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LEGAL RIGHTS IN A JUVENILE CORRECTIONAL INSTITUTION

Although the primary objectives of the adult criminal justice system are determination of guilt, fixation of criminal responsibility, and administration of punishment, these are not the major objectives of the juvenile criminal justice system. The creation of a separate set of procedures and institutions to deal with juvenile legal problems grew from reformers' recognition of the dangers of applying the adult penal system to juveniles. The reformers were convinced that society has a duty to care for and rehabilitate its youth.

State juvenile statutes presently reflect the benevolent, social welfare goals of the early reformers. Despite these treatment-oriented statutes and the increased utilization of a broad range of therapeutic practices, a large majority of American juvenile correctional institutions continue to emphasize custody and punishment. As in adult penal institutions, obedience, conformity, and respect for authority are stressed. Juvenile programs center on regimentation of the inmates and restriction of their

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1 Kent v. United States. 383 U.S. 541, 554 (1966). Indeed juvenile proceedings are not "criminal" at all. They are designed to permit civil commitment of offenders for the purpose of treatment and rehabilitation.

2 As Mr. Justice Fortas acknowledged in In re Gault, 387 U.S. 1, 15 (1967):
   They [early reformers] were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.' . . . The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

Id. at 16 (footnote omitted).

3 Kent v. United States. 383 U.S. 541, 554 (1966). Typical is Indiana which sets forth the basic principle of its Juvenile Court Act as follows:
   The purpose of this act [IND. STAT. ANN. §§ 9-3201 to 3225 (1971)] is to secure for each child within its provisions such care, guidance and control, preferably in his own home, as will serve the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents. IND. CODE § 31-5-7-1 (1971).


6 D. Street, C. Perrow & R. Vinter, supra note 4, at 21.
freedom. Smooth institutional operation is primary. Though numerous juvenile treatment institutions focus on the psychological “reconstitution of the individual” and employ practices which vary in many ways from the classic adult prison model, disciplinary and control concerns continue to play predominant roles.

As a result of two significant, recent legal developments, post-adjudicative juvenile correctional institutions may be forced to reexamine many of their current policies and procedures. First, the courts in the last seven years have made deep inroads into the traditional “hands-off” doctrine that has been used to shield the actions of state correctional institution administrators from judicial and public scrutiny. The traditional judicial restraint exercised with respect to review of petitions alleging mistreatment of prisoners and denial of basic rights led courts to refuse to decide cases on the ground that the internal affairs of state prisons are beyond the scope of the court’s jurisdiction. Until recently, this policy effectively “placed prison correction officials in a position of virtual invulnerability and absolute power.” However, a series of cases brought predominantly by adult prisoners served to clarify and expand the enunciated constitutional rights of prisoners. While the concept of the prisoner as a non-person has long

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9 Id. at 224.
10 Any re-examination will have a significant impact because of the number of individuals affected. In 1965, 62,773 youths were confined in juvenile institutions on a daily average. UNITED STATES PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 161 (1967).
11 Typical is the Fourth Circuit’s response in refusing to consider a petition concerning prison disciplinary sanctions. See McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) (Censorship of anti-semitic literature upheld as valid because the court declared that no judicially enforceable right was at stake.). The court stated, “In the great mass of instances...the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted.” 337 F.2d at 74.
13 A number of courts are in agreement with the view expressed by the Supreme Court in Johnson v. Avery, 393 U.S. 483 (1969), concerning judicial review of institutional rules and procedures:

There is no doubt that discipline and administration of state detention facilities are state functions. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with [federal constitutional] rights, the regulations may be invalidated.

14 Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871) (Prisoner possesses no rights normally granted a citizen.).
been disavowed.\textsuperscript{15} the erosion of the "hands-off" doctrine has finally begun to give some substance to the statement, "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication taken from him by law."\textsuperscript{16}

Second, the rights of the youth in the juvenile justice process have begun to undergo careful re-examination after \textit{In re Gault}.\textsuperscript{17} It is now clear that the juvenile justice system, despite its enunciated beneficial purpose, is still subject to the rigors of due process. While the court in \textit{Gault} explicitly limited its holding to the adjudicative stage of the juvenile process, several federal courts have rejected this narrow construction.\textsuperscript{18}

This article focuses on the effect on juvenile correctional institutions of the erosion of the "hands-off" doctrine and the introduction of procedural safeguards in the juvenile justice system. In so doing, the article examines the difficulties inherent in any attempt to reform institutional practices and procedures to accommodate the goals of the juvenile correctional model. In the juvenile context, the extent to which fundamental rights need or may be abrogated to allow the institution freedom to rehabilitate and treat its inmates is crucial. Therefore, this article examines three areas involving fundamental constitutional rights: imposition of punitive segregation, freedom of communication, and post-adjudicative disciplinary proceedings. The article discusses the

\textsuperscript{15} See, \textit{e.g.}, Cruz \textit{v. Beto}, 405 U.S. 319 (1972) (Majority upheld the right of Buddhist inmates to freedom of religion.).\textsuperscript{16} Collin \textit{v. Reichard}, 143 F.2d 443, 445 (6th Cir. 1944), \textit{cert. denied}, 325 U.S. 887 (1945). Recent cases have dealt with freedom of religion. Cruz \textit{v. Beto}, 405 U.S. 319 (1972); freedom from racial segregation. Lee \textit{v. Washington}, 390 U.S. 333 (1968); freedom from cruel and unusual punishment. Holt \textit{v. Sarver}, 442 F.2d 304 (8th Cir. 1971); and the right to the fourteenth amendment's guarantee of due process. Landman \textit{v. Royster}, 333 F. Supp. 621 (E.D. Va. 1971).\textsuperscript{17} 387 U.S. 1 (1967). The parents of a fifteen-year-old boy, who was committed to the Arizona State Industrial School as a juvenile delinquent by the county juvenile court, petitioned for a writ of habeas corpus. The Arizona Supreme Court affirmed a lower court dismissal of the petition, and the parents appealed to the United States Supreme Court. The boy was taken into custody without notice to his parents; no written charges were filed against him; the complainant was not present at the hearing; he admitted making an obscene phone call, but the admission was made without benefit of counsel and without advice of his right to remain silent; and finally, the boy was never advised of his right to state-appointed counsel. Mr. Justice Fortas, writing for five members of the court, stated that in the above particulars the boy was denied due process of law because juvenile delinquency proceedings that may lead to commitment in a state institution must meet the essential requirements of due process and fair treatment.\textsuperscript{18} In \textit{Nelson v. Heyne}, 355 F. Supp. 451 (N.D. Ind. 1972, Supp. Op. 1973), the court stated, "[I]t 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." \textit{Id.} at 459. The case involved the grant of injunctive relief against the Indiana Boys School, a medium security juvenile correctional institution, forbidding several disciplinary practices. \textit{See also} Inmates of the Boys' Training School \textit{v. Affleck}, 346 F. Supp. 1354 (D.R.I. 1972); Martarella \textit{v. Kelley}, 349 F. Supp. 575 (S.D.N.Y. 1972).
traditional judicial stance regarding these issues in the adult institutional setting and suggests that each issue is affected differently by the juvenile character of the institution's inmates, the nature of the process by which the youth is committed, and the treatment orientation of many juvenile correction centers. Throughout the article the institutional need for flexibility in choosing and carrying out treatment methods is balanced against the need for procedural safeguards to ensure that the rehabilitative purpose is carried out with respect for minimal requirements of fairness and decency.

