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JUDICIAL RECOGNITION AND IMPLEMENTATION OF A RIGHT TO TREATMENT FOR INSTITUTIONALIZED JUVENILES

I. Introduction

Why is it not the duty of the state, instead of asking merely whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.¹

These sentiments, expressed by Judge Julian Mack sixty-five years ago, were a reaffirmation of the precepts upon which the juvenile court system was founded—to provide youth with regenerative treatment rather than subject them to the punitive and debilitating influence of the adult criminal system. The intervening sixty-five years have shown that our juvenile system is not accomplishing its avowed goals. In view of some of the recent revelations of conditions and practices in our juvenile correctional institutions,² there is reason to wonder whether they are any different from the prisons that Judge Mack and the other reformers fought to keep our youth out of.

Recently, in the case of Nelson v. Heyne,³ a United States Court of Appeals recognized for the first time that a constitutional right to treatment exists for institutionalized juveniles. In this and several recent district court decisions that recognized a right to treatment,⁴ the judiciary has armed itself with a tool to force compliance with the basic tenets of the juvenile court system. This note will examine the recognition, meaning, and impact of the phrase “the right to treatment.”

II. Historical Background

A. The Juvenile Court System—Treatment as Its Goal

Established by statute first in Illinois in 1899, the juvenile court system now exists in every state, the District of Columbia, and Puerto Rico.⁵ At the turn of the century children were being given long prison sentences and were being warehoused with hardened criminals. The social reformers were convinced that this idea of crime and punishment, as used in the adult criminal system, was not the position society should take in dealing with its youth. “The child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through

³ 491 F.2d 352 (7th Cir. 1974).
⁵ In Re Gault, 387 U.S. 1, 14 (1967).
in institutionalization, were to be ‘clinical’ rather than punitive.”

Thus, the system was originated as essentially a civil process with treatment and rehabilitation as its foundation and its avowed goal.

The constitutionality of the juvenile court acts of the states has been challenged often. In each instance the constitutionality of the act has been upheld, precisely because treatment and rehabilitation, rather than punishment, were the purpose of the legislation. When faced with a challenge to the constitutionality of the Pennsylvania Juvenile Court Act, the court in *Commonwealth v. Fisher* emphasized the treatment orientation of the statute:

> The objection that “the act offends against a constitutional provision in creating, by its terms, different punishments for the same offense by a classification of individuals,” overlooks the fact, hereafter to be noticed, that it is not for the punishment of offenders, but for the salvation of children...”

The concept that incarcerated juveniles have a constitutional right to treatment has had a parallel development in the mental health area where the theory was first applied. The argument in favor of a right to treatment is the same in both fields and can probably best be expressed through the words of the court in *Wyatt v. Stickney*, the leading mental health case: “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.” Thus, if the state is to confine a person without the due process protections of the criminal system on the theory that he will be treated, that confinement is a violation of due process if the treatment is not forthcoming. The development and recognition of the right to treatment for the mentally ill have been thoroughly dealt with elsewhere and lie beyond the scope of this note.

### B. Pre-recognition Juvenile Cases

The Supreme Court has never ruled on the question of whether there is a guaranteed constitutional right to treatment for those youths who come within the jurisdiction of the juvenile courts. Several times within the last decade, however, the Court has confronted the issue of whether certain procedural safeguards...
normally required by the due process clause must be incorporated into juvenile court proceedings. Faced with this issue and with the juvenile justice system for the first time in *Kent v. United States*,\(^{15}\) the Court, through Mr. Justice Fortas, expressed its concern as to the effectiveness of the system:

> 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.\(^{16}\)

The Supreme Court was now faced with the problem of deciding whether to implement the protections of the adult criminal system or to try to salvage the juvenile system.

