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The Right to Treatment for Juveniles in Texas: A Legislative Proposal.

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COMMENT

THE RIGHT TO TREATMENT FOR JUVENILES IN TEXAS: A LEGISLATIVE PROPOSAL

MARK H. MARSHALL

I. INTRODUCTION

During the past ten years much attention has been focused upon preserving our nation's dwindling supply of natural resources. While the average American citizen associates oil, water, and air with the term "natural resources," this nation's most precious resource, its children, remains overlooked. The goal of conservation, to leave succeeding generations resources with which to build a greater future, becomes an exericse in futility when we fail to develop the potential of those succeeding generations. This failure is evidenced by the unprecedented increase in crime among persons under the age of twenty-one.[1] Forty-three percent of all police arrests in 1974 involved persons under twenty-one years of age.[2] Further-

1. The F.B.I. reported that in 1974 the national crime rate, a reflection of the chances of becoming a victim of major crime, had risen 32 percent since 1969 and 157 percent since 1960. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 10, 11 (1974). *See generally* Reaves, *The Right To Treatment For Juvenile Offenders*, 7 CUM. L. REV. 13, 13-14 (1976).

2. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 10, 45 (1974). *See generally* S. WINSLOW, JUVENILE DELINQUENCY IN A FREE SOCIETY 2-3 (1968); Pyfer, *The Juveniles Right To Receive Treatment*, 6 FAMILY L.Q. 279, 280-81 (1972); Reaves, *The Right To Treatment For Juvenile Offenders*, 7 CUM. L. REV. 13, 13-14

more, the FBI has established that one third of all arrests for violent crime[3] in suburban areas involve persons under twenty-one years of age.[4] Recent studies indicate that Texas is not immune to this staggering juvenile crime rate.[5]

Although American courts, since 1899, have segregated youthful offenders from adult judicial and penal systems,[6] recent statistics indicate that rehabilitation has not resulted from these efforts.[7] The Federal Bureau of Investigation (F.B.I.) found that nearly seventy-five percent of offenders under twenty years of age released from custody in 1965 were re-arrested within five years.[8] As a result, some critics suggest the approach taken toward juveniles is too lenient and, therefore, advocate harsher punishment of juvenile offenders.[9] At the opposite end of the spectrum, others suggest the *parens patriae*[10] promise of non-penal treatment is merely a

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(1976).

3. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 204 (1975). Murder, rape, robbery, and aggravated assault constitute violent crime. *Id.* at 204.

4. *Id.* at 204.

5. *See* LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 300-08 (1973). The Sourcebook lists the number of children's cases disposed of in juvenile court by state and county. A total of 15,713 cases were disposed of in Harris County, Texas. That is three times the number disposed of in St. Louis, Missouri and twice that of San Francisco, California. *Id.* at 302-06. *See also* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 209 (1977). The Uniform Crime Report lists the 30 Metropolitan areas which appear most frequently among the top 30 cities in per capita reported crime rates. Of the top 30 cities suffering from violent crime, 6 are in Texas. Well over half of these crimes involve juvenile offenders. *Id.* at 209.

6. Prior to 1899 there was no legal distinction made between juveniles and adults. In that year the Illinois legislature created the first juvenile court. This court employed a parental and therapeutic approach designed to eliminate behavioral traits that brought the juvenile into the system. *See generally* R. PERKINS, PERKINS ON CRIMINAL LAW 837-42 (2d ed. 1969); Mennel, *Origins of the Juvenile Court*, 18 CRIME & DELINQUENCY 68, 70-77 (1972).

7. Seventy one percent of those persons arrested who were between the ages of 20 and 24 years and 65 percent of those ages 20 to 29 were rearrested within five years of their initial contact with police. *See* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS AND GOALS FOR JUVENILE JUSTICE 33 (1977).

8. *Id.* at 34.

9. *See* Wigmore, *Juvenile Court vs. Criminal Court*, 21 ILL. L. REV. 375, 375-77 (1926). The author contests the very existence of the juvenile court by questioning the premises underlying such a system of justice and recommending imprisonment for juvenile offenders. *Id.* at 375-77.

10. *Parens patriae* originated with the feudal chancery court. The term is literally translated as "parent of the country." *See* West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir. 1971). The doctrine was invoked to enable the state to protect the property rights of impoverished minors. Upon acceptance in the United States, the jursidiction of the *parens patriae* ideal was intended to apply first to personal injuries and later to children accused of criminal violations. *See In re* Gault, 387 U.S. 1, 16 (1967).

change of labels from the adult criminal process.[11] Justice Fortas aptly described the juvenile's plight in *Kent v. United States*,[12] by noting that juveniles were denied procedural safeguards with the promise of treatment, yet never received that promised treatment.[13] Due to such criticism the courts began to reevaluate the juvenile justice system.[14] The changes resulting from this reevaluation, however, apply to the adjudicative stage of juvenile proceedings and do not advance the goal of post-adjudicative rehabilitation.[15] In recent years a solution to the perplexing problem of post-adjudicative rehabilitation has emerged in the "right to treatment" concept.[16] Simply stated, the "right to treatment" guarantees the juvenile post-adjudicative care and treatment aimed at rehabilitation.[17] This concept found its origin in the mental health field in the late 1950's[18] and by the middle of the next decade was applied to the post-adjudicative stage of the juvenile process.[19]

This comment will discuss the development of the right to treatment concept and its applicability to the juvenile justice system. Consideration will be given to the judicial recognition of the juvenile's right to treatment and the counterproductive lack of legislative response to this development. Recommendations will be made for incorporating the "right to treatment" into Texas' juvenile justice statutes as a tool to fulfill the promise of rehabilitation.

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11. *See In re* Winship, 397 U.S. 358, 375 (1970) (Burger, J., dissenting); *In re* Gault, 387 U.S. 1, 78-81 (1967) (Stewart, J., dissenting). *See generally* A. ALEXANDER, *Constitutional Rights in the Juvenile Court*, in JUSTICE FOR THE CHILD 82, 92 (Rosenheim ed. 1962).

12. 383 U.S. 541 (1966).

13. *Id.* at 555-56.

14. Reevaluation began with *Kent* and continued with later Supreme Court decisions. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 531-34 (1971); *In re* Winship, 397 U.S. 358, 365-68 (1970); *In re* Gault, 387 U.S. 1, 12-27 (1967).

