Questioning the Juvenile Commitment: Some Notes on Method and Consequence

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Recent years have witnessed a continuing struggle by defense lawyers to rephrase the issues of the juvenile justice process in constitutional rather than child welfare terms.[1] This struggle to limit the state's power to intervene in a child's life and to substitute the formalities of rule and procedure for the informal discretion of juvenile court officials has produced only limited success. Some adjudicative practices have been modified to conform with constitutional guarantees.[2] Beyond adjudicative procedures, however, change has been glacial. Substantive issues have been litigated successfully in only a handful of cases, and pretrial practices have been only randomly constitutionalized. Change at the dispositional level has been even less apparent.[3]

The reasons for resistance to constitutional domestication in these areas are not obscure. Juvenile courts have consistently professed individualized, rehabilitative treatment for children,[4] and any legal assault on the pretrial and dispositional levels, the phases directly concerned with implementation of the asserted uniqueness,[5] threatens to question the integrity of the entire

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[1] *See* S. FOX, THE LAW OF JUVENILE COURTS IN A NUTSHELL viii (1971). *Compare In re* Gault, 387 U.S. 1 (1967, *with* Commonwealth v. Fisher, 213 Pa. 48, 52-57, 62 A. 198, 200-01 (1905).

[2] *See In re* Winship, 397 U.S. 358 (1970) (delinquency based on criminal law violation must be proved beyond a reasonable doubt rather than by a preponderance of evidence); *In re* Gault, 387 U.S. 1 (1967) (juvenile charged with criminal law violation has rights to counsel, notice of charges, confrontation, and cross-examination, and privilege against self-incrimination). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required in juvenile cases).

[3] *See* Chused, *The Juvenile Court Process: A Study of Three New Jersey Counties*, 26 RUTGERS L. REV. 488, 489 (1973) (citing numerous cases).

[4] *See* O. KETCHAM & M. PAULSEN, CASES AND MATERIALS RELATING TO JUVENILE COURTS 1-16 (1967).

[5] *See In re* Gault, 387 U.S. 1, 22, 31 n.48 (1967). Adult criminal law has no counterpart to the pretrial intake phase of the juvenile justice process, a phase at which individualized determinations of "whether the interests of the public or of the child require that further action be taken" are made. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD JUVENILE COURT ACT § 12 (6th ed. 1959). At the dispositional level, statutes give a juvenile judge a variety of options. He may postpone adjudication of guilt contingent upon a child's maintaining good behavior for a specified time, release the child with or without warning, place the child on probation, or commit him to an institution. *E.g.*, N.J. STAT. ANN. 2A:4-61 (Supp. 1974-75).

process. Moreover, a court, especially one inclined to restraint rather than activism,[6] will always consider substantive reform more unpalatable than procedural reform. It is one thing, for example, for a court to require notice and counsel before allowing the state to deprive an "incorrigible" or "wayward" child of liberty. Such requirements do not prevent the state from proceeding against the child but merely require that it surround its intervention with certain protections. It is quite another and a more drastic thing, however, for a court to declare such phrases as "incorrigible" or "wayward" to be unconstitutionally vague. Such a holding deprives the state of its authority to deal at all, at least under its existing statutory standards, with certain types of conduct perceived to require intervention into the child's life.[7]

Not surprisingly, when a legal argument intrudes upon an area which involves substantive reform at either the pretrial or dispositional stage, change is doubly difficult. This Article is concerned with such an area of juvenile law and is devoted to a comparative evaluation of two recent lines of attack on juvenile confinements: the right to treatment theory, which has been conscripted from its origins in the law relating to insane persons and applied in the effort to reform juvenile prisons, and the equal protection theory,[8] which has been applied in a handful of recent cases to invalidate indeterminate sentences for lack of the promised rehabilitative care. Both arguments go to substance: both address the conditions under which a juvenile serves his allegedly rehabilitative sentence, and both represent a response to the widely documented failure of the rehabilitative ideal—the fact that reform schools do not reform. Both assert that a child who receives no treatment is serving an unconstitutional sentence, and both attempt to fashion a remedy for such a child. But while these arguments have some analytical similarity, they are distinct

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[6]*See In re* Gault, 387 U.S. 1, 70-71 (1967) (Harlan, J., concurring and dissenting). *See generally* Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis,* 1970 WIS. L. REV. 431.

[7]*See, e.g.,* Commonwealth v. Brasher, 270 N.E.2d 389 (Mass. 1971) ("stubborn child" provision not unconstitutionally vague); *In re* L.N., 109 N.J. Super. 278, 263 A.2d 150, *aff'd mem.,* 57 N.J. 165, 270 A.2d 409, *cert. denied,* 402 U.S. 1009 (1970) ("incorrigibility" provison upheld); *In re* Walker, 14 N.C. App. 356, 188 S.E.2d 731 (1971) ("undisciplined child" provision upheld); E.S.G. v. State, 447 S.W.2d 225 (Tex. Civ. App. 1969), *cert. denied,* 398 U.S. 956 (1970) ("habitual deportment so as to endanger self or others" provision upheld). *But see* Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971), *aff'd mem.,* 406 U.S. 913 (1972). *See generally* Note, Parens Patriae *and Statutory Vagueness in the Juvenile Court,* 82 YALE L.J. 745 (1973).

[8]*In re* Wilson, 438 Pa. 425, 264 A.2d 614 (1970). See notes 19-25 *infra* & accompanying text.

in fundamental ways. Of the two, the right to treatment theory has received more attention in the literature and in the cases.[9] Significantly, however, this continuing concern with the mechanics of the right to treatment theory and its extension to various areas of the law, has masked the fact that the theory is premised upon fundamental assumptions and fateful choices in respect to a legal attack on juvenile confinements. These assumptions and choices are not necessarily bad, but they are certainly not the only ones available. Indeed, on many of the issues on which the right to treatment and equal protection theories vie, the right to treatment approach, because of its choices, may be self-defeating.

