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Andrew D. Roth
University of Michigan Law School

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NOTES

An Examination of Whether Incarcerated Juveniles Are Entitled by the Constitution to Rehabilitative Treatment

What are the constitutional rights of persons who have been deprived of their liberty through civil commitment?¹ This vexing question has involved the federal courts in much litigation over the past two decades. At the center of the debate is the asserted right of civilly committed persons to receive rehabilitative treatment. Beginning in 1966 with the landmark case of *Rouse v. Cameron*,² this "right to treatment"³ has gained a significant degree of acceptance in the lower federal courts.⁴ Buoyed by an "unusual amount" of scholarly support,⁵ these courts have held that the due process clause of the four-

1. The justification for depriving a person of his or her liberty is the critical factor in distinguishing civil from criminal commitment. When society invokes the criminal laws to incarcerate certain of its members, it has determined that their conduct is "so reprehensible and injurious to others that they must be punished to deter them and others from crime." *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J., concurring). In other contexts, however, society desires to pursue legitimate interests without necessarily punishing the persons who threaten those interests. A mentally ill person, for example, may pose enough of a danger to himself or society to warrant his incarceration. *O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1975). Yet the state has no interest in punishing those who are mentally incapable of conforming their behavior to the norms of society. To accommodate the interests of society and the individual, the state will invoke its civil laws to confine such persons under conditions that — at least in theory — are less intrusive and less stigmatizing than those that accompany criminal conviction. See *McKeiver*, 403 U.S. at 551-52 (White, J., concurring).

2. 373 F.2d 451 (D.C. Cir. 1966).

3. The term "right to treatment" has become a term of art in the scholarly literature. See, e.g., Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978); Volenik, *Right to Treatment: Case Developments in Juvenile Law*, 3 JUST. SYS. J. 292 (1978). The phrase is not very descriptive, however, in that "treatment" may encompass both rehabilitative programs aimed at alleviating the behavioral problems that necessitated confinement and more narrowly prescribed attempts to prevent the deterioration of the confinee's condition or to reduce the intrusiveness of the confinement. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 317-19 (1982) (involuntarily confined mental patient entitled to adequate training to ensure bodily safety and a minimum of physical restraint); see also UNITED STATES DEPT. OF JUSTICE, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 487-88 (1980). This Note concerns itself with the right to treatment in the broader sense — the right of juvenile delinquents to receive minimally adequate training designed to alleviate the behavioral problems that led to their incarceration.

4. *Rouse* itself found that involuntarily confined mental patients were entitled to treatment as a matter of statutory interpretation. 373 F.2d at 453-55. The first case to lay a constitutional foundation for the right was *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971). See notes 7 & 79 *infra* and accompanying text. On two occasions the Supreme Court has had an opportunity to reach the constitutional issue, only to resolve the case on narrower grounds. See *Youngberg v. Romeo*, 457 U.S. 307, 318 (1982); *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975).

5. *Santana v. Collazo*, 533 F. Supp. 966, 973 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). See the references collected in Shephard, *Challenging the Rehabilitative Justification for Indeterminate Sentencing in the Juvenile Justice System: The Right to Punishment*, 21 ST. LOUIS U. L.J. 12, 22 n.57 (1977).

teenth amendment, and, perhaps, the eighth amendment, require the states to provide civilly committed persons with some minimum amount⁶ of rehabilitative treatment.

While the initial right to treatment cases dealt primarily with the mentally ill,⁷ courts soon extended the logic of these cases to the incarceration of juvenile offenders.⁸ Before long, several district courts,⁹ as well as the Court of Appeals for the Seventh Circuit,¹⁰ had concluded that involuntarily incarcerated juveniles have a constitutional right to minimally adequate rehabilitative treatment. Recently, however, the First Circuit became the first court of appeals firmly to reject the notion that the Constitution guarantees a right to treatment to incarcerated juvenile offenders.¹¹

This Note attempts to resolve the arguments presented in the literature and the case law and determine whether the federal Constitution mandates a right to treatment for involuntarily incarcerated juveniles. Part I examines the varied situations that have given rise to right to treatment claims. Part II elucidates the three principal theories on which right to treatment claims have been based: (1) that because the purpose of incarcerating juveniles is to promote their welfare, rehabilitation is mandated by the due process requirement that the nature of the commitment "bear some reasonable relation to the *purpose* for which the individual is committed";¹² (2) that rehabilitation is required as the *quid pro quo* for the reduced procedural safeguards af-

6. The courts have been very reluctant to displace medical knowledge in deciding what and how much treatment is mandated. See, e.g., *Youngberg v. Romeo*, 644 F.2d 147, 166-69 (3d Cir. 1980), *vacated and remanded*, 457 U.S. 307 (1982); *Morales v. Turman*, 562 F.2d 993, 999 (5th Cir. 1977) (court not in position to monitor day-by-day changes that affect rehabilitative programs). Instead, they have merely insisted in vague terms that the required treatment be "minimally adequate." *Youngberg*, 644 F.2d at 176 (Seitz, C.J., concurring); see also UNITED STATES DEPT. OF JUSTICE, JUVENILE DISPOSITIONS AND CORRECTIONS: A COMPARATIVE ANALYSIS OF STANDARDS AND STATE PRACTICES 65-66 (1977).

7. See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

8. See, e.g., *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972) (analogizing to *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), in finding a constitutional right to treatment for involuntarily incarcerated juveniles).

9. See, e.g., *Morgan v. Sproat*, 432 F. Supp. 1130, 1135-36 (S.D. Miss. 1977); *Pena v. New York State Div. for Youth*, 419 F. Supp. 203, 207 (S.D.N.Y. 1976); *Morales v. Turman*, 383 F. Supp. 53, 70-71 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977); *Nelson v. Heyne*, 355 F. Supp. 451, 458-59 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

10. See *Nelson v. Heyne*, 491 F.2d 352, 358-60 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). Prior to *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) (discussed in text at note 11 *infra*), the only other court of appeals to consider this question was the Fifth Circuit in *Morales v. Turman*, 562 F.2d 993 (5th Cir. 1977). Without finally deciding the issue, the Fifth Circuit expressed strong doubt about the existence of a right to treatment. 562 F.2d at 997-98.

11. *Santana v. Collazo*, 714 F.2d 1172, 1176-77 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

12. See notes 34-38 *infra* and accompanying text.

forded in juvenile proceedings;¹³ and (3) that confinement absent rehabilitation violates evolving standards of decency in contravention of the eighth amendment.¹⁴

With respect to the constitutional theories outlined above, Part III concludes (1) that rehabilitation is required by the due process clause when the state must rely on a rehabilitative purpose to justify its confinement of the juvenile, but not when the state may incarcerate the juvenile through an exercise of its police power;¹⁵ (2) that the reduction of procedural safeguards in juvenile proceedings should not give rise to a substantive constitutional right to rehabilitation;¹⁶ and (3) that rehabilitation is required by the eighth amendment where, as in (1), the state must rely on a rehabilitative purpose to justify the juvenile's confinement. The protections offered by the eighth amendment are therefore found to be coextensive with those provided by the due process clause.¹⁷

The Note infers from these separate conclusions that there is no single answer to the question of whether involuntarily incarcerated juveniles possess a constitutional right to rehabilitative treatment. The Note concludes that the existence of such a right depends ultimately on an evaluation of the delinquent act that led to the juvenile's incarceration.

