

DEVELOPMENTS IN VERMONT LAW

NOTE

A RIGHT TO TREATMENT: PROMOTING THE INTERESTS OF MINORS IN STATE CUSTODY IN VERMONT

INTRODUCTION

Vermont changed its mental health laws with the adoption of the Mental Health Act of 1968.¹ The policy of the Act is to assure that adequate treatment under the least restrictive conditions shall be provided to the mentally ill.² In the same legislative session, Vermont adopted its juvenile code.³ The legislative history of the juvenile code⁴ displays a concern that Vermont's juvenile proceedings conform to the United States Supreme Court's decision in *In re Gault*.⁵ In *Gault* the Court held that juveniles subject to delinquency proceedings are entitled to due process, including notice of charges, a hearing, assistance of counsel, and findings of fact by the juvenile court.⁶

In the ensuing decades, both state and federal courts held that mentally ill and mentally retarded individuals who are institutionalized have a right to treatment.⁷ The majority of this case law

1. VT. STAT. ANN. tit. 18, §§ 7101-9105 (1987) [hereinafter the Act].

2. Policy Statement, Acts, 1977, No. 252 (Adj. Sess.), § 1 provides:

It is the policy of the state of Vermont to assure the availability of adequate treatment to persons in this state who are mentally ill. Treatment on a voluntary basis shall be preferred to involuntary treatment and in every case, the least restrictive conditions consistent with adequate treatment shall be provided.

Id.

3. 1967, Act No. 304, (Adj. Sess.) (codified as amended at VT. STAT. ANN. tit. 33, §§ 637-667 (1981 & Supp. 1988)).

4. *Record of Committee Meetings: Hearings on S. 1110 Before the House Judiciary Committee*, Adj. Sess. (1967).

5. 387 U.S. 1 (1967).

6. *Id.* at 30, 31.

7. The idea of a right to treatment for the institutionalized mentally ill has its origin in Birnbaum, *The Right to Treatment*, 46 A.B.A. J. 499 (1960). "If the right to treatment were to be recognized, our substantive constitutional law would then include the concept . . . that

pertains to minors who are mentally ill or mentally retarded, and the holdings have been based on both constitutional⁹ and statutory law.⁹

The constitutional holdings of the courts have generally been based on one or a combination of the following arguments: treatment is the *quid pro quo* for the decrease in procedural protections afforded the civilly committed;¹⁰ due process requires that the nature of civil confinement bear some relation to the purpose of the state's exercise of its *parens patriae* power;¹¹ and absent rehabili-

substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him" without treatment. *Id.* at 503.

8. *Johnson v. Solomon*, 484 F. Supp. 278, 300 (D. Md. 1979) ("The right to treatment . . . is . . . the corresponding obligation of the State in light of its right to exercise its *parens patriae* power over its citizens."); *Inmates of Boys' Training Sch. v. Southworth*, 76 F.R.D. 115, 125 (1977) (rehabilitative treatment required by due process); *Pena v. New York State Division for Youth*, 419 F. Supp. 203, 207 (S.D.N.Y. 1976) ("[T]he detention of a youth under a juvenile justice system absent a provision for the rehabilitative treatment of such youth is a violation of due process rights guaranteed under the Fourteenth Amendment."); *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971) ("To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process.").

9. *Nelson v. Heyne*, 491 F.2d 352, 360 n.12 (7th Cir. 1974) (right to treatment found in the 'custody, care, and discipline' language of the state juvenile code); *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967) (juvenile code's stated purpose to provide care substantially equivalent to that which should have been provided by parents may give rise to "a legal right to a custody that is not inconsistent with the *parens patriae* premise of the law"); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (right to treatment provision of mental health statute applicable to the mentally ill who are involuntarily committed); *In re Schmidt*, 429 A.2d 631 (Pa. 1981) (state has duty under mental health statutes to provide adequate care in the least restrictive environment).

10. *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Gary W. v. State of LA.*, 437 F. Supp. 1209, 1216 (E.D. La. 1976) ("If an individual, adult or child, healthy or ill, is confined by the government for some reason other than his commission of a criminal offense, the state must provide some benefit to the individual in return for the deprivation of his liberty. . . . That *quid pro quo* is care or treatment of the kind required to achieve the purpose of confinement."); *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972) (effective treatment is the *quid pro quo* for society's right to exercise its *parens patriae* powers).

11. See *Jackson v. Indiana*, 406 U.S. 715 (1972); *Nelson v. Heyne*, 491 F.2d 352, 358-59 (7th Cir. 1974) (right of juveniles to rehabilitative treatment under the due process clause of the 14th Amendment is based upon the *parens patriae* premise of the juvenile justice system); *Johnson v. Solomon*, 484 F. Supp. 278, 299 (D. Md. 1979). "[F]or the State to justify its actions, there must be 'proper' treatment provided in the sense that such treatment must 'bear some reasonable relation to the purpose for which the individual is committed.'" *Id.* (quoting *Jackson v. Indiana*, 406 U.S. 715, 718 (1972)); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1367 (D.R.I. 1972) (state, acting in its *parens patriae* capacity, cannot treat juveniles in a manner which would justify state's removal of child from home).

tation, confinement for purposes other than punishment for criminal activity violates the Eighth Amendment's prohibition of cruel and unusual punishment.¹² The statutory arguments are typically based on express statutory provisions,¹³ judicial interpretation,¹⁴ and in one instance by the holding that an interpretation of a juvenile code statute which did not provide a right to treatment would itself be unconstitutional.¹⁵

In response to this trend, Vermont amended its Mental Health Act in 1977 to include, among other things, the following policy statement:

It is the policy of the State of Vermont to assure the availability of adequate treatment to persons in this state who are mentally ill. Treatment on a voluntary basis shall be preferred to involuntary treatment and in every case, the least restrictive conditions consistent with adequate treatment shall be provided.¹⁶

Although the Vermont Supreme Court has stated that there is a "statutory right to appropriate care, treatment and habilitation" for mentally retarded individuals residing at Vermont State Hospital,¹⁷ it has not had the opportunity to extend this right to minors

12. *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972) (where the state, through the exercise of its *parens patriae* power, detains children classified as 'persons in need of supervision,' it can "meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee."); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1366 (D.R.I. 1972) (confinement of juveniles for rehabilitative rather than punitive purposes "does not preclude operation of the Eighth Amendment").

13. *Ass'n for Retarded Citizens of N.D. v. Olson*, 713 F.2d 1384, 1393 (8th Cir. 1983); *In re Schmidt*, 429 A.2d 631, 637 (Pa. 1981).

14. *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967).

15. *Nelson v. Heyne*, 491 F.2d 353, 360 n.12 (7th Cir. 1974).

16. Policy Statement, Acts, 1977, No. 252 (Adj. Sess.). A statement of policy, however, does not rise to the level of an entitlement. See Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment*, 84 MICH. L. REV. 286, 296 n.85 (1985). But cf. Note, *Protecting Liberty Interests: Developments in Vermont's Mental Health Law As Federal Constitutional Protection Declines*, 9 VT. L. REV. 265, 278 (1984) (statement of state policy supports statutory claim to right); *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967) (stated policy of juvenile code established policy objective, and in appropriate case, a legal right "not inconsistent with the *parens patriae* premise of the law").

17. *In re C.B.*, 147 Vt. 378, 385, 518 A.2d 366, 371 (1986). See *In re R.A.*, 146 Vt. 289, 292, 501 A.2d 743, 744 (1985) (statutory mandate of adequate and appropriate treatment of mentally ill "may require more than the 'reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests' which the Fourteenth Amendment requires"). The Vermont Supreme Court acknowledges a limi-

in state custody who are in need of mental health services. The majority of cases concerning the right to treatment involve the rights of the mentally retarded, not the rights of juveniles who are in state custody but not civilly committed under the mental health laws.¹⁸ It would be consistent to extend the right to treatment to minors who are in need of mental health services but who have not been committed under the Mental Health Act.¹⁹ In fact, some writers have suggested that litigating under state statutes would be the most promising avenue in light of the Supreme Court's reluctance to recognize a right to treatment under the Due Process Clause of the Fourteenth Amendment.²⁰

This note discusses Vermont Supreme Court cases concerning

tation to the United States Supreme Court's holding in *Youngberg v. Romeo*, 457 U.S. 307 (1982). See *infra* text accompanying note 48.

18. The contrast is highlighted by surveys of state statutes concerning the respective rights of persons subject to state mental health codes and children subject to state juvenile codes. As of 1985, only Alabama, Mississippi, and Oregon were without statutory mental health provisions substantially or partially affirming the right to treatment in the least restrictive environment. Weiner, *Rights of Institutionalized Persons*, in *THE MENTALLY DISABLED AND THE LAW* (3d ed. 1985). See also Lyon-Levine, Levine & Zusman, *Developments in Patients' Bill of Rights Since the Mental Health Systems Act*, 9 *MENTAL & PHYSICAL DISAB. L. REP.* 146 (1985); Lyon, Levine & Zusman, *Patients' Bills of Rights: A Survey of State Statutes*, 6 *MENTAL DISAB. L. REP.* 178 (1982).

On the other hand, no state has expressly provided a statutory right to treatment in its juvenile code. See *infra* text accompanying notes 168-77.

19. See *State v. Trent*, 289 S.E.2d 166, 172 (W.Va. 1982) (holding that a child incapable of conforming his conduct to prescribed legal norms comes within the definition of mental illness and shall be treated accordingly).

20. See Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 *LOV. L.A.L. REV.* 1249 (1987); Note, *Saving the Child: Rejuvenating a Dying Right to Rehabilitation*, 11 *N. ENG. J. OF CRIM. & CIV. CONFINEMENT* 123 (1984).

In two decisions concerning plaintiffs who were institutionalized as mentally retarded, the United States Supreme Court has refused to recognize a constitutional right to treatment per se for involuntarily committed mentally retarded persons. In a series of cases culminating in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court refused to find a constitutional right to treatment for a plaintiff confined at a school and hospital for the mentally handicapped, although the Court left untouched the holding of the United States Court of Appeals for the Third Circuit that there was such a right under the Pennsylvania mental health statutes.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court refused an opportunity to explicitly address the question, finding the case "[did] not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right per se, even when no type or amount of training would lead to freedom." *Id.* at 318. The Court in *Youngberg* did state, however, that the respondent's "liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint," but that the "courts must show deference to the judgment exercised by a qualified professional." *Id.* at 319-24.

the institutionalized mentally ill and mentally retarded and then discusses United States Supreme Court cases concerning juvenile adjudication and confinement of the mentally ill. Principles are found in these cases which support the establishment of a right to treatment for minors in state custody who are in need of mental health services. This note then discusses Justice Blackmun's concurring opinion in *Youngberg v. Romeo*²¹ and suggests that a confined individual's liberty interest in freedom from undue restraint is flexible enough to support a right to treatment for minor's in state custody. Finally, this note briefly discusses all state juvenile codes before concluding that establishing a statutory right to treatment for minors in state custody would be consistent with the Vermont Supreme Court and U.S. Supreme Court cases discussed without placing an unmanageable strain upon the juvenile system.