The purpose of this Article is to elaborate upon the fundamental distinctions between the right to treatment and equal protection theories by systematically comparing the *methodologies* employed by each and the *consequences* which follow from faithful adherence to either. In these areas of analysis the literature is silent. Such a study seems justified because important differences attend the choice to contest a juvenile's confinement under one theory or the other, and the typical public defender or legal aid lawyer frequently lacks the luxuries of time or resource to develop fully the implications of competing theories.[10]

I. The Theories Stated

A. *Right to Treatment*

The right to treatment argument proceeds quite simply. Some classes of defendants, the theory notes, are diverted from the criminal justice system because of various conditions of diminished responsibility: drug addiction, mental illness or, most important for present purposes, youth.[11] These "diversions," however, carry their own confinement consequences in the form of an indeterminate rehabilitative sentence, which may be long or short depending upon the individual's response to curative treat-

[9] *E.g.*, *Symposium—The Right to Treatment*, 57 Geo. L.J. 673 (1969); Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 Notre Dame Law. 1051 (1974).

[10] Public defender or legal aid lawyers do the bulk of juvenile court representation because "the overwhelming number of children processed through the juvenile court are the children of the poor." Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 Calif. L. Rev. 694, 696 (1966).

[11] *See* Goodman, *Right to Treatment: The Responsibility of the Courts*, 57 Geo. L.J. 680, 701 (1969); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 Geo. L.J. 848, 865 (1969). *See generally* National Institute of Mental Health, Center for Studies of Crime and Delinquency, Civil Commitment of Special Categories of Offenders (Public Health Service Pub. No. 2131, 1971).

ment.[12] Thus, the designated offenders are not altogether diverted from social control, but only from social control attended by punishment, which is inappropriate because of the offender's diminished responsibility.[13] The basis for diversion and the justification for confinement in these cases is the individual's condition and need rather than his act or offense.[14] The authority for confinement is the state's *parens patriae* responsibility to care for those who cannot care for themselves.[15]

However, if the rationale for commitment is that the offender will be treated for his condition rather than punished for his act, treatment must actually be provided. If treatment is not provided, the stated justification for commitment collapses, and the offender's actual commitment in effect becomes indistinguishable from punishment.[16] Punitive confinement is not rationally related to the stated purpose of curing or rehabilitating juvenile offenders. Confinement under punitive conditions is arbitrary and irrational in light of the expressed purpose of the commitment and thus

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[12]The outside limit of a juvenile's confinement under most statutes is age twenty-one. Within the time frame set by the date of commitment and attainment of age twenty-one, a juvenile's sentence is indeterminate in that the precise time of release is determined by an administrative agency and is not limited by the terms of the underlying offense. The younger the child, the longer the potential sentence. Even with the release-at-twenty-one proviso, convicted juvenile offenders are subject to substantial deprivations of liberty under the indeterminate sentencing schemes. *See generally* Chase, *Schemes and Visions: a Suggested Revision of Juvenile Sentencing*, 51 TEXAS L. REV. 673 (1973).

[13]*See* NATIONAL INSTITUTE OF MENTAL HEALTH, CENTER FOR STUDIES OF CRIME AND DELINQUENCY, DIVERSION FROM THE CRIMINAL JUSTICE SYSTEM 4 (Public Health Service Pub. No. 2129, 1971). The notion of a child's diminished responsibility for acts which would otherwise be criminal is formalized in statutes which provide variously that a child shall be deemed incapable of committing a crime or that adjudication of delinquency shall not be deemed a conviction of crime. *E.g.*, MASS. GEN. LAWS ANN. Ch. 119, § 53 (1969); N.J. STAT. ANN. 2A:4-64 (Supp. 1974-75).

[14]*See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 11-16 (1968); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 407 (1958).

[15]*See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967). "Civil" commitment, of which juvenile confinement is an example, can be justified additionally by the state's police power to protect society from the harm which might otherwise be inflicted by the diverted clientele. *Id.* The right to treatment theory, however, seems officially cognizant only of the *parens patriae* rationale for civil confinement and thus exposes itself to considerable criticism. See notes 48-58 *infra* & accompanying text.

[16]*See* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

is violative of due process of law.[17] The right to treatment theorists argue, therefore, that the rehabilitative ideal upon which diversionary confinement is based is not one which the state is free to implement or reject as it sees fit. Rather, the ideal of treatment vests in the offender a constitutional right to treatment and imposes a corresponding duty upon the state to furnish it.[18]

This argument is brilliantly simple in its conception because it avoids the necessity of looking beyond the terms of the commitment statutes to fashion objections to the commitment scheme. The right to treatment theorists accept the rehabilitative framework and terminology in which the problem of juvenile sentencing is expressed and merely insist that the state fulfill the promise implicit in that terminology. Furthermore, the theory is potentially devastating for reasons which will be set forth later in a detailed comparison of the right to treatment and equal protection theories.

B. Equal Protection

There is a marked judicial reluctance to question the theoretical basis of juvenile commitment schemes—to question the adequacy of the classifications by which juvenile offenders are selected for rehabilitative care.[19] In contrast, a few decisions have indicated a willingness to question the administration of juvenile commitment schemes by analyzing the actual conditions under which rehabilitative confinements are served.[20] Thus, the courts are willing to question the application of juvenile sentencing statutes but not the terms of the statutes. Unfortunately, however, this willingness is usually stated as a consolation, rather than as a direct holding, after the court has rejected an attack on the terms of the statute.

In at least two cases, however, the practical failure of rehabilitative theory has served as the basis for a direct holding of a violation of equal protection. In the case of *In re Wilson*,[21] a

[17]Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140 (1967). *See* Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966).

[18]Although the seminal decision in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), was based primarily on statutory grounds and only hinted at constitutional objections, the due process underpinnings of the right to treatment argument are now universally recognized. See notes 9, 11 and 15 *supra*.

