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be placed within the purview of the *parens patriae* power. These safeguards would include a precise formulation of the elements of informed consent. One proposal[58] would require the following:

> The "facts" given should include the nature, expected duration, purpose, and benefits of the administration of the therapy; the method by which it is to be administered; the hazards involved; the existence of alternative forms of therapy, if any; and the experimental nature of the therapy, if it is experimental.[59]

In cases where it has been determined that a patient is incapable of giving informed consent there have been proposals that an attorney visit an incompetent immediately after certification,[60] and that a guardian be appointed. A more imaginative proposal calls for an adversary proceeding before a judge during which an attorney for the inmate would argue against treatment and an attorney for the institution would explain the benefits of the proposed treatment.[61] An evolution of the law along these lines would do much to restore traditional liberties in the therapeutic state.

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Voluntarily Confined Mental Retardates: The Right to Treatment vs. The Right to Protection from Harm

The past decade has witnessed a rising concern surrounding conditions in mental institutions and the quality of care provided. The fear that state operated institutions have failed to provide minimal treatment, coupled with the staggering incidence of neglect and the inability of the residents to devise programs for their own rehabilitation, has stimulated the judiciary to intervene on behalf of the confined patient. Significantly, judicial involvement ultimately requiring the adoption of minimal standards of care and treatment has arisen even in the absence of statutory authority. Justification for this intervention may rest on the belief that the rights involved are so fundamental that constitutional protection must, of necessity, be afforded the mental patient.

58. Note, *supra* note 7, at 616.
59. *Id.* at 675-76.
60. Thorn v. Superior Court of San Diego County, 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600 (1970).
61. Note, *supra* note 7, at 677-78.

In dealing with the rights of the mentally handicapped, the courts must accommodate public policy with existing equitable and legal precepts. Thus, the dilemma facing the judiciary is to find an appropriate statutory or constitutional basis upon which a right to care and treatment may be ordered, and to define the scope and extent of the remedy granted. Applying this type of analysis, courts have taken into consideration the peculiarities of the institutions involved and the available medical and scientific expertise in formulating what has been generally called a "right to treatment."

The case of *New York State Association for Retarded Children v. Rockefeller*[1] (*Willowbrook*) illustrates the conceptual difficulties which arise in recognizing a "right to treatment," particularly with regard to the mentally retarded. In response to the deficient custodial care given patients at the institution, the court fashioned a remedy based upon a constitutional right to protection from harm. In so doing, the court attempted to halt patient exposure to physical assaults, and in addition, attempted to rectify the inadequate medical treatment of patients and the lack of appropriate rehabilitative programs by ordering that additional professional staff be hired. Although the remedy was labelled "protection from harm," the decision in effect afforded the type of relief that prior case law would have classified a "right to treatment." In examining the approach taken by the *Willowbrook* court, therefore, it is necessary to discuss the historical basis for the right to treatment, the legal theories upon which the right may be based, the relationship between the right to treatment and the mentally retarded, and the effect of the *Willowbrook* "protection from harm" doctrine on the existing body of law.

1. Legal Origins of the Right to Treatment

Although the current approach to the right to treatment has a constitutional underpinning, the initial development in the area occurred in the landmark decision of *Rouse v. Cameron*,[2] where the Court of Appeals for the District of Columbia recognized a statutory right to treatment under the revisions of the 1964 Hospitalization of the Mentally Ill Act.[3] The *Rouse* decision

1. 357 F. Supp. 752 (E.D.N.Y. 1973). This was a class action suit on behalf of residents at the Willowbrook institution for the mentally retarded. In ruling on a motion for a preliminary injunction, Judge Judd, in a memorandum decision, reserved judgment with respect to petitioner's constitutional claims of a right to treatment pending further evidence and argument. New York State Ass'n for Retarded Children v. Rockefeller, Civil No. 72-356 at 2 (Final Order) (E.D.N.Y., May 22, 1973). Rather, the court granted preliminary relief in an attempt to correct deficiencies affecting physical safety and risk of physical deterioration to inmates.

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

3. D.C. CODE ANN. § 21-562 (1967).

emphasized that "[t]he purpose of involuntary hospitalization is treatment, not punishment. . . . Absent treatment, the hospital is "transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense.' "[4] Although the question of whether there is a constitutional right to treatment was not affirmatively decided in the *Rouse* case, its significance lies in the fact that the court alluded to certain constitutional issues[5] and thus laid the foundation for subsequent decisions based upon this alternative theory.

The Massachusetts Supreme Judicial Court, in *Nason v. Superintendent of Bridgewater State Hospital*,[6] developed the constitutional issues peripherally explored in *Rouse* and found that confinement in the absence of treatment raised due process and equal protection objections which could only be effectively met by instituting a program of appropriate treatment within a reasonable time.[7]

While both *Rouse* and *Nason* involved criminally committed patients, *Wyatt v. Stickney*[8] evidenced a new phase in the development of the right to treatment concept by expressly holding that civilly committed mental patients have a constitutional right to receive adequate treatment. *Wyatt*, a class action brought on behalf of patients in Alabama's three state insti-

4. 373 F.2d at 453, citing as evidence of the second proposition Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring). The D.C. Circuit reached a similar conclusion in two other cases. In Hough v. United States, 271 F.2d 458 (D.C. Cir. 1959), the court stated: "The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety." *Id.* at 462. In Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957), the court stated that two policies underlie the distinction in treatment between the mentally responsible and the mentally handicapped. "It is both wrong and foolish to punish where there is no blame and where punishment cannot correct." Moreover, "the community's security may be better protected by hospitalization . . . than by imprisonment." *Id.* at 25-26. *See also* Douglas v. United States, 239 F.2d 52 (D.C. Cir. 1956); Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945); Wyatt v. Stickney, 325 F. Supp. 781 (N.D. Ala. 1971).