I. FACTUAL VARIATION IN RIGHT TO TREATMENT CASES

Traditionally, society has affixed the label "juvenile delinquent" to those children confined as a consequence of their "misbehavior."¹⁸ That "misbehavior" may range from criminal acts such as "robbery, auto theft, or burglary" to noncriminal conduct such as "habitual truancy."¹⁹ While common sense suggests that societal power over delinquent juveniles should vary according to the severity of their conduct, the legal definition of juvenile delinquency is broad enough to encompass each of these manifestations of waywardness.²⁰

13. See notes 39-45 *infra* and accompanying text.

14. See notes 46-51 *infra* and accompanying text.

15. See notes 57-94 *infra* and accompanying text.

16. See notes 95-132 *infra* and accompanying text.

17. See notes 133-53 *infra* and accompanying text.

18. See T. PHELPS, *JUVENILE DELINQUENCY: A CONTEMPORARY VIEW* 33 (1976).

19. *Id.* at 35.

20. See *id.* at 35; see also R. MENNEL, *THORNS & THISTLES* xi (1973) (a finding of delinquency may be premised on a "violation of the law or ordinance by an individual below the legal adult age of the community," and "acts or courses of conduct deemed socially, morally, [or] physiologically undesirable for children," such as truancy, disobedience of parents, and consumption of alcoholic beverages).

Courts faced with right to treatment claims have failed to consider adequately that acts of juvenile delinquency vary greatly in degree. This Note argues that any adjudication of the rights of juvenile delinquents must, in the first instance, inquire into the type of "misbehavior" that warrants the juvenile's confinement. See notes 89-94 *infra* and accompanying text.

The lower federal court decisions asserting a right to treatment for juvenile offenders illustrate the variety of factual settings in which such claims arise. In one of the earlier decisions, juveniles who had been designated "PINS" — persons in need of supervision²¹ — were "temporarily"²² confined in juvenile centers. Under New York law, PINS included truants, runaways, and children deemed "ungovernable."²³ None of the children had committed acts that, if committed by adults, would have constituted crimes.²⁴ Similarly, in *Morgan v. Sproat*, Mississippi law defined a delinquent child as "any child 'whose occupation, behavior, environment or associations are injurious to his welfare or the welfare of other children.'"²⁵ This definition was read to encompass the habitually disobedient, the wilfully truant, and those who had violated school rules.²⁶

By way of contrast, *Nelson v. Heyne* involved a group of boys ages twelve to eighteen confined in a medium security correctional institution.²⁷ Of the almost 400 inmates, approximately two-thirds had committed criminal acts.²⁸ *Morales v. Turman* involved a class of juveniles who had been adjudicated "delinquent" and involuntarily committed to the custody of the Texas Youth Council.²⁹ The Council operated six "training" schools, three for girls and three for boys.³⁰ Of the males, sixty percent were committed for crimes of stealing, nine percent for crimes of violence, nineteen percent for disobedience and immoral conduct, and sixteen percent for other reasons.³¹ For the females, the figures were fifteen, four, sixty-eight, and thirteen percent respectively.³² As these cases illustrate, juveniles may be incarcerated for a broad range of delinquent acts that differ markedly in their severity.

21. *Martarella v. Kelley*, 349 F. Supp. 575, 577 (S.D.N.Y. 1972).

22. The detention was theoretically temporary. In practice, juveniles were often confined in excess of 100 days. *Martarella v. Kelley*, 349 F. Supp. 575, 579 (S.D.N.Y. 1972). Had the detention truly been temporary, the court intimated that no right to treatment would have arisen. 349 F. Supp. at 601-02.

23. *Martarella v. Kelley*, 349 F. Supp. 575, 578-79 (S.D.N.Y. 1972).

24. *Martarella v. Kelley*, 349 F. Supp. 575, 579 (S.D.N.Y. 1972).

25. 432 F. Supp. 1130, 1134 (S.D. Miss. 1977) (quoting MISS. CODE ANN. § 43-21-5 (1972)).

26. 432 F. Supp. at 1134.

27. 355 F. Supp. 451, 453 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

28. 355 F. Supp. at 453. The court did not elaborate on the severity of the criminal acts.

29. 383 F. Supp. 53, 58 (E.D. Tex. 1974), *rev'd*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

30. 383 F. Supp. at 58.

31. 383 F. Supp. at 59. Since these figures add up to 104%, there was obviously some slight error in the district court's calculations.

32. 383 F. Supp. at 59.

II. THE CONSTITUTIONAL BASIS FOR THE RIGHT TO TREATMENT

In each case discussed in Part I, the court found that the juveniles had a right to treatment under the due process clause of the fourteenth amendment.³³ The due process argument, in turn, consists of two alternative theories. The first theory, the "purpose" argument, is based on the Supreme Court's pronouncement in *Jackson v. Indiana* that due process requires "the nature and duration of commitment" to "bear some reasonable relation to the purpose for which the individual is committed."³⁴ The state's authority over delinquent juveniles, it is urged, derives from its *parens patriae*³⁵ interest in their welfare.³⁶ The purpose of confinement is therefore to aid the juvenile, which can be accomplished only through efforts to rehabilitate the child and "re-establish" him or her in society.³⁷ Thus, the right to treatment alleg-

33. *Morgan v. Sproat*, 432 F. Supp. 1130, 1135-36 (S.D. Miss. 1977); *Morales v. Turman*, 383 F. Supp. 53, 70-71 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977); *Nelson v. Heyne*, 355 F. Supp. 451, 458-59 (N.D. Ind. 1972), *aff'd.*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Martarella v. Kelley*, 349 F. Supp. 575, 585, 598-600 (S.D.N.Y. 1972).

Two other district courts have also held that the due process clause affords involuntarily confined juveniles a right to rehabilitative treatment. See *Pena v. New York State Div. for Youth*, 419 F. Supp. 203, 206-07 (S.D.N.Y. 1976); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1363-65 (D.R.I. 1972).

34. 406 U.S. 715, 738 (1972).

35. BALLENTINE'S LAW DICTIONARY 911 (3d ed. 1969), defines the *parens patriae* doctrine as "[t]he doctrine that all orphans, dependent children, and incompetent persons, are within the special protection, and under the control, of the state." See also *Schall v. Martin*, 467 U.S. 253, 265 (1984) (state's role as *parens patriae* is to preserve and promote the welfare of the child); *cf. In re Gault*, 387 U.S. 1, 16 (1967) (describing the *parens patriae* power as the authority vested in the state to act "in loco parentis for the purpose of protecting the property interests and the person of the child," but noting that the precise meaning of the phrase is "murky" and its historic credentials of "dubious relevance").

36. See, e.g., *Santana v. Collazo*, 714 F.2d 1172, 1176 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); *Martarella v. Kelley*, 349 F. Supp. 575, 598 (S.D.N.Y. 1972).

37. See, e.g., *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974) (cited approvingly in *Morgan v. Sproat*, 432 F. Supp. 1130, 1135 (S.D. Miss. 1977)), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977).

At least one court has questioned whether the state's obligation to promote the welfare of the child encompasses rehabilitative treatment, arguing that mere removal of the juvenile from an unhealthy environment is a valid exercise of the state's *parens patriae* power. *Santana v. Collazo*, 714 F.2d 1172, 1176-77 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); *cf. Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977) ("The Constitution does not specify in what manner a state may exercise its *parens patriae* power. Historically, the states merely provided custodial care for the incompetent or mentally ill."). This argument must fail, however, in that it ignores both the realities of "custodial" confinement and the Supreme Court's pronouncements regarding the scope of the *parens patriae* power. It is fallacious to contend that the state acts in the child's welfare when it removes him from an unsafe environment and places him in an equally harsh institution. See note 138 *infra*. Moreover, that child will eventually be returned to society, where he is likely to confront the same problems that led to his initial incarceration. It is difficult to say that society truly aids the juvenile when it temporarily removes him from an unhealthy environment only to return him to society ill-equipped to function as a responsible citizen. Indeed, after being "warehoused" in a juvenile facility for an extended period of time, it is not inconceivable that the juvenile will emerge even worse off than when society first interposed itself between him and his "unhealthy environment." See note 153 *infra*. It is perhaps in recognition of these realities that the Supreme Court has found the *parens patriae* authority to include the

edly follows from *Jackson's* insistence that the nature of commitment bear a reasonable relation to the purpose of that commitment.³⁸