[19]For the present writer's attempt to fashion constitutional objections to the juvenile sentencing classifications, see Chase, *supra* note 12.

[20]*See In re* K.V.N., 116 N.J. Super. 580, 597-98, 283 A.2d 337, 346-47, (1971); Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969).

[21]438 Pa. 425, 264 A.2d 614 (1970). *Cf.* Commonwealth v Daniels, 430 Pa. 642, 243 A.2d 400 (1968); United States *ex rel.* Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).

sixteen-year-old was committed to a state institution for an indeterminate period which was not to exceed his twenty-first birthday, a period of five years, while an adult convicted of the same offense could have received a maximum sentence of four years. The institution to which the juvenile was committed housed both juvenile and adult prisoners. The court in *Wilson* held that this commingling of juveniles and adults violated the fourteenth amendment guaranty of equal protection and stated that there is "no constitutionally valid distinction between a juvenile and an adult offender which justifies making one of them subject to a longer maximum commitment in the same institution for the same conduct."[22] A similar holding was reached in *People ex rel. Meltsner v. Follette*[23] when a juvenile who was originally confined to a separate institution was transferred to an adult penal institution.

The logic of the holdings in *Wilson* and *Meltsner* develops as follows. The argument supporting juvenile commitment schemes is that a juvenile's youthfulness, which subsumes elements of diminished responsibility as well as malleability and susceptibility to treatment, furnishes a rational basis for subjecting him and not the adult to the indeterminate rehabilitative sentence. An age classification thus "reasonably" relates to the rehabilitative purpose of providing protection, care and curative treatment for those offenders who most need and can most benefit from rehabilitation. A juvenile may be accorded a different and if necessary a longer sentence because he is situated differently from an adult with respect to the rehabilitative purpose.[24] If rehabilitative care is not forthcoming, however, the reasoning which predicates different dispositions for the juvenile and the adult on their rehabilitative dissimilarity collapses. Absent rehabilitation, confinement of a juvenile for his commission of a crime, like confinement of an adult, becomes a form of punishment. In the context of punishment rather than rehabilitation, a juvenile's reputedly lesser responsibility and greater susceptibility to treatment, the basis for an extended juvenile rehabilitative sentence, become irrelevant; in all relevant particulars relating to punishment, juveniles and adults are similarly situated. Thus, a juvenile's sentence cannot constitutionally exceed an adult's sentence on the basis of differences which have no relation to the

[22]438 Pa. at 431, 264 A.2d at 617.

[23]32 App. Div. 2d 389, 302 N.Y.S.2d 624 (1969).

[24]*See id.* at 390, 302 N.Y.S.2d at 626; Smith v. State, 444 S.W.2d 941, 945 (Tex. Civ. App. 1969).

punitive purpose actually being implemented.[25] The necessary result of this reasoning is that, absent rehabilitation, a juvenile may be detained for no greater period than an adult convicted of the same crime.

II. The Methods of Each Theory: The Structure of Proof

In their attempts to determine the validity of a juvenile's commitment, the equal protection and due process right to treatment arguments are similar in focus. Both question whether a juvenile is actually receiving the asserted rehabilitative care. However, the arguments differ markedly in their methods of proving the failure of the rehabilitative ideal, in their results once this failure is demonstrated, and in their appeal to and exploitability by the judiciary. Because of these differences the choice of whether to view the question of adequacy of rehabilitative facilities in terms of equal protection rather than due process has decisive consequences. The present section will focus on the methodological differences.

A. Vertical and Horizontal Perspectives

In determining whether a juvenile's right to treatment is being accorded, courts must assess the adequacy of the facilities which provide such treatment. In *Rouse v. Cameron*,[26] the leading statement, the court dictates that the right demands treatment "which is adequate in the light of present knowledge."[27] Although this general statement elicits agreement, lively controversy continues over the appropriate standard for specifically determining the "adequacy" of treatment. Under an objective standard, treatment is adequate if minimum numerical standards for staffing and physical facilities are met: physician-inmate ratio, number of physician-inmate consultations, and what is generally and perhaps tautologically referred to as "adequacy of physical facilities."[28] If these criteria are met, their actual beneficial impact on an inmate is left to a convenient and rather large inference.[29] Under a subjective standard, however, the inference itself

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[25] *See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 390-91, 302 N.Y.S.2d 624, 626-27 (1969). *Cf.* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).

[26] 373 F.2d 451 (D.C. Cir. 1966).

[27] *Id.* at 456.

[28] Birnbaum, *A Rationale for the Right*, 57 Geo. L.J. 752, 753-57 (1969).

[29] *See* Tribby v. Cameron, 379 F.2d 104, 105 (D.C. Cir. 1967), in which the court stated:

We do not suggest that the court should or can decide what par-

must be addressed; although the subjective standard does not require a cure, it does insist that a bona fide effort be made to mold the objective facilities into a program suited to the particular needs of an individual inmate.[30]

Advocates of each standard are quick to point out the deficiencies of the other. The objective standard may well fail to secure the very right in whose service the standard is adopted[31] since there is no assurance that the numerical minimums sanctioned by the objective standard will in any way benefit the individual offender. The alternative subjective standard, however, is necessarily imprecise because of medical disagreement on the nature of mental illness[32] and perforce on the appropriate treatment modalities. It correspondingly invites and requires a battle of experts to establish which treatment method is best in the case before it[33] and, consequently, results in judicial second-guessing that one group of experts is incorrect in its evaluation.[34]

Regardless of whether the objective or subjective standard is used, however, the right to treatment theory forces reliance on what one may designate a vertical measurement. Thus, the right to treatment theory evaluates the adequacy of treatment either against an ascertainable but perhaps self-defeating objective yardstick, or against a potentially valuable but unascertainable and easily manipulable subjective evaluation. In neither case does the theory refer or compare the alleged treatment received by the juvenile to that received by any other specific class of offenders. By contrast, as *Wilson* and *Meltsner* suggest, the measurement in equal protection analysis, which by definition is concerned with the question of parity between classes, is horizontal and compares the disposition accorded a juvenile with that accorded an adult offender. Since a criminal act is frequently the fulcrum for a juvenile's commitment, it is entirely appropriate to measure this commitment against that accorded adults for the same criminal act.