15. While *Gault, Kent,* and *Winship* adopted certain procedural safeguards applicable to juveniles, the Supreme Court stopped short of adopting a constitutional right to treatment. *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975) (Burger, J., concurring) (Court rejected opportunity to rule on right to treatment as applied to mentally ill). Chief Justice Berger's concurring opinion reflected the Court's reluctance to recognize a right to treatment. The Court declined, however, to review *Burnham v. Georgia*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied*, 422 U.S. 1057 (1975), a Fifth Circuit case which reaffirmed the holding that a right to treatment does exist. *Id.* at 1321.

16. *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 502 (1960); Burris, *The Right to Treatment*, 57 Geo. L.J. 673, 673-75 (1969).

17. *See* Reaves, *The Right to Treatment for Juvenile Offenders*, 7 CUM. L. REV. 13, 16-17 (1976); Comment, *Establishment of a Constitutional Right to Treatment for Delinquent Children*, 26 BAYLOR L. REV. 366, 368-69 (1974). *See generally* Birnbaum, *The Right to Treatment* 46 A.B.A.J. 499, 499 (1960).

18. *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 499 (1960).

19. *See* Kittrie, *The Juvenile Process*, 57 GEO. L.J. 848, 871-75 (1969).

II. RIGHT TO TREATMENT

The mental health field provided the impetus which brought the "right to treatment" into national focus.[20] Morton Birnbaum first advocated the concept in 1960.[21] Birnbaum argued that an individual institutionalized under the *parens patriae* philosophy must receive "adequate medical and psychological treatment."[22] Believing the inherent problems in the system could be remedied through the creation of new and more advanced treatment facilities,[23] Birnbaum asserted that judicial recognition of a right to treatment would force legislatures to provide appropriate facilities.[24]

Judicial recognition of a right to treatment can have either a statutory or a constitutional basis.[25] The first case to consider the right to treatment did so from a statutory basis.[26] The Court of Appeals for the District of Columbia held that commitment of a sexual psychopath in an institution for the violently insane, without treatment, violated a statute specifically providing for treatment of offenders.[27] Subsequent decisions have required the existence of special treatment facilities, which must

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20. *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 499-505 (1960); Editorial, *A New Right*, 46 A.B.A.J. 516, 516-17 (1960).

21. *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 500-01 (1960).

22. *Id.* at 504.

23. *Id.* at 501.

24. *See id.* at 505. Birnbaum's efforts have been met with limited success. One need consider that currently only five states have recognized a statutory right to treatment. *See* IDAHO CODE § 66-344 (1980) (every patient shall be entitled to humane care and treatment); N.M. STAT. ANN. § 34-2-13 (Supp. 1975) (every patient is entitled to humane care and treatment to the extent facilities and personnel are available); OKLA. STAT. ANN. tit. 43A, § 91 (West 1979) (all patients at institutions shall be given humane care and treatment); TEX. REV. CIV. STAT. ANN. arts. 5547-5570 (Vernon 1958) (adequate medical and psychiatric care and treatment shall be given each patient in accordance with the highest standards accepted in medical practice); UTAH CODE ANN. § 64-7-46 (Supp. 1979) (every patient entitled to humane care and treatment). Four other states as well as the District of Columbia have given tacit recognition to a right to treatment. *See, e.g.*, CAL. WELF. & INST. CODE § 7251 (Deering 1979) (hospitalized individual is entitled to care); D.C. CODE ANN. § 21-562 (West 1967) (hospitalized patient is entitled to treatment); ILL. ANN. STAT. ch. 91½, § 100-7 (Smith-Hurd 1980-1981) (those committed to state hospitals are entitled to highest quality care and treatment); IOWA CODE ANN. § 225.15 (West Supp. 1980-1981) (patient is entitled to examination and appropriate treatment); R.I. GEN. LAWS § 14-1-2 (1970) (patient is entitled to examination).

25. *See generally* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS AND GOALS FOR JUVENILE JUSTICE 9, 59-61 (1977). This volume contains the working papers of the National Task Force to Develop Standards and Goals for Juvenile Justice and Delinquency Prevention. It contains an excellent analysis of case law pertaining to the right to treatment. *See id.* at 56.

26. *See* Miller v. Overholser, 206 F.2d 415, 419 (D.C. Cir. 1953).

27. *Id.* at 420. *See generally* Note, *Persons In Need Of Supervision: Is There A Constitutional Right To Treatment?*, 39 BROOKLYN L. REV. 624, 645 (1973).

have been provided for by statute, before one could be confined under the provisions of that statute.[28] Eventually, the judiciaries' attention shifted from the need for centers of treatment, to the availability of treatment within those centers.[29] While upholding the constitutionality of a Maryland statute allowing confinement of delinquent juveniles suffering from mental health problems,[30] the district court in *Sas v. Maryland*,[31] held that if treatment was not provided there would be no justification for confinement and the statute would be subject to constitutional attack.[32]

In the absence of a statutory right to treatment, the institutionalized individual was forced to find implied support for the "right to treatment" in the constitution.[33] Such constitutional support was first announced in *Rouse v. Cameron*.[34] Notwithstanding the fact the court's opinion was based on a statute,[35] the decision concluded that anyone confined to a mental institution has a constitutional right to treatment founded in the fifth amendment.[36] Further, the *Rouse* court incorporated the eighth amendment prohibition against cruel and unusual punishment[37] by not-

28. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 457-58 (D.C. Cir. 1966) (based on statute, court held a right to treatment existed which would be enforced); Sas v. Maryland, 334 F.2d 506, 516 (4th Cir. 1964) (court expressly rejected appellant's constitutional challenge of Maryland statute); Commonwealth v. Page, 159 N.E.2d 82, 85 (Mass. 1959) (finding non-penal commitment valid under certain circumstances, but remedial aspects of commitment had to be existent; not proper to confine appellant for treatment when treatment facilities were non-existent).

29. This shift was first noted in *Sas v. Maryland*, 334 F.2d 506, 516-17 (4th Cir. 1964). The court required that the proposed objectives of the statute had to be implemented sufficiently to justify elimination of certain procedural safeguards. *Id.* at 516-17.

30. MD. ANN. CODE, art. 31B, §§ 645A, 688 (Supp. 1964).

31. 334 F.2d 506 (4th Cir. 1964).

32. *Id.* at 516-17.

33. As previously mentioned, the only bases recognized by the courts for the right to treatment have been statutory or constitutional. *See* NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELIQUENCY PREVENTION, STANDARDS AND GOALS FOR JUVENILE JUSTICE 9, 59-61 (1977).

34. 373 F.2d 451, 452 (D.C. Cir. 1966) (appellant involuntarily committed to mental hospital after felony acquittal due to insanity plea).

35. *Id.* at 453.