The second due process argument on which right to treatment claims have been founded is the "*quid pro quo*" argument.³⁹ According to this theory, incarcerated juveniles have a right to treatment because they generally receive less procedural protection than adults. A line of Supreme Court cases⁴⁰ has found it constitutionally permissible for a state, in juvenile proceedings, to dispense with certain procedural safeguards that are mandated in criminal trials of adults.⁴¹ This denial is justified by reference to the rehabilitative, as opposed to the punitive, goals of the juvenile justice system.⁴² The hope is that freeing the states from the strict procedural requirements of the adult criminal justice system will afford them greater latitude in pursuing the rehabilitative goals of the juvenile system.⁴³ Since the denial of procedural due process is seemingly predicated on the pursuit of rehabilitative goals, it is argued that the denial is constitutionally impermissible unless the state provides the expected rehabilitation.⁴⁴ In short, due process requires the state to offer treatment as the *quid pro quo* for the deprivation of procedural safeguards.⁴⁵

Finally, a number of courts have suggested that the eighth amendment⁴⁶ may afford an independent basis for the right to treat-

provision of rehabilitative treatment. See, e.g., *Fare v. Michael C.*, 439 U.S. 1310, 1312 (1978) (probation officer, who exercises the authority of the state as *parens patriae*, has duty to implement "the protective and rehabilitative powers of the juvenile court") (quoting *In re Michael C.*, 21 Cal. 3d 471, 476, 579 P.2d 7, 10, 146 Cal. Rptr. 358, 361 (1978)) (emphasis added); *Kent v. United States*, 383 U.S. 541, 555-56 (1966) ("There is much evidence that some juvenile courts . . . lack the personnel, facilities and techniques to perform adequately as representatives of the state in a *parens patriae* capacity There is evidence, in fact, that . . . the child receives . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.").

38. See note 34 *supra* and accompanying text.

39. See, e.g., *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977).

40. See *Nelson v. Heyne*, 355 F. Supp. 451, 458-59 (N.D. Ind. 1972), *affd.*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (describing the Supreme Court precedent in this area).

41. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for example, held that a state need not provide a juvenile offender with a trial by jury.

42. See, e.g., *Santana v. Collazo*, 714 F.2d 1172, 1176 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

43. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 544 n.5, 547 (1971) (no constitutional right to jury trial in juvenile proceedings so that state may be free to devote its resources and ingenuity to the pursuit of rehabilitative goals); *In re Winship*, 397 U.S. 358, 375 (1970) (Harlan, J., concurring) (procedural strictures should not be permitted to interfere with the states' purpose in creating juvenile courts, including the "worthy goal" of rehabilitating the juvenile).

44. See, e.g., *Morgan v. Sproat*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977).

45. See, e.g., *Santana v. Collazo*, 714 F.2d 1172, 1176 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977).

46. By its terms, the eighth amendment proscribes "[e]xcessive bail," "excessive fines," and "cruel and unusual punishments." U.S. CONST. amend. VIII.

ment.⁴⁷ It is fair to say, however, that none of the courts that have alluded to a right to treatment arising under the eighth amendment have made the slightest attempt to develop this theory. In *Martarella v. Kelley*, the court indiscriminately merged the fourteenth and eighth amendment sources of the right, concluding that "[w]here 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."⁴⁸ In *Morales v. Turman*⁴⁹ and *Morgan v. Sproat*,⁵⁰ the courts merely asserted that the strictures of the eighth amendment *apply* to conditions of civil confinement.⁵¹ Apart from this bare conclusion, neither court even stopped to consider whether the punishment being inflicted upon the juveniles — incarceration without rehabilitative treatment — could properly be deemed "cruel and unusual."

III. THE CONSTITUTIONAL THEORIES EXAMINED

The courts have differed significantly regarding the relative weight of the constitutional arguments discussed in Part II. In *Morgan v. Sproat*,⁵² the court embraced both the purpose and the *quid pro quo* arguments, concluding that the right to treatment was supported independently by each of these "two equally sound theories."⁵³ The court in *Martarella v. Kelley*⁵⁴ was less bold; while concluding that the right to treatment undoubtedly existed, it hedged as to whether that right was based on "due process, equal protection or the Eighth Amendment, or a combination of them."⁵⁵ And, in rejecting the existence of a right to treatment, the First Circuit completely derogated the *quid pro quo* argument, concluding that it had "even less merit" than the purpose argument.⁵⁶ Thus, it remains unclear whether any of these

47. *Morgan v. Sproat*, 432 F. Supp. 1130, 1136 (S.D. Miss. 1977); *Morales v. Turman*, 383 F. Supp. 53, 70 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977); *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972).

48. 349 F. Supp. 575, 585 (S.D.N.Y. 1972); *see also* *Doe v. McFaul*, 599 F. Supp. 1421, 1429 (N.D. Ohio 1984) (accepting *Martarella's* conclusory statement that detention of juveniles without treatment implicates both due process and cruel and unusual punishment concerns).

49. 383 F. Supp. 53, 70 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977).

50. 432 F. Supp. 1130, 1136 (S.D. Miss. 1977).

51. The Supreme Court has never had occasion to apply the eighth amendment outside the context of criminal punishment. *See* *Ingraham v. Wright*, 430 U.S. 651, 666 (1977). However, a persuasive argument can be made that conditions of juvenile confinement should be scrutinized under eighth amendment standards. *See* notes 134-41 *infra* and accompanying text.

52. 432 F. Supp. 1130 (S.D. Miss. 1977).

53. 432 F. Supp. at 1135-36.

54. 349 F. Supp. 575 (S.D.N.Y. 1972).

55. 349 F. Supp. at 599.

56. *Santana v. Collazo*, 714 F.2d 1172, 1177 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

theories, either independently or in combination, support a constitutional right to treatment for involuntarily confined juveniles.

A. *The Purpose Argument*

In *Jackson v. Indiana*,⁵⁷ the Supreme Court established the requirement that the nature of civil confinement bear a reasonable relation to its purpose.⁵⁸ *Jackson* itself, however, involved the commitment of a criminal defendant who, due to mental illness, was deemed incompetent to stand trial.⁵⁹ The purpose of the commitment — to aid the defendant in attaining competency through custodial care and treatment — was not in dispute.⁶⁰ Due process therefore obligated the state to treat the defendant, or, in the absence of treatment, to release him.⁶¹ Obviously, the Court had no occasion to examine the purpose(s) of the juvenile justice system when it insisted in *Jackson* that states conform the nature of civil commitment to its purpose.

However, on other occasions the Supreme Court has had ample opportunity to consider the objectives of the juvenile system. Indeed, a series of Court decisions in the juvenile justice area can be read for the proposition that the very existence of juvenile courts as a separate system is justified primarily by reference to rehabilitative goals. In *Kent v. United States*,⁶² for example, the Court expressly noted that the state's authority over juvenile delinquents proceeds from a *parens patriae* rationale.⁶³ Observing that the "theoretical" purpose of juvenile courts is to determine the needs of children and society rather than to adjudicate criminal conduct, the Court expressed concern with the fact that, in practice, juveniles are often deprived of the "solicitous care and regenerative treatment postulated for children."⁶⁴ In subsequent cases involving the due process requirements of juvenile proceedings, the Court has echoed this theme.⁶⁵

57. 406 U.S. 715 (1972).

58. See note 34 *supra* and accompanying text.

59. 406 U.S. at 717-19, 738.

60. 406 U.S. at 738.

61. 406 U.S. at 738.

62. 383 U.S. 541 (1966).

63. 383 U.S. at 554-56.

64. 383 U.S. at 554-56.

65. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 544 n.5 (1971) ("In theory the juvenile court was to be helpful and rehabilitative rather than punitive. . . . In theory it was to exercise its protective powers to bring an errant child back into the fold. . . . In theory it was to concentrate on each case the best of current social science learning.") (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 7-9 (1967)); *In re Gault*, 387 U.S. 1, 15-16 (1967):

The early reformers were appalled by adult procedures and penalties 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"

The Court's characterization of the purpose of the juvenile justice system is supported by the voluminous scholarly literature on the subject.⁶⁶ One author writes:

Traditional juvenile justice philosophy depicts the [juvenile] court as non-punitive and therapeutic, a legal institution whose espoused goals are the protection and guidance of children [T]he prevailing interpretation of the court has depicted it as an expression of humanitarian sentiments in which children are not truly capable of criminal intent and the state, embodying the principle of *parens patriae*, is the benevolent protector.⁶⁷

While focusing on the rehabilitative mission of the juvenile justice system, both the Court and academia have nevertheless recognized that society may have other valid interests in confining juvenile delinquents. Foremost among those interests is the protection of society.⁶⁸ As noted earlier, many involuntarily confined juveniles have committed criminal acts that evidence a significant danger to society.⁶⁹ Though society may wish to eschew the full weight of criminal penalties for offenses of this kind,⁷⁰ it may — and in fact does — retain a significant interest in preventing the recurrence of such “antisocial”

and “rehabilitated” and the procedures, from apprehension through institutionalization, were to be “clinical” rather than punitive.

(Footnote omitted). See also *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring) (emphasizing the “beneficent and rehabilitative purposes” of the states’ juvenile court systems).

66. See Gottfredson, Chandler & Cohen, *Legal Aim, Discretion, and Social Control: A Case Study of the Federal Youth Corrections Act*, 21 *CRIMINOLOGY* 95, 97 (1983):

The growth of the juvenile court movement in the United States has been traced to the idea that, in setting the proper role for state intervention in the lives of adjudicated delinquents, the rehabilitative ideal should predominate. The strong preference for considering the rehabilitative needs of the juvenile offender . . . is reflected in statutes governing the disposition of juveniles, in case commentary and decisions, and in the professional literature.

67. M. BORTNER, *INSIDE A JUVENILE COURT* 1 (1982); see also Polier, *Prescriptions for Reform: Doing What We Set Out to Do?*, in *JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS* 217 (L. Empey ed. 1979) (juvenile court movement founded on premise that society would provide care, support, and rehabilitative services as needed); R. MENNEL, *supra* note 20, at xxvii (juvenile justice system designed to ensure that juvenile delinquents are suitably corrected and reformed); UNITED STATES DEPT. OF JUSTICE, *MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: YOUTH IN ADULT COURTS: BETWEEN TWO WORLDS* 15 (1982) (ultimately, *parens patriae* theory became the constitutional foundation for a separate system of juvenile courts).

68. See *Schall v. Martin*, 467 U.S. 253, 264 (1984) (“We have stressed before that crime prevention is a ‘weighty social objective,’ and this interest persists undiluted in the juvenile context.”) (citation omitted); *O'Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring); *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 n.6 (1971) (While rehabilitating offenders is appropriately the primary way of dealing with children, the “guiding consideration for a court of law that deals with threatening conduct is nonetheless protection of the community.”) (quoting PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* 7-9 (1967)); T. PHELPS, *supra* note 18, at 217; UNITED STATES DEPT. OF JUSTICE, *supra* note 67, at 7 (society must strike proper balance between the “dual juvenile court goals of rehabilitating youth and protecting society”).

69. See text at notes 27-32 *supra*.

70. See note 1 *supra*; notes 64-67 *supra* and accompanying text.

behavior.⁷¹ To vindicate this interest, a state may exercise its police power to incarcerate those juveniles who pose a significant danger to society.⁷²

Arguably, certain juveniles may be subjected to a deprivation of liberty *only* by an exercise of the state's *parens patriae* power. It is difficult to conceive how "habitual truants and runaways,"⁷³ for example, would pose a significant enough "danger" to society to justify their confinement under the state's police power.⁷⁴ Normally, a juvenile's parents would be expected to eradicate such misbehavior, and only when they failed would the state be empowered to fill their shoes in its traditional role as *parens patriae*.⁷⁵ In these situations, the state must actually invoke the rehabilitative aims of the juvenile justice system in order to deprive the juvenile of his or her liberty.⁷⁶ Absent its interest in providing for the juvenile's welfare, the state would be powerless to confine the juvenile. Because the state must rely on a rehabilitative purpose to support the juvenile's incarceration, the limitations on the nature of confinement enunciated in *Jackson v. Indiana*⁷⁷ apply with full force.⁷⁸ When a deprivation of liberty is justified on "the

71. See *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring).

72. *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring); see also *Schall v. Martin*, 467 U.S. 253, 263-65, 274 (1984) (need to protect society justifies preventive detention of juveniles likely to commit crimes if released).

73. See text at notes 19 & 23 *supra*.

74. This is not to suggest that the state may not combat truancy or noncriminal delinquency through the exercise of its police power. Traditionally, the police power has been employed by state and local governments to promote and maintain the health, morals, safety and "general welfare" of the public. See, e.g., *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 232 (1945); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 411 (1935). However, the issue is not whether the state may exercise its police power — perhaps in the guise of the infamous "truant officer" — to deter truancy or other acts of domestic disobedience. Rather, the critical question is whether the police power supports the *involuntary confinement* of juveniles who have committed such relatively innocuous acts. Historically, it seems clear that confinement under the police power was limited to acts that posed a more serious danger to society, whereas the *parens patriae* power provided the sole justification for confining children with behavioral problems. See *Johnson v. Solomon*, 484 F. Supp. 278, 285-87 (D. Md. 1979) ("Dangerousness to others results in commitment under the State's police powers, whereas dangerousness to oneself provides the rationale for commitment by the State's *parens patriae* powers."); note 75 *infra*; see also *Lynch v. Baxley*, 744 F.2d 1452, 1458 (11th Cir. 1984) ("When it is attempting to protect society from the dangerous mentally ill, the state is using its police power. When it is acting as a parent to care for those incapable of helping themselves, the state is employing its *parens patriae* power.") (footnote omitted); cf. *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring) ("[I]n the exercise of its police power a State may confine individuals solely to protect society from the dangers of *significant* antisocial acts or communicable disease.") (emphasis added).

75. See *Schall v. Martin*, 467 U.S. 253, 265 (1984) ("Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*."); *In re Gault*, 387 U.S. 1, 16-17, 30 (1967) ("If . . . parents default in effectively performing their custodial functions . . . the state may intervene."); *Kent v. United States*, 383 U.S. 541, 554-55 (1966) (exercise of *parens patriae* power places state in "parental" role).

76. See notes 37 & 74 *supra*.

77. 406 U.S. 715 (1972).

78. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 574 n.10 (1975) ("Where 'treatment' is

altruistic theory" that the confinement is for "humane therapeutic reasons," a failure to provide rehabilitative treatment "violates the very fundamentals of due process."⁷⁹

The more difficult issue is whether *Jackson* applies to juvenile confinement that may be fully justified by either the police or the *parens patriae* power. When a juvenile is confined for an act that, if he or she were an adult, would constitute a criminal offense, the state may justify the confinement by citing the need to protect society.⁸⁰ However, the fact that the juvenile is processed through a system purposely demarcated from the adult criminal justice system suggests that protection of society is not the sole⁸¹ purpose of confinement. Since a juvenile may not be capable of the same criminal intent as an adult,⁸² and since juveniles are arguably more amenable to rehabilitation,⁸³ one can argue that the rehabilitative aims of the juvenile justice system obtain wholly apart from the seriousness of the offense. In short, society may have an interest in rehabilitating *all* juvenile delinquents, irrespective of the nature of their delinquent acts.