Because of this measure the equal protection argument is more productive for challenging juvenile confinements, regard-

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ticular treatment the patient requires . . . . We . . . only make sure that it has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion.

[30]*See* Rouse v. Cameron, 373 F.2d 451, 456 (D.C. Cir. 1966); Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 233 N.E.2d 908 (1968).

[31]*See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 792 (1969); Rothman, *Decarcerating Prisoners and Patients*, 1973 CIVIL LIBERTIES REV. 8, 25.

[32]*See* Birnbaum, *supra* note 28, at 759, 774.

[33]*See* Halpern, *supra* note 31, at 793.

[34]*See* Birnbaum, *supra* note 28, at 753.

less of whether an objective or subjective measure is used in assessing the adequacy of the facilities provided by the state. When the objective standard is employed in the right to treatment analysis, a juvenile's claim fails whenever a certain minimum standard for adequate facilities is met. In the equal protection analysis, establishing that the juvenile institution meets such a minimum standard does not end a court's inquiry. If adult facilities in the jurisdiction are significantly similar in these objective terms, a juvenile's claim of a denial of equal protection must prevail.[35] Even though the juvenile is in some sense receiving treatment, his treatment is essentially identical to that accorded an adult. Thus, any rational basis for giving a juvenile a longer sentence predicated upon his receiving treatment different from that associated with the criminal sentence which ordinarily would attach to his crime vanishes.[36]

Similarly, if the subjective standard is used and a program is provided for an individual which is or can be said to be "adequate" to his needs, then the juvenile's claim fails if based upon the right to treatment argument. In equal protection analysis, however, the provision of individualized programs again does not terminate a court's inquiry. If adults in criminal institutions also have the benefit of individualized programs, the juvenile confinement again appears to be constitutionally invalid. A juvenile's supposedly lesser responsibility and greater susceptibility to rehabilitation is the rational basis for selecting him over an adult for participation in the rehabilitation process. This, however, is not a rational basis for extending a juvenile's term beyond that of an adult when their sentences are served under identical conditions. In fact, if a juvenile and an adult receive the same treatment, the juvenile's supposed malleability should suggest, if anything, that he receive a shorter term because he may well be re-

[35] *See In re* Wilson, 438 Pa. 425, 264 A.2d 614 (1970). In *Wilson* the court stated that a "central premise of the Juvenile Court Law is that the post-adjudication treatment of the juvenile delinquent is somehow different from and better than that which the adult offender must endure." *Id.* at 432 n.6, 264 A.2d at 618 n.6. *See generally Hearings on S. Res. 32 Section 12 Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

[36] *See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 302 N.Y.S.2d 624 (1969). In *Meltsner* the court emphasized that the state may not "confine a reformatory inmate for a period greater than the maximum to which a prison term inmate convicted of the same crime is subject, unless the basis for distinguishing between the two persons continues to exist." *Id.* at 391, 302 N.Y.S.2d at 626. The court held that transfer of the inmate to an adult institution destroys the distinguishing basis.

formed more quickly than the adult.[37] At the very least, the equal protection theory permits the assertion of the offender's right to receive either the treatment which justified the extended sentence or a definite sentence.[38]

In short, the equal protection analyst, unlike the right to treatment theorist, does not hostage his success to a court's willingness to evaluate the state's rehabilitative facilities according to some subjective but elusive, or some objective but abortive, standard of "treatment." A determination that facilities are adequate by either of these standards is not sufficient to uphold commitment unless a court reaches and decides the further question of similarity of juvenile and adult facilities. If a comparison determines the facilities to be significantly similar,[39] a juvenile's commitment fails the equal protection test of adequacy. Moreover, as will be set forth below,[40] the inadequacy of facilities can be proved under the equal protection argument with relative ease and precision in comparison to the probative difficulties inherent in the right to treatment theory. Finally, a court employing the equal protection approach need not engage in second-guessing expert evaluation of treatment methods. The question is not whether one set of experts is right and another wrong in its diagnoses and prognoses concerning treatment of the defendant, but whether the

[37]*See* Baum & Wheeler, *Becoming an Inmate*, in CONTROLLING DELINQUENTS 153, 183 (S. Wheeler ed. 1968); S. RUBIN, CRIME AND JUVENILE DELINQUENCY 69-70, 102, 124 (1958).

[38]Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1145-46 (1967).

[39]The mechanics of determining that facilities are "substantially similar" is the subject of the next section. "Substantial similarity" is not, of course, a precise test, and a court bent on upholding a juvenile's commitment at all costs may seize upon relatively minor differences between juvenile and adult institutions, elevate them to the level of "substantial dissimilarity," and thereby defeat the equal protection claim. Hopefully, this danger is not too great since the equal protection argument, unlike the right to treatment theory, presents itself in such a way as inherently to minimize the judiciary's reluctance to tamper with juvenile commitments. See notes 48-58 *infra* & accompanying text. But in any event, there are compelling reasons for using a "substantial similarity" test. First, the conditions to be compared in juvenile and adult institutions are likely to be too numerous to catalog easily or profitably; the test of "substantial similarity" is intended to suggest that it is the overall *quality* of the confinement experience, as revealed in part by those conditions, that is the proper judicial focus—rather than a wooden insistence on an absolute equivalence of beds, locks, and the like. Secondly, the test of "substantial similarity" has been stated in the case law. *See* Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App. 1969). Thus, a court wishing to implement the arguments advanced in this Article will find precedential support for doing so.

[40]See section B *infra*.

available programs at juvenile and adult institutions are significantly similar.

