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The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions

Maynard E. Pirsig*

I. INTRODUCTION

The Minnesota Commissioner of Corrections recently discussed the need for a new security institution for State Training School boys who need tighter control. He observed:

> What keeps this nifty idea from sailing along (other than the high price tag on the proposed security facility, of course) is the spectre of the more than 700 vacant beds in the two adult institutions for men. It's a factor that just won't go away, even though strong argument is easy to come by about how the administrative transfer of juveniles, no matter how uncontrollable they may be, to a penal institution is legally taboo. As long as some states are permitting such transfers, the temptation is strong here to avoid building a new security institution by just transferring our difficult boys to the Reformatory instead.[1]

The Commissioner was addressing himself to male juveniles committed to the Department of Corrections by juvenile courts upon an adjudication of delinquency. In Minnesota the institutions to which these youths may be confined are limited to the State Training School for Boys at Red Wing, the Youth Vocational Camp at Rochester, the Home School at Sauk Centre (for younger boys) and some other camps established for this purpose. All are open institutions organized either on a cottage plan or as camps. None have walls or fences or are otherwise designed for effective security. They are, of course, all intended as treatment institutions to implement the purposes of juvenile court laws.

Because juvenile proceedings are considered noncriminal and confinement is considered treatment oriented, juvenile court procedures need not include all criminal protections. The proceedings may commence by petition and summons rather than by indictment or information, and the hearings are informal,

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1. 3 CORRECTIONS CORNER (Nov. 29, 1968). During the 1969 Minnesota legislative session, bills were introduced in both houses authorizing transfers of youths from the State Training School for Boys at Red Wing to the State Reformatory at St. Cloud, Minnesota, and had the support of the governor's office. The Senate bill received considerable support in committee, but the bill in the House made little headway. Neither bill reached the floor of its respective house.

confidential and do not involve a jury.[2] Until recently at least, proof by a fair preponderance of the evidence was sufficient.[3]

In re Gault[4] does not compel the elimination of all differences between the two procedures. It held that a juvenile charged with delinquency and facing the possibility of confinement is entitled to notice of the charges, the right to present his own evidence and confront and cross-examine adverse witnesses, the right to be represented by counsel and the privilege against self-incrimination. It may be assumed also that the *Miranda* rules[5] and the restrictions on illegal searches and seizures[6] will be applied. There is nothing, however, that indicates that a juvenile court proceeding must be treated in all other respects as a criminal trial. The limitations imposed by *Gault* are those which are essential to a fair determination of the facts and to assurance against arbitrary state action, and hence come within the general concept of due process as applied to the special procedures of the juvenile court. If these differences between juvenile and criminal proceedings are to be upheld, the primary purpose of juvenile court proceedings must remain noncriminal. Accordingly the institutions to which juvenile delinquents are committed by juvenile courts must remain treatment oriented. Some juveniles, however, do not always respond to such treatment. They violate rules and regulations and disrupt the program to the detriment of other juveniles. They escape from the institution and commit depredations upon the community. An open institution is not the place for them. There is a genuine need for separate facilities, specially designed for these difficult juveniles and provided with measures of security not needed or desirable for the remainder of those committed by juvenile courts.

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2. People v. Dotson, 46 Cal. 2d 891, 299 P.2d 875 (1956); *In re* Deadler, 194 Cal. 320, 228 P. 467 (1924); Peterson v. McAuliffe, 151 Minn. 467, 187 N.W. 226 (1922).

There are, of course, other differences between criminal and juvenile procedures, such as the absence of bail and of preliminary hearings and the privacy of juvenile court hearings. It is not the purpose here to develop these differences.

3. *See* W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969). *Contra, In re* Agler, —— Ohio ——, 249 N.E.2d 801 (1969) (clear and convincing proof required); *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967), holding proof beyond a reasonable doubt was required by the implications of *In re* Gault, 387 U.S. 1 (1967).

4. 387 U.S. 1 (1967).

5. Miranda v. Arizona, 384 U.S. 436 (1966).

6. Mapp v. Ohio, 367 U.S. 643 (1961).

II. THE PENAL INSTITUTION APPROACH

This is not a new problem. It is reflected in state legislation since separate institutions for juvenile delinquents were first provided. In 1861, New York permitted the managers of juvenile institutions to obtain a court order committing a child temporarily to a local "county penitentiary"

> [w]henever it shall appear to the managers . . . that any of the delinquents therein confined shall have been guilty of attempting wilfully to set fire to any building belonging to the institution, or any combustible matter for the purpose of setting fire to any such building, or that any delinquent shall have been guilty of openly resisting the lawful authority of the officers of the institution, or of attempting, by threats or otherwise, to excite others to do so, or shall, by gross or habitual misconduct, exert a dangerous and pernicious influence over the other delinquents . . . .[7]

If the juvenile has committed a felony, nearly all juvenile court legislation permits juvenile court transfer to the criminal court for criminal prosecution. If the transfer procedure meets the requirements of *Kent v. United States*[8] and the juvenile is subsequently convicted of a felony, the judge may commit him to any penal institution authorized by law for a criminal offense.[9]

This procedure, however, has not succeeded in eliminating the problem. It is difficult for a juvenile court judge to identify with any assurance those juveniles who cannot be treated in an open institution. Neither statutes, juvenile judges nor appellate courts have developed any consistent or helpful criteria to determine which youths should or should not be transferred for crim-

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7. N.Y. LAWS, 1861, ch. 306 § 1. *See also* MASS. ACTS AND RESOLVES, 1847, ch. 165 § 6, stating that "if he shall be found incorrigible, or his continuance in the school shall be deemed prejudicial to the management and discipline thereof," transfer is permitted "to the jail, house of correction, or state prison." In the cases to which these statutes applied, the juvenile had been convicted of a criminal offense.

8. 383 U.S. 541 (1966). A hearing must be held and counsel must be given the right to examine and refute whatever information is given to the judge and the judge must state his reasons for the transfer. Although a federal statute was under consideration, it was construed in the light of constitutional requirements.

> [T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.

Id. at 554.

9. State laws commonly provide for his commitment to a state reformatory if he is under a given age, usually 30 years, and has not previously been convicted of a felony. *See, e.g.*, OHIO REV. CODE ANN. § 5143.03 (Page 1968).

inal prosecution.[10] It may be assumed also that the administrative authorities responsible for the operation of the juvenile institutions have not supplied the judges with any guidelines in accordance with which a wise selection can be made. Absent such standards, there is likely a defensible reluctance on the part of juvenile court judges to commit a youth to a criminal court for prosecution and possible commitment to a penal institution. Juvenile institutions find themselves, therefore, with a considerable number of youths who cannot be treated effectively without more secure facilities than are presently provided them and whose presence undermines the efforts of the institution on behalf of other juveniles committed to it.

A number of states have sought to deal with the problem by authorizing the administrative authorities to whom the juvenile court commits the child to transfer the child to a penal institution. These statutes take two forms. In one, the authority is general, giving discretion to transfer without specifying any conditions or standards. An example is the Wisconsin statute which provides that the state department of public welfare "may use other facilities and services under its jurisdiction," rather than the customary receiving homes, foster and group homes and institutions designed "for the training and treatment of children."[11] The state reformatory at Green Bay, Wisconsin, is un-

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10. See the guide lines prepared by the juvenile court of the District of Columbia set out in the Appendix to the opinion in Kent v. United States, 383 U.S. 541 (1968). For discussions of the haphazard character of transfers, see Advisory Council of Judges, *Transfer of Cases Between Juvenile and Criminal Courts*, 8 CRIME & DELINQ. 3 (1962); Sargent & Gordon, *Waiver of Jurisdiction*, 9 CRIME & DELINQ. 121 (1963). *Compare* State v. Van Buren, 29 N.J. 548, 150 A.2d 649 (1959) *with Ex parte* Lewis, 85 Okla. Crim. 322, 188 P.2d 367 (1947).

Concerning the possibility that constitutional problems are raised by a transfer based on absence of a secure treatment facility, see Haziel v. United States, 404 F.2d 1275, 1280 (D.C. Cir. 1968), per Bazelon, J.:

> We do not find it necessary to determine the difficult question whether the statutory promise of noncriminal treatment in all but exceptional circumstances may be denied the juvenile because of the lack of adequate facilities. We well recognize the undeniable limitations upon the resources available to the Juvenile Court. On the other hand, we also cannot ignore the mockery of a benevolent statute unbacked by adequate facilities. And to the extent that a juvenile with more affluent parents might avoid waiver because of the availability of privately-financed treatment and rehabilitation, constitutional issues may lurk in the problem.

11. WIS. STAT. ANN. § 48.52 (Supp. 1969). *See* Note, *Transfer of Juveniles to Adult Correctional Institutions*, 1966 WIS. L. REV. 866. *See also* ILL. REV. STAT. ANN. ch. 23, §§ 2601, 2602, 2604, 2626 (Smith-Hurd 1968).

der the department's jurisdiction and substantial numbers of children have been transferred from institutions for delinquent children to the reformatory. The language of the Wisconsin statute is so broad that it might encompass neglected and dependent children committed to the care of the department.[12] The federal statute is also of this general character.[13]

Sometimes the power of transfer is limited to specifically described juveniles, reminiscent of the early statutes.[14] The Washington statute authorizes the transfer of "incorrigible juvenile delinquents" over the age of 16 years.

> Incorrigibility . . . [is defined as] conduct by a juvenile committed to the department by the juvenile court indicating over the course of a reasonable period of time that the rehabilitative program of the department can be of no further benefit to such juvenile, and that he is in need of closer security.[15]

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12. This possible interpretation is strengthened by the deletion, in 1961, of language which expressly excluded such children:

> except that penal institutions may be used only for children adjudged delinquent and only until July 1, 1959, or such earlier date as medium security facilities for delinquents are in operation.

WIS. LAWS ch. 67, § 1 (1961).

A neglected child may indeed find himself placed in a penal institution. *See* Wintjen v. State, 433 S.W.2d 257 (Mo. 1968), a particularly distressing case. Wintjen was adjudged a neglected child at the age of nine. At age 13, he "was transferred as in need of discipline to the custody of the State Training Schools." From there, he was transferred administratively to the state reformatory, where, at age 17, he assaulted a guard. Charged with the assault, he refused the offer of counsel, pled guilty, and was sentenced to 3½ years imprisonment. The sentence was sustained because the plea was "voluntary" and in any event he was, under Missouri statutes, a " 'prisoner' . . . not entitled to resort to self-help to secure his release."

13. The general authority of the Attorney General to transfer inmates from one penal institution to another was extended in 1941 to provide: "The authority conferred upon the Attorney General by this section shall extend to all persons committed to the National Training School for Boys." 18 U.S.C. § 4082(e) (1964). Shortly prior to the enactment of this provision, Huff v. O'Bryant, 121 F.2d 890 (D.C. Cir. 1941), had held that the Attorney General had not been given this authority. "This having created a problem, the Department of Justice immediately applied to Congress for the enactment of legislation that would change this rule of law." Clay v. Reid, 173 F. Supp. 667, 668 (D.D.C. 1959), in which the history of this provision is related.

14. *See* text accompanying note 7 *supra*.

15. WASH. REV. CODE § 13.04.200 (Supp. 1967). Judicial review is permitted on the ground that the transfer is "arbitrary, capricious, or contrary to law." WASH. REV. CODE §§ 13.04.200, 13.04.220 (Supp. 1967).

See also CAL. WELF. & INST'NS CODE § 780 (West 1966), permitting the Youth Authority to return the youth to the committing court if he

> be so incorrigible or so incapable of reformation under the discipline of any institution or facility under the jurisdiction of

Some states authorize the juvenile court, as one of its powers of disposition, to commit the child directly to the penal institution.[16] Statutes so providing leave the commitment to the discretion of the juvenile court without designation of standards to guide it. They permit the juvenile court to commit a juvenile to a penal institution if the judge considers the crime to be an aggravated one, if he wishes to set an example for others or presumably for any other purpose he envisions, whether or not the child committed would be uncontrollable if sent to the special institution for delinquents.

