Duquesne Law Review

Volume 10 | Number 4 Article 7

1972

The Right to Treatment - Alternative Rationales [Note]

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INTRODUCTION

That which is most clear in any debate over proper care for the mentally ill is the need for an immediate solution. Understaffed and poorly maintained hospitals with doctor-patient ratios as high as one to 950 are no less than a national shame.[1] To ask where the blame lies is a waste of time. The important concern is what must be done.[2]

Legislative action in the form of a right to treatment law has long been looked to as a cure. Numerous writers have advocated this position in the belief that objective standards of administration and fair treatment will cure the present situation.[3] The problems that beset the passage of such legislation are legion. Foremost among them are the allocation of resources and low visibility. Both of these have been discussed in other parts of this symposium.[4] The major question clouding the promise of a legislative solution is: What is the validity of a right to treatment statute if a constitutional right to treatment is recognized by the judiciary? *Wyatt v. Stickney*[5] recognized a constitutional right to treatment, and it is submitted that other courts will eventually follow its lead. When they do, the iron mold of a statutory remedy will have

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1. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 41 (1970). *See generally* Birnbaum, *A Rationale For The Right*, 57 GEO. L.J. 752 (1969).

2. Birnbaum, *Some Remarks On "The Right to Treatment,"* 23 ALA. L. REV. 623, 628 (1971).

3. *See, e.g.*, Birnbaum, *supra* note 1.

4. *See* Debate, *The Right to Treatment—Encounter and Synthesis*, 10 DUQ. L. REV. 554 (1972) [hereinafter cited as Debate]; Comment, *The Right to Treatment—Judicial Realism and Judicial Initiative*, 10 DUQ. L. REV. 609 (1972). It has been said:

> The failure of this field to get its due legal attention can be primarily explained by the absence of a moving power behind it. Unfortunately, the "insanity" field was deprived of its most powerful lobby through a process of human erosion, in institutions where cure was the exception rather than the rule. With the voice of the mentally ill themselves muted and their families either too willing to be relieved of the burden of care, or too poor, or too eager to conceal the family "stigma," appeals to legislature, the courts and the legal profession were rather few. This legal situation, however, appears to have been part and parcel of a general pattern of neglect in everything connected with mental illness.

Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO ST. L.J. 28, 29 (1960). See also Birnbaum, *supra* note 1, at 763 for the proposition that a massive effort by the Pennsylvania AFL-CIO was responsible for legislation being drafted which led to Pennsylvania's proposed "Right to Treatment Law of 1968." This bill died when the Pennsylvania General Assembly failed to enact the statute. For the text of this proposed bill and a discussion of it by its drafters see Furman and Conners, *The Pennsylvania Experiment in Due Process*, 8 DUQ. L. REV. 32 (1969). For a discussion of this bill's future see the comments of Mrs. Mary Baltimore in the Debate at 578.

5. 325 F. Supp. 781 (M.D. Ala. 1971).

been a fruitless endeavor. Constitutional rights simply do not lend themselves to rigid statutory control.

This is not to say that a statutory right to treatment is of no value; if properly administered it offers some hope for the mentally ill. It is our contention, however, that it is far from being a complete solution, and in light of *Wyatt*, it may very well be one which does not respond to the full rights of the mentally ill. Therefore, it is up to the judiciary to provide the initiative if proper treatment is to become a reality.[6]

Our purpose in this article is to present alternative rationales for a constitutional right to treatment by tracing the development of the law in the right to counsel and education areas.[7] Since *Wyatt*, such an undertaking is open to the criticism of no longer being necessary. *Wyatt*, however, makes it more necessary for two reasons. First, the issue of a constitutional right to treatment was not litigated. Before the trial the defendants agreed there was or should be a constitutional right to treatment. Therefore, the recognition of this right did not result from the adversarial process.[8] The opinion simply expresses the joint conclusion of the parties; a conclusion that may not be reached prior to trial in another state when the issue again arises. Second, the opinion is based on the moral argument that the state has no justification to take one's freedom without supplying proper treatment. This argument has been advocated with little success for many years.[9] Specifically, the court said:

> When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition . . . . Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."
> . . . The purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions. . . .[10]

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6. Birnbaum, *supra* note 1, at 765.
7. It is recognized that because a constitutional right to treatment has no clear history in our common law that it is more readily established by argument than by precedent. Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1147 (1967).
8. Birnbaum, *The Right to Treatment—Some Comments on Implementation*, 10 DUQ. L. REV. 579 (1972).
9. It was first proposed by Dr. Morton Birnbaum in 1960. Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 516 (1960).
10. 325 F. Supp. at 784 (citations omitted).

No one can morally reject this language but the key word here is *morally*. The court relied on *Rouse v. Cameron*[11] and *Covington v. Harris*[12] as authority. These cases dealt with a statutory right to treatment and never reached the constitutional issue. Therefore, the opinion is weak authority. It is with this in mind that we analyze other areas of the law to support the existing arguments.

The two areas we have chosen are right to counsel and education. Right to counsel is guaranteed by the Constitution and has developed through due process. Right to education is relatively new and its advancement has been through equal protection. Clearly, they are different in these respects but when analyzed in reference to a common model they show a parallel development which must be followed in the mental health area. The model consists of three parts. The first is recognition of a fundamental personal interest.

Fundamental personal interests are interests or rights of important personal concern such as procreation,[13] divorce,[14] and rights with respect to criminal procedure.[15] The Supreme Court in protecting fundamental interests has relied on either equal protection or due process, and in some instances on a combination of both. In *Skinner v. Oklahoma*[16] *ex rel. Williamson,* equal protection was used to invalidate a state statute which provided for the sterilization of certain classes of habitual criminals. The Court said that procreation was an interest fundamental to the individual, and after a "strict scrutiny" of the sterilization statute concluded that no compelling reason existed to justify the classification.[17] The ability to obtain a divorce was protected in *Boddie v. Connecticut,*[18] where the Court held that it was a denial of due process to preclude indigents because of their inability to pay filing fees from dissolving a marriage.[19] In *Griffin v. Illinois*[20] and *Anders v. California*[21] the Court did not differentiate between equal