I. PUNITIVE SEGREGATION

A. Present State of the Law

The legality of punitive segregation has most frequently been analyzed in terms of the eighth amendment's prohibition of cruel and unusual punishment. Recent cases, which bypass the "hands-off" doctrine to protect prisoners from such cruel and unusual punishment, leave little question that the eighth amendment applies to the treatment of prisoners as well as to the length of their sentence. Nonetheless, no court has declared that segregated confinement by itself violates the eighth amendment and several courts have explicitly rejected this assertion. As the Second Circuit noted in Sostre v. McGinnis, "a similar form of confinement is probably used in almost every jurisdiction in this country.... The federal practice appears to be that prisoners shall be retained in solitary 'for as long as necessary to achieve the purposes intended,' sometimes 'indefinitely.'"

Courts generally limit their corrective involvement to conditions that could properly be called "barbarous" or "shocking to

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19 For the purpose of this paper punitive segregation is defined as the disciplinary isolation of a person from human contact in a barren room, with little or no opportunity for exercise or recreation, as distinguished from the temporary isolation of an individual who is emotionally out of control in order to allow him to "cool off."

20 Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (enjoined solitary confinement in subhuman conditions); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (two years solitary confinement not "reasonably related" to the disturbance of prison peace); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (debasing conditions, if proved, establish a violation of the eighth amendment). But see Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969) (bread and water diet supplemented by one regular meal every third day and no running water; does not state an eighth amendment claim).


22 442 F.2d 178 (2d Cir. 1971).

23 Id. at 192.
the conscience." For example, in Wright v. McMann the circuit court unhesitatingly held that solitary confinement violated the prohibition against cruel and unusual punishment when a prisoner was forced to remain nude in a stripped solitary confinement cell, subjected to subfreezing temperatures, and denied all hygienic essentials. The court said that these conditions "could only serve to destroy completely the spirit and undermine the sanity of the prisoner." Similarly, in Jordan v. Fitzharris where a prisoner was forced to sleep nude, allowed to wash his hands only once every five days, and was otherwise deprived of all items necessary to maintain bodily sanitation in his wet, filth-encrusted cell, the district court felt that judicial intervention was required. The court stated:

However, when, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene . . . to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.

Thus, in the adult correctional setting, courts are reluctant to limit the practice of imposed solitary confinement unless such treatment is accompanied by an almost total lack of the amenities to which a prisoner is deemed entitled.

B. The Legality of the Practice in a Juvenile Setting

Given the stated benevolent statutory purpose of confinement at juvenile correctional institutions, the limited due process protections received by the youth at the adjudicatory stage in the juvenile justice system and the emerging empirical data on the effects of solitary confinement on a juvenile who is in his most formative years, the courts may be far less reluctant to declare a

24 See Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).
25 387 F.2d 519 (2d Cir. 1967).
26 Id. at 526.
28 Id. at 680.
29 See note 3 and accompanying text supra.
30 McKeiver v. Pennsylvania, 402 U.S. 528 (1971) (The full due process protection required in adult criminal proceedings is not required in juvenile adjudication.).
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specific confinement condition violative of a youth's constitutional rights. Currently the disciplinary use of juvenile solitary confinement is the subject of increased judicial scrutiny, and today there can be little doubt that merely categorizing the confinement as rehabilitative does not preclude the operation of the eighth amendment when the reality of the confinement becomes punitive. In fact, more careful judicial scrutiny is called for to prevent deviation from the goal of rehabilitation. The cautionary observation of a noted scholar bears consideration:

Measures which subject individuals to the substantial and involuntary deprivation of their liberty [are essentially punitive in character] and this reality is not altered by the facts that the motivations that prompt incarceration are to provide therapy or otherwise contribute to the person’s well-being or reform. As such, these measures must be closely scrutinized to insure that power is being applied consistently with those values of the community that justify interferences with liberty for only the most clear and compelling reasons.

Acknowledging that measures aimed at rehabilitation often have punitive overtones, numerous courts have relied on statutory pronouncements defining the purpose of the juvenile justice system, to insist that juveniles be treated in a fashion consistent with established rehabilitative goals. In an effort to enunciate a right to treatment for juveniles incarcerated in correctional institutions, the courts affirmed that institutionally confined juveniles possess rights not given to adult prisoners. The courts implicitly acknowledged that the juvenile's avowed possession of a right to treatment often serves to justify rehabilitative incarceration. These courts have recognized that non-treatment may be considered cruel and unusual punishment for those held in civil custody, even without reference to a standard proscribing inhumane conditions of confinement.

The circuit court in *Martarella v. Kelley* justifies its decision to hold the state to a higher standard of care in juvenile institutions based upon its interpretation of the rehabilitative ideal. The court wrote:

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35 349 F. Supp. 575 (S.D.N.Y. 1972) (recognized right to treatment for juveniles involuntarily confined by the juvenile justice system).
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 detainee.  

Underlying the decisions upholding a right to treatment for juveniles is an awareness that the anticipation of benevolent care and treatment is the only justification for denying juveniles the full panoply of due process protections accorded an adult during the adjudicatory stage. It is therefore arguable that conditions which would not be considered cruel and unusual punishment in an adult correctional institution may be so designated in the juvenile setting. In addition, juvenile adjudicatory due process may be vitiated if post-adjudicatory treatment is not provided.

