declined to review *Burnham v Georgia,*[9] another Fifth Circuit opinion that explicitly reaffirmed its initial analysis of right to treatment as expressed in *Donaldson v O'Connor.*[10]

DEVELOPMENT OF THE CONCEPT OF A JUVENILE'S RIGHT TO TREATMENT

The juvenile system has always had as its philosophical base the idea that children, instead of being punished by the state for antisocial behavior, should receive the care, attention and treatment needed to rehabilitate them. With this end in mind nearly every state has enacted, as part of its juvenile

code, a purposes clause that normally includes language similar to that of the *Uniform Juvenile Court Act* drafted by the National Conference of Commissioners on Uniform State Laws (1968) which states in part:

This Act shall be construed to effectuate the following public purposes:

> (1) to provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions;
>
> (2) consistent with the protection of the public interest, to remove from children commiting delinquent acts the taint of criminality and the consequences of criminal behavior and to substitute therefor a program of treatment, training and rehabilitation;
>
> (3) to achieve the foregoing purposes in a family environment whenever possible, separating the child from his parents only when necessary for his welfare or in the interest of public safety.[11]

With rehabilitation and care the stated goals of the juvenile system, it was logical that juveniles would eventually begin to assert that they, like the mentally ill, had a right to treatment once their liberty was curtailed. Because of the similarities in civil commitment and delinquency proceedings, it was equally logical that the courts would find that juveniles too have a right to treatment.

Courts have justified the denial of certain rights to juveniles on the grounds that there are certain advantages to being processed as a juvenile that would be lost with the extension of these rights. For example, the Supreme Court concluded that the extension to juveniles of the right to a jury trial would add both the formality and the clamor of the adversary system to a hearing and thus be inimical to the ideal of an intimate and informal juvenile hearing.[12]

Longer periods of confinement for a juvenile who has committed an offense than for an adult convicted of the same offense have been justified because the purpose of a juvenile proceeding is not punishment but rather "rehabilitation and restoration" of the minor to useful citizenship.[13] The similarities to an involuntary commitment which provdes for institutionalization of a mental patient until a cure can be effected are unmistakeable.

The justification for a right to treatment for juveniles, like the justification for the right for the civilly committed, is found both in state codes and in state and federal constitutions.

This has been recognized by those courts that have acknowledged a right to treatment for juveniles. In articulating the justification for a right to treament, courts normally begin with a discussion of the history of the juvenile court, stressing the *parens patriae* philosophy that gave rise to the concept that rehabilitative treatment should be substituted for punishment when children are brought before the bar. This acts as a preamble to discussion of the individual state statute, which will often contain language similar to the purposes clause of the *Uniform Juvenile Court Act*.[14] From this analysis the court may conclude that there is either a common law or a statutory basis for the right.

The Constitutional bases for the right vary slightly. It may be found to be grounded in the Eighth and Fourteenth Amendments[15] or in the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.

RAISING A JUVENILE'S RIGHT TO TREATMENT: INTRODUCTORY OVERVIEW

The idea that a child has a right to treatment has important repercussions for many phases of the juvenile process. As outlined in some detail below, courts have considered the applicability of the concept to; 1) detention prior to adjudication, 2) cases involving transfers of jurisdiction to criminal courts, 3) instances where specific treatment has been ordered at the dispositional stage of trial court proceedings, and 4) post dispositional reviews of the adequacy of treatment once commitment has occurred. Acceptance of the right, however, is far from complete and, as noted above, the future integration of the vocabulary and substance of the right to treatment concept in the formal law affecting juveniles is uncertain.

DETENTION PRIOR TO ADJUDICATION

That a juvenile has a right to treatment that he is not receiving may be alleged when a child is confined prior to an adjudication of his guilt or innocence. *Creek v. Stone,*[16] one of the earliest juvenile right to treatment cases illustrates this situation.

On May 31, 1966, a juvenile was arrested on a charge of robbery and detained at the District of Columbia Receiving Home for Children for several months before being brought to trial.[17] During that period of confinement, he filed a petition for a writ of habeas corpus in the District Court for the District of Columbia alleging that his detention at the Home was unlawful because the Home had no facilities to provide him with needed psychiatric assistance. As a corollary to this, he objected to the Juvenile Court's refusal to hold a hearing on whether or not the Home was a suitable place of detention because it could not provide the care he needed. The District Court refused to hear evidence on this issue concluding that suitability of the Home, based upon failure to provide allegedly necessary psychiatric assistance, was not relevant to the issue of the lawfulness of the actual detention.