These statutes permitting administrative transfer or direct judicial commitment raise serious constitutional questions, for the juvenile finds himself in a penal institution as the result of a noncriminal proceeding intended to provide for his treatment and rehabilitation. In view of the extensive attention that has been given to the rights of juveniles in juvenile court proceedings and to defendants in criminal cases, it is surprising that little scholarly consideration has been given to the constitutional validity of these transfers and commitments. Very little information is available regarding the extent, function and effect of these transfers or commitments.[17] Sheridan and Freer[18] found

> the Youth Authority as to render his retention detrimental to the interests of the Youth Authority . . . the court is not permitted to return the youth to the Authority.

But see In re Dargo, 86 Cal. App. 2d 114, 194 P.2d 34 (1948).

16. OHIO REV. CODE ANN. § 21.51.35(E) (Page 1968), which provides that the court may "[c]ommit a male child over sixteen years of age who has committed an act which if committed by an adult would be a felony to the Ohio State reformatory;" N.J. STAT., § 2A:4-37 (Supp. 1968):

> The juvenile and domestic relations court on proper cause shown may . . . . Commit the child to a public institution established for the care, custody, instruction and reform of juvenile offenders or to any other appropriate institution maintained by the State.

The phrase "any other appropriate institution maintained by the State" appears to include the reformatory for men. *See In re* Smigelski, 30 N.J. 513, 524, 154 A.2d 1 (1959).

17. Only one major discussion, published by the U.S. Children's Bureau and addressed specifically to the problem has appeared. *See* W. SHERIDAN & A. FREER, CHILDREN'S BUREAU, U.S. DEP'T OF HEW, DELINQUENT CHILDREN IN PENAL INSTITUTIONS (1964). *See also*, Comment, *Transfer of Juveniles to Adult Correctional Institutions*, 1966 WIS. L. REV. 866 (discussing the Wisconsin practice); Comment, *Facts and Law of Inter-Institutional Transfer of Juveniles*, 20 ME. L. REV. 93 (1968) (discussing the Maine practice); Case Note, 16 DRAKE L. REV. 101 (1967) (discussing Wilson v. Coughlin, 259 Iowa, 1163, 147 N.W.2d 175 (1966)). Note the brief and vapid comment in the TASK FORCE REPORT: CORRECTIONS, Appendix A. at 178:

> In many States, intermediate institutions receive both juve-

from questionnaires submitted to the juvenile institutions that "[a]n average of about 478 children per year were transferred by State training schools for juvenile delinquents to penal institutions in the period 1959-61." This figure did not reflect the number of direct commitments by juvenile courts nor, of course, juvenile institutions not reporting. That the figure is too low is indicated by the following facts: (1) in 1965 the Reformatory of Ohio alone released 111 juveniles;[19] and (2) in Wisconsin there were 169 transfers to the State Reformatory by the Department of Public Welfare.[20]

Even less information is available concerning such matters as the characteristics of the juveniles committed to reformatories, the basis on which they were selected,[21] the program provided them in reformatories, and the impact of the reformatory on the child while there and on his subsequent return to the community. The writer's visits to the reformatories in Ohio, Iowa and Wisconsin indicated no separate programs for these children. They were integrated into the general inmate population and subjected to the same control, routine and discipline. There was no observable evidence of any special concern.[22] Ab-

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> niles and adults. Thus, the border between the juvenile and the adult is blurred.

The report "blurred" the subject even more by treating juvenile institutions throughout its discussion as merely an aspect of correctional institutions in general.

18. *Supra* note 17, at 6.

19. OHIO LEG. SERV. COMM. OHIO'S JUVENILE CORRECTION SYS. STAFF RESEARCH REP., No. 83, at 62 (1967). It may be assumed that the number committed to the Reformatory was approximately the same. Their average stay was 19 months.

20. I WIS. LEG. COUNCIL REP. 12 (1967).

21. *Compare* OHIO LEG. SERV. COMM., OHIO'S JUVENILE CORRECTION SYS., STAFF RESEARCH REP., No. 83 at 62-63 (1967):

> A review based purely on the most serious offense with which the offender was charged, shows little difference in offenses for which juveniles are sent to the reformatory by the juvenile court or the common pleas court. . . . [I]t appears from available information that these youths could as well have been committed to a medium security facility operated by the Youth Commission, were it considered desirable to remove the juvenile court's authority to commit juveniles to the reformatory.

22. *Compare* 1 WIS. LEG. COUNCIL REP. 24 (1967). After expressing concern over the "serious legal problems" presented, the report continued:

> However it was argued that these transfers avoid giving the juvenile a criminal conviction on his record and provide the department with the only practicable method of handling those juveniles who cannot successfully be handled in juvenile facilities.

It therefore offered a compromise solution, "give the child an administra-

sent any substantial literature or factual data, it is not surprising that the decisional law is in a state of confusion.

III. THE CASE LAW

A. Background

In examining the decisions, some frequently ignored distinctions need to be drawn. First, it is well settled that the legislature may give an administrative agency authority to transfer a *convicted felon* from one penal institution to another. The right to transfer is implicit in the sentence imposed.[23] Furthermore, the constitutional issues are the same if the original commitment following criminal conviction was to a treatment institution and the subsequent transfer is to one penal in character. Thus, in *Sheehan v. Superintendent of Concord Reformatory*[24] the court stated:

> As penalty for the crime to which the petitioner pleaded guilty he might have been sentenced in the first instance to the Massachusetts Reformatory at Concord. He was in truth sentenced to [a treatment institution]. There was, however, incorporated into that sentence, as an integral part, the condition that if he proved unmanageable or unfit for the mild treatment of the industrial school, he might be transferred by the proper executive officers to the Massachusetts Reformatory. That is the effect of [the statute]. That provision was as much a part of the sentence as if it had been extended at length on the record of the court. It follows that the differences between the industrial school and the reformatory in management or character, whatever they may be, are of no consequence in this connection. Confinement in each was affixed by the statute as a penalty for the crime to which the defendant pleaded guilty. Both institutions were within the purview of the sentence actually imposed.
>
> The determination of the question whether the petitioner after his sentence was "unmanageable or an improper person" longer to remain at the industrial school is not necessarily judicial in nature. It stands on the same footing as the decision of numerous questions touching the discipline of inmates of reformatory or penal institutions. It was administrative in its essence.[25]

In such cases, the requirements of due process having been satisfied by the trial, the transfer merely involves a change in the manner in which the sentence is carried out.[26]

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tive hearing, set standards for transfer and provide judicial review." The report is devoid of any other concern for an adequate program for these children.

23. S. Rubin, et al., The Law of Criminal Corrections 284 (1963).

24. 254 Mass. 342, 150 N.E. 231 (1926).

25. *Id.* at 346, 150 N.E. at 233. *Accord*, Harwood v. State, 184 Tenn. 515, 201 S.W.2d 672 (1947).

26. The grant of even wider powers to the Youth Conservation Com-

Second, there are many decisions which sustain transfers and commitments of delinquents to penal institutions without consideration of their constitutional validity. For example, a number of federal decisions, frequently cited as sustaining transfers under the federal statute, involve no more than statutory interpretation and application.[27] In *Riley v. Pescor*[28] statutory authorization of the Attorney General to transfer juvenile delinquents from the National Training School for Boys to a penal institution was upheld. The court merely stated:

> Under Section 753f (now U.S. Code, § 4032) as amended, the Attorney General may transfer prisoners from one institution to another, at his discretion. Stroud v. Johnston, 9 Cir., 139 F.2d 171.[29]

The *Stroud* decision, however, involved not a juvenile delinquent, but a convicted criminal who had been transferred from one federal penitentiary to another.

The federal statutory provision that proceedings under the Juvenile Act were permissible only upon consent of the juvenile has similarly been used as a matter of statutory construction to sustain transfers. In *Suarez v. Wilkinson*[30] the juvenile, acting *pro se*, contended that his transfer to a penal institution was invalid, stating:

> The proceding [*sic*] being Civil Nature only and not Criminal, therefore the committment [*sic*] that holds Petitioner in the Northeastern Penitentiary at Lewisburg, Pennsylvania, is [Void]. Being no committment [*sic*] at all.[31]

The court replied that the benefit of the Act is accorded the juvenile only "if he consents to such procedure" but that this

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mission in the execution of sentences was sustained in State v. Meyer, 228 Minn. 286, 37 N.W.2d 3 (1949).

These principles are not believed to be affected by Specht v. Patterson, 386 U.S. 605 (1967). After Specht had been convicted of a criminal offense, proceedings were commenced under a sex offenders act which authorized an increased sentence following a psychiatric examination and a finding that the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Because an adequate hearing was not provided for the existence of the latter facts, the statute was held to violate the requirements of due process. Statutes authorizing the transfer of a convict from one institution to another do not entail an increase in the length of sentence and hence *Specht* is inapplicable.

27. For a discussion of lower federal court decisions, reported and unreported, see the opinion of Ketcham, J., in Matter of Eleven Youths Committed to National Training School, reported in 14 JUV. CT. JUDGES J., No. 4, at 9 (1964).

28. 63 F. Supp. 1 (W.D. Mo. 1945).

29. *Id.* at 4.

30. 133 F. Supp. 38 (M.D. Pa. 1955).

31. *Id.* 38-39.

did not mean that he could dictate determination of the proper remedy.

> The [Juvenile Delinquency] Act was enacted with the realization that persons under the age of eighteen do not have mature judgment and may not fully realize the nature or consequences of their acts. The right to benefits of the Act is not absolute. . . . Custody is an essential feature in those cases where parole is not feasible and the nature of such custody, in line with the juvenile's reaction thereto, must necessarily be left to the discretion of those in charge of the problem of rehabilitation. The power of the Attorney General to designate the place of confinement has not been abrogated in any respect by the Juvenile Delinquency Act.[32]

This was the origin in the federal courts of the consent theory. By asking to be tried under the federal juvenile delinquency law, the juvenile was deemed to have consented to a later possible transfer. The theory was adopted by the only federal court of appeals decision[33] on the question, the court adding:

> Petitioner alleges that no facilities are provided at Terre Haute for juveniles. However, the United States Penitentiary there is equipped with the usual medical, psychiatric and vocation training facilities for individual treatment of inmates.[34]

The import of these decisions is that because the youth consented to the proceedings under the Federal Juvenile Delinquncy Act, he cannot then complain that he is being confined in a penitentiary so long as he is provided "with the usual medical, psychiatric and vocation training facilities" provided for the prison population generally. In none of these consent cases is there real examination of the extent to which the consequences of his consent were explained to the youth or whether he understood the explanation if one was given. The cases similarly ignore the question of whether the juvenile had access to the advice of his parents, another adult or an attorney. They thus stand in stark contrast to the concern which the United State Supreme Court has shown over juvenile waivers of constitutional rights.[35]

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32. *Id.* at 39-40.

33. Sonnenberg v. Markley, 289 F.2d 126 (7th Cir. 1961). *See also* Arkadiele v. Markley, 186 F. Supp. 586 (S.D. Ind. 1960); Coats v. Markley, 200 F. Supp. 686 (S.D. Ind. 1962).

Clay v. Reid, 173 F. Supp. 667 (D.D.C. 1959), also sustained a transfer solely on the ground that the Federal Act so provided. The court was "aware that the opposite opinion has been expressed," but thought "that if the legislative history of this statute had been presented in detail, very likely the opposite conclusion would not have been reached." The relevance of the legislative history to the constitutional issues raised by the "opposite opinion" was not discussed.

34. 289 F.2d 126 (7th Cir. 1961).

35. *Compare* Gallegos v. Colorado, 370 U.S. 49, 54 (1962):

Since the consent provision in the Federal Juvenile Delinquency Act is a peculiar one rarely found in other juvenile court acts, the federal decisions discussed are of little value in considering the constitutional validity of statutes which authorize transfers or commitments of juvenile delinquents to penal institutions without regard to their consent. Turning to the remaining state and federal cases dealing specifically with the problem, one finds the decisions sharply divided with analysis of the central issues strikingly inadequate.

B. Cases Invalidating Commitments and Transfers

White v. Reid[36] was the first decision to hold a transfer of a juvenile delinquent to a penal institution invalid on constitutional grounds. The youth was being confined in the District of Columbia jail and sought a writ of habeas corpus to obtain his release. The court held that continued confinement in the jail was not authorized by the adjudication of delinquency, but stayed further action to permit the Attorney General to place him in an appropriate institution.