A number of court decisions examine the efficacy of forced isolation as a measure used in the treatment of juveniles. The case of *Lollis v. New York State Department of Social Services,* involved a petition by a fourteen-year-old girl, who was confined as a "person in need of supervision" rather than as a delinquent, challenging her two-week placement in solitary confinement. At the outset the court stipulated that it recognized the state's right to isolate temporarily a child under emergency conditions in order to protect the child from danger and to protect others. Framing the issue in terms of the constitutionality of extended isolation or isolation imposed on civil inmates as punishment, the court held that two weeks of confinement in an isolation cell with no recreation facilities or reading matter is, with respect to juveniles, cruel and unusual punishment. The district court noted that it is not

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36 Id. at 585.

37 While pronouncements as to the adequacy of adjudicatory procedural safeguards are affected by the expectation that treatment will be provided, the overall sufficiency of treatment rendered raises post-adjudicatory due process considerations as well. The decision rendered in *Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971).* is directly in point. The court held, "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." *Id.* at 785. Incorporated in the opinion as Appendix A was a list of minimum constitutional standards for adequate treatment of the mentally ill. Paragraph 11-7 of the Appendix specifically states.

Patients have a right to be free from physical restraint and isolation except for emergency situations, in which it is likely that patients could harm themselves or others and in which less restrictive means of restraint are not feasible; patients may be physically restrained or placed in isolation only on a Qualified Mental Health Professional's written order which explains the rationale for such action.

Thus solitary confinement found to have the status of non-treatment may be constitutionally prohibited as an activity constituting a post-adjudicatory denial of due process notwithstanding its failure to be classified as cruel and unusual punishment.


39 Id. at 477.
necessary to demonstrate "barbarous acts" for a juvenile to state a claim under 42 U.S.C.A. § 1983.40 "It is sufficient, for example, to show... that plaintiff was held for two weeks in isolation which... was 'augmented by surroundings so oppressive as to destroy the integrity and identity of a child.' "41

Nelson v. Heyne42 involved a class action by the inmates of an Indiana boys' training school seeking to enjoin the use of solitary confinement without due process safeguards. The court concluded that isolation could not be used in the future unless the institution could demonstrate in each case that isolation met the best treatment interests of the child.43

While dealing directly with the problem of isolated confinement of juveniles, the court in Inmates of the Boys' Training School v. Affleck44 stated:

[T]he Constitutional validity of present procedural safeguards in juvenile adjudications... appears to rest on the adherence of the juvenile system to rehabilitative rather than penal goals.... Thus, due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further the goal of rehabilitation.45

The court refused to enjoin the allegedly unconstitutional use of isolation cells only because the petitioner failed to present expert testimony to demonstrate what constitutes solitary confinement and to distinguish between acceptable and destructive segregation. However, the opinion noted the increased limitations on freedom and educational opportunity caused by isolation and declared such action to be punishment regardless of the justification given for its use.46

Of crucial importance is the recognition by all three courts that solitary confinement is not rehabilitation but punishment and that isolation is believed to have definite detrimental effects on children. In each case, the effect of prolonged isolation on juveniles

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40 The statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 322 F. Supp. at 478.
44 Id. at 456.
46 Id. at 1364.
47 Id. at 1368. 1369.
was the subject of extensive expert testimony. The consensus that emerged from the expert testimony indicates that the unconscionably cruel practice of forced isolation serves no constructive treatment purpose and is actually punitive in its effect, stifling emotional development and causing behavior to deteriorate rather than improve. The experts concluded that since the seclusion of a juvenile produces far more serious psychological repercussions than similar measures administered to adults, prolonged isolation can never be considered beneficial to the juvenile recipient.

47 The testimony of Dr. Robert Gould in *Lollis*, 322 F. Supp. at 481 is representative. It is unconscionably cruel and inhumane treatment to put an adolescent in isolation for a two week period. In fact one day of such isolation would not constitute constructive action to rehabilitate a troubled youngster. . . .

Isolation as a 'treatment' is punitive, destructive, defeats the purposes of any kind of rehabilitation efforts. . . . There is no justification for such treatment unless one wants to dehumanize a young person in trouble and wants to create more trouble with such person in the future.

Dr. Gould is an Associate Professor of Psychiatry at the New York University School of Medicine and Director of Adolescent Services at Bellevue Psychiatric Hospital. Echoing these views is Dr. Richard Feinberg, who directs the Bronx Childrens Psychiatric Hospital and is a member of the Task Force on Child Psychiatry of the American Psychiatric Association.

I am wholly against the concept of punitive, prolonged isolation of children, normal or aberrant in their behavioral development. While brief isolation may be clinically indicated in both groups of youngsters, punitive prolonged isolation never can promote emotional development . . . . 322 F. Supp. at 482.

Finally, Dr. George L. Hardman, staff psychiatrist at Roxbury Court Clinic and consultant to the Massachusetts Department of Youth Services stated,

It is my professional opinion that confining a child in isolation for punishment serves no treatment purpose whatsoever. On the contrary, because the child's problem or problems are in no way being dealt with during the period in which he is confined in isolation, the child's behavior deteriorates rather than improves in the course of his isolation. The isolation of a child only inhibits that child's emotional development . . . . 346 F. Supp. at 1366.

The Affleck court also quotes from testimony to the same effect by Dr. Jerome Miller, Commissioner, Department of Social Services for the Commonwealth of Massachusetts.