In a *per curiam* opinion by Chief Judge Bazelon and Circuit Judges McGowan and Leventhal, the appeal to the Court of Appeals for the District of Columbia was dismissed as moot. In dismissing the appeal, however, the Court of Appeals recognized that the District of Columbia Juvenile Code was premised on the assumption that the juvenile court, acting in its *parens patriae* capacity, had an affirmative duty to provide a child with an environment as similar as possible to the one he should have been receiving at home. It, therefore, stated that the juvenile court, when faced with a claim that a need for treatment exists that is not being met, should make an inquiry to discover whether the child is being treated in accordance with the statute. *Creek* illustrates the major problem with raising the issue of a juvenile's right to treatment when he is detained prior to adjudication: before the Circuit Court could rule on the case, the juvenile had been adjudicated

delinquent and committed to the National Training School, rendering the appeal moot.

TRANSFER OF JURISDICTION TO CRIMINAL COURTS

All but two states, New York and Vermont,[18] provide a statutory mechanism whereby a juvenile may be transferred, when certain circumstances have been met, to the criminal court system for prosecution. Generally a hearing is required before transfer can be effected. At that hearing a crucial issue, and one frequently established by statute, is whether the juvenile is amenable to treatment. For example § 31 of the *Model Act for Family Courts and State-Local Children's Programs,* Department of Health, Education, and Welfare (1975) states in part that:

> The court shall conduct a hearing . . . for the purpose of determining whether there are reasonable prospects of rehabilitating the child prior to his 19th birthday. If the court finds that there are not reasonable prospects for rehabilitating the child prior to his 19th birthday . . . , it shall order the case transferred for criminal prosecution.

Likewise the *Uniform Juvenile Court Act,* §34,[19] provides in part that transfer of jurisdiction may be authorized if the court finds that "the child is not amenable to treatment or rehabilitation as a juvenile through available facilities." These statutory provisions clearly imply that if a juvenile is amenable to treatment he should not be transferred. The logical corollary to that is that treatment will be provided if he is retained within the system.

This raises two right to treatment issues in connection with transfer of jurisdiction: 1) can a child be transferred if he is considered amenable to treatment but no suitable programs exist within the state to provide the treatment necessary for his rehabiliation, and 2) if a juvenile has a satutory or constitutional right to treatment, can he be transferred from the juvenile system and hence denied that right?

The first question was recently considered by the Minnesota Supreme Court in *In re Welfare of J.E.C.*[20] The court was asked to decide whether the juvenile court had acted properly in authorizing the transfer of a juvenile for criminal prosecution when evidence indicated that the juvenile was amenable to treatment, but not amenable to treatment in any of the programs currently in operation in the state. Essentially, the juvenile argued that he had a right to treatment that could rehabiliate him.

Although the court recognized that Minnesota law is grounded on the theory that a juvenile has a right to treatment, it was unwilling, without a more complete record before it, to exercise any of the options available to it: retention of the juvenile within the system for placement in a program unlikely to have any beneficial effects, or transfer of jurisdiction over the juvenile to the criminal system with its services that would, at best, have doubtful rehabilitative value.

Instead the court remanded the case with specific instructions that the court inquire into:

> (1) whether there is presently any program available for treatment for this and other similar juveniles; (2) if no program is available,

> whether it is feasible and possible to put together an effective program which could treat this and other similar juveniles; (3) if so, why has the Department of Corrections failed to make such a program available?[21]

Availability of rehabilitative programs for persons prosecuted and convicted as adults was also to be investigated.