The argument of the court centered on two points. First, notwithstanding the greater emphasis placed by modern penal institutions on rehabilitation and training, their basic purpose is still "punishment as a deterrent to crime." Unless the institution "is one whose primary concern is the individual's moral and

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> The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared to an adult in full possession of his senses and knowledgeable of the consequences of his admissions. . . . Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

See also Haley v. Ohio, 332 U.S. 596 (1948); *In re* Gault, 387 U.S. 1 (1967).

To the argument that the juvenile had waived the usual safeguards of criminal procedure with knowledge of the Attorney General's power of transfer, the court in United States v. Hegstrom, 178 F. Supp. 17, 19 (D. Conn. 1959) replied:

> The difficulty with that arguement is that the waiver was for the purpose of a juvenile proceeding, not criminal in nature. A later change without opportunity to be heard, reconverting it into a criminal proceeding, is lacking in due process.

36. 125 F. Supp. 647 (D.D.C. 1954). A second opinion following a transfer to a penal institution was rendered in White v. Reid, 126 F. Supp. 867, 870 (D.D.C. 1954).

physical well-being, unless its facilities are intended for and adapted to guidance, care, education and training rather than punishment, unless its supervision is that of a guardian, not that of a prison guard or jailor," commitment without a criminal conviction cannot withstand constitutional attack. Second, "to send a juvenile to the usual penitentiary where hardened criminals are kept in close confinement and under special types of strict discipline, where the juvenile would inevitably come into contact with them and suffer the same type of treatment as they do would in effect stamp the case of the juvenile as a criminal case."[37] The opinion was thus open to the implication that if the primary purpose of a penal institution was treatment and rehabilitation rather than punishment, and if it contained no hardened criminals, the transfer would be permitted.

The Attorney General promptly transferred the youth to the Federal Correctional Institution at Ashland, Kentucky, an institution designed primarily for treatment but including only those youths convicted of a criminal offense who were amenable to treatment. This would appear to have met the implications of the court's opinion. Nevertheless, the transfer was challenged and the court held it invalid. The issue was considered to be "whether a juvenile committed under civil or equitable proceedings may be sent to mingle with those convicted of crime."[38]

The court found that the purpose of the Federal Youth Correction Act, under which the Ashland facility was designed, was to

> rehabilitate youths regularly convicted of crime who show promise of becoming useful citizens by providing a new alternative sentencing and treatment procedure. . . . The purpose of the Juvenile Court Act of the District of Columbia, on the other hand, is the promotion of the child's welfare and the state's best interests by the strengthening of family ties where possible, and, when it is necessary to remove the child from custody of his parents for his welfare or the safety or protection of the public, securing for him custody, care and protection as nearly as possible equivalent to that which should have been given him by his parents. . . . It extends not only to those who have violated the law, but also includes the truant, the abandoned, the homeless, the neglected.[39]

The court contrasted the procedures under the Juvenile Court Act of the District of Columbia with those under the Federal Juvenile Delinquency Act,[40] listing six differences including

37. 125 F. Supp. at 650.
38. White v. Reid, 126 F. Supp. 867, 870 (D.D.C. 1954).
39. *Id.*
40. The court left open the question whether a transfer of a youth committed under this Act was permissible.

the consent provision of the latter.[41] The court appeared to be impressed that the procedure under the Federal Act retained more of the characteristics of a criminal trial.[42]

How these several considerations bore on the constitutionality of the transfer to the Ashland facility was not explained. The court simply concluded

> that both Constitution and statute forbid the transfer of a youth committed under the Juvenile Court Act to any institution designed for the custody of persons convicted of crime, including the Federal Correctional Institution at Ashland, Kentucky, and the commingling of such juveniles with criminals.[43]

The issue was next presented in *State v. Adams*[44] where a youth initially committed to the Industrial School for Boys was later returned to the juvenile court as incorrigible and sentenced by that court to the state penitentiary for a period of years without a criminal trial.[45] The court referred to the state constitutional provision that "[n]o person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury,"[46] and held that due process forbids such confinement of a youth in the state penitentiary unless the sentence was upon conviction under a valid indictment of a grand jury for a felony.[47] The invalidity was particularly apparent since the statute and the action taken by the juvenile court were in terms characteristic of a sentence

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41. The court cites Holtzoff, *The Purposes and Constitutionality of the Federal Juvenile Delinquency Act*, 84 CONG. REC. app., at 3289-91 (1939), an address before a federal judicial conference. Both the address and White v. Reid preceded the U.S. Supreme Court decisions cited in note 35 *supra*. 126 F. Supp. at 871.

42. Speaking of the Juvenile Court Act for the District of Columbia, the court observed:

> In contrast, . . . since the proceedings are not criminal in nature, and the court being without jurisdiction to try the juvenile as an accused criminal, the strict requirements of criminal trials under the Constitution are neither required nor observed.

126 F. Supp. at 871.

43. *Id.*

44. 143 W. Va. 325, 102 S.E.2d 145 (1958).

45. The sentence was pursuant to W. VA. CODE § 28-1-7 (1966), which reads:

> In any case where a youth is committed to the industrial school for an offense punishable by confinement in the penitentiary, and it is found by the State commissioner of public institutions . . . his presence is a detriment . . . to the general good of the school, he may be returned to the court by which he was committed to the school, and such court shall thereupon pass such sentence upon him as to confinement in the penitentiary as may be proper in the premises, or as it might have passed had it not committed him to the industrial school.

46. W. VA. CONST., art. III, § 4.

47. 143 W. Va. 325, 329, 102 S.E.2d 145, 147 (1958).

upon a conviction of a crime—the word "sentence" was used and the commitment was to a "penitentiary" for a term of years.

A more careful analysis of the issues posed was made in *United States ex rel. Stinnett v. Hegstrom*[48] where several juveniles sought release from a penal institution to which they had been transferred from a juvenile facility. Some had been committed to the facility under the District of Columbia Juvenile Court Act and others under the Federal Juvenile Delinquency Act. Among its findings of facts, the court stated that the penal institution had no provision for segregation of juveniles.[49] Observing that there had been no criminal trial either for the original misconduct which led to the juvenile court commitment or the later misconduct resulting in transfer,[50] the court deemed the transfer a punishment inflicted "without the constitutionally guaranteed trial for the offense for which incarcerated," and added, "[t]hey must be confined only with other juveniles until and unless charged with and convicted of crime."[51] The court thereupon concluded that the transfers were invalid on the constitutional ground of denial of due process.

More recently, in 1966 two state supreme courts have also condemned these transfers or commitments. In *In re Rich*,[52] a 14 year old juvenile had been committed to a boys' school following a charge that he "had contributed to the delinquency of a 14 year old school friend by encouraging and causing the friend to commit petty larceny by stealing a sum of money from that friend's own parents."[53] Three years later by order of the governor he was transferred to the Vermont House of Correction, a penal institution.[54] The Vermont Supreme Court ordered his return to the boys' school, stating that the validity of the juvenile court system depends upon its adherence to its protective rather than its penal aspect and that to permit confinement in a penal institution would convert the proceedings from juvenile to criminal and require the observance of constitutional criminal safe-

48. 178 F. Supp. 17 (D. Conn. 1959).
49. *Id.* at 18.
50. *Id.*
51. *Id.* at 21. *White* and *Hegstrom* were relied upon in Kautter v. Reid, 183 F. Supp. 352 (D.D.C. 1960), to reach a statutory construction which prevented detention of a juvenile delinquent in the District of Columbia jail upon revocation of parole from the National Training School for Boys.
52. 125 Vt. 373, 216 A.2d 266 (1966).
53. *Id.* at 374, 216 A.2d at 267.
54. 28 VT. STAT. ANN § 415 (1959) authorizes the transfer of a juvenile "who does not obey the regulations of such school and is not of good deportment."

guards.[55] The court referred to the "administrative and disciplinary problems" which its holding imposed, but stated, "[i]t is fundamental, however, that solutions to these problems must meet constitutional standards."[56]

The other 1966 decision, one of the latest to hold these transfers and commitments unconstitutional, is *State v. Owens*.[57] The factual situation in the case was unique. The district court in a mandamus proceeding had ordered the juvenile court judge to assume jurisdiction of a case in which the child was charged with "glue sniffing." The juvenile judge had stated that since the child had previously been adjudicated a wayward or miscreant child under an existing statute,[58] he would be subjected to a possible sentence in the Kansas Industrial Reformatory at Hutchinson, Kansas. The acts for which the child was charged in this case were neither a misdemeanor nor a felony under state law and therefore the juvenile judge deemed the statute unconstitutional.

The district court thought otherwise, basing its conclusion on the statute creating the Reformatory—its stated purpose was to "reform" the persons committed to it.[59] The Kansas Supreme Court disagreed. Notwithstanding the language of the statute and of prior Kansas cases characterizing the reformatory as a school rather than a prison, the court held the Reformatory to be a penal institution. It noted that the institution was under the supervision of the state director of penal institutions while the boys' industrial school was under the state department of social welfare.[60] It reviewed the testimony that the reformatory

55. 125 Vt. 373, 377; 216 A.2d 266, 270 (1966).
56. *Id.* at 378, 216 A.2d at 271.
57. 197 Kan. 212, 416 P.2d 259 (1966).
58. The statute refers to a "miscreant child" as one who has been adjudged a "wayward child" three or more times. A "wayward child" includes one "whose behavior is injurious to his welfare."
59. KAN. STAT. § 76-2320 (1964) provides:

> The discipline to be observed in said reformatory shall be reformatory, and it shall be the duty of said director to maintain such control over all persons committed to his care as shall prevent them from committing crime and best secure their self-support and accomplish their reformation; and to this end said director shall adopt such means of reformation as consistent with the improvement of the inmates as he deems expedient.

This statute is typical of those of many states establishing reformatories. *E.g.*, OHIO REV. CODE § 5143.02 (1954); MO. STAT. ANN. § 216.090 (1959); N.Y. CORREC. LAW § 277 (McKinney 1968); MINN. STAT. § 243.78 (1967).
60. This would appear to be a factor of limited significance. Modern departments of correction commonly include both penal institutions and institutions for delinquent children without affecting their separate functions.

was a maximum security facility with guards, iron bars and cell blocks, unlike the boys industrial school, which had a smaller population, gave more individual attention to its inmates and had a more extensive professional staff. The court concluded:

> We hold confinement in a penal institution will convert the proceedings from juvenile to criminal and require the observance of constitutional safeguards. The noncriminal aspect is the legal backbone of the constitutionality of all American juvenile court legislation. If after a juvenile proceeding, the juvenile can be committed to a place of penal servitude, the entire claim of *parens patriae* becomes a hyprocritical mockery. Such action confines a person in a penal institution without having been found guilty of a crime.[61]

The analysis in these cases leaves much to be desired. It is inadequate to state summarily that confinement in a penal institution is punishment which cannot be inflicted without a criminal conviction. This is the very issue that requires examination. If a reformatory or other penal institution does in fact provide a program of rehabilitation best suited to reform the incorrigible and dangerous juvenile, why not use it? Why must it be considered punishment? What constitutional principle is violated by utilizing an effective program located in a penal institution? Indeed, an eminent penologist has stated that exposure to the advice and assistance of those criminal inmates who are stable and mature in the setting of a penal institution may be very conducive to effective rehabilitation of juveniles.[62] The failure to provide satisfactory answers to such questions may be a reason why some courts have chosen to follow a different course.

C. Cases Sustaining Transfers and Commitments

A frequently expressed rationale for sustaining transfers and commitments of juveniles to penal institutions is that the juvenile court proceeding is noncriminal and therefore commitment to an institution pursuant to such proceedings is not punishment. Thus in *Leonard, Superintendent v. Licker*,[63] the court concluded:

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61. 197 Kan. 212, 223, 416 P.2d 259, 269 (1966).

62. D. Glaser & F. Cohen, The Effectiveness of the Prison Parole System 157-59 (1964). *Compare* Paulsen, *Fairness to the Juvenile Offender*, 41 Minn. L. Rev. 547, 575 (1957).

> Should there be a proper classification of convicted personnel and a civilized penal philosophy directing an institution, the mingling of some convicted young people with delinquents will not strike us as unfair.

