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THE INSTITUTIONAL TRANSFER STATUTE: THREE CHALLENGES TO THE IMPRISONMENT OF JUVENILE OFFENDERS

At the regular meeting in May, 1979, the Wyoming Board of Charities and Reform voted to send a 17-year-old juvenile offender to the State Penitentiary.¹ The Board which is made up of the top executive officers of the State² does not regularly oversee the administration of inmates' sentences.³ Parole is administered by the Board of Parole⁴ and probation is administered by the sentencing court.⁵ The decision to send Larry B. to prison was made in a few minutes without a hearing, without the presentation of evidence, without notice or representation for the juvenile who was at that time an inmate at the Wyoming Industrial Institute. The Board of Charities and Reform listened to the recommendation from the Superintendent of the Industrial Insti-

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1. Because WYO. STAT. § 14-6-239 (1978) makes it unlawful to publish the name of a minor involved in a proceeding under the Juvenile Court Act, the case which is described in the opening section cannot be cited. Larry B. is, of course, a fictional name. The story as it is related is taken from court records, records of the Board of Charities and Reform and from discussions with several of the people involved in the case. It is accurate according to the records and is not a single isolated incident but rather represents a common procedure in several states. The issues discussed in this comment were raised before the Board of Charities and Reform by way of memorandum which discussed the "Larry B. case." See Wyoming State Tribune, July 6, 1981, at 1.

The sections describing the various juvenile court practices are taken from court documents, records of the Board of Charities and Reform and from conversations with Wyoming attorneys and judges. The various district court judges who also sit as judges of the juvenile courts, WYO. STAT. § 14-6-202 (1978), use somewhat different approaches to the questions of the pretrial hearing to determine adult or juvenile jurisdiction and sentencing. It is beyond the scope of this comment to set out these differences and their effect. It is worth noting, however, that the Wyoming Juvenile Court Act of 1971 was passed in response to the major Supreme Court decisions discussed in this comment. It was a stopgap measure that filled the big holes in Wyoming's juvenile procedure, but it does not provide a complete logical system for handling juvenile offenders. It is not surprising then that the courts have filled the remaining gaps in a variety of ways. As a result, the individual juveniles face widely varying procedures, some of which adequately protect their rights and interests and some of which do not.

For an illuminating review and critique of the juvenile justice system in Wyoming, see OFFICE OF THE ATTORNEY GENERAL, THE WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION (1981) [hereinafter cited as WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION]. The report describes the maze of courts, officials and agencies which have broad and frequently overlapping authority over juvenile matters, and concludes that "Wyoming has never had a statewide juvenile system." *Id.* at 11.

2. WYO. STAT. § 9-3-701 (1977).
3. The Board of Charities and Reform is established in WYO. CONST. art. 7, § 18, and the powers are delineated in WYO. STAT. § 9-3-706 (Supp. 1980) and WYO. STAT. § 9-3-707 (1977).
4. WYO. STAT. §§ 7-13-402 to -403 (1977).
5. *Id.* §§ 7-13-301, -304.

tute that Larry B. should be housed at the Penitentiary, then voted to approve the transfer.⁶ The vote drew brief criticism from one member, but the whole business was quickly buried among budget and administrative concerns.

Larry B. had been confined to the Industrial Institute after being adjudged a "delinquent child"⁷ in an informal hearing before a juvenile court judge. Once the decision had been made to try Larry as a juvenile,⁸ the judge who placed

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6. The superintendent's recommendation described Larry as a "management problem" and "a threat to the order in the institution." The incident which was the immediate cause of the transfer request was Larry's second escape attempt which resulted in some physical damage to the institution (no dollar amount was stated), and a tussle with a case worker, who was apparently uninjured.
 7. Any minor who is found by the juvenile court to have committed any act in violation of the laws of the State of Wyoming or its political subdivisions is a "delinquent child" under the Juvenile Court Act of 1971. WYO. STAT. § 14-6-201(iii), (ix), (x) (1978).
 8. As required by the United States Supreme Court in *Kent v. United States*, 383 U.S. 541 (1966), the Wyoming Juvenile Court Act provides for a pre-trial hearing to determine whether the minor offender should be tried as a juvenile in juvenile court or as an adult in district court. WYO. STAT. § 14-6-237 (1978). If the judge determines that juvenile proceedings are inappropriate for this minor, and that there is a high likelihood that the juvenile committed the crime and the juvenile is not subject to being placed in a mental institution, then the juvenile will be tried as an adult and receive a full trial of the charges and be subject to the full legal penalty. The criteria used to determine what kind of proceedings are appropriate for any particular juvenile are not stated in the Wyoming Juvenile Court Act. In its decision in *Kent v. United States*, the United States Supreme Court set out a list of eight criteria for use in juvenile proceedings in the District of Columbia. 383 U.S. at 566-67. This list has become the generally accepted standard in Wyoming proceedings, although the use of the eight-point standard has never been affirmatively mandated by the United States Supreme Court:

The determinative factors which will be considered by the judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
6. The sophistication and maturity of the Juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

him in the Industrial Institute did not have authority to commit Larry to the Penitentiary.⁹ Yet, the Board of Charities and Reform, relying on a confusing statute originally passed in 1909,¹⁰ regularly transfers inmates from the Industrial Institute to the prison without any hearing.¹¹ In Larry's case, within six months of his placement in the Industrial Institute, he was imprisoned in the same facility, on the same floor, as Wyoming's convicted felons without having an opportunity to fully contest his imprisonment. Furthermore, he would be confined at the prison until the same Board of Charities and Reform decided to transfer him back to the Industrial Institute or to release him.¹² Since there is no maximum term set by the original judge¹³ or by the Board,¹⁴ Larry may be imprisoned in the Peniten-

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

383 U.S. at 566-67.

9. WYO. STAT. § 14-6-229 (1978) sets out the range of powers the juvenile court has over the delinquent child; confinement in prison is not included.
10. *Id.* § 9-6-311 (1977); originally 1913 Wyo. Sess. Laws ch. 63, § 10.
11. As will be seen later, there are four separate categories of minors who are affected by the Prison Transfer Statute, WYO. STAT. § 9-6-311 (1977). In the summer of 1981 there were at least four juveniles confined at the State Penitentiary who were transferred by the Board of Charities and reform pursuant to the statute. Three of them were transferred under conditions somewhat different than Larry's but all of them were transferred without benefit of a due process hearing. See Wyoming State Tribune, July 6, 1981, at 1.
12. Attorneys General Opinion No. 1 (Jan. 3, 1974), in OFFICIAL OPINIONS, 1973-1976, at 81; *id.* No. 65 (June 7, 1956), in OFFICIAL OPINIONS, 1953-1956, at 547. Much of the legal analysis in these opinions do represent the position of the Board of Charities and Reform in handling these types of cases. Like the original transfer decision, there are no procedures established by the Board for periodic review. This review is made by request of an interested party.
13. WYO. STAT. § 14-6-229(c) (iii) (1978). Juvenile commitments are theoretically rehabilitative in nature and not punitive. Because of this, most commitments are for whatever period it takes to rehabilitate the inmate or, as the statute puts it, "indefinitely." Practically, the two major factors in determining the length the juvenile is held seem to be: (1) the availability of space at the institution; and (2) the inmate's willingness to cooperate with the administration of the Institute.
14. WYO. STAT. § 9-6-311 (1977) makes no provision for setting a sentence once the juvenile is transferred to the Penitentiary. WYO. STAT. § 14-6-231 (a) (1978) gives the Board of Charities and Reform the power to release any juvenile committed to the Industrial Institute. Attorney General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, states that this statute gives the Board the corresponding power to terminate the sentence of any juvenile transferred from the Industrial Institute to the Penitentiary. While this power may be implied by a court faced with interpreting the statute, the power is not found in the language of WYO. STAT. § 14-6-231(a) (1978). Sentencing is a judicial power and may not be delegated to an executive board. WYO. R. CRIM. P. 33; WYO. CONST. art. 5, § 1; *Uram v. Roach*, 47

tiary until he reaches the age of 21.¹⁵ If Larry's original offense was a misdemeanor, he could serve four years in prison for a crime which if committed by an adult carries a maximum sentence of 90 days in a county jail.¹⁶ Finally, Larry served time in prison without the benefit of a trial or of a judicial determination of the proper sentence.

This article will examine the many aspects of the Institutional Transfer Statute¹⁷ and how it relates to the Juvenile Court Act of 1971.¹⁸ Though the statute is substantially the same as when it was first adopted in 1913, it has come to be used in ways its drafters could not have foreseen. After examining its present uses, the article will

Wyo. 335, 37 P.2d 793 (1934). While it has been held that the length of a prison term under an indeterminate sentencing statute is not required to be set by the sentencing court, see *In re Sandel*, 64 Cal.2d 412, 412 P.2d 806, 50 Cal. Rptr. 462, (1966), this differs substantially from the questions of statutory authorization raised by Wyo. STAT. § 9-6-311 (1977).

15. Wyo. STAT. § 14-6-231(c) (1978).

16. *Id.* §§ 6-1-102, -107 (1977).

17. In this comment the term Institutional Transfer Statute refers to Wyo. STAT. § 9-6-311 (1977) which allows the Board of Charities and Reform to transfer inmates at the Industrial Institute to the Penitentiary. This statute also provides authority for transfer and return from the Industrial Institute to the State Hospital.

Two related statutes provide for discretionary transfer from the Penitentiary to the Industrial Institute by the Board of Parole of first offenders under the age of 21, Wyo. STAT. § 7-13-102 (1977), and for optional sentencing of first offenders under the age of 21 to the Industrial Institute rather than the Penitentiary when a juvenile or young adult has been convicted of a crime in district court. Wyo. STAT. § 7-13-101 (1977).

These related statutes are part of the overall scheme of inter-institutional transfer. This comment will treat these additional statutes only to the extent it is necessary in order to demonstrate the abuse of the Institutional Transfer Statute. This overall scheme of transfer among institutions arose early in the century and is not integrated into the Juvenile Court Act. There are numerous inconsistencies in the operation of these statutes. The three statutes are administered by three different agencies: the Board of Charities and Reform administers Wyo. STAT. § 9-6-311 (1977); the Board of Parole administers Wyo. STAT. § 7-13-102 (1977); and the district courts administer Wyo. STAT. § 7-13-101 (1977).