B. The Horizontal Perspective: Proving the Case

The indeterminate juvenile sentence should be invalid unless a child receives care significantly different from and better than that which an adult confined for the same crime would receive. Absent such better treatment, a juvenile must receive a determinate sentence which may not exceed that which would be imposed upon him if he were an adult. In seeking to implement this equal protection principle, a court must look to the quality of the commitment experiences of juvenile and adult inmates in order to determine whether their experiences are substantially similar.

The first circumstance in which the equal protection principle must be employed was established by *Wilson* and *Meltsner*. Whenever juvenile and adult offenders are commingled in the same institution,[41] a decision limiting a juvenile sentence to that of an adult must be reached. Such commingling is against the express language of some juvenile court statutes[42] and is against the spirit of all. All juvenile statutes seek to insulate a child from the consequences, and by implication from the perpetrators, of adult crime: adjudication of delinquency is not deemed a criminal conviction, commitment entails no loss of civil rights, and a child has no record of arrest or conviction to prejudice future sentencing or employment decisions.[43] The prohibition against commingling has a compelling correctional basis. Constant, and perhaps even casual, association of juvenile and adult offenders—at mealtime, during recreation and in sleeping quarters—is thought to undo any beneficial effect that rehabilitative efforts directed toward the child may have; the treatment contingencies are in danger of being frustrated, on a daily basis, by the child's asso-

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[41] Published reports indicate that commingling is far more common than the number of reported cases might suggest. *See, e.g.*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM 131, 135 (Washington, D.C., August, 1971); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINSTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 6 (1967); DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, SOCIAL AND REHABILITATION SERVICE, CHILDREN'S BUREAU, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (Pub. No. 415-1964).

[42] *E.g.*, ARIZ. REV. STAT. ANN § 8-207 (B) (1974); D.C. CODE ENCYCL. ANN. § 16-2320(e) (1966).

[43] *E.g.*, N.J. STAT. ANN. § 2A:4-64 (Supp. 1974-75); *see* Comment, *Youthful Offenders and Adult Courts: Prosecutorial Discretion vs. Juvenile Rights*, 121 U. PA. L. REV. 1184 (1973).

ciation with offenders for whom different treatment modalities or, more likely, none at all are being provided.[44]

It is thus perfectly appropriate for a court, as in *Wilson* and *Meltsner*, to implement the explicit or implicit statutory prohibition against commingling by translating an indeterminate juvenile sentence into a determinate sentence. Such a holding insures that a child who suffers the same conditions of confinement as an adult correspondingly serves no longer sentence than the adult. The facts which are necessary to justify such a holding are the presence of adult prisoners in the institution to which juveniles are confined and the opportunity for contact between juvenile and adult inmates. The presence of adult prisoners may be proved by testimony of the institution's administrators, by commitment records showing the ages of its inmates, or by judicial notice if the facility is predominantly an adult facility. The opportunity for contact may be proved by testimony of the juvenile, other inmates, or the institution's staff or administration, as to eating, sleeping or recreational arrangements.

Wilson and *Meltsner*, however, represent the clearest, but by no means the exclusive, opportunity for the application of the equal protection determinate sentence principle. The second and probably more common class of situations occurs when a child is housed in facilities separate from those provided for adults and receives ostensibly different treatment. Such situations may arise when a juvenile is housed in a separate wing of a building where adult prisoners are housed, in a separate building of an institutional plant containing buildings where adult prisoners are housed, or in completely independent facilities. It is the absence of contact between juvenile and adult inmates and the presence of separate treatment programs for juveniles which serve to place this second class of situations in a category analytically distinct from that involved in *Wilson* and *Meltsner*. In these latter situations, a court must compare the physical facilities and the treatment programs available to the institutionalized child to those available to the institutionalized adult in order to determine whether they are substantially similar.

Two approaches may be utilized to accomplish the necessary probative presentation. First, testimonial evidence of various sorts may be introduced.[45] Thus, the juvenile himself, the staff

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[44]*See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 2-3 (1967); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1368 (D.R.I. 1972).

[45]If testimonial evidence were unavailable during the trial, depositions or interrogatories could be utilized. Since the equal protection inquiry is

and administrators of juvenile and adult institutions, and adult prisoners may provide evidence as to the similarity of the physical facilities of the institutions in question. The existence and use of guards, gun-towers, barred doors and isolation units, among other things, may be proved to establish the nature of the institutions as primarily penal rather than rehabilitative. The ratio of guards and other management personnel to the number of inmates and therapeutic personnel may be explored in order to discount the possibility that any meaningful rehabilitation occurs in the juvenile institution as compared to that which occurs in the adult institution. The presence or absence of work release, school release, or other programs which seek to reintegrate the offender into the community also may be proved to determine whether the juvenile has the actual benefit of his presumably better rehabilitative sentence. Finally, expert testimony from penologists familiar with conditions in the juvenile and adult institutions may be introduced to establish qualitative comparisons of treatment programs. However, unlike the right to treatment theory, the equal protection theory does not require a court to venture into the psychological or medical thicket of the etiology of criminal behavior or its appropriate treatment modalities. Thus, a court will ask experts to express their opinions only on the similarity of two concrete situations—the programs prevailing in the juvenile and the adult facilities.

Secondly, demonstrative evidence may be introduced. For example, photographs showing the exterior and interior of the institutions and establishing dimensional comparisons of eating, sleeping and recreation facilities may be employed.[46] Maps and diagrams also may be used for these purposes. Finally, a court seeking a forthright estimation of the comparative conditions may choose to view the institutions in question.

In summary, when conditions of confinement are compared to other conditions of confinement rather than analyzed for their intrinsic reliability, the necessary evidence can be produced by affidavits, depositions, photographs and maps, testimony from interested parties, and only minimal expert testimony. These are all forms of evidence with which a court routinely deals and with which a court is thoroughly familiar and comfortable. The question of what specifically is needed to rehabilitate juveniles is an inherently unstructured inquiry and leaves a court lost; but it is an indispensable inquiry under the right to treatment theory.