On remand the juvenile court was presented with evidence indicating that the treatment of this juvenile and others like him within the juvenile system would be neither practical nor effective. Accepting this conclusion, the appellate court upheld the transfer decision predicted upon it without attempting to resolve the important question of whether it or the juvenile court could direct the Department of Corrections to establish a particular program designed to provide rehabilitative treatment for a juvenile with special problems.[22]

The second question, whether, if a juvenile has a statutory or constitutional right to treatment, he can be transferred from the juvenile system and so deprived of that right, has never been addressed squarely. While it is possible that a court might conclude that transfer denies a juvenile the right to treatment and so is unconstitutional, it is more likely that a court would conclude that a juvenile's right to treatment does not vest until the court affirmatively indicates that it is exercising jurisdiction over the child by prosecuting him as a juvenile.[23]

THE RIGHT TO TREATMENT AT DISPOSITION

An issue arising with considerable frequency recently is whether the juvenile court may order state agencies to provide specific treatment for a child, particularly if that treatment is unavailable within the state. Note this situation differs from that presented in *J.E.C., supra,* in that the decision has already been made to treat the child within the juvenile system. Therefore, if his right to treatment is recognized, delivery of treatment becomes the raison d'etre for placement in a juvenile program.

In Mississippi the courts have recognized that, according to state law, children committed to training schools or other facilities operated by the Mississippi Department of Youth Services are entitled to treatment reasonably calculated to rehabilitate them back into society. Because this is true, no child can then be committed to an institution unless the child will there receive treatment reasonably calculated to rehabilitate him.

Even beyond the statutory right, one court concluded that the Due Process Clause of the Fourteenth Amendment also required that confinement be reasonably related to treatment and rehabilitation.[24] Faced with the problem of how to deal with a child adjudged delinquent who was suffering from both organic brain damage and a behavior disorder, the court found no reasonable solution. The consensus of the psychiatric testimony before the court was that the child needed a structured residential treatment center with individual and group psychotherapy available. Unfortunately no such facility existed within the state and the court did not believe that it had the inherent power to direct the Department of Youth Services by dictating the kinds of facilities that should be provided. While out of state placement via

purchases of services was authorized, no placement had been effected. However, the court did order that the State either provide the juvenile with treatment "reasonably calculated to rehabilitate" him or release him.

In reaching this conclusion the court utilized an interesting analysis. It first found that the juvenile was amenable to treatment that could rehabilitate him. It then identified the kind of treatment that the child needed and concluded that no facilities capable of providing the treatment were available to the court. To do this, it specifically examined and eliminated as acceptable alternatives certain facilities within the state. Once the child's right to treatment was established and his specific needs identified, the court's conclusion became the only logical one, short of ordering the development of a new facility (an alternative specifically discarded), that was available to the court.

The Oregon Court of Appeals, clearly recognizing a statutory right to treatment but raising a question as to the existence of a constitutional right, dealt with a similar question recently.[25] In *Matter of L.* a Children's Service Division (CSD) worker recommended a child be given care and treatment in an out of state institution that would provide a relatively secure setting. CSD ultimately declined to place the child in this institution because it had exhausted its budget allocations for out of state placements. The Juvenile Court, reviewing CSD's actions, found that funds were available and that failure to use them for treatment of the juvenile was an abuse of discretion. It then ordered the implementation of the recommended treatment plan.

The state appealed this decision alleging that the juvenile court exceeded its authority in ordering treatment. While the court of appeals concluded that ordering CSD to provide treatment, irrespective of budgetary limitations, was an act in excess of its authority, it found that the court could order CSD to secure treatment or certify to the court that it was unable to do so. If such certification were forthcoming, the court would then have the option of terminating SCD's custody over the child

> since the statutory basis for CSD's custody no longer exists when it becomes evident that CSD will not provide a child with responsive treatment.[26]

The Appellate Division of the Superior Court of New Jersey overturned a similar decision by a Camden County juvenile court.[27] A fifteen year old, adjudicated delinquent on seventeen different charges of breaking, entering, and larceny was before the court for disposition. The juvenile court, like the court in Mississippi, made certain findings of fact: the juvenile was suffering from a severe emotional disorder requiring immediate treatment in a structured facility; the juvenile was not an appropriate candidate for placement at a state training school; failure to provide the juvenile with prompt and adequate treatment could result in his becoming irreversibly psychotic; the juvenile needed intensive psychotherapy unavailable at private facilities within the state; and a residential placement at a psychiatric institute would provide the treatment needed by the juvenile.

The court recognized that two questions needed to be decided: whether the Juvenile Court could order the State Division of Youth and Family Services to place a child in a specific private residential facility for treatment of his

mental illness; and whether a juvenile has a right to treatment. Addressing the second question first, the court recognized that the juvenile code purposes clause constituted a mandate to the court to exercise its *parens patriae* power to assure, "that a juvenile adjudicated delinquent will get effective rehabilitative treatment, and to choose a dispositional alternative most likely to achieve that result.[28]" Beyond that, the court recognized that the constitution required, on due process and equal protection grounds, that an adjudicated child obtain effective rehabilitative treatment.