See also F. Cohen, The Legal Challenge to Corrections 98-100 (Joint Comm. on Correctional Manpower and Training 1969).

63. 3 Ohio App. 377 (1914).

> The Ohio state reformatory is a prison for persons who are convicted of felonies and committed thereto upon a sentence of the court following such conviction; but for delinquent children who may be committed thereto after having committed an act constituting a felony it is only a school or place of reformation. It is what its name imports, a reformatory.[64]

The juvenile court proceedings were regarded as noncriminal in character and hence commitment to the reformatory was likewise noncriminal.[65]

The theme that juvenile court proceedings are noncriminal in character and hence the child cannot object to his confinement in a reformatory was repeated by the Ohio Supreme Court in *In re Darnell.*[66] The court stated, "[h]e was not *convicted.* Nor was he *sentenced* but was *committed* to the reformatory."[67] The only authority cited was two cases in which commitment to a treatment facility rather than a penal institution was sustained.[68] The difference between a boys' institution and a reformatory was ignored or overlooked. *Cope v. Campbell*[69] reached the same conclusion on substantially the same reasoning. It held that because juvenile court proceedings are civil rather than criminal, the appellant was not entitled to a jury trial, appointed counsel, or advice of his constitutional rights, and that his record of misconduct made him "a proper subject of commitment to the Ohio State Reformatory."[70]

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64. *Id.* at 381.

65. The case is criticized in Antieau, *Constitutional Rights in Juvenile Courts,* 46 CORNELL L.Q. 387, 388 (1961). *See also* S. RUBIN, CRIME AND JUVENILE DELINQUENCY 70 (1958). The case has been ignored in subsequent cases in Ohio and elsewhere.

Also generally ignored is the reported decision of the trial court in *In re* Robertson, 5 Terry 28, 54 A.2d 848 (Del. Gen. Sess. 1947). The court sustained its prior approval of a transfer from the Ferris School for Boys to the New Castle County Workhouse, an institution for criminals. A statute authorized the transfer if the "minor is destructive to the program of the School, and is hindering and delaying the rehabilitation of other minors in said School." DEL. CODE ANN. tit. 31, § 5109 (1953). The only question discussed was whether transfers from one penal institution to another are permissible. No recognition was given to the fact that the Farris School was not a penal institution.

66. 173 Ohio St. 335, 182 N.E.2d 321 (1962).

67. *Id.* at 336, 182 N.E.2d at 322.

68. Prescott v. State of Ohio, 19 Ohio St. 184 (1869); Wissenburg v. Bradley, 209 Iowa 813, 229 N.W. 205 (1929).

69. 175 Ohio St. 475, 196 N.E.2d 457 (1964).

70. *Id.* at 477, 196 N.E.2d at 458. This case and foregoing Ohio decisions are, however, of doubtful validity because of *Gault.* Indeed the recent case of State v. Fisher, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969) disregarded them and relying on *Gault* held the statute permitting commitment to the State Reformatory unconstitutional. *But see contra,*

A more careful discussion sustaining the validity of a transfer or commitment to a penal institution occurs in *Wilson v. Coughlin*,[71] in which the juvenile sought release by writ of habeas corpus from the Iowa Reformatory after he had been administratively transferred from the state's training school for boys.[72] Release was denied, the court stating:

> Petitioner was not charged or convicted of a crime, and his confinement in a state institution under the board of control is for the purpose of education, discipline, and rehabilitation. Section 242.2 Code.[73] Petitioner's detention is custodial, not penal in nature, but the security provisions necessary for his detention are, in the first instance, strictly up to the boy. If he cannot be detained at the school, the board is given permission to transfer him to a more secure facility. By doing so, he is not being punished and is not treated as a prisoner. He has no term to serve, has no record placed against him, and must be classified as a juvenile in parental custody. He is not permitted association with older prisoners. Section 246.36.[74] His commitment

In re Baker, 18 Ohio App. 2d 276, 248 N.E.2d 620 (1969) in which *Gault* is not mentioned.

See also In re Agler, —— Ohio ——, 249 N.E.2d 808 (1969) which overrules *Cope v. Campbell* on the issues of appointed counsel and advising of constitutional rights.

71. 259 Iowa 1163, 147 N.W.2d 175 (1966).

72. IOWA CODE ANN. § 218.91 (1969) provides for the transfer "for custodial care whenever it is determined that such action will be conducive to the welfare of the other inmates of the school." A court order approving the transfer must first be obtained. As worded, the statute is concerned only with "custodial care" of the child transferred and the "welfare of the other inmates." It says nothing about the treatment of the child. The point is not discussed in the decision.

73. This section provides that the superintendent of the training school for boys

> shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious, and industrious habits, and regular, thorough, and progressive improvement in their studies, trade, and employment.

There is no corresponding provision with respect to the reformatory. IOWA CODE ANN. § 218.91 (1969), authorizing transfers, provides that the child shall thereafter "be subject to all the provisions of law and regulations of the institution to which he is transferred."

74. This section provides, "The wardens shall, so far as practicable, prevent prisioners under eighteen years of age from associating with other prisoners."

Compare the observation of the dissenting judge:

> We should not presume from such an equivocal section that the warden at Anamosa has been provided with the facilities and budget to handle juvenile inmates separately. Though the record is silent on the matter, oral argument by the attorneys indicated the contrary.

259 Iowa at 1179, 147 N.W.2d at 185.

During the writer's visit to the Iowa Reformatory in early 1967, he found no such separation. In fact he was informed it had few if any

or detention is not that of a convict.[75]

In short, because the child has not been convicted, and receives no criminal record but is "in parental custody" of the state, he is not being punished though he is confined in the same institution in which adults are being punished. If he doesn't like this parental attention, he need only change his ways.[76]

The two latest cases upholding these transfers or commitments come from Maine. In *Shone v. State*,[77] the juvenile was committed by a juvenile court to the Boys Training Center of the state. Thirteen days later he was administratively transferred to the state Reformatory for Men.[78] As stated by the Maine Supreme Judicial Court, the boy attacked the transfer because it was "without notice and hearing and without judicial approval" and specifically "being in violation of the due process clauses of both constitutions and of the equal protection clause of the fourteenth amendment to the United States Constitution."

These objections were held without validity. After referring to cases sustaining administrative transfer of a person convicted of a crime,[79] the court recognized that

> the instant transfer from the Boys Training Center to the Reformatory for Men is not on the same level as transfers from the Reformatory to the State Prison. The Center in the eyes of the Legislature was not meant to be considered as a penal institution. The State is directed to establish and maintain centers to *rehabilitate* boys between the ages of 11 and 17 committed thereto as juvenile offenders. . . . See, in contrast thereto, 34 M. R. S. A. § 1501, wherein the Reformatory is defined as a correctional institution and the State prison as a penal institution.

However, the court did not pursue the consequences of that contrast. Instead, it quoted from a prior Maine case,[80] which extolled the "benevolent purposes" of the juvenile court law the

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such transfers. The information given him at the boys training school did not fully bear this out.

75. 259 Iowa at 1169, 147 N.W.2d at 179.

76. *Compare* the dissenting opinion, *id.* at 1178, 147 N.W.2d at 184:

> The observation that how the boy is treated is completely up to the boy begs the question here presented. . . . That he is not capable of meeting such a challenge is the very reason for his special treatment, for the training-not-penalty theory of the entire system.

77. 237 A.2d 412 (Me. 1968).

78. 15 ME. REV. STAT. § 2717 (1965) authorizes such transfer of a boy

> whose presence therein may be seriously detrimental to the well-being of the center, or who wilfully and persistently refuses to obey the rules and regulations of said center.

79. *See* text accompanying notes 24 & 26 *supra*.

80. Wade v. Warden of State Prison, 145 Me. 120, 73 A.2d 128 (1950). The case sustained the validity of a transfer by a juvenile court to the criminal court for criminal prosecution.

aim of which is "to protect, *by exercising a parental control*, without the scar of the so-called criminal record."[81]

These "benevolent purposes" were not thought to invalidate the transfer statute. The court viewed the statute as recognizing that at times in dealing with disruptive juvenile delinquents "sterner treatment and better security . . . must replace the benevolent attitude initially displayed." The transfer was authorized "not so much as a measure of punishment to the individual youth, but rather as a device for the protection of the juvenile center itself in the interest and general welfare of all those who submit willingly and obediently to its humanitarian curriculum."[82]

The court was well aware of the impact of the transfer on the child:

> The petitioner decries his loss of certain substantial privileges to support his claim of deprivation of constitutional rights. True, at the Center a juvenile is not required to wear institutional garb; he is not under constant surveillance of guards; he is not confined within fenced or walled areas; he may leave the grounds to spend weekends at private homes; he may attend a public high school in the vicinity or be allowed to take courses at the University of Maine; he may travel throughout the state as part of the Center's athletic program or choir group. All these liberties vanish with his transfer to the Reformatory. But they are withdrawn for all juveniles transferred because of incorrigibility and thus the procedure is not offensive to the constitutional requirement of equal protection.[83]

The court concluded the transfer statute "merely sets up an administrative procedure to which the rules of constitutional due process are not applicable"[84]—but a conclusion reached evidently not without misgivings. The court warned that the transfer was dependent upon the juvenile court proceeding having met the requirements of *Gault*. The court emphasized, however, that the proceedings "remain civil in character, and the constitutional requirement of a jury trial . . . does not apply to them."[85] The misgivings were carried no further. The central constitutional issue of whether a child may be transferred to a penal institution without criminal conviction was not examined. It was sufficient for the court that these children could not be dealt with in an

81. Shone v. State, 237 A.2d 412, 415 (Me. 1968).
82. *Id.* at 415.
83. *Id.* at 416. Baxstrom v. Herold, 383 U.S. 107 (1966), discussed at text accompanying note 150 *infra*, was not mentioned, nor was there any other discussion of the question of equal protection.
84. 237 A.2d 412, 416 (Me. 1968).
85. *Id.* at 417.

existing boys' institution. From that it concluded that a penal institution was a proper alternative.[86]

Young Shone then sought relief from the federal district court of Maine, and met the same fate.[87] The case is the only federal decision dealing with the validity of a state transfer or commitment of a juvenile delinquent to a penal institution. It is unclear from the court's opinion what it considered the constitutional issue to be. It stated that

> the sole ground asserted by petitioner . . . is that he was denied due process of law and the equal protection of the laws . . . . He contends that 15 M. R. S. A. § 2717, insofar as it permits the transfer of an inmate of the Boys Training Center to the Men's Correctional Center without at least some procedural safeguards such as a judicial hearing, the right to counsel, and the right to confront and cross-examine witnesses is unconstitutional and void.[88]

If this means that only the transfer procedure was being attacked for lack of procedural safeguards, the issue was indeed a narrow one and fairly settled by current state decisions. Without further analysis the court replied that "the great weight of state and lower federal authority" upholds such administrative inter-institutional transfers. For this the court cited four relevant decisions sustaining these transfers,[89] five lower federal court cases, without noting that they were based on the consent theory,[90] and seven state cases involving transfers of persons convicted of criminal offenses, and hence inapplicable.[91]

With respect to decisions contrary to its views the court referred only to *United States ex rel. Stinnett v. Hegstrom*,[92] and *White v. Reid*.[93] In a footnote, it questioned the present merit of these cases in view of *Gault*,[94] which it construed as holding "that a juvenile may not be committed for a juvenile offense to any type of institution without the traditional criminal constitu-

86. The court relied on Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 150 N.E. 231 (1926) in which there had been a conviction and which, therefore, is inapplicable to the present issue. *See* text accompanying note 24 *supra*.

87. Shone v. Maine, 286 F. Supp. 511 (S.D. Me. 1968).

88. *Id.* at 512.

89. The Ohio decisions were not included, probably because they were concerned with direct juvenile court commitments to the penal institutions rather than with transfers.

90. *See* text accompanying notes 30-35 *supra*.

91. *See* text accompanying note 23 *supra*.

92. 178 F. Supp. 17 (D. Conn. 1959). *See* text accompanying notes 48-50 *supra*.

93. 125 F. Supp. 647 (D.D.C. 1954). *See* text accompanying notes 36-41 *supra*.