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likely to arise upon a habeas corpus petition, a civil proceeding, free use of such discovery is permissible.

[46] *See* McCormick's Handbook of the Law of Evidence § 214, at 530-31 (2d ed. E. Cleary 1972).

By contrast, the equal protection theory avoids the question of the extent of the state's affirmative duty to provide rehabilitative facilities satisfactory to meet an adequacy of treatment test. It simply demands that a state not treat a juvenile like an adult under the guise of rehabilitation by hanging a sign saying "hospital" over what is essentially a prison.[47]

III. The Results of Each Theory

Another crucial difference between the equal protection and the right to treatment approaches lies in the result dictated once the juvenile facilities are declared inadequate. The right to treatment theorists assert that if treatment is not provided the indeterminate confinement must collapse. However, they are not saying that only the additional commitment beyond that provided in the substantive offense is invalid if treatment is not forthcoming. Although this thread of the right to treatment argument is rarely made explicit, the thrust of the argument is that *no* commitment is valid if treatment is not provided.[48] Thus, the entire sentence, which is predicated on treatment, and not merely the excess sentence, fails in the absence of treatment. Absent treatment, the juvenile must be released if he has begun to serve his sentence, even if he has not fully served the sentence imposed by statute. If it can be established at the dispositional hearing that no rehabilitative facilities adequate to fulfill the rehabilitative ideal are present in the state, then it would appear that no valid order of commitment can be made. The juvenile must be released, or a non-commitment alternative must be used. If the state has no rehabilitative facilities, it has no theoretical justification for confinement.

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[47] *Cf.* Powell v. Texas, 392 U.S. 514, 529 (1968). The right to treatment theory could rely upon the horizontal perspective to prove its case. Under this view the state's commingling of the child and adult, or its failure to provide different conditions of confinement for the child, would be a denial of the right to treatment. But even if it lessened its probative difficulties by borrowing the horizontal equal protection perspective, the right to treatment theory would still face intense judicial resistance because the logic of its challenge, however proved, is that the child must be released if no treatment is provided.

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> If courts are to fully strip away the facade of legislative hypocrisy, they must treat any length of confinement without treatment as a denial of due process of law, for the lack of responsibility which triggered the confinement purportedly rendered all criminal punishment inappropriate. The justification for confinement is lacking as much in the first year as it is in the next three.

Goodman, *supra* note 11, at 690.

The right to treatment theory is thus potentially devastating because both compliance and noncompliance with its terms places the state in a desperate position. Compliance with the demand for a good faith effort to provide reasonable treatment, at least under the subjective view, would require the state to implement a wholesale improvement of its juvenile detention system. Thus, the state would incur a massive expenditure of resources which either are not available or cannot, considering public resistance, be devoted to a system for dealing with junior "criminals." Failure to provide treatment, however, destroys the state's authority to intervene at all into the juvenile's life by way of commitment.[49]

The right to treatment theory makes the fateful choice to address the problem of juvenile commitment solely in the terms ("rehabilitation" and "treatment") presented by the statutes and by prevailing juvenile court philosophy. Rehabilitation under the *parens patriae* authority is the only stated basis for confinement, and the only accepted basis in the right to treatment theory.[50] When rehabilitative care is not provided, confinement is invalid. The right to treatment theory thus has no conceptual apparatus to deal with a very pressing practical problem. The theory recognizes the need for treatment as the only basis for the confinement of a juvenile offender. It recognizes the juvenile court as the state agency which certifies a child for the rehabilitative process. Suppose, however, that the motivation behind a court's decision to commit a child is not his need for treatment, but the threat, signified by the conduct with which he is charged and perhaps his past record, which he poses to the community. Conceptually, dangerousness is a different basis for incarceration than is need for treatment.[51] An indeterminable but probably very large

[49]It has been suggested that as an alternative to immediate release, a court using the right to treatment theory might order either prospective release conditional upon the institution's failure to improve treatment or transfer to an institution which will provide treatment. *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1158 (1967). These alternatives do not remove the distinction between the right to treatment and equal protection theories in terms of the point under discussion—the result dictated by each theory when treatment is not provided. The alternatives simply are attempts to determine finally whether treatment *can* be provided. In any event, it is doubtful whether these alternative remedies will benefit the juvenile since both are predicated on an assumption which the very initiation of a right to treatment challenge seems to deny—that the state has, can come up with, or is willing to employ adequate facilities for the treatment of children in trouble with the law.

[50]*See, e.g.*, Kittrie, *supra* note 11, at 870, 882; Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 NOTRE DAME LAW. 1051 (1974).

[51]*See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138 (1967); Note, *Civil Restraint, Mental Illness, and the Right to Treatment*,

number of juvenile offenders commit crimes as a perfectly normal response to their social conditions rather than as an expression of an individual pathology to which treatment, even if adequate, might be directed.[52] When a juvenile court deals with such children and confines them, it functions not as a rehabilitative agency, but as an ordinary criminal court. It asserts the norms and standards of the community against conduct which is perceived as a threat to community safety, and it protects the community from such conduct through the temporary incapacitation of the child.[53] The juvenile court in these instances represents values at odds with the values of benevolence and humanity which are isolated and emphasized by the right to treatment theory.

These observations are intended neither to diminish the devotion of juvenile courts to the rehabilitative ideal, nor to suggest that no ameliorative effort at all should be directed to such individuals during their incarceration. These remarks, however, are intended to suggest that lack of treatment during confinement does not remove the state's right to confine. A person who violates the law may legitimately be subjected to some form of intervention for purposes of deterrence or incapacitation, and intervention in the form of imprisonment seems reasonably related to such a purpose. The only meaningful legal relief for such offenders is an assurance that they will not be confined, under the guise of "treatment" which they neither need nor want, for a longer period than an adult who commits the same crime. It is that relief which the right to treatment theory cannot provide.[54]

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77 YALE L.J. 87 (1967). *See generally* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966).