36. *Id.* at 453. While *Rouse* followed several other courts in enforcing a statutory right to treatment, it was one of the first cases to intimate that there might be a constitutionally based right to treatment. Chief Judge Bazelon indicated the due process and equal protection clauses, as well as the prohibition against cruel and unusual punishment, might support such an argument. *See id.* at 453.

37. U.S. CONST. amend. VIII. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) (indefinite confinement without treatment is cruel and unusual punishment); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972) (confinement of juveniles in dark, cold cells is cruel and unusual punishment); *In re* Wilson, 264 A.2d 614, 618 (Pa. 1970) (court set out factors necessary to justify making juveniles subject to longer periods of confinement than adults charged with the same offense).

ing "[i]ndefinite confinement without treatment of one who has been found not criminally responsible may be so inhumane as to be 'cruel and unusual.' "[38]

Subsequently, an Illinois court[39] specifically held that failure to provide proper treatment to a seventeen year old deaf-mute was a violation of both the eighth and fourteenth amendments.[40] This rationale was followed by a Massachusetts court[41] which held that a program of treatment must be provided within a reasonable time for an objection on eighth or fourteenth amendment grounds to be overcome.[42] Eventually the Alabama Federal District Court in *Wyatt v. Stickney*[43] placed the right to treatment squarely on constitutional grounds.[44] The court stated that confinement without treatment defeated the very purpose of confinement.[45] "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane and therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."[46]

III. Changes in the Adjudicative Stage

Procedural changes resulting from recent United States Supreme Court

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38. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966). *See generally* Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499, 499-502 (1960). Such confinement has also been defined as that which is of such a repulsive nature as to "shock the conscience" of reasonable and civil people. *See* Holt v. Sarver, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971). The court held that the eighth amendment prohibition against cruel and unusual punishment precluded intolerable conditions as well as unjust individual punishment. *See id.* at 372-73.

39. *See In re* Harris, 2 Crim. L. Rep. 2412 (Ill. Cir. Ct., Cook Co., Juv. Div. 1967). The court ordered that Harris, a seventeen year old deaf mute, be transported to special classes which would help him overcome his disability. The court based its holding on an Illinois Juvenile statute, but went on to indicate that constitutional grounds did exist insuring Harris' right to proper treatment. *See id.* at 2412. *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?,* 57 Geo. L.J. 848, 875 n.22 (1969).

40. *See In re* Harris, 2 Crim. L. Rep. 2412, 2412 (Ill. Cir. Ct., Cook Co., Juv. Div. 1967).

41. *See* Nason v. Superintendent of Bridgewater State Hosp., 233 N.E.2d 908, 909 (Mass. 1968). After denial of writ of mandamus, Nason sought habeas corpus relief contending that his confinement without treatment denied him equal protection of the laws and due process. *Id.* at 909.

42. *Id.* at 914.

43. 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305, 1309 (5th Cir. 1974).

44. *See id.* at 785.

45. *See id.* at 785.

46. *Id.* at 785. *See generally* Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499, 501 (1960); Reaves, *The Right to Treatment for Juvenile Offenders,* 7 Cum. L. Rev. 13, 20-21 (1976).

decisions apply to the adjudicatory stage of the juvenile proceeding.[47] The Supreme Court, in keeping with the original goals of the juvenile justice system, has recognized that the juvenile court's purpose is to determine the needs of the juvenile rather than adjudicating criminal conduct.[48] While recognizing the juvenile must be afforded certain procedural safeguards, the Court in its opinion in *In re Gault*[49] declared that those safeguards could not interfere with the unique benefits of the juvenile system.[50] Subsequently, the Court in *In re Winship*,[51] expanded the reasoning of *Gault* by holding that juveniles were entitled to a criminal standard of proof as this would not interfere with the juvenile's individualized right to treatment.[52] In a later decision, however, the Court refused to extend the right to a jury trial to juveniles fearing that such a right would interfere with the juvenile process.[53] These cases do not answer the question of what to do with juvenile offenders once they are taken off the street.[54] Suggestions, plans, and standards are abundant, yet none will be fully effective if implemented outside a right to treatment framework.[55]

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47. *See, e.g., In re* Winship, 397 U.S. 358, 362 (1970) (juveniles entitled to criminal standard of proof); *In re* Gault, 387 U.S. 1, 16 (1967) (while juvenile system confers many benefits on the juvenile, he must be given notice of pending charges, informed of the right to counsel and the privilege against self incrimination, and be afforded the right of confrontation and cross-examination); Kent v. United States, 383 U.S. 541, 554 (1966) (needs of the juvenile are paramount to adjudication of criminal conduct). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 551 (1971) (denying juvenile the right to jury trial).

48. *See* Kent v. United States, 383 U.S. 541, 554 (1966). The purpose of the juvenile court is to determine the needs of the juvenile rather than to adjudicate criminal conduct. *Id.* at 554-56.

49. 387 U.S. 1 (1967).

50. *See id.* at 17.

51. 397 U.S. 358 (1970).

52. *See id.* at 364.

53. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971).

54. While some lower courts are moving toward improvement of post-adjudicatory care and treatment, others are not. *Compare* Morales v. Turman, 383 F. Supp. 53, 125-26 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977) (establishing guidelines for post-adjudicatory care) *with* Pena v. New York State Div. for Youth, 419 F. Supp. 203, 208-10 (S.D.N.Y. 1976) (court may evaluate punitive and therapeutic aspects of institutions) *and* Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1372-73 (D.R.I. 1972) (minimum conditions established by court). *See generally* Volenik, *Right to Treatment: Case Developments in Juvenile Law*, 3 JUST. SYS. J. 292, 297-306 (1978).

55. The recently published Standards for the Administration of Juvenile Justice are an excellent example of such standards. They were prepared by the National Advisory Committee for Juvenile Justice and Delinquency Prevention. The purpose of the standards is "to respond to the enormous annual cost and unmeasurable loss of human life, personal security, and wasted human resources caused by juvenile delinquency. . . ." NATIONAL ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 1-13 (1980).