Wyo. STAT. § 9-6-311 (1977) grants a power without any defined guidelines; Wyo. STAT. § 7-13-102 (1977) is apparently to be applied within the framework of the parole process; and Wyo. STAT. § 7-13-101 (1977) is an extension of the general sentencing power of the district courts. No coordinating body or procedure is provided for by the statutes. In the past, this state of affairs has led to successive attempts to transfer and re-transfer inmates who do not fit the respective administrators' criteria for confinement at the several institutions. The administration of each institution deals only with its narrow role in the disposition of the inmate, while the overall course of "rehabilitation" is lost in the shuffle.

These are problems which require a legislative solution. During most of this comment, every attempt will be made to skirt these Byzantine complications and to focus on the major problems with Wyo. STAT. § 9-6-311 (1977).

18. Wyo. STAT. §§ 14-6-201 to -243 (1978) [hereinafter cited in text as the Act].

trace the tortured legislative history of the statute and of the Juvenile Court Act. The important United States Supreme Court cases of *Kent v. United States*¹⁹ and *In Re Gault*²⁰ and their progeny will then be discussed. The article will show that the present uses of the statute are invalid on three counts: (1) the legislative history/statutory interpretation; (2) the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution; and (3) the equal protection requirements of the Fourteenth Amendment. The concluding section will briefly set out recommendations for correcting the unacceptable procedures currently in use.

JUVENILE OFFENDERS AND THE INSTITUTIONAL TRANSFER STATUTE

The practice of transferring juvenile offenders²¹ from the Industrial Institute to the general population at the Wyoming State Penitentiary has been justified as being an administrative power necessary for the maintenance of discipline and order at the Industrial Institute. In addition, it has been suggested, in some individual cases, that the transfer is for the best interests of the incorrigible inmate for whom the Institute's rehabilitative programs have been ineffective. There can be little doubt that effective administration of a facility such as the Industrial Institute requires that there be some way to isolate and discipline disruptive inmates.²² The Industrial Institute houses three categories of juveniles, ranging from those who have committed serious felonies to those whose only offense is

19. *Supra* note 8 [hereinafter cited in text as *Kent*].

20. 387 U.S. 1 (1967) [hereinafter cited in text as *Gault*].

21. In this article the term juvenile offender refers to a delinquent child or a child in need of supervision as defined by WYO. STAT. § 14-6-201 (1978) and not to minors tried and convicted as adults.

22. These justifications offered by juvenile administrators are grounded in the realities of an inflexible two-tiered system. When the rehabilitative institution fails to reform or restrain the juvenile, then the only other alternative is incarceration at the Penitentiary. In order to protect the treatment program at a juvenile reformatory, administrators resort to removal of disruptive inmates. See Pirsig, *The Constitutional Validity of Confining Disruptive Delinquents in Penal Institutions*, 64 MINN. L. REV. 101, 102-06 (1969).

truancy, unruliness or chronic disobedience.²³ Removing the serious troublemakers from the institution altogether is, of course, the easiest method of isolating them from the rest of the population.

The three categories of juveniles housed at the Industrial Institute are (1) children in need of supervision;²⁴ (2) juvenile delinquents,²⁵ and (3) young adults²⁶ and juveniles who have been tried and convicted as adults²⁷ but are serving all or part of their sentence in the Industrial Institute. The provision in the Wyoming Juvenile Court Act which allows some juveniles to be tried as adults is a common one, found in many states' laws.²⁸ This third category of juveniles may arrive at the juvenile facility by way of two separate procedures. A brief description of the four distinct procedural actions which may result in a juvenile being placed in the Industrial Institute follows.

(1) *Children in need of supervision* are those who have committed one of the "status offenses."²⁹ These offenses are not violations of the criminal code but rather violations of the moral or parental authority of the child's parents or of

23. The mixture of inmates has been resisted by the administrator of the Industrial Institute and has come under attack as being detrimental to the treatment oriented objectives of the institution. WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 78, 266.

24. WYO. STAT. § 14-6-201(iv) (1978): "Child in need of supervision' means any child who is habitually truant, has run away from home or habitually disobeys reasonable and lawful demands of his parents, guardian, custodian or other proper authority and is ungovernable and beyond control."

25. *Id.* § 14-6-201(x), (ix). A delinquent child is a person under the age of majority who has committed "an act punishable as a criminal offense by the laws of this state or any subdivision," but who is tried under the Juvenile Court Act of 1971 and not in the adult district court proceeding. *Id.*

26. WYO. STAT. § 7-13-101 (1977) allows those persons under the age of 21 who have been convicted of their first felony to be sentenced by the sentencing judge to the Industrial Institute. Originally the age limit corresponded with the age of majority but when the age of majority was lowered to 19, see WYO. STAT. § 14-1-101 (1978), the sentencing statute kept the old age limit, thereby creating a class of adults ages 19-20 who may be confined at the Industrial Institute but who were not eligible to be otherwise treated as minors.

WYO. STAT. § 7-13-102 (1977) applies to the same category of young adults and creates the power in the Board of Parole to transfer these 19-20 year old Penitentiary inmates to the Industrial Institute.

27. WYO. STAT. §§ 7-13-101, 7-13-102 (1977), also apply to minors tried as adults in district court proceedings as provided for in WYO. STAT. § 14-6-237 (1978).

28. WYO. STAT. § 14-6-237 (1978); Pirsig, *supra* note 22, at 103.

29. WYO. STAT. § 14-6-201(iv) (1978).

the State. Truancy, running away, disobedience and sexual activity are status offenses.

In the majority of cases, the Juvenile Court Act provides for an "informal but orderly" hearing to determine whether the juvenile is in need of supervision.³⁰ However, because of an unusual provision of the Wyoming Act, the juvenile may demand a jury trial for the determination of the facts alleged in the petition.³¹ The provision is worded in such a way that it apparently covers all actions brought under the Juvenile Court Act including a petition to declare the child neglected or in need of supervision.³² A jury trial in juvenile cases is not a constitutionally mandated right.³³ The inclusion of this right in the Wyoming Juvenile Court Act means that there are two distinct procedures that might be followed in any juvenile proceeding: an informal hearing by the juvenile court judge or a formal trial by jury. In either case, the juvenile is guaranteed the right to notice of the charges against him, to confront and cross-examine witnesses against him, to introduce evidence, to present witnesses and to speak in his own behalf.³⁴ These statutory rights are also constitutionally mandated.³⁵

Once the determination is made that a juvenile is "in need of supervision," the juvenile court judge has broad powers to determine the custody of the child. The judge may place the child with his parents, with any relative or other interested person, with any public or private agency, or in the Industrial Institute.³⁶

A "child in need of supervision" might be placed in the custody of the Industrial Institute either directly by the Juvenile Court Judge following the adjudicatory hearing, or indirectly, without court supervision or approval, by administrative transfer by the Board of Charities and Reform from one of the county homes or other court-appointed

30. *Id.* §§ 14-6-224, 226.

31. *Id.* § 14-6-223.

32. Compare WYO. STAT. §§ 14-6-212 (1978) with *id.* § 14-6-223.

33. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

34. WYO. STAT. § 14-6-223 (1978).

35. *In re Gault*, *supra* note 20, at 33, 36, 41, 56, 58.

36. WYO. STAT. § 14-6-229 (1978).

custodians of the child. This administrative action by the Board of Charities and Reform parallels the power the Board has in transferring inmates of the Industrial Institute to the Penitentiary.³⁷

(2) *The delinquent child* is a minor who has committed an act that is a crime under Wyoming criminal laws or under the laws of the political subdivisions of the State.³⁸ If the offense was committed by an adult, it would be punishable either as a misdemeanor or a felony; the juvenile court does not distinguish between the grades of offenses when determining delinquency. The child charged with delinquency has the same procedural rights as a child charged with being in need of supervision, including the right to demand a jury trial. Additionally, the right against self-incrimination is also preserved by statute and by constitutional case law.³⁹ If the child is found to be delinquent, the court will then determine the custody and course of rehabilitation appropriate for the individual offender. The court has wide discretion to commit the delinquent child to the Industrial Institute or place him with another appropriate public or private agency or with an individual. The Act does not contain any language authorizing placement of a delinquent child in the State Penitentiary.⁴⁰

(3) *The juvenile tried as an adult but sentenced to the Institute.* For the same crime the child may be tried as an adult if it is found at a transfer hearing that "the juvenile proceedings are inappropriate under the circumstances of the case."⁴¹ The decision to try the minor as an adult is made by the juvenile court judge and based on a series of factors set out in an appendix to *Kent*.⁴² Once the case has been

37. WYO. STAT. § 14-6-229(e) (1978) provides for the transfer of custody of a child in need of supervision or a delinquent child and gives the custodian broad powers to determine where the child lives, etc. In the institutional context, the Board of Charities and Reform becomes the child's custodian and exercises its power by administrative actions which include transfer of juveniles among the various state institutions. The Board's authority over these institutions and over the state's children in general is found in WYO. STAT. §§ 9-3-706 and 9-3-708 (1977).

38. WYO. STAT. § 14-6-201(ix), (x) (1978).

39. *Id.* § 14-6-223; *In re Gault*, *supra* note 20, at 55.

40. WYO. STAT. § 14-6-229(c), (d) (1978).

41. *Id.* § 14-6-237. The provision for trying older and/or serious offenders as adults is an important practical and theoretical bridge between the child protective philosophy of the juvenile court and the criminal court philoso-

transferred to district court, it is handled under the appropriate statutes as if the child were an adult. If the child is found guilty in the district court, he is subject to the normal range of penalties, including incarceration in the State Penitentiary, probation, and various treatment programs. In addition, the district court judge has the power to sentence a minor convicted of a felony to serve his term at the Industrial Institute, providing he has not previously been convicted of a crime punishable by imprisonment in the State Penitentiary.⁴³ The district courts will often include a provision in the order sentencing this category of offender that provides for transfer from the Institute to the State Penitentiary if the inmate fails to obey the rules of the Institute.