5. Judge Bazelon noted that "a failure to supply treatment may raise a question of due process of law." 373 F.2d at 453. The court also suggested that the failure to provide treatment "may violate the Equal Protection Clause," and may be so inhumane as to constitute "cruel and unusual punishment." *Id.*

6. 353 Mass. 604, 233 N.E.2d 908 (1968). There, petitioner was confined in Bridgewater State Hospital by reason of incompetency to stand trial. He alleged that he had received no treatment while incarcerated.

7. *Id.* at 614, 233 N.E.2d at 914. (*See* the discussion of the adequacy of standards notes 57-61 *infra* and accompanying text.)

8. 344 F. Supp. 387 (M.D. Ala. 1972); 344 F. Supp. 373 (M.D. Ala. 1972), *enforcing* 325 F. Supp. 781 (M.D. Ala. 1971), *appeal docketed* Wyatt v. Aderholt, No. 72-2634, 5th Cir., Aug. 1, 1972. *Wyatt* has been consolidated for purposes of appeal with Burnham v. Dep't of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), *appeal docketed*, No. 72-3110, 5th Cir., Oct. 4, 1972, in which the district court dismissed a complaint on the ground that there is no constitutional right to treatment.

tutions for the mentally handicapped,[9] stood for the proposition that the patients had an absolute "constitutional right to receive such individual treatment as [would] give each of them a realistic opportunity to be cured or to improve his or her mental condition."[10] The court cited with approval the prior holding in *Rouse* which indicated that "[t]he purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment."[11] In addition, the final order in the *Wyatt* case[12] mandated that minimum medical and constitutional requirements be met with dispatch.

The view that the failure to provide adequate treatment violates due process and equal protection guarantees was rejected in *Burnham v. Department of Public Health.*[13] In disagreeing with the *Wyatt* decision, the court found that "an affirmative federal right to treatment absent a statute so requiring" does not exist.[14] Further, the court declared that even if a right to treatment were found, it would be nonjusticiable because "specific, judicially ascertainable and manageable standards" of adequate care are lacking.[15] The *Burnham* court, therefore, was reluctant to devise criteria upon which to evaluate the adequacy of institutional care since it felt that the legislature possessed superior resources and expertise for formulating such standards.

That the *Burnham* court refused to formulate minimum institutional standards of care may stem from its examination of the *Wyatt* decree and an ensuing fear that courts should not involve themselves with such far-reaching, comprehensive remedies. The minimum constitutional standards enunciated in *Wyatt* were held to encompass the right to a humane psychological and physical environment—the right to communicate with outsiders, freedom from unnecessary medication or restraint, freedom from treatment or experimentation without informed consent, a presumption of

9. Originally, the complaint was filed on behalf of employees and patients at Bryce Hospital for the mentally ill. Amended complaints dropped the claims of the employees and added to the plaintiffs' class the patients at Searcy Hospital for the mentally ill, and Partlow State School and Hospital for the mentally retarded. Wyatt v. Stickney, 334 F. Supp. 1341, 1342 n.1 (M.D. Ala. 1971) (interim order). Subsequently, the court issued a separate decree with regard to Partlow. 344 F. Supp. at 390.

10. 325 F. Supp. at 784.

11. *Id.*

12. 344 F. Supp. at 376. The *Wyatt* court defined adequacy of treatment in terms of institution-wide standards. Individual treatment plans were to be formulated but this requirement was to insure that every individual at the institution would be given satisfactory care. *Id.* at 384-86. It is interesting to note that the standards required by the court had been agreed on by the parties as the minimum requirements necessary for adequate treatment. *Id.* at 376.

13. 349 F. Supp. 1335 (N.D. Ga. 1972).

14. *Id.* at 1340.

15. *Id.* at 1341. *But see* Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), wherein the court stated that the existence of judicial standards with which to evaluate the adequacy of treatment disposes of the justiciability objections. *Id.* at 495.

competency, and compensation for labor. In addition, the *Wyatt* court ordered the development of individual treatment plans, the filing of restraint orders, and the periodic review of patient records.

Since *Wyatt* is the only judicial pronouncement on the substantive aspects of the constitutional right to treatment,[16] it is to this decision that other courts will look when ordering remedial measures. *Willowbrook* demonstrates, on the one hand, a rejection of extensive involvement by courts in the revamping of state operated mental institutions while, on the other hand, a recognition that the failure of the *Burnham* court to grant relief was also unsatisfactory. However, why the *Willowbrook* court chose to formulate a constitutional right to protection from harm rather than follow *Wyatt* and find a constitutional right to treatment must be discussed initially in light of the conditions prevalent at the institution.

II. The Willowbrook Institution

The *Willowbrook* case emphasizes the stark realities facing numerous patients committed to mental institutions throughout the country. Affidavits, depositions and expert testimony established that the conditions at the institution were hazardous to the health, safety and sanity of the residents, and, indeed, contributed to the deterioration of the patients. "The loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident and frequent bruises and scalp wounds" were typical of the dangers facing residents.[17] Among the major criticisms leveled against Willowbrook were those which dealt with the overcrowded conditions, the lack of adequately trained personnel, and the shortage of ward attendants and professional staff.[18]

Plaintiffs based their claim for relief on a constitutional right to treatment which would entail the imposition of minimum standards of care in order to insure that conditions at Willowbrook would be raised to a level consonant with those enunciated in recent national accreditation standards.[19] Ruling on a motion for preliminary injunctive relief, the court

16. *See also* Welsch v. Likins, 373 F. Supp. 487, 496-97 (D. Minn. 1974). Relying on *Wyatt*, the court found that a constitutional right to treatment could be based on both the due process clause of the fourteenth amendment and the eighth amendment's prohibition of cruel and unusual punishment. Additionally, as in *Wyatt*, the right to treatment was extended to civilly committed mental retardates.