11. 373 F.2d 451 (D.C. Cir. 1966).
12. 419 F.2d 617 (D.C. Cir. 1969).
13. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
14. Boddie v. Connecticut, 401 U.S. 371 (1971).
15. Anders v. California, 386 U.S. 738 (1967); Griffin v. Illinois, 351 U.S. 12 (1956).
16. 316 U.S. 535 (1942).
17. *Id.* at 541. For a detailed discussion on fundamental personal interests in equal protection see *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1120-23, 1127-31 (1969).
18. 401 U.S. 371 (1971).
19. *Id.* at 374-76. *See The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 108-110 (1971) for a discussion on *Boddie* in reference to access to the courts as an equal protection fundamental interest. For a discussion on due process fundamental interests see Ratner, *The Function of the Due Process Clause,* 116 U. PA. L. REV. 1048 (1968).
20. 351 U.S. 12 (1956).
21. 386 U.S. 738 (1967).

protection and due process in protecting the accused's fundamental interest in a fair criminal process.[22] In *Griffin*, where the Court held that indigent defendants could not be denied appellate review because of their inability to buy transcripts, the entwining of the two clauses can be seen in the statement that the "Due Process or Equal Protection Clauses protect persons like petitioners from invidious discrimination."[23] *Anders* also provides a striking example of this fusion. Holding that a court appointed appellate counsel's decision not to prosecute a first appeal from a criminal conviction of an indigent violated the Constitution, the Court said "California's action does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment."[24]

Although a greater scope of review, when fundamental personal interests are at stake, has come under equal protection rather than due process,[25] it must be noted that the Court's desire to protect the fundamental interests involved is common to both areas.[26] Therefore, an analysis of a problem where an infringement of a fundamental interest is involved need not be pigeon-holed in either equal protection or due process.[27]

Recognition of a fundamental interest and its further development into a right is the initial step in the development of legal duties toward that right. In the right to counsel area recognition of a fundamental interest and development into an effective right is relatively easy to grasp. The interest is that of liberty, a fair trial, and an effective opportunity to defend criminal charges. In education the interest is more sophisticated than liberty; in the face of compulsory school programs it also has its source in state concern. The interest is in producing responsible citizens for society and to afford each member an opportunity to live a useful life. The fundamental interest of the mentally ill patient is also that of liberty. However, it includes the concept of treatment as it is only with effective treatment that he will be able to enjoy liberty in the true sense of the word.

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22. *See* Comment, *Trumpets in the Corridors of Bureaucracy: A Coming Right to Appointed Counsel in Administration Adjudicative Proceedings*, 18 U.C.L.A. L. REV. 758, 781-783 (1971).
23. 351 U.S. at 18.
24. 386 U.S. at 741.
25. *Developments, supra* note 17 at 1131-32.
26. *See* Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 25 (1969).
27. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970).

The second part of our proposed model of analysis is the concept of involuntariness or compulsion present in the form of state action. Once again in right to counsel this concept is quickly identifiable—the state's deprivation of freedom under its police power. Compulsory attendance laws illustrate this aspect in education. In mental health involuntariness is present when the patient is involuntarily civilly committed.[28]

The third part of the model is the definition of state duties when involuntariness through state action acts upon the fundamental personal interest. Whether the response is based on due process or equal protection is not important. What is crucial is the judicial recognition that the state has an affirmative duty to protect the fundamental interest.

Right to counsel and education demonstrate the model at different stages of development. Right to counsel, since *Powell v. Alabama,*[29] has steadily developed to a point where one can safely say it is an integral part of the concept of justice in today's society. Review of its development, despite its presence in the Bill of Rights, amply demonstrates that before *Powell* it was an empty right. The right to education is a relatively new concept. Its stage of development might be termed embryonic, but it still commands a position much higher in terms of recognition than mental health. For this reason we have selected education to test the pattern of development which the model reflects has been followed in the right to counsel area.

Right to Counsel

This argument will deal with the due process clause and its possible application in giving an involuntarily civilly committed patient relief. The arguments themselves are based upon the development of due process in the area of right to counsel. The first recognition of an effective right to counsel came in *Powell.* In order to understand its

28. It is submitted this does not mean that the principles calling for the recognition of a right to treatment apply only to the involuntarily civilly committed. Involuntariness can also be accomplished by passive state action. If one looks at the problem of housing this is readily seen. Clearly it is not the state itself that promotes separation of the races in neighborhoods. But even if the state does nothing it is passively allowing society to do it themselves. The state does not offer alternative ways to create the proper balance. In mental health the same phenomenon is present in the voluntary form of commitment. Inherent in voluntariness is the notion of choice—viable alternatives. State inaction has resulted in a minimum of alternatives available to one who must face the problem. A clear example can be seen with those who may loosely be termed senile psychotics. The senile psychotic label is attached to older people so that the state mental hospital can be used as an old folks home. Passive state action in not presenting alternatives makes the voluntary commitment no less an involuntary withdrawal from society.

29. 287 U.S. 45 (1932).

significance, however, a brief development of the history of due process is necessary.

Development of Due Process

As early as 1855 the Supreme Court, while not defining the words "due process of law," did say that the term was intended to have the same meaning as the words "by the law of the land" found in the Magna Carta.[30] In England at the time of the Magna Carta this phrase was used to substitute law for kingly force. The law substituted was feudal law, and as the feudal system disappeared "there was no reason why the meaning of 'freemen,' 'peers,' and 'law of the land' should not be extended and it was."[31] In 1354 King Edward III promised in the "Statute of Westminster of the Liberties of London" that "no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by due process of the Law."[32] However, due process was never extended to apply to the control of legislation, and received practically no judicial construction in English case law.[33]

On the other hand, due process has been applied in an ever increasing variety of situations in the United States. Originally, it was thought to encompass only procedural matters.[34] In 1884 the Court in dictum extended its meaning to include matters of substantive law.[35] This extension was followed in 1890 when the Court formally freed due process from its procedural mold.[36] The new applications of the due process guarantee were flexible enough to allow the courts to look to the inherent elements of justice in any determination of right.[37] While all

30. Davidson v. New Orleans, 96 U.S. 97 (1878); Murray v. Hoboken L. & I. Co., 59 U.S. (18 How.) 272 (1855). For the early development of due process of law, see Hough, *Due Process of Law—Today*, 32 HARV. L. REV. 218 (1918).