I. THE VERMONT SUPREME COURT AND THE RIGHT TO TREATMENT

The Vermont Supreme Court has considered the question of a right to treatment in the least restrictive environment for mentally ill and mentally retarded persons in the state's custody.²² In *In re M.G.*,²³ the court considered a student's continued hospitalization at the Brandon Training School.²⁴ The court stated that the inquiry involved the *constitutional* question of whether the capabilities of the student required release into the community. The court also stated that the state must show by clear and convincing evidence that the custodial restraint of Brandon's program was "no more than is reasonably required for safety and the welfare and best interests of the student."²⁵

In *In re A.C.*,²⁶ the Vermont Supreme Court again considered an admission to Brandon. The court stated that to limit the reviewing court's disposition to either continued admission or discharge would "render the state incapable of fulfilling its duty to

21. 457 U.S. 307 (1982).

22. See *In re C.B.*, 147 Vt. 378, 518 A.2d 366 (1986); *In re R.A.*, 146 Vt. 289, 501 A.2d 743 (1985); *In re V.C.*, 505 A.2d 1214 (1985); *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984); *In re M.G.*, 137 Vt. 521, 408 A.2d 653 (1979).

23. 137 Vt. 521, 408 A.2d 653 (1979).

24. Brandon Training School is a school "established for the custody, treatment, education, habilitation and remedial care of mentally retarded persons in Vermont." VT. STAT. ANN. tit. 18, § 8838(a) (1987).

25. *In re M.G.*, 137 Vt. 521, 529, 408 A.2d 653, 657 (1979).

26. *In re A.C.*, 144 Vt. 37, 470 A.2d 1191 (1984).

care for those unable to provide for themselves."²⁷ The reviewing court must consider the "particular needs and circumstances of the student" in formulating its decision because "[t]o do otherwise would be tantamount to a breach of the duty to accord special treatment and protections to the mentally retarded."²⁸ The court held that the lower court properly rejected an inappropriate treatment in order to protect A.C.'s statutory right to appropriate treatment.²⁹

In *In re C.B.*,³⁰ the Vermont Department of Mental Health appealed a district court order directing the Commissioner of Mental Health to locate an appropriate placement within ninety days for mentally retarded individuals whom the court had ordered discharged from Vermont State Hospital.³¹ The parties agreed that the hospital was intended to provide treatment for the mentally ill, that the individuals were not mentally ill, and the hospital could not provide the individuals with appropriate treatment and habilitation.³²

The Vermont Supreme Court stated that the district court failed "to give due consideration to [the] Department's argument that it did not have the funds needed to place petitioners in community-based programming for the mentally-retarded."³³ Citing the Mental Health Act,³⁴ the Court stated that "although our statutes clearly seek to place mentally retarded persons in the least restrictive environment which can provide appropriate care and treatment, they do not mandate that such treatment be provided when it is unavailable."³⁵ While recognizing that the petitioners had a statutory right to treatment,³⁶ the Court held that "[w]hen the evidence presented demonstrates that a less restrictive noninstitutional placement is unavailable due to lack of resources, the

27. *Id.* at 43, 470 A.2d at 1194-95.

28. *Id.* at 43, 470 A.2d at 1195.

29. *Id.* at 44, 470 A.2d at 1195.

30. 147 Vt. 378, 518 A.2d 366 (1986).

31. *Id.* at 379, 518 A.2d at 368.

32. *Id.*

33. *Id.* at 383, 518 A.2d at 370.

34. The Court cited VT. STAT. ANN. tit. 18, § 8907(a) (1987), which provides in pertinent part that "the commissioner shall, within the limits of funds designated by the legislature for this purpose, ensure that community services to mentally ill and mentally retarded persons throughout the state are provided through designated community mental health agencies." *Id.* at 384, 518 A.2d at 371.

35. *Id.*

36. *Id.*

district court is limited to ordering the Commissioner to use his best efforts to find such a placement within a reasonable time."³⁷

The Court stated that on remand the district court could conditionally commit the petitioners to Brandon for no more than three months, while directing the Commissioner to "use his best efforts to locate or develop community-based placement alternatives."³⁸ Such a conditional commitment could be extended, and "[s]carcity of resources . . . is a legitimate argument to be raised in support of such extensions."³⁹ The Court concluded that "a conditional commitment order would fully vindicate [the] petitioners' rights to appropriate care, treatment, and habilitation."⁴⁰

In *In re V.C.*,⁴¹ the Commissioner of Mental Health appealed a district court order directing the Commissioner to place V.C., a brain-damaged patient at Vermont State Hospital, at a facility in Connecticut. The district court found that the treatment received at the hospital was inadequate and inappropriate and that there was no appropriate facility in Vermont.

The following undisputed facts characterize the state of affairs preceding V.C.'s application for a discharge:

[D]uring the first four years of her stay at VSH, there was adequate and qualified staff, behavioral programming, and stimulating intellectual and outdoor activities. V.C.'s condition improved significantly. After 1982, however, the treatment programs at VSH were drastically reduced. At the time of the hearing, V.C. was receiving drug therapy and custodial care, but no "treatment." The trial court found that she had significantly regressed from being able to read, write and speak in sentences, to being persistently mute. Her self-care habits have deteriorated, and her combative behavior has worsened.⁴²

The Vermont Supreme Court agreed that V.C. had a statutory

37. *Id.*

38. Provided, however, the district court finds that "the type of less restrictive environment required by [petitioners] is generally available, but that there is no specific opening available at that time, and [petitioners are] otherwise . . . person[s] in need of commitment." *Id.* at 384-85, 518 A.2d at 371.

39. *Id.* at 385, 518 A.2d at 371.

40. *Id.* at 385, 518 A.2d at 372.

41. 146 Vt. 454, 505 A.2d 1214 (1985).

42. *Id.* at 455, 505 A.2d at 1215.

right to treatment,⁴³ and that the district court may enforce this right by ordering the Commissioner to provide adequate treatment. However, the Court held that "the district court may order the Commissioner to make his best efforts to find an appropriate placement which will provide adequate treatment" when no appropriate alternative placement otherwise exists for patients not receiving adequate treatment at Vermont State Hospital.⁴⁴

In *In re R.A.*,⁴⁵ a mentally ill patient voluntarily committed to Vermont State Hospital was involuntarily committed by the Department of Mental Health after the patient gave the requisite notice of his intention to leave. R.A. challenged the district court's hospitalization order on the ground that he was not receiving treatment adequate and appropriate to his condition.⁴⁶ The state claimed that R.A.'s treatment met the constitutional standard applicable to the mentally retarded as set forth in the United States Supreme Court decision in *Youngberg v. Romeo*.⁴⁷ The Vermont Supreme Court stated that the statutory mandate that a mentally ill person shall not be ordered hospitalized unless the hospital can provide adequate and appropriate treatment "may require something *more than* the 'reasonable care and safety, reasonably restrictive confinement conditions, and such training as may be required by these interests' which the Fourteenth Amendment requires."⁴⁸ The Court remanded the case with instructions that the trial court examine R.A.'s treatment to ensure compliance with statutory requirements.⁴⁹

43. In addition to a statutory right to treatment under VT. STAT. ANN. tit. 18, § 7617(e), the trial court held that V.C. had a "protected liberty interest under the United States Constitution." *Id.*

44. *Id.* at 1216-17. The specific means of compliance with the duty to provide adequate treatment to hospitalized patients in Vermont is within the Commissioner of Mental Health's special expertise. *Id.* at 1217.

45. 146 Vt. 289, 501 A.2d 743 (1985).

46. *Id.* at 290, 501 A.2d at 744. The Vermont Mental Health Act provides in part that "[h]ospitalization shall not be ordered unless the hospital in which the person is to be hospitalized can provide him with treatment which is adequate and appropriate to his condition." VT. STAT. ANN. tit. 18, § 7617(e) (1987).

47. *In re R.A.*, 146 Vt. at 291, 501 A.2d at 744. In *Youngberg*, the Court held that the institutionalized mentally retarded had a constitutional right under the due process clause of the fourteenth amendment to "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Youngberg v. Romeo*, 457 U.S. 322, 325 (1982).

48. *In re R.A.*, 146 Vt. at 292, 501 A.2d at 744 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982)).

49. *Id.*

These cases dealing with the rights of the institutionalized mentally ill and mentally retarded contain certain principles which support a right to treatment for minors in state custody who are in need of mental health services.⁵⁰ First, the restraint upon an institutionalized individual may be no more than is reasonably required for the best interests of the individual.⁵¹ If a minor in state custody could function in the community with the provision of mental health services, then custody without such services is tantamount to a restraint which is not in the best interests of the minor. Second, the state has a duty to care for those unable to care for themselves.⁵² To the extent that the state does not provide mental health services to those in need, then its duty to care for those in its custody is not being fulfilled. Third, the particular needs and circumstances of institutionalized persons are important to a court reviewing the conditions of confinement.⁵³ Similarly, if a minor in state custody is in need of mental health services, the courts should be sensitive to the possibility that failure to provide such services may result in a deterioration of the minor's welfare.⁵⁴ Finally, the Vermont Supreme Court has held that the right to appropriate treatment under the Act may require something more than that which is required by the United States Supreme Court's decision in *Youngberg v. Romeo*.⁵⁵ In *Youngberg*, the Court held that an institutionally mentally retarded person has liberty interests in "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."⁵⁶ Custody of a minor is a form of restraint. If the provision of mental health services will enable a minor to live free from restraint, then such services should be required.

II. THREADING THE DUE PROCESS NEEDLE: THE U.S. SUPREME COURT, ADJUDICATION, AND CONFINEMENT

Vermont should establish a statutory right to treatment for minors in state custody. A review of certain U.S. Supreme Court

50. See, e.g., *State v. Trent*, 289 S.E.2d 166, 175 (W. Va. 1982). "[T]here is little question that a child adjudged delinquent and committed to the custody of the State has both a constitutional and a statutory right to treatment." *Id.*

51. See *supra* text accompanying note 25.

52. See *supra* text accompanying note 27.

53. See *supra* text accompanying note 28.

54. See *infra* text accompanying notes 116-18.

55. 457 U.S. 307 (1982).

56. *Id.* at 319.

cases is in order for two reasons. First, the Supreme Court's decisions requiring that due process rights be accorded to juveniles during adjudication show a hesitancy to displace the rehabilitative philosophy of the juvenile court with a full scale adversarial model.⁵⁷ The Court has been careful to note that the procedures which are constitutionally required in juvenile adjudications do not undermine the traditional benefits of the juvenile court.⁵⁸

Second, cases concerning the rights of the institutionalized mentally retarded and the mentally ill have not expressly excluded the possibility of establishing a constitutional right to treatment.⁵⁹ The Court has been able to decide certain 'treatment' cases on a different basis,⁶⁰ being careful to state that it is not determining the issue of a right to treatment. Nevertheless, if the circumstances and policy reasons which the Court has used to circumvent the issue of a right to treatment can be identified, then it can be shown that establishing a right to treatment for minors in state custody who are in need of mental health services is consistent with both the Court's holdings and its concerns about the juvenile justice system.⁶¹

57. See *infra* text accompanying note 93.

58. See *infra* text accompanying notes 82 & 88.

59. See *Pena v. New York State Division for Youth*, 419 F. Supp. 203, 206 (S.D.N.Y. 1976). "While none [*McKeiver*, *In re Winship*, *In re Gault*, and *Kent*] required the Court to address itself squarely to the question of the juvenile's right to rehabilitative treatment, the conclusion which this court draws from a reading of those cases is that such a right does exist." *Id.*

60. *E.g.*, in the protracted *Pennhurst* litigation, the issue of a right to treatment under state law was subordinated to the issue of whether a federal court could hear a state law action against state officials under the Eleventh Amendment. *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part & rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), *on remand* 673 F.2d 647 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984), *final settlement approved*, 610 F. Supp. 1221 (E.D. Pa. 1985). For a discussion of the Court's attempts to narrow the issue in order to avoid directly addressing the right to treatment, see Comment, *We Have Met the Imbeciles and They Are Us: The Courts and Citizens with Mental Retardation*, 65 *NEB. L. REV.* 768, 804 (1986). "Clearly, the Court's continuing struggle to identify the narrowest possible grounds for each of its decisions in this area is the product of calculated assessment rather than ignorance or naivete." *Id.*

61. For example, the Court has suggested that if other legitimate bases exist for the 'detention' of an individual, such as the protection of others, then the detention may be justifiable in the absence of the provision of treatment. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (Burger, C.J., concurring). In addition, the Court noted that it had "no occasion . . . to decide whether persons committed on grounds of dangerousness enjoy a 'right to treatment'." *Id.* at 571, n.6.