94. 387 U.S. 1 (1966).

tional safeguards." *Stinnet* and *White*, it stated, had assumed that juvenile court proceedings were not criminal in nature and had found in this the constitutional infirmity of the subsequent transfer.[95] The court evidently thought that if the requirements of *Gault*, so construed, were met, the subsequent transfer to a penal institution was permissible. *Gault*, however, explicitly disclaimed that it was insisting that all the constitutional requirements of a criminal trial must be met in a juvenile delinquency proceeding.[96]

The court then considered whether this "great weight" of authority was still valid in the light of four recent United States Supreme Court cases.[97]

> Petitioner urges that these decisions make it clear that a statute which provides for the transfer of an inmate of a juvenile institution to a "functionally different" institution without a judicial finding of fact to support the transfer and without tradi-

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95. *But see* the discussion of these cases at text accompanying notes 30-35, 48-50 *supra.*

96. Referring to Kent v. United States, 383 U.S. 541 (1966) the Court in *Gault* stated:

> We announced with respect to such waiver proceedings [for criminal prosecution] that while "We do not mean . . . to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." We reiterate this view, here in connection with a juvenile court adjudication for delinquency.

387 U.S. at 30.

The premise of the present paper is that a juvenile proceeding does not conform to all of the constitutional requirements of a criminal trial and that *Gault* does not so require. This certainly represents present practice under existing juvenile court codes. *See, e.g.*, the provisions of UNIFORM JUVENILE COURT ACT (1968). *See also* Shone v. State, 237 A.2d 412 (Me. 1968) stating, after discussing *Gault*, "Such prooceedings, we hold remain civil in character, and the constitutional requirement of a jury trial . . . does not apply to them." *Id.* at 417. Note also the dissent of Justice Harlan:

> The court begins with the premise, to which it gives force at several points, that juvenile courts need not satisfy "all of the requirements of a criminal trial."

Id. at 74.

Justice Black, concurring with the majority, would go farther:

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the state to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.

Id. at 61.

97. Mempa v. Rhay, 389 U.S. 128 (1967); *In re* Gault, 387 U.S. 1 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966).

tional constitutional safeguards deprives the inmate of due process and equal protection of the laws.[98]

Again the issue was thus focused upon the procedural aspect of the transfer. The equal protection of the laws argument of counsel was, so the court stated, that the transfer is "without a judicial proceeding" which other youths get when committed to the state reformatory by a juvenile court.[99]

With the issues thus posed, the court found little difficulty in distinguishing *Mempa v. Rhay*[100] and *Specht v. Patterson:*[101]

> The difference between the present case and *Specht* is that the sentence under the sexual offender statute was a considerable enhancement of the maximum sentence for the crime of which Specht had in fact been convicted while in the present case the original commitment is not being extended in any way. In *Mempa*, the Court found that due process requires that counsel be present at the time of sentencing where sentence has been deferred subject to probation. However, there the alternatives were probationary freedom or confinement, and the sentencing court had to determine whether probation should be revoked and a prison sentence imposed. Here, petitioner is already confined pursuant to a valid commitment, and the administrative determination only affects the locus in which his confinement is to take place.[102]

Gault was distinquished with equal ease, for "petitioner is not attacking the constitutional sufficiency of his original juvenile proceedings" to which *Gault* is confined, "nor does he maintain that a juvenile cannot be constitutionally committed to the Correction Center in the first place."[103]

The court closed its opinion with the observation that both institutions were aimed at rehabilitation and continued:

> To be sure, the methods employed at the Training Center . . . are milder and more suited to young and impressionable boys . . . . Undoubtedly it is not desirable for a young boy to be kept in company with experienced criminals in a prison environment. However it is equally undesirable to have a disruptive and incorrigible youth hampering the program at a juvenile institution and exercising his unwholesome influence over the

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98. 286 F. Supp. at 514.
99. 15 ME. REV. STAT. ANN. § 2611 (1964) authorized such a commitment. Similarly, the argument that due process was denied is addressed by the petitioner to the transfer procedure "in that a 'critical finding' of a 'new fact' which affected the type of petitioner's sentence was made administratively without the safeguards of criminal judicial procedures." The court distinguished Baxstrom v. Herold, 383 U.S. 107 (1966) on the ground that the transfer in the present case involved no extension of the term of possible confinement as it did in Baxstrom. The Baxstrom case is discussed at text accompanying note 150 *infra*.
100. 389 U.S. 128 (1967).
101. 386 U.S. 605 (1967).
102. 286 F. Supp. at 514.
103. *Id.* at 515.

> other boys there. In administering custodial and rehabilitative institutions, the state must have some latitude to determine what course of treatment is most appropriate for the individual inmate and to preserve discipline and protect the welfare of other inmates within its various institutions.[104]

How this bore on the constitutional validity of the transfer was not stated and again the key issue of whether a juvenile may be confined in a penal institution as the result of a juvenile court proceeding not conforming to the constitutional requirements of a criminal trial was never considered.

Four main points may be noted in the arguments supporting the transfers and commitments under consideration. It is said first that the state has been given parental authority, custody and control over the child through the juvenile court commitment. The state is merely a substitute for the child's parents and is acting in their stead. However, this advances the constitutional justification very little. Obviously, there are constitutional limits imposed on the state which do not apply to a parent. These can hardly be avoided by calling the state a parent. The question still remains—when can a state confine a child in a penal institution? The thought that a child has no rights beyond what the state may choose to give him was laid to rest by *Gault*[105] and *Kent*.[106]

Second, it is said that in a juvenile court proceeding the child has not been convicted of a crime, has no criminal record and is in custody for his own welfare and the safety and welfare of others. It is a peculiar inversion of logic to conclude that he may therefore be confined in a penal institution rather than that he may not be.

Third, it is argued that since the child's presence at a juvenile institution is harmful to the institution and the other children in it, it is essential that his removal be permitted. That the necessity exists cannot be doubted. The argument is not, however, a constitutional justification. It only warrants confinement in a more secure *juvenile treatment* institution. Yet none of the

104. *Id.*

105. 387 U.S. 1, 29-30 (1967), stating:

> So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide. . . . In Kent v. United States *supra*, we stated that the Juvenile Court Judge's exercise of the power of the state as *parens patriae* was not unlimited. We said that "the admonition to function as a "parental" relationship is not an invitation to procedural arbitrariness.

106. 383 U.S. 541 (1966).

courts sustaining these transfers and commitments address themselves to this alternative.

Finally, the point is made that the penal institution provides a form of treatment or rehabilitation and thus fulfills the objectives of the juvenile court commitment. The term "reformatory" invites this conclusion. It may be based also on statutory provisions stating the purposes of the reformatory,[107] but the analysis seldom extends beyond this. There is no factual examination into the character of the program pursued in the institution or of the facilities provided, or into the kind of program that is needed to rehabilitate a child.

Nevertheless, the reason last assigned, though inadequately developed, goes to the heart of any constitutional justification that may exist and warrants further consideration. If in fact the reformatory or other penal institution provides a program which rehabilitates the child, does this not meet any constitutional objection? May not a penal institution for adult criminals be used also for juvenile delinquents when the end result is the attainment of the objectives of the juvenile court system?

The resolution of these questions is suggested in principles developed by the United States Supreme Court in analogous fields. While none of its decisions are directly in point, its treatment and disposition of related issues indicate the direction it will take on juvenile transfers and commitments. The indication is that it will insist upon maintaining a distinct line between institutions in which adult criminals are confined and those directed to the treatment of juvenile delinquents, and that juvenile delinquents may not be committed or transferred to an institution for adult criminals even though the objective and effect are, in a sense, rehabilitative.

D. UNITED STATES SUPREME COURT CASES

There was a brief reference to juvenile penal commitments in *Gault*.[108] In justifying the application of the privilege against self-incrimination to juvenile court proceedings, the court observed: "Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions,

107. For a discussion of the failure of the reformatory ideal in the reformatories of the country, see H. BARNES & N. TWEETERS, NEW HORIZONS IN CRIMINOLOGY 428-33 (3d ed. 1959). In recent years, both prisons and reformatories have proclaimed that rehabilitation of their inmates is one of their primary objectives. *Id.* at 441. *See also* note 59 *supra*.

108. 387 U.S. 1, 50 (1967).

apart from adult 'criminals.' In those States juveniles may be placed in or transferred to adult penal institutions."[109] The observation was made to emphasize the court's need to apply the privilege against self-incrimination to juvenile court proceedings. It was not intended as an endorsement of the practice.[110] Rather, the implication is clear that the Court will look beyond the labels placed by a state on any given program. To call a program reformatory when in fact it is punitive will not save it from constitutional attack.[111]

In examining the substance of the assertion that the commitments or transfers under consideration are but reformatory in nature, two lines of Supreme Court decisions become relevant. The first relates to the civil commitment of persons suffering some disability for purposes of treatment. In *Minnesota ex rel. Pearson v. Probate Court*,[112] the Court had before it an involuntary civil commitment of a so-called "sex psychopath" or "psychopathic personality." The commitment was attacked on the

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109. The Court cites W. SHERIDAN & A. FREER, CHILDREN'S BUREAU, U.S. DEP'T OF HEW, DELINQUENT CHILDREN IN PENAL INSTITUTIONS, Pub. No. 415-1964, at 1.

110. The authors of the article cited in note 109 *supra*, Sheridan & Freer, consider the practice unconstitutional.

Elsewhere in a footnote to its opinion the Court cited among other cases Kautter v. Reid, 183 F. Supp. 352 (D.D.C. 1960) cited in note 51 *supra*, and White v. Reid, 125 F. Supp. 647 (D.D.C. 1954) discussed at text accompanying note 31 *supra*, as indicating that "appropriate treatment is essential to the validity of juvenile custody." 387 U.S. 1, 23 n.30 (1967). These references negate any inference that might be drawn that the Court looked kindly upon the practice under consideration.

State v. Fisher, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969) interpreted *Gault* as prohibiting confinement of a juvenile delinquent in a penal institution, and hence disregarded the earlier Ohio Supreme Court decisions to the contrary.

111. *See also* Trop v. Dulles, 356 U.S. 86 (1958):

> But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. We are told this is so because a committee of Cabinet members, in recommending this legislation to the Congress, said it "technically is not a penal law." How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them. . . . But surely form cannot provide the answer to this inquiry. A statute providing that "a person shall lose his liberty by committing bank robbery," though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.

Id. at 64. *See also* note 105 *supra*.

112. 309 U.S. 270 (1940).

grounds that the appellant had been denied due process of law and that the statute under which the commitment was authorized was unconstitutionally vague, but was upheld on both counts. On the issue of due process, the Court found that adequate notice, opportunity to be heard, and the right to be represented by counsel had been given. The Court did not address itself to the question of whether the principles of due process governing criminal proceedings were applicable. Nevertheless, the case warrants the conclusion that given compliance with the due process requirements of a civil proceeding, involuntary confinement of the mentally ill by a noncriminal proceeding is constitutionally permissible.[113]

Some years later, California undertook to impose criminal penalties not only on the criminal acts of possessing, using, or selling narcotic drugs, but also on those "addicted to the use of narcotics."[114] In *Robinson v. California*,[115] the conviction of the defendant as one so addicted was held unconstitutional. The Court held that to punish a "status" which amounts to an illness and to imprison a person

> thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.[116]

What is significant for present purposes is the Court's observation that

> in the interest of discouraging the violation of such laws [dealing with narcotics], or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[117]

In a footnote the Court added,

> California appears to have established just such a program in §§ 5350-5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.[118]

The Court continued:

> Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for

113. *See also* Lynch v. Overholzer, 369 U.S. 705 (1962) (incidental discussion of civil proceedings to commit persons suffering from mental illness).
114. CALIF. HEALTH & SAFETY CODE § 111721 (West 1955).
115. 370 U.S. 660 (1961).
116. *Id.* at 667.
117. *Id.* at 664-65.
118. *Id.* at 665 n.7.

> failure to comply with established compulsory treatment procedures.[119]

By this dictum, the Court plainly recognized the validity of, and in fact encouraged the use of, involuntary civil commitments for purposes of treatment.