31. Willis, *Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331, 333 (1925).

32. Statute of 28 Edward III.

33. Willis, *supra* note 31, at 334.

34. Murray v. Hoboken L. & I. Co., 59 U.S. (18 How.) 272 (1855); Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819).

35. Hurtado v. California, 110 U.S. 516 (1884). The Court in dictum said that the concessions of the Magna Carta "applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property." *Id.* at 532.

36. Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890).

37. Kittrie, *supra* note 4, at 45.

scholars did not agree that the Supreme Court should have extended due process to include matters of substantive law, extend it they did.[38] The Court's function was to balance the individual's interests, as expressed in the general terms of life, liberty, and property, against the claims of society and state. It has been said:

> The work of examining, valuing and balancing all these varied and conflicting claims cannot be based on logical deduction from abstract legal principles, but rather will find its dynamics in economics, sociology, and philosophy. The task will be accomplished not by a tired-eyed scrutiny of the words of the Constitution, but by an examination of the concrete interests involved in each case, and by the individual views of the justices as to their validity and importance.[39]

Due process was at this stage of development and understanding when the Supreme Court made its momentous decision in *Powell.*

Powell v. Alabama and Due Process

In *Powell* seven Negro youths were arraigned, tried, convicted, and sentenced to death for rape twelve days after their arrest—without having the benefit of "counsel in any real sense." The Supreme Court reversed, holding that the denial of effective counsel—the customary incidents of consultation and opportunity to prepare for the trial—violated fourteenth amendment due process.

With this decision the Court demonstrated its willingness to apply due process concepts, even though such application was in keeping with sociological and philosophical aspects of society rather than strict legal rules. The Court declared, "the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."[40] This violated a firmly established, long-standing rule—that constitutional questions, even when properly raised and argued, are to be decided only when necessary for a determination of the rights of the parties in controversy before it.[41] The Court could have complied with this rule by relying on *Moore v. Dempsey,*[42] or by holding that on the facts as alleged and

38. Willis, *supra* note 31, at 344.
39. Brown, *Due Process, Police Power, and the Supreme Court,* 40 HARV. L. REV. 943, 966-67 (1927).
40. 287 U.S. at 71.
41. *Id.* at 77 (Butler, J. dissenting).
42. 261 U.S. 86 (1923). In this case five Negroes were sentenced to death on conviction for murder. The petition to the federal court alleged mob domination and the denial of

proved the Alabama trial court denied due process by failing to give the defendants reasonable time and opportunity to secure counsel.

This extension of due process was unnecessary. Therefore, the question is—what impelled the Court to abandon their established mode of procedure? If, as has been suggested, case law resembles a patch-work quilt,[43] the Court must have found a gaping hole which they chose to plug by means of the due process clause. Apparently, this was the utilization of due process to meet the demands of the time. The Court in 1932 recognized their responsibility to weigh the individual's interests against the claims of society and the state. Further, they were not deterred by constitutional rules from arriving at a result that had to be made.

The expansion of due process can be clearly understood by reference to the basic model proposed in the introduction. The Court was concerned with a fundamental interest—individual freedom. The concept of involuntariness is seen in the deprivation of that freedom. Therefore, we see the interaction of these concepts in terms of state action impinging upon the fundamental interest. When these two concepts come together there must be an extension of guarantees by the state in order to protect the fundamental interest. The right to counsel is present in the Constitution. The extension through due process of the right to effective counsel, however, can only be understood as a response to the state's prosecutorial thrusts. If the Court in 1932 was willing to span the gaps of the patch-work quilt by utilizing due process, it is submitted that it is incumbent on today's Court to take the same pervasive look at society and plug the gaps which deny justice to the mentally ill.

In 1932 the Court recognized that the right to effective counsel was constitutionally required to protect the liberty of seven Negro youths. If a person is involuntarily committed to a state mental institution, without a right to effective treatment, his liberty is similarly offended. He needs the protection of the Constitution just as much as the accused in *Powell*. Nevertheless, this is no more than a nice theoretical proposition unless the Court is willing to face and decide affirmatively the issue

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a fair trial. The Supreme Court of Arkansas had denied all exceptions to the rulings of the trial court. The Supreme Court of the United States held that if it were shown the trial was dominated by a mob, and the state courts failed to correct this wrong, perfection in the state machinery for correction would not prevent them from securing to the petitioners their constitutional rights. For a discussion of the similarity between *Powell* and *Moore* see 23 J. CRIM. L.C. & P.S. 841 (1933).

43. This view of case law is suggested by Hough, *supra* note 30, at 224.

of the existence of a constitutional right to treatment. The Court has refused to do so in the past.[44]

Before 1971 several mental patients sought judicial recognition of the right to adequate treatment. One district court had the opportunity to wrestle with the constitutional problems touching upon the rights of those committed to a mental institution—but chose not to deal with these issues.[45] The United States Court of Appeals for the District of Columbia, when faced with the narrow issue of applying a statute to find a statutory right to treatment, did not find it necessary to expand their holding to include a constitutional right to treatment.[46] The spirit of the *Powell* Court in 1932 to willingly go beyond the factual situation before them in order to serve an overall needed goal was not present. One dissenting justice wished to limit the issue before the court to whether the appellant was in need of treatment. This view of the case would have mooted the issue of a statutory right to treatment as well—a judicial attitude inconsistent with that necessary to establish a constitutional right to treatment.[47] This attitude is also prevalent among state courts; only one court having alluded that an involuntarily committed patient has a constitutional right to treatment.[48] In *Wyatt v. Stickney,*

44. The most interesting examples of the Court's refusal to hear this issue can be seen in the *Donaldson* decisions; Donaldson v. O'Connor, 400 U.S. 869 (1970); Donaldson v. O'Connor, 390 U.S. 971 (1968); Donaldson v. Florida, 371 U.S. 806 (1963); *In re* Donaldson, 364 U.S. 808 (1960). In all of these cases certiorari was denied. *See* Birnbaum, *supra* note 1, at 774.

45. *Maurietta v. Ciccone,* 305 F. Supp. 775 (W.D. Mo. 1969), was a proceeding on a habeas corpus petition by an unconvicted inmate of a medical center for federal prisoners. The court said the petition raised constitutional questions based on numerous authorities. However, they ducked these questions by saying: "Because it is possible, we decide this case without reaching the many grave constitutional questions which might be presented by an application of the principles articulated in the authorities noted in the last paragraph." *Id.* at 778.

46. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). The court stated: "Because we hold that the right to treatment provision applies to appellant, we need not resolve the serious constitutional questions that Congress avoided by prescribing this right." *Id.* at 455. This position was repeated by Chief Justice Bazelon in *Covington v. Harris,* 419 F.2d 617 (D.C. Cir. 1969).

47. Circuit Judge Danaher, dissenting in *Rouse v. Cameron,* saw the issue before the court as not whether Rouse had a statutory right to treatment but whether Rouse needed treatment. 373 F.2d at 462. While this is in keeping with looking at a case in light of the narrowest constitutional principles possible, it does not advance the spirit necessary to utilize the due process clause as a bridge to provide involuntarily committed persons with effective treatment. As well, it ignores the involuntariness which has impinged the fundamental interest of effective treatment for the mentally ill.

48. In *Nason v. Superintendent of Bridgewater State Hospital,* 353 Mass. 604, 233 N.E.2d 908 (1968), Nason, having been indicted for murder, was committed to Bridgewater State Hospital because he was mentally incompetent to stand trial. He challenged this commitment on a writ of habeas corpus. He argued that because the medical standards at Bridgewater were substantially lower than at other state hospitals he was being deprived of equal protection of the laws, and his confinement without treatment deprived him of due process of law. In discussing the issue of a right to treatment, the court said, "We merely determine that, if adequate treatment for Nason is not provided there within a reasonable

however, a federal district court unequivocally recognized a constitutional right to treatment.[49]

In *Wyatt* the guardians of patients confined in a state mental hospital brought a class action alleging that the treatment programs at the hospital were scientifically and medically inadequate, thereby depriving patients of their constitutional rights. The court, in an order written by Chief Judge Johnson, held that state mental institutions are constitutionally required to provide adequate medical treatment for civilly committed patients. In arriving at this conclusion the court permitted the defendants[50] six months "to promulgate and implement proper standards for the adequate mental care of the patients" in the state hospital. This allowed the defendants a reasonable time to implement the new mental health measures[51] which had already been undertaken.

The court relied on *Rouse v. Cameron*[52] and *Covington v. Harris*[53] in recognizing a constitutional right to treatment. Reliance on these two cases (both having dealt with a statutory right) is subject to the attack that the court could have looked to a statutory remedy and not have gone as far as they did. Therefore, the decision can be read for the proposition that if a state possesses a statutory right to treatment there is no necessity to establish a constitutional right.

It is just as plausible to give another reading to *Wyatt* which is more in keeping with its general spirit. The court, when talking about pa-

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time, the legality of his further confinement may be presented to the county court." *Id.* at 613, 233 N.E.2d at 914. Because Nason had, by statute, the right to receive treatment the court may have been alluding to a constitutional right.

49. 325 F. Supp. 781 (M.D. Ala. 1971).

50. The defendants were the commissioners and the deputy commissioner of the Department of Mental Health of the State of Alabama, the members of the Alabama Mental Health Board, the Governor of the State of Alabama, and the probate judge of Montgomery County, Alabama, as representative of the other judges of probate in the State of Alabama. *Id.* at 782.

51. The Alabama Department of Mental Health had for two and one half years been engaged in a transition from a departmental system organization to the unit-team system of delivery of mental health services and treatment to patients. The unit-team system would divide Alabama into contiguous geographical county units. Each unit would be led by a team leader who would normally be a professional. It was proposed that each unit contain such professionals as physicians, psychologists, and social workers, as well as psychiatric aids and nurses. The patients within the unit were to receive individual attention according to their needs. *Id.* at 783.

An interim order was filed March 2, 1972, referring to the massive reform needed. It specifically dealt with the operation of Partlow State School and Hospital which the court referred to as a warehousing institution because of its atmosphere of psychological and physical deprivation. Among the specific remedies ordered was the immediate employment of 300 persons. A final order was entered as this article went to press on April 13, 1972, *see* Birnbaum, supra note 8, at n.77.

52. 373 F.2d 451 (D.C. Cir. 1966).

53. 419 F.2d 617 (D.C. Cir. 1969).

tients who were involuntarily committed through noncriminal procedures without the constitutional protections that are afforded defendants in criminal proceedings, stated:

> When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . . Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."[54]

It is submitted the correct reading of *Wyatt* is that even when a statutory right to treatment is present there is still a constitutional right to adequate treatment. When a patient is not receiving the individual treatment that would give him a realistic opportunity to be cured or to improve his mental condition, this constitutional right is being violated irrespective of any statutory guarantees made to the patient. Such a reading is not unprecedented. The court simply utilized due process to plug the gap found in the patch-work quilt of case law. This reading of *Wyatt* is closely analogous to the spirit of the Supreme Court displayed in *Powell.* As such it is a judicial response to the needs of the time, not an opinion based on unfounded precedent.

Protection of the Fundamental Interest—Expansion of the State's Duty

The logical attack to the use of the extension of right to counsel to justify the recognition of a constitutional right to treatment is simply that one is talking of apples and oranges at the same time. Procedural rights are not substantive rights and therefore the argument must fail. Although no amount of rhetoric can conclusively bridge the gap, it is submitted that the basic model we have chosen to analyze the two areas eliminates the need to do so. We started with the premise that what we have in the two areas is a fundamental interest. Our concern is what the response of the state must be when it imposes upon this interest by involuntarily taking the individual's liberty. The concern is what the response must be, not the form of that response. The differences in the goals sought by state action dictate a difference in the protection which is needed. Therefore, that the response in one is procedural while the other is substantive does not mean we are confusing apples and oranges.

54. 325 F. Supp. at 784 (citations omitted).

It is the realization that the state possesses certain duties that is the common bond between the two areas.