In *In Re Gault*\(^{17}\) the Court opted for the latter alternative and decided to balance the implementation of adult procedural rights with the requirements of treatment.\(^{18}\) Therefore, the Court has taken the approach of determining, assuming treatment is being given, whether the implementation of the procedural right will interfere with that treatment. This has been the continued philosophy of the Supreme Court in its subsequent decisions involving juvenile court procedures—*In Re Winship*\(^{19}\) and *McKeiver v. Pennsylvania*.\(^{20}\)

A number of juvenile cases over the last twenty years have considered the right to treatment indirectly in response to conditions of confinement. In doing so the courts have emphasized that treatment and rehabilitation are the goals of the juvenile justice system and that confinement of a juvenile in an adult correctional institution which is punitive by nature is a contravention of these objectives.\(^{21}\) Perhaps the first case of this type was *White v. Reid*.\(^{22}\) The court in *White* held that a juvenile who had not been waived by the juvenile court and tried as an adult could not properly be held in jail. Although the decision was based on statutory grounds, the court voiced its opinion that confinement of a juvenile in any institution whose facilities are intended for punishment rather than "guidance, care, education and training" may be in violation of fundamental constitutional safeguards.\(^{23}\) The *White* decision and similar cases show an increasing awareness

\(^{15}\) 383 U.S. 541 (1966).

\(^{16}\) Id. at 556.

\(^{17}\) 387 U.S. 1 (1967).

\(^{18}\) Id. at 21. The Court determined that adequate written notice be afforded the child and his parents; that the child and his parents must be advised of their right to counsel; that the privilege against self-incrimination is applicable to juvenile proceedings; and that in these proceedings the juvenile has the rights to confrontation and cross-examination.

\(^{19}\) 397 U.S. 358 (1970) (Proof beyond a reasonable doubt required at the adjudicatory stage when a juvenile is charged with an act that would constitute a crime if committed by an adult.)

\(^{20}\) 403 U.S. 528 (1971) (A jury trial is not constitutionally required at the adjudicatory stage of a juvenile proceeding.)

\(^{21}\) See, e.g., Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (where conditions of confinement are anti-rehabilitative, use of the structure violates equal protection and due process); Baker v. Hamilton, 345 F. Supp. 345 (W.D. Ky. 1972) (commitments of juveniles to the county jail, even for a limited period of time, are a violation of the fourteenth amendment); Kautter v. Reid, 183 F. Supp. 352 (D.D.C. 1960) (juvenile cannot be detained in the district jail unless under an indictment charging him with committing a crime at a time when he was more than eighteen years old).

\(^{22}\) 125 F. Supp. 647 (D.D.C. 1954*).

\(^{23}\) Id. at 650.
of the problems faced by institutionalized youth.

A case that illustrates the attitude of the judiciary towards finding a right to treatment for juveniles is *M. v. M.*\(^{24}\) In discussing the juvenile court acts which allow the courts to place juveniles in correctional institutions, the court says:

> If these statutes are viewed thusly, we must also be prepared to hold that they create a vested right. That once jurisdiction is taken, that infant has a right to treatment rather than a liability to be subject to it. The difference is not in semantics but rather in a positive expectation as opposed to negative defeatism.\(^{25}\)

Although it is statutory right that is being dealt with here, the strong language of the court clearly illustrates the judicial awareness of the need for a return to the ideals upon which the juvenile court system was founded.

**III. Judicial Recognition of the Right to Treatment**

As the preceding discussion has shown, the courts have recognized that the purpose of the juvenile court system is different from that of the criminal court system and have not been unwilling to grant relief where the action complained of violated the precepts of the juvenile justice system by providing bare incarceration rather than rehabilitative treatment. These decisions have not addressed themselves to the basic question of whether there is a constitutionally guaranteed right to treatment for juveniles which places duty on the state to provide treatment. Within the last two years several decisions have indicated that the answer to that question is in the affirmative.

An important matter to consider initially is the phrase chosen by a court to describe the right that the juvenile is asserting. Is the right in question considered to be a "right to rehabilitation," a "right to treatment," or a "right to rehabilitative treatment"? It can be argued that the second two phrases are broader and more in line with what the originators of the juvenile court system had in mind. In *Inmates of Boys' Training School v. Affleck*\(^{26}\) the court seemingly recognized a constitutional right to treatment based on the fourteenth amendment by saying that "due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further this goal of rehabilitation."\(^{27}\) In recognizing the right as one of "rehabilitation," the *Affleck* court may not have made the best choice of words. Although the court may have meant the same thing as others who use the term "treatment," it seems potentially dangerous to use the word "rehabilitation" in light of the fact that the same word is bandied about as being the goal of our prison system. Juveniles, due to the nature of their civil commitment, are theoretically entitled to something more than prison inmates are. Courts that are recognizing a right that is of such importance to our juvenile justice system should be careful to guard against possible misconceptions.