(4) *Juveniles tried as adults, sentenced to the Penitentiary, and transferred to the Institute.* A juvenile who was tried as an adult and sentenced to the Penitentiary may be transferred to the Institute by the Board of Charities and Reform, providing they are under the age of 21.⁴⁴ This category of juveniles receives a full adult trial, just as do those in the third group. The transfer to the Industrial Institute is accomplished by the Board of Parole. Transfer to the Institute is an alternative form of parole. The reasons for transferring these juveniles from the prison to the Industrial Institute include considerations for the safety of the juvenile, the opportunities for his rehabilitation and administrative concerns such as the relief of overcrowding and maintenance of order at the Penitentiary.

THE TRANSFER DECISION

In Wyoming the age of majority is 19.⁴⁵ The Wyoming statutory scheme provides that a juvenile offender may be

phy which balances the rights of individuals with a search for social justice. As will be seen, the philosophies behind these two systems are in frequent conflict.

42. See *supra* note 8.

43. WYO. STAT. § 7-13-101 (1977).

44. *Id.* § 7-13-102. While this provision seems to parallel WYO. STAT. § 7-13-101 (1977), this statute does not require that the person transferred be a first-time offender, so that the class of transferees covered by the two statutes differs in this respect.

45. WYO. STAT. § 14-1-101 (1978).

held at the Industrial Institute until he reaches the age of 21.⁴⁶ Additionally, an adult under the age of 21, or a juvenile tried and convicted as an adult may be sentenced to serve their terms in the Industrial Institute or may be paroled to the custody of the Institute.⁴⁷ Thus, the legislative scheme allows for a transition age classification with discretion for disposition in the sentencing and in subsequent administrative disposition of the juvenile and young adult offenders. Yet, nowhere in this scheme is there any central authority or guiding philosophy governing the handling of these inmates.⁴⁸ The same statutes direct the Board of Charities and Reform to "make all rules and regulations necessary and proper for the employment, discipline, instruction, education, removal and return of all the convicts in said institute."⁴⁹ The institutional decision to recommend transferring an inmate is made by the Superintendent of the Industrial Institute without any hearing or opportunity by the inmate to challenge the action. The only requirement governing the removal and return of the inmates is that the institutional recommendation must be approved by the Board. No written code of disciplinary regulations exists to guide inmates at the Industrial Institute in their behavior.⁵⁰ From the inmate's point of view, transfer is an arbitrary punishment that cannot be challenged or foreseen.

There is the additional problem of notice for juvenile offenders from the first two categories. Since juvenile court

46. *Id.* § 14-6-231(c).

47. WYO. STAT. §§ 7-13-101 and 7-13-102 (1977) provide only that the terms at the Institute may not exceed the length of the Penitentiary terms set at the original sentencing. Thus, these people could properly remain at the Institute long after their twenty-first birthday. Such a situation would complicate the running of the Institute and would probably be resisted by the administration. The author knows of no such case.

48. This lack of coordination and guiding philosophy characterizes the Wyoming juvenile system. The major recommendations of the recent study of the state's juvenile justice system were centered around these issues. See WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 254-270.

49. WYO. STAT. § 9-6-311(b) (1977). The wording of this statute only refers to making rules for transferred convicts. It is likely a court would give a broader reading of the directive so that it covers all the inmates of the Industrial Institute. The only other authority for rulemaking is the very general supervisory authority granted the Board of Charities and Reform in WYO. STAT. §§ 9-3-706 and 9-3-707 (1977).

50. Requests for copies of disciplinary rules at the state's juvenile institutions made during August of 1981 were met with the reply that a disciplinary code was being prepared for the Children's Home but that no code existed for the Industrial Institute and none was planned.

judges have no authority to sentence delinquent children or children in need of supervision to the State Penitentiary, these juveniles are not put on notice that the proceedings against them might result in imprisonment unless the judge explains the workings of the Institutional Transfer Statute.⁵¹ Judges frequently take the position that post-committal transfer is a wholly administrative concern beyond the powers the courts are given under the Juvenile Court Act; and, therefore, they make no mention of it.⁵²

The differing methods of sentencing juveniles and adults give rise to further uncertainties and inequities. A minor who has been tried as an adult in a district court proceeding receives a sentence specifying a minimum and maximum time that may be served. Whether the time is served in the county jail, the Penitentiary or in the Industrial Institute, the time limit may not be expanded beyond the maximum by the administrators of the institution in which he is held.⁵³ In the case of the adults and of juveniles convicted as adults, their sentences are set by the convicting judge and, therefore, they are eligible to participate in earning good time credits and to be considered for parole once they are placed at the Penitentiary.

A delinquent child or a child in need of supervision placed in the custody of Industrial Institute normally receives an indeterminate sentence.⁵⁴ The length of confinement is determined by the Superintendent of the Industrial Institute depending on the effectiveness of rehabilitation, the juvenile's prospects if released, and the institution's need for space. If the juvenile is transferred to the State Penitentiary, he still maintains his indeterminate sentence.

51. While it may seem incredible that a child in need of supervision might end up in prison, there is at least one reported case of a neglected child who was administratively transferred to an adult reformatory. See *Wintjen v. State*, 433 S.W.2d 257 (Mo. 1968).

52. In this way, the juvenile court judges correctly interpret their own statutory authority but ignore the reality of the juveniles' predicament. Furthermore, they are turning a blind eye to the unconstitutional transfer of inmates. While it would be going beyond the case before them to attack the transfer practices, they participate in concealing the danger of imprisonment from the juvenile.

53. WYO. STAT. §§ 7-13-101 to -102 (1977).

54. *Id.* § 14-6-231 (1978).

The Board of Parole which oversees probation, parole, and good time release has no authority to set a release date for the juvenile offender transferred to the Penitentiary.⁵⁵

The Board of Charities and Reform retains supervision of the juveniles and young adults transferred from the Industrial Institute to the Penitentiary.⁵⁶ The juvenile offender held in prison is not only excluded from early release programs but has an indefinite period of time to serve, the only terminal date coming on the inmate's twenty-first birthday.⁵⁷ Thus, a minor adjudged delinquent at the age of 16 for a misdemeanor might find himself held briefly in the Industrial Institute and then in the State Penitentiary for up to five years. The maximum sentence for a misdemeanor is 90 days in a county jail and judges frequently give lighter sentences for such a crime depending on the circumstances.⁵⁸

Indeterminant sentences have long been upheld by courts in juvenile cases on the theory that the juvenile is not being punished for a crime but rather is being confined for rehabilitation.⁵⁹ This may make some sense when the juvenile is at a special rehabilitation facility, but once the juvenile is transferred to the general population of the State Penitentiary, the distinction loses whatever logic it might have had.⁶⁰ In order to justify these inequities, the State maintains that the transfer is not a change in the original judgment of the court but rather only a change in

55. Attorneys General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, appears to be correct in respect to this question. See also Uram v. Roach, *supra* note 14.

56. WYO. STAT. § 9-6-311(a) (1977).

57. *Id.* § 14-6-231 (1978).

58. The very mitigating circumstances that might convince a judge to give a lighter sentence are often the indicators that would recommend treatment at a reform institution. For instance, the fact that a juvenile offender had been abused by his parents would indicate leniency if he was being sentenced to serve time in a penal institution but would indicate institutionalization in a juvenile proceeding.

59. Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962) (opinion of then Circuit Court Judge Warren Burger).

60. United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1123-25 (2d Cir. 1974); see also Annot., 95 A.L.R.3d 568, §§ 3, 4 (1979). Generally, the cases hold that there must be express statutory authority for housing juveniles at an adult facility and that when they are housed there, they must be segregated from the general population. The cases cover a wide range of statutory schemes. Most of the cases are prior to 1966 and must be considered in light of subsequent United States Supreme Court decisions.

the administration of the court's judgment.⁶¹ By this circuitous route, the juvenile's confinement at the Penitentiary becomes rehabilitative rather than penal.

It can be seen then that the process of transferring inmates between the Industrial Institute and the State Penitentiary is characterized by an informal decision on the part of the heads of the two institutions who request the Board of Charities and Reform to transfer the person in question. This request is acted on without a hearing by the Board in one of its regular business meetings. Regardless of which category of offender the inmate falls under, he has no representation at any level of the process. But in several important respects those juveniles who were tried and convicted as adults are in a better position once they are transferred to the State Penitentiary.

THE HISTORY OF WYOMING JUVENILE LAW AND W.S. 9-6-311

The juvenile court movement which swept the country at the turn of the century was one of the most immediately successful movements in the age of reform.⁶² The impetus for the massive reorganization of the criminal legal system can be found in the changes in the social perspective on childhood. By the nineteenth century, America and the rest of the industrial world had discovered childhood. The development of the concept of childhood had taken over 400 years and corresponded with the radical changes in the society that had been brought about with the industrialization of the economy and the urbanization of the population. Even in the early seventeenth century children were viewed as being part of the overall economy of the society; they were

61. Attorneys General Opinion No. 1 (Jan. 3, 1974), *supra* note 12, at 82.

62. The literature on the political, philosophical and historical aspects of childhood and the development of the juvenile justice system is plentiful. The account given in this article is derived primarily from L. EMPEY, D. ROTHMAN & T. HIRSHI, *JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS* 3-69, 183-212 (L. Empey ed. 1979) and W. STAPLETON & L. TEITELBAUM, *IN DEFENSE OF YOUTH* 1-48 (1972). See also *In re Gault*, *supra* note 20; A. PLATT, *THE CHILD SAVERS* (1969). For those interested in a more in depth look at these subjects, each of the previously mentioned works is well documented and will provide an opening for endless study.

not segregated from adults and shared the same freedoms, rights and duties as did adults. They also were treated as equals before the law except that a very young child was presumed to be incapable of committing a crime. But although they had a full participatory role in society, children had little, if any, social status. They were dependent either on their families or on masters to whom they were apprenticed. Apprenticeship, and even slavery, were the precursors of the child labor practices which came under attack by the progressives at the turn of the century. Historically, the primary attitude toward children was one of indifference, tempered with exploitation.