17. 357 F. Supp. at 756. Further, the court took notice of the fact that in 1972 "there were over 1,300 reported incidents of injury, patient assaults, or patient fights." *Id.*

18. Willowbrook had a resident population of 4,727 on December 10, 1972, reduced from a high of 6,200 in 1969 and from a total population of approximately 5,700 at the beginning of the action. *Id.* at 755. The court found that in general the number of ward attendants fell below minimum standards and that professional workers were in short supply. *Id.* at 756.

19. *Id.* at 757.

held that petitioners could claim no constitutional right to treatment on either due process or equal protection grounds, but could only claim the right to reasonable protection from harm.[20] To this end, the court prescribed quite detailed requirements governing the staff-to-patient ratio, the sanitary facilities, and the periodic reporting of plans for implementation of the court order.[21]

In addition to granting the relief specified, the court set forth some of the elements which would be encompassed in its definition of the right to protection from harm. Included in the court's conception of the right were protection from assaults by fellow inmates or by staff;[22] "corrections of conditions which violate 'basic standards of human decency;' "[23] provision of medical care;[24] recreational facilities;[25] adequate heat during cold weather;[26] and the necessary elements of basic hygiene.[27] The court emphasized that its enumeration of rights did not exhaust the potential forms of relief to which residents of an institution like Willowbrook may be entitled under the constitution. Faced with such immediate problems as overcrowded conditions, understaffing, and present dangers to health and safety, the court's preliminary relief was designed to meet the institution's most obvious deficiencies. In refusing to grant a constitutional right to treatment, the court distinguished *Willowbrook* from prior decisions on the grounds that the resi-

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20. *Id.* at 758.

21. *Id.* at 768-69. This was relief comparable to the type fashioned by Judge Johnson in Wyatt v. Stickney, 344 F. Supp. at 383. The *Willowbrook* court, however, refused to incorporate into its order any remedy which could relate to a right to treatment (*e.g.* medical screening). 357 F. Supp. at 769.

22. Analogizing the plight of Willowbrook residents, who are confined behind locked gates, to that of prisoners, the court held that the residents are entitled "to at least the same living conditions as prisoners." 357 F. Supp. at 764. One of the basic rights of persons in confinement is protection from assaults by fellow inmates or by staff. *See* Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362, 384 (E.D. Ark. 1970).

23. 357 F. Supp. at 765, *quoting* Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972). "The subhuman conditions the court discovered at [the penitentiary] could not help but destroy the spirit and threaten the sanity of the men who had to endure them. In such circumstances the courts must act immediately to enforce the mandates of the Constitution." 343 F. Supp. at 133.

24. *See* Newman v. State, 349 F. Supp. 278 (N.D. Ala. 1972), in which the court stated: "The adequacy of medical treatment provided prison inmates is a condition subject to Eighth Amendment scrutiny." *Id.* at 280. *See also* Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972).

25. *See* Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Brenneman v. Madigan, 343 F. Supp. at 133.

26. *See* Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971).

27. *See* Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972), in which the court stated: "[T]he deprivation of basic . . . elements of hygiene has consistently been held violative of constitutional guarantees." *Id.* at 768. *See also* Novak v. Beto, 453 F.2d 661 (5th Cir. 1971).

dents at the institution were voluntarily committed, and that remedies appropriate for the mentally ill may prove inadequate for the mentally retarded.

A. Voluntary vs. Involuntary Confinement

In *Wyatt* and *Rouse*, the right to treatment was accorded civilly committed patients. Although the residents at Willowbrook were voluntarily committed, it may be argued that the status of these patients should not serve as the basis upon which a right to protection from harm was upheld while a right to treatment was denied. Specifically, the court's reliance on dissimilarities inherent in voluntary and involuntary commitment as a rationale for its decision may be contrasted to Judge Johnson's final decision in *Wyatt* which recognized that status should not be determinative of patients' rights: "In the context of the right to appropriate care for people civilly confined to public mental institutions, no viable distinction can be made between the mentally ill and the mentally retarded."[28] Further, it was stipulated that only twenty-seven percent of the residents at Willowbrook were there on a voluntary basis; the court explicitly found that voluntarily committed patients were "not treated any differently from those who [were] there under court order."[29] Since the court established a right to protection from harm for all classes of residents at Willowbrook, it may be contended that it could have easily extended a right to treatment in a similar fashion. Moreover, due to the uniform application of the relief to all patients, it seems that the court could have better served the residents at Willowbrook by establishing the most comprehensive form of relief possible —the right to treatment.

Reliance on the voluntary-involuntary status of the patient further clouds the issue of a uniform right to treatment in light of due process guarantees. It has been noted that institutional confinement of the mentally ill individual and the accompanying deprivation of liberty may only be justified if he re-

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28. 344 F. Supp. at 390.

29. 357 F. Supp. at 756. Further, the argument that *all* patients should receive comparable treatment and care may be based upon equal protection grounds. The Supreme Court has relied on the equal protection clause in the mental health area to strike down unreasonable classifications. *See* Baxstrom v. Herold, 383 U.S. 107 (1965), where the Court held in part that a statutory procedure whereby an individual could be civilly committed at the expiration of a prison sentence without the jury review available to all others civilly committed in New York violated the equal protection clause. *See also* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969), where the court, relying on the *Baxstrom* decision, found that "we cannot tolerate two classes of insane persons—criminal and noncriminal—when we are asked to examine commitment procedures available to both." *Id.* at 1081. It seems that equal protection guarantees would also compel the extension of the same standards of treatment accorded involuntarily committed individuals to those patients voluntarily confined.

ceives adequate treatment. The *quid pro quo* for his confinement is treatment, the absence of which provides the basis for release on due process grounds.[30] In the field of mental retardation, however, parental consent causes the commitment to be voluntary and thus gives rise to the argument that no constitutional right to treatment may be predicated upon the due process clause because the patient is free to leave the institution at any time.[31] "The logic of such a proposition, of course, ignores the fact that many of the retarded in institutions are not capable of living outside a sheltered environment and that the right to leave in this context is just as illusory as in the area of mental illness."[32] Thus, as noted in *Wyatt*, "[t]o deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[33]

B. Appropriate Remedies

A constitutional basis for the right to treatment can be found in the theory of the least restrictive alternative. The *Willowbrook* court, however, found this to be inappropriate with regard to the mentally retarded. An analysis of this approach demonstrates that although the mentally ill and mentally retarded cannot always share in the same therapeutic objectives, the least restrictive alternative provides both with the opportunity to live productive and more independent lives.