The difficulty with the above argument is that it confuses the traditional objectives of the juvenile justice system with the *authority* vested in the state to confine juveniles for acts of delinquency. By emphasizing its interest in rehabilitating juveniles, the state may well assume a moral obligation to provide adequate treatment.⁸⁴ A mere statement of interest, however, does not elevate the right to treatment to constitutional dimensions.⁸⁵ Only when rehabilitation is the sole purpose and justification for depriving a juvenile of his or her liberty does the due process clause create a right to receive that rehabilitation. Where the deprivation of liberty is unauthorized absent a rehabilitative pur-

the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present.") (citing *Jackson v. Indiana*, 406 U.S. 715 (1972)). The Court explicitly refused to consider whether mentally ill patients who *did* pose a danger to society were likewise entitled to treatment. 422 U.S. at 573.

79. *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971).

80. See notes 71-72 *supra* and accompanying text.

81. See note 78 *supra*.

82. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) ("Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control."); M. BORTNER, *supra* note 67; text at note 67 *supra*. But see note 147 *infra*.

83. See *Schall v. Martin*, 467 U.S. 253, 265-66 n.15 (1984) ("Our society recognizes that juveniles in general are in the earlier stages of their emotional growth . . . and that their value systems have not yet been clearly identified or firmly adopted.") (quoting *People v. Schupf*, 39 N.Y.2d 682, 687, 350 N.E.2d 906, 908, 385 N.Y.S.2d 518, 520 (1976)).

84. Choosing to rehabilitate juvenile offenders may therefore be wise as a matter of social policy. *Morales v. Turman*, 562 F.2d 993, 998 (5th Cir. 1977); see also *Santana v. Collazo*, 714 F.2d 1172, 1177 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

85. Obviously, a multitude of state activities are undertaken with an avowed purpose. For instance, a state may construct a highway system for the purpose of facilitating automobile travel. No one would seriously contend that the state's acknowledged purpose in building the highway system elevated automobile travel to a constitutional right.

pose, a state acts arbitrarily, and therefore in contravention of the due process clause, when it denies the juvenile the very rehabilitation that supports the confinement.⁸⁶ However, where the deprivation is legitimate *even in the absence* of a rehabilitative purpose, the state need not rely on such a purpose to deprive the juvenile of his or her liberty, and it is therefore not constrained by the due process clause from weighing the social utility of providing rehabilitative treatment.

While the state may therefore have a general interest in rehabilitating all juvenile offenders, it nonetheless has the power to incarcerate certain juveniles solely in order to protect society from their antisocial acts.⁸⁷ No one would suggest, I take it, that the lack of financial resources or psychiatric knowledge to maintain successful rehabilitative programs would deprive the state of the power to remove dangerous juveniles from society. The fact that the police power may, in certain instances, constitute an independent and sufficient basis for confining delinquent juveniles undermines the assertion that all incarcerated juveniles, regardless of the nature of their delinquency, are entitled by the Constitution to rehabilitative treatment.

This conclusion, of course, does not imply that the purpose argument is without merit.⁸⁸ Rather, it merely rejects the existence of an absolute right to treatment in all cases involving the confinement of juvenile offenders. Unfortunately, the need to draw precise factual distinctions among juvenile offenders has been ignored by those lower federal courts that have entertained right to treatment claims. Only one of these courts has intimated that its decision was influenced by the type of misbehavior that justified the juvenile's confinement.⁸⁹

86. See *Morales v. Turman*, 383 F. Supp. 53, 71 (E.D. Tex. 1974), *revd.*, 535 F.2d 864 (5th Cir. 1976), *revd.*, 430 U.S. 322 (1977) ("[U]nder the *parens patriae* theory, the juvenile must be given treatment lest the involuntary commitment amount to an *arbitrary exercise of governmental power* proscribed by the due process clause.") (emphasis added).

87. See, e.g., *Santana v. Collazo*, 714 F.2d 1172, 1176 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

88. Indeed, a recent study by the Federal Bureau of Justice Statistics indicates that the purpose argument, as construed by this Note, will support a constitutional right to treatment in a significant number of cases. According to the *ABA Journal*, the study reveals that juveniles are often incarcerated for "offenses" that are "as minor as vagrancy and running away from home." *Jailed Juveniles*, A.B.A. J., Sept. 1985, at 32. Only about 10% of jailed juveniles are charged with serious crimes, and 25% have committed no crime at all. These results suggest that many incarcerated juveniles pose no danger to society, and are confined through an exercise of the state's *parens patriae* power. Under the test proposed by this Note, these juveniles would be entitled by the Constitution to some form of rehabilitative treatment. See notes 73-79 *supra* and accompanying text; notes 92-93 *infra* and accompanying text.

89. See *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354, 1364-65 (D.R.I. 1972) ("And whatever deviation, *if any*, from this goal of rehabilitation which *might* be tolerated as to those incarcerated juveniles convicted of violations of the criminal laws, such deviations are far less tolerable for the other classes of children incarcerated by the state.") (emphasis added).

In *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972), the court did take great pains to clarify the distinctions, under New York law, between "PINS" (persons in need of supervision) and "JDs" (juvenile delinquents). "JDs," in contrast to "PINS," had committed acts that would have been criminal if committed by adults. 349 F. Supp. at 579. Nevertheless, the court's discus-

This all-or-nothing approach is fraught with peril for those juveniles with meritorious constitutional claims. Unwilling to condition the state's power to confine dangerous juveniles on the provision of adequate rehabilitative treatment, a court may well reject the claims of nondangerous juveniles rather than embrace a broad constitutional right to treatment.⁹⁰ A state may thereby escape its obligation to conform the nature of juvenile confinement to its purpose simply because it is entitled to incarcerate *some* juveniles for the protection of society.

What is necessary in each case is a factual inquiry into the basis of the state's jurisdiction over the delinquent juvenile. Where the state, by statute, authorizes confinement for the purpose of "care and treatment," it is obvious that the dictates of *Jackson v. Indiana*⁹¹ are violated when that treatment is not forthcoming.⁹² Even when the statute enumerates several possible justifications for commitment,⁹³ a judicial finding that the confinement is not supported by the need to protect society should also be enough to trigger the right to treatment. However, when the police power is sufficient in and of itself to support the confinement, no *constitutional* obligation to provide treatment should arise. The inquiry must always center on the acts of delinquency that have precipitated the incarceration of the juvenile.⁹⁴

sion of the right to treatment proceeded in general terms, with no explicit distinctions drawn between the two classes of incarcerated juveniles. Indeed, the court noted with seeming approval that the right to "effective treatment" had previously been applied to all children, "whether delinquent or merely in need of supervision." 349 F. Supp. at 598.

90. It is conceivable that this fear dissuaded the First Circuit from finding even a limited constitutional right to treatment in *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). *Santana* involved a group of juveniles committed pursuant to the "Minor's Law" of Puerto Rico, which authorizes a judge to confine neglected or undisciplined children upon a finding that the children's *own* welfare is threatened. Although juveniles who pose a danger to the community are within the statute's sweep, there is no explicit requirement that the children pose a threat to anyone other than themselves. 714 F.2d at 1177 n.2, 1180.

Despite this apparently favorable factual setting, *cf.* notes 27-32 *supra* and accompanying text, the plaintiffs urged a broad constitutional right to treatment upon the court. In denying the existence of such a right, the court thought it significant that states may, under appropriate circumstances, confine individuals "solely to protect society from them." 714 F.2d at 1176. The court's reliance on a hypothetical threat to the community was misplaced, however, in that the statute expressly provided for confinement on alternative grounds. Arguably, the court was reluctant to posit a broad constitutional right to treatment for fear that Puerto Rico could not meet an obligation to provide treatment to those juveniles who *did* pose a danger to the welfare of the community. This suggests that the result may have been somewhat different had individual members of the plaintiff class been able to demonstrate that only their own welfare was at stake.