Procedural rights for the criminally accused have been greatly expanded in order to define the state's duty toward the fundamental interest of human liberty. After *Powell* the Court extended the guarantee of counsel to all indigent criminal defendants in federal courts.[55] Although in 1942 the Court retrenched,[56] in 1963[57] they held that the indigent criminal defendant, whether in a state or federal court, was constitutionally guaranteed the right to be provided with counsel. However, this was not the end of procedural protection which the Supreme Court felt were guaranteed by the due process clause. Procedural guarantees were expanded and reached their highest degree of development in a juvenile case in 1967. In *In re Gault*[58] every aspect of juvenile court jurisdiction was weighed against the rights of a juvenile under due process. Due process guarantees were found to apply to notice, right to counsel, right to confrontation and cross-examination, right to a transcript of the proceedings, right to appellate review, and the privilege against self-incrimination.[59]

Similarities Between Juvenile Delinquency Proceedings and Involuntary Civil Commitments

Certain patent similarities exist between juvenile delinquency proceedings and involuntary civil commitment processes. The state action in both can be prompted by the same rationale—parens patriae.[60] It is

55. Johnson v. Zerbst, 304 U.S. 458 (1938).
56. In *Betts v. Brady*, 316 U.S. 455 (1942), the Court held that an absolute right to counsel in non-capital cases was only necessary under special circumstances and was not fundamental to due process in state courts. The "totality of facts" in a given case was to be the test for a denial of due process.
57. Gideon v. Wainwright, 372 U.S. 335 (1963).
58. 387 U.S. 1 (1967).
59. *Id.* at 10.
60. The doctrine of parens patriae has long been the rationale behind juvenile court proceedings. Under parens patriae the court intervenes when there is danger to the health and welfare of the child because of a lack of parental attention. *See generally* Lipsitt, *Due Process as a Gateway to Rehabilitation in the Juvenile Justice System*, 49 B.U. L. REV. 62 (1969); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

Compulsory commitments are generally made under two rationales: commitment because a person is dangerous to others, *i.e.*, the state's police power is exercised, or commitment because the patient is dangerous to himself, *i.e.*, the state as parens patriae. Frequently, these have been combined. *See generally* Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966). For purposes of the present analogy we are speaking of the state in its parens patriae role. However, the analogy also serves for commitments under the state police power. Even if it were truly possible to isolate those persons who really constitute a danger to others with some degree of certainty the end result is the same—deprivation of freedom and impingement of the fundamental

submitted that the following description of the mutual compact between the state and the delinquent child applies equally as well to the relationship between the involuntarily committed patient and the state.

> The child [patient] agrees to relinquish certain constitutional safeguards and to allow intervention into the family institution in exchange for the court's promise "to employ the best institutional, probationary, medical, psychiatric and other techniques in providing an opportunity for each child [patient] to develop into a mature [functional] and law-abiding citizen."[61]

This is the same guarantee the involuntarily committed patient wants. State action has affected his fundamental interests and in return he wants treatment. Unfortunately, the state has not been upholding its part of the bargain.[62] The course which must be followed by the judiciary has been partly chartered for them in *Gault*.

In *Gault* the Court found that parens patriae proved to be a great help in rationalizing the exclusion of juveniles from the constitutional scheme; further the Court said its meaning is murky and its historic credentials of dubious relevance.[63] It is submitted that involuntary civil commitments made under the strength of the state's role as parens patriae—when not followed by a right to treatment—can no more be justified than the delinquency proceedings found so defective in *Gault*. When the Supreme Court said "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principal and procedure"[64] they could have just as accurately been speaking of the history of involuntary civil commitments.[65] Outrageous doctor-patient ratios[66] are one indication that the involuntarily committed patient is not getting real help. This

interest through involuntary commitment. Also we see in the criminal law area that concomitant with imprisonment is rehabilitation. Therefore the duties which must flow from the state are the same no matter which rationale for commitment is used. For a discussion of the difficulty in determining when one does present a real danger, see Livermore, Malmquist and Meehl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

61. This quote which appears in Lipsitt, *supra* note 60, at 71, combines the author's language with that of Judge Ketchum which appears in Ketchum, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIM. & DELIN. 97 (1961).

62. Birnbaum, *supra* note 2, at 631-32.

63. 387 U.S. at 16.

64. *Id.* at 18.

65. It might be argued that decisions such as *Dixon v. Attorney General of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971) are giving these procedural rights to the mentally ill and therefore further use of *Gault* as an analogy is unwarranted. However, *Dixon*, which declared two doctor involuntary commitments to be unconstitutional, does not affect the analogy. Even if every procedural guarantee possible were given to the mentally ill the problem of inadequate treatment would still be present. Once committed, the patient has no alternative but what is provided for him by the state.

66. Birnbaum, *supra* note 1, at 779-81.

much is clear, to cure these ills judicial action is necessary. The action needed is not the same procedural due process guarantees made in *Gault*, but the recognition of a constitutional right to treatment.

Only by this recognition can the fundamental interests involved be fully protected. A decision clearly declaring that there is a right to treatment is a step just as fittingly within a court's decision-making capabilities as was the granting of the procedural guarantees to the juvenile through *Gault*. Courts should not be impeded by any feeling that due process can be extended to procedural rights easier than it can to substantive rights. Any timidity based on such a rationale would be unfounded. The time has long since passed when due process was thought to apply only to procedural rights.[67] That courts must extend themselves and decide there is a constitutional right to treatment is supported by practicality, reality, common sense and—since *Wyatt*—precedent.

It has been suggested that *Gault* provided the right to counsel and other procedural safeguards to the juvenile because of the nature of the treatment received after a judicial determination of delinquency has been made.[68] The theory is that the treatment a youth receives after being found a juvenile delinquent is so suspect that procedural guarantees are necessary to protect him from an unfounded exposure to this treatment. The same guarantees have not generally been given to the involuntarily committed patient. Even if they had, their effect would be minimal. The involuntarily committed patient, influenced by the "institutionalizing" effect of confinement would probably "choose" to remain in the institution.[69] Even though the evils of inadequate treatment are similar, the differences in the purposes to be served by state action call for the affording of different remedies.