The answer to the first question was also answered in the affirmative. The court declared that its power to place a child in a specific residential facility was rooted in common law, state law, and the state and federal constitutions, and was essential in order to implement the stautory mandate of the purposes clause to "secure for [a child] custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents."[29]

On appeal, the Superior Court concluded that the juvenile court exceeded its authority in its order committing the youth to the state agency, the Division of Youth and Family Services (DYFS). The commitment order, which invoked agency responsibility for the youth's care, foreclosed the exercise of any discretion by the agency in the ultimate selection of a placement. Instead the court selected a placement for the youth without regard to agency budget limitations and wihout concern for the treatment needs of other youths committed to the agency.

The Superior Court, commenting on the Juvenile Court's discussion of a right to treatment, declined to affirm whether or not such a constitutional right existed and further indicated that "it was inappropriate in the context of this case."[30] The court took the position that the youth had not been confined for purposes of treatment that was then denied him and that the right, if it existed, was "triggered by confinement, not by the adjudication of delinquency."[31]

Had the New Jersey juvenile court gone only so far as to order DYFS to provide treatment that would meet the juvenile's already ascertained needs, without ordering placement in a specific institution, the judgement might have survived appeal. Both the Oregon and Mississippi decisions tend to support this position since in each of those cases, the courts were ultimately taking a position of "treat or release," without mandating all details of treatment.

Delivery of treatment to a child entitled to it took a somewhat different turn in a recent Pennsylvania case.[32] In 1973, a juvenile court ordered that Janet D., a sixteen year old deprived child, be placed in shelter care. In the order, the court noted that the girl had run away from the McIntyre Shelter, operated by the Allegheny Child Welfare Services (CWS), on previous occasions and therefore CWS was directed "to make suitable arrangements that said child does not run away subsequent to her placement in the shelter facility to be provided by CWS."[33]

The girl was then again placed at McIntyre. Shortly thereafter, her appointed counsel wrote to Thomas Carros, the Director of CWS, to complain

that suitable arrangements had not yet been made and to ask for compliance with the court order. The same evening Janet D. ran away.[34] The following day her attorney petitioned the lower court for a rule to show cause why Carros should not be held in contempt. After hearing, the court did find him in contempt.

Reviewing the propriety of the contempt order, the Superior Court of Pennsylvania first addressed the issue of whether Janet D. had a right to treatment. Because the right was so clearly mandated by the Pennsylvania Juvenile Act, 11 P.S. §50-101 *et seq.*, the court did not decide whether the constitution similarly established a right. However, the Juvenile Act and the Department of Public Welfare Regulations were interpreted to require a right to treatment for Janet D. conforming to the following minimum requirements:

> 1. An analysis of her personal history, to determine her physical, psychological, and educational needs;
>
> 2. The development of an individualized treatment program based upon those needs;
>
> 3. The provision of the counseling, psychiatric, educational, recreational, and social work services required by the individualized treatment program, and the incorporation of her caseworker into the program;
>
> 4. The formulation of a longer-term placement plan, based on analysis of her needs;
>
> 5. Adequate communication and consultation about her and the plans for her future among all levels of the staff;
>
> 6. Periodic re-evaluation of the treatment program developed for her in terms of her behavior in response to the treatment, and revision of the program as necessary;
>
> 7. Application of disciplinary measures consistent with her dignity.[35]

Without ordering a specific plan, the court recognized that individualized planning for Janet or any child was needed in order to assure that more than mere custodial care would be delivered.[36] The court also concluded that while contempt would be a proper method of enforcing a child's right to treatment, the court had improperly exercised the power in that case.

THE RIGHT TO TREATMENT AFTER COMMITMENT

A number of cases have discussed the issue of right to treatment in terms of whether institutions to which children have been committed are providing required treatment. As suggested by the court in *Pena v. New York State Division for Youth*,[37] this can require that a court evaluate the punitive and the therapeutic aspects of practices at these institutions, a task for which the judicial branch may not be ideally suited, but one which must be assumed if constitutional rights have been violated.[38]

In *Pena*, the court was specifically asked to rule on whether the use of isolation, hand restraints, and thorazine and other tranquilizing drugs at

Goshen Annex Center was violative of the inmates' right to treatment under the Fourteenth Amendment and whether these acts amounted to cruel and unusual punishment prohibited by the Eighth Amendment. Their conclusion was that, indeed, these practices were used in punitive and anti-therapeutic ways and were, therefore, unconstitutional. The court did not, however, conclude that these practices were *per se* unconstitutional, merely that they had been used that way at Goshen and for that reason issued an injunction to end the practices.