The change in the social perception of childhood stretched over 400 years beginning in the Renaissance. On the eve of the twentieth century there was a firmly established idea that childhood was a period of life distinct from adulthood with its own expectations and rules. Childhood was a time of innocence, which meant a time when children must be molded into proper adults or else be lost to indolence, dishonesty, promiscuity and laziness. The ideal child was to be "submissive to authority, hard working, self-controlled, modest and chaste." Parents and schools were now considered responsible for the production of children who measured up to the new standard. It is no surprise that, when the progressive reform movement set out to attack a legal system which still treated most children as if they were adults,⁶³ it was able to mobilize public opinion and bring about reform in every state within 20 years.

The main instrument of reform was the juvenile court which was to have extraordinary powers to intervene in the life of the child not to punish violations of criminal laws, but to rehabilitate the child and to keep order. This new court was to direct the children to social workers and to

63. At common law a child under the age of seven was presumed to be unable to form the intent to commit a crime, and a youth over the age of 14 was presumed capable of forming criminal intent. No other doctrine existed to isolate children from the full force of the criminal justice system. *In re Gault*, *supra* note 20, at 16. Historians disagree as to the practical results of trying children as adults, but by the turn of the century the popular opinion was strongly against the practice. See authorities cited *supra* note 62.

the child protective institutions both public and private which would take the place of the parents who had failed. The juvenile court would operate on equitable principles rather than on the traditional tenets of the criminal law. The jury trial was deemed unnecessary as was the strict adherence to the rules of evidence and procedure. The requirement of public proceedings was deemed to leave a stigma on the child was an ongoing punishment and since the object was rehabilitation and not punishment, the proceedings were made secret. The abridgement of traditional legal rights was so drastic that the noted American legal scholar Roscoe Pound warned: "the powers of the court of the Star Chamber were a trifle in comparison with those of [the American] juvenile courts."⁶⁴

Such a complete revision of legal institutions and rights required the support of an equally broad based legal theory. To supply the theoretic underpinnings of the new system, the progressives dusted off the medieval legal concept of *parens patriae*. *Parens patriae* originally described the right of the feudal landholder to take the children from his feudal tenants if the children failed to produce their required share due to a failure of parental supervision. This feudal economic theory was based on the supposed contract between feudal landholder and peasant. It was transformed by the reformers into a doctrine that conceived of the state as the ever present superparent, overseeing each parent-child relationship, ready to intervene at the early indications of failure. The child was the passive object of the new system and was denied any active participation in the determination of his fate. The State took on the role of the late nineteenth century parent complete with arbitrary and undisputed powers of discipline and control.⁶⁵

64. *In re Gault*, *supra* note 20, at 18 (Quoting Roscoe Pound).

65. The fact that this paternalistic legal theory gained universal acceptance during a period when the rights of adults were being greatly expanded indicates that the new concept of childhood did not encompass a role for the child as a citizen or even as a "person" if that word is used in its constitutional sense. While the aim of the reformers was to stop exploitation, they also denied children any power to defend themselves against abuse by the new system.

The practicalities of American reform politics encouraged the reformers to portray the problems and solutions in simplified stereotypical fashion. Childhood was defined as a single period reaching from birth to the legislated age of majority. The causes of delinquency were said to be environmental and psychological, which in practice meant it was primarily understood to be a problem of the emigrant and working classes. Absolute faith was placed in the social worker, the probation officer and the child protective institutions to cure the defective conditions in the child's environment. The time was ripe for a new system and the reformers presented a daring solution in a forceful and popular manner; it is, therefore, little surprise that the movement gained immediate and nearly universal support. This enthusiastic popular perception of the juvenile court system lasted long after statistics and studies led scholars and workers in the juvenile field to criticize the juvenile system from a wide variety of political and philosophical points of view.⁶⁶

In Wyoming reform was ushered in over a period of years beginning in 1888 when the Territorial Legislature passed a statute which provided that minors under 16 convicted of their first offense could serve their term in a reform institution in another state.⁶⁷ In 1909, the State Legislature empowered the Board of Charities and Reform to confine convicted young adults in the state "reformatory."⁶⁸

66. The early universal success of the juvenile justice system is matched today by universal dissatisfaction. One scholar recently reviewed the history of theory on the causes and treatment of juvenile delinquency during the twentieth century. He summarized his view of 80 years of theory and practice by saying that "we are left with a choice of illusions" and by comparing the juvenile justice system with the proud but naked emperor who was "despite his posturing, pretty damned ridiculous." L. EMPEY, D. ROTHMAN & T. HIRSCHI, *supra* note 62, at 212. Another author, writing from a law enforcement perspective, acknowledges the criticisms of the liberals and conservatives, but suggest that the progressive concept of juvenile justice has never been given a fair opportunity to operate according to its principles. P. HAHN, *THE JUVENILE OFFENDER AND THE LAW* 319 (1978).

67. 1888 Wyo. Sess. Laws ch. 57, at 130.

68. 1909 Wyo. Sess. Laws ch. 90, at 137. This statute allowed first offenders aged 16 to 25 to serve their term at the Industrial Institute. These inmates were young adult convicts who had been given a full criminal trial. No state reformatory was created until 1927 when a separate building at the Industrial Institute was set aside for the housing of "prisoners" transferred from the Penitentiary to the Institute. 1927 Wyo. Sess. Laws ch. 49, at 48; WYO. STAT. §§ 9-6-201 to -202 (1977). Until 1927 the Industrial

In 1911, the Industrial Institute was created, apparently to handle this category of "youthful first offenders."⁶⁹ In 1913, the Institutional Transfer Statute was passed to provide a way to return inmates of the Industrial Institute to the Penitentiary if they were unruly or were found not to be first offenders.⁷⁰ It wasn't until 1915, however, that the legislature provided for a separate judicial treatment for juveniles and created a category of offenders distinct from adult felons and misdemeanants.⁷¹ By 1945, "delinquent children" were regularly housed at the Industrial Institute along with those young adult offenders for whom the Institute was originally established.⁷² Not until 1951 did the

Institute apparently served as the reformatory but even it was not established until 1911. *See infra* note 69.

69. 1911 Wyo. Sess. Laws ch. 107, at 180. This law seems to limit the inmates of the Industrial Institute to those described in note 68, *supra*, by incorporation of the definition found in WYO. COMP. STAT. § 540 (1910). The Industrial Institute was not actually built until sometime after 1913. *See* 1913 Wyo. Sess. Laws ch. 63, at 53.
70. 1913 Wyo. Sess. Laws ch. 63, §§ 10, 11, at 56; WYO. STAT. § 9-6-311 (1977) (hereinafter referred to in the text as Institutional Transfer Statute).
71. 1915 Wyo. Sess. Laws ch. 99, at 113. The delinquent child defined by this Act included both delinquent children and children in need of supervision in current statutory terminology. The Act allowed for these children to be placed with "child-caring agencies, societies or institutions" but did not include the Industrial Institute in the definition of such agencies. The category of "delinquent children" must be carefully distinguished from "juvenile delinquents" defined in WYO. COMP. STAT. § 3127 (1910). In 1931, "juvenile delinquents" were persons under the age of 16 who had been tried and convicted in a regular adult proceeding. They were subject to the normal range of penalties given adult offenders, including imprisonment at the Penitentiary. Additionally, the trial judge could sentence them to serve their term at a reform school or the Industrial Institute.
72. *See* WYO. COMP. STAT. §§ 58-613, 19-1301 (1945) and accompanying editor's notes. No statute was ever passed that allowed the statutorily defined "delinquent children" to be housed at the Industrial Institute. *See supra* note 71. The compiler of the 1945 statute took the 1911 Act creating the Industrial Institute as authority for changing an earlier law allowing for placement of 14-year-olds in reform schools to provide for placement in the Industrial Institute. *Compare* WYO. COMP. STAT. 1945 § 58-613 with WYO. COMP. STAT. 1920 § 3892. A statute passed in 1913 states that "juvenile delinquents" may be housed at the Industrial Institute. 1913 Wyo. Sess. Laws ch. 63, § 8. These "juvenile delinquents" are not the "delinquent children" defined in the 1915 Act, *see supra* note 71; but, rather, they are young offenders tried and convicted in adult proceedings. *See supra* note 68. The category of "delinquent children" did not exist in 1913, while that of juvenile delinquents did. When the class of "delinquent children" was created by the legislature, no provision was made for placing them at the Institute. *See supra* note 71.

The 1945 compiler confused the two separate categories of "delinquent children" and "juvenile delinquents." *See supra* note 71. By doing so, he made imprisonment at the Industrial Institute for "delinquent children" appear to be statutorily authorized when the legislature had never acted to do so. The compiler of the 1920 statutes had not made the change even though the statute relied on by the 1945 compiler had been passed in 1911. The compiler of the 1945 statutes may have been acting to conform the statutes to the then current realities since no legislative enactment sup-

legislature finally create a separate juvenile court system with distinct powers to adjudicate the delinquency and custody of minors.⁷³ This system survived with some modifications until 1971, when the legislature attempted a complete overhaul of the juvenile court system.⁷⁴

With the Juvenile Court Act of 1971 the Wyoming Legislature was responding not to a broad based political movement but, rather, to the recent United States Supreme Court rulings in *Kent*⁷⁵ and *Gault*.⁷⁶ The rulings of nine judges in 1965 and 1967 would change the course of juvenile law almost as radically as the popular movement of 65 years before.⁷⁷ In *Kent* and *Gault*, the Supreme Court attacked the theory of *parens patriae*. Juvenile proceedings no matter what their purpose frequently result in the substantial loss of freedoms and rights that the juvenile would normally have. To deny the juvenile offender the traditional constitutional protections is to deny the juvenile the due process of the laws.⁷⁸ The Court did not reject *parens patriae* altogether but rather said that some rights remained intact while others were subject to reconsideration in light of the nature of the juvenile proceedings.⁷⁹ Thus, in these decisions

ports this substantive change in the statutes. If so, this change in practice came sometime after 1934 when the Wyoming Supreme Court declared: "The Wyoming Industrial Institute is a reformatory for the custody and discipline of those persons under the age of 25 years . . . who have not theretofore been convicted of a crime punishable by imprisonment in the state penitentiary." *Uram v. Roach*, *supra* note 14, at 794. The Juvenile Court Act of 1951 was the first positive legislative enactment which provided for the placement of juveniles at the Industrial Institute. 1951 Wyo. Sess. Laws ch. 124, § 12, at 194.