A. Adjudication

The Court exhibited an ambivalence toward the *parens patriae* premise of the juvenile justice system⁶² in two landmark cases extending procedural rights to juveniles in delinquency proceedings.⁶³ While the Court based its holdings in both cases on the need to afford minors protection from arbitrary procedures when significant rights were at risk, there is an implicit recognition by the Court that the juvenile justice system, based on the rehabilitative ideal, may not be effective.⁶⁴

In *Kent v. U.S.*,⁶⁵ the juvenile court waived its exclusive jurisdiction, permitting a juvenile who admitted to acts of housebreaking, robbery, and rape to be criminally prosecuted in the federal district court. A provision of the District of Columbia juvenile code provided for waiver of the juvenile court's jurisdiction after a "full investigation" without specifying any standards for the exercise of the court's discretion.⁶⁶ The Court held that at a minimum such a waiver "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'"⁶⁷ The Court went on to hold that a juvenile could not be subjected to an adult jail facility and exposed to the possibility of a death sentence without a hearing, the assistance of counsel, and findings of fact by the juvenile court.⁶⁸

The Court expressed some concern about whether the social welfare basis⁶⁹ of the juvenile codes was sufficient to protect the

62. See *infra* text accompanying notes 71 & 83.

63. *In re Gault*, 387 U.S. 1 (1967); *Kent v. U.S.*, 383 U.S. 541 (1966).

64. After an exposition of the juvenile court 'movement' from its inception in Illinois in 1899, the Court in *Gault* stated that the "constitutional and theoretical basis for the peculiar system is—to say the least—debatable." *Gault*, 383 U.S. at 17.

65. 383 U.S. 541 (1966).

66. *Id.* at 547.

67. *Id.* at 553.

68. *Id.* at 553-54.

69. It is commonly said that the underlying purpose of the juvenile court is to rehabilitate rather than to punish. A state's interest in the rehabilitation of its youth is an element of state power under the *parens patriae* doctrine, a common law doctrine whereby the state may act as guardian for persons who are unable to care for themselves.

Children, by definition, are not assumed to have the capacity to care for themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's *parens patriae* interest in preserving

interests of children subject to the jurisdiction of juvenile courts. The Court recognized that the theory of juvenile codes is "rooted in social welfare philosophy"⁷⁰ and that the "objectives are to provide measures of guidance and rehabilitation for the child and protection for society."⁷¹ However, the Court doubted that the *parens patriae* premise of the juvenile courts was sufficient to immunize them from the full panoply of due process guarantees afforded adults in criminal proceedings.⁷²

In *Kent*, the Court established that due process requires that juveniles have certain procedural rights when faced with the prospect of being tried as an adult.⁷³ While the Court premised its holding on the fact that the juvenile would lose significant rights guaranteed under the juvenile code,⁷⁴ the Court gave great weight to the possibility that the *parens patriae* premise of juvenile custody may not be sufficient to protect the interests of the child.

In *In re Gault*,⁷⁵ the petitioner was detained for allegedly making remarks on the telephone that "were of the irritatingly, offensive, adolescent, sex variety."⁷⁶ The petitioner was adjudicated a delinquent and committed to state custody for a maximum of six years.⁷⁷ Because there were serious questions as to the confession, notice of the charges was untimely and inadequate, and a possible consequence of being adjudicated a delinquent was commitment to a state institution, the Court could not countenance such a procedure absent the protections accorded to transfer proceedings in

and promoting the welfare of the child.'

Schall v. Martin, 467 U.S. 253, 265 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

70. *Kent*, 383 U.S. at 554.

71. *Id.*

72. *Id.* at 555. "There is much evidence that some juvenile courts . . . lack personnel, facilities and technique to perform adequately as representatives of the State in a *parens patriae* capacity . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." *Id.* at 555-56.

73. See *supra* text accompanying note 68.

74. *E.g.*, the juvenile is shielded from publicity, may not be confined in an adult facility, and cannot be disqualified from public employment. Most important, under the facts of *Kent*, the juvenile could only be detained until the age of 21. If tried as an adult, however, the petitioner faced a possible death penalty. *Id.* at 556-57.

75. 387 U.S. 1 (1966).

76. *Id.* at 4.

77. *Id.* at 29.

Kent.⁷⁸

The Court in *Gault* was also concerned that the *parens patriae* doctrine was not sufficient to accord juveniles protection from procedural abuses absent certain due process rights.⁷⁹ However, the Court's concern that juveniles be afforded procedural protections in delinquency proceedings was not based solely on paternalist concerns with minors' welfare. It was also based on recognition of the fact that juveniles were committing increasing numbers of crimes⁸⁰ and that any arbitrariness in the delinquency proceedings may further alienate the juveniles.⁸¹ In affording due process protection at the adjudicatory stage, the Court implicitly suggested that the *parens patriae* ideal of rehabilitation had failed.⁸²

Despite the cynicism directed at the theoretical underpinnings of the juvenile justice system, the Court was careful to point out that affording due process protections to delinquency proceedings would not "compel the States to abandon or displace any of the substantive benefits of the juvenile process."⁸³ The separate treatment of adults and minors is preserved. The classification of a minor as 'juvenile' rather than 'criminal' in an effort to avoid stigmatization is not affected. The confidentiality of the proceedings is not affected. The common statutory provision barring a delinquency adjudication from disqualifying the minor from state or federal employment is also preserved.

In addition, the Court noted that "to the extent that the special procedures for juveniles are thought to be justified by the spe-

78. The Court in *Kent* held that notice must be given with particularity and sufficiently in advance to afford the opportunity to prepare for the hearing. In addition, there can be no determination and commitment absent sworn testimony and cross-examination. Also, in light of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court held that the right against self-incrimination was applicable because delinquency proceedings are 'criminal' if they may lead to institutional commitment. *Kent*, 383 U.S. at 553-54.

79. *Gault*, 387 U.S. at 14-21, nn.14-26.

80. *Id.* at 20 n.26.

81. *Id.* at 26 n.37.

82. It does not require a great leap from the argument that minors should be afforded procedural rights in order to protect them from arbitrary adjudications to the argument that such rights should be afforded not because the proceedings are criminal but because the juveniles are criminal. The Court in *Gault* noted with deference the "surprising unanimity" of studies which are cynical toward the therapeutic value of the "fatherly judge" and which "suggest that the appearance as well as the actual fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." *Gault*, 387 U.S. at 26.

83. *Id.* at 21.

cial consideration and treatment afforded them, there is reason to doubt that juveniles always receive the benefits of such a *quid pro quo*."⁸⁴ More important, the Court expressly acknowledged that such an argument was being made in the lower courts to challenge custody where no special treatment was received.⁸⁵

In *In re Winship*,⁸⁶ the Court held that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination."⁸⁷ The Court reasoned that being subject to the possible "loss of his liberty for years" was sufficient to warrant a higher standard of proof.⁸⁸ The Court, as in *Gault*, was careful to explain that its holding would "not compel the States to abandon or displace any of the substantive benefits of the juvenile process."⁸⁹ According to the Court, requiring proof beyond a reasonable doubt would not render the finding of delinquency a criminal conviction, make the proceedings less confidential, deprive the minor of civil rights to employment, or necessarily render the proceedings more formal or inflexible. In addition, the opportunity "during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment" would remain.⁹⁰

In *McKeiver v. Pennsylvania*,⁹¹ the Court drew the line. Having provided a panoply of procedural rights to the juvenile in the

84. *Id.* at 22, 23 n.30.

85. *Id.* "[S]ome courts have recently indicated that appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment." *Id.* The *quid pro quo* argument, that treatment must be afforded in exchange for less procedural safeguards, is also based on the due process clause of the Fourteenth Amendment but is different from the 'due process' argument that treatment must be provided if it is the sole basis for custody and thus loss of liberty.

86. 397 U.S. 358 (1969).

87. *Id.* at 368. Proof beyond a reasonable doubt is required where a minor is charged with an act which would be criminal if committed by an adult. A clear and convincing standard is required where parental rights are being terminated. *Santosky v. Kramer*, 455 U.S. 745 (1982). A preponderance of the evidence is sufficient where the adjudication is to determine whether the child is subject to the juvenile court's jurisdiction by meeting other statutory criteria, e.g. whether the child is a child 'in need of supervision' or a victim of neglect.

88. *Id.* at 365, 366 (citing *In re Gault*, 387 U.S. 1, 36 (1967)).

89. *Id.* at 367 (citing *In re Gault*, 397 U.S. 1, 21 (1967)).

90. *Id.* at 366.

91. 403 U.S. 528 (1971).

adjudicatory stage, the Court held that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement."⁹² The Court again took the opportunity to express misgivings about the juvenile court system.⁹³ Despite these misgivings, the Court was unwilling to completely transform juvenile courts for fear of making juvenile proceedings "into a fully adversary process and [putting] an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."⁹⁴

It is important to note the dual nature of the Court's misgivings. On the one hand, the juvenile system, without the procedural safeguards required by due process, leads to arbitrary and abusive adjudications. On the other hand, the juvenile court system, to the extent that its function is premised on the rehabilitation of the juvenile, is ineffective.

In *McKeiver*, the Court relied solely on a government task force report in support of its premise that the juvenile justice system is ineffective.⁹⁵ The report states that there is "'increasing reason to believe that [the juvenile court's] intervention reinforces the juvenile's unlawful impulses.'"⁹⁶

The following language of the Task Force Report provides the ideological framework which was present in the Court's discussion of the adjudicatory stage of the juvenile system. It sketches the parameters of certain policy considerations which confronted the Court:

The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitating offenders through individualized handling is one way of providing protection. . . . But the guiding consideration for a court of law

92. *Id.* at 545. The Court enumerated thirteen reasons in support of its holding. Principally, the Court stated that the jury is not a "necessary component of accurate factfinding." *Id.* at 543.

93. "We must recognize . . . that the fond and idealistic hopes of the juvenile court proponents and early reformers . . . have not been realized The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment." *Id.* at 544-45.

94. *Id.* at 545.

95. *Id.* at 544-46, nn.4-6 (citing the PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967)) (hereinafter TASK FORCE REPORT).