Where fundamental liberties are involved, as they are in the commitment process, the courts have required that the least restrictive means of accomplishing therapeutic and rehabilitative goals be employed. Therefore, as an

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30. *See* Rouse v. Cameron, 373 F.2d 451, 458-59 (D.C. Cir. 1966) ("Unconditional or conditional release may be justified if it appears that . . . treatment is otherwise inappropriate"); Lake v. Cameron, 364 F.2d 657, 662 (D.C. Cir. 1966) (Wright, J., concurring).

31. *See* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 154-55 (1972).

32. *Id.* at 155.

33. 325 F. Supp. at 785. *See also* Cameron, *Nonmedical Judgment of Medical Matters*, 57 GEO. L.J. 716 (1969) for the proposition that "[t]he purpose of any medical treatment, including that afforded by voluntary or involuntary hospitalization, is cure or palliation, not punishment." *Id.* at 717.

In addition to the criticisms advanced against retaining the voluntary-involuntary distinction with regard to the right to treatment, it is necessary to consider the procedural rights of the patient as well. Generally speaking, as to involuntary admissions, the individual receives substantial rights, including the right to a subsequent court hearing at which he is entitled to be present, to be represented by counsel, and to have his need for hospitalization determined by a judge or jury. A person who is voluntarily admitted, on the other hand, gives up some basic constitutional rights since the decision for hospitalization is made on the basis of a cursory examination of the admissions officer. This difference in procedural rights may prompt one to argue on be-

alternative to institutional confinement, states should provide care in the least restrictive setting possible with a degree of treatment which offers the optimum chance for improvement.[34] For example, where feasible, courts may order outpatient care or the use of half-way houses rather than long term confinement.

The concept of the least restrictive alternative as an adjunct to the right to treatment was initially articulated in *Lake v. Cameron*,[35] where the court held that inquiry into various courses of treatment must be made prior to confinement in a mental hospital.[36] According to *Lake*, "any alternative course of treatment which the court believes will be in the best interest of the person or of the public" could be ordered.[37]

The principle of the least restrictive alternative was extended in *Covington v. Harris*[38] and was held applicable to the type of restraint which may be imposed on a patient already confined to a hospital. In *Covington*, petitioner had been civilly committed to St. Elizabeth's Hospital ten years before her request to transfer to a less restrictive ward. Finding that confinement in a maximum security pavilion was only reasonable when the hospital had examined all other adequate dispositions, the court noted that the duty to explore alternatives to maximum security confinement "can hardly be assailed as an intolerable burden on the administrators."[39] The rationale for the principle of the least restrictive alternative was based upon the finding that commitment "entails an extraordinary deprivation of liberty" and that "such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law."[40]

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half of a constitutional right to treatment for those voluntarily committed, in lieu of the procedural safeguards inherent in involuntary commitment situations. *See* Gilboy & Schmidt, *"Voluntary" Hospitalization of the Mentally Ill*, 66 NW. U.L. REV. 429, 452 (1971).

34. *See* Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients To Adequate Treatment*, 86 HARV. L. REV. 1282, 1295 (1973).

35. 364 F.2d 657 (D.C. Cir. 1966). In that case the constitutional right to the least restrictive alternative was based upon the statutory right to treatment provided by the District of Columbia Hospitalization of the Mentally Ill Act, D.C. CODE ANN. § 21-501-21 (1961) [hereinafter cited as D.C. Mentally Ill Act]. *Id.* at 659.

36. *See* Covington v. Harris, 419 F.2d 517, 623 (D.C. Cir. 1969).

37. 364 F.2d at 659, quoting D.C. CODE ANN. § 21-545(b) (Supp. V 1966). Thus, the *Lake* court mandated the hospital and the trial judge to explore alternatives that would allow petitioner a degree of liberty consonant with the degree of care required. *Id.* at 661.

38. 419 F.2d 617 (D.C. Cir. 1969). The court came to this conclusion relying principally on the D.C. Mentally Ill Act and the rationale underlying the right to treatment.

39. *Id.* at 625.

40. *Id.* at 623. Support for the principle of the "least restrictive alternative" can be found in Supreme Court decisions dealing with other areas of conflict between the state and the individual. *See* Shelton v. Tucker, 364 U.S. 479 (1960).

The courts have placed on the state the burden of exploring various alternatives to institutional confinement since, in most cases, it is the state and not the retarded or mentally ill individual who has knowledge of the various community resources that might be utilized for treatment.[41] For the mentally retarded, this doctrine "is particularly important because it is now beyond dispute that even short-term institutionalization can, of itself, create additional behavior problems for the mentally retarded; and that long-term institutionalization is extremely anti-therapeutic."[42] With regard to *Willowbrook*, serious constitutional questions are presented when individuals are confined to a severely overcrowded, under-staffed institution when less drastic alternatives would suffice.[43]

The constitutional right to treatment may rest on grounds other than the theory of the least restrictive alternative. Absent appropriate care, confinement may violate the constitutional guarantee against cruel and unusual punishment.[44] The amendment's prohibition is not "restricted to instances of particular punishment inflicted on a given individual but [encompasses] confinement to an institution which is 'characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people,' "[45] In acknowledging petitioner's depiction of the institution, the court found that the detention of Willowbrook's residents entitled them "to at least the same living conditions as prisoners."[46]

Despite the potential applicability of the eighth amendment to the voluntarily committed mental retardate, most cases involving the guarantee have dealt with the conditions and methods of criminal incarceration. Several

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41. *See* Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), where the court found that "[t]he Due Process Clause requires that state officials charged with obligations for the care and custody of civilly committed persons make good faith attempts to place such persons in the settings that will be suitable and appropriate to their mental and physical conditions while least restrictive to their liberties." *Id.* at 502.