This gradual shift in the use of the Institute, first as a penal institution and later as a juvenile reformatory, complicated the interpretation of the statute and case law relating to the housing and transfer of inmates at the Institute.

73. 1951 Wyo. Sess. Laws ch. 125, at 190.

74. WYO. STAT. §§ 14-6-201 to -243 (1978 & Supp. 1981). See also Comment, *The Wyoming Juvenile Court Act of 1971*, 8 LAND & WATER L. REV. 237 (1973).

75. *Kent v. United States*, *supra* note 8.

76. *In re Gault*, *supra* note 20.

77. *Kent* and *Gault* attacked the foundations of the juvenile justice system but did not destroy it. There is disagreement as to whether the change has been primarily the formalities observed by the authorities or whether there is a substantive change in the way cases are handled and decided. The Supreme Court has generally adhered to the course it set in the mid-60's but has occasionally raised doubts in some subsequent decisions. N. SCHULTZ & F. COHEN, *PURSuing JUSTICE FOR THE CHILD* 22-29 (M. Rosenheim ed. 1976).

78. *In re Gault*, *supra* note 20, at 27-28.

79. *Id.* at 22.

and subsequent ones, the Court affirmed the juvenile's right to counsel, to present evidence and confront witnesses, and to be free from self-incrimination, but did not require the juvenile be given a jury trial in a delinquency proceeding,⁸⁰ nor hold that the rules of evidence apply in full force.⁸¹ The result of these decisions was to force basic revisions in the juvenile laws of the 50 states. Juveniles were granted rights that had been denied them since the turn of the century. In fact, during the 65 years of the juvenile court era, the concept of adult due process rights had been expanded while the juveniles' due process rights had all but been abolished.⁸²

Wyoming's legislative response⁸³ to these decisions seems at first glance to be an attempt at a comprehensive treatment of the State juvenile justice system.⁸⁴ But the provisions for administrative transfer to and from the Industrial Institute were never a part of the original juvenile code and were not examined or considered as part of the new Juvenile Court Act.⁸⁵ The confused language of the 1913 Institutional Transfer Statute and its companion statutes⁸⁶ remained intact and stood in strong contrast to the provi-

80. *McKeiver v. Pennsylvania*, *supra* note 33.

81. This appears to be an open question. The Supreme Court did constitutionalize the juvenile's right to confront and present witnesses in *In re Gault*, *supra* note 20, at 56, and cited with approval a law review casenote which called for adherence to the hearsay rules except to the extent that they are "merely technical." *Id.* at 11 n.7.

82. In describing the workings of the doctrine of *parens patriae*, Justice Fortas wrote: "[The state] does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled." *Id.* at 17. This statement was a paraphrase of an article published in the *American Bar Association Journal* in 1962. *Id.* at 17 n.21.

83. The Juvenile Court Act of 1971, WYO. STAT. §§ 14-6-201 to -234 (1978 & Supp. 1981).

84. The problems of the Juvenile Court Act of 1971 extend beyond those discussed in this comment. Because the Juvenile Courts are not given exclusive jurisdiction over juvenile matters a number of minor courts also exercise jurisdiction over juvenile matters. See WYOMING JUVENILE JUSTICE SYSTEM, AN EVALUATION, *supra* note 1, at 52-58, 262.

85. WYO. STAT. § 9-6-311 (1977) is located in Title 9, Administration of Government, under Chapter 6, State Institutions. WYO. STAT. §§ 7-13-101 and 7-13-102 (1977) are found in Title 7, Criminal Procedure, under Chapter 13, Sentence, Imprisonment, Parole and Pardon.

The location of these statutes under these headings is not merely accidental. It indicates that they were designed to serve the purposes of efficient penal administration and were never integrated into the Juvenile Court Act. Consequently, the legislature never addressed the problems that arise when the unrestricted transfer provisions come in conflict with the Juvenile Court Act's underlying philosophy of guaranteeing the juvenile offender his due process protections.

86. See *supra* note 17.

sions of the Juvenile Court Act which attempted to exhaustively enumerate the juvenile court's powers. Furthermore, there was no sense of the growing body of constitutional due process law governing administrative dispositions involving prisoner's liberty interests in the transfer provisions. The statutes which were originally drafted in the early days of the first wave of reform were left untouched in the second and third important revisions of the juvenile law. In practice, the application of the statute amounts to a complete grant of arbitrary power to dispose of the affected juveniles in whatever manner the administrators of the Industrial Institute and the State Penitentiary see fit.

This brings us to a consideration of the Institutional Transfer Statute itself. It was passed by the legislature in 1913 as part of the legislation which established the Industrial Institute.⁸⁷ The language of the law published in the Session Laws of Wyoming, 1913, differs only in technical details from the statute now published as W.S. 9-6-311 (1977). It now reads:

Transfer of inmates to Penitentiary or Wyoming State Hospital; return to institute.

(a) The State Board of Charities and Reform shall have the power to transfer to the State Penitentiary, or in case an inmate shall become mentally incompetent, to the Wyoming State Hospital, any inmate, who subsequent to his committal, shall be shown to have been, at the time of his conviction, an adult, or to have been previously convicted of crime, and may also so transfer any apparently incorrigible prisoner, whose presence in the institute appears to be seriously detrimental to the well-being of the institute; and said State Board of Charities and Reform, by written requisition, may require the return to the institute of any person who may have been so transferred.

(b) The Board of Charities and Reform shall also have power to make all rules and regulations necessary and proper for the employment, discipline,

87. 1913 Wyo. Sess. Laws ch. 63, § 10, at 56.

instruction, education, removal, and return as aforesaid of all the convicts in said institute.⁸⁸

At first glance, the statute appears to authorize the administrative transfer of any juvenile inmate from the Industrial Institute to the State Penitentiary, but even this interpretation is open to question. The Industrial Transfer Statute is open to attack on at least three grounds: on the question of its correct interpretation; on the failure to conform to the requirements of constitutional due process; and because it denies the equal protection of the law.

A. *Statutory Interpretation*

The problem of legislative intent can be stated reasonably simply but the solution the courts will adopt is difficult to predict since extrinsic evidence of legislative intent is nonexistent, and the statute itself may be read in contradictory ways without doing obvious violence to the texts involved. Briefly stated, the argument is that the 1913 law was passed prior to the introduction of the current concept of juvenile delinquent to the Wyoming legal system. The section of the 1913 law entitled "Who May Be Imprisoned" defined two separate categories of inmates: those who had been "convicted" and who were to be "imprisoned," and "juvenile delinquents" who were to be "confined" at the Industrial Institute.⁸⁹ The question is to whom do these categories of inmates refer. Does the statute apply to any person legally housed at the Industrial Institute or was the intent of the legislature to single out a more restricted category of inmates, those who had been convicted of a violation of the criminal code? The problem is greatly confused by the proliferation of contradictory statutes dealing with minors and young offenders. The legislature's distressing habit of passing new statutes but never repealing or revising the outmoded ones makes the usual problems of determining the legislative intent of state statutes even more bewildering.⁹⁰

88. WYO. STAT. § 9-6-311 (1977).

89. 1913 WYO. SESS. LAWS ch. 63, § 8, at 55.

90. See *supra* notes 68, 71-72.

The Institutional Transfer provision of the 1913 law refers variously to "any inmate," "any inmate . . . at the time of his conviction" and "any apparently incorrigible prisoner." Sorting out the various dependent clauses in the statute, a reasoned interpretation would read: (1) any inmate may be transferred to the Wyoming State Hospital if he has become insane (now mentally incompetent); (2) any convicted inmate may be transferred to the State Penitentiary if he is shown to have a previous conviction or is over the age of 25 (now 21); and (3) any incorrigible prisoner may be transferred to the State Penitentiary if he is shown to be seriously detrimental to the well being of the Institute. In 1913, all of the inmates who were statutorily authorized to be confined at the Industrial Institute had received full criminal trials as adults. In fact, the best reading of the statutes indicates that a full adult criminal adjudication existed until the creation of the juvenile court system in 1951.⁹¹ When the juvenile court system was created, juvenile proceedings became equitable and not criminal.⁹² Even today with the reassertion of constitutional due process protections in juvenile proceedings, the adjudication in most instances does not amount to a full trial.⁹³ Equally important, the juvenile being processed through the system

91. *See id.* In 1915 the new category of juvenile delinquent included those under the age of 21 who had been convicted of a felony after receiving a full trial. This category remained unaffected by the passage of the Juvenile Court Act of 1951 which set up the first separate juvenile court system in the state. Following the Juvenile Court Act of 1951, there were two independent and somewhat conflicting statutes defining juvenile delinquents. WYO. COMP. STAT. §§ 14-35, 14-41 (1957). When the Institutional Transfer Statute is considered, there are three separate procedural routes by which the same juvenile could be sentenced directly to the Industrial Institute. In all but one of the procedures, the inmate received a full trial. That procedure was under the Juvenile Court Act of 1951, WYO. COMP. STAT. § 14-41 (1957).

The conflicting definitions finally fell when the new Juvenile Court Act of 1971 established definitions for the delinquent child and the person in need of supervision to take the place of the old single category. WYO. STAT. § 14-6-201 (1978). Under the 1971 Act, a delinquent child was not convicted of a criminal offense and had usually bypassed the opportunity for a full trial that was an integral part of the determination of delinquency in 1913.

92. 1951 Wyo. Sess. Laws ch. 125, § 11(c), at 194; WYO. STAT. § 14-6-238 (1978).

93. WYO. STAT. § 14-6-224 (1978) provides for an informal hearing unless a trial is demanded within ten days after the accused is advised of his right to trial pursuant to WYO. STAT. § 14-6-223(c) (1978). The uninformed election of the informal hearing cannot serve as a valid waiver of the juvenile's due process rights in the same way that a plea of guilty by an informed and competent person will.

is led to believe that this is a less serious proceeding than an adult trial. The juvenile delinquent under the current law is in a significantly different position than the delinquent juvenile described in the 1913 law. Indeed, the "delinquent juvenile" of 1913 is almost identical to the minor who is tried as an adult and sentenced to the Industrial Institute under the current statutory scheme. The present day juvenile delinquent resembles more closely the "delinquent child" in the statutory language of 1909, though the comparison can be distinguished on several points.