96. TASK FORCE REPORT, *supra* note 95, at 9. *Cf. In re Gault*, 387 U.S. 1, 26, n.37 (1967).

that deals with threatening conduct is nonetheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is greater emphasis on rehabilitation, not exclusive preoccupation with it.⁹⁷

Although the Court in *Kent*, *Gault*, *Winship*, and *McKeiver* held that greater procedural protections are constitutionally required in juvenile adjudications, one must not lose sight of the fact that not all minors subject to juvenile adjudications have committed delinquent acts. For example, a minor who is a child in need of supervision may be subject to juvenile court jurisdiction without having committed an act which would be a crime if committed by an adult. With respect to such minors who have not committed delinquent acts, the state's interest in protecting the community from threatening conduct is seriously diluted if not nonexistent. For these minors, the state's interest in rehabilitation is paramount. If rehabilitation requires mental health services, then establishing an entitlement to such services would not cause the state to "abandon or displace any of the substantive benefits of the juvenile process."⁹⁸

B. Confinement

As the Court moves from determining what due process requires in juvenile adjudication to determining what due process requires for the institutionalized mentally ill and mentally retarded, the narrow choices of rehabilitation or protection of society from "threatening conduct" are insufficient when discussing the interests of a minor *not* adjudicated a delinquent whose liberty may nonetheless be significantly curtailed.

In *Jackson v. Indiana*,⁹⁹ the petitioner was incompetent to stand trial and was committed to a psychiatric institution until such time as he was determined to be sane. The petitioner, a "mentally defective deaf mute [who could not] read, write, or otherwise communicate except through limited sign language,"¹⁰⁰ was

97. TASK FORCE REPORT, *supra* note 95, at 9.

98. *In re Gault*, 387 U.S. 1, 36 (1967).

99. 406 U.S. 715 (1972).

100. *Id.* at 717.

charged with two separate robbery offenses in which a total of nine dollars was stolen.¹⁰¹ Three statutory procedures were available to the trial court: the petitioner could be committed to a psychiatric institution until its administrator certified him to be sane for trial; he could be civilly committed as mentally ill; or he could be civilly committed as feeble-minded. On the basis of the record, the Court was unable to determine whether the petitioner could have been committed under the latter two procedures.¹⁰² The pending criminal proceedings did not justify a commitment which was likely to be indefinite given the petitioner's slim prospects of improvement.¹⁰³ Because the petitioner was subjected to more lenient commitment standards and to more stringent release standards than those applicable to all others not charged with a crime, the Court held that the petitioner was denied equal protection of the law.¹⁰⁴

In addition, the Court stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."¹⁰⁵ After discussing indefinite commitment in the federal criminal system,¹⁰⁶ the Court stated that the "States have traditionally exercised broad power to commit persons found to be mentally ill. . . . The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training."¹⁰⁷ Because the proceedings which led to Jackson's commitment did not consider "any of the articulated bases for [the state's exercise] of indefinite commitment,"¹⁰⁸ there was no reasonable relation between the nature of the commitment and its purpose.

101. *Id.*

102. *Id.* at 727.

103. *Id.* at 729-30.

104. *Id.* at 730.

105. *Id.* at 738.

106. The Court stated that the applicable federal statutes, 18 U.S.C. §§ 4244-4246, were similar to the Indiana statute at issue, but the "federal statutes have been construed to require that a mentally incompetent defendant must also be found 'dangerous' before he can be committed indefinitely." *Jackson*, 406 U.S. at 731. The Court stated further that "[w]ithout a finding of dangerousness, one committed thereunder can be held for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future." *Id.* at 733.

107. *Id.* at 736-37. Particularly interesting, in light of the Court's remarks in *Gault*, *supra* note 48, is the Court's statement that "[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." *Id.* at 737 (emphasis added) (footnote omitted).

108. *Id.* at 737-38 (emphasis in original).

In *O'Connor v. Donaldson*,¹⁰⁹ respondent Donaldson was civilly committed to a Florida state hospital where he was kept against his will for fifteen years.¹¹⁰ The uncontradicted testimony showed that Donaldson posed no danger to himself or to others, that he could have supported himself outside the hospital, and that his confinement consisted of mere custodial care.¹¹¹

The district court's jury instructions contained the following language:

You are instructed that a person who is involuntarily civilly committed to a mental hospital does have a constitutional right to receive such *treatment as will give him a realistic opportunity to be cured or to improve his mental condition.*

... [T]he purpose of involuntary hospitalization is treatment and not mere custodial care or punishment if a patient is not a danger to himself or others. Without such treatment there is no justification from a constitutional stand-point for continued confinement unless you should also find that the Plaintiff was dangerous either to himself or others.¹¹²

The United States Court of Appeals for the Fifth Circuit held that minimally adequate treatment must be provided when treatment is the rationale for the confinement.¹¹³ The Supreme Court, however, stated that the constitutional issue of whether there is a right to treatment if treatment is the rationale for the confinement was not present before the Court.¹¹⁴ The Court was able to avoid

109. 422 U.S. 563 (1975).

110. *Id.* at 564.

111. *Id.* at 568.

112. *Id.* at 571-72 n.6 (emphasis added). For the origin of the language emphasized in the above instructions, see *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971). For the landmark statement that such a right to treatment may have a constitutional basis, see *Rouse v. Cameron*, 373 F.2d 451, 455 (D.C. Cir. 1966). "Because we hold that the [statutory] right to treatment provision applies to appellant, we need not resolve the serious constitutional questions that Congress avoided by prescribing this right." *Id.*

113. The Supreme Court stated that such a holding implies that it is constitutionally permissible to confine a person if the rationale is treatment, regardless of whether the person is dangerous. This use of the Fifth Circuit's holding against itself is expanded upon in Chief Justice Burger's concurring opinion. See *O'Connor*, 422 U.S. at 580-85 (Burger, C.J., concurring). The Chief Justice explained that "in light of 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." *Id.* at 580.

114. The Supreme Court focused on the jury instructions:

Neither party objected to the jury instruction defining treatment. There is,

the right to treatment issue by narrowing the question to whether a finding of mental illness is sufficient to confine someone indefinitely if they are not dangerous and are capable of living safely without confinement.¹¹⁵ The Court held that a "State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."¹¹⁶

In effect, the facts in *O'Connor* presented the Court with the opportunity to at least address whether treatment is constitutionally required when it serves as the rationale for the confinement of a nondangerous individual. But for the failure of either party to object to the jury instructions, the law regarding the right to treatment of a nondangerous person capable of living outside of an institution might have been determined in this case.

It is significant to note, however, that the Court did at least take issue with the state's claim that the adequacy of treatment was a nonjusticiable question best left to the determination of the psychiatric profession. The Court stated that "[w]here 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present."¹¹⁷ The Court in *O'Connor* thus suggested that had the right to treatment issue

accordingly, no occasion in this case to decide whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose. In its present posture this case involves not involuntary treatment but simply involuntary custodial confinement.

Id. at 574 n.10.

115. Specifically, the Court stated that "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." *Id.* at 573. In addition, the Court stated that it was not necessary to address other rationales which are used to justify the involuntary confinement of the mentally ill. *Id.* at 573-74.

116. *Id.* at 576. The Court further distanced itself from the treatment issue by suggesting that the jury may actually have found both that Donaldson was not dangerous and that he was not mentally ill, in which case "there would remain no substantial issue." *Id.* at 573 n.8.

117. *Id.* at 574 n.10. The Court cited *Jackson v. Indiana*, 406 U.S. 715 (1972), thus suggesting that the courts are able to determine whether the treatment provided is consistent with the purpose of the confinement. *Cf.* *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, the Court, also citing *Jackson*, stated that "decisions made by the appropriate professionals are entitled to a presumption of correctness" when a court is determining whether a confined patient is receiving care consistent with the purpose of confinement. *Id.* at 324.

been present, the Court would have at least made a determination as to what was constitutionally necessary to satisfy due process, *i.e.*, what was consistent with the purpose of the confinement.

Chief Justice Burger's concurring opinion attempted to disassociate the Court from the Court of Appeal's unequivocal approval of a right to treatment for persons who are involuntarily civilly committed.¹¹⁸ It is in the Chief Justice's concurring opinion that the *parens patriae* and *quid pro quo* arguments for the right to treatment are first directly addressed by a member of the Court.¹¹⁹

Instead of considering what would be required if treatment *were* the rationale for confinement of the non-dangerous mentally ill, Chief Justice Burger turns the argument on its head by stating that confining the non-dangerous mentally ill with the purpose of providing treatment is not a traditional exercise of the States' *parens patriae* power.¹²⁰ Burger argued that the claimed right to treatment is of recent origin¹²¹ and that such a right is inconsistent with the variable needs of the mentally ill.¹²² In addition, Burger argued that patients may not cooperate with a plan of treatment;¹²³ may be unable to care for themselves unless provided shelter;¹²⁴ may suffer from an illness for which there is no effective therapy;¹²⁵ may fail to cooperate with any treatment; and may suf-

118. *O'Connor*, 422 U.S. at 580. Chief Justice Burger also emphasized, however, that "involuntary confinement of an individual for any reason . . . is a deprivation of liberty which the State cannot accomplish without due process of law." *Id.* at 580.

119. The concurring opinion has provided support for cases that hold that a right to treatment may not be based on the *parens patriae* or the *quid pro quo* arguments. *E.g.*, *Santana v. Collazo*, 714 F.2d 1172, 1176-77 (1st Cir. 1983). "[T]here is no legally cognizable quo to trigger a compensatory quid." *Id.*

120. *O'Connor* at 581-83. The Chief Justice argued that the "idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin, and there is no historical basis for imposing such a limitation on state power." In addition, the Chief Justice stated that statutory schemes evidence a dual interest in providing medical services to those who could benefit as well as custodial care to those not amenable to such treatment. *Id.*

121. *Id.* at 582.

122. *Id.* at 584. "[T]here are many forms of mental illness which are not understood, some of which are untreatable in the sense that no effective therapy has yet been discovered for them, and the rates of 'cure' are generally low." *Id.*

123. *Id.* at 584. "[I]t is universally recognized as fundamental to effective therapy that the patient acknowledge his illness and cooperate with those attempting to give treatment; yet the failure of a large proportion of mentally ill persons to do so is a common phenomenon." *Id.*

124. *Id.*

125. *Id.*

fer harm unless placed in a sheltered environment.¹²⁶

Burger's discussion of the *parens patriae* rationale for confinement is limited to persons who are civilly committed as mentally ill and who may fit the picture which he painted. However, if someone is amenable to treatment, cooperative, not dangerous to anyone, and capable of surviving without confinement, then the argument against a right to treatment for such a person weakens to the extent these characteristics are present. Similarly, if the subject is a minor who is cooperative, not dangerous, and capable of functioning with some level of support, then any significant curtailment of liberty would seem to require treatment if mental health services are needed.