42. Brief for Plaintiff at 65, New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

43. *See* Birnbaum, *The Right to Treatment—Some Comments on Implementation*, 10 DUQ. L. REV. 579, 597-603 (1972), where the author concludes that alternative facilities are usually inadequate. It has been argued, however, "that it is less costly to provide equivalent or even better treatment in community mental health centers or by means of out-patient services than in large mental institutions." Comment, *supra* note 34, at 1304 n.125. This would seem to call for the development by the states of adequate facilities for treatment short of full term institutionalization.

44. U.S. CONST. amend. VIII, which reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." As noted above, Judge Bazelon stated in *Rouse* that "indefinite commitment without treatment, of one who has been found not to be criminally responsible may be so inhumane as to be 'cruel and unusual.' " 373 F.2d at 453.

45. Martazella v. Kelley, 349 F. Supp. 574, 597 (S.D.N.Y. 1972), quoting Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970).

46. 357 F. Supp. at 764.

courts have, however, determined that the eighth amendment is not on its face limited to criminal prosecutions. As a result, the rights embodied in the amendment have been extended to remedy conditions found in juvenile detention centers.[47] Although commitment may be pursuant to statute, the juvenile is not considered a criminal, nor is the institution characterized as penal.[48] Similarly, voluntarily committed individuals are not guilty of any criminal offense; institutionalization is designed to afford treatment and care rather than punishment. Therefore, it can be argued that the constitutional proscription of cruel and unusual punishment may afford relief to the residents of Willowbrook despite the non-criminal nature of their confinement.

In basing a right to treatment on the eighth amendment, courts have found that the institutional purpose becomes one of punishment rather than rehabilitation where adequate care is not provided.[49] The Supreme Court, in *Robinson v. California*,[50] held that the eighth amendment prohibits the penal incarceration of a narcotics addict when the sole basis for the confinement is the "status" of the offender. The *Robinson* doctrine may apply to situations involving noncriminal detention where commitment is predicated on the status of the individual. Specifically, institutionalization of the mentally ill or retarded without any accompanying curative or remedial program would subject them to punishment based upon "status" and would be the

47. *See* Lollis v. New York State Dep't of Social Serv., 322 F. Supp. 473, 479-80, *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971), where the court found that punishment in a noncriminal setting violated the eighth amendment; Martazella v. Kelley, 349 F. Supp. 575, 599 (S.D.N.Y. 1972) where the court stated that "[t]here can be no doubt that the right to treatment, generally for those held in non-criminal custody (whether based on due process, equal protection or the Eighth Amendment, or a combination of them) has by now been recognized by the Supreme Court, the lower federal courts and the courts of New York." *See also* Nelson v. Heynes, C.A. No. 72 S 98 (M.D. Ind., June 15, 1972), where a federal district court found that the institutional conditions at an Indiana boys school violated the eighth amendment; *and* Comment, *supra* note 34, at 1291-92.

48. *See* Note, *A New Emancipation: Toward an End to Involuntary Civil Commitments*, 48 NOTRE DAME LAW. 1334, 1343-44 (1973).

49. *See* note 4 *supra*, and accompanying text. Moreover, the very fact of confinement itself, however humane, may place an undo restriction on personal liberties and may thus constitute a form of punishment. *See, e.g.*, Hamilton v. Love, 328 F. Supp. 1182, 1193 (E.D. Ark. 1971); *accord*, Cross v. Harris, 418 F.2d 1095, 1101 (D.C. Cir. 1969) ("[i]ncarceration may not seem 'punishment' to the jailers, but it is punishment to the jailed").

50. 370 U.S. 660 (1962). "It is unlikely that any state . . . would attempt to make it a criminal offense for a person to be mentally ill. . . . [I]n light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 666. *See* Driver v. Hinnant, 356 F.2d 761, 765 (4th Cir. 1966) (nontherapeutic detention of an alcoholic is unconstitutional); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971), where it was noted that long term confinement without treatment of one incompetent to stand trial "would certainly face constitutional problems under *Robinson*." *Id.* at 708.

equivalent of placement in a penitentiary where one could be held indefinitely for no convicted offense.[51] Consequently, "[t]he confinement of Willowbrook residents whose only [crime], was that they were born with fewer abilities and skills than most of us clearly violates the eighth amendment."[52]

III. Judicial Enforcement of the Right to Treatment

The *Willowbrook* court did not find a constitutional provision upon which to base a right to treatment. Neither the due process clause of the fourteenth amendment nor the eighth amendment's proscription of cruel and unusual punishment were found adequate to justify the imposition of a comprehensive program of rehabilitation and care.[53] Influencing the court's rejection of a constitutional basis for the right were the complex issues involved in imposing minimally acceptable therapeutic programs.

A. Standards for Determining the Adequacy of Treatment

Opponents of judicially imposed treatment argue that courts do not possess the medical expertise with which to formulate standards for adequate care. Although courts may be assisted in the formulation of such criteria through the development of administrative guidelines, it may be argued that the absence of legislative action should not preclude the court from attempting to establish minimal standards of treatment in order to uphold the rights of committed patients.[54]

In light of these considerations, the institution involved in *Rouse* was required to provide treatment which was adequate to serve the needs of the particular patient in light of current medical knowledge. To satisfy the requirement of adequate treatment, the institution must show (1) that it made

51. *See* Welsch v. Likins, 373 F. Supp. 487, 503 (D. Minn. 1974), where the court found a constitutional right to treatment based, in part, on the theory that absent treatment, confinement would become cruel and unusual punishment.