IV. Right to Treatment Arguments and Their Application to the Juvenile System

Examination of case law makes it clear that two basic arguments have emerged in support of the right to treatment:[56] the *parens patriae* argument, which justifies intervention and commitment based upon the state's police powers and its role as *parens patriae;* and the *quid pro quo* argument, which states if procedural safeguards are removed treatment must be the *quid pro quo.*[57] These arguments have been adopted in juvenile cases.[58] In 1967, two decisions by the District of Columbia Circuit extended the rights recognized in *Rouse* to juveniles.[59] Both decisions insisted that in appropriate cases there exists a legal right to custody that is not inconsistent with the *parens patriae* promise in the law.[60] Subsequent cases further recognized the need for judicial intervention and the constitutional footing on which treatment of institutionalized children is based.[61]

Clearly, the courts are attempting to ensure treatment for institutional-

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56. Most of the argument centers around whether or not the right should be given constitutional status. It is important to note that courts as well as commentators have trouble finding a basis for the right to treatment in the absence of legislation. *See* Morales v. Turman, 562 F.2d 993, 997-98 (5th Cir. 1977); Morales v. Turman, 383 F. Supp. 53, 70-72 (E.D. Tex. 1974), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976), *rev'd,* 430 U.S. 322 (1977). *See generally* Gough, *The Beyond Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox,* 16 St. L.U. L.J. 182, 188-89 (1971); Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process,* 57 Geo. L.J. 848, 862-63 (1969).

57. Both arguments have received judicial recognition in one form or another. Most courts are now more apt to rely on an eighth amendment cruel and unusual punishment argument than adopt the rationale of either the *parens patriae* or *quid pro quo* arguments. *See* Morales v. Turman, 562 F.2d 993, 997-98 (5th Cir. 1977). *See generally* Reaves, *The Right to Treatment for Juvenile Offenders,* 7 Cum. L. Rev. 13, 24 (1976); Volenik, *Right to Treatment: Case Developments in Juvenile Law,* 3 Just. Sys. J. 292, 292-95 (1978).

58. *See In re* Elmore, 382 F.2d 125, 126-27 (D.C. Cir. 1967) (petitioner sought review because juvenile court judge failed to explore alternatives to confinement); Creek v. Stone, 379 F.2d 106, 108-09 (D.C. Cir. 1967) (juvenile needing psychiatrist claimed confinement without psychiatrist's services unlawful).

59. *See In re* Elmore, 382 F.2d 125, 127 (D.C. Cir. 1967); Creek v. Stone, 379 F.2d 106, 110 (D.C. Cir. 1967).

60. Creek v. Stone, 379 F.2d 106, 111 (D.C. Cir. 1967). *See also* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?,* 57 Geo. L.J. 848, 873 (1969).

61. *See, e.g.,* Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) (court followed rationale of *Morales* in recognizing constitutional right to treatment for juveniles); Morales v. Turman, 383 F. Supp. 53, 125-26 (E.D. Tex. 1974) (recognizing constitutional right to treatment and ordering compliance with guidelines established), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976), *rev'd,* 430 U.S. 322 (1977); Mortarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1972), *enforcing* 349 F. Supp. 575, 579 (S.D.N.Y. 1972) (class action suit on behalf of incarcerated juveniles; court found right to treatment on due process grounds).

ized juveniles. The constraints by which our courts are bound, however, preclude their affecting a comprehensive change without legislative support.[62] Lack of such support is painfully evidenced by a survey of existing right to treatment legislation. Only ten states and the District of Columbia have recognized a statutory right to treatment[63] and of these, five make only tacit reference to such a right.[64] Furthermore, no state has adopted appropriate legislation necessary to implement such a right. In fact, no state has even attempted to adopt standards by which a right to treatment could be insured.[65] For the right to treatment to be fully implemented, legislatures must provide more specific guidelines.

V. TEXAS REACTION TO THE RIGHT TO TREATMENT FOR JUVENILES

The right to treatment concept has been received as reluctantly in Texas as in the rest of the country.[66] Courts are willing to enforce a right to treatment;[67] however, the legislature has not yet recognized the right.[68]

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62. Any movement by the courts requires legislative support because only the legislature can appropriate the funds needed for such a change. Additionally, legislatures are in a much better position to establish the machinery which will put the right to treatment into effect. *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 879-80 (1969).

63. The applicable statutes guarantee the right to treatment for mental health patients, but have not extended this right to juveniles. *See* IDAHO CODE § 66-344 (1980); N.M. STAT. ANN. § 34-2-13 (Supp. 1975); OKLA. STAT. ANN. tit. 43A, § 91 (West 1979); TEX. REV. CIV. STAT. ANN. arts. 5547-5570 (Vernon 1958); UTAH CODE ANN. § 64-7-46 (Supp. 1979).

64. Four other states as well as the District of Columbia have given tacit recognition to a right to treatment. *See, e.g.*, CAL. WELF. & INST. CODE § 7251 (Deering 1979); D.C. CODE ANN. § 21-562 (1967); ILL. ANN. STAT. ch. 91½, § 100-7 (Smith-Hurd 1980-1981); IOWA CODE ANN. § 225.15 (West 1980-1981); R.I. GEN. LAWS § 14-1-2 (1970).

65. *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 863 n.52 (1969). Since the publication of Kittrie's article, New York has repealed its right to treatment language. *See* N.Y. MENTAL HYG. § 31.19-.21 (McKinney 1978).

66. The Federal District Court for the Eastern District of Texas provided the Texas Legislature with the impetus needed to formulate a legislative right to treatment. *See* Morales v. Turman, 383 F. Supp. 53, 125-26 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977). The legislative response was to repeal existing legislation defining the goals and methods of the TYC and reincorporate such legislation into the Human Resources Code. The revised legislation was reduced from 78 sections to 37 sections. While more concise, the revised goals and methods found in the Human Resources Code suffer from lack of clarity. *Compare* 1957 Tex. Gen. Laws, ch. 281, at 660 *with* TEX. HUMAN RES. CODE ANN. § 61.001-.077 (Vernon 1980).

67. *See* Note, *Establishment of a Constitutional Right to Treatment for Delinquent Children*, 26 BAYLOR L. REV. 366, 367-69 (1974).

68. The Human Resources Code does not address an express right to treatment for juveniles. *Compare* TEX. HUMAN RES. CODE ANN. § 61.001-.077 (Vernon 1980) *with* IDAHO CODE § 66-344 (1980).

The court's willingness is exemplified by recent Texas cases reaffirming the goals of the juvenile system as being rehabilitation and restoration to useful citizenship.[69] The cases recognizing a right to treatment in Texas, do so on a limited statutory basis, being hesitant to recognize a constitutional right to treatment.[70] This reluctance, however, has been removed by a recent Fifth Circuit decision, *Morales v. Turman.*[71]

The *Morales* decision and its repercussions established the foundation for Texas' current position regarding the right to treatment.[72] In *Morales,* a class action suit was brought against the executive director, members, and employees of the Texas Youth Council (TYC) by a group of minor children committed to TYC facilities.[73] In a detailed opinion the court set out numerous criteria the TYC would have to meet to afford proper treatment to incarcerated juveniles.[74] Two facilities operated by the TYC were ordered closed on grounds that confinement in such facilities constituted cruel and unusual punishment.[75] The court further ordered that the par-

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69. *See In re* S.J.C., 533 S.W.2d 746, 750 (Tex. 1976) (McGee, J., dissenting). The court must take great care to ensure that procedural requisites do not overshadow the protective concept of *parens patriae. Id.* at 750 (McGee, J., dissenting). *See also* R.A.M. v. State, 599 S.W.2d 841, 848 (Tex. Civ. App.—San Antonio 1980, no writ) (state *parens patriae* role interested in the rehabilitation of juveniles); Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.) (juvenile system aimed at treatment and rehabilitation).