Chief Justice Burger stated that the *quid pro quo* argument is also defective.¹²⁷ He argued that such a right to treatment would be inflexible and inconsistent with due process principles because the interests of the state and the expectations of the confined person are not the same in all cases. Basically, the argument is that not all cases which involve reduced procedural safeguards involve the same state interest. Similarly, not all cases involving the confinement of the mentally ill are necessarily premised on the same state interest. Hence, it would be 'inflexible' to require treatment in all cases.¹²⁸

This objection to the *quid pro quo* argument is subject to the same criticism as the objection to the *parens patriae* argument: In the narrow instance where a state's rationale for the confinement of a person is the person's rehabilitation, then absent other 'traditional' reasons for the exercise of the state's control over the person there should be a right to treatment.¹²⁹ In particular, if the

126. *Id.*

127. *Id.* at 585-87. Because not all the procedural safeguards of a criminal court are present in the commitment process, courts have held that rehabilitative treatment is the *quid pro quo* required by the due process clause of the 14th Amendment for this lack of procedural protection. *E.g.*, *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Pena v. New York State Division for Youth*, 419 F. Supp. 203 (S.D.N.Y. 1976); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972). *Cf.* *Santana v. Collazo*, 533 F. Supp. 966 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). Indeed, Chief Justice Burger was concerned that the *quid pro quo* theory "would elevate a concern for essentially procedural safeguards into a new substantive constitutional right." *O'Connor*, 422 U.S. at 587 (Burger, C.J., concurring).

128. *Id.* However, if the 'confinement' were premised on the same state interest, *i.e.*, treatment, then it may not be "inflexible" to require treatment in those cases where no other state interest were present.

129. See Note, *An Examination of Whether Incarcerated Juveniles Are Entitled by*

child is neglected or a mere status offender, then there is arguably only one rationale for confinement: treatment.¹³⁰

The Chief Justice's second argument was that the *quid pro quo* theory "would elevate a concern for essentially procedural safeguards into a new substantive right."¹³¹ Rather than being concerned with whether the procedural protections were adhered to, a court would be concerned with whether the benefits provided by a state are "adequate 'compensation' for confinement."¹³² Burger contended, however, that it is not the proper role of a court to make such determinations "[i]n light of the wide divergence of medical opinion regarding the diagnosis of and proper therapy for mental abnormalities."¹³³

On the one hand, the Chief Justice stated that the courts should not be involved in a procedural determination that the alleged benefits justify the commitment.¹³⁴ On the other hand, he stated that "questions regarding the adequacy of procedure and the power of a State to continue particular confinements are ultimately for the courts, aided by expert opinion to the extent that it is helpful."¹³⁵ Nevertheless, the Court has stated that the nature of treatment is justiciable when it is the sole ground for confinement.¹³⁶ After *O'Connor v. Donaldson*, the question remained as to what treatment was required in order for the nature of the confinement to bear a reasonable relationship to its purpose.

the Constitution to Rehabilitative Treatment, 84 MICH. L. REV. 286, 303 (1985). "Only when a state actually employs the rehabilitative objectives of the juvenile system to justify a reduction in procedural safeguards—and then proceeds to withhold the requisite rehabilitation—does it offend constitutional principles." *Id.*

130. See Note, *Saving the Child: Rejuvenating A Dying Right to Rehabilitation*, 11 NEW ENG. J. OF CRIM. & CIV. CONFINEMENT 123, 149-52 (1984) (classification of different types of juveniles "causes Chief Justice Burger's concurrence in *O'Connor v. Donaldson* to lose much credibility").

131. *O'Connor*, 422 U.S. at 587.

132. *Id.*

133. *Id.* (citing *In re Gault*, 387 U.S. 1, 71 (1967)) (Harlan, J., concurring and dissenting) ("[C]ourts may not substitute for the judgments of legislators their own understanding of the public welfare, but must . . . concern themselves with the [constitutional] validity of the methods which the legislature has selected."). Cf. *O'Connor*, 422 U.S. at 574 n.10. If "treatment" is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that courts are powerless to determine whether the . . . ground is present." *Id.*

134. See *supra* notes 95, 96 and accompanying text.

135. *O'Connor*, 422 U.S. at 587.

136. See *supra* note 131 and accompanying text.

In *Youngberg v. Romeo*,¹³⁷ the Court was faced with the question whether a mentally retarded minor, involuntarily committed to a state institution, has a right to treatment under the due process clause of the Fourteenth Amendment.¹³⁸ Romeo had suffered at least sixty-three injuries due to his own actions as well as the actions of others. In addition, Romeo was routinely restrained for prolonged periods.¹³⁹

In addition to a right to treatment, Romeo claimed a right to safe conditions of confinement and a right to freedom from bodily restraint.¹⁴⁰ The Court concluded from the record that Romeo was seeking "only training related to safety and freedom from bodily restraint."¹⁴¹ Consequently, the Court determined that the case did not "present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom."¹⁴² The Court held that Romeo's liberty interests in safety and freedom from bodily restraint required the state to provide "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."¹⁴³

Having established that Romeo was entitled to such training, the Court next addressed the question of what was "minimally adequate or reasonable." The Court held that Romeo was entitled to "such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function

137. 457 U.S. 307 (1982).

138. As the Court plainly acknowledged, "[w]e consider here for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution." *Id.* at 314.

139. *Id.* at 310.

140. Both of these claims were summarily upheld. As to the first, "[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.* at 315-16. As to the second claim, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Id.* at 316 (quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part)).

141. *Id.* at 318.

142. *Id.*

143. *Id.* at 319. The Court's narrowing of the issue was simplified by its claim that Romeo was not seeking any training unrelated to safety and freedom from bodily restraint. In addition, it was conceded that no amount of training would make Romeo's release possible due to the severity of his retardation.

free from bodily restraint."¹⁴⁴ The Court emphasized that "courts must show deference to the judgment exercised by a qualified professional [in order to minimize the] interference by the federal judiciary with the internal operations of these institutions."¹⁴⁵ Further, "[i]n determining whether the State has met its obligations in these respects, decisions made by the appropriate professional are entitled to a presumption of correctness."¹⁴⁶

Youngberg established for the first time that an involuntarily committed mentally retarded person "retains liberty interests in safety and freedom from bodily restraint."¹⁴⁷ These liberty interests require the state to provide "minimally adequate or reasonable training to ensure safety and freedom from undue restraint."¹⁴⁸ The "minimally adequate training required by the Constitution is such training as may be reasonable in light of [such person's] liberty interests in safety and freedom from unreasonable restraints."¹⁴⁹ Further, "in determining what is 'reasonable'—in this and any case presenting a claim for training by a State— . . . courts must show deference to the judgment exercised by a qualified professional."¹⁵⁰ A decision regarding treatment, "if made by a professional, is presumptively valid." Further, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."¹⁵¹

Three constitutional principles concerning the confinement of the mentally ill and the mentally retarded were established in *Jackson v. Indiana*, *O'Connor v. Donaldson*, and *Youngberg v. Romeo*. First, due process requires at a minimum that the nature of a person's confinement must bear a reasonable relationship to its purpose.¹⁵² Second, absent a legitimate purpose, a state may not

144. *Id.* at 324.

145. *Id.* at 322.

146. *Id.*

147. It should be noted that the Court used different language to describe the liberty interest regarding restraint. The Court used the following phrases: "freedom from bodily restraint," "freedom from undue restraint," "freedom from restraint," and "reasonably non-restrictive confinement conditions." See *id.* at 319-24.

148. *Id.* at 319.

149. *Id.* at 322.

150. *Id.*

151. *Id.* at 323.

152. See *supra* text accompanying note 103.

confine a nondangerous individual who has a reasonable expectation of living in the community.¹⁵³ Third, an involuntarily committed mentally retarded person is entitled to that training which is required to facilitate his or her ability to function absent restraint.¹⁵⁴

These three principles should be applied in establishing a right to treatment for minors who are in state custody and who are in need of mental health services. If the purpose of the state's custody is rehabilitation and a minor is in need of mental health services, then custody without such services will not bear a reasonable relationship to its purpose. This argument is strengthened to the extent that the minor is a nondangerous individual with a reasonable expectation of living in the community. If an institutionalized mentally retarded person has a constitutional right to training which will facilitate his or her ability to function absent restraint, then a minor who is in state custody and in need of mental health services should be entitled to such services if they will facilitate his or her ability to function absent any custodial restraints.

III. A CONTINUUM OF CONFINEMENT

The question of what rehabilitation is required when a person has a reasonable expectation of living in the community was not answered by the Court in *Youngberg*. As Justice Blackmun pointed out in his concurring opinion, the Court's opinion in *Youngberg* leaves unresolved the issue of whether a state could refuse to provide treatment when such was the basis for the confinement under state law.¹⁵⁵ Justice Blackmun, with whom Justices Brennan and O'Connor joined in a concurring opinion, stated that the majority opinion left unresolved two important issues.

153. See *supra* text accompanying note 114.

154. See *supra* text accompanying notes 145-47.

155. "Were that question properly before us, in my view there would be a serious issue whether, as a matter of due process, the State could so refuse." *Youngberg v. Romeo*, 457 U.S. 307, 325 (1982) (Blackmun, J., concurring.). In contrast, Burger wrote:

[S]ome amount of self-care instruction may be necessary to avoid unreasonable infringement of a mentally retarded person's interests in safety and freedom from undue restraint; but it seems clear to me that the Constitution does not otherwise place an affirmative duty on the State to provide any particular kind of training or habilitation—even such as might be encompassed under the essentially standardless rubric 'minimally adequate training,' to which the Court refers.

Id. at 330-31 (Burger, C.J., concurring).

First, Justice Blackmun stated that the majority did not address the question whether the state of Pennsylvania could accept Romeo for care and treatment under the applicable state statutes¹⁵⁶ and then constitutionally refuse to provide treatment as defined by the statute. Had the question been properly before the Court, Justice Blackmun concluded, "there would be a serious issue whether, as a matter of due process, the State could so refuse."¹⁵⁷ According to Justice Blackmun, under the standard set forth in *Jackson v. Indiana*,¹⁵⁸ a state may constitutionally refuse to provide treatment to someone who is only in custody for safekeeping.¹⁵⁹ However, if a state orders a person committed for "care and treatment," then "commitment without any 'treatment' whatsoever would not bear a reasonable relation to the purpose of confinement."¹⁶⁰

Second, Justice Blackmun questioned whether Romeo had an independent constitutional claim under the due process clause of the Fourteenth Amendment to "training necessary to preserve those basic self-care skills he possessed" upon entering state custody.¹⁶¹ According to Justice Blackmun:

If a person could demonstrate that he entered a state institution with minimal self-care skills, but lost those skills after commitment because of the State's unreasonable refusal to provide him training, then . . . he has alleged a loss of liberty quite distinct from—and as serious as—the loss of safety and freedom from unreasonable restraints.¹⁶²

Consequently, Justice Blackmun stated that minimally adequate training should include "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment."¹⁶³

156. The Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN., tit. 50, § 4406(b) (Purdon 1969).

157. *Youngberg*, 457 U.S. at 325. Justice Blackmun cited a leading case finding a constitutional right to treatment: *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974), *aff'g* *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). See *Youngberg*, 457 U.S. at 325 n.1.

158. 406 U.S. 715 (1972). "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

159. *Youngberg*, 457 U.S. at 325-26.

160. *Id.* at 326. This statement, as applied to juveniles, is tantamount to an expression of the *parens patriae* theory of a right to treatment.

161. *Youngberg*, 457 U.S. at 327.