52. Brief for Plaintiff at 56, New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973). The U.S. Justice Department has, for the first time, brought suit against the Maryland institutions for mentally retarded charging the state with violation of the eighth amendment's prohibition of cruel and unusual punishment. The suit is being instituted in order to remedy the substandard conditions and treatment facilities present at the institutions. *See* The Washington Post, Feb. 22, 1974, at 11, col. 4.

53. Although the rights of Willowbrook residents to the "protection from harm" could rest on the eighth amendment, the due process clause of the fourteenth amendment or the equal protection clause of the fourteenth amendment, the court found that it was not necessary to determine which source of rights is controlling. 357 F. Supp. at 764.

54. *See, e.g.*, Rouse v. Cameron, 373 F.2d 401, 457 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972).

a "bona fide effort" to cure and improve; (2) that it conducted "initial and periodic examinations" of the patient's condition; and (3) that it provided a therapeutic program suited to the individual's needs.[55] It is noteworthy that the *Rouse* decision did little to insure enforcement of its holding since it failed to establish strict criteria by which to evaluate the adequacy of care provided to patients generally, deferring such determination to a case-by-case analysis.

Relying on the *Rouse* decision, the court in *Nason* indicated that the mode of treatment had to be reasonably related to the specific needs of the patient. The court concluded that the standard to be used in ascertaining the appropriateness of the treatment was "to be determined by competent doctors in their best judgment within the limits of permissible medical practice."[56] As in *Rouse*, however, the *Nason* court failed to articulate strict judicial criteria to be used in the formulation of guidelines for adequate care.

The equivocal approach taken by the courts in *Rouse* and *Nason* with regard to the establishment of standards for defining the adequacy of treatment may be contrasted with the explicit requirements set forth in *Wyatt*. There, the court held that the patients had a constitutional right to receive such treatment as would afford the individual "a realistic opportunity to be cured or to improve his or her mental condition."[57] In order to remedy the substandard conditions found at the named institutions, the court established requirements governing staff-to-patient ratios, educational opportunities, floor space, nutrition and sanitary facilities. An extensive program of rehabilitation and care was imposed despite legislative inaction because the *Wyatt* court believed "the very preservation of human life and dignity" was at stake.[58]

In advancing the constitutional right to treatment beyond its applicability to the mentally ill, the court in *Wyatt* extended its decree to include involuntarily confined mental retardates because they also "have a constitutional right to receive such individual habilitation as will give each of them a realistic opportunity to lead a more useful and meaningful life and to return to society."[59] Included in the court's definition of "habilitation" were formal, structured educational and therapeutic programs[60] aimed at "assist[ing] the

55. 373 F.2d at 457.

56. Nason v. Superintendent of Bridgewater State Hosp., 353 Mass. 604, 614, 233 N.E.2d 908, 914 (1966). *See, e.g.*, Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87, 107 (1967), which suggests possible standards in evaluating the adequacy of treatment provided by an institution.

57. Wyatt v. Stickney, 344 F. Supp. 373, 374 (N.D. Ala. 1972).

58. *Id.* at 379.

59. *Id.* at 390. Judge Johnson concluded that this requirement was necessary if society is to justify civil commitment of mentally retarded persons.

60. *Id.* at 395 (Appendix A).

resident to acquire and maintain those life skills which enable him to cope more effectively with [himself] . . . and his environment . . . ."[61] Thus, the court went one step beyond the right to treatment in concluding that the right to education was an integral component of adequate care, essential to the rehabilitation of the mental retardate. Given this requirement, a serious obstacle arises in applying the *Wyatt* decision to future litigants, since the right to education cannot be grounded in the constitution.[62] It is clear that this lack of constitutional authority led the *Willowbrook* court to conclude that expanding the right to treatment "to a constitutional right of habilitation owed by the State of New York to mentally retarded children resident at Willowbrook is more than the next logical step in an inexorable sequence."[63] Yet, it can be argued that since the right to education is intimately tied to the right to treatment of the mentally retarded, the right to habilitation should receive the same constitutional protection.

The *Burnham* decision stands in contrast to the affirmative role taken by the *Wyatt* court in defining standards of treatment for the mentally ill and in formulating a right to habilitation for the mentally retarded. In *Burnham*, the court concluded that "it [was] beyond the technical expertise of the judiciary to endeavor to administer a state-wide mental health program . . . ."[64] Indeed, the court found that "the only feasible way in which the adequacy of treatment could ever be measured is against the needs of a particular patient."[65] The *Wyatt* decision attempted to establish *minimum* standards of habilitation; that the *Burnham* court could not have fashioned perfect relief seems, therefore, an inadequate justification for its failure to afford petitioners any relief whatsoever.[66] While taking judicial notice of the decision reached in *Wyatt*, the *Burnham* court's refusal to formulate institutional standards of treatment can fairly be ascribed not only to its lack of medical expertise, but also to its rejection of a constitutional basis for the right.

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61. *Id.*

62. *See* Rodriguez v. San Antonio Independent School Dist., 411 U.S. 1 (1973).

63. 344 F. Supp. at 395. *See also* Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 160 (1971).

64. Burnham v. Department of Pub. Health, 349 F. Supp. 1335, 1344 (N.D. Ga. 1972).

65. *Id.* at 1343.