70. *See, e.g.,* Morales v. Turman, 562 F.2d 993, 998-99 (5th Cir. 1977) (constitutional right to treatment not expressly recognized but court willing to force TYC to provide treatment without express recognition); *In re* D.L.S., 520 S.W.2d 442, 444-45 (Tex. Civ. App.—San Antonio 1975, no writ) (upholding non-penal commitment to TYC while recognizing evidence juvenile not receiving treatment shows denial of equal protection); Smith v. State, 444 S.W.2d 941, 948 (Tex. Civ. App.—San Antonio 1969, no writ) (without evidence that promise of treatment was not being kept, court could not strike down statute providing for confinement of children).

71. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976), *rev'd,* 430 U.S. 322 (1977).

72. The repercussions of *Morales* are best seen in the legislative changes which subsequently occurred. Subsections a, c, d, e, and f of article 5143 were repealed and reincorporated into the Human Resources Code. *Compare* 1957 Tex. Gen. Laws, ch. 281, at 660 *with* TEX. HUMAN RES. CODE ANN. § 61.001-.077 (Vernon 1980). Unfortunately the Human Resources Code is devoid of any reference to the right to treatment. *See generally* TEX. HUMAN RES. CODE ANN. § 61.001-.077 (Vernon 1980).

73. Morales v. Turman, 383 F. Supp. 53, 58 (E.D. Tex. 1974), *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976), *rev'd,* 430 U.S. 322 (1977).

74. *Id.* at 61-126, *rev'd on other grounds,* 535 F.2d 864 (5th Cir. 1976), *rev'd,* 430 U.S. 322 (1977). The opinion sets out requirements the TYC must meet to stay in operation. These requirements deal with various rights including the right to consult with counsel and the right to rehabilitative care and treatment, as well as the prohibition against unwarranted punishments. *Id.* at 61-126.

75. Three facilities at Gatesville were closed and the Mountain View facility was transferred to the Texas Department of Corrections. *See* Morales v. Turman, 562 F.2d 993, 996

ties submit a curative plan written by experts in fields dealing with juveniles.[76] Several appeals followed.[77] Eventually, on remand from the Supreme Court,[78] the Fifth Circuit ordered the district court to hear additional evidence regarding changes which had occurred within the TYC since the action originally was filed.[79] Noting that the Supreme Court recently had refused to recognize a constitutional right to treatment,[80] the district court held that any abuses found within the TYC could be enjoined on eighth amendment grounds without embracing the right to treatment concept.[81]

As a result of the *Morales* decisions, the enabling legislation for the TYC was repealed in 1979.[82] Although the Sixty-sixth Texas Legislature re-enacted the TYC enabling legislation in the Human Resources Code,[83] the legislators made no substantive changes prior to re-enactment.[84] In some instances the language of the new statute is more vague than that of the previous act.[85] The applicable sections of the Human Resources Code primarily address the administrative and procedural aspects of running

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(5th Cir. 1977).

76. *See* Morales v. Turman, 383 F. Supp. 53, 126 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977). The district court ordered all parties to confer within 30 days for the purpose of drafting a detailed plan setting up a network of facilities for the treatment of juveniles. The court specifically called for the adoption of standards which would establish such a system. *Id.* at 126.

77. *See* Morales v. Turman, 535 F.2d 864, 865-67 (5th Cir. 1975), *rev'd*, 430 U.S. 322 (1977). TYC appealed, contending that a three judge panel was necessary in order to affect changes having a state-wide impact. *Id.* at 865. The Court of Appeals for the Fifth Circuit reversed and remanded. *Id.* at 867. In 1976 the Supreme Court granted certiorari and held that the district court judge properly exercised jurisdiction. *See* Morales v. Turman, 430 U.S. 322, 323 (1976).

78. *See* Morales v. Turman, 430 U.S. 322, 322-24 (1976).

79. *See* Morales v. Turman, 562 F.2d 993, 996-97 (5th Cir. 1977). The court found extensive changes had occurred within the TYC and that further hearings would be required to determine the impact of such changes. *Id.* at 996-97.

80. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). In *O'Connor*, the Court held that a non-dangerous person could not be confined without treatment. *Id.* at 576. Chief Justice Burger's concurring opinion, however, expressly entitled the appellant to treatment, yet gave no approval to the court of appeals' holding that a hospitalized individual has a constitutional right to treatment. This dicta was made applicable to juveniles as well as mental health patients. *Id.* at 572 (Burger, C.J., concurring).

81. Morales v. Turman, 562 F.2d 993, 998 (5th Cir. 1977).

82. 1937 Tex. Civ. Stat., tit. 82, art. 5143(a), (c), (d), (e) & (f), at 419-65.

83. *See* TEX. HUMAN RES. CODE ANN. §§ 61.001-.077 (Vernon 1980). Included in the code is the enabling legislation for the TYC. *Id.* §§ 61.011-.047.

84. The Code goes further to incorporate subchapters on admission and commitment care and treatment, release, and miscellaneous provisions. *See id.* §§ 61.061-.077.

85. The provisions simplify and condense the old articles at the expense of creating a broader and possibly more permissive piece of legislation. *Compare id.* §§ 61.001-.077 *with* 1949 Tex. Gen. Laws, ch. 538, at 988.

the TYC.[86] The Texas Legislature, however, provided for treatment and care of the juvenile in chapter 61, subsection e of the Human Resources Code.[87]

While establishing some procedures for treatment, the vague and conditional language of the statute fails to address adequately the juvenile as an individual.[88] Three essential elements are missing from the current statute. First, while the code states its purpose is to provide "a program of constructive training aimed at rehabilitation and reestablishment in society of children . . . committed to the Texas Youth Council . . .,"[89] there is no express right to treatment which ensures this goal.[90] Second, the provisions dealing with care and treatment do not include specific standards by which treatment is measured.[91] Finally, although the TYC establishes and administers the standards which do exist, an autonomous board composed of experts from the various fields dealing with juveniles would be better equipped to handle evaluation of the program's standards, while the TYC handled the administrative function.[92] Consequently, the applicable sections of the Human Resources Code must be expanded or supplemented to ensure the right to treatment. Through comprehensive right to treatment legislation, the courts and administrative agencies will be better able to fulfill the purpose stated in the Code—"[c]onstructive training aimed at rehabilitation. . . ."[93]

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86. TEX. HUMAN RES. CODE ANN. §§ 61.001-.047 (Vernon 1980).