The Court in *Gault* recognized that some type of shield was necessary if the fundamental personal interest of liberty was to be protected. Their response was to put an affirmative duty on the state to afford certain procedural guarantees to the juvenile. The remedy to the problem was procedural and they did not attempt to deal with inadequate treatment. In the mental health area, however, they must. Liberty is

67. Willis, *supra* note 31, at 343-44.
68. Lipsitt, *supra* note 60, at 71.
69. This line of reasoning has been verified by the aftermath of *Dixon v. Attorney General of Pennsylvania*, 325 F. Supp. 966 (M.D. Pa. 1971). The state undertook the task of recommitting all the patients previously committed under an unconstitutional procedure. Even though they were now offered additional procedural guarantees, roughly 88% voluntarily remained in the state hospitals. Letter from Ralph J. Phelleps, Special Assistant for Service to Offenders, Office of Mental Health, Department of Public Welfare to the *Duquesne Law Review*, Dec. 15, 1971.

similarly offended by state action and commitment without treatment is both "shocking and scandalous."[70] A procedural guarantee does not go to heart of the problem. There is even more at stake when dealing with a mental health patient. A juvenile is only confined as a delinquent until he reaches his majority. A mental health patient without proper treatment may be confined for life. Every conceivable procedural guarantee will not give this patient proper treatment. Furthermore, all juvenile delinquent suspects are before the court for an alleged wrong, while those patients committed under the state's banner of parens patriae are guilty only of unaccepted behavior. It is grossly unjust to lock these patients away without some guarantee of effective treatment. The juvenile who was suspected of some wrong-doing is given procedural guarantees. This involuntarily civilly committed patient who is guilty of not conforming to society must be given the constitutional right to adequate treatment.

Education

By compelling children to go to school the state has acted to develop and protect a fundamental person interest—education. In order to do so the state has taken away the child's liberty, and in return the state has certain affirmative duties. Similarly, treatment for the mentally ill should be recognized as a fundamental personal interest and therefore, when someone is involuntarily civilly committed to a state institution he should be entitled to adequate treatment in return for his loss of liberty. The state's activity of involuntarily taking the individual to protect and develop a fundamental personal interest gives rise to the state's duty to the individual.[71]

The education cases are generally based on equal protection. Too strict an adherence to equal protection, however, is misleading. In *Harper v. Virginia Board of Elections*,[72] the Court held that a classification based on wealth could not bar the exercise of voting rights. It has been suggested that the Court's decision was based on protecting the right to vote rather than eradicating the inequalities of the wealth classification.[73] The basic principle here has been labeled "minimum

70. Twerski, *Treating the Untreatable—A Critique of the Proposed Pennsylvania Right to Treatment Law*, 9 DUQ. L. REV. 220 (1970).
71. *Cf.* Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407, 420 (1966); Michelman, *supra* note 26, at 25.
72. 383 U.S. 663 (1966).
73. Michelman, *supra* note 26, at 24-25; *cf.* Comment, *Feeding the Hungry*, 5 HARV. CIV. RIGHTS—CIV. LIB. REV. 440, 457 (1970).

protection," that is, where a fundamental personal interest is infringed upon because of inequalities of wealth the state has an affirmative duty to relieve that inequality in order to protect the interest.[74] Reference to the model we have proposed shows that we are not arguing minimum protection although it may be present. Minimum protection is triggered by economic hazards whereas the state's affirmative duties in our model are triggered by the involuntary taking of the individual's liberty. Common to both, however, is the notion that in order to be able to participate in society certain state services must not be denied.[75] If the state's services are necessary in order to participate in society then an even greater duty should be on the state when it voluntarily takes the individual in order to provide those services.[76]

Education—A Fundamental Personal Interest—Affirmative State Duties

Education as a fundamental personal interest has an erratic history.[77] The strongest statement of its fundamental importance was made by Chief Justice Warren in *Brown v. Board of Education*:[78]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[79]

Lower courts adopted the reasoning of *Brown*, but failed to hold that

74. Michelman, *supra* note 26.
75. Goodpaster, *supra* note 27, at 225.
76. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954).
77. *See* Coons, Clune and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 373-83 (1969).
78. 347 U.S. 483 (1954).
79. *Id.* at 493. It has been suggested that the Court's reliance on *Brown* in other desegregation cases, *e.g.*, *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (parks), leads to the conclusion that the Court in *Brown* was concerned more with race than with education. Therefore, *Brown* is weak authority for the proposition that education is a fundamental personal interest. *See* Coons, Clune and Sugarman, *supra* note 79, at 380-81; *Development*, *supra* note 17, at 1089-90.

education was a fundamental interest.[80] In *Serrano v. Priest*,[81] however, the California Supreme Court, in invalidating that state's public school financing system which was substantially based on local property taxes, held that education was a fundamental interest.[82] Recognizing the lack of direct authority for this proposition, the court examined the role of education in our modern industrial society. The court said that education was indispensable in that it affected both the individual and society. Education was found to affect the individual's chances for economic and social success, and his development as an active political citizen. In comparing education to voting, which has been deemed a fundamental interest since other basic rights are founded upon it,[83] the court emphasized that both are crucial to the functioning of a democracy. Convinced that the uniqueness of education compelled treating it as a fundamental interest, the court summarized the arguments to support its conclusion: despite a disadvantaged background education can give the individual an opportunity to participate in free enterprise; education is relevant to every individual for a long time; education molds the personality of the recipient; and finally, education is so essential, states make attendance compulsory.[84]

Serrano's significance, however, lies beyond the court's holding. It is submitted that *Serrano* can be read as saying that when the state involuntarily takes the child's liberty, by compelling him to attend school in order for the state to protect and develop the interest of education, the state must give something in return. California was forced to reorganize its educational financing scheme so that a child's education would not depend on the wealth of his parents and neighbors. More importantly, the state must strive for quality education for all of its citizens—"the right to an education means more than access to the classroom."[85] Relying on *Reynolds v. Sims*,[86] the court stated: "If a

80. *E.g.*, Hargrave v. McKinney, 413 F.2d 320, 324 (5th Cir. 1969) (referring to education as an interest that may be fundamental); Hobson v. Hansen, 269 F. Supp. 401, 496-97, 507 (D. D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (referring to education as a "critical right").

81. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

82. California's system of financing public education was not the first state system to come under attack. For an analysis of other state's decisions on public education financing schemes similar to the one in *Serrano* and a discussion on whether the United States Supreme Court will accept the *Serrano* view see Shanks, *Educational Financing and Equal Protection: Will the California Supreme Court's Breakthrough Become the Law of the Land*, 1 J. LAW & ED. 73 (1972).

83. 5 Cal. 3d at 608, 487 P.2d at 1258, 96 Cal. Rptr. at 618 *citing* Reynolds v. Sims, 377 U.S. 533, 562 (1964).

84. 5 Cal. 3d at 609-10, 487 P.2d at 1258-59, 96 Cal. Rptr. at 618-19.