48 An ever-increasing number of experts have concurred in these views. The Department of Health. Education and Welfare in 1962 announced standards for institutions serving delinquents. Stating that the imposition of solitary confinement "rarely contributes anything to treatment," it sought severely to restrict its use. The Department characterized the use of such a measure as "an extremely severe type of punishment for a hyperactive delinquent." See DEPT OF HEALTH, EDUCATION AND WELFARE, INSTITUTIONS SERVING DELINQUENT CHILDREN 124 (1962). More recently, the National Advisory Commission on Criminal Justice Standards and Goals labeled isolation as "inhumane" and commented that solitary confinement "in the long run brutalizes those who impose it as it brutalizes those upon whom it is imposed." NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS TASK FORCE REPORT, Standard 2 (1973). Instances of suicide and suicide attempts by youths in solitary confinement have also begun to surface. See, e.g., Hearings on S. 48 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 91st Cong., 1 Sess., vol. 5, at 5077 (1969); Konopka, *Our Outcast Youth*, 15 SOCIAL WORK 76 (1970). In her book about adolescent females, Gisela Konopka, Professor of Social Work and Director of the Center for Youth Development and Research at the University of Minnesota, has stated the problem poignantly:

Even the highly motivated person, the person who is willing to suffer for an ideal, feels degraded and abandoned because of the segregation from any
In light of such testimony and supporting data, the prolonged isolation of juveniles is clearly punitive in nature and without sustainable justification in a system committed to a rehabilitative goal. Isolation of juveniles may be illegal on two separate grounds. First, it may constitute cruel and unusual punishment when judged by a standard which is much less tolerant than that imposed with respect to adults. Second, since juvenile commitment is based on the assumption that treatment will be provided, due process is violated if punitive segregation, serving no rehabilitative purpose, is imposed upon juvenile inmates.

II. FREEDOM OF EXPRESSION: MAIL

A. Present State of the Law

A prisoner has no absolute right to use the mails or to receive an unlimited, unrestricted amount of mail from any source. Many correctional institutions regularly read and censor all incoming and outgoing inmate mail. Administrative restrictions relating to the mails have often been endorsed as a necessary incidence of prison life and regularly upheld where reasonably related to the needs of administering the institution and maintaining prison discipline. Thus, regulations preventing subversive, inflammatory, or reasonably objectionable mail from entering the prisons have been approved. Outgoing letters containing inaccuracies, lies, or critical remarks about the institution or its administration are often rejected and returned to the inmate. Thus concern for the maintenance of institutional norms serves to justify the imposition of limitations on a prisoner’s right of free expression.

Several courts have questioned the need for, and constitutionality of such restrictions on incoming mail. Long v. Park-
er\textsuperscript{55} held that where prisoners of other faiths are allowed to receive literature, Muslims may not be denied the same right unless the authorities can demonstrate that the literature presents a "clear and present danger" to prison discipline. Similarly, \textit{United States ex rel. Shakur v. Commissioner of Corrections}\textsuperscript{56} affirmed the right of Black Panthers to receive and read the party newspaper, although officials retained discretion to decide when the Panthers could read it and to whom it could be disseminated. In addition, the National Conference on Criminal Justice has stated that free expression in prisons should not be restricted in order to protect other offenders from unpopular ideas or to protect other offenders from views correctional officials deem not conducive to rehabilitation.\textsuperscript{57} The district court case of \textit{Palmigiano v. Travisono}\textsuperscript{58} represents the most radical departure from traditional reasoning regarding a prisoner's right of free expression. Basing the decision on the freedom of publishers to circulate materials, the judge enjoined prison officials from screening out any printed matter except hard-core pornography. The court in \textit{Palmigiano} also forbade prison officials from reading any correspondence from sources on the prisoner's approved mailing list, although officials remained free to search the mail for contraband. Officials were required to treat letters from attorneys, courts, and public officials in a like manner. Recent decisions have tended to follow the lead of \textit{Palmigiano}. In both \textit{Morales v. Schmidt}\textsuperscript{59} and \textit{Nelson v. Heyne},\textsuperscript{60} the courts characterized the prisoner's right to free correspondence by mail as "fundamental" and barred interference with that right absent the showing of a compelling governmental interest.

Certain restrictions on outgoing correspondence have also been upheld as justified. These restrictions include those aimed at preventing the perfection of escape plans, forbidding correspondence with persons whom the prison officials feel will inhibit the inmate's rehabilitation,\textsuperscript{61} or limiting the number of people to whom a prisoner may write.\textsuperscript{62} One court has even refused to invalidate a regulation forbidding correspondence with anyone not specifically

\textsuperscript{55} 390 F.2d 816 (3d Cir. 1968). \textit{See also} Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).


\textsuperscript{57} \textit{WORKING PAPERS FOR THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE: CORRECTIONAL INSTITUTIONS}, Standard 2.15 (1973).


\textsuperscript{59} 340 F. Supp. 544 (W.D. Wis. 1972).

\textsuperscript{60} 355 F. Supp. 451 (N.D. Ind. 1972).

\textsuperscript{61} Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958) (Court upheld warden's actions in barring mail to a woman the prisoner claimed as a common law wife.).

\textsuperscript{62} Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965).
permitted as a correspondent by statute. However, the routine censorship of outgoing mail in federal prisons was abolished in 1962. Further, Palmigiano, Morales, and Nelson enjoined prison officials from opening, reading, or inspecting any outgoing mail without a search warrant. The court in Palmigiano explicitly rejected the idea that prison officials have any duty or right to protect the public from the contents of letters written by inmates.

Restrictions on correspondence to public officials, courts, and attorneys are of particular concern, and have been subjected to more rigid judicial scrutiny. Not only are the first amendment rights of prisoners involved, but such restrictions may deprive the public of information necessary for it to carry out its watchdog role. The ability to communicate with those on the outside acts as an effective outlet for airing legitimate inmate grievances, and is a necessity if the individual’s right of access to the court is to be meaningful. A number of courts have now ruled that the interruption or censorship of mail addressed to public officials represents an unconstitutional infringement on the prisoner’s first amendment rights. The right of prisoner access to the courts has long been recognized; its efficacy depends largely on the right of the individual to communicate freely and privately with the court and his attorney. Consequently, the courts have held that both the due process clause and the equal protection clause of the fourteenth amendment prohibit any restrictions on correspondence addressed to the courts. Correspondence with an inmate’s