Probably the first case to hold specifically that institutionalized juveniles

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\(^{24}\) 336 N.Y.S.2d 304 (1972).
\(^{25}\) *Id.* at 307.
\(^{27}\) *Id.* at 1364 (emphasis added).
have a constitutional right to treatment was Martarella v. Kelley. The plaintiffs in Martarella alleged that incarceration in maximum security detention under conditions which are punitive, hazardous, and unhealthy, and in the absence of rehabilitative treatment, constitutes cruel and unusual punishment and a violation of due process. In responding favorably to this allegation, the court recognized a constitutional right to treatment for long-term detainees:

[H]owever benign the purposes for which members of the plaintiff class are held in custody, and whatever the sad necessities which prompt their detention, they are held in penal condition. Where the State, as parens patriae, imposes such detention, 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 detainees.

In developing its recognition of this right for juveniles, the court discussed the historical evolution of the right and seemed to place a good deal of emphasis on the Supreme Court’s excursions into the juvenile justice system and on the recognition of a right to treatment for the mentally ill.

Although the Martarella court makes a strong fourteenth amendment justification for the right to treatment, the fact that the court also recognizes it as an eighth amendment right is somewhat puzzling. The court makes use of the Robinson v. California rationale that punishing an individual for his status (in this case, “person in need of supervision” or “juvenile delinquent”) rather than for a crime can only withstand the eighth amendment’s proscription of cruel and unusual punishment if there is a curative program. The two amendments not only provide different bases for the right to treatment but also have significantly different scopes and standards. A remedy fashioned under eighth amendment criteria is by its very nature more limited than one based on the broader proscriptions of the fourteenth amendment. This concept becomes clear in the Martarella court’s later opinion detailing final relief. In ruling as to what constitutes long-term detention so as to activate the right to treatment, the court says:

NOTES

29 The plaintiff class in Martarella was Persons In Need of Supervision (PINS). Section 712 of the Family Court Act of New York classifies the types of youths who may be brought under its supervision into two groups, Persons In Need of Supervision and Juvenile Delinquents. PINS are generally children who are truants, runaways, or are ungovernable at home—generally those whose conduct is not criminal in nature. JD’s are those whose acts, if committed by an adult, would have constituted a crime.

Since the plaintiff class in Martarella consisted solely of PINS, the question naturally arises whether the court intends the constitutional right to treatment to extend only to this classification. This does not seem to be the case, in light of the fact that the court also held there to be no bar to combining the two classes during institutionalization. 349 F. Supp. at 595. The court made its intention that the right apply to both groups clear in its later opinion detailing final relief. In a footnote to its opinion the court pointed out that the improvement for PINS should not be at the expense of JD’s by diverting personnel to one group exclusively. Martarella v. Kelley, 359 F. Supp. 478, 481 n.1 (S.D.N.Y. 1973).
30 In its later opinion the court defines detention for thirty days or more as long term.
31 349 F. Supp. at 482.
32 See discussion in text accompanying notes 15-20 supra.
33 See discussion in text accompanying notes 11-14 supra.
34 349 F. Supp. at 600.
36 See note 29 supra.
In doing so we must remember that the Eighth Amendment does not impose on the States the requirement of furnishing the best possible service for those in custody nor of adhering to the highest professional standard. The office of the Eighth Amendment is to assure that custodial conditions are minimally acceptable—that is, not cruel or unusual.38

Thus, using an eighth amendment justification for the right to treatment could be a poor course. First, the eighth amendment may be an unsound theoretical basis for enforcing a right which demands significant affirmative action. Secondly, the eighth amendment may be quite limited as to the types of relief that can be provided. There seems to be a greater degree of flexibility in a fourteenth amendment justification since the fourteenth amendment is not restricted in fashioning relief to assuring that custodial conditions are “minimally acceptable.”