66. It can be argued that the Fifth Circuit could reconcile the *Wyatt* and *Burnham* cases on appeal. First, reliance was placed in *Burnham* on the recent adoption by the legislature of an innovative mental health statute. 349 F. Supp. at 1337. Thus, the factual distinctions between the two cases could provide a justification for different rulings. Secondly, the petitioners in *Burnham* were unable to clearly present to the court their claim for relief based on a constitutional right to an adequate standard of overall treatment for patients. The difference in the two courts' views of what constitutes adequate treatment might also aid in the resolution of this issue by the Fifth Circuit. *See* Comment, *supra* note 34, at 1284 n.11 and accompanying text.

Paralleling the *Burnham* court in its rejection of a constitutional foundation for the right to treatment, the *Willowbrook* decision is, nonetheless, in accord with *Wyatt* in its determination to fashion certain remedial standards. Although of the belief that a court does not have to avoid the imposition of detailed requirements,[67] the *Willowbrook* court narrowly limited the relief granted to the protection from physical harm in the maintenance of an adequate custodial institution. To this end, the court dealt with "the shortages of ward attendents and supervisors, the shortage of physical therapists and recreation staff, the shortage of nurses and doctors . . . and the repair of toilets, since these deficiencies affect physical safety and the risk of physical deterioration."[68] Although *Willowbrook* merely finds a right to protection from harm, it is noteworthy that the relief granted petitioners is similar to that granted in the *Wyatt* decision and hence, the court's reluctance to find a constitutional right to treatment is not easily understood.

B. Financial Considerations

The most effective method of enforcing the right to treatment may well be by court order compelling an institution to establish minimum standards of care. As emphasized in *Rouse*, the continuing failure "to provide suitable and adequate treatment [could not] be justified by lack of staff or facilities,"[69] since a patient's condition may deteriorate if he is confined without treatment in an ill-equipped, poorly staffed mental hospital. Following the *Rouse* rationale, the *Wyatt* court refused to allow the defense of lack of operating funds as the justification for inadequate treatment.[70] Additionally, *Wyatt* cautioned that in the event the legislature failed to appropriate money for the implementation of adequate treatment standards, the court itself would utilize other methods to raise the requisite funds.[71] Thus, implicit in the *Wyatt* and *Rouse* decisions was the recognition that immediacy of relief should be the primary objective: "the rights here asserted are . . . *present* rights . . . and, unless there is an overwhelming compelling reason, they are to be promptly fulfilled."[72]

Focusing on the extensive remedy particularly provided for by the *Wyatt* court, it is evident that the enforcement of the constitutional right to treat-

67. 357 F. Supp. at 768.
68. *Id.*
69. Other courts have similarly disregarded the budgetary limitations of mental hospitals. *See* Sas v. Maryland, 334 F.2d 506 (4th Cir. 1964).
70. 325 F. Supp. at 784.
71. The opinion does not explicitly state what affirmative steps might be taken by the court, other than the appointment of a master and an advisory panel. 344 F. Supp. at 378.
72. Rouse v. Cameron, 373 F.2d 451, 458 (D.C. Cir. 1966), quoting Watson v. City of Memphis, 373 U.S. 526, 533 (1963).

ment will require vast sums of money. Consequently, the propriety of such judicial intervention raises questions concerning the authority of a court to compel a state legislature to appropriate additional funds for public mental institutions. Despite the lack of precedent in the mental health area specifically, it is clear that courts have on many occasions ordered relief predicated upon legislative appropriations where a vindication of constitutional rights is necessary.[73]

The *Burnham* court, however, argued that a decree such as that fashioned in *Wyatt*, while not ordering appropriations, imposed an obligation which could only be met by the expenditure of state funds. As a result, the *Burnham* decision concluded that the relationship between such a court order and concomitant legislative appropriations would render the suit an action against the state barred by the eleventh amendment.[74] The amendment would be misconstrued, however, if compliance with a court order which required the state to spend money was equated, per se, with a suit against the state.[75]

The *Willowbrook* decision followed the reasoning of the *Burnham* court in acknowledging the potential eleventh amendment obstacle where appropriations of state funds are required by court order. Nonetheless, the *Willowbrook* court imposed relief which would entail the expenditure of funds by the state legislature[76] since "money is not an obstacle to the defendants doing what the court intends to direct."[77] It seems anomolous that, on the one hand, the court found that the scope of relief granted would be

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73. The propriety of judicial intervention in matters falling withing the jurisdiction of the legislative or executive branch when those branches act in derogation of constitutional rights is generally accepted. *See* Watson v. City of Memphis, 373 U.S. 526 (1963). In the area of school desegregation, it is clear that in fashioning relief for these cases, the Court anticipated the involvement of state appropriations. *See* Green v. County School Bd., 391 U.S. 430 (1968); Swann v. Charlotte Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). Moreover, in Hoosier v. Evans, 314 .F Supp. 316 (D.V.I. 1971), the court held that "fundamental rights guaranteed by the Constitution may be neither denied nor abridged solely because their implementation requires the expenditures of public funds . . . ." *Id.* at 320. *See also* Cruz v. Betto, 405 U.S. 319 (1972) wherein the Court ordered affirmative action in regard to prisons.

74. 349 F. Supp. at 1341.

75. In cases factually similar to *Wyatt v. Stickney*, a number of courts have summarily rejected the eleventh amendment argument even though the orders they granted required expenditures. *See, e.g.*, Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Rozecki v. Gaughan, 459 F.2d 6, 8 (1st Cir. 1972).

76. 357 F. Supp. at 769. Thus, in establishing minimum salaries for physical therapists, the *Willowbrook* court recognized that it had been cited "to no cases dealing specifically with *the power of a federal court to adjust state salaries*, but this is a necessary part of the power of an equity court to fashion an effective decree." (emphasis added). Additionally, the court mandated the increased hiring of ward attendants, nurses, physicians, and recreation staff.