Different practices have been the target of litigation in other cases. In *Inmates of Boys' Training School v. Affleck*,[39] a class of Rhode Island juveniles challenged the conditions of their confinement alleging that certain practices constituted cruel and unusual punishment while others were anti-rehabilitative and so violative of both equal protection and due process. The court held that conditions in the former women's reformatory, then being used to house children, were such as to be anti-rehabilitative and enjoined them as in violation of equal protection and due process.[40] Juveniles transferred to the Youth Correctional Center of the Adult Correctional Institute had to be provided with at least three hours of outdoor exercise daily.[41] Further, education equivalent to that provided in the Boys' Training School was ordered for all youth confined in this facility.[42]

For juveniles confined in any facility, the following minimum conditions were ordered:

a) a room equipped with lighting sufficient for an inmate to read by until 10:00 p.m.;

b) sufficient clothing to meet seasonal needs;

c) bedding, including blankets, sheets, pillows, pillow cases and mattresses; such bedding must be changed once a week;

d) personal hygiene supplies, including soap, toothpaste, towels, toilet paper and a toothbrush;

e) a change of undergarments and socks every day;

f) minimum writing materials; pen, pencil, paper and envelopes;

g) prescription eyeglasses, if needed;

h) equal access to all books, periodicals and other reading materials located in the Training School;

i) daily showers;

j) daily access to medical facilities, including the provision of a 24-hour nursing service;

k) general correspondence privileges.

The court refused to order other specific relief requested by the plaintiffs largely because it was unwilling to interfere with the management of the Training School in those areas where the record failed to clearly show the deprivation of a constitutional right. It also recognized that while the defendants were handicapped by lack of facilities and trained personnel, this was no excuse for failing to protect the constitutional rights of the youth interred.[43]

The detention of "Persons in Need of Supervision" (PINS) in secure facilities was challenged in *Martarella v. Kelley.*[44] The district court was asked to determine whether the conditions were punitive, hazardous and unhealthy and, is so, whether confinement of non-delinquents in these conditions, absent rehabilitative treatment, constituted cruel and unusual punishment and a violation of due process. The Court recognized that decisions "clearly pronounce the constitutional requirement of 'treatment' as a guid pro quo for the exercise of the State's rights as *parens patriae,*" but that, even so, they provide little guidance as to what is adequate treatment.[45] Agreeing with Judge Bazelon's observations in *Rouse v. Cameron,*[46] the court viewed the following guidelines as valuable for measuring a facility's programs to determine whether or not it furnishes effective treatment:

> (1) The institution need not demonstrate that its treatment program will cure or improve, but only that there is "a bona fide effort to do so," (2) The effort must be to provide treatment adequate in light of present knowledge, (3) the fact that science has not reached finality of judgment as the most effective therapy cannot relieve the court of its duty to render an informed decision, and (4) continued failure to provide suitable adequare treatment cannot be justified by lack of staff or facilities. . .[47]

The court also found useful the following considerations suggested in the American Psychiatric Association's "Position Statement on the Question of Adequacy of Treatment":

> (1) the purpose of institutionalization, and reference to the length of custody, (2) the importance of interrupting the "disease process" as in separating the addict from his drugs or the psychotic from his family stress situation, (3) efforts to change the emotional climate around the "patient" and (4) the availability of conventional psychological therapies.[48]

In depth scrutiny led to the conclusion that "the program at the centers does not furnish adequate treatment for children who are not true temporary detainees, and thereby violated their right to due process."[49]

In the order issued subsequent to the decision, the court held that detention of a child for 30 days or longer without treatment constituted a deprivation of constitutional proportions.[50] The court then specifically outlined what it considered to be a constitutionally adequate standard of treatment. This included specific educational and training requirements for caseworkers, recreational workers and counselors. It defined treatment and outlined the process by which the decisions for living assignments for a child would be made. It specified the amount of recreational time to be provided daily, called for reasonable access to a psychiatrist and the formulation and review of individualized treatment programs, and established minimally acceptable ratios of children to workers. The court order also required that a complete file be compiled and maintained on each child, and that the information be considered privileged and confidential. Lastly the court ordered the appointment of an independent ombudsman to hear and act on all grievances of the inmates.[51]