63 Labat v. McKeithen. 361 F.2d 757 (5th Cir. 1966).
65 Three separate grounds exist to support that right. First, the ability to complain to state and federal officials is an inseparable part of the right to petition for a redress of grievances. Second, as employees entrusted by the public with the responsibility for prison administration, corrections officials should not be allowed to interdict communications alleging abuse of that trust. Third, denial of the right to uncensored communications with public officials serves no rational public interest and is, therefore, an arbitrary exercise of power prohibited by the due process clause of the fourteenth amendment. Hirschkop & Millemann, supra note 12, at 825. The authors point out that the federal system allows uncensored mail to be sent to specified public officials, and forbids the reading of mail to attorneys, with no apparent detriment to the system. Id.
67 Ex parte Hull, 312 U.S. 546 (1941) (Court declared invalid a state regulation that habeas corpus petitions must be approved by the parole board’s “legal investigator” as properly drawn before transmittal to the court.).
68 Dowd v. United States ex rel. Cook. 340 U.S. 206 (1951) (Prison regulations may not prevent an inmate from filing a timely appeal.); Lee v. Tahash. 352 F.2d 970 (8th Cir. 1965); Smartt v. Avery. 370 F.2d 788. 790 (6th Cir. 1967) (Court declared invalid a parole board rule which delayed for a year a prisoner’s parole board hearing whenever he sought a writ of habeas corpus.).
attorney has also received special consideration. Most courts agree that it is impermissible for prison officials to censor or refuse to send mail to the inmate's attorney. ⁶⁹ Nolan v. Scafati ⁷⁰ specifically held that, absent countervailing interests, a state cannot prevent an inmate from seeking legal assistance from a bona fide attorney. An allegation by prison officials that the letter contained "lies" was held insufficient to justify its not being mailed. ⁷¹ Few courts, however, would go as far as Palmigiano and expressly forbid prison officials from reading inmate letters before they are sent.

While the judiciary has traditionally been reluctant to recognize an absolute right of prisoners to send or receive mail, recent court opinions dealing with this subject have evinced a heightened recognition of the fundamental nature of that right and displayed increased judicial reluctance to defer to the judgment of correctional officials. The impetus for this departure from established doctrine would seem to be the recognition that there can be little tolerance of official interference with correspondence, especially with material addressed to public officials, attorneys, or the courts, if the prisoner is to retain all rights save those society has specifically taken away.

B. The Legality of the Practice in a Juvenile Setting

While a balancing of competing considerations in the juvenile setting would seem to demand that the restrictions on inmate correspondence be identical to those promulgated in the adult correctional setting, the special status of juvenile institutions dedi-

⁷⁰ 430 F.2d 548 (1st Cir. 1970).
⁷¹ The danger in permitting prison officials to read outgoing mail addressed to the courts lies in the possible "chilling effect" it may have on the prisoner. While disciplinary action is not allowed in retaliation for prisoner allegations of mistreatment by prison officials, reprisals can result when prison authorities are alerted to the prisoner's action by reading his mail. See United States ex rel. Cleggett v. Pate, 229 F. Supp. 818, 821-22 (N.D. Ill. 1964). District Judge Motley expressed the belief, in Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970) that prison officials had fabricated a bogus excuse to put Sostre in solitary confinement in order to punish him for obtaining a court order releasing him from a previous punitive confinement. These dangers are enhanced by the proof problems involved and by the fact that most correctional institutions do not give an inmate a full hearing before punishment is administered. The court in Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965), acknowledged the seriousness of the problem of reprisals by noting that "a theoretical right of access to the Courts is hardly actual and adequate if its exercise is likely to produce reprisals, physical or otherwise, from Penitentiary personnel." Id. at 690.
icated to rehabilitation rather than punishment means that the treatment justification given for many of the restrictions deserves special consideration. It seems logical that the staff should be aware of any material discussed in an incoming letter which would greatly upset the youth. Also if it can be demonstrated that reading the youth's general outgoing correspondence makes the staff better able to relate to the youth's needs, there may be an argument to support this action.

There is no justification, however, for treating an adolescent's correspondence with the courts, his attorney, or public officials other than in conformity with the standard enunciated for adult prisoners. No rational nexus exists between a legitimate purpose or goal of the institution and the censorship of mail to an attorney or a court. The argument that screening of "official" mail allows the administrators to deal more efficiently with the problem, at an earlier stage and in a more informal manner, is no more appealing in this situation than in an adult prison and is fraught with the same potential for abuse. Additionally, the National Conference on Criminal Justice has recently agreed that administrative inconvenience and cost are inadequate justifications for any first amendment restrictions.\textsuperscript{72} A policy more closely in line with that enunciated by the National Conference\textsuperscript{73} and Palmigiano, allowing mail to be inspected for contraband but not read for content, is desirable, especially for all correspondence to an attorney, the court, or public officials. In any case, mail addressed to officials who are concerned with a youth's confinement or treatment should never be censored or delayed by institutional officials.

III. Post-Adjudicative Due Process in the Juvenile Correctional Institution

A. Present State of the Law

Any discussion of due process rights of institutionally confined juveniles subject to administrative disciplinary decisions is complicated by the traditional freedom granted juvenile correctional administrators and the limitation of \textit{In re Gault}\textsuperscript{74} that the due process standards of the juvenile justice system are applicable solely to the adjudicatory stage. Furthermore, analogy to the present state of the law in the adult correctional setting is com-

\textsuperscript{73} \textit{Id.} at Standard 2.17.
\textsuperscript{74} 387 U.S. 1 (1967).
plicated by the Supreme Court's pronouncement in *McKeiver v. Pennsylvania*\(^7^5\) that, despite *In re Gault*, the full range of due process protections given an individual in an adult criminal proceeding need not be applied in the juvenile setting. Nonetheless, the reasoning that motivated the court in *In re Gault* is equally applicable at the post-adjudicative stage.\(^7^6\) This has been recognized by at least three federal district courts that have recently examined the rights of juveniles confined in a post-adjudicatory juvenile institution and insisted on some form of procedural protection for incarcerated juveniles.\(^7^7\)

The juvenile institution presents variations from the adult corrections model which must be considered in delineating the role of due process protections within the institution. The very age of the individuals involved creates a situation where some sanctions such as solitary confinement may have a decidedly more serious effect than on an adult. In addition, the non-criminal nature of the juvenile's confinement may require the provision of additional protective procedures before he is transferred from one institution to another.

In the following discussion, the rights of mentally ill individuals involuntarily committed to mental institutions for treatment purposes are examined to provide an analogy to civil incarceration of juveniles. The Circuit Court of Appeals for the District of Columbia has consistently held that decisions that affect the rights and liberties of the patient and are justified with reference to a rehabilitative goal, are subject to judicial review to "make sure the [hospital] has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion."\(^7^8\) In each case, the court acknowledged that it could not and should not decide what treatment was best for the patient, but recognized that to afford no procedural protections in the form of judicial review would be "to abandon the interests affected to the absolute power of administrative officials."\(^7^9\) This the court re-

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\(^7^5\) 402 U.S. 528 (1971). While recognizing that certain due process procedural safeguards are applicable to juvenile proceedings, the Court held that there is no constitutional right to a jury trial in juvenile court.