87. *See id.* §§ 61.071-.076.

88. *Id.* §§ 61.071-.076. This subsection deals with seven major elements: examinations, re-examinations, records, failure to examine, determination of treatment, type of treatment permitted, and the mentally ill child. The permissive language which runs rampant through these sections does not approach setting standards to determine whether or not the juvenile is receiving adequate treatment. According to the statute, the council "may" do just about anything which does not amount to cruel and unusual punishment. In fact, under the code, the council need do nothing with the juvenile in the way of treatment or rehabilitation. *Id.* §§ 61.071-.077.

89. *Id.* § 61.002.

90. Section e of chapter 61 deals with the care and treatment afforded juveniles committed to TYC facilities. *See id.* §§ 61.071-.077. This section sets out only a few standards which must be met, all of which use permissive language, but none of which includes an express right to treatment. *See id.* §§ 61.071-.077.

91. *Id.* §§ 61.071-.077.

92. The TYC is composed of individuals in the community who are known for their interest in juveniles. There is no guarantee that the members of the group are employed in youth service occupations. *See id.* § 61.012. A group of experienced experts would be better equipped to set minimum standards than someone whose great interest in juveniles is outweighed only by their lack of expertise in the field. *See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 808 (1969).

93. TEX. HUMAN RES. CODE ANN. § 61.002 (Vernon 1980).

VI. Proposed Right to Treatment

An overview of the legislation hereinafter proposed will aid in its interpretation. The purpose of such legislation is to establish an express right to treatment for institutionalized juveniles and set standards which must be met to ensure this right.[94] This purpose can be accomplished through the creation of an autonomous Standards Committee to formulate minimum standards and assist the TYC in application and interpretation.[95] The committee should be composed of members of the educational, medical, social science, legal, and administrative fields, who specialize in dealing with juveniles and their particular needs.[96] The TYC would actually remain in control of the administrative function, while the committee would establish minimum standards the TYC must meet.

The standards established by the committee should recognize that institutionalized juveniles have an enforceable right to receive adequate treatment based upon their particular needs.[97] The committee must define adequate treatment, keeping in mind that individuals' needs will vary.[98] Furthermore, the standards must ensure the treatment of the juvenile is adequate. To this end, the committee must establish procedures by which the juvenile, as well as the courts, may enforce the right to treatment.[99] Finally, the committee must promulgate a review procedure which, not only relieves the juvenile of the burden of confronting employ-

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94. The Human Resources Code contains a limited number of "standards" which must be followed. They include keeping records, making examinations, and providing for the treatment of mentally ill children. *Id.* §§ 61.071-.077. A more comprehensive set of standards backing up an express right to treatment not only insures the right of the juvenile but also gives administrative authorities a solid framework within which to design a rehabilitative program for juveniles. *See generally* American Psychiatric Association, *Position Statement on the Question of Adequacy of Treatment*, 123 Am. J. Psychiatry 1458, 1460 (1967); Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 Geo. L.J. 782, 811-17 (1969); Szasz, *The Right to Health*, 57 Geo. L.J. 784, 786-87 (1969).

95. *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 Geo. L.J. 848, 862-65 (1969); Lemert, *Legislating Change in the Juvenile Court*, 1967 Wis. L. Rev. 421, 447-48 (1967); Reaves, *The Right to Treatment for Juvenile Offenders*, 7 Cum. L. Rev. 13, 25-26 (1976).

96. *See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 Geo. L.J. 782, 810 (1969). Halpern sets out six criteria which must be included in right to treatment legislation. An autonomous board of experts is one of those criteria. *Id.* at 811.

97. The Standards Committee is the most essential part of the proposed legislation. This core of experts directly establishes the standards by which each facility must be run thereby allowing the TYC to fulfill its administrative function as set out in the Human Resources Code. *See* Tex. Human Res. Code Ann. §§ 61.011-.047 (Vernon 1980). *See also* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 Geo. L.J. 848, 862 (1969).

98. See Appendix, §§ 7-8.

99. See *id.* § 4(b)(1).

ees of state detention facilities with objections to substandard treatment, but also defines what judicial remedies are available to juveniles who establish the fact they were not provided adequate treatment.[100] Establishment of this committee would lift the tremendous burden currently shouldered by the TYC, of formulating and applying standards as well as administering facilities,[101] thereby facilitating a more efficient system. Additionally, formulation of such standards would be left to experts, rather than political appointees.

The proposed legislation also requires an independant Review Board whose main functions are to assist the TYC in the initial assessment of the juvenile and periodically review the juvenile's progress toward rehabilitation.[102] Requiring a periodic review ensures ongoing evaluation of goals and objectives for treatment. The Review Board, therefore, not the courts, will assume the position of program watchdog.[103] This procedure relieves the courts of administrative functions and makes the TYC answerable to an independant body of experts. Overall this section of the proposed legislation ensures adequate care and treatment as well as an efficient system.

Finally, the proposed legislation outlines possible avenues of relief available to juveniles who have not been receiving adequate treatment.[104] When the juvenile or his guardian believes that minimum standards have not been met, they must first petition the Juvenile Treatment Review Board for a determination of whether the juvenile is receiving adequate treatment.[105] Upon receiving a complaint the Reveiw Board will investi-

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100. See *id.* §§ 6-8.

101. *See* TEX. HUMAN RES. CODE ANN. §§ 61.032, .034, .044 (Vernon 1980). *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 879 (1969).

102. The establishment of the Review Board rounds out a system of checks and balances designed to insure the juvenile's right to treatment. The Standards Committee sets out the minimum standards which the administrative body, the TYC, must work within. The Review Board insures that these standards are being met by the TYC. *See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 842 (1969). *See generally* Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 462 (1967).

103. Judicial relief is recognized as a last resort in the proposed legislation. This legislation is designed to take much of the work away from the court. After the child is adjudicated delinquent he is placed in the juvenile system for a determination of what specific mode of treatment should be employed. The court's primary function is to insure that the juvenile's constitutional rights are protected. Judicial review of treatment programs should only occur when there is an irreconcilable difference of opinion as to whether the juvenile is receiving adequate treatment. *See generally* Ketcham, *The Unfulfilled Promise of the Juvenile Court*, 7 CRIME & DELINQUENCY 97, 194 (1961).