Not so specific in its dictates was the Seventh Circuit's decision in *Nelson v. Heyne,*[52] upholding a district court's action in enjoining the unconstitutional practices and policies of the Indiana Boys School.[53] In doing so it agreed with the district court that juveniles have a right to rehabilitative treatment pursuant to state law and the federal Constitution.

The specific practices with which the court was concerned were the infliction of corporal punishment and the administration of tranquilizing drugs. Without holding all corporal punishment in juvenile institutions per se cruel and unusual, it did find the beatings administered at the Boys School unnecessary and therefore excessive, hence, cruel and unusual. Likewise, the use of tranquilizing drugs in the cirmumstances evidenced in the record constituted cruel and unusual punishment.

The court did not, however, decide that minimum treatment would be required to provide constitutional due process. Instead it remanded the case to the district court for further proceedings on the question but noted that the right to treatment includes:

> the right to minimum acceptable standards of care and treatment for juveniles and the right to *individualized* care and treatment. Because children differ in their need for rehabilitation, individual need for treatment will differ. When a state assumes the place of a juvenile's parents, it assumes as well the parental duties, and its treatment of its juveniles should, so far as can be reasonably required, be what proper parental care would provide. Without a program of individual treatment the result may be that the juveniles will not be rehabilitated, but warehoused, and that at the termination of detention they will likely be incapable of taking their proper places in free society; their interests and those of the state and the school thereby being defeated.[54]

In 1973, the United States District Court for the Eastern District of Texas ruled that confined juveniles have a right to treatment.[55] In conjunction with that decision, it held that numerous criteria would have to be followed by the state of Texas in order to assure that proper treatment would be afforded incarcerated juveniles.[56] Included in these criteria were extensive requirements for establishing minimum standards for assessing and testing children committed to the state before a placement decision could be made. Similar standards were set for assessing educational skills and handicaps and for providing programs aimed at advancing a child's education. Criteria were also established for the delivery of vocational education, medical and psychiatric care, and treatment programs designed to return the child to the community. Finally minimal standards for conditions at the institution were established in order to assure that a child's daily environment would not be so deprived so as to confound all effort at rehabilitation.

That order, no doubt the most extensive ever justified by a child's right to treatment, has been harshly assailed. The order was vacated on procedural grounds by the Fifth Circuit on the theory that a three-judge court should have been convened to hear the case.[57] On certiorari to the Supreme Court, that Court reversed the Court of Appeals and remanded the case.[58]

When once again faced with the extensive order entered by the District Court, the Court of Appeals stated that, while it was not deciding the legal issues presented because of its decision to remand for further evidentiary hearings, it had reservations concerning the constitutional right to treatment theory relied on by the district court judge.[59] These reservations were based on questions concerning the lack of universal acceptance of a constitutionally based right to treatment for the adult mentally ill especially since the argument espousing the right for juvenile offenders is less forceful. While the Fifth Circuit did not totally reject the concept, it did state that the minimum requirements established by the District Court were excessively detailed[60] and implied that such requirements might result in a rigidity that would make it difficult for the Texas Youth Council to adjust to new treatments and testing techniques.

At present it is unlikely that the 1974 order of the District Court can withstand the assaults against it. Whether the constitutional right to treatment concept, still in infancy in the juvenile system, will be served a mortal wound along with the order is an open question and one of major importance to those who chart developments in the field of juvenile justice.

CONCLUSION

Despite the uncertain status of the right to treatment insofar as it relates to juveniles, the right has served as the basis for many substantive changes within the last fifteen years. Just as the Supreme Court, during that same period, improved the lot of children by extending to them the procedural due process protections afforded adults, lower courts have implemented meaningful and beneficial changes in the substantive law governing children on the grounds that these changes are mandated by the right to treatment.