\(^7^6\) In writing for the Court, Mr. Justice Fortas observed: "[W]hile these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the fourteenth amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13.


\(^7^8\) Williams v. Robinson, 432 F.2d 637 (D.C. Cir. 1970); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Tribby v. Cameron, 379 F.2d 104, 105 (D.C. Cir. 1967).

\(^7^9\) Covington v. Harris, 419 F.2d 617, 621 (D.C. Cir. 1969).
fused to do, despite the fact that many of these decisions resulted from challenges to administrative actions prescribing the treatment of individuals civilly committed for rehabilitative purposes.

Much of the discussion that follows concerns decisions in juvenile institutions relating more closely to discipline than to treatment, thereby creating an even greater justification for close judicial examination of the administrative decision-making process. Expert testimony reveals that procedures in even the better juvenile institutions cannot always be categorized as treatment-oriented.80 The judicial imperative was best stated by the court in *Landman v. Royster*81 in the context of disciplinary procedures in an adult prison setting: "'Security' or 'treatment' are not shibboleths to justify any treatment."82

Notwithstanding the acknowledged general application of the fifth and fourteenth amendments, courts have traditionally failed to impose procedural requirements on administrative decisions regarding prison discipline.83 Until recently, little concern was demonstrated for procedural regularity in non-parole or release situations, in spite of the fact that disciplinary action often directly affected an inmate's liberty. Courts would regularly justify the denial of a petition alleging arbitrary loss of good time84 or transfer to tighter security85 because such actions were deemed to involve matters of privilege rather than right. As a result of this prevailing judicial disinclination, many American correctional institutions failed to adopt procedures designed to protect prisoners from arbitrary disciplinary actions by correctional administrators. In many states there is no requirement that a hearing be held before an inmate is placed in solitary confinement.86 Prison disciplinary measures are often summarily administered for the violation of what may be an unwritten regulation.87 A series of recent

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80 See notes 47-48 and accompanying text supra.
82 Id. at 645.
83 For example, Banning v. Looney, 213 F.2d 771 (10th Cir. 1954) (The court declared itself without power to supervise prison administrators or to interfere with the ordinary prison rules and regulations.).
84 Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); Brown v. Warden, 351 F.2d 564 (7th Cir. 1965); Hiatt v. Campagna, 178 F.2d 42 (5th Cir. 1949). aff'd per curiam, 340 U.S. 880 (1950). In all three cases the courts declared that the grant or denial of good time credit was a discretionary power of the executive prison administrative officer. Good time is defined as accumulated credit for good behavior, the acquisition of which is necessary to obtain parole eligibility.
87 Id. at 192. In Courtney v. Bishop, 409 F.2d 1185 (8th Cir.). cert. denied, 396 U.S. 915 (1969), the court rejected a prisoner's complaint that he should have been given a hearing before his placement in solitary confinement where no such hearing was authorized.
cases reject, to varying degrees, the tradition of automatic judicial deference to the disciplinary decisions of prison officials and subject disciplinary procedures within correctional institutions to increased scrutiny. Collectively they hold that prison administrators must observe at least minimal impartial procedures before imposing substantial punishment upon an inmate for a rule infraction.

Among the first cases to discard explicitly the "hands-off" doctrine regarding prison disciplinary procedures was *Morris v. Travisono.* The court in *Morris*, appeared to follow the lead of the Fifth Circuit which wrote in *Jackson v. Godwin*, "Even prisoners have the constitutional right—a right to due process of law—to be free of arbitrary actions affecting their liberties." In *Landman v. Peyton*, the Fourth Circuit refused to sanction the system employed in a Virginia prison whereby untrained, lower-rank personnel were granted wholesale discretion in the administration of the disciplinary cell blocks. The due process objection centered on concern for prisoner exposure to the capricious imposition of added punishment. Despite the fears of some commentators that the introduction of adversary proceedings into corrections will impair correctional efficiency and public safety, it is now clear that where a substantial interest is involved, inmates of a state correctional institution may not be subjected to arbitrary and summary action on the part of prison officials.

Not surprisingly, this trend has burgeoned simultaneously with the Supreme Court's reiteration of the importance of fair procedures in all administrative settings in which significant deprivations of life, liberty, or property are possible. The decision in *Goldberg v. Kelly* typifies this trend. The Supreme Court declared invalid a provision which cut off funds to welfare recipients without the grant of minimal pre-termination procedural

by the prison rules. A recent study of the U.S. Penitentiary at Atlanta, Georgia discovered that although an inmate will appear before a disciplinary board for a serious rule violation, he will not receive notice in advance of the charge, nor will he be allowed to call any witness in his behalf, to cross-examine the officer alleging the misconduct, or to retain counsel. Jacob, *supra* note 50, at 232-33 (1970).


89 400 F.2d 529 (5th Cir. 1968). Plaintiff, a state prison inmate, claimed that prison rules and regulations denying him the right to receive Negro newspapers and magazines because he was Negro deprived him of equal protection of the law.

90 Id. at 533.


safeguards. The interest of the welfare recipient, the court found, was not outweighed by the interest of the state in instituting summary proceedings. Increasingly, as the question becomes not whether any due process procedural safeguards are required before action is taken which significantly affects the liberty of a prisoner, but rather what procedures and protections will be adequate to meet applicable constitutional imperatives, courts and authors are turning to the concepts that govern the administrative process throughout government to guide their actions in the prison context. Because due process is a flexible concept, the requirements of which vary in different situations depending on different factors, it is important to delineate the considerations used by courts in formulating due process standards in the correctional setting.

Weighing the institutional need for flexibility to preserve discipline and staff morale together with increased demands for a stricter rule of law in prison procedures, one commentator has suggested that the guiding principle should be "the greater the impact on the conditions of present or prospective liberty, or the physical or psychiatric integrity of the prisoner, the greater (or more plausible) the claim to substantive and procedural safeguards." The reasoning of the court in *Cafeteria and Restaurant Workers Union v. McElroy* is consistent with this principle.