Following closely on the heels of Martarella was the district court determination in Nelson v. Heyne39 that juveniles incarcerated at the Indiana Boys’ School have a constitutionally guaranteed right to treatment. In a class action the plaintiffs—inmates seeking declaratory and injunctive relief—charged that the general operation of the school violated their constitutional right to treatment and additionally challenged certain institutional practices and policies as being violative of various constitutional safeguards.40

Perhaps the most notable aspect of the Nelson court’s consideration of the treatment issue is that it makes no reference to the application of the right in the mental health field or to the earlier juvenile cases that dealt indirectly with the right to treatment. Instead, it stresses the approach taken by the Supreme Court in its decisions as to what due process standards are required at the adjudicative stage of juvenile proceedings.41 The Nelson court then goes on to say:

In light of the Supreme Court’s prior holdings, it would be anomalous to find treatment and rehabilitation of an offender as relevant goals during pre-dispositional phases of the juvenile process but not as to the post-dispositional period. Treatment and rehabilitation represent, in this Court’s view, a continuum measured by the period of time the juvenile offender remains in the state’s custody.

Accordingly, we now hold that plaintiffs are entitled to a right to treatment under the laws of the State of Indiana and the Federal Constitution.42

The Nelson case is quite significant in that the operation of the institution in general was attacked and found to be in violation of the plaintiffs’ right to treatment. For this reason the case is somewhat distinguishable from Martarella, Affleck, and the earlier cases which focused, in part, on the fact that specific practices of the institutions were in violation of the rehabilitation and treatment

38 Id. at 481 (emphasis added).
40 Specifically, the use of corporal punishment, the use of tranquilizing drugs, the use of solitary confinement, mail censorship, and freedom of religion. The consideration of these issues is not within the scope of this note.
41 See discussion in text accompanying notes 15-20 supra.
42 355 F. Supp. at 459. The court’s recognition of a state statutory right to treatment was based on its interpretation of the Indiana Juvenile Court Act, IND. CODE § 31-5-7-1 (1971).
goals of the juvenile justice system. The *Nelson* court was faced with the determination of whether a treatment plan in operation at the institution provided constitutionally acceptable treatment. In deciding that the defendants were not fulfilling their duty, the court stated that “the defendants’ program of treatment appears to be more form than substance.” The court’s decision that the defendants’ plan as a whole was constitutionally inadequate established that the right to treatment was now more than a label to be used in attacking specific institutional or adjudicative practices. Results were now being considered, and an affirmative duty was placed on the juvenile justice system to make good on the promises of the last seventy-five years.

The most recent district court determination of a constitutional right to treatment was entered in the case of *Morales v. Turman*. The court there was faced with a class action by plaintiffs who alleged that certain practices of the Texas Youth Council, where juvenile inmates were physically abused, were in violation of the constitutional and civil rights of the youths. Relying on *Nelson, Affleck*, and *Wyatt*, the court concluded that, since juveniles are committed “under conditions and procedures much less rigorous than those required for the conviction and imprisonment of an adult offender,” they enjoy a federal constitutional right to treatment based on the fourteenth amendment. Like the court in *Nelson*, the *Morales* court found the right to have a state statutory basis as well.

The United States Court of Appeals for the Seventh Circuit recently became the highest court to pass on the question of whether there is a constitutional right to treatment for involuntarily committed juveniles. In affirming the district court decision in *Nelson*, the court held that “the plaintiff juveniles have the right under the 14th Amendment due process clause to rehabilitative treatment.” With this determination there can be no doubt that involuntarily incarcerated youths have joined the ranks of the mental health patients and others who are entitled to treatment because of the nature of their commitment.

IV. What Is “Treatment”?

Throughout this note liberal usage has been made of variations of the phrase “right to treatment.” The courts in the last few years have recognized it to be a right constitutionally guaranteed to incarcerated youths. But what have juveniles gained through this recognition? What is the meaning of the term “treatment”?