104. See Appendix, §§ 6-8.

105. See *id.* § 7(a)(1).

gate to determine what, if any, corrective action must be taken.[106] Once the Review Board has made a determination, the petitioner may petition the court for any of the following reasons: if the petitioner disagrees with the board's findings; if the findings indicate non-compliance with minimum standards; or if the petitioner believes the minimum standards still are not being met.[107] The court shall have the power to order such remedies as it deems necessary, including, in limited circumstances, release of the petitioner.[108]

VII. CONCLUSION

During the past twenty-five years courts have indicated a willingness to support the right to treatment concept.[109] Courts, however, are limited in their power to affect a change.[110] Legislatures are in a much better position to define procedures and remedies.[111] The Texas Legislature has an excellent start toward this goal, but it should not be satisfied with the present rules.[112] Further legislation specifically adopting the right to treatment and provisions such as those herein proposed would enhance greatly a court's ability to review and implement the right to treatment for juveniles.[113] The Texas Legislature, however, must also provide the physical and financial resources necessary to make right to treatment legislation meaningful. Indeed, most commentators agree that the lack of resources allocated to juvenile institutions and treatment programs precludes their effectiveness.[114]

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106. See *id.* § 7.

107. See *id.* § 8. As previously mentioned, judicial relief is recognized as a last resort to the proposed legislation which should only be used when irreconcilable conflicts arise. *See generally* Gough, *The Beyond Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. L.U. L.J. 182, 198-200 (1971).

108. See Appendix, § 8.

109. *See, e.g.*, Morales v. Turman, 562 F.2d 993 (5th Cir. 1977) (right to treatment not expressly recognized yet court willing to force TYC to provide treatment); *In re* D.L.S., 520 S.W.2d 442 (Tex. Civ. App.—San Antonio 1975, no writ) (evidence juvenile not receiving treatment demonstrates denial of equal protection); Smith v. State, 444 S.W.2d 941 (Tex. Civ. App.—San Antonio 1969, no writ) (without evidence that promise of treatment was not being kept, court could not strike down statute providing for confinement of children).

110. *See* Volenik, *Right to Treatment: Case Developments in Juvenile Law*, 17 JUST. SYS. J. 292, 305 (1978).

111. *See* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile System?*, 57 GEO. L.J. 848, 879 (1969); Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 429-32 (1967).

112. *See* TEX. HUMAN RES. CODE ANN. §§ 61.001-.077 (Vernon 1980).

113. For a full summary of positions recommended by Standards Groups, see NATIONAL INSTITUTE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE DISPOSITIONS AND CORRECTIONS, STANDARDS AND GOALS FOR JUVENILE JUSTICE 10, 57-58 (1977).

114. *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juve-*

Results of studies of adult prison populations establish that large percentages of such populations were juvenile offenders.[115] Taking these studies into account, a logical argument can be made in favor of providing resources to rehabilitate juveniles. If treatment is not provided at an early age, resources nevertheless must be provided to support adult prison populations.[116] Finally, as Chief Judge Bazelon so wisely stated, "when the legislature justifies confinement by a promise of treatment, it thereby commits the community to provide the resources necessary to fulfill the promise . . . and the duty that society assumes, to fulfill the promise of treatment employed to justify involuntary confinement is clear."[117]

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nile Process?, 57 GEO. L.J. 848, 858-60 (1969); Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421.

115. *See* S. GLUECK & E. GLUECK, OF DELINQUENCY AND CRIME 167-76 (1974).

116. *See id.* at 241-49.

117. *See* Bazelon, *The Right to Treatment*, 57 GEO. L.J. 673, 676 (1969).

APPENDIX

THE TEXAS RIGHT TO TREATMENT ACT[118]

Proposed Legislation for Juveniles

§1 *Philosophy*

This act establishes a uniform procedure whereby incarcerated juveniles are guaranteed proper and adequate treatment; minimum standards of care for such treatment; and redress for failure to provide adequate treatment.

§2 *Juveniles Right to Minimum Standards of Treatment*[119]

A) Every juvenile confined in a state institution must be accorded the minimum treatment provided for in this act. The Review Board, hereinafter designated, shall inform each juvenile of his/her rights under this act taking into consideration the age and cognizant ability of the juvenile.

B) A summary of the "Minimum Standards" and a statement of the right to treatment as set out in this act shall be made available to the parents or legal guardian of the juvenile, and shall be written in plain and concise language.

§3 *Definitions* (as used in this act)

A) "Committee" is the Juvenile Treatment Standards Committee.

B) "Board" is the Juvenile Treatment Review Board.

C) "Manual" is the Manual of Minimum Standards for the treatment of juveniles in state detention facilities.

D) "Minimum Standards" refers to those standards prepared and adopted by the Committee and contained in the manual.

E) "Treatment" means a program of individualized therapy aimed at the rehabilitation of the juvenile which conforms to the standards established by the Committee.

F) "Director" refers to the Executive Director of the Texas Youth Council.

§4 *Establishment of the Juvenile Treatment Standards Committee*[120]

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118. The Texas Right To Treatment Act is based on legislation which was introduced in the Pennsylvania General Assembly in 1967. *See* S.B. 1274 and H.B. 2118. Pa. Gen. Assembly, 1968 Sess., *reprinted in* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 811 app. (1969). The bill was reintroduced unsuccessfully in 1969 as S.B. 158.

119. *See generally* Kittrie, *Can the Right to Treatment Remedy the Ills of the Juvenile Process?*, 57 GEO. L.J. 848, 849-51 (1969); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 947-49 (1959). *See also* Morales v. Turman, 383 F. Supp. 53, 121-26 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977).

120. The Committee is the basis of the proposed legislation. It forms the standards by

A) Within 90 days after the effective date of this act the Juvenile Treatment Standards Committee shall be formed.
B) The Committee shall consist of the following members:

(1) a licensed administrative psychologist with at least five years administrative experience in a juvenile treatment facility;
(2) a licensed psychiatrist who is a member of the American Psychiatric Association and has experience with juveniles;
(3) a licensed pediatric physician who is a member of the American Medical Association;
(4) a psychiatric social worker, holding at least a master's degree and having five years experience in institutional psychiatric social work with juvenile populations;
(5) a clinical psychologist who is a member of the Clinical Psychologists of the American Psychological Association and who has had experience with juveniles;
(6) an educator licensed by the State of Texas who has had at least five years teaching experience at the elementary or secondary levels;
(7) the executive director of the Texas Youth Council;[121] and
(8) an attorney with five years experience in juvenile law.