When the legislature adopted the Juvenile Court Act of 1971, it intended to substitute a single coherent statutory scheme for the incomplete patchwork that characterized juvenile law in Wyoming up to that time.⁹⁴ The extensive enumeration of the powers of the juvenile courts did not include the power to commit the juvenile delinquent to the Penitentiary.⁹⁵ Under the Act delinquents may be held in the "county jail or another restrictive facility" for only a period of no more than ten days providing they are strictly segregated from adult prisoners.⁹⁶ The statutes state that the juvenile proceeding is equitable and not criminal and that the juvenile incurs no civil disability by operation of the Act.⁹⁷ Taken together, these provisions clearly indicate that delinquent juveniles were to be treated as a noncriminal class for whom confinement in the Penitentiary would be contrary to the intent of the Juvenile Court Act and beyond the powers vested in the juvenile courts.

When the Institutional Transfer Statute was passed, delinquent juveniles were convicted of crimes in the regular course of adult criminal proceedings. The legislature was providing a mechanism for the administrative imposition of a sentence that the judiciary had been legislatively authorized to levy.⁹⁸ In many cases, the inmate had initially been sentenced to the Penitentiary and then administratively

94. See *supra* note 1.

95. WYO. STAT. § 14-6-229 (1978).

96. *Id.* § 14-6-229 (c) (ii).

97. *Id.* § 14-6-238.

98. *Uram v. Roach*, *supra* note 14.

transferred to "the reformatory."⁹⁹ In such a case, the administrative power to transfer the inmate back to the Penitentiary is the logical and proper corollary to the original transfer power. In both types of cases the administrative power is co-extensive with the judicial sentencing authority.

The Wyoming Supreme Court upheld this use of the statute in the 1934 case of *Uram v. Roach*.¹⁰⁰ The facts of the case illustrate the proper application of the statute. But while the holding in the case was substantially correct, the opinion contains misleading dicta which has been relied on by corrections administrators to justify improper transfers.

In *Uram*, a man who called himself John Spaulding was arrested, tried and convicted of burglary. When asked by the judge, Spaulding said he was 18 years old and that this was his first felony conviction. In light of this, the judge sentenced the man to an indeterminate sentence in the Wyoming Industrial Institute. Since the trip from Lincoln County Courthouse in Kemmerer to Worland was a two-day affair in 1928, he was sent to the Institute in Worland by way of the Penitentiary in Rawlins. At the Penitentiary John Spaulding was recognized to be Mike Uram, a former prisoner at the Penitentiary and a two-time felon. Without a hearing, the Board of Charities and Reform ordered Uram to serve his sentence at the State Penitentiary. Furthermore, the Board fixed a minimum and maximum sentence.

Under the committing statute, Uram could not properly be sentenced to the Industrial Institute.¹⁰¹ This is one of the three express instances covered under the Institutional Transfer Statute, allowing for transfer in the case of improper sentencing.¹⁰² Unlike the case of Larry B., Uram was tried and convicted under the criminal code and the judge was empowered to sentence him to prison.¹⁰³ If Uram

99. WYO. COMP. STAT. § 545 (1910) (current version at WYO. STAT. § 7-13-102 (1977)).

100. *Supra* note 14.

101. WYO. REV. STAT. § 80-301 (1981) (current version at WYO. STAT. § 7-13-101 (1977)).

102. *See supra* text accompanying notes 90-93.

103. *Uram v. Roach*, *supra* note 14, at 793-94.

was a first offender between the ages of 16 and 25, then the judge could sentence him to the Industrial Institute. By statute this last act was discretionary; it was and is within the power of the judge to sentence an 18-year-old first offender to the Penitentiary.¹⁰⁴

In reviewing the case, the Wyoming Supreme Court upheld the administrative change of sentence on the theory that the published statutes of the state were incorporated into the sentence given at trial.¹⁰⁵ The sentence to the Industrial Institute was thereby made conditional on the existence of the statutory preconditions. The court held that the administrative determination of those facts was not a judicial act but properly within the scope of the administrative power delegated to the executive by the legislature.¹⁰⁶ While the last point could be quibbled with, this far into the court's opinion the theory is sound and would hold up under contemporary analysis. Unfortunately, the court went on to analyze the need for a due process hearing in a manner that can best be described as dated and misconceived. The court admitted that due process notice and hearing were sometimes required even in administrative hearings but denied that those procedures were required in Uram's case.¹⁰⁷

The court offered two justifications for denying the due process hearing to Uram. First the court said the due process protections did not attach when transferring convicts from "one penal or reformatory institution to another."¹⁰⁸ The important question under federal constitutional analysis is whether the transferor and transferee institutions can be considered functionally similar or whether they serve distinct purposes. If the institutions are functionally distinct, then the inmate has a protectable liberty interest in the question of transfer and due process protections are mandated.¹⁰⁹ The court was substantially correct in saying that

104. *Id.* at 794.

105. *Id.* at 795.

106. *Id.* at 796.

107. *Id.*

108. *Id.*

109. The concept of functionally distinct institutions was first announced in *Baxstrom v. Herold*, 383 U.S. 107, 113-14 (1966). In *Baxstrom*, the United States Supreme Court used equal protection analysis to invalidate a New York State procedure for the administrative transfer of prisoners from

transfer from one adult penal institution to another did not give rise to a fully protectable liberty interest. The problem turns on the characterization of the Industrial Institute as an adult penal institution rather than as a juvenile reform institution. The court did not discuss this problem directly but indicated that institutions were sufficiently similar to allow for unfettered administrative transfer. Rather than analyze this issue in depth, the court confused the question of whether a substantial liberty interest against transfer existed when an offender was properly held in the Industrial

the penitentiary to the mental hospital. The Court said New York must provide the same procedural protections to the imprisoned convict that were provided at the regular civil commitment proceeding. The court rejected the argument that the person serving a prison sentence was not entitled to the full range of civil rights because of his conviction and sentence to confinement at a penal institution. The Court held that the liberty interest at stake was different from the one that had been adjudicated at the original trial, and therefore the convict was entitled to a separate determination of his mental condition. Recently, lower courts have applied the doctrine to distinguish between juvenile reformatories and prisons. See Pirsig, *supra* note 22, at 136-39, and cases cited therein. When this doctrine is applied to the question of transferring juveniles to adult penal institutions, the standard is whether the juvenile transferred to prison has received substantially the same procedural rights and protections as have the adults who were convicted and sentenced directly to the Penitentiary.

The doctrine is closely related to the more traditional due process analysis which looks to see if the juvenile will incur a substantial loss of liberty or an additional stigma by the transfer. Once it is determined that there is a liberty interest at stake, then the juvenile is entitled to due process proceedings sufficient to protect the liberty interest. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). While in the case of juvenile offenders transferred to penal institutions, both equal protection analysis and due process analysis mandate certain procedures be given the juvenile, there is a difference in what procedures are required by each analysis. Equal protection requires that the same procedural rights be given all people faced with the loss of the same liberty interest. Even if those procedures are granted to only a limited class of people by statute, court rule or common law, they must be given to every person in a similar situation. Due process protections are mandated by the Constitution according to the importance of the liberty interest involved. *Goldberg v. Kelly*, *supra*. Due process proceedings are not derived from statutes or nonconstitutionally based court rulings.

In the area of the transfer of juvenile offenders to adult penal institutions, the differences between the intended functions of the adult prison and the juvenile reformatory will trigger both equal protection analysis and due process analysis. The juvenile justice system is a rehabilitative system in which the punitive and stigmatizing aspects are minimized. The Industrial Institute is clearly a juvenile institution in 1982, regardless of its original role. See *supra* note 72. Placement in the Penitentiary involves a significant loss of liberty and an increased stigmatization. While many authorities have been critical of the apparent failure of juvenile institutions to reform delinquents and of the excessively penal nature of these institutions, see *In re Gault*, *supra* note 20, at 18-27, no court can equate a juvenile institution to an adult penal institution without granting full criminal trial rights to any juvenile. To deny that there is a functional difference between the Industrial Institute and the State Penitentiary invalidates the basic assumptions of the juvenile system. See *Carter v. United States*, *supra* note 59 and accompanying text.

Institute with the second issue, namely, that Uram never made a valid claim to that liberty interest. This second line of reasoning is the correct basis for the decision in *Uram* regardless of the result of the analysis of the liberty interest at stake in the transfer.

In making his appeal, Mike Uram admitted that he was previously convicted of a felony and that he had deceived the trial judge into the improper sentence.¹¹⁰ He claimed that the transfer amounted to an administrative change of sentence which was an improper exercise of judicial power and that he could only be resentenced by the courts.¹¹¹ While the court did strike down the administrative imposition of a minimum and maximum sentence on this very theory, it upheld the transfer as being within the "conditional sentence" handed down by the judge and supplemented by the statutory transfer provision.¹¹² The court correctly noted that Uram was not a member of the statutorily created class of first offenders who were eligible to serve their sentence at the Industrial Institute. Uram made only a technical claim that he received an improper sentence and did not challenge his conviction or the substantive propriety of the sentence. Since he did not deny these facts, he had not placed a liberty interest in question and the Board's application of the transfer power required no judicial determination. The court noted that if Uram had denied the conditional facts that required transfer, then a due process hearing would be required.¹¹³

The decision was correctly founded on this reasoning and the court need never have reached the question of whether transfer from the Industrial Institute to the State Penitentiary was merely a transfer from one penal institution to another. Since the court never examined this issue, the brief statement to that effect found in *Uram* should properly be considered as dicta. Thus, the result in *Uram* can be defended under current constitutional analysis if

110. *Uram v. Roach*, *supra* note 14, at 794.

111. *Id.* at 795.