The latest case in this category, *Powell v. State of Texas*,[120] involved the chronic alcoholic. The defendant had been convicted of public drunkenness and fined $50.00.[121] He appealed on the ground that such was cruel and unusual punishment. The conviction was sustained, but by a sharply divided court. Justice Marshall, with whom Chief Justice Warren and Justices Black and Harlan concurred, pointed to the imprecision of the concept of chronic alcoholism, to the lack of consensus as to its causes, and to the proper modes of, and facilities for, treatment. Under these conditions he thought there were serious dangers both for the public and for the alcoholic if resort to the criminal process was forbidden. *Robinson* was distinguished since Powell

> was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson* . . . .[122]

Justice Marshall was unwilling to depart from "[t]raditional common-law concepts of personal accountability" and by extending *Robinson* become involved in "the scope and content of what could only be a constitutional doctrine of criminal responsibility."[123] Current medical knowledge and the record in the case before the Court did not permit him to conclude

> that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication.[124]

Justice Black, joined by Justice Harlan, concurred and added some additional considerations. He thought the claim that jail-

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119. Justice Douglas concurring at 676, stated:
The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. [*citing* Lynch v. Overholzer, 369 U.S. 705 (1962)] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.

120. 392 U.S. 514 (1968).

121. TEX. PEN. CODE art. 477 (1948): "[W]hoever shall get drunk or be found in a state of intoxication in any public place . . . shall be fined not exceeding one hundred dollars."

122. 392 U.S. 514, 532 (1968).

123. *Id.* at 534-35.

124. *Id.* at 535. The trial court's findings to the contrary were disregarded as going beyond the proper function of findings.

ing of chronic alcoholics has therapeutic value was not insubstantial and that, apart from this, jailing served other objectives of the criminal law such as "isolation of the dangerous" and deterrence both of other potential alcoholics and of the chronic alcoholic himself. Powell's appearance in public was an act for which he can be punished

> without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. . . . [P]unishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment.[125]

Mr. Justice White, concurring in the result, had a different approach. He viewed *Robinson* as requiring the conclusion that

> the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.
>
> Powell's conviction was for the different crime of being drunk in a public place. . . .
>
> [There was nothing to show that he had a] compulsion not only to drink to excess but also to frequent public places when intoxicated.[126]

Powell was not therefore "shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place."[127]

Justice Fortas dissented with Justices Douglas, Brennan and Stewart concurring. For him, chronic alcoholism is medically recognized as a disease attributable to a variety of causes and subject to a variety of methods of treatment. The fact that existing knowledge on the subject is incomplete did not for him alter the fact that

> alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological and psychological make-up and history of the individual, cannot be controlled by him.[128] . . . [J]ailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent).[129]

Justice Fortas would therefore apply *Robinson* which he construed as standing for the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[130]

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125. *Id.* at 540.
126. *Id.* at 549.
127. *Id.* at 550.
128. *Id.* at 561.
129. *Id.* at 564.
130. *Id.* at 567. Justice Fortas stated also that:

> [T]he findings of the trial court call into play the principle that a person may not be punished if the condition essential

The relevance of this decision to the topic under present discussion is tangential but nevertheless significant. Its significance lies in the implied assumption that an involuntary civil commitment for treatment of chronic alcoholics is valid. The five justices who were prepared to forbid the use of criminal sanctions, Justice White on a more limited scale, could scarcely have assumed otherwise and left the states to rely solely on the relatively inadequate means of voluntary treatment. Justice Fortas was careful to point out that "[t]his case does not raise any questions . . . as to the State's power to commit chronic alcoholics for treatment."[131] Justice Marshall also clearly assumed that the alternative to punishment was civil commitment.[132]

> to constitute the defined crime is occasioned by a compulsion symptomatic of the disease.

Id. at 569.
He would differentiate crimes committed while intoxicated such as driving while intoxicated, assault, theft and robbery since these are "not part of the syndrome of the disease."
Id. at 559 n.2.

131. *Id.* at 559.

132. *Id.* at 528-29.

> Facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country. It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no state or city will tolerate such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.
>
> One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom."

Id. at 531.

Justice Marshall's description raises the question whether civil confinement without, or with inadequate, treatment would not in itself be illegal. *See* Nason v. Superintendent, 353 Mass. 604, 233 N.E.2d 908 (1968); Director v. Daniels, 243 Md. 16, 221 A.2d 397 (1965); Livermore, Malmquist & Meehl, *On the Justification for Civil Commitment,* 117 U. PA. L. REV. 75 (1968); Note, *Civil Restraints, Mental Illness, and the Right to Treatment,* 77 YALE L.J. 87 (1967); Note, *The Nascent Right to Treatment,* 53 VA. L. REV. 1134 (1967).

Of course, Justice Marshall does not suggest, in holding a chronic

Pearson, Robinson and *Powell* thus provide strong support for the broad principle that a person suffering from some disability which seriously diminishes or robs him of his judgment or control of his conduct may properly be subjected by civil proceedings to involuntary forms of treatment designed to remove the disability and to restore or improve his judgment and control. Juveniles fall squarely within this category. In virtually every area of the law, the immaturity of a person under 18 years of age, the usual limit of juvenile court jurisdiction, or even 21 years of age, is recognized. He may not vote, or hold public office, he is not bound by his contracts for other than necessaries, and he may not convey property or appear in an action except through a guardian. He is protected from intoxicants, obscenity and vice. Until the advent of the juvenile court, the principal area of the law in which he has been held to the same degree of accountability as an adult was that of the criminal law. The laws establishing the juvenile courts were designed to remove that anomaly, and substitute a civil procedure directed toward rehabilitation of the child.[133] The constitutional validity of that change seems evident from the foregoing cases. *Gault* is not to the contrary. It merely insists that the civil proceedings for the determination of delinquency conform to certain elementary principles of due process.[134]

Quite different principles come into operation when the state seeks to deal with an adult individual possessed of his normal faculties. A line of Supreme Court decisions indicates that such a person cannot be confined for purposes of treatment except through the usual criminal proceedings with their attendant constitutional requirements. Again, however, one must rely on the language of the Court rather than on specific decisions to that effect. In *Williams v. New York*,[135] for example, Justice Black stated:

> [T]he prevalent modern philosophy of penology [is] that the punishment should fit the offender and not the crime. . . . "Retribution is no longer the dominant objective of the crim-

alcoholic may be punished for his criminal acts, that he may not be subjected to compulsory treatment for his condition. As to whether he may be both punished and treated, see note 143 *infra*.

133. *See* text accompanying note 2 *supra*.

134. *See* text accompanying note 4 *supra*.

135. 337 U.S. 241 (1949). Here the Court upheld a trial court's imposition of sentence of death over the objection that information contained in a presentence report had been used in arriving at the sentence without the defendant confronting or cross-examining the witnesses supplying the information.

> inal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[136]

In another context,[137] Justice Brennan, concurring in *Trop v. Dulles*,[138] stated:

> In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to rehabilitate the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is but one of the several purposes of the penal law.[139]

Indeed, so great has been the emphasis on rehabilitation as an objective of the criminal law that Justice Marshall felt it necessary to say in *Powell*, "[t]his Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects . . . ."[140]

These statements of principle by the Court warrant the conclusion that whenever a state attempts to impose involuntary confinement of a normal adult person without his consent, even though its purpose is to alter his behavior through treatment and rehabilitation, the constitutional principles governing the imposition of criminal sanctions will be applied, including, of course, the requirements of due process. This is also a necessary conclusion if the constitutional principles which have been so carefully and painstakingly evolved for the protection of the accused in criminal cases are not to be eroded through the device of civil commitment. Any other position would afford an easy route for bypassing these protections, for all penal institutions now assert that their primary objective is the rehabilitation of their inmates, and it is clearly the objective of probation and parole.

It has been noted that *Robinson* and, with qualifications, the majority in *Powell* take the view that a person under a disability

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136. *Id.* at 248.

137. The topic was deprivation of citizenship for deserting the army.

138. 356 U.S. 86, 111 (1958). The Court held that deprivation of citizenship imposed a penalty and was unconstitutional as a bill of attainder.

139. *Id.* at 111. *See also* United States v. Brown, 381 U.S. 437 (1965), holding invalid as a bill of attainder a statute prohibiting a communist party member from holding a labor union office and stating:

> It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes; retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

Id. at 458.

140. Powell v. Texas, 392 U.S. 514, 530 (1968).

such as narcotic addiction or chronic alcoholism cannot be subjected to criminal sanctions on the ground that he is in that status or condition. It would appear to be a necessary consequence that he cannot, by civil commitment for treatment which the court approves, be confined in a penal institution even for purposes of treatment. The treatment program of a penal institution is identified with an objective different from that intended by a civil commitment. It centers on rehabilitation as a reorientation of the convicted inmate who is there because he is deemed to be in possession of his normal mental faculties and is held morally and criminally responsible for the conduct which brought him there and which was the product of his free choice. It is in this sense that rehabilitation of the inmate is regarded as a criminal sanction requiring a constitutionally valid conviction. The treatment program in an institution for those who are the subject of a civil commitment has a different focus. It is directed at a condition, disability or "status" of the person who is the object of the program and assumes an absence, or at least a more limited degree, of free choice and hence of moral and criminal responsibility. A treatment program with this objective does not involve the application of criminal sanctions.

It is essential that these two aspects of treatment or rehabilitation remain distinctly identified as serving their separate roles. If the constitutional rights surrounding the application of criminal sanctions are not to be undermined, treatment used as a criminal sanction cannot be substituted for treatment directed at a disability, unless there has been a valid criminal conviction. The prohibition of *Robinson* and *Powell* against applying criminal sanctions to persons under disability requires, therefore, that institutional treatment under a civil commitment be restricted to a nonpenal institution. Otherwise, what was prohibited by way of criminal proceedings could be accomplished by resort to civil commitment.

No different conclusion is warranted when the person under disability commits some criminal act, which under the differing views expressed in *Powell* can be punished, and the state resorts to civil commitment instead. The criminal act can justify commitment to a penal institution only if there has been a criminal trial and conviction which meets constitutional standards. That the state in this situation may proceed by either civil commitment or criminal prosecution reflects the fact that courts

have been disinclined to prescribe, in the words of Justice Marshall, "a constitutional doctrine of criminal responsibility."

Two state decisions support these conclusions. *In re Maddox*[141] is particularly apt. A state statute provided for the commitment of the criminal sexual psychopath.[142] The proceedings were civil in character but were initiated in the course of criminal proceedings charging the defendant with a criminal offense.[143] Maddox, an adult, had originally been so committed to a state hospital. Thereafter he was transferred by administrative action to a state prison on the recommendation of a state psychiatrist who believed it to be medically indicated as a desirable and effective form of treatment. This procedure was declared unconstitutional in a vigorous opinion by Judge Edwards:

> We are confronted here by a record that plainly shows that life sentence in State prison, based solely on medical diagnosis, can result from the administrative interpretations placed upon the act. And this, without the person concerned ever having been found guilty of any crime.
>
> We reject any such interpretation of the statute. . . .
>
> This Court holds that incarceration in the penitentiary designed and used for the confinement of convicted criminals is

141. 351 Mich. 358, 88 N.W.2d 470 (1958).

142. MICH. COMP. LAWS §§ 780.501-780.509 (1948). These sections were repealed by Mich. P.A. 1968, No. 143, § 2.

143. MICH. COMP. LAWS § 780.503 (1948). Section 780.508 provided that on a finding that the defendant was a criminal sexual psychopath he could not thereafter be tried or sentenced on the criminal charge. *See* People v. Griffes, 13 Mich. App. 299, 164 N.W.2d 426, 430 (1968) stating:

> [T]he question of whether sick people are to be treated for their illness or punished for it, is a question which touches the very heart of judicial consciousness of a civilized system of jurisprudence. If perchance, the parties or counsel fail to raise the matter our courts cannot close their eyes to so important a matter. Under facts such as indicated in the present case, the trial judge should have initiated criminal sexual psychopath proceedings on his own motion once the defendant was convicted of the offense charged. It is essential to the dignity of the jurisprudence of this State that we do not punish mental disorder.

The opinions in *Powell* do not discuss the question whether commitment for treatment bars an otherwise permissible criminal conviction or whether a conviction and sentence would bar a civil commitment stemming from the same criminal act. *See* People v. Reyloso, 50 Cal. Rptr. 2d 468, 470, 412 P.2d 812, 814 (1966) (a case of drug addiction) stating:

> A defendant in a criminal case has not suffered double jeopardy nor double punishment who has first been committed under section 6451, Penal Code, to the California Rehabilitation Center and later sentenced to prison in the criminal proceedings that had been suspended.