85. *Id.* at 607, 487 P.2d at 1257, 96 Cal. Rptr. at 617.

86. 377 U.S. 533 (1964).

voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education."[87] The duties imposed on the state in return for compelling the child to give up his freedom can also be drawn from prior education cases.

In compulsory education as in involuntary civil commitment[88] the state's authority to take the individual's liberty is based on two theories: parens patriae and police power.[89] The state in exercising its police power takes it upon itself to provide the education the parent may be unable to provide for the child.[90] In upholding compulsory education laws, courts have recognized that only the state is in a position to assure adequate education.[91] Generally, the state has complete control over the education of children. Early cases upheld the right of the parent to select courses for his child.[92] Today, however, courts will uphold the state's authority to supervise education unless the parents can show an infringement of some constitutional right.[93] Some courts have gone beyond prohibiting what the state may do in educating children and have held that the state has certain affirmative duties in educating the young.[94] Courts requiring these affirmative duties, explicitly or inferentially, rely in part on the state's involuntary taking of the child's liberty.

Following *Brown*, the question arose whether the state had an affirmative duty to alleviate racial imbalance in schools where the imbalance was not a result of racially motivated state action.[95] Many courts read *Brown* as merely requiring that a state discontinue support for segregated schools.[96] Other courts, however, have interpreted *Brown* as em-

87. 5 Cal. 3d at 613, 487 P.2d at 1262, 96 Cal. Rptr. at 622.
88. *Supra* note 60.
89. Parr v. State, 117 Ohio St. 23, 26, 157 N.E. 555, 556 (1927).
90. Compulsory attendance legislation is in effect in all fifty states. N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 519 (1955). The state can compel school attendance, but cannot compel public school attendance for those who choose to go to adequate private schools. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
91. Commonwealth *ex rel.* School District of Pittsburgh v. Bey, 166 Pa. Super. 136, 140, 70 A.2d 693, 695 (1950).
92. *E.g.*, State *ex rel.* Sheibley v. School Dist. No. 1, 31 Neb. 552, 48 N.W. 393 (1891).
93. *E.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (statute requiring that passages from the Bible be read at the beginning of each school day, held unconstitutional); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compulsory flag staute and pledge of allegiance held unconstitutional).
94. *See generally* Cox, *The Supreme Court, 1965 Term, Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).
95. *See* Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role for Private Constitutional Litigation*, 35 GEO. WASH. L. REV. 698 (1967); *Developments supra* note 17, at 1183-87.
96. *E.g.*, Bell v. School City, 213 F. Supp. 819 (N.D. Ind.) *aff'd*, 324 F.2d 209 (7th Cir.

phasizing the inherent inequality of segregated schools[97] and have therefore, felt compelled to require affirmative action by the state to relieve the detrimental effects[98] of segregation. In *Barksdale v. Springfield School Committee*,[99] the court found the schools to be racially imbalanced due to a non-discriminatory districting plan. In ordering compulsory integration the court emphasized the state's affirmative duty when it compels attendance at school: "Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise . . . ."[100]

It has been suggested that since the state compels the child to participate in its educational system, it also has an affirmative duty to eradicate the unequal achievement of students from disadvantaged backgrounds by providing compensatory education.[101] Compensatory education programs require unequal spending in order to achieve equal results.[102] Their purpose is to help the socially disadvantaged student without adversely affecting the student who is progressing normally.[103] In *Hobson v. Hansen*,[104] the District of Columbia school system was carefully examined. The court found that the system adversely affected "disadvantaged minorities." As part of its ordered remedy, the court directed the school district to implement a compensatory education program to overcome the effects of segregated education.[105] It is submitted that although the court did not say the state's affirmative duties

1963), *cert. denied*, 377 U.S. 924 (1964); Brown v. Bd. of Educ., 139 F. Supp. 468 (D. Kan. 1955).

97. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954), where the Court said that, "Separate educational facilities are inherently unequal."

98. *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950). In *McLaurin*, a Negro admitted to graduate school, although permitted to use all facilities was segregated from the whites. The Court, in holding the plan unconstitutional, said that the "restrictions impair and inhibit his ability to study, . . . and, in general, to learn his profession." *Id.* at 641.

99. 237 F. Supp. 543 (D. Mass.), *vacated and remanded with direction to dismiss without prejudice*, 348 F.2d 261 (1st Cir. 1965).

100. 237 F. Supp. at 546. *Accord*, Blocker v. Bd. of Educ., 226 F. Supp. 208, 227 (E.D. N.Y. 1964), where the court said: "In a publicly supported, mandatory state educational system, the plaintiffs have the civil right not to be segregated, not to be compelled to attend a school in which all of the Negro children are educated separate and apart from over 99% of their white contemporaries."

101. Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. Rev. 1147, 1167, 1170-71 (1966).

102. Comm. on Race and Education, Race and Equal Educational Opportunity in Portland's Public Schools 187 (1964). *See generally Developments, supra* note 17, at 1187-89.

103. Bloom, Davis and Hess, Compensatory Education for Cultural Deprivation 6 (1965).

104. 269 F. Supp. 401 (D. D.C. 1967), *aff'd sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

105. 269 F. Supp. at 515. *See generally* Comment, *Hobson v. Hansen, Judicial Supervisor of the Color Blind School Board*, 81 Harv. L. Rev. 1511 (1968).

were based on its compelling children to attend school, it was not necessary to do so. The entire problem arose in the context of compulsory education. The court was concerned with the evils caused by social disparity. One of the remedies to cure these defects was compensatory education. However, without compulsory education such a remedy would make absolutely no sense. It is only because there is compulsory education that a compensatory education program can be used as a vehicle to achieve the desired end—social and educational equality.