[C]onsideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

In *Joint Anti-Fascist Refugee Committee v. McGrath*, Justice Frankfurter more specifically delineated the factors considered in determining the extent to which due process must be afforded a recipient of governmental action. He wrote:

The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the function-

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96 Id. at 895.
ary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.98

In sum, the three factors stressed are the nature of the particular government interest involved, the interest of the government in having a summary proceeding, and the interest of the private party which is placed in jeopardy by the governmental act.

One of the most important cases in this area is *Sostre v. Rockefeller.*99 Sostre, the plaintiff-inmate, had been placed in solitary confinement and denied over 100 days “good time” without prior benefit of hearing or written notice of the charges against him. The district court ordered that before a prisoner can be sent to punitive segregation, he must receive advance written notice of the charges against him including the rule or regulation he is charged with violating, be given a recorded hearing before a disinterested official, have the opportunity to cross-examine adverse witnesses and to call witnesses in his own behalf, and be permitted to retain counsel or to appoint a voluntary counsel substitute. In addition, the district court judge provided that the prisoner must receive a written decision of the proceeding which briefly sets forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed. On appeal, the Second Circuit felt that full trial-type procedures were unnecessary and reversed the lower court decision.100 While agreeing that a prisoner is not subject to the capricious and arbitrary actions of prison officials, the court felt that due process was satisfied if the procedures utilized guaranteed that all disciplinary action would be “premised on facts rationally determined.”101 Accordingly, the court required that before disciplinary action having a substantial effect on the prisoner may be taken, he must be confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions.

*Sostre* is not an isolated example of a court’s becoming intimately involved in the elaboration of precise internal institutional procedures. A number of courts have insisted on procedural protections more in line with those required by the district

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98 Id. at 163.
100 *Sostre v. McGinnis,* 442 F.2d 178 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972).
101 442 F.2d at 198.
court in *Sostre*. The Third Circuit declared that before a prisoner could be transferred to solitary confinement the fourteenth amendment required that he receive a hearing and pre-hearing notice of the charges against him. *Landman v. Royster* is of particular interest because the district court carefully considered, enunciated, and balanced the interests of the prisoner and the state in the initiation and implementation of intra-institutional disciplinary actions before announcing separate procedures for minor violations and major violations. For disciplinary action which could result in solitary confinement, maximum security confinement, or loss of good time, the court ordered full trial-type proceedings because a possible loss of substantial privileges was involved. In addition to evaluating the impact of increased restrictions on the prisoner's movement, the court considered the effect of the action on the prisoner's diet, his opportunity to work, his access to religious services, educational opportunity, and the library, and his chances for parole and possible loss of "good time." Although the court did not require the same panoply of procedures for violations resulting in less severe deprivations, such as restrictions on use of the commissary or recreation facilities, adherence to minimal procedures consisting of verbal notice of the charges, a hearing before an impartial decision-maker, and the right to present testimony and cross-examine adverse witnesses was ordered in order to prevent arbitrary administrative action. *Landman v. Royster* and *Sostre v. Rockefeller* have also re-evaluated the traditional right-privilege doctrine in the prison context. Under the right-privilege doctrine states were able to avoid providing due process guarantees by labeling a state benefit a "privilege" rather than a "right."
than a "right." Citing Shapiro v. Thompson, Landman explicitly rejects the doctrine and holds that benefits authorized by state law may not be arbitrarily denied. In Sostre the court wrote, "The exaction of segregated confinement was onerous indeed, and the distinction between a 'right' and a 'privilege'—or between 'liberty' and a 'privilege' for that matter—is nowhere more meaningless than behind prison walls." In sum, recent decisions, with increasingly stronger language, have tended to emphasize the constitutional necessity of providing prisoners with adequate due process protection. While due process considerations have traditionally had little impact on administrative decisions imposing prison discipline, an emerging judicial reluctance to defer to the judgment of prison administrators coupled with the realization that the dictates of due process are equally applicable to inmates has resulted in a judicial re-examination of the role of due process in the post-adjudicative correctional setting. The demise of the right-privilege doctrine leaves courts free to weigh and balance the respective interests involved. Applying this mode of analysis, the question is no longer whether due process requirements are applicable, but rather what procedures will comport with due process in the imposition of specific disciplinary measures.

B. The Legality of the Practice in a Juvenile Setting

The eventual effect on juvenile institutions of the trend toward increased due process protection is unclear. Lollis and Affleck demonstrate that the issue here, as in the adult correctional setting, will not be centered around whether due process applies, but rather what procedures adequately satisfy its requirements. There can be no doubt that the juvenile has substantial interests at stake. A juvenile has no statutory right to a reduction in his length of confinement based on an accumulation of "good time." Nevertheless, disciplinary action has a profound effect on the length of the juvenile's commitment because his confinement, while limited in time to the period of his legal classification as a juvenile, is of indefinite duration since it is directly tied to estimates of the extent of his reform and rehabilitation. Further, the effect of the imposition of disciplinary sanctions on the attainment of rehabilitative goals is unmistakable. It has already been demonstrated

108 442 F.2d at 196.
that punitive measures, such as denial of recreational or educational privileges, or utilization of solitary confinement, may have a significantly more detrimental effect on the juvenile than similar sanctions imposed on adults.\textsuperscript{109}

Arguments for procedural protection are tempered by the fears of some administrators of treatment-oriented institutions that the introduction of procedural requirements will destroy the therapeutic character of their programs.\textsuperscript{110} The fear is two-pronged. First, administrators argue that the system causes undesirable rigidity, decreasing staff flexibility in coping with new situations as they occur. Second, it is argued that the system creates an atmosphere and attitude that is detrimental to treatment and problem-solving. In addition, the continued utility of group therapy, recently introduced as part of the treatment program in some institutions, may be jeopardized by strict application of due process requirements.\textsuperscript{111} In light of these legitimate expressions of concern, attorneys and judiciary alike must be aware that the introduction of formal adversary procedures may at times be counter-productive to the provision of treatment in the juvenile correctional setting. However, this does not mean that due process considerations are any less relevant. Incarcerated juveniles must be protected against arbitrary action and cannot be left at the mercy of the good faith of institutional administrators.

It is imperative that minimal due process procedures be established at some level within each juvenile institution. While such procedures should be designed to facilitate the on-going treatment process, the youth is entitled to demand that there be a published set of rules enunciating basic disciplinary policy together with potential sanctions; that he be granted a fair and impartial hearing before a disinterested officer prior to the imposition of punishment; and that, where the sanction proposed is serious, he be provided with some form of adequate representation. While experimentation in the provision of treatment must be encouraged, the basic procedural protection of an incarcerated youth cannot be ignored.