162. *Id.*

163. *Id.* This additional loss of liberty due to the deterioration of self-care skills caused

The federal circuit courts of appeals have differed in the degree of elasticity afforded the liberty interests in freedom from undue restraint and such training as that freedom requires.¹⁶⁴ After *Youngberg*, institutionalized plaintiffs have attempted to claim a constitutional right to community placement.¹⁶⁵ While no court has found such a constitutional right, placement in the community, to the extent that it is an appropriate less restrictive alternative, is consistent with an elastic approach to the liberty interest in "reasonably nonrestrictive confinement conditions."¹⁶⁶

It is clear, however, that a more flexible interpretation of the liberty interest in being free from unreasonable restraint would be consistent with, and indeed require, a higher degree of treatment. For example, at one end of the continuum might be someone such as Romeo, who was deemed to have no reasonable expectations of living outside of an institution. Because Romeo conceded this fact, the Court in *Youngberg* was not faced with determining what level of training was required for someone who was not actually physically restrained and who might be expected to live a meaningful life outside of an institution. It may be reasonable to physically

by the state's refusal to provide training has been referred to as the non-deterioration principle. See *Clark v. Cohen*, 794 F.2d 79, 95 (3rd Cir. 1986) (Becker, J., concurring).

164. Courts have followed Blackmun's concurrence in *Youngberg* and have held that there is such a constitutional right under the due process clause of the fourteenth amendment. See, e.g., *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1250 (2d Cir. 1984). "[A]n individual has a due process right to training sufficient to prevent basic self-care skills from deteriorating." *Id.* But cf. *id.* at 1250. "Where the state does not provide treatment designed to improve a mentally retarded individual's condition, it deprives the individual of nothing guaranteed by the Constitution; it simply fails to grant a benefit of optimal treatment that it is under no constitutional obligation to grant." *Id.* See also *Lelsz v. Kavanagh*, 807 F.2d 1243, 1251 (5th Cir. 1987):

While *Youngberg* may eventually have to be squared with the duty of a state to prevent deterioration of skills of the retarded committed to its institutions[,] this is by no means the same as requiring the State to provide the best care possible or the optimum location to improve the client's physical, mental and emotional conditions.

Id.

165. See *S.H. v. Edwards*, 860 F.2d 1045 (11th Cir. 1988); *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987); *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983).

166. *Youngberg*, 457 U.S. at 324. A right to mental health treatment in the least restrictive environment has been construed to be provided by statute. See *Ass'n for Retarded Citizens of N.D. v. Olson*, 713 F.2d 1384, 1392-93 (8th Cir. 1983) (panoply of rights provided to handicapped by state law renders without merit state's contention that it has "no duty to provide appropriate treatment, services, and habilitation to involuntarily committed individuals in the least restrictive appropriate setting"). Cf. *Mental Health Ass'n v. Deukmejian*, 233 Cal. Rptr. 130, 135-40 (Cal. App. 1986) (legislative scheme creates a preference for mental health treatment in the least restrictive environment but not an absolute right to it).

restrain someone who is dangerous to himself or to others, but not if the person is not dangerous. Similarly, it may be reasonable to keep someone institutionalized if they cannot otherwise live in the community, but it seems unreasonable to confine someone who can live in a less restrictive environment so long as services commensurate with the person's condition can be provided.

The claim that there is a right to a placement in the *least restrictive* environment is nothing more than the recognition that there is a continuum of confinement¹⁶⁷ along which restraints and training are determined in accordance with professional judgment, taking into account a person's ability to live in the community without danger of harm.¹⁶⁸ The constitutionally required training

167. It should be noted that the words confinement and restraint are not used interchangeably by courts since *Youngberg*. In cases which construe 'restraint' narrowly, the liberty interest in being free from undue restraint is not expanded beyond a literal interpretation, such as being tied to a wheelchair when one is able to walk with assistance. See, e.g., *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239, 1247 (2d Cir. 1984). "The 'freedom from restraint' with which *Youngberg* was concerned was Nicholas Romeo's freedom from being unnecessarily shackled." *Id.* In cases which construe 'restraint' broadly, treatment which is not coextensive with a person's abilities may be unreasonable. In this latter sense, not being placed in the community is unreasonable if it is contrary to the abilities of the patient and the prevailing professional judgment. See *Clark v. Cohen*, 794 F.2d 79, 87 (3rd Cir. 1986); *Thomas S. v. Morrow*, 781 F.2d 367, 375 (4th Cir. 1986).

For the purposes of this note, state custody is a form of confinement and restraint. Therefore, a child in state custody is "restrained" for purposes of constitutional analysis just as a hospitalized mentally ill or mentally retarded person is restrained. Cf. *Doe v. N.Y. City Dep't of Social Services*, 670 F. Supp. 1145, 1173 n.38 (S.D.N.Y. 1987) (children's liberty interests implicated by virtue of state's custody). To the extent that the reasons for the custody are similar, e.g., to provide for care, treatment, and rehabilitation, then the same constitutional arguments for a right to treatment are arguably applicable. See *Thomas S. v. Morrow*, 781 F.2d 367, 374 (4th Cir. 1986) (ward of state need not be institutionally confined to be entitled to minimally adequate treatment); *Klostermann v. Cuomo*, 481 N.Y.S.2d 580, 584 (Sup. 1984). "[T]he New York courts have firmly linked 'the right to adequate treatment' to those whom the state has either confined or assumed custody over." *Id.* But cf. *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1247 (2d Cir. 1984) (court unwilling to extend *Youngberg* "to apply to situations in which the state has done nothing to place undue physical restraints on individuals").

168. The idea of a continuum of confinement or restraint is consistent with the holding in *Jackson* that due process requires that the "nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana* 406 U.S. 715, 738 (1972). See *S.H. v. Edwards*, 860 F.2d 1045, 1060 (11th Cir. 1988) (Clark, J., dissenting). "The linchpin of the major decisions in this field—*Youngberg*, *Donaldson*, and *Wyatt*—is that there must be a rational relationship between the nature and duration of confinement and its purpose." *Id.*

Of course, since *Youngberg*, the nature of the restraint will only be unreasonable if it represents a substantial departure from prevailing standards of practice. As noted in *Ass'n for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 486 (D.N.D. 1982), *aff'd on other grounds, modified and remanded*, *Ass'n for Retarded Citizens of N.D. v. Olson*, 713 F.2d 1384 (8th Cir. 1983), "the constitutional right to the least restrictive method of care or treat-

should be commensurate with expectations of being free from unreasonable restraint.¹⁶⁹ Analogously, if a minor is in state custody and is in need of mental health services, then such services are arguably constitutionally required if rehabilitation is the basis of the custody and such services will facilitate the minor's living free of custody.

IV. A STATUTORY RIGHT TO TREATMENT

No state has a right to treatment in its juvenile code.¹⁷⁰ Some states have provisions for the appropriate court to order physical and mental examinations of children within its jurisdiction.¹⁷¹

ment exists only insofar as professional judgment determines that such alternatives would measurably enhance the residents' enjoyment of basic liberty interests."

169. See *Youngberg*, 457 U.S. at 319 n.25. "The basic requirement of adequacy . . . may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case." *Id.* The best statement of the issue may be found in *S.H. v. Edwards*, 860 F.2d 1045 (11th Cir. 1988):

To hold that the plaintiffs have no substantive right to community placement is to misstate the question. . . . The question . . . is whether, given (1) the needs of the individual plaintiffs, (2) the nature of the confinement which they face in institutions, and (3) the State's asserted reasons for so confining them, their liberty interest is being constitutionally abridged.

Id. at 1061 (Clark, J., dissenting).

170. Things have not changed since 1974. See M. LEVIN & R. SARRI, *JUVENILE DELINQUENCY: A COMPARATIVE ANALYSIS OF LEGAL CODES IN THE UNITED STATES* 57 (1974). "The Codes . . . do not explicitly require that a juvenile receive service or treatment—it is merely presumed that this will take place." *Id.* Prior to its repeal effective in 1984, Kentucky had a juvenile code provision which stated that "[a]ny child brought before the court under this section shall have a right to treatment reasonably calculated to bring about an improvement of his condition." KY. REV. STAT. ANN. § 208.A.010(4) (Michie/Bobbs-Merrill Supp. 1988).

171. See CALIF. WELF. & INST. CODE § 6550 (West Supp. 1990) (court may order juvenile ward to undergo treatment and evaluation if it is in doubt as to whether juvenile is mentally ill or mentally retarded); COLO. REV. STAT. § 19-2-308 (Supp. 1989). In Colorado, a court may order mental health prescreening if it appears that a juvenile may be mentally ill. If the child is determined to be mentally ill, then the court shall deem the evaluation as certification for short term care. *Id.* § 19-2-308(3)(a). Only if such certification occurs is there an express right to treatment in the least restrictive environment. *Id.* § 27-10-116 (1989). See also D.C. CODE ANN. § 16-2321(a) (1989) (if the court "has reason to believe that a child is mentally ill or substantially retarded," it may order physical and mental examinations); IOWA CODE ANN. § 232.98 (West Supp. 1990) (prior to adjudication, court may commit a child in need of assistance to nonsecure location for examination); MASS. GEN. LAWS ANN. CH. 119, § 68A (West Supp. 1990) (child may be referred by court at its discretion to the department of mental health for inpatient or outpatient diagnosis for no longer than 30 days); MINN. STAT. ANN. §§ 260.185 Subd. 1(g), 260.191 Subd. 1(a)(3) (West Supp. 1990) (court may order parent, guardian, or custodian to provide mental health care to minor subject to juvenile proceedings); N.C. GEN. STAT. § 7A-647(3) (1989) (court may order physical and mental examinations); N.D. CENT. CODE § 27-20-35 (Supp. 1989) (if evidence indicates that delinquent or unruly (but not deprived) child may be suffering from mental retardation or mental illness, or alcohol or drug abuse, the child *shall* be committed for

Some states also provide that the court with jurisdiction over juvenile proceedings may order that physical and or mental health treatment be provided.¹⁷² If it appears in a juvenile proceeding

evaluation); N.Y. FAM. CT. ACT § 231 (McKinney 1983) (if it appears that any child within court's jurisdiction is mentally retarded, then court may cause examination); OKLA. STAT. ANN. tit. 10 § 1120(A) (1987) (court may order physical and mental examination of any child as to whom a petition has been filed); OR. REV. STAT. § 419.511(3) (1989) (court may direct that child be treated and may place child in hospital or other facility for such purpose); R.I. GEN. LAW § 14-1-51 (1981) (court may order examination of child by expert in physical diagnosis or neuropsychiatry); S.C. CODE ANN. § 20-7-1330(c), (d) (Law. Co-op. 1985) (court may direct examination of any child concerning whom a petition has been filed); S.D. CODIFIED LAWS ANN. § 26-8-39(1) (1984); *id.* §§ 26-8-35(3), 40.1(4) (Supp. 1990) (court may order that neglected, dependent or delinquent child, or child in need of supervision undergo examination); TENN. CODE ANN. § 37-1-128(e) (Supp. 1989) (if evidence at dispositional hearing indicates mental illness or mental retardation, then court may order inpatient or outpatient evaluation); TEX. FAM. CODE ANN. § 55.01(a) (Vernon 1986) (juvenile court may order physical and mental examinations); UTAH CODE ANN. § 78-3a-23 (1987) (court may place child concerning whom a petition has been filed in hospital or other facility for examinations); VA. CODE § 16.1-275 (Supp. 1989) (juvenile court may cause any child within its jurisdiction to be examined and treated at mental health center); W. VA. CODE § 49-5-13a (Supp. 1989); *id.* § 49-6-4 (1986) (after adjudication, delinquent may be ordered examined at juvenile diagnostic center, and court may order examination of neglected or abused children at any time during proceedings); WIS. STAT. ANN. § 48.295(1) (West 1987 & Supp. 1989) (court may order child within its jurisdiction to undergo examination); WYO. STAT. 14-6-219(a) (1986) (on motion, court may order examinations on outpatient basis unless inpatient is deemed necessary).