Parents have successfully argued that their children should not be compelled to go to inferior schools. In *In re Skipwith*,[106] Negro parents refused to send their children to racially segregated schools with inferior teacher staffing. The parents were cited as respondents by the New York City Board of Education for violating the compulsory attendance laws. The court held that the parents had a constitutional right to elect no education for their children rather than to subject them to discriminatory inferior education. The necessary implication of this decision is that if the state is to compel attendance at school, it must provide more than inferior education in order to justify the deprivation of liberty.[107]

The taking of the child's liberty by compelling him to attend school has also been used to justify the state's tort liability. In *Jackson v. Hankinson*,[108] the plaintiff's son was injured by a fellow student while on a board of education bus. In holding that the board of education could be liable for the injury for failure to exercise "reasonable supervisory care" the court said:

> It must be borne in mind that the relationship between the child and the school authorities is not a voluntary one but is compelled by law. The child must attend school . . . and is subject to school rules and disciplines. In turn the school authorities are obligated to take reasonable precautions for his safety and well-being.[109]

State recognition of some responsibility when it compels children to attend school adds support to the judicial recognition of affirmative duties. Providing books,[110] clothing,[111] and transportation[112] for those

106. 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958); *see* Dobbins v. Commonwealth, 198 Va. 697, 96 S.E.2d 154 (1957).
107. *Compare* Birnbaum, *supra* note 9.
108. 51 N.J. 230, 238 A.2d 685 (1968).
109. *Id.* at 236, 238 A.2d at 688. *Contra*, Wood v. Bd. of Educ., 412 S.W.2d 877 (Ky. 1967).
110. *E.g.*, BURNS' IND. STAT. ANN. § 28-5314 (1970).
111. *Id.*
112. *E.g.*, N.J.S.A. tit. 18a, § 39-1 (1968).

who might be unable to comply with the compulsory attendance laws without such aid is consistent with the state's position toward education. Courts in stating that the primary purpose of compulsory education is to secure attendance of the children at school, have recognized the state's authority to make attendance possible.[113] In *Chance v. Mississippi State Textbook Rating and Purchasing Board*,[114] free school books were provided for pupils in all elementary schools. In rejecting the argument that providing free books for students in parochial schools violated the establishment clause of the first amendment, the court stated: "If the pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it 'by all suitable means.' "[115] Similarly, in *Everson v. Board of Education*,[116] the Supreme Court upheld a statute authorizing the school boards to provide transportation to and from parochial and other private schools as well as public schools. In rejecting the establishment of religion argument, the Court reasoned that transportation to private schools aided those compelled to attend and not the school attended.

Treatment—A Fundamental Personal Interest—Affirmative State Duties

In order to understand what the developments in education mean to treatment for the mentally ill, we must refer to the proposed model. If education is a fundamental personal interest then treatment for the mentally ill is no less than a fundamental personal interest. Treatment for the mentally ill is also unique, in that it affects both the individual and society. For the mentally ill, treatment affords an opportunity to re-enter society as a normal productive individual; treatment is relevant to all those who are committed; treatment may continue over a lengthy period of time; and, treatment works against the stigma of institutionalization in a mental hospital. Society profits from the indi-

113. *See, e.g.*, State *ex rel.* School City v. Union Civil Twp., 222 Ind. 267, 53 N.E.2d 159 (1944).

114. 190 Miss. 453, 200 So. 706 (1941).

115. *Id.* at 468, 200 So. at 710. In *Johnson v. New York State Educ. Dep't.*, 449 F.2d 871 (1971) *cert. granted*, 40 U.S.L.W. 3398 (U.S. Feb. 27, 1972) (No. 5685). The Court upheld a statute which provided state financial aid to local school districts to buy books to be loaned free to students in grades 7-12, but not for grades 1-6. The court noted but obviously rejected the amicus brief's argument: "That whenever the State undertakes to provide an education, there is a duty to provide free textbooks." 449 F.2d at 878.

116. 330 U.S. 1 (1947).

vidual's development as an active citizen. Although possibly an oversimplification, an individual must have a mind free of mental disorder to vote intelligently, to be educated or to profit from any education received.[117] As in education, the state's interest in treating the mentally ill is evidenced by compulsory commitment statutes. Although no court has specifically recognized treatment for the mentally ill as a fundamental interest, certain intimations do exist. In *Wyatt v. Stickney*,[118] the court stated that the "purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment."[119] Each patient must receive treatment that will enable him to be cured or to improve his mental condition.[120] It is not important whether treatment for the mentally ill has been recognized as a fundamental interest; it is only important that treatment for the mentally ill deserves such recognition.[121]

Treatment for the mentally ill is, or should be, a fundamental personal interest. By involuntarily taking the individual's liberty, the state must in return, provide adequate treatment. In mental health, as in education, courts in requiring affirmative duties have relied in part on the state's involuntary taking of the individual's liberty. In *Department of Mental Hygiene v. Kirchner*,[122] the California Supreme Court invalidated, as a denial of equal protection, a statute imposing liability upon one person for the support of another in a state institution. The Department of Mental Health was precluded from recovering the cost of the care and maintenance of a mother in a state mental institution from the estate of the mother's daughter. The court reasoned that the purpose of the involuntary confinement was to protect society, and possibly to rehabilitate the individual. Therefore, the state had to bear "the cost of maintaining the state institution, including provision for adequate care for its inmates. . . ."[123] This represents one judicial recognition of an affirmative state duty in return for the involuntary taking of the individual's liberty—it is not a recognition of a constitutional right to treatment.

117. *Cf.* Reynolds v. Sims, 377 U.S. 533 (1964); Goodpaster, *supra* note 27, at 253.
118. 325 F. Supp. 781 (1971).
119. *Id.* at 784.
120. *See* Dept. of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964). In *Kirchner*, the court said that the purpose of treatment for the civilly committed encompasses the individual's "possible reclamation as a productive member of the body politic." *Id.* at 718, 388 P.2d at 722, 36 Cal. Rptr. at 490. *Compare*, text *supra* page 642, in reference to *Serrano*.
121. *Cf.* Coons, Clune and Sugarman, *supra* note 77, at 382.
122. 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964).
123. *Id.* at 718, 388 P.2d at 722, 36 Cal. Rptr. at 490.

Conclusion

The right to counsel and the right to education are susceptible of a common analysis. This analysis demonstrates that once a fundamental personal interest is interfered with by state action the judiciary has responded with the creation of affirmative state duties to protect and promote the interest. If the right to an education means more than access to a classroom, then care for the mentally ill must mean more than custodial confinement. If the right to counsel means the right to effective representation, then treatment must mean something more than one doctor to every thousand patients. Society has not tolerated blatant violations of fundamental personal interests in education and right to counsel—how can we do so for the mentally ill?

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DUQUESNE LAW REVIEW

Published by Students of the Duquesne University School of Law, Pittsburgh, Pennsylvania

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