112. *Id.*

113. *Id.* at 796.

correctly read. Unfortunately, the current policy of the Board of Charities and Reform and the superintendent of the Industrial Institute is to deny all due process protections to prospective transferees, citing the dicta in *Uram* as supporting their actions. This reliance is without foundation in the current case law.¹¹⁴

Uram v. Roach correctly indicates that the statute will remain valid in at least three types of cases that are still likely to arise. The first is in the *Uram* fact situation where the person is convicted in a district court proceeding but is sentenced to the Industrial Institute on the basis of false information, making him ineligible in law for the less restrictive sentence. As the court noted in *Uram*, if the conditional facts are disputed by the prisoner, he must be granted a due process hearing for their determination.¹¹⁵

The second type of case includes those juveniles who were transferred from the Penitentiary to the Institute by the Board of Charities and Reform. The administrative transfer power in these cases should properly be a two-way street. Since the juveniles were originally sentenced to the Penitentiary, no challenge can be made that their sentence has been improperly altered by administrative action. This power is analogous to parole and parole revocation powers which are regularly entrusted to administrative agencies.¹¹⁶ In order to transfer this class of juveniles, a due process hearing must be granted by the Board.¹¹⁷

114. In discussing due process and equal protection rights, the Wyoming court cited only WYO. CONST. art. 1, §§ 3 & 10, and the discussion of federal cases is kept to a minimum. *Uram v. Roach*, *supra* note 14, at 795-96.

115. *Uram v. Roach*, *supra* note 14, at 795-96.

116. WYO. STAT. §§ 7-13-401 to -422 (1977); *see also* *Morrisey v. Brewer*, 408 U.S. 471, 477 (1972).

117. *Morrisey v. Brewer*, *supra* note 116, at 487-88. The procedure described is initiated by the Board of Parole under WYO. STAT. § 7-13-102 (1977). There can be no doubt that this is a type of parole even if the revocation process is handled by the Board of Charities and Reform. One alternative is to allow the Board of Parole to maintain jurisdiction over this class of prisoners and to handle them through the normal parole revocation process. The power to transfer the inmate back to the Penitentiary could be found in WYO. STAT. § 7-13-403 (1977). In either case, the hearing process set out in *Morrisey v. Brewer*, *supra* note 116, is constitutionally mandated for all parole revocation hearings.

In *Morrisey v. Brewer*, *supra* note 116, at 489, the Court set out the minimum requirements of a due process hearing in the parole revocation situation, as follows:

The third category of inmate which may be properly transferred under the Institutional Transfer Statute involves the juvenile convicted as an adult in district court but sentenced initially to the Industrial Institute.¹¹⁸ The theory relied on in *Uram* that the sentence is conditioned on the provisions of the Institutional Transfer Statute will support the transfer of this class of inmate, as well.¹¹⁹ In this case, the conditional facts that determine the appropriate sentence occur after the sentencing rather than being in existence at the time of the sentence. This power is analogous to probation revocation which is recognized as an appropriate power for administrative disposition. Once again, this class of transferees is entitled to a due process hearing.¹²⁰ There is no problem of notice in this type of case since the juvenile is subject to the full range of statutory penalties when he is tried as an adult.

What the statute cannot properly be used for is the transfer of inmates who were originally sentenced to the Industrial Institute following a juvenile court proceeding. In these cases, there is no statutory authorization for commitment at the Penitentiary under the Juvenile Court Act.¹²¹

They include (a) written notice of the claimed violation of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), a probation revocation case, the Court said the right to counsel was dependent on whether the probationer claims that there is a question of fact at issue concerning the alleged violation or whether there are complicated mitigating circumstances which require presentation by an expert. This standard is now used in parole revocation cases. In view of the juvenile's presumed legal handicap (his minority legal status) and practical maturity, he should be provided with counsel as a matter of course in all these hearings.

118. Wyo. STAT. § 7-13-101 (1977).

119. *Uram v. Roach*, *supra* note 14.

120. *See Gagnon v. Scarpelli*, *supra* note 117; *Mason v. State*, 631 P.2d 1051 (Wyo. 1981).

Wyo. STAT. § 7-13-409 (1977) provides for any probation revocation hearing to be conducted by an administrative hearing officer. *Weisser v. State*, 600 P.2d 1320, 1324 (Wyo. 1979).

121. Wyo. STAT. § 14-6-229(c), (d) (1978).

The Juvenile Court sentence cannot be characterized as conditional since there are no circumstances under which the juvenile court could sentence the juvenile delinquent to the Penitentiary. When the Board of Charities and Reform transfers the juvenile delinquent to the Penitentiary, it is not administering the sentence of the juvenile court; it is imposing a new sentence. This, unlike *Uram*, is an improper delegation of a judicial power to the executive branch.¹²² The fact that this is currently done without a due process hearing highlights the problems with the procedure. But even given a proper hearing, there is no statutory authorization for the transfer.

A close reading of the legislative history makes it clear that the legislature only authorized the transfer of a class of offender who had received a full trial and had been found guilty of a criminal violation. The 1971 Juvenile Court Act provides for noncriminal proceedings that may be held in an informal manner, without notice to the accused juvenile that the proceedings may indirectly result in imprisonment at an adult penal institution. The use of the Institutional Transfer Statute to place the juvenile offenders in the general population of the Penitentiary was never authorized by the Legislature and is in clear conflict with the disposition provisions of the Juvenile Court Act of 1971.

B. *Due Process*

In deciding *In Re Gault*, the United States Supreme Court repeated Justice Frankfurter's famous phrase, "the history of individual liberty is largely the history of procedure."¹²³ This is the key to the attack on the juvenile justice system in the United States. The juvenile system was conceived at the outset, as being informal, personal, and paternalistic. Juveniles, too, are persons for the purposes of the constitutional protections of the Bill of Rights and the

122. WYO. CONST. art. 5, § 1 vests the judicial power of the state in "a supreme court, district courts, and such subordinate courts as the legislature may . . . establish. . . ."

123. *Supra* note 20, at 21 (Quoting *Malinski v. New York*, 324 U.S. 401, 414 (1945) (separate opinion)).

Fourteenth Amendment.¹²⁴ Thus, the juvenile, like anyone else, may not be deprived of life, liberty, or property without due process of the law.¹²⁵ Central to the holding in *Gault* was the declaration that a juvenile proceeding that resulted in the confinement of the juvenile involved a protected liberty interest. The restriction of the juvenile's freedom could not be wiped away in an arbitrary proceeding simply because the court's intentions were benevolent.¹²⁶

The amount of process due in any case is dependent on the nature of the liberty interest and the extent of the restriction.¹²⁷ The Supreme Court deemed the incarceration of a juvenile in a reform school to be a serious enough infringement of a protected liberty interest to grant the juveniles right to notice, the right to be represented by counsel,¹²⁸ the right to a hearing, the right to present, confront, and cross-examine witnesses and the right to be free from self-incrimination.¹²⁹ As extensive as these rights are, the Court did not mandate a strict adherence to the rules of evidence or formal trial procedures, nor did it require the right to a jury trial¹³⁰ or preliminary hearing to determine probable cause.¹³¹ These procedural rights are all part of the guarantees accorded any adult accused of a crime where there is a possibility of imprisonment for over six months.¹³² While the right to a jury trial and to an appeal on the record were provided statutorily in the Wyoming Juvenile Court Act,¹³³ the protections can be hollow ones.

124. *Miller v. Gillis*, 315 F. Supp. 94, 99 (N.D. Ill. 1969). The point is not frequently argued. The most famous United States Supreme Court opinion dealing with the definition of person under the Constitution is *Roe v. Wade*, where it was proclaimed that "'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973). The clear but unstated assumption is that a child born, even momentarily, is a person for purposes of the Fourteenth Amendment.

125. *In re Gault*, *supra* note 20, at 27-28.

126. *Id.* at 18.

127. *Morrisey v. Brewer*, *supra* note 116, at 481.

128. *Gagnon v. Scarpelli*, *supra* note 117.

129. *In re Gault*, *supra* note 20, at 33, 36, 41, 56, 58.

130. *McKeiver v. Pennsylvania*, *supra* note 33.

131. *In re Gault*, *supra* note 20, only required the *Kent* transfer hearing prior to the adjudicatory hearing. See also *Kent v. United States*, *supra* note 8. In Wyoming, the *Kent* transfer hearing serves as the only pre-adjudicatory hearing, if any such hearing is held at all. WYO. STAT. §§ 14-6-226, -237 (1978).

132. *In re Gault*, *supra* note 20, at 29.

133. WYO. STAT. §§ 14-6-223(c), -233 (1978).

The lack of effective notice inherent in the statutory transfer provision is at the heart of the due process challenge. Notice is the first of the essential elements comprising the modern doctrine of due process. Without notice sufficient to apprise the accused of the charges against him and the consequences involved, a person is unable to intelligently avail himself of the procedural rights guaranteed him under the doctrine.¹³⁴

Under the present scheme a juvenile accused of delinquency is given notice of the crime he is charged with, but he will be unaware of the potential penalty attached to a determination of delinquency. The court usually does not inform the juvenile of the potential for transfer since it has no power to sentence or transfer the juvenile to the Penitentiary.¹³⁵ A careful reading of the Juvenile Court Act gives no hint of the transfer process. The common belief is that a juvenile delinquent cannot be imprisoned.¹³⁶

In the juvenile process this lack of notice can be critical at a very early stage of the proceedings. Once a delinquency petition is filed, the accused has only ten days to demand a jury trial.¹³⁷ The transfer hearing is an optional event.¹³⁸ Without a preliminary hearing, the juvenile may not be able to evaluate the seriousness of his predicament and the need for a jury trial. Most likely, he remains unaware of the possibility of the proceeding resulting indirectly in a prison term. If the right to the jury trial is lost by failing to demand it, the delinquency hearing will be "informal," meaning the rules of evidence will not apply in full force.¹³⁹ A juvenile convinced he is faced only with the prospect of a six-month stay at the Industrial Institute or probation might well choose the informal procedure, since a full-blown trial

134. In the area of juvenile adjudications when both the juvenile's liberty and his parents' custody rights are at stake, notice must be given to both the child and the parents. *In re Gault*, *supra* note 20, at 31-34.

135. See WYO. STAT. § 14-6-229 (1978).

136. This statement is made after many months of discussions between the author and citizens of all stripes, including a large number of lawyers and other professionals who practice outside the field of juvenile corrections.

137. WYO. STAT. § 14-6-223(c) (1978).

138. See *supra* note 131.

139. WYO. STAT. § 14-6-224(a) (1978).

involves considerable expense and effort. Additionally, a demand for a jury trial might well antagonize the judge who has extremely broad discretion in sentencing the juvenile.¹⁴⁰ The same juvenile faced with the prospect of prison might well feel the full trial was a better procedure through which he may seek to protect his interest. The choice is made more problematic since it must be made within ten days after filing the petition, frequently before the juvenile has secured the advice of counsel. Taken together, the lack of notice, the possibility of administrative transfer, and the abbreviated time during which the accused may demand a trial and formal hearing procedures make the statutory protections granting a jury trial and subsequent right to appeal little more than window dressing for the discredited practices that existed in the juvenile courts before *Gault*.