The most dramatic and noticeable change has been the improvement of the physical conditions within many juvenile institutions. Perhaps the most important, however, is recognition by the judiciary that they can and must become more involved in the juvenile justice system. Many judges are evidencing an awareness that their role in the juvenile process does not end when they dispose of a child. They can and must become involved in monitoring the agencies that treat children if for no other reason than that these agencies are generally protected from public scrutiny. While the authority of the court may not go so far as to order the creation of new programs nor so far as to diagnose the specific treatment needed by a child, it does encompass the right to make a decision that minimum standards of treatment have not or are not being met. It further allows the court, after eliciting expert testimony, to make findings that existing programs either are or are not capable of treating individual children.

This means that a judge can, if he or she is so inclined, change the nature of the disposition hearing. When examination reveals problems that may lie at the root of a child's difficulties, representatives of the state social agency often recommend to the court specific courses of treatment that may be of benefit to the youth. Often these recommendations are made without any thought to the alternatives that, realistically, are available to the court.

The court will note the recommendations and then order placement of the youth in whichever available facility appears most likely to suit the youth, based, often, upon a set of criteria totally unrelated to the child's needs: age, size, and seriousness of the offense. While not unimportant considerations, these factors may bear no relationship to the child's problems.

Relying on the theory that the child has a right to treatment, the judge may wish to request that the social agency representative recommend specific programs or facilities designed to deal with the individual problems of the youth. If no such facilities exist, the judge may then direct the agency representative to prepare an assessment of existing programs with an eye toward evaluating their capabilities for providing services to the youth. Where the capability exists, the judge may seek to enter an order directing that facility to make those adjustments necessary to implement a needed program of care, realizing that any program beyond the financial capabilities of the program or agency will never be implemented, despite court order. As indicated by the cases discussed *supra*, the final sanction that the court apparently has in ordering specific treatment plans is the option that it retains of releasing the child if no suitable program can be found for him or her.

Requiring that social agencies provide detailed and specific treatment plans for youths adjudicated delinquent can serve a very useful collateral function. These recommendations should be screened for the purpose of accumulating information on the number of times during the course of a set interval, a particular kind of recommendation is made. It may become obvious that a certain jurisdiction has a great need for a facility capable of providing certain services, and that a campaign to erect such a facility is appropriate. It may also become obvious that certain available treatment facilities are obsolete and should be either altered or abolished. Aditionally, the juvenile court judge has a continuing duty to ascertain that programs and facilities that promise treatment actually provide it. Just as it would appear to be within the realm of the juvenile court judge to determine that a youth has obtained the maximum benefit from a program or facility and so should be released, so too should it be within his authority to determine that the program or facility is not delivering the treatment promised. This failure ultimately could also be the basis for the release of the child.

This kind of involvement by the court is not only not in excess of its authority, it is imperative if the juvenile court is to fulfill the promise that gave birth to it at the turn of the twentieth century. It is imperative to assure that a child does not receive the worst of both worlds — receiving neither "the solicitous care and regenerative treatment postulated for children" nor "the protections accorded to adults."[61]

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[1] *Birnbaum,* The Right to Treatment, *46 A.B.A.J. 499 (1960).*

[2] Id. *at 503.*

[3] *125 U.S. App. D.C. 266, 373 F. 2d 451 (D.C. Cir. 1966).*

[4] *125 U.S. App. D.C. at 368, 373 F. 2d at 453.*

[5] See, e.g., Wyatt v. Aderholt, *503 F. 2d 1305 (5th Cir. 1974) aff'g* Wyatt v. Stickney, *325 F. Supp. 781 (M.D. Ala. 1971); 334 F. Supp. 1341 (1971); 334 F. Supp. 373 (1972; 344 F. Supp. 387 (1972), in which the court held that civilly committed mental patients had a right to treatment stemming from the Due Process Clause of the Constitution;* Stachulak v. Coughlin, *364 F. Supp. 686 (N.D. Ill. 1973), in which the court noted its agreement with* Wyatt v. Stickney, *insofar as it recognized a constitutional right to treatment for civilly committed mental patients. In accord,* Welsch v. Likens, *373 F. Supp. 487 (D. Minn. 1974);* Burnham v. Dept. of Pub. Health of State of Ga., *503 F. 2d 1319 (5th Cir. 1974),* cert. denied *422 U.S. 1057, 95 S. Ct. 2680 (1975); contra* N.Y. St. Ass'n For Retarded Children, Inc. v. Rockefeller *357 F. Supp. 752 (E.D. N.Y. 1973);* Renelli v. Dept. of Mental Hygiene, *340 N.Y.S. 2d 498 (1975).*