No committee member shall be appointed who has been employed by the State of Texas, its subdivisions or agencies during the three year period immediately proceeding their appointment.

§5 *Preparation and Adoption of Minimum Standards*

A) The Treatment Standards Committee shall prepare a Manual of Minimum Standards for the Treatment of Juveniles which shall set out the standards of treatment acceptable to the professional association which each Committee member represents. The Committee shall have six months to complete the Manual.
B) The Standards are not limited to but must include:

(1) the number of professional and non-professional personnel per juvenile population who are directly responsible for the care and treatment of the juvenile and the maximum number of juveniles assigned to each psychiatrist, physician, social worker, attorney, aide, instructor, or attendant;[122]
(2) the minimum amount of treatment each child shall receive from appropriate professional personnel, determined in terms of frequency and

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which the other units must operate. Requiring that the Committee be composed of experts in dealing with juveniles helps insure progressive rehabilitation of the juvenile. *See* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 808-09 (1969).

121. *See* TEX. HUMAN RES. CODE ANN. § 61.017 (Vernon 1980).

122. *See generally* Morales v. Turman, 383 F. Supp. 53, 85-126 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 810-11 (1969).

duration of contact, recognizing that prescribed professional treatment may vary between the three different stages of incarceration (the admission and diagnostic phase, the treatment phase, and the post release phase);
(3) the frequency and extent of general physical examinations;
(4) that minimum employment prerequisites for institutional staff shall comply with the minimum standards established by the State of Texas for licensing in their respective fields;
(5) that treatment method and procedure are to be designed by the diagnostic staff of the appropriate institution to suit the individual juvenile.

C) Each juvenile treatment facility involved shall receive a copy of the minimum standards. Each juvenile treatment facility shall be responsible for keeping a complete and accurate record of treatment for each juvenile confined therein, clearly showing compliance with the minimum standards. These records shall be made available to any independently retained psychiatrists, physicians, attorneys, or other authorized professionals, and to the Review Board hereinafter designated.
D) The Committee shall review the minimum treatment standards every two years and make appropriate changes. Copies of any amendments to the minimum standards must be distributed to appropriate institutions and interested persons.

§6 *The Juvenile Treatment Review Board*[123]

The Committee shall:
A) appoint a Treatment Review Board for each treatment facility, composed of one licensed child psychologist, one pediatric physician, one social worker, and one attorney; and
B) provide that the function of the Review Board be two fold:

(1) When a juvenile is admitted and diagnosed, the Board shall review each juvenile's record to ensure that the planned course of treatment complies with minimum standards. Furthermore, within 90 days of the admission/diagnostic review, the Board shall review the juvenile's record to ensure ongoing compliance with minimum standards. Thereafter, the Board shall review each juvenile's progress on a case by case basis every 120 days.
(2) The Board shall receive, hear, and investigate all complaints filed by or on behalf of the juvenile alleging non-compliance with minimum standards. The Board shall issue findings on each petition submitted.

§7 *Legal Remedies*

A) When an institutionalized juvenile, his or her parent, legal guardian, designated relative, or other interested person, believes that the

123. *See* S.B. 1274 and H.B. 2118, Pa. Gen. Assembly, 1968 Sess., *reprinted in* Halpern, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782, 811 app. (1969).

minimum standards, as set out in the Manual, are not being adhered to, the individual shall have the right to take action by petitioning the Board for a formal determination of whether or not the minimum standards have been met. The petition must be in writing and include all reasons which lead the petitioner to believe adequate treatment had not been rendered.

B) The Board shall hold hearings, make appropriate investigations, and confer with the director of the facility where the juvenile is confined.

(1) Each petition shall be reviewed en banc;
(2) the Board shall publish written findings within 30 days after receipt of the petition and shall determine whether or not minimum standards have been met, and whether or not the director agrees to provide acceptable treatment;
(3) the findings must delineate in what way the treatment has failed to meet the minimum standards; and
(4) copies of the findings shall be given to the petitioner and the director of the facility wherein the juvenile resides.

C) Any remedial action must be implemented within 90 days after publication of the Board findings.

(1) At the conclusion of the 90 day period, the Board shall inquire as to whether the juvenile has received the modified treatment.
(2) If the Board receives no response, then it shall make further appropriate investigations and issue a final finding.

D) A record of all proceedings under this section shall become a part of the juvenile's permanent record.

E) A petition under this section may be filed no more frequently than once in a six month period.[124]

§8 *Right to Petition Court*[125]

A) The juvenile, through his or her parent, legal guardian, designated relative, or other interested person may petition a court regarding violations of the minimum standards if:

(1) the petitioner disagrees with a board finding that the minimum standards have been met;
(2) the Board's final determination indicated non-compliance with the mininum standards and the petitioner believes that minimum standards are still not being met; and
(3) the Board fails to notify the petitioner of its determination within 30 days after reciept of the petition.

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124. *See id.* § 7.
125. *See id.* § 8.

B) The following legal remedies are available to the petitioner:

(1) Petition for writ of mandamus;
(2) Petition for mandatory injunction; and
(3) Petitions for writ of habeas corpus in accordance with Texas law.[126] In the case of such petitions the court may make orders as it deems appropriate regarding disposition of charges pending against the juvenile. Further, the court may order a probationary period during which the juvenile is required to continue treatment on an individual basis, provided payment for such treatment is made by the state.

C) The defendants named in such a suit shall be the Director of the appropriate institution and the Secretary of the Standards Committee.
D) Any petitioner taking aforementioned court action shall have the right to have all evidence presented de novo before the court and shall have the right to appeal any adverse ruling of the court.
E) The petitioner, even though indigent, may obtain independant professional evaluations for the purpose of supporting the allegations in his or her petition. Such evaluators shall be allowed to present evidence and testimony to the Board and the court in any proceeding hereunder.
F) Each petitioner shall have the right to adequate legal counsel in proceedings under this section. Indigency shall not interfere with this right.
G) When the court determines that the minimum standards of treatment have not been and will not be met, the juvenile shall be released and placed on a mandatory independant treatment program. In such a case, the state will bear the burden of the program's expense.
H) The Board and the Director, with the consent of the petitioner, may design a private program of treatment independant of court action and paid for by the state. In cases where independant treatment programs are used, the Board and the Director shall review the juvenile's progress at least every twelve months and determine the need for continued treatment.

126. *See* TEX. CODE CRIM. PROC. ANN. arts. 11.01-.64 (Vernon Supp. 1981).