A. The Dual Aspect Approach of Nelson and Martarella

The early social reformers who worked for the establishment of the juvenile court system intended rehabilitative treatment to be its goal. One such reformer
and commentator on the juvenile justice system was Judge Julian Mack, who visualized the juvenile institution in the following manner:

What is needed is a large area, preferably in the country, . . . laid out on the cottage plan, giving opportunity for family life, and in each cottage some good man and woman who will live with and for the children. Locks and bars and other indicia of prisons must be avoided; human love, supplemented by human interest and vigilance, must replace them.\(^4\)

Though sixty-five years have shown that most of Judge Mack’s ideals have been forgotten, his philosophy is evident in the juvenile court acts of our states. These acts define the duty of the state to be one of providing the care and guidance that should ordinarily be provided by the youths’ parents in their homes.\(^5\)

This concept of providing the care and guidance that the parents should have given seems to be the philosophy underlying the recent decisions recognizing the right to treatment. The courts, however, have looked upon the concept as containing a dual aspect in arriving at their definitions of treatment. Judge Kiley expressed the dual purposes of treatment in the Seventh Circuit’s affirmance of Nelson\(^6\):

> In our view the “right to treatment” includes the right to minimum acceptable standards of care and treatment for juveniles and the right to individualized care and treatment. Because children differ in their need for rehabilitation, individual need for treatment will differ.\(^7\)

Under this approach, treatment would require the state to provide for its youth in two ways in order to satisfy its constitutional duty. First, it would have to provide a minimum standard of general care such as would be provided by the juveniles’ parents. This would include food, clothing, shelter, education, and basic medical care—those things for which children have a common need.\(^8\) Second, this definition of treatment would require the state to provide an affirmative treatment program that would meet the individual needs of the youth. Such a program would include psychiatric and psychological services to deal with diagnosed individual problems, medical treatment for identified disabilities and illnesses, and special education to correct specific educational deficiencies.\(^9\)

At the present time Martarella v. Kelley\(^10\) is the only case in the juvenile field to have issued its final order detailing a treatment plan. The Martarella court’s plan has as its basis the same concept that Judge Kiley, later espoused in Nelson; that is, that the state is obligated to provide both the general care that all youths need and the individualized care and treatment that the particular youth needs:

\(^{49}\) Mack, supra note 1, at 114.
\(^{50}\) See, e.g., Ind. Code § 31-5-7-1 (1971).
\(^{51}\) The court was not faced with the question of what constitutionally adequate treatment is. That was still to be determined by the district court and the Seventh Circuit remanded for this purpose.
\(^{52}\) 491 F.2d at 360 (emphasis in the original).
\(^{54}\) Id.
“Treatment” is defined as a therapeutic living situation for a child, including his grouping with other children; the adequacy and competency of staff members dealing with him or his case; diagnosis of his emotional and psychological needs and on the basis of such diagnosis and all other information about the child that is available, . . . the provision of appropriate mental health, case work, educational, recreational and medical services for him.

A child confined to a secure detention facility shall be afforded treatment appropriate to his individual need. . . .

In setting forth its treatment standards according to this definition, the Martarella court places a great deal of emphasis on the use of the staff at the institution. Specific standards are detailed in regard to educational qualifications of staff members, staff training programs, procedural requirements in dealing with the admission of juveniles to the institution, staff-juvenile ratios, and staff duties as to the implementation of individualized treatment programs. This emphasis on the institutional staff seems to be the result of the belief, expressed by the court in its earlier opinion, that the success of any treatment program is dependent for the most part on the existence of a good relationship between the youth and the members of the institution with which he comes into contact.

By defining the right to treatment as they did, the Seventh Circuit and the court in Martarella have announced that the juveniles’ right to treatment guarantees more than that the conditions of confinement be humane. Both decisions have brought the concept of the right to treatment beyond the limits it had in the earlier cases when it was discussed in the context of an eighth amendment attack upon specific institutional practices. An affirmative duty is now placed on the states to provide individualized care and guidance to the youths it institutionalizes.

B. The Need for Psychiatric and Psychological Services

One aspect of the right to treatment which has been given a great deal of attention by the courts is the need to upgrade individual treatment through better utilization of psychiatric and psychological services. This is not strictly a modern concept. The early social reformers believed that “in the behavioral sciences and the medical arts there was a body of scientific information which, if applied to an erring child, could work beneficial change in him.” The courts that have recently recognized a right to treatment seem to agree, for they all have emphasized the need to make the use of psychiatric and psychological counseling an integral part of individualized treatment programs.