91. 406 U.S. 715 (1972).

92. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307, 325-26 (1982) (Blackmun, J., concurring) (where state statute authorizes commitment for "care and treatment," confinement without treatment fails to bear a reasonable relation to the purpose of that confinement).

93. *See Santana v. Collazo*, 714 F.2d 1172, 1177 n.2 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984); note 90 *supra*.

94. *See* notes 20-32 *supra* and accompanying text.

B. *The Quid Pro Quo Argument*

The *quid pro quo* argument derives from the fact that the Supreme Court, in recognition of the beneficent purpose of juvenile justice, has permitted states to reduce the procedural safeguards available to juveniles in civil commitment proceedings.⁹⁵ The *quid pro quo* for this deprivation, it is argued, is the provision of rehabilitative treatment.⁹⁶

In rejecting the *quid pro quo* argument, the First Circuit in *Santana v. Collazo*⁹⁷ emphasized the flexibility inherent in the concept of due process.⁹⁸ As the Supreme Court has indicated on numerous occasions, there is no single answer to the question of what process is due.⁹⁹ Rather, "the demands of due process differ according to the interests of the individual and of society in the given situation."¹⁰⁰ The Supreme Court, the First Circuit observed, has already examined the demands of due process in the juvenile context and held that it is constitutionally acceptable for states to provide fewer procedural safeguards in that setting.¹⁰¹ Since in reducing the procedural safeguards available to juveniles the state has committed no constitutional violation, "there is no legally cognizable quo to trigger a compensatory quid."¹⁰²

The difficulty with the *Santana* court's argument is that it ignores the critical question of *why* less process is due in the juvenile context. Certainly, the unique problems posed by juvenile delinquency may demand a different approach to due process than is required in adult, criminal proceedings. However, essential to the continued constitutionality of procedural distinctions is a determination that the "interests of the individual and of society"¹⁰³ do *in fact* differ in the two settings. The First Circuit thought such a determination unnecessary since, in its view, the Supreme Court had already balanced the respective interests of society and juvenile delinquents and concluded that reduced procedural safeguards in juvenile proceedings are constitutionally permissible.¹⁰⁴ The First Circuit failed to consider, however,

95. See notes 40-43 *supra* and accompanying text.

96. See notes 44-45 *supra* and accompanying text.

97. 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

98. 714 F.2d at 1177.

99. See *O'Connor v. Donaldson*, 422 U.S. 563, 585 (1975) ("It is too well established to require extended discussion that due process is not an inflexible concept."); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

100. *Santana*, 714 F.2d at 1177 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

101. 714 F.2d at 1177. The court concluded that "no amount of treatment" would compensate plaintiffs for an *unconstitutional* deprivation of procedural safeguards. 714 F.2d at 1177.

102. 714 F.2d at 1177.

103. See text at note 100 *supra*.

104. See text at note 101 *supra*.

that the Supreme Court was prepared to accept reduced procedural protection for juveniles precisely and only because it sought to free the states to pursue the nonpunitive, rehabilitative aims of the juvenile system.¹⁰⁵ When reductions in constitutional protections are justified on the assumption that states will pursue particular objectives, it is incumbent upon the courts to inquire whether those objectives are actually being fulfilled.¹⁰⁶

Should a court determine that the state has failed to utilize its greater flexibility in conducting juvenile proceedings to pursue meaningful rehabilitative programs, it must then decide whether to impose upon that state an affirmative obligation to provide rehabilitative treatment. According to proponents of the *quid pro quo* theory, a court is empowered to create a new substantive right to treatment in response to the denial of *procedural* safeguards.¹⁰⁷ Indeed, justice would seem to require the state to provide treatment when it has been permitted¹⁰⁸ to reduce procedural safeguards for the purpose of facilitating such treatment. For various reasons, however, it may be inappropriate for a court to countenance such an exchange of rights.

One practical objection to providing treatment in lieu of procedural safeguards is that the proposed exchange "makes no sense."¹⁰⁹ If, as a consequence of less rigorous procedures, a juvenile is erroneously incarcerated for an act he did not commit, he is obviously not in need of rehabilitative treatment.¹¹⁰ Yet it is treatment that the proponents of the *quid pro quo* argument offer as "compensation" for the relaxation of procedural safeguards.

This criticism of the *quid pro quo* theory has substantial force only if one accepts the premise that relaxed procedures in the juvenile setting will inevitably result in a substantial increase in erroneous commitments. That premise, however, is probably flawed. The term "procedural safeguards" has been employed in a much broader con-

105. See note 43 *supra* and accompanying text.

106. See *O'Connor v. Donaldson*, 422 U.S. 563, 586 (1975) (Burger, C.J., concurring) ("Where claims that the State is acting in the best interests of an individual are said to justify reduced procedural and substantive safeguards, this Court's decisions require that they be 'candidly appraised.'") (quoting *In re Gault*, 387 U.S. 1, 21 (1967)); cf. note 78 *supra*.

107. But see *O'Connor v. Donaldson*, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring) ("A . . . troublesome feature of the *quid pro quo* theory is that it would elevate a concern for essentially procedural safeguards into a new substantive constitutional right.").

108. See note 123 *infra* and accompanying text.

109. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1788 n.140 (1981).

110. Professor Garvey writes, in the context of a right to treatment for the mentally ill: If the state — because of a relaxed procedure — locks up a sane person, he would hardly consider it a fair trade if he were treated for schizophrenia. And, if the state locked up a person for five years after proving by the most procedurally scrupulous methods possible that he was schizophrenic, he might properly feel cheated that the state refused to provide treatment after proving so carefully that he needed it.
Id. at 1788 n.140.

text than the above argument suggests. Many of these so-called "safeguards," such as the right to confront witnesses¹¹¹ and the requirement of proof beyond a reasonable doubt,¹¹² are indeed essential in reducing the risk of error in juvenile proceedings.¹¹³ The term has also been used, however, to refer to the right to bail,¹¹⁴ the right to be confined apart from adults,¹¹⁵ and other protections not in any way associated with the minimization of erroneous decisions.¹¹⁶ The Supreme Court, recognizing that even civil commitment is a serious intrusion on personal liberty, has required the states to provide those "procedural safeguards" considered most vital in preventing erroneous adjudications.¹¹⁷ It is conceivable, then, that the juvenile is being deprived only of those "procedural safeguards" that serve benefits other than the prevention of erroneous decisions. To the extent that this is true, it is not absurd to compensate for the reduction of "safeguards" with rehabilitative treatment.

There is, however, a more fundamental objection to creating a substantive right to treatment as the *quid pro quo* for the deprivation of procedural safeguards. The notion of a *quid pro quo* is that one party has promised "something" in exchange for "something."¹¹⁸ But the

111. See *In re Gault*, 387 U.S. 1, 42, 56 (1967); *Santana v. Collazo*, 533 F. Supp. 966, 971 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

112. See *In re Winship*, 397 U.S. 358, 368 (1970).

113. See note 117 *infra* and accompanying text.

114. *In re Gault*, 387 U.S. 1, 14 (1967); *Santana v. Collazo*, 533 F. Supp. 966, 971 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

115. *Santana v. Collazo*, 533 F. Supp. 966, 971 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

116. See *Santana v. Collazo*, 533 F. Supp. 966, 970-71 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

117. See *In re Winship*, 397 U.S. 358, 365, 368 (1970) ("The same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child"; therefore, juvenile proceedings that might conceivably result in prolonged confinement require that guilt be established by proof beyond a reasonable doubt.); *In re Gault*, 387 U.S. 1, 21, 31-59 (1967) (juvenile offenders must be permitted, *inter alia*, to confront witnesses, retain counsel, and receive notice of the charges against them; "[i]t is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data").