77. *Id.* at 765.

adversely affected if the legislature was required to *appropriate* funds while, on the other hand, it imposed an obligation on the state to allocate *existing* revenue to meet *court*-determined objectives (*i.e.*, requiring minimum starting salaries for physical therapists). In ordering that specific expenditures be made, the court has achieved substantially the same result as that achieved in *Wyatt* even though it disclaimed any attempt to "radically restructure the state's treatment of the mentally retarded through the appropriation of state funds."[78]

IV. The Ramifications of Willowbrook

In analyzing the judicial recognition of a constitutional right to treatment, it is evident that the courts differ in their approach when defining the scope of the right. While *Wyatt* inaugurated the most extensive reform in the mental health field, *Burnham* and *Willowbrook* clearly indicate that courts are reluctant to prescribe broad content to the right to treatment. Although the *Burnham* decision refused to find such a constitutional right, *Willowbrook* may be viewed as tempering the disparity between the *Wyatt* and *Burnham* decrees.

Initially, it must be noted that the *Willowbrook* court reserved its decision with respect to the petitioner's constitutional claims of a right to treatment or habilitation pending further evidence and argument.[79] As indicated in dicta, it seems evident that a constitutional right to treatment will not be found.[80] In order to determine why the court spoke of its relief in terms of a constitutional right to protection from harm, it is necessary to evaluate the extent of this right, the way in which it differs from the right to treatment, and the adequacy of the relief granted.

The staggering evidence presented to the court with regard to the physical abuses prevalent at the institution may account for its reliance on a right to protection from harm rather than on a right to treatment. That the court itself "observed a boy whose right eye was swollen shut and whose forehead was covered with fresh blood from several open wounds"[81] may have stimulated its desire to afford immediate relief. The right to protection from harm may, therefore, be viewed as a remedy that can be readily adminis-

78. *Id.* at 760.

79. New York State Ass'n for Retarded Children v. Rockefeller, Civil No. 72-356, slip op. at 2 (Final Order) (E.D.N.Y. May 22, 1973).

80. The court concluded "that the plaintiffs' class has no constitutional right to treatment either independently or on due process or equal protection grounds. . . ." 357 F. Supp. at 758.

81. New York State Ass'n for Retarded Children v. Rockefeller, Civil No. 72-356, slip op. at 22 (E.D.N.Y., April 10, 1973).

tered with an effectiveness easily ascertainable. Moreover, to wait for the submission of proposed standards for adequate treatment by all interested parties as was done in *Wyatt*, could have resulted in delay and the perpetuation of hazardous conditions.

While the physical protection of Willowbrook residents was clearly a motivating force in the formulation of the court's decree, several other factors emerge which may account for the disparate scope of relief between the *Willowbrook* and *Wyatt* decisions. To begin, the *Willowbrook* order provided no explicit rehabilitative programs, but was confined to the upgrading of the custodial care given at the institution. Further, the court rejected any approach that could be identified as a *Wyatt*-inspired treatment plan by refusing to institute a medical screening program, "since this relates to the right to treatment rather than to the protection from harm."[82] It is evident that the right to protection from harm is a far more limited form of relief which focuses on the correction of overall institutional deficiencies rather than on the development of the individual's potential through therapeutic and rehabilitative programs.

Although *Willowbrook* may be viewed as taking a conservative approach to the problems of institutional reform,[83] it is noteworthy that the court incorporated several important facets of the *Wyatt* decision into its own decree. As in *Wyatt*, the *Willowbrook* court recognized that relief could not be denied on the basis of inadequate financial resources.[84] Moreover, these decisions are in accord with the proposition that a court is not precluded from imposing detailed provisions for the correction of institutional abuses.[85] Finally, in ordering that additional physical therapists, physicians and nurses be hired, the court, in effect, provided for improvements that would extend beyond the mere correction of custodial deterioration.

Discussion of the differences and similarities that exist between the *Wyatt* and *Willowbrook* decisions leads to the ultimate questions concerning the adequacy of the *Willowbrook* decree and its effect on future litigants in the mental health area. Unquestionably, the implementation of programs based upon a right to treatment or a right to protection from harm will involve increased expenditures by the state for mental hygiene. Therefore, a court faced with an appeal to order these types of appropriations is subject to vast

82. 357 F. Supp. at 769.

83. An additional consideration that may account for the court's conservative approach is the fact that the *Wyatt* and *Burnham* decisions are on appeal to the fifth circuit. The fear of reversal may perhaps have resulted in the court's inauguration of a new approach—the right to protection from harm.

84. 357 F. Supp. at 765. *See* note 77 *supra*, and accompanying text.

85. 357 F. Supp. at 768.

political and economic pressures which could explain its taking a more conservative approach. When viewed in this light, the *Willowbrook* decision indicates that courts may choose a more economical and readily administered form of relief which would suffice in alleviating the most obvious inadequacies of institutions. It may be argued, however, that the state's responsibility to its mentally handicapped individuals does not end with the upgrading of the physical environment in which these patients are confined. With regard to the mentally retarded in particular, educational and rehabilitative programs might be instituted in order to maximize the potential opportunities open to the retardate. The result of the *Willowbrook* decree, therefore, may be to foster the maintenance of good custodial care at the expense of responding to the therapeutic needs of the individual patient.

An overall evaluation of the *Willowbrook* decree indicates that the court, in taking an affirmative role to remedy the basic deprivations existing at the institution, did impose a modified form of the right to treatment. This is evidenced in the appointment of medical personnel and the hiring of ward attendants. In future litigation, however, the right to protection from harm may be narrowly construed and thus fail to include provision of, for example, professional staff specially trained in the area of rehabilitation. Future courts may well emphasize the improvement of the physical environment to the detriment of programs bearing a relation to the right to treatment. Thus, although the relief granted the Willowbrook residents may prove to be adequate as an immediate response to the conditions at the institution, the decree itself may serve to impede the implementation of comprehensive programs aimed at returning the mentally ill and mentally retarded to a more active role in society.

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