The trend of the courts to focus on the need for improvements in the psychiatric and psychological services seems to be due at least in part to reports of the manner in which emotionally disturbed youths are treated in juvenile institutions. The court in Affleck states:

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56 Id. at 484.
57 Id. at 483-86.
58 349 F. Supp. at 586.
59 See discussion in text accompanying notes 21-23 supra.
60 Paulsen, supra note 7, at 170.
There is evidence, and I so find, of at least two probable suicide attempts by boys who received no medical or psychiatric care proximately following the attempts. The response of BTS supervisors to these suicide attempts was solitary confinement.  

Similarly, in *Nelson* it was reported that during fifty-seven consecutive days of solitary confinement one of the plaintiffs mutilated himself on three different occasions and on each occasion was returned to confinement without receiving recommended psychiatric treatment.  

In response to situations such as these and because psychiatric and psychological services are often needed in order to insure adequate treatment for incarcerated youths, the *Affleck* court granted plaintiffs' request that defendants supply an appropriate and adequate psychiatric counseling program. Although the district court in *Nelson* has yet to rule on what it believes to be the constitutionally required mandates of treatment, it seems evident from the language of its earlier opinion that the court considers the use of psychiatrists and psychologists to be indispensable to a regenerative treatment program. Even though there were three psychologists and a part-time psychiatrist on the staff of the Indiana Boys School, the court was concerned that they were not being properly utilized.  

The importance of utilizing these services is also reflected in the Seventh Circuit's opinion in *Nelson*. The court left to the district court the decision of what treatment standards are required, "having in mind that the juvenile process has elements of both the criminal and mental processes." This language is significant in that in a footnote to this sentence the court quotes from a law review note to the effect that treatment in both processes relies "heavily upon the medical services, especially psychiatry and psychology." Though they were relying on the district court to determine exactly what is constitutionally mandated in the way of treatment, it seems that the Seventh Circuit wished to inform the district court that they believed psychiatric and psychological services should be part of that mandate.  

Thus, in arriving at a definition of treatment, it seems that the courts look upon it as the duty of the state to provide the general care and guidance that all youths need as well as the individualized treatment that the particular juvenile requires. Further, the judiciary seems to have taken the position that the provision of psychiatric and psychological services is an essential element in this definition.  

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61 346 F. Supp. at 1359. For a description of another particularly disturbing incident where psychiatric help was sorely needed but was not forthcoming, see id. at 1360.


63 Id. at 460. The *Nelson* court makes light of the fact that counselors spend more than half of their time on paperwork rather than dealing interpersonally with inmates; that the limited time commitment of the staff psychiatrist confines him to short-term crisis intervention rather than the management of individual psychotherapy programs; and that the staff psychologists are not certified by the state, do not hold graduate degrees, and spend most of their time supervising intake behavior classification.  

64 491 F.2d at 360.

V. Implementation—Some Questions

A. Is This an Area for the Judiciary?

Up until the last decade the courts were unwilling to interfere in the area of postsentencing and postcommitment conditions. The cases discussed in this note have shown that the judiciary has recently taken an active interest in assuring adequate care for institutionalized juveniles. There are those, however, who believe that the adoption and implementation of treatment standards are not proper court functions. The argument is made that the formulation of treatment standards should be left to a quasi-legislative commission rather than "catch-as-catch-can inspections and prickings by courts of justice."

The court in Martarella addressed itself to the question of whether treatment standards are an appropriate matter for judicial concern. Although aware of the view that it is "generally undesirable (both for the courts and the institutions) that courts should administer institutions," the court felt that a specific order was necessary nonetheless. The opinion points out that court specification of standards for care "is no longer novel and has been recognized as the appropriate dispositional method by an increasing number of Federal Courts in cases involving disadvantaged institutional inmates." The court seems concerned also with the fact that these institutions have had a history of ignoring reports and recommendations that have urged reform and improvement of facilities. While recognizing the limitations placed on institutional administrators, the court proceeds on the presumption that if relief does not come from the courts it may not come at all. Addressing itself specifically to the assertion that the court was overstepping its bounds and assuming an executive and legislative function, the Martarella opinion answers that "[i]t is the job of courts to decide issues. This is particularly true when we are dealing with the rights of children growing up in the difficult conditions of modern urban life."

The court in Martarella is thus far the only court to have set out constitutionally mandated standards of treatment for juveniles. The courts in Morales and Nelson will do so in the near future and for this reason it appears that the judiciary views such a determination as being within the scope of the courts.