172. See ARK. STAT. ANN. § 9-27-331 (Supp. 1989) (treatment affecting juvenile's family may be ordered only after finding that it is necessary "for the treatment or rehabilitation of the juvenile"); CALIF. WELF. & INST. CODE § 370 (West 1984) (juvenile court may order psychiatric services as may be required by appropriate treatment of *dependent* children); FLA. STAT. ANN. §§ 39.08(2), 39.407(4), 39.439(4) (1988) (court may order delinquent, dependent child, or child in need of services in state's custody to "receive mental health or retardation services from a psychiatrist, psychologist, or other appropriate service provider"); HAW. REV. STAT. § 571-44 (Supp. 1988) (court may order physical or mental health examination before adjudication, and treatment after adjudication); ILL. ANN. STAT. ch. 37, § 806-3(3) (Smith-Hurd 1990) (court may order psychiatric services for children within its jurisdiction); MINN. STAT. ANN. §§ 260.185(g), 260.191(a)(3) (West Supp. 1990) (court may order the parent, guardian, or custodian of any child within its jurisdiction to provide special treatment and care for physical or mental health if the child is in need); MISS. CODE ANN. § 43-21-315(4) (1972) (court may order department of mental health to provide for the care of a child in state custody *provided* that such care is within the statutory authorization and budget of such department); MO. ANN. STAT. § 211-181.1(4), 2(4) (Supp. 1990) (court may order child to be placed in a public or private hospital, clinic or institution for treatment and care); MONT. CODE ANN. §§ 41-3-406(4), (5), 41-5-523(i) (1989) (In abuse, neglect or dependency proceedings, the court may order any party to the action to do what is necessary to implement the disposition order, including such care and treatment as the court deems in the child's best interests. However, as to delinquent youth and youth in need of supervision, the court may only order care and treatment which does not obligate funding from the state without its approval.); NEB. REV. STAT. § 43-289 (1988) (court may commit juvenile to a public hospital or institution for treatment if the juvenile's health so requires); N.Y. FAM. CT. ACT § 233 (McKinney 1983) ("Whenever a child within the jurisdiction of the court appears to the court to be in need of medical, therapeutic, or hospital care or treatment, a

that a child is mentally ill, mentally retarded, mentally disordered or developmentally disabled, some states provide that the court may initiate proceedings to commit the child under the appropriate mental health statutes.¹⁷³ Other states provide that a court

suitable order may be made therefor."); N.C. GEN. STAT. § 7A-647(3) (1989); ("If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director for appropriate action.") OR. REV. STAT. § 419.507(b) (E) (1989) (court may generally indicate the type of appropriate care for child placed in state custody and which children are in need of treatment); S.C. CODE ANN. § 20-7-1330(c), (d) (Supp. 1988) (court may cause any child concerning whom a petition has been filed to be treated by a psychiatrist in a hospital or other suitable facility and may order such other care and treatment as it considers best); S.D. CODIFIED LAWS ANN. § 26-8-39(1) (1984); *id.* § 26-8-35(3), 40.1(4) (Supp. 1990) (court may order treatment for neglected, dependent, and delinquent child or child in need of supervision and may place the child in a hospital or other suitable facility for such purpose); UTAH CODE ANN. § 78-3a-1(2) (Supp. 1989) (where appropriate, the juvenile court may order rehabilitation and treatment for persons within its jurisdiction); VA. CODE § 16.1-278(A) (1988) (judge may order only such services as may be provided for by state or federal law, or city, county, or town ordinances).

173. See ALA. CODE § 12-15-90 (1975) (minor may be involuntarily committed only if mental illness or retardation poses a threat of harm to himself or others); D.C. CODE ANN. § 16-2321(b) (1989) (child found to be mentally ill or substantially retarded may be committed to an appropriate institution); IND. CODE ANN. § 31-6-4-15.3(c) (Burns Supp. 1989) (if it appears to the court that a child is mentally ill then the child may be referred for commitment proceedings); IOWA CODE ANN. § 232.51 (West Supp. 1990) (if evidence indicates that a child who has committed a delinquent act is mentally ill or mentally retarded, the court may direct initiation of civil commitment proceedings); KAN. STAT. ANN. §§ 38-1513(a)(4), (b)(1), 38-1614(b)(1) (1986) (If court is informed that a juvenile or child under the court's jurisdiction may be mentally ill, the court may order initiation of commitment proceedings. A child in need of care may not otherwise be treated as an inpatient at a state psychiatric hospital.); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-820(h), (i) (1989) (court may not order child committed for inpatient care and treatment in state hospital unless court finds by clear and convincing evidence that child has a mental disorder or is mentally retarded and there is no less restrictive form of care and treatment which is consistent with the child's welfare and safety); MISS. CODE ANN. § 43-21-611 (Supp. 1989) (if a child in need of supervision, or a delinquent, neglected, abused or dependent child is found to be in need of special care, the court may order additional disposition designed for treatment of the disability or infirmity, including commitment to any state institution); N.J. STAT. ANN. § 2A:4A-43(b)(7) (Supp. 1990) (disposition of a juvenile may include commitment to facility for treatment of mentally ill if the juvenile would otherwise be "a probable danger to himself or others or property by reason of mental illness"); N.M. STAT. ANN. § 32-1-35 (1989) (if evidence indicates at any stage of delinquency proceeding that child is or may be developmentally disabled or mentally disordered, the court may initiate commitment proceedings); N.Y. FAM. CT. ACT §§ 231, 353.4 (McKinney 1983) (If it appears to court that any child within its jurisdiction is mentally retarded, the court may cause examination. If examination determines that the child is mentally retarded, the court may proceed to commit the child. In the case of a delinquent, if at the conclusion of the dispositional hearing the court finds by clear and convincing evidence and subsequent to a diagnostic assessment that a child suffers from mental illness, mental retardation or development disability which is likely to result in serious harm to himself or others, the court may direct placement with the appropriate mental health facility.); OKLA. STAT. ANN. TIT. 10, § 1120(2) (1987) (whenever it appears that a child in custody as a deprived child, delinquent, or child in need of supervision may also be a

shall initiate proceedings to commit a child.¹⁷⁴ Even though state juvenile codes do not provide for a right to treatment, some states intend or require that the disposition of children be the least restrictive alternative.¹⁷⁵

child in need of treatment, the court may place the child for inpatient or outpatient care); S.C. CODE ANN. § 20-7-400(A)(2) (Law Co-op. 1985) (except as otherwise provided, family court "shall have exclusive original jurisdiction and shall be the sole court for initiating action . . . [f]or the treatment or commitment to any mental institution of a mentally defective or mentally disordered or emotionally disturbed child"); TENN CODE ANN. § 37-1-128(e)(3) (Supp. 1989) (if it appears upon evaluation that child is in need of care, training or treatment for mental illness or mental retardation, then court may order commitment proceedings initiated); VA. CODE § 16.1-280 (1988) (delinquent child or child in need of services which court reasonably believes to be mentally ill or mentally retarded may be committed to appropriate facility for observation in accordance with mental health code provisions for involuntary commitment).

174. See GA. CODE ANN. § 15-11-40 (Supp. 1989) (child found to be committable as mentally retarded or mentally ill shall be committed); ME. REV. STAT. ANN. tit. 15, § 3318(1) (A) (1980), and § 3318(1) (b) (Supp. 1989) (if juvenile appears to be mentally ill or incapacitated, the court shall either initiate proceedings for commitment or order an examination to determine if confinement is required); N.M. STAT. ANN. § 32-1-35(A), (C) (1989) (If evidence in proceeding for neglect or abuse indicates that child is developmentally disabled or mentally disordered, the child shall be transferred to appropriate agency for involuntary commitment if case is not dismissed. The court may initiate commitment proceedings if it is a delinquency matter.); N.C. GEN. STAT. § 7A-647(3) (1989) ("If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director for appropriate action, which may include institutionalization."); N.D. CENT. CODE § 27-30-35 (Supp. 1987) (if delinquent or unruly child is committable as mentally retarded or mentally ill, the court shall proceed to commit the child to appropriate institution); OKLA. STAT. ANN. tit. 10, § 1116(5)(a) (Supp. 1990) (Court shall order child adjudicated to be in need of treatment to receive outpatient treatment; if mental illness is shown by clear and convincing evidence, the court shall order inpatient treatment.); S.D. CODIFIED LAWS ANN. § 26-8-22.8 (1984) (if evidence at adjudicatory hearing indicates that child may be mentally ill or mentally retarded, then hearing shall be suspended and the court shall either order examination of child or proceed to commit the child); TEX. FAM. CODE ANN. §§ 55.02(a) 55.03(a) (Vernon 1986) (juvenile court shall initiate proceedings to commit a child alleged to be delinquent or in need of supervision if it is determined that such child is mentally ill or mentally retarded); VT. STAT. ANN. tit. 33, § 657(b) (1981 & Supp. 1989) (if the court finds after hearing that there is evidence that child alleged to be delinquent is "committable to an institution for the mentally defective, retarded, or mentally ill," the court shall transfer the case to the probate court having jurisdiction for appropriate proceedings); WYO. STAT. § 14-6-219(b) (1986) (if it appears that child "alleged to be delinquent or in need of supervision is incompetent to participate in further proceedings by reason of mental illness or mental retardation" to the degree which would render the child subject to involuntary commitment, the district attorney shall commence proceedings for commitment).