The most vital procedural safeguard denied to juvenile offenders is the right to trial by jury. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). However, there seems to be no basis to conclude *a priori* that a judge will render a greater quantity of erroneous decisions than a lay jury. See 403 U.S. at 547 (Blackmun, J., plurality) ("The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function . . ."); 403 U.S. at 551 (White, J., concurring) ("Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge."). What the juvenile loses from the absence of a jury trial may be leniency rather than accuracy. By appealing to the "community conscience," the juvenile, though guilty of the substantive offense, may receive more humanitarian treatment. 403 U.S. at 554-55 (Brennan, J., concurring in part and dissenting in part).

118. See BLACK'S LAW DICTIONARY 1123 (5th ed. 1979) (defining "*quid pro quo*" as "[w]hat for what, something for something . . . nothing more than the mutual consideration which passes between the parties to a contract, and which renders it valid and binding").

Supreme Court has never suggested that the states are *obligated* to provide rehabilitative treatment as the consideration for reduced procedural safeguards. If there were a constitutional basis for positing a substantive right to treatment, it would have been simple for the Court to have held that states must provide rehabilitative treatment in lieu of procedural safeguards. Instead, the Court merely tried to encourage states to provide rehabilitation by freeing them from the strict procedural requirements that are mandated in adult proceedings.¹¹⁹ When the states fail to provide rehabilitative treatment — thereby spurning the Court's enticement — it does not follow that they suddenly acquire an affirmative obligation to furnish that treatment. The constitutional infirmity in this situation is a *procedural* one, the state having relied on the supposed benevolence of the juvenile justice system to deprive juveniles of *procedural* safeguards. Rather than creating a new, substantive constitutional right out of a procedural defect, the proper response is for a court to evaluate — in light of the realities of the juvenile justice system — whether the “demands of due process”¹²⁰ in fact justify reduced procedural protection.¹²¹ Indeed, this has been the Supreme Court's typical response to evidence that the juvenile justice system has failed in its mission to act in the juvenile's welfare.¹²²

Finally, it is important to recognize that the Supreme Court has never mandated that states provide fewer procedural safeguards in juvenile proceedings. Rather, it has merely held that certain safeguards are not constitutionally required.¹²³ Predictably, then, the quantity

119. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971):

The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative goals. So much depends on the availability of resources, on the interest and commitment of the public, on willingness to learn, and on understanding as to cause and effect and cure. In this field, as in so many others, one perhaps learns best by doing. We are reluctant to disallow the States to experiment further and to seek in new and different ways the elusive answers to the problems of the young, and we feel that we would be impeding that experimentation by imposing the jury trial.

(Emphasis added.) See also *In re Winship*, 397 U.S. 358, 375 (1970) (Harlan, J., concurring) (emphasizing the “worthy goal,” as opposed to the *requirement*, of rehabilitation, and cautioning that certain procedural strictures might interfere with the states' ability to achieve that goal) (emphasis added).

120. See text at note 100 *supra*.

121. See *O'Connor v. Donaldson*, 422 U.S. 563, 587 (1975) (Burger, C.J., concurring) (courts should evaluate the adequacy of the procedures rather than accept the absence of procedural safeguards and offer in their place what the court considers to be adequate “compensation”); text at notes 103-06 *supra*.

122. See, e.g., *In re Gault*, 387 U.S. 1, 14-31 (1967) (In theory, strict procedural safeguards were unnecessary in juvenile courts since the state was proceeding, not as adversary, but as *parens patriae*. Since reality departs significantly from theory, the state must provide the juvenile with the fundamental due process safeguards.); see also note 138 *infra* and accompanying text.

123. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (“If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no

and character of procedural safeguards afforded in juvenile proceedings will vary from state to state. As with the purpose argument, this factual variation makes it exceedingly difficult to posit a constitutional right to treatment for all involuntarily confined juveniles.¹²⁴

An illustrative case is *Santana v. Collazo*,¹²⁵ in which the district court carefully scrutinized the procedural safeguards available to juveniles in the commonwealth of Puerto Rico.¹²⁶ The court discovered that a panoply of procedural safeguards were available to juveniles,¹²⁷ including several that were not available to adults.¹²⁸ In view of this favorable dispensation of procedural due process rights, the court concluded that "the juvenile justice system of Puerto Rico places a juvenile defendant in a privileged position, not in one of constitutional disadvantage."¹²⁹

For present purposes, the accuracy of the court's assessment of the juvenile system in Puerto Rico is immaterial. The central point is that the structure of the juvenile court system is largely a matter of state law — subject of course to the minimum requirements imposed by the Supreme Court.¹³⁰ As such, it is impossible to determine *a priori* whether juveniles have been placed at a "constitutional disadvantage"¹³¹ in any particular state. Only when a state actually employs the rehabilitative objectives of the juvenile system to justify a reduction in procedural safeguards — and then proceeds to withhold the requisite rehabilitation — does it offend constitutional principles. Even then, the appropriate remedy would be an insistence on the procedural safeguards rather than a broad right to treatment.¹³²

C. The Eighth Amendment

Finally, some courts have suggested that confinement of juveniles

impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation.").

124. See notes 89-94 *supra* and accompanying text.

125. 533 F. Supp. 966 (D.P.R. 1982), *aff'd.*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984).

126. 533 F. Supp. at 970-71.

127. These included adequate prior notice of all hearings, the right to counsel — free of charge when necessary — and full rights of confrontation, cross-examination and presentation of evidence. 533 F. Supp. at 971. The only "substantial right" denied to juveniles was the right to a trial by jury, although the court noted that even adults in the commonwealth of Puerto Rico were not "constitutionally entitled to a jury trial in criminal cases." 533 F. Supp. at 971 (citing *Balzac v. Porto Rico*, 258 U.S. 298 (1922)) (emphasis in original).

128. 533 F. Supp. at 970-71. For example, no fingerprints or photographs of the juvenile could be taken without judicial authority, and no records of juvenile proceedings could be made available to the public.

129. 533 F. Supp. at 972.

130. See note 117 *supra*.

131. See text at note 129 *supra*.

132. See notes 118-22 *supra* and accompanying text.

without treatment may constitute "cruel and unusual" punishment in violation of the eighth amendment.¹³³ As a threshold matter, it must be determined whether the eighth amendment applies at all to conditions of civil confinement. Although several lower courts have assumed that the eighth amendment applies to the civil confinement of juveniles,¹³⁴ that conclusion is by no means obvious. In *Ingraham v. Wright*,¹³⁵ two schoolchildren brought suit under 42 U.S.C. § 1983 claiming that the infliction of corporal punishment in the public schools constituted cruel and unusual punishment in violation of the eighth amendment. This setting provided the Supreme Court with the opportunity to canvass the history of the eighth amendment. Noting that the "original design of the Cruel and Unusual Punishments Clause was to limit *criminal* punishments," and distinguishing the "openness of the public school and its supervision by the community" from the "harsh facts of *criminal* conviction and incarceration," the Court concluded that the eighth amendment does not apply to corporal punishment in the public schools.¹³⁶

In an important footnote, however, the Court acknowledged that the eighth amendment question could not fully be resolved by recourse to labels:

Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment. *Cf. In re Gault*, 387 U.S. 1 (1967). We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or *juvenile* institutions can claim the protection of the Eighth Amendment.¹³⁷

The above reference to *In re Gault* assumes special significance in the context of juvenile confinement. In *Gault*, the Supreme Court mandated that certain procedural safeguards be afforded in juvenile proceedings, citing the congruence, in practice, between the rigors of civil and criminal confinement.¹³⁸ Emphasizing the helplessness of the in-

133. See notes 46-51 *supra* and accompanying text. The eighth amendment applies to the states through the fourteenth amendment. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 101 (1976).

134. See notes 49-51 *supra* and accompanying text.

135. 430 U.S. 651 (1977).

136. See 430 U.S. at 664-671 (emphasis added).

137. 430 U.S. at 669 n.37 (emphasis added); see also Note, *Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978) (construing this footnote to suggest that the eighth amendment might afford a right to treatment to involuntarily confined mental patients).