[52]*See* F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 51-52 (1964); Kittrie, *supra* note 11, at 858, 882.

[53]*See* F. ALLEN, *supra* note 52, at 52-56. Caldwell, *The Juvenile Court: Its Development and Some Major Problems*, in JUVENILE DELINQUENCY: A BOOK OF READINGS 399 (2d ed. R. Gaillombardo 1972).

> [B]y no stretch of the imagination can what actually happens to the child during [the dispositional phase of the] process be called merely treatment. Thus the action of the court involves both community condemnation of antisocial conduct and the imposition of unpleasant consequences by political authority—the two essential elements of punishment. It is, therefore, highly unrealistic to say that the court treats, but does not punish the child. What it really does is to emphasize treatment in a correctional process which includes, and of necessity must include, both treatment and punishment.

Id. at 419.

[54]Some juveniles perceived as dangerous by a juvenile court judge are likely candidates for waiver to adult court. This group primarily consists of those charged with serious offenses against persons, *e.g.*, murder, rape, or armed robbery, or against property, *e.g.*, arson. *See* Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*,

In short, the sentencing decision is too complex and involves too many variables to be captured by the right to treatment theory's one-dimensional perception of the juvenile dispositional phase as a purely rehabilitative process.[55]

The implacable logic of the right to treatment theory is its undoing. No court which has in the first instance opted for commitment rather than probation in order to protect the community will accept an argument whose logic invalidates commitment. The tension between the necessity for confinement and the demand for release is most likely to be eased by a judicial dilution of the notion of "treatment," to the extent that almost any state effort at all will pass muster against a right to treatment challenge. This appears to have occurred.[56] Such a result comfortably immunizes a juvenile's confinement from attack and manifestly deprives him of any benefit; he gets neither a reduction in the length of his sentence nor an improvement in the conditions under which he serves it.

A court resolved on commitment, however, may, without having to confront the tension generated by the right to treatment

16 ST. LOUIS U.L.J. 604, 609-13 (1972). Since waiver would remove the possibility of advancing either a right to treatment or equal protection argument in juvenile court, the difference between the two theories may have little practical import as to these offenders. There remain, however, numerous offenders whom a judge may be disposed to confine because of their threat to community safety although they are not obvious candidates for waiver. Chronic joy-riding, unauthorized use of an automobile, assault and battery, and drug and sex offenses present the most likely of such cases. But any offender whom the judge merely wants off the street, even though the possibility of treatment appears slight, would qualify. As to these offenders the right to reatment argument is conceptually impotent. Its advocates cannot argue successfully against either the fact or the conditions of commitment on the ground that there is little likelihood that treatment will be successful, since it is dangerousness rather than need for treatment which initially prompted the commitment.

[55]One may argue that the juvenile court is more concerned with "rehibilitation" of a total condition, however caused, than with "treatment" for a particular set of disturbing conditions. Thus, even those confined for dangerousness would come within the conceptual shelter of a "right to rehabilitation." Right to treatment theorists who have addressed the issue, however, seem to insist upon a right to some form of specific "treatment" rather than a generalized right to "rehabilitation." *E.g.*, Note, *Judicial Recognition and Implementation of a Right to Treatment for Institutionalized Juveniles*, 49 NOTRE DAME LAW. 1051, 1054 (1974). *See* D. GIBBONS, CHANGING THE LAWBREAKER: THE TREATMENT OF DELINQUENTS AND CRIMINALS 130 (1965). Moreover, even taking the broadest view of the juvenile court system's "rehabilitative" function, there will remain individuals who elude the court's capacity for help. *See* F. ALLEN, *supra* note 52, at 51-52. As to those offenders, the right to treatment theory affords no help.

[56]*See* Halpern, *supra* note 31, at 790; Pyfer, *The Juvenile's Right to Receive Treatment*, 6 FAM. L.Q. 279, 281 (1972).

theory, accept an argument which acknowledges that confinement per se is not invalid even when adequate rehabilitative facilities are not present in the state. The equal protection argument makes this acknowledgement. It recognizes "rehabilitation" not as the basis and justification for commitment itself, but only for the disparity between the lengths of the juvenile and the adult sentences. Failure of rehabilitation, therefore, does not destroy the reason for the sentence itself but only destroys the reason for distinguishing between juveniles and adults and for treating them differently.[57] Whatever legitimate purposes commitment might serve apart from rehabilitation are left unscathed and indeed are validated by the equal protection attack. *Wilson* is clear on this point.[58]

IV. The Applicability of Each Theory

The aim of the preceding remarks has not been to discredit the right to treatment theory. Such an attempt in any event would be futile. The impulses of benevolence and humanity which the theory seeks to insure in the juvenile correctional process are too deeply rooted in the correctional psyche to be removed, and the amount of face-saving necessary if the juvenile system were to concede that its promises of treatment are a pious fraud is simply too large to contemplate. Thus, official assurances of treatment will continue, as will demands by lawyers that treatment in fact be provided. What this Article has attempted to suggest, however, is that an appreciation of the right to treatment theory must be tempered with a cool appraisal of its defects. For the practicing lawyer, such an appraisal may well lead to the conclusion that an equal protection, rather than a right to treatment, argument is the more viable for his client. The probative problems are less severe, and the outcome is more palatable to courts.

But any comparative evaluation of the two theories would be remiss if it failed to indicate those dispositional situations in which the equal protection argument should not be substituted for the right to treatment theory. At least two such situations exist. The first is the situation in which a child's confinement until age twenty-one translates into a *shorter* sentence than he would have received had he been sentenced in an adult court. Such a situation arises when a child is adjudicated delinquent for

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[57]*See* People *ex rel.* Meltsner v. Follette, 32 App. Div. 2d 389, 390, 302 N.Y.S.2d 624, 626 (1969).