175. See ARK. STAT. ANN. § 9-27-344(a) (1987) ("[T]he court shall give preference to the least restrictive disposition consistent with the best interests and welfare of the juvenile and society."); IDAHO CODE § 16-1801 (Supp. 1989) (policy of state to divert juvenile prior to court action into a program of treatment, counseling, rehabilitation and restitution in the least restrictive setting necessary to best interests of the child and the state); IND. CODE ANN. § 31-6-4-15.3(e) (Burns Supp. 1989) (disposition decree shall be in the child's best interests and shall impose the least restraint on the child's freedom "[w]hen consistent with

Of those states that require the least restrictive disposition of a child, such a requirement may not be applicable to all classes of children within a court's jurisdiction.¹⁷⁶ In addition, some states provide that a mentally ill or mentally retarded juvenile may be committed *only if there are no less restrictive placements and/or the facilities can provide appropriate treatment.*¹⁷⁷ Therefore, while some juvenile codes provide that necessary services shall be

the safety of the community"); MISS. CODE ANN. §§ 43-21-605(1)(g)(ii), 43-21-607(1)(f)(ii), 43-21-609(1)(e)(ii) (1981) (court may give legal custody of child subject to its jurisdiction to any private or public organization, preferably community-based, which is able to assume the education, care and maintenance of the child); N.H. REV. STAT. ANN. §§ 169-C:19, 169-D:17(1), 169-B:19(1)(c) (Supp. 1989) (court shall order the least restrictive and most appropriate disposition for delinquent child or child in need of services, but there is no such provision for abused or neglected child); N.Y. FAM. CT. ACT §§ 352.2, 754, 1052 (McKinney 1983 & Supp. 1990) (In the case of a delinquent, with the exception of a delinquent who has committed a designated felony, the court shall order the least restrictive available alternative of those statutorily prescribed. There is no such requirement for persons in need of supervision, or abused and neglected children.); N.C. GEN. STAT. § 7A-646 (1989) (in disposition of delinquent, the court shall select the least restrictive disposition appropriate to the seriousness of the offense, the degree of culpability, and age and prior record); PA. STAT. ANN. tit. 42 § 6352 (Purdon 1982) (if confinement is necessary for disposition of delinquent child, the court "shall impose the minimum amount of confinement that is consistent with the protection of the public and the rehabilitation needs of the child"); TENN. CODE ANN. § 37-1-132 (Supp. 1989) (Unruly child removed from home of parent or guardian shall be placed with "the person, agency or facility which presents the least drastic or restrictive alternative." There is no such language concerning placement of delinquent, or dependent and neglected children.); W. VA. CODE §§ 49-5-13(b), 49-6-5(a) (Supp. 1989) (Disposition in juvenile proceedings shall give precedence to the least restrictive alternative consistent with the best interests of the child and the public. There is no such preference for abused or neglected children.); WIS. STAT. ANN. § 48.33 (West 1987 & Supp. 1989) (disposition of a delinquent child or a child in need of protection or services shall occur after a court designated agency submits plan for rehabilitation or treatment which "employs the least restrictive means available to accomplish the objectives of the plan"); WYO. STAT. § 14-6-229(a) (Supp. 1989) (disposition of child adjudicated to be neglected, delinquent or in need of supervision shall be in the least restrictive environment consistent with the child's welfare and the available facilities).

176. See *supra* note 175.

177. See LA. CODE JUV. PROC. ANN. ART. 13:1583(B) (1983) (juvenile shall be committed for care and treatment for mental retardation only when needs can be adequately met and there is necessary space and staff); MD. CTS. & JUD. PROC. CODE ANN. § 3-820(h), (i) (1989) (court may not commit child for inpatient care and treatment unless the court finds by clear and convincing evidence that the child is mentally disordered or mentally retarded and there is no less restrictive form of appropriate care and treatment); MO. ANN. STAT. §§ 211-206(1), (2), (5) (Vernon 1983) (the department of mental health shall discharge any child committed to its custody if the least restrictive environment is not provided); TENN. CODE ANN. §§ 33-3-203, 33-5-305 (Supp. 1989) (mentally ill or mentally retarded juvenile may be committed *if and only if* all available less drastic alternatives are unsuitable to minor's needs); VT. STAT. ANN. tit. 18, §§ 7617(c), (e) (1987) (hospitalization of mentally ill shall not be ordered in the absence of a "thorough consideration of available alternatives," and not unless the hospital can provide appropriate treatment).

provided, at least subject to legislative appropriations,¹⁷⁸ it is not until a minor is committed as mentally ill or mentally retarded that a right to treatment is expressly provided for by statute, if at all.¹⁷⁹

It has been argued that there is a right to treatment for minors in need of mental health services under Vermont's Mental Health Act of 1968.¹⁸⁰ The Act's policy statement is clear. It provides in part that "in every case, the least restrictive alternative conditions consistent with adequate treatment *shall be provided*."¹⁸¹ However, the Act contains language which evidences a legislative intent that mental health services shall be provided to those in need to the extent that state appropriations are

178. See ALASKA STAT. § 47.10.160(1) (1984) (Dept. of Health and Social Services shall provide for the welfare, control and care of minors in its custody); ARIZ. REV. STAT. ANN. § 8-512(A)-(E) (1989) (state shall provide necessary physical and mental health services subject to current appropriations); MONT. CODE ANN. § 41-5-523(1)(i) (1989) (court may order care and treatment for delinquent youth and youth in need of supervision that does not obligate funding from the department of family services without its approval); NEB. REV. STAT. §§ 43-247, -284, -285 (1988 & Supp. 1989) (the department of social services shall have the authority to determine the care, services, placement and expenditures for each child committed to its custody); W. VA. CODE § 49-5B-4(b) (1986) (the department of human services shall establish with available funds an individualized program of rehabilitation for juvenile offenders).

179. See, e.g., COLO. REV. STAT. § 27-10-116 (Supp. 1988) (any person found to be mentally ill is entitled to medical and psychiatric care and treatment suited to meet individual needs and in the least restrictive environment); S.D. CODIFIED LAWS ANN. § 27A-12-11 (Supp. 1990) (if committed as mentally ill, a child has a right to "the implementation of a comprehensive individualized treatment program"); TENN. CODE ANN. § 33-3-203 (Supp. 1988) (state shall provide mentally ill juvenile the "necessary care, training, or treatment" in the least drastic alternative which is available and appropriate). Cf. TENN. CODE ANN. § 33-3-104 (Supp. 1989) ("Any person who is mentally ill or mentally retarded is entitled to humane care and treatment, and, to the extent that facilities, equipment and personnel are available; to medical care and other professional services in accordance with the highest standard of accepted medical practice."); TEXAS REV. CIV. STAT. ANN. ART. 5547-300, secs. 7, 11 (Vernon Supp. 1990) (mentally retarded persons have the right to live in the least restrictive setting and the right to receive treatment and habilitative services); VT. STAT. ANN. tit. 18, § 7617(e) (1987) (hospitalization of mentally ill shall not be ordered unless the hospital can provide adequate and appropriate conditions); VA. CODE § 37.1-84.1(6) (1984) (each person who is a patient or a resident in a state hospital or facility shall be treated under the least restrictive conditions consistent with the person's condition and shall not be subjected to unnecessary physical restraint and isolation).

180. *Jane T. v. Morse*, S359-86WnC, a class action suit currently in Washington County Superior Court, Vermont, contains a cause of action alleging a right to treatment under the Act. A hearing regarding a motion to dismiss this cause of action was held in Chittenden Superior Court, Burlington, Vermont, on February 6, 1989. Telephone interview with Robert Shields, Attorney for the Office of the Defender General (Mar. 8, 1989). The court denied the motion.

181. See *supra* note 2 and accompanying text.

available.¹⁸²

Although there is no express grant of an entitlement to treatment, the legislative intent that mental health services be granted to the mentally ill is clear. If no right to such services is found by the courts or established by the legislature, then the provision of such services is left to the discretion of the officials administering the programs established pursuant to the Act. Establishing a right to treatment under the Act or the juvenile code would render more effective an express purpose of the juvenile code to "provide for the care, protection and wholesome moral, mental and physical development" of children.¹⁸³

If no private action is established, then the courts are left in the posture of being able only to accept or reject a plan formulated by the Vermont Social and Rehabilitative Services Department. An individualized treatment plan must be prepared to promote the best interests of the child. If promoting a minor's best interests is left to the efforts of state agencies which may not have sufficient resources to provide adequate care, a minor's recourse is limited to administrative reviews, periodic judicial reviews,¹⁸⁴ or a petition to amend, modify, set aside or terminate the court's dispositional order.¹⁸⁵ The court may not direct the state as to the disposition of a minor in custody.¹⁸⁶ Therefore, a statutory entitlement would permit a court to direct that certain minimally adequate services be

182. VT. STAT. ANN. tit. 18, § 8907(a) (1987). "[T]he commissioner shall, within the limits of funds designated by the legislature . . . ensure that community services to mentally ill . . . persons throughout the state are provided through designated community health agencies." *Id.* See *In re C.B.*, 147 Vt. 378, 384, 518 A.2d 366, 371 (1986). "[A]lthough our statutes clearly seek to place mentally retarded persons in the least restrictive environment which can provide appropriate care and treatment, they do not mandate that such treatment be provided when it is unavailable." *Id.*

183. VT. STAT. ANN. tit. 33, § 631(a)(1) (1981). Cf. *Creek v. Stone*, 379 F.2d 106, 111 (D.C. Cir. 1967) (statutory purpose to give juvenile care substantially equivalent "to that which should have been given by his parents . . . establishes not only an important policy objective, but, in an appropriate case, a legal right to a custody that is not inconsistent with the *parens patriae* premise of the law").

184. See VT. STAT. ANN. tit. 33, § 658(a) (Supp. 1989).

185. See VT. STAT. ANN. tit. 33, § 659 (1981).

186. *In re G.F.*, 142 Vt. 273, 455 A.2d 805 (1982). Once legal custody is transferred to the Department of Social and Rehabilitation Services, the juvenile court's authority is limited to "accepting or rejecting a placement recommendation of the legal custodian." *Id.* at 281, 455 A.2d at 809. "[T]he court may reject the recommendation only where it finds that it is not in the child's best interests. Its grounds for rejecting the recommendation must not be unreasonable, arbitrary or capricious and its reasons for rejecting should be supported by the court's findings of fact." *Id.*

provided¹⁸⁷ and in the appropriate instance that the minor be released from state custody absent any justification for continued state intervention.¹⁸⁸

CONCLUSION

It has been more than twenty years since the Vermont legislature adopted its mental health and juvenile codes. Yet, for minors in state custody who are in need of mental health services, the only way to gain an entitlement to such services under the current Vermont statutes is to be institutionalized as mentally ill or mentally retarded. It seems contrary to the *parens patriae* premise of the juvenile code that minors need to get worse before they can get better. The Vermont Supreme Court has held that Vermont's statutory mandate of appropriate treatment may require something more than the training which is required by the due process clause of the Fourteenth Amendment under *Youngberg*. A child in state custody is arguably restrained for purposes of constitutional analysis just as a hospitalized mentally ill or mentally retarded person is restrained. Establishing a right to treatment for minors in state custody who are in need of mental health services would not cause a minor to forego any of the benefits of the juvenile court. An express statutory entitlement to mental health services would permit the courts to ensure that minors in need would receive appropriate

187. The Vermont Supreme Court has held that the statutory mandate that adequate and appropriate treatment be provided to those committed to state hospitals "may require something more than the 'reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests' which the Fourteenth Amendment requires." *In re R.A.*, 146 Vt. 289, 292, 501 A.2d 743, 744 (1985) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982)). See *supra* text accompanying notes 45-48.

188. The argument for a right to treatment is strongest for juveniles who have not been adjudicated delinquent. In the case of a delinquent, a state arguably has an interest in protecting the community's safety. The right to treatment becomes more compelling, then, to the extent that such a state interest is not involved in a particular case. In addition, nationally, the number of juveniles in state custody who are not adjudicated delinquent is a small percentage of the total juvenile population. For example, in 1985, 93% of the juvenile population in state custody had been adjudicated delinquent, while less than 7% were status offenders such as truants and runaways. U.S. DEPARTMENT OF JUSTICE, BULLETIN: PUBLIC JUVENILE FACILITIES: CHILDREN IN CUSTODY, 1985 (No. NCJ-102457 Oct. 1986). Also, in 1987, just over 2% of minors in long-term, state-operated juvenile institutions were status offenders. U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT: SURVEY OF YOUTH IN CUSTODY, 1987 (No. NCJ-113365 Sept. 1988). Assuming that an even smaller proportion of status offenders in custody requires mental health services, then granting such an entitlement, at least to status offenders, should not create an unmanageable demand on the courts or the state's resources.

treatment which is necessary to promote their ability to function free of restraint.

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