B. A Clockwork Orange?

Assuming that the courts continue to recognize a right to treatment for juveniles and to adopt constitutional standards of treatment, there is still another problem that may remain. There is a concern with whether the courts will be able to insure effective treatment through these standards or whether they will

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66 For an excellent discussion of the history of judicial restraint as far as the examination of institutional conditions see Rothman, Decarcerating Prisoners and Patients, 1973 Civil Liberties Rev. 8.


68 359 F. Supp. at 482.

69 Id. at 483.

70 349 F. Supp. at 602.
merely be prescribing limitations that do little to prevent abuses under the name of "treatment." David Rothman, in discussing the new institutions that are and will be opening, states the problem:

Undoubtedly, each will have a large staff of professionals, an elaborately designed program, and dedicated and articulate directors. And using these criteria, the courts will turn away constitutional attacks. From all past indications, judges will focus not on performance, not on whether the institutions actually do any good, but on external criteria, on the size of the staff and style of the directors, on whether the institution promises to do good.71

Rothman and others suggest that if this is the approach taken by the courts we may be opening the door to possible destructive uses of treatment. They warn that negative reinforcement and the deprivation of institutional freedoms (for example, food, visitations, or goods) may be used in attempts to program behavior.72 The concern that they express is that if the courts focus on external criteria rather than positive results, practices such as these may be condoned on the premise that they are necessary for therapeutic treatment.

The degree to which this possibility can be seen as a matter of concern depends of course on the approach the courts take in their implementation of treatment standards. In Martarella the court places a good deal of emphasis on what Rothman describes as "external criteria" in setting forth its treatment standards.73 The court does, however, retain jurisdiction over the action to permit possible modifications as they become necessary. This may be one way to deal with the abuses of treatment that some people fear.

The district court opinion in Nelson may be a major step in closing the door on the theory that any attempt at treatment will be judicially recognized as treatment. In Nelson the court, to a degree at least, did what Rothman was concerned courts would not do—it focused on performance when it determined that the defendants' treatment plan appeared to be "more form than substance."74 By ruling that a treatment plan adopted and implemented by a juvenile correctional institution did not meet constitutional standards, the court has shown there to be another avenue through which effective treatment may be insured.

The argument can also be made that the eighth amendment could be utilized by the courts as a protection against the use of negative reinforcement and similar abuses practiced in the name of treatment.75 Regardless of whether the courts would choose to use the eighth amendment or to use the approach of the Nelson court in dealing with these practices, it appears in any event that we are forced to place a great deal of faith in the judiciary's ability to insure effective treatment for incarcerated youths.

71 Rothman, supra note 66, at 25.
72 See, e.g., id. at 24; Malmquist, Juvenile Detention: Right and Adequacy of Treatment Issues, 7 Law & Soc'y Rev. 159, 180-81 (1972).
73 See, e.g., 359 F. Supp. at 483-86.
74 355 F. Supp. at 460.
75 An example of this approach is the Nelson court's finding that practices such as beatings, improper use of tranquilizing drugs, and certain uses of solitary confinement are in violation of the eighth amendment. Id. at 454-57.
VI. Conclusion

The recognition of a constitutionally guaranteed right to treatment for incarcerated juveniles will hopefully insure for the nation's youth that which was promised them seventy-five years ago. Mere recognition of the right is not enough. Effective treatment standards must be promulgated and implemented. Strict supervision of these standards and the flexibility to modify as needed are essential if positive results are to be forthcoming.

The courts have demonstrated that they consider the implementation of measures designed to secure adequate treatment for juveniles to be an area of judicial concern. In light of the continued reluctance of the legislatures to make any meaningful attempts to deal with correctional problems, this would appear to be the proper, if not the only, approach for the courts to take. In doing so the courts must be concerned with more than whether the institutions seem adequate on the surface; they must take steps to guarantee that positive results are produced. This requires more than recognition and implementation; it requires that courts retain jurisdiction in order to supervise the adequacy of treatment. If this is done, perhaps we can envision the day when the number of youths who graduate from our juvenile correctional institutions only to flood our prisons will be drastically reduced.

*Bill Britt*