[58]"It is our view that there can be no constitutionally valid distinction between a juvenile and an adult offender which justifies making one of them subject to *a longer maximum commitment* in the same institution for the same conduct." 438 Pa. at 431, 264 A.2d at 617 (emphasis added).

the more serious crimes against persons and property, which usually carry lengthy sentences. It will be recalled that the equal protection theory outlined in *Wilson* was predicated upon the juvenile's receiving a longer sentence than an adult convicted of the same crime. It is entirely appropriate to concentrate on and develop an analytical theory for the cases in which the juvenile's confinement exceeds the adult's. Statistics indicate a substantial incidence of confinements in which the sentencing differential is likely to be disadvantageous to the child,[59] and cases such as *Wilson* and *Meltsner*, as well as cases in which relief was denied,[60] dramatize the problem. Other situations exist, however, in which the sentencing differential works to the child's advantage, and an equal protection attack on the conditions and length of sentence as developed in *Wilson* is inappropriate. In this situation a child has no cause to complain about his lesser sentence. Any attack on the conditions of the sentence must proceed by way of the right to treatment theory. This limitation on the application of the equal protection theory, however, should not be overemphasized. Many cases in which equal protection is not a viable argument because of the severity of the underlying offense will be the very cases in which the state will seek waiver of the child to an adult court.[61] If the juvenile is successfully waived to an adult court, the differences between the impact of the right to treatment and the equal protection arguments in the juvenile court become irrelevant.[62]

The second situation in which the equal protection argument may be inappropriate is in the area of adjudications based upon noncriminal conduct. Juvenile court jurisdiction under all statutes extends to conduct which violates the state's criminal law and to conduct, designated by such terms as "incorrigibility" or "waywardness,"[63] which is illegal only for children. The touchstone

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[59]*See* Chase, *supra* note 12, at 676-79.

[60]*E.g.*, State v. Pitt, 28 Conn. Supp. 137, 253 A.2d 671 (Super. Ct. 1969) (possible juvenile commitment of two years for offense carrying one year penalty); State v. Pinkerton, 186 Neb. 225, 182 N.W.2d 198 (1970) (six years for six month offense); *In re* K.V.N., 116 N.J. Super. 580, 283 A.2d 337 (1971) (four years for six month offense); *Ex parte* Watson, 157 N.C. 340, 72 S.E. 1049 (1911) (five years for thirty day offense); State v. Cagle, 111 S.C. 548, 96 S.E. 291 (1918) (thirteen years for ten day offense).

[61]See note 54 *supra*.

[62]Waiver is possible in most states and frequently has devastating consequences for the child. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 24-25 (1967); S. FOX, CASES AND MATERIALS ON MODERN JUVENILE JUSTICE 767 (1972).

[63]*See* S. FOX, *supra* note 1, at 38-42.

of the equal protection argument is the adult's criminal sentence.[64] If there is no adult sentence against which a child's sentence can be matched, the equal protection argument would appear to lose a necessary conceptual component. There are, however, two ways in which this conceptual difficulty could be redressed, although neither is entirely satisfactory.

First, the equal protection theorist could contend that the differential sentencing problem is caused not by the length of the child's sentence for incorrigibility or waywardness but by the mere fact of that sentence. If no treatment is provided, any sentence at all would appear to deprive the child of equal protection, since in being confined he is being treated differently from the adult on the basis of a rationale which does not materialize in fact. This argument, of course, is nothing more than a right to treatment argument presented in equal protection terms, and its all-or-nothing treatment or release approach would suffer from all the objections which were advanced earlier to the right to treatment theory. A second method of extending the equal protection argument to adjudications based upon noncriminal conduct would be to analogize such conduct to adult offenses. Juvenile offenses such as incorrigibility or waywardness as statutorily elaborated or judicially interpreted are in many respects simply the equivalent of the adult offenses of disorderly conduct or vagrancy. If a valid statute exists covering such offenses, a court could use the penalty designated therein for purposes of implementing an equal protection argument.

V. Conclusion

The impulse behind the right to treatment theory, that the committed juvenile should be treated or released, is commendable. The juvenile court system promises treatment, and it is thus legitimate to expect and to seek to insure that this promise is honored. However, the choice of questioning the problems of juvenile commitment exclusively through a right to treatment argument is in many instances an unfortunate one. The choice entails acceptance of the emotive terminology of present juvenile court statutes and commits the right to treatment theorists and the courts to the course of attacking what should be a fairly manageable legal problem on the medical battlefield. Specifically, the right to treatment theorists subsume a fairly precise problem of constitutional law—whether differential sentencing of persons

[64]In reiteration, the argument states that if rehabilitative treatment is not provided, a child convicted of a crime may not be confined for a longer period than an adult convicted of the same crime.

who have committed the same crime is valid if the conditions of confinement are the same—under the largely imprecise and unmanageable rubrics of "treatment" and "rehabilitation." For reasons indicated in this Article, this approach is often impractical and futile.

Hopefully, courts will move from their questionable view of the juvenile court as a unique sui generis system with rationales and operations totally different from those of conventional criminal courts, toward a more realistic view. The right to treatment theorists pretend that one important function of the juvenile court system, the rehabilitation of the child in trouble with the law, is the only function of the juvenile court system. It is not. A juvenile court is a *court*, and it is also a *criminal* court; it deals with children who are charged with criminal offenses, and it visits involuntary and often unpleasant consequences upon such conduct. Much of the difficulty and resistance encountered in attempts to inject constitutional protections into the juvenile court system might disappear if proponents of that system would recognize that the rehabilitative function does not exhaust the juvenile court's purposes. The process of redefining the juvenile court to include its criminal functions was begun in the case of *In re Gault*.[65] In *Gault* the Court imposed procedural requirements on the adjudicative, or guilt-determining, phase of the process commensurate with the criminal function which the juvenile court was perceived to perform at that stage. This process should be continued and extended to the pretrial and dispositional phases of the process. It is hoped that this Article has made a modest contribution to that effort.

[65]387 U.S. 1 (1967).