138. *In re Gault*, 387 U.S. 1, 27 (1967):

Ultimately . . . we confront the reality of that portion of the Juvenile Court process with which we deal . . . [H]owever 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. His world becomes "a building with whitewashed walls, regimented routine and institutional hours." . . . [H]is world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

carcerated juvenile,¹³⁹ the Court refused to permit the state to escape its constitutional obligations simply by attaching the word "civil" to its confinement of juvenile delinquents. Given that both juvenile delinquents and criminals are ordinarily incarcerated in harsh institutions,¹⁴⁰ albeit through different procedures, it seems logical to extend the eighth amendment's proscriptions to the involuntary confinement of juvenile offenders.¹⁴¹

The more difficult issue is whether the failure to provide rehabilitative treatment is somehow "cruel and unusual." The argument that it is cruel and unusual has not been articulated in the federal courts.¹⁴² Since it has never been suggested that the eighth amendment affords a right to treatment to those adjudged "criminally responsible,"¹⁴³ the argument must rest on the distinction between those incarcerated for criminal behavior and those confined on alternative grounds. In short, the argument would be that confinement without treatment of those who have not been convicted of crimes offends "evolving standards of decency"¹⁴⁴ in contravention of the eighth amendment.

Viewed in this light, it appears that the eighth amendment argument is nothing but a restatement of the purpose argument.¹⁴⁵ Just as it is a "fundamental" violation of due process to "deprive any citizen

(Footnotes omitted.)

139. See note 138 *supra*; see also Note, *supra* note 137, at 741 (The civilly confined person shares the harshest element of the prisoner's criminal conviction, involuntary confinement, which "renders the prisoner helpless and in need of protection," and places him or her "at the state's mercy for the necessities of life and health.").

140. See note 138 *supra*.

141. See *Santana v. Collazo*, 714 F.2d 1172, 1179-80 (1st Cir. 1983) (use of isolation to discipline juveniles held in detention centers analyzed under eighth amendment standards), *cert. denied*, 466 U.S. 974 (1984). But see *Lynch v. Baxley*, 744 F.2d 1452, 1462-63 (11th Cir. 1984) (conditions of involuntary commitment should be judged under due process rather than eighth amendment standards).

142. See notes 48-51 *supra* and accompanying text.

143. Cf. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966) ("Indefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual punishment.'").

144. Various phrases have been invoked to define the words "cruel and unusual." In *Estelle v. Gamble*, the Court noted that the eighth amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency,'" and concluded that the amendment therefore proscribes punishments that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" 429 U.S. 97, 102 (1976) (citations omitted). Further on in the opinion, the Court appeared to backtrack from this broad view of the amendment, employing descriptive phrases such as "an unnecessary and wanton infliction of pain" and "repugnant to the conscience of mankind." 429 U.S. at 105-06. In *Martarella v. Kelley*, where the court held that the confinement of "PINS" (persons in need of supervision) without treatment violated the eighth amendment, see notes 21-24 & 48 *supra* and accompanying text, the standard was whether conditions and practices were "so bad" as to be "shocking to the conscience of reasonably civilized people." 349 F. Supp. 575, 597 (S.D.N.Y. 1972). Needless to say, this terminology is anything but precise.

145. See *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972) (when state acts as *parens patriae*, it assumes an obligation under both the fourteenth and eighth amendments to furnish adequate treatment).

of his or her liberty upon the altruistic notion that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment,"¹⁴⁶ so it is "cruel and unusual" to confine a juvenile for acts of delinquency that fall short of criminal behavior and then fail to make efforts to return that juvenile to society as a responsible citizen. Cast in different terms, and grounded on separate amendments, the two arguments appear indistinguishable.¹⁴⁷ Essentially, both require the state to tailor its confinement of juvenile offenders to the rationale for depriving them of their liberty.¹⁴⁸

The eighth amendment argument therefore suffers from the same deficiencies as the purpose argument.¹⁴⁹ In certain cases, it will undeniably be true that incarceration without treatment violates "evolving standards of decency."¹⁵⁰ To confine a juvenile in an institution without any sort of guidance because he or she is a habitual truant or runaway¹⁵¹ would be "shocking to the conscience of reasonably civilized people."¹⁵² The same may not be true, however, of a habitual thief, rapist or arsonist. In view of the fact that these juveniles will eventually be released, it might be wise as a matter of social policy to establish a rehabilitative program.¹⁵³ This decision, however, involves the delicate balancing of societal resources; it is not a matter of federal constitutional law.

146. *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971); see text at note 79 *supra*.

147. The arguments may possibly be distinguished on the ground that *all* juveniles, irrespective of whether they have committed serious crimes, are incapable of forming criminal intent. See note 67 *supra* and accompanying text. This, if true, would implicate the statement in *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966), that confinement without treatment of those not "criminally responsible" may be so inhumane as to constitute "cruel and unusual punishment." See note 143 *supra*.

However, the assumption that all juvenile delinquents are incapable of forming criminal intent is rather dubious. Depending on the state, juvenile delinquents may be as old as eighteen years of age. See R. MENNEL, *supra* note 20, at xi; text at note 27 *supra*. At common law, only children below the age of seven were deemed to lack the "legal ability" to form criminal intent. UNITED STATES DEPT. OF JUSTICE, *supra* note 67, at 15; see also *In re Gault*, 387 U.S. 1, 16 (1967). And, between the ages of seven and fourteen, there was a rebuttable presumption that juveniles were capable of forming the requisite intent. UNITED STATES DEPT. OF JUSTICE, *supra* note 67, at 15; cf. *In re Gault*, 387 U.S. at 16 (children over age seven subject to arrest, trial, and punishment as adults). Of course, proof in any individual case that the juvenile was not responsible for his or her actions would raise serious eighth amendment concerns were that juvenile to be punished as a criminal.

148. See *Doe v. McFaul*, 599 F. Supp. 1421, 1430 (N.D. Ohio 1984) ("[I]ncarceration of juveniles for rehabilitation violates the Eighth Amendment when the reality of the imprisonment is punishment, not treatment.") (emphasis added).

149. See notes 84-87 *supra* and accompanying text.

150. See note 144 *supra* and accompanying text.

151. See note 23 *supra* and accompanying text.

152. See note 144 *supra*.

153. See note 84 *supra* and accompanying text; see also *Nelson v. Heyne*, 491 F.2d 352, 360 (7th Cir.), cert. denied, 417 U.S. 976 (1974) ("Without a program of individual treatment the result may be that the juveniles will not be rehabilitated, but warehoused, and that at the termination of detention they will likely be incapable of taking their proper places in free society.").

CONCLUSION

Undeniably, there are compelling reasons to insist on rehabilitation of juvenile offenders — if not of *all* persons incarcerated in state prisons and institutions. This Note, however, has addressed itself to the narrower question of whether states are *constitutionally* obligated to rehabilitate juvenile delinquents. An analysis of the constitutional theories supporting a right to rehabilitation suggests a unifying theme: Before broad constitutional claims to treatment can be evaluated, a thorough factual inquiry must be conducted into the circumstances surrounding the confinement.

A court confronted with such claims must inquire into the authority relied upon and the procedures used by the state in depriving the juvenile of his or her liberty. If the state must depend on its *parens patriae* power to deprive juveniles of their liberty, the Constitution delimits the power of the state to confine the juveniles without treatment. Moreover, if the state is unwilling to provide rehabilitative treatment, it may not cite the benevolence of the juvenile justice system to justify reduced procedural safeguards. However, if the deprivation of liberty is justified as a valid exercise of the state's police power, and is accompanied by procedures that reflect the realities of the juvenile justice system, then the Constitution is silent regarding the allocation of scarce societal resources.

— *Andrew D. Roth*