A second due process challenge focuses on the transfer stage rather than the delinquency determination. While the earlier analysis only applies to those people who are processed through the juvenile courts, this challenge applies equally to juveniles found delinquent, and juveniles convicted as adults and either sentenced or subsequently transferred to the Industrial Institute. The liberty interest at issue in the transfer stage can best be understood by analogy to cases involving parole, probation, and good time release.¹⁴¹ These are all statutorily created rights, which are not mandated by the Constitution. A state could choose to allow fixed sentences for a proper criminal conviction. Once a release program is legislatively authorized, however, the convicted person may not be denied due process in the administration of these programs.¹⁴² Thus, it is unimportant what procedures led to the placement of the juvenile at the Industrial Institute; the very placement at a reform institution is a protected liberty interest, a statutorily created right.

The existence of this liberty interest triggers a balancing test which weighs the seriousness of the individual's potential loss against the State's interest in summary pro-

140. *Id.* § 14-6-229.

141. See *supra* note 117.

142. *Morrisey v. Brewer*, *supra* note 116, at 480-84.

ceedings.¹⁴³ Generally, the State may not use summary proceedings for its convenience or to save money; rather, an emergency situation must exist to justify summary proceedings. If immediate action is required to meet an emergency, due process may not be denied except to the extent necessary to meet the emergency. A hearing may be delayed in some cases, but it may not be denied permanently.¹⁴⁴ In practice, transfer from the Industrial Institute has to be approved by the Board of Charities and Reform which meets only monthly.¹⁴⁵ There is adequate time between monthly meetings to hold a proper hearing. *Parens patriae* is not a justification for summary proceedings, and no other serious governmental interest has been suggested for withholding a due process hearing from transferees.

The amount of process due at the transfer stage depends on the nature of the liberty interest involved. If the transferee has received a full trial in district court, the transfer hearing need not amount to a full trial; but, at the least, it must include notice, a hearing before a neutral hearing body, opportunity to be heard and present witnesses, opportunity to confront witnesses, right to representation by counsel, and a written explanation of the reasons for transfer.¹⁴⁶ The juvenile offender who has only had an informal hearing in a juvenile court may not be transferred to the Penitentiary by an administrative board since he has not yet been granted his full due process protections at the initial stage of commitment. It is doubtful that full trial proceedings can be constitutionally conducted by an administrative board in such a case.¹⁴⁷

C. *The Equal Protection Problems*

Separate from the due process analysis, the Equal Protection Clause of the Fourteenth Amendment requires

143. *Id.*

144. The Supreme Court has held that no such state interest exists in the parole and probation situations. *Id.*; see also *Gagnon v. Scarpelli*, *supra* note 117.

145. WYO. STAT. § 9-3-702 (1977).

146. See *supra* note 117.

147. See WYO. CONST. art. 5, § 1; *Uram v. Roach*, *supra* note 14. For the juvenile offender the right to a sentence by a district court judge is an integral part of his due process rights. See *Mempha v. Rhay*, 389 U.S. 128 (1967). The indeterminate term given at juvenile court proceedings does

that each person who is imprisoned must receive the same procedural protections, whether or not they are constitutionally or statutorily required.¹⁴⁸ Thus, even if the present use of the transfer statute was upheld as being legislatively authorized and as meeting due process requirements, the statute would be invalid if it resulted in one class of offenders which received fewer procedural protections. The juvenile who is given an informal juvenile court delinquency hearing which results in his placement at the Industrial Institute, and who is subsequently transferred by summary administrative action, has not received the same procedural protections as one who has been tried and sentenced in a district court proceeding.¹⁴⁹

A second violation of the equal protection clause occurs because the juvenile offender is denied a fixed sentence determined by a judge in an appropriate due process setting.¹⁵⁰ The transferred juvenile keeps the original indeterminate sentence that he received at the juvenile hearing.¹⁵¹ If a juvenile is placed in the Industrial Institute for a status offense or a delinquent act amounting to a misdemeanor or a felony carrying a penalty of only a few years,¹⁵² the juvenile faces a term at the Penitentiary that would exceed the punishment authorized for a convicted adult. Even if the delinquent act charged is a serious felony, the juvenile has not had a proper sentencing before a judicial officer to determine the mitigating and aggravating circumstances and the appropriate sentence.¹⁵³ The indeterminate sentence is valid only as the *quid pro quo* for rehabilitative treatment. Once the juvenile is transferred to the adult penal institution, he has the same right to a judicially determined minimum and maximum sentence as does the adult convict.¹⁵⁴

not meet the statutory sentencing requirements found in WYO. STAT. §§ 7-13-201 to -205 (1977). Sentencing is a judicial function under the Wyoming Constitution. *Uram v. Roach*, *supra* note 14.

148. See Pirsig, *supra* note 22.

149. See *supra* note 109; *Shone v. Maine*, 406 F.2d 844 (1st Cir. 1969).

150. See *supra* note 147; *United States ex rel. Sero v. Preiser*, *supra* note 60.

151. See *supra* notes 12-14.

152. See *supra* notes 29 & 38 and accompanying text, for explanation of the classifications of juvenile offenders.

153. See *supra* note 147.

154. *United States ex rel. Sero v. Preiser*, *supra* note 60, at 1123-24.

At this point, it may be useful to make a comparison of the results under the due process analysis and the equal protection analysis. Due process protections arise because a significant liberty interest is threatened. The extent of this threatened loss is the factor that determines what kind of due process procedures are necessary. The greater the difference between the liberty interests associated with confinement at the two institutions, the greater the procedural protections must be. All the procedures required by the due process analysis are constitutionally mandated. These protections attach to those tried and sentenced in district court as well as to delinquent juveniles, regardless of the nature of the proceedings that placed them at the Industrial Institute.

Under the equal protection analysis, the State must provide substantially the same protections to all. Once it is determined that the transfer involves a change in the functional conditions of the institutional confinement, then the person is entitled to the complete range of rights and protections given to others faced with a similar restriction of liberty. In the case of transfer from the Industrial Institute to the Penitentiary, a juvenile would be entitled to the equivalent of a full adult trial. Procedural protections granted by the Constitution, state laws or even the custom of the jurisdiction are all required to be provided equally to all people threatened with the loss of the same liberty interest. However, a person convicted and sentenced in a district court proceeding will have received the full range of trial rights required by the Constitution and by statute. This trial satisfies the equal protection requirements whether the convicted person is sentenced directly to the Industrial Institute or is sentenced to the Penitentiary and is administratively transferred to the Industrial Institute later. For these transferees, the only challenge that applies is based on the due process analysis. The hearing required in their case may be less stringent in its protections. The format for this type of hearing may be taken from the decisions in the probation, parole and good time release cases. The Wyoming Supreme Court has recognized this line of cases and may

be expected to follow them closely if called on to set standards for transfer of this class of transferees.¹⁵⁵

CONCLUSION

The three-part analysis of the Institutional Transfer Statute leaves no doubt that the transfer of juvenile offenders from the Industrial Institute to the State Penitentiary is statutorily unauthorized and violates the due process and equal protection clauses of the Fourteenth Amendment.¹⁵⁶ The various challenges to the validity of the statute affects every type of potential transferee. The statute does not authorize the transfer of juveniles judged delinquent or in need of supervision in spite of claims to the contrary by current State officials. Even if it did, the statute is invalid as to these juveniles since it does not provide the procedural protections required by the Constitution. The State Board of Charities and Reform has adhered only to the minimum requirements of the statute and has done nothing to correct the defects of the statute. Those persons convicted in an adult trial in district court and placed in the Industrial Institute are also entitled to an appropriate due process hearing prior to their transfer. While the hearing need not reach the formality of a full trial, it must include the essential elements of constitutional due process.

Perhaps the most disturbing aspect of the administration of discipline at the Industrial Institute is the complete lack of standards at all levels of administration. The stan-

155. *Mason v. State*, *supra* note 120.

156. In *Shone v. Maine*, *supra* note 149, a federal district court invalidated a transfer statute similar to the one in Wyoming using a combination of all three analyses—legislative, due process, and equal protection. The federal court rejected the contention that the transfer provision was incorporated into the sentence of the original court. Similarly, the court rejected the assertion that transfer was essential to maintain order, and therefore the power to transfer represented a significant state interest that should give rise to an implied power to transfer. This interpretation was only available if the state had provided for notice and a hearing followed by state review of the decision. The court also rejected the claim that confinement in the State Penitentiary was not for the purposes of punishing the juvenile, but rather it was the only "treatment" available since the other rehabilitation programs had failed. The court affirmed that the two institutions were distinct and that therefore the juveniles had a right to a due process hearing. The last portion of the opinion confuses the due process analysis and the equal protection analysis at a point where they almost seem to merge. The decision reached is similar under either analysis.

ardless statute is used to justify summary action by the Board of Charities and Reform. The Board itself has no procedure for addressing transfer and disciplinary issues beyond the official approval made by motion, parliamentary discussion and summary vote. At the Industrial Institute, there is no formal institutional procedure for determining when transfer should be sought or discipline administered, and no code of disciplinary regulation exists to guide the resident juveniles in their behavior.¹⁵⁷ Taken together, this scheme confronts the juveniles caught in the system with a formless, arbitrary bureaucracy that can punish without warning and without heed to their protest. In the present system there is no particular standard to measure behavior which will result in punitive transfer or other discipline.

In this setting, the United States Supreme Court's warning in *Gault* should be kept in mind: the juvenile cannot be expected to respect an authority which appears secretive and arbitrary no matter how well intentioned its motivation. The delinquent juvenile will be better served by regular and orderly proceedings where the course of his rehabilitation is openly and fairly considered.¹⁵⁸ Finally, the juvenile, like all people, is entitled to fundamental protections of the Constitution.

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157. See *supra* note 50.

158. *In re Gault*, *supra* note 20, at 26-27.