The soundness of this position will not here be examined. If the criminal act for which he is punished is not a basis for the civil commitment the problem of double jeopardy probably does not arise. *See* Commonwealth v. Dagle, 345 Mass. 539, 188 N.E.2d 450 (1963).

> not a prescription available upon medical diagnosis and order to an administrative branch of the government. Such confinement can only be ordered by a duly constituted court after trial conducted in accordance with the guarantees pertaining to individual liberty contained in the Constitution of this State and this nation.[144]

Commonwealth v. Page[145] reached a similar result although in less positive terms. The Commonwealth of Massachusetts had established a treatment center for sex offenders at a state prison.[146] By a civil proceeding prescribed by statute, the defendant, then serving a sentence for a criminal offense and about to be discharged, was committed to this center. The appellate court concluded that the evidence did not show that a true treatment center had been established but that on the contrary, persons committed under the act were housed with the general prison population, no separate treatment staff was provided, and the only treatment available was that offered to the prison population generally. The Court held that under these circumstances, the commitment was invalid:

> [T]o be sustained as a nonpenal statute, in its application to the defendant, it is necessary that the remedial aspects of confinement thereunder have foundation in fact. It is not sufficient that the Legislature announce a remedial purpose if the consequences to the individual are penal. While we are not now called upon to state the standards which such a center must observe to fulfill its remedial purpose, we hold that a confinement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape constitutional requirements of due process.[147]

These cases represent but the concrete application of the principles which find support in the Supreme Court decisions. That these principles apply also to the commitment or transfer of juvenile delinquents to a penal institution seems evident. Like the sexual psychopath who is the subject of a civil commitment, the juvenile delinquent has not been convicted of a criminal offense. His commitment is through a juvenile court procedure, noncriminal in character, which does not contemplate all of the constitutional protections of a criminal trial, and is for the pur-

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144. 351 Mich. 358, 370, 88 N.W.2d 470, 477 (1958). The court cited White v. Reid, 125 F. Supp. 647 (D.D.C. 1954), discussed at text accompanying note 36 *supra*.

145. 339 Mass. 313, 159 N.E.2d 82 (1959).

146. MASS. GEN. LAWS ch. 123A (1958).

147. 339 Mass. 313, 317, 159 N.E.2d 85 (1959). Dodd v. Hughes, 81 Nev. 43, 398 P.2d 540 (1965) applied NEV. REV. STAT. § 433.310, authorizing confinement of a dangerous but mentally ill person in the State Prison, without considering its constitutional validity. This section was repealed by NEV. STAT. ch. 541, § 59 (1967).

poses of treatment and rehabilitation, the need for which stems from his status of immaturity. His confinement in a penal institution under these circumstances is equally a denial of due process.

IV. JUVENILE PENAL COMMITMENT—A DENIAL OF EQUAL PROTECTION OF THE LAWS

The discussion thus far has centered on whether due process is denied either by a transfer of a juvenile delinquent from a juvenile institution to a penal one or by a direct juvenile court commitment to a penal institution. Another obstacle to these transfers or commitments lies in the constitutional prohibition against the denial of the equal protection of the laws.[148] This question has received little consideration by courts passing upon the validity of these practices. When their validity has been upheld, it has been on the grounds, among others, that confinement in the penal institution was only an aspect of treatment and did not constitute punishment for a crime. There was thus little necessity to consider whether there had been a denial of equal protection.[149] Cases denying the validity of the transfer or commitment have been content to do so on due process grounds.

Baxstrom v. Herold,[150] however, raises the question to new dimensions. The case involved the validity of New York's procedure for detaining in Dannemora Hospital prisoners who were mentally ill and whose term of imprisonment was expiring.[151]

148. U.S. CONST. amend. XIV, § 1.

149. There was a brief reference to the question in Shone v. State, 237 A.2d 412, 416 (Me. 1968). *See* note 83 *supra*.

In Shone v. Maine, 286 F. Supp. 511, 514 (S.D. Me. 1968) the petitioner's complaint was said to lie in the denial of a judicial proceeding on transfer while it was granted in a commitment by a juvenile court to the penal institution. The court merely distinguished *Baxstrom v. Herold*, stating that in *Baxstrom*

> the period of the commitment was an extension of the term of the original criminal sentence imposed. In the present case, the transfer does not prolong the period of confinement; it merely changes the environment in which the original judicially imposed commitment is to be served.

As the discussion in the text indicates, the impact of *Baxstrom* goes beyond this narrow interpretation.

150. 383 U.S. 107 (1966).

151. Dannemora Hospital is:

> used for the purpose of confining and caring for such male prisoners as are declared mentally ill while confined in a state prison, reformatory, penitentiary or institution; for male defective delinquents, who have been sentenced or committed thereto for a felony and others provided for under section three hundred eighty three. The department of correction shall have jurisdiction and control of such hospital.

After initiation of the proceeding by the hospital superintendent, physicians examined the inmate and provided a certificate as to his condition, and a court issued an order authorizing his continued detention.[152] The procedure and standards applied were different from those applied to other persons who were not prisoners but whose commitment to the hospital was sought. In the latter situation the court was required to find the subject of the proceeding to be "dangerously mentally ill."[153] Where the subject was a prisoner, however, it was sufficient that the court find that "such person may require care and treatment in an institution for the mentally ill"—a much less rigid standard. Once that finding was made, it became an administrative rather than a judicial question whether the prisoner should be confined in Dannemora or elsewhere.[154] If the patient was not a prisoner in the hospital, he was entitled to a jury trial *de novo* on the question of his mental illness. No such right existed for prisoners.

A nonprisoner was thus given substantial protections, both in standards to be met and in the procedures followed, that were denied to a prisoner in the hospital whose term was expiring. These differences were held by the court to be a denial of equal protection of the laws and rendered the confinement of a prisoner invalid.

> This statutory classification cannot be justified by the contention that Dannemora is substantially similar to other mental hospitals in the State and that commitment to one hospital or another is simply an administrative matter affecting no fundamental rights. The parties have described various characteristics of Dannemora to show its similarities and dissimilarities to civil hospitals in New York. As striking as the dissimilarities are, we need not make any factual determination as to the nature of Dannemora; the New York State Legislature has already made that determination. By statute, the hospital is under the jurisdiction of the Department of Correction and is used for the purpose of confining and caring for insane prisoners and persons, like Baxstrom, committed at the expiration of a penal

N.Y. CORREC. LAW § 375 (McKinney 1944). Section 383 covers "state correctional institutions," "workhouse" and "city prison" in addition to those mentioned in § 375.

152. N.Y. CORREC. LAW § 384 (McKinney 1944). The section was repealed in 1966 and the procedure altered to conform to the requirements of the *Baxstrom* case. *See id.* § 385.

153. N.Y. MENTAL HYGIENE LAW § 85 (McKinney 1951). Before application was made to the court, a certificate was required

> that such patient . . . has committed or is liable to commit an act or acts which if committed by a sane person would constitute homicide or felonious assault, or is so dangerously mentally ill that his presence in such hospital is dangerous to the safety of other patients therein.

154. N.Y. CORREC. LAW § 384 (McKinney 1944).

> term. . . . Civil mental hospitals in New York, on the other hand, are under the jurisdiction and control of the Department of Mental Hygiene. Certain privileges of patients at Dannemora are restricted by statute. . . . While we may assume that transfer among like mental hospitals is a purely administrative function, where, as here, the State has created functionally distinct institutions, classification of patients for involuntary commitment to one of these institutions may not be wholly arbitrary.[155]

The government contended that persons like Baxstrom had demonstrated by their past criminal record that they were dangerously insane and therefore classifying them separately for purpose of confinement was reasonable. To this the Court replied:

> We find this contention untenable. Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.[156]

The application of the principles developed by *Baxstrom* would appear to render a transfer or direct commitment of a juvenile delinquent to a penal institution equally invalid.[157] He has not been given the same protection of the laws as those in the penal institution who arrive there for like conduct but following a criminal trial and conviction. The latter has had all the constitutional protections attendant upon a criminal prosecution. The juvenile has not. Furthermore, the length of his possible confinement in the penal institution may in some cases be longer than the statutory limits provided for confinement under a criminal sentence for the crime involved. Juvenile court codes

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155. Baxstrom v. Herold, 383 U.S. 107, 113-14 (1966).

156. *Id.* at 114-15. For decisions applying the *Baxstrom* principles to invalidate automatic confinement in a mental hospital upon an acquittal by reason of mental illness, see Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967). *See also* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87 (1966).

157. *See* State v. Fisher, 17 Ohio App. 2d 183, 245 N.E.2d 358 (1969). (*Baxstrom* was not mentioned.) Earlier Ohio Supreme Court decisions sustaining confinement of juveniles in penal institutions were disregarded in the light of *Gault*. *See* text accompanying note 70 *supra*. *See also* dissent in *In re* Wilson, 251 A.2d 671 (Super. Ct. Pa. 1969) (majority decision without opinion); Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968), holding a statute permitting greater maximum prison terms for women than for men invalid as denying women equal protection of the law.

uniformly provide that on a commitment of a juvenile delinquent to a state department or state juvenile institution he may be held for the duration of his minority. The delinquent act which led to the juvenile's commitment may have been a felony carrying a maximum sentence less than this period. It may have been a misdemeanor or even noncriminal conduct such as truancy or incorrigibility for which an adult could not be tried or confined at all. The unequal treatment is thus even more glaring than that which appeared in *Baxstrom*.

Some states have sought to reduce these anomalies and elements of unfairness by limiting the power to transfer or commit a juvenile to a penal institution to instances in which the particular conduct leading to the adjudication of delinquency constituted a felony.[158] However, such provisions meet the objection of unconstitutional treatment only in the sense that others in the penal institution are also there for having committed a felony. Other aspects of the objection remain. The juvenile still has not had a criminal trial and his confinement may be for a longer period than that permitted for adults depending on his age and the maximum sentence prescribed for the crime involved.

These provisions also defeat in substantial measure the very reasons given for authorizing transfers from a juvenile to a penal institution, namely, that the child is incorrigible, uncontrollable and disruptive of the juvenile institution. These reasons apply whether his commitment is based on the commission of a felony, misdemeanor or noncriminal conduct. To limit transfers to those children who have committed a felony makes the transfers purely arbitrary and only a partial solution to the problem. It increases rather than decreases the validity of the objection that these transfers deny to the child the equal protections of the laws. Some misbehaving children would be transferred for their misconduct while others creating equal or greater problems for the juvenile institution would not, based solely on the irrelevant question of whether the conduct which brought them there constituted a felony.

V. THE VALIDITY OF A SEPARATE PROGRAM WITHIN PENAL INSTITUTIONS

It has thus far been assumed that the juvenile delinquents transferred or committed to a penal institution are integrated

158. *E.g.*, N.Y. FAMILY CT. ACT § 758 (McKinney 1963); OHIO REV. CODE ANN. § 2151.35(E) (Page 1968), *quoted in* note 16 *supra*.

into the general population of the institution and participate in an undifferentiated program with prisoners confined under sentence. There remains the question whether a separate program designed for the juvenile may be conducted within the walls of the institution. So far as can be discovered, this has nowhere been tried. Some possible support for such a program may be found in state decisions dealing with separate programs for mentally ill persons or narcotics addicts which were located in penal institutions.