\textsuperscript{109} See notes 47-48 and accompanying text \textit{supra}.

\textsuperscript{110} This view has been expressed by several administrators of juvenile correctional institutions. See Reed, \textit{Gault and the Juvenile Training School}, 43 Ind. L. J. 641 (1968).

\textsuperscript{111} In cases in which such treatment is employed, an individual's disciplinary restriction will often be subjected to discussion and review by his group. Not only must the disciplined member explain the incident, but the group, in turn, is under an obligation to question him fully and responsibly about it, and to ask how it affects the individual's rehabilitative goals and the goals of the group as a whole. Information concerning group therapy treatment was gathered from observations and interviews at the Green Oak Center, a maximum security juvenile institution located in Whitmore Lake, Michigan.
Finally, while it is clear that adult prisoners have no legal right to remain in a minimum as opposed to a maximum security prison, there exists both a statutory and constitutional argument that a juvenile is entitled to the least restrictive confinement that concerns for public safety will allow. Many state statutes enunciate this goal by emphasizing the need for keeping the child in the home or its nearest equivalent. This concept is based on the premise that where a person's liberty is restricted for a purpose other than punishment and by a procedure less than that required for a criminal conviction, due process demands that treatment must be dispensed in the least restrictive setting and manner commensurate with the purpose of the commitment. If this right exists, a juvenile must be afforded a reasonable opportunity to challenge the decision to transfer him to a maximum security institution where his freedom of movement will be greatly curtailed.

A series of cases involving the rights of non-criminal, involuntarily committed mental patients have explicitly held that these patients have a right to be confined only to the extent absolutely necessary for their proper treatment and the public safety. The factors that were determinative in each of the cases involving mental patients are equally applicable to juveniles. Neither individual has been convicted of a crime, while both have been confined primarily for purposes of treatment. The court in Covington v. Harris phrased the legal argument succinctly:

[T]he principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraor-

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112 Gray v. Creamer, 465 F.2d 179, 187 (3d Cir. 1972); Bundy v. Cannon, 328 F. Supp. 165, 173 (D. Md. 1971). Cases such as Gray and Bundy have consistently held that adult prisoners have no constitutional right to procedural due process in challenging a prison transfer. An exception to this general rule was recently enunciated in Gomes v. Travisono, 41 U.S.L.W. 2413 (D.R.I. 1973). In Gomes, the court held that in light of the protections offered prisoners in Morris v. Travisono, 317 F. Supp. 857 (D.R.I. 1970), disciplinary transfer of adult prisoners without a due process hearing violated the equal protection clause. The National Conference on Criminal Justice has also expressed the view that institutional transfers should be the subject of more rigid procedural scrutiny. WORKING PAPERS FOR THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE: CORRECTIONAL INSTITUTIONS, Standard 2.13 (1973).

113 See note 3 and accompanying text supra. Several states have adopted minimum security programs in an effort to maintain the child in the community. In re Arnold, 12 Md. App. 384, 278 A.2d 658 (Md. Ct. Sp. App. 1971); Hill v. State, 454 S.W.2d 429 (Tex. Ct. App. 1970); State v. Braun, 145 N.W.2d 482 (N.D. 1966); (All three cases held that children must not be transplanted away from their families and communities when their treatment needs could be served just as well outside a training school.).


115 419 F.2d 617 (D.C. Cir. 1969).
ordinary deprivation of liberty justifiable only when the respondent is 'mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty.' A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.\textsuperscript{116}

The treatment motivation of the decision in cases like \textit{Covington} was not and should not be sufficient to bar judicial review of administrative action if a severe loss of liberty is involved. On a number of occasions the courts have expressed their particular concern over the degree of confinement of a juvenile. In both \textit{Affleck} and \textit{Shone v. Maine}\textsuperscript{117} transfer of a juvenile to an adult correctional institution was forbidden without formal due process protections. In light of this concern, and recent developments enunciating the rights of the mentally ill, the undertaking of procedural reform in the custodial placement of juveniles must be considered as part of the larger goal of insuring that juvenile inmates receive the procedural protection to which they are entitled.

\textbf{IV. Conclusions}

Any attempt by the judiciary to police the operation of the juvenile corrections system involves the complex task of balancing the needs of a program ideally designed to be treatment-oriented, against the rights of the individual youth involuntarily confined in these institutions. Until recently, juvenile institution administrators possessed virtually uncontrolled power. Not only did the courts abstain from reviewing the actions of these administrators, but most state legislatures granted them broad discretionary powers with little or no guidance.\textsuperscript{118} The recent action of the courts is only the initial step in bringing the juvenile correctional process squarely within the rule of law and determining what safeguards are necessary to ensure realization of the systemic goals.

\textsuperscript{116} Id. at 623. Significantly, the petitioner in \textit{Covington} was questioning his transfer from one ward in the mental institution to the maximum security area of the same facility. While acknowledging the increased judicial difficulty in dealing with an intra-hospital disposition, the court recognized its duty to guard against unwarranted deprivations of liberty both before and after the patient enters the hospital.

\textsuperscript{117} 406 F.2d 844 (1st Cir.), \textit{vacated as moot}, 396 U.S. 6 (1969) (held invalid the transfer of a juvenile from a juvenile training center to a state prison for young adults because of a failure to employ procedures required by due process, despite compliance with state law).

The emerging picture indicates that the demands of treatment may justify a lesser standard of procedural due process in disciplinary proceedings while requiring increased due process protection surrounding the decision to transfer a youth to a maximum security institution. However, there is no justification for relaxing procedural due process requirements in juvenile institutions focusing primarily on custody rather than treatment. Further, there is a strong argument that solitary confinement per se may be unconstitutional in the juvenile setting, although solitary confinement of adults is permissible. Finally, there appears to be little justification for a separate juvenile standard for resolution of first amendment issues, except insofar as differentiation can be justified by reference to treatment objectives.

Correctional administrators must not be allowed to regain the immunity from judicial scrutiny that they previously possessed. There is no escaping the realities of the deprivation which may be imposed on a juvenile. As the Supreme Court accurately recognized in *In re Gault*:

The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.119

—Matthew L. Myers*

119 387 U.S. at 27.

*J.D., 1973, University of Michigan.