[6] *422 U.S. 563, 95 S. Ct. 2486, 45 L.Ed.2d 396 (1975).*

[7] Id. *at 573.*

[8] Id. *at 578, n. 12.*

[9] *503 F. 2d 1319 (1974),* cert. denied, *422 U.S. 1057 (1975).*

[10] *493 F. 2d 507 (5th Cir. 1974).*

[11] Uniform Juvenile Court Act, *§1, page 5.*

[12] McKeiver v. Pennsylvania, *403 U.S. 528 (1971).*

[13] See, e.g., In re Juvenile, *274 A.2d 506 (Vt. 1970).*

[14] *See pp. 5-6 for text.*

[15] See, e.g., Martarella v. Kelly, *349 F. Supp. 575 (S.D. N.Y. 1972).*

[16] *379 F. 2d 106 (D.C. Cir. 1967).*

[17] *Five days after the juvenile was apprehended the Juvenile Court entered an order authorizing his continued confinement. Before a petition was actually filed nearly three months later, the Court considered but rejected after a hearing the possibility of waiving jurisdiction over him.*

[18] *Levine and Sarri,* Juvenile Delinquency: A Comparative Analysis of Legal Codes in the United States, *National Assessment of Juvenile Corrections (1974) p. 19.*

[19] Uniform Juvenile Court Act *drafted by the National Conference of Commissioners on Uniform State Laws (1968).*

[20] *225 N.W.2d 245 (Minn. 1975).*

[21] Id. *at 253.*

[22] In re Welfare of I.Q.S., *224 N.W. 2d 30 (Minn. 1976).*

[23] Cf. United States v. Bland, *472 F. 2d 1329 (D.C. Cir. 1972).*

[24] In the Interest of R.R., *#10,513 Youth Court First Judicial District of Hinds County (3/10/76) [unreported].*

[25] Matter of L., *546 P.2d 153, 158 n.3 (Ore. App. 1976).*

[26] Id. *at 160.*

[27] State of New Jersey in the Interest of D.F., *367 A. 2d 1198 (Sup. Ct. N.J. 1976).*

[28] State in the interest of D.F., *351 A.2d 43, 47 (Juv. & Dom. Rel. Ct. 1975).*

[29] Id. *at 57.*

[30] *367 A.2d at 1203.*

[31] *Id.*

[32] Janet D. v. Carros, *362 A2d 1060 (Pa. Super. 1976).*

[33] Id. *at 1062.*

[34] During the forty-two days Janet D. was held at McIntyre, she ran away five times.

[55] Id. *at 1074.*

[56] Id. *at 1076.*

[57] *419 F. Supp. 203 (S.D. N.Y. 1976).*

[58] Id. *at 207.*

[59] *346 F. Supp. 1354 (D.R.I. 1972).*

[60] Id. *at 1367.*

[61] Id. *at 1370.*

[62] Id. *at 1373.*

[63] Id. *at 1374.*

[64] *349 F. Supp. 575 (S.D. N.Y. 1972).*

[65] Id. *at 585.*

[66] Supra *at note 3.*

[67] *349 F. Supp. at 601.*

[68] Id.

[69] Id. *at 603.*

[70] Martarella v. Kelley, *359 F. Supp. 478 (S.D. N.Y. 1973).*

[71] Id. *at 485-486.*

[72] *491 F. 2d 352 (7th Cir. 1974),* cert denied *417 U.S. 976, 94 S. Ct. 3183, 41 L.Ed.2d 1146 (1974).*

[73] *355 F. Supp. 451 (N.D. Ind. 1973).*

[74] Id. *at 360.*

[75] Morales v. Turman, *364 F. Supp. 166 (E.D. Tex. 1973).*

[76] Morales v. Turman, *383 F. Supp. 53 (E.D. Tex. 1974).*

[77] Morales v. Turman, *535 F.2d 864 (5th Cir. 1976).*

[78] Morales v. Truman, *430 U.S. 322, 97 S.Ct. 1189, 51 L.Ed. 2d 368 (1977).*

[79] Morales v. Turman, *562 F.2d 993 (5th Cir. 1977).*

[80] Id. *at 999.*

[81] Kent v. United States, *383 U.S. 541, 556 (1966).*