In re De La O[159] dealt with this question as it affects narcotics addicts. Pursuant to statute,[160] California had established a Rehabilitation Center for addicts under the control and direction of the Director of Corrections and located at a state prison. Those committed to the center were fingerprinted and had their mail censored. Maximum and minimum periods of confinement were specified by statute and parole was under the direction of the agency empowered to grant paroles and fix sentences for persons committed to a state prison.[161]

Relying on *Robinson*[162] the defendant, who had been committed to the Center, contended that he was "being incarcerated and treated in the same manner as if he were a felon." To this the court replied:

> It appears, however, that the branch of the California Rehabilitation Center where petitioner is confined is physically and administratively distinct from the other facilities at Chino and consists of 16 buildings including dormitories, gymnasium, mess hall, academic and vocational buildings, and others; that the California Rehabilitation Center employs a full-time psychiatrist and professionally trained counselors and therapists; and that petitioner is given daily group therapy and twice weekly intensive therapy in small units of not more than 15 men, all under the direction of trained counselors. In addition, the California Rehabilitation Center provides a specially selected vocational and academic program.[163]

The court concluded

> that the demonstrably civil purpose, mechanism, and operation of the program outweigh its external "criminal" indicia, and hence that petitioner's commitment and confinement thereunder do not constitute cruel and unusual punishment within the meaning of [*Robinson*].[164]

159. 59 Cal. 2d 128, 28 Cal. Rptr. 489, 378 P.2d 793 (1963).
160. CAL. WELF. & INST'NS CODE § 3050 (West 1966), formerly Cal. Penal Code § 6450.
161. 59 Cal. 2d 128, 144, 378 P.2d 793, 803, 28 Cal. Rptr. 489, 499 (1963).
162. *See* discussion in text accompanying notes 115-19 *supra*.
163. 59 Cal. 2d 128, 148, 378 P.2d 793, 806, 28 Cal. Rptr. 489, 502 (1963).
164. *Id.* at 149, 378 P.2d at 807, 28 Cal. Rptr. at 503.

De La O was followed by *In re Cruz*.[165] Cruz had been transferred from the California Rehabilitation Center, where he was confined under a commitment procedure as a narcotics addict, to a "branch" of the Center established at a prison. The transfer was sustained in an opinion which appears to retreat somewhat from the standard implicit in *De La O*. The court pointed out the necessity for a more secure institution for addicts such as Cruz and continued:

> Equally unsupported by the facts is petitioner's further contention that the conditions of his confinement at California Men's Colony-East constitute "cruel and unusual punishment" within the meaning of Robinson. . . . It is true that the 46 addicts in that facility . . . are not housed apart from the other inmates, but the People explain that the decision not to segregate them was taken "[i]n order to prevent internal security and management problems and to expose them to the normal activities of the Facility. . . ." More importantly, these addict inmates are offered a program of treatment and rehabilitation similar in all respects to that of the central facility at Corona: i.e., qualified counseling on a weekly basis in groups of less than ten men, plus individual counseling when indicated; academic and vocational training, plus regular work assignments; recreational and religious facilities; and periodical progress evaluation with a view to retransfer to the central facility at Corona or direct release to out-patient status. . . . Nothing in Robinson . . . forbids such special civil confinement for the treatment and rehabilitation of the individual addict and for the protection of the society.[166]

The opinion appears to permit some mixing of addicts with the other prison population, although the extent is not clear. But the emphasis is on the separate treatment given addict inmates identical with that of the central institution.

Commonwealth v. Page[167] left open the question whether a program for sexual psychopaths housed in a prison which was not "undifferentiated from the incarceration of convicted criminals" could be sustained. The issue was met in *Commonwealth v. Hogan*.[168] The center in which the defendant was confined was now housed in a separate wing of a hospital for the criminally insane. The wing was isolated from the rest of the institution by locked double doors. The general medical staff of the institution appears to have been used for the center. The center contained no full-time staff, but part-time personnel were available to meet the treatment needs from day to day. The dining

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165. 62 Cal. 2d 307, 398 P.2d 412, 42 Cal. Rptr. 220 (1965).
166. *Id.* at 316, 398 P.2d at 417, 42 Cal. Rptr. at 225.
167. 339 Mass. 313, 159 N.E.2d 82 (1959). The case is discussed at text accompanying note 145 *supra*.
168. 341 Mass. 372, 170 N.E.2d 327 (1960).

and infirmary facilities of the general institution were used for the center, but the policy was to keep the inmates of the center separated from the general population of the hospital. These arrangements were temporary pending more complete establishment of the center. With a cautionary comment,[169] the court held that under these circumstances the remedial character of the center was sufficient to meet the requirements of *Page.*

The degree to which these decisions afford any reliable support for placing juvenile delinquents in a penal institution with a separate program is open to doubt. Assuming the cases are relevant, neither their specific holdings nor the opinions written to support them evidence an awareness of the distinction, previously adverted to, between treatment as a criminal sanction and nonpenal treatment for a disability, or of the fact that presence in a penal institution alone invites identification of the program for those under civil commitment as penal, both by the public and the committed person himself.

The court in *De La O* noted that the Center being considered was physically and administratively distinct from the other prison facilities. This suggests that a separate superintendent or warden with his own staff and records may be required. These cases also seem to require a large degree of isolation of the juveniles from the adult population although the degree of separation required is not clear. May they share common cell blocks, eat at the same tables, join in recreation activities, work in the same shops, sit at the same movies, attend the same religious services, go to the same education classes and share the same medical and hospital facilities, such as beds in the same wards? Probably none of these is permissible. Could the institutional activities operate in shifts, one for juveniles, the other for adults, the isolation being thus maintained? The answer is more clearly no. To call each of the shifts by different names—one punishment of adults, the other rehabilitation of juveniles —would be to resort to the kind of hypocrisy condemned by the Supreme Court.

Finally, there is no indication that the Supreme Court would be as permissive as the decisions might indicate. Imprisonment is still the dominant sanction of the criminal law. The Court

169. We cannot assume that the necessary action to establish a fully adequate treatment center, already begun, will not be carried to completion. If it should later appear that it has not, a different question will be presented.

Id. at 377, 170 N.E.2d at 330.

might well take the position that any institution used by the state for the imprisonment of convicted persons is ipso facto a penal institution in which persons not found guilty of a crime by constitutionally valid procedures cannot be confined regardless of the special programs existing within it.[170] That position would maintain clearly the distinct functions of treatment; as a penal function, on the one hand, for those held responsible for their criminal conduct and as a rehabilitative or corrective function, on the other hand, for those under some disabling status or condition, in the present context, juvenile delinquents. It would also remove from the trial and appellate courts questions about the constitutionally required degree of separation that must be maintained between programs directed at these different functions and operating within the same institution, questions to which probably no clear cut, satisfactory or enduring answers could be given.

VI. MINNESOTA EXPERIENCE

Minnesota has had some experience in the use of the State Reformatory for purposes other than those for which it was originally intended. In 1945, legislation authorized the creation of an Annex within the Reformatory for mentally defective persons who were committed or transferred there by civil proceedings.[171] Personal observation by this writer disclosed that, while the Annex was in operation, the principal separation from the other inmates of the institution consisted only in their location in a separate room, called a dormitory.[172] They were assigned to work with convicted inmates and were subject to the general and disciplinary rules of the institution, including confinement in solitary isolation cells for misconduct. A Commission appointed in 1962 by former Governor Elmer Anderson reported that, notwithstanding the program's apparent success, the confinement of these individuals in the Annex was unnecessary and

170. *Compare* the statement in *Baxstrom*, quoted in text accompanying note 155 *supra*.

171. [1945] Minn. Laws, ch. 565.

172. While a separate dormitory was set up for housing, no funds were made available for separate staff or training facilities and it was decreed that the staff of the Reformatory and its facilities were to be used in this program. The Superintendent of the State Reformatory also became the Superintendent of the Annex for Defective Delinquents and the Reformatory Director of Education was designated as Supervisor and Training Director for the Annex.

From a mimeographed statement supplied by the Reformatory to the Commission appointed in 1962 by Governor Elmer Anderson.

probably amounted to a denial of their constitutional rights. Upon the Commission's recommendation, use of the Annex was discontinued.[173]

When the Youth Conservation program was first adopted, the reception center for youth offenders[174] was located at the Reformatory. Later, in 1957, a separate reception center was established at Lino Lakes, Minnesota,[175] in order to remove the identification of the youths at the center with the Reformatory itself as a penal institution and to make possible a better diagnostic program. It was intended by the Youth Conservation program that those committed to the Reformatory under this Act would receive special treatment and rehabilitation distinct from the program for adults at the institution.[176] This has never materialized.

Thus, the experience at the Reformatory with collateral programs of this kind has not been a reassuring one. One explanation is that the structure itself is an antiquated one, ill-adapted to serving any function other than the traditional regimented prison routine. It does not permit the development of the kind of facilities needed for an effective individualized rehabilitation program, assuming that the independent problem of staff could be resolved.

VII. CONCLUSION

Legislation authorizing the transfer or commitment of juvenile delinquents to reformatories and other penal institutions and facilities has been motivated primarily by the desire to remove problem children from juvenile institutions with a minimum expenditure of money. Its purpose has not been to respond to the challenge these children present by providing an effective rehabilitation program. Most of the statutes were adopted at a time when the constitutional rights of individuals were not as well articulated as they are at the present time. If the analysis made in this paper is correct this legislation will not withstand

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173. [1963] Minn. Laws, ch. 214 repealed the law.

In 1962, repeal of the law was recommended by the Committee on Youth Conservation and Adult Corrections of the Minnesota State Bar Association, headed by a distinguished member of the bar, Mr. Frank Claybourne. 19 BENCH & BAR OF MINN. 67 (June, 1962). The recommendation was approved by the Association. *Id.* at 28 (July, 1962).

174. These are youths under 21 years of age who have been convicted of a felony [*see* MINN. STAT. §§ 242.13, 242.19(b) (1967)] and are to be distinguished from juveniles found delinquent by a juvenile court. *See* MINN. STAT. § 260.015(5) (1967).

175. MINN. STAT. § 242.385 (1967).

176. *See* MINN. STAT. §§ 242.18, 242.20 (1967).

constitutional attack. Substantial expenditures made to implement it run the risk of such attack[177] and would serve a better purpose if used to establish a separate facility especially designed to meet the problems of these juveniles and integrated into the total state program for the rehabilitation of delinquent children.[178] States in increasing numbers are providing these separate facilities—a development that would be stimulated greatly if more state courts, without waiting for the United States Supreme Court to tell them so, frankly recognized that the cheaper route of transfer or commitment to a penal institution is neither penologically sound nor constitutionally valid.

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177. There also may be personal liability for false imprisonment on the part of those responsible for the transfer to the penal institution and for his confinement there. That the warden may be liable is suggested in Peterson v. Lutz, 212 Minn. 307, 308, 3 N.W.2d 489 (1942): "A jailer or prison superintendent can be held liable for false imprisonment in an action by a prisoner detained beyond the expiration of his sentence." Confinement under a void transfer should carry the same consequence as detention after expiration of a valid sentence. *See also* Garvin v. Muir, 306 S.W.2d 256 (Ky. Ct. App. 1957) (jailer held liable); Nostasi v. State, 275 App. Div. 524, 90 N.Y.S.2d 377 (Ct. Cl. 1949) (denial of claim against the state reversed); Schildhous v. City of New York, 163 N.Y.S.2d 201 (Sp. Term 1957) (city held liable—what constitutes invalidity on its face discussed).

If the warden is liable for confining a juvenile received through administrative transfer, it would seem logical to impose liability also on the administrators who sent him there. No cases were found dealing with this question.

In either case, the defense that the confinement was pursuant to an order or sentence valid on its face and issued by a court having jurisdiction is inapplicable. *See* Peterson v. Lutz, *supra*; Nostasi v. State, *supra*; Commings v. State, 44 Misc. 2d 932, 255 N.Y.S.2d 437 (Ct. Cl. 1964); Schildhous v. City of New York, *supra*; Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 281 (1937). The juvenile court commitment does not and cannot show on its face valid authority for the transfer since the commitment evidences no criminal conviction but rather the contrary. Moreover, if the commitment is from a court not having criminal jurisdiction, for example, a probate court, the second leg of the defense also would not be met.

178. This is recommended by the Committee on Youth Conservation and Adult Corrections of the Minnesota State Bar Association:

> [T]he only satisfactory solution lies in the establishment of a new special security institution for the containment and treatment of this hard core delinquent group.

24 BENCH & BAR OF MINN. 156 (May-June 1968).

Confinement in penal institutions is opposed by the UNITED STATES CHILDREN'S BUREAU, STANDARDS FOR JUVENILE AND FAMILY COURTS, at 35, 86 (1966); the NATIONAL COUNCIL ON CRIME AND DELINQUENCY, STANDARD FAMILY COURT ACT, § 24 (1959); and the NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT § 33 (a) (1968):

> A child shall not be committed or transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime.