

3-1-1980


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### Recommended Citation

Mark Soler, Michael J. Dale, and Kathleen Flake, *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails*, 1980 BYU L. Rev. 1 (1980).

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# Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails†

*Mark Soler*  
*Michael J. Dale*  
*Kathleen Flake\**

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† Stubborn children, runaways, common night walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly act or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, prostitutes, disturbers of the peace, keepers of noisy and disorderly houses and persons guilty of indecent exposure may be punished by imprisonment in a house of correction for not more than six months or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

MASS. GEN. LAWS ANN. ch. 272, § 53 (West 1970) (amended 1973).

If a man have a stubborn and rebellious son, which will not obey the voice of his father, or the voice of his mother, and that, when they have chastened him, will not hearken unto them; then shall his father and his mother lay hold on him, and bring him out unto the elders of his city, and unto the gate of his place; and they shall say unto the elders of his city, This our son is stubborn and rebellious, he will not obey our voice; he is a glutton, and a drunkard. And all the men of his city shall stone him with stones, that he die; so shalt thou put evil away from among you; and all Isreal shall hear, and fear.

*Deuteronomy 21:18-21 (King James).*

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The Juvenile Justice Legal Advocacy Project is a public interest law project operating under a grant from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the Law Enforcement Assistance Administration of the United States Department of Justice. The project provides a comprehensive range of legal advocacy services to national and local advocate organizations working to implement the Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601-5751 (1976). The project also provides back-up support to local attorneys who are engaged in youth advocacy work, and provides direct legal assistance in the form of legislative, administrative and litigant advocacy.

This article was prepared under Grant #78-JS-AX-0073 from the Office of Juvenile Justice and Delinquency Prevention, Law Enforcement Assistance Administration, U.S. Department of Justice. A portion of this article is based upon research and pleadings done by attorneys at the National Juvenile Law Center in Saint Louis, Missouri. Points of view or opinions in this article are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

## I. INTRODUCTION

Each year thousands of children are confined in adult jails throughout the United States. Although the exact number of children confined is difficult to determine, some authorities place the figure as high as 500,000 per year.<sup>1</sup> In 1970, a limited survey by the National Jail Census reported that on March 15, 1970, some 7,800 children were confined in adult jails in the United States.<sup>2</sup>

The massive confinement of children in adult jails is a long-standing practice. In 1869, for example, investigators for the Illinois Board of State Commissioners of Public Charities inspected seventy-eight jails in Illinois. They found 511 inmates, ninety-eight of whom were children under the age of sixteen.<sup>3</sup> They described the Cook County jail as follows:

The jail is so dark that it is necessary to keep the gas burning in the corridors both day and night. The cells are filthy and full of vermin . . . this effort of promiscuous herding together of old and young, innocent and guilty, convicts, suspected persons and witnesses, male and female, is to make the county prison a school of vice. In such an atmosphere purity itself could not escape contamination.<sup>4</sup>

More than 100 years later, a federal judge made similar observations concerning the conditions in the jail in Lucas County, Ohio:

[W]hen the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in cramped and overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confine-

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1. R. SARRI, UNDER LOCK AND KEY, JUVENILES IN JAILS AND DETENTION 5 (1974).

2. The survey was limited to locally administered jails with authority to confine persons for 48 hours or more. The survey did not include federal and state prisons or other correctional institutions; jails in Connecticut, Delaware, and Rhode Island (where jails are administered by state, not local, authorities); and drunk tanks and lockups that detain individuals for fewer than 48 hours. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE, 1970 NATIONAL JAIL CENSUS, A REPORT ON THE NATION'S LOCAL JAILS AND TYPES OF INMATES 1 (1971).

3. A. PLATT, THE CHILD SAVERS 118 (2d ed. 1977).

4. *Id.* at 119.

ment, stripped of clothing and every last vestige of humanity, in a sort of oubliette.<sup>5</sup>

As in other states,<sup>6</sup> detention of juveniles in adult jails is illegal in Utah. State law generally requires that juveniles be detained in facilities separate and distinct from adult jails.<sup>7</sup>

In addition, the federal Juvenile Justice and Delinquency Prevention Act<sup>8</sup> requires states to develop state plans for implementation of the Act which will ensure that juveniles who are

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5. *Baker v. Hamilton*, 345 F. Supp. 345, 352 (W.D. Ky. 1972) (quoting *Jones v. Wittenberg*, 323 F. Supp. 93, 99 (N.D. Ohio 1971)).

6. Attorneys for the Juvenile Justice Legal Advocacy Project focus their work primarily on six states: Colorado, New Mexico, North Carolina, Oregon, Utah, and Washington. The laws in these six states differ somewhat in terms of statutory liability and immunity of public officials. These differences are representative of those among other states. In this Article, the text will focus on Utah law, with references to the laws of the other states for comparative purposes.

7. The Utah Juvenile Court Act, UTAH CODE ANN. § 78-3a-30(3) (1953), specifically provides:

No child under the age of 16 may be confined in a jail, lockup or other place for adult detention. The provisions of section 55-10-49 remain in full force and effect. . . .

Section 55-11a-1 provides:

Children under the age of sixteen years, who are apprehended by any officer or are brought before any court for examination under any of the provisions of this chapter, shall not be confined in the jails, lockups or police cells used for ordinary criminals or persons charged with crime nor shall they be confined in the state youth development center.

UTAH CODE ANN. § 55-11a-1 (Supp. 1979) (previously designated § 55-10-49).

The State of Washington prohibits the detention of *any* child under 16 years of age in a jail, lockup, or police station. The child may be held in a detention facility separate from a jail. WASH. REV. CODE ANN. § 13.04.115 (1962).

The basic rule in Colorado is that children under the age of 14 may not be held in jails used for the confinement of adults. Children over the age of 14 may not be held in jails used for adults except pursuant to court order. The exception may be invoked only where "no other suitable place of confinement is available." COLO. REV. STAT. § 19-2-103(6)(a) (1978).

In New Mexico, the Children's Code states that no child alleged to be in need of supervision or neglected may be held in jail. N.M. STAT. ANN. § 32-1-25 (E) (1978). Alleged juvenile delinquents may only be held in jail "in a room totally separate and removed from incarcerated adults." *Id.* § 32-1-25(C).

North Carolina's current statute provides that, until 1983, alleged status offenders and delinquents may be held in jails with holdover facilities for juveniles as long as there is both sight and sound separation from adults. N.C. GEN. STAT. § 7A-576 (Supp. 1979). After this date no children can be held in detention in jails. *Id.* § 7A-576(c).

Unlike the other states cited, Oregon allows all classes of juveniles—dependent, status offenders, and delinquents—14 years of age or over to be placed in an adult detention facility in a separate room screened from sight and sound of adult detainees under circumstances where a suitable juvenile detention facility is not available. OR. REV. STAT. § 419.575 (1977).

8. 42 U.S.C. §§ 5601-5751 (1976).

charged with or have committed offenses that would not be criminal if committed by an adult (status offenders), and such nonoffenders as dependent and neglected children, are not placed in secure facilities at all.<sup>9</sup> These plans must also provide that juveniles alleged or found to be delinquent, status offenders, or nonoffenders may not be detained in any institution or facility where they have regular contact with adults charged with or convicted of crimes.<sup>10</sup>

Despite these clear mandates, substantial numbers of juveniles are regularly detained in adult jails in Utah. In July, 1976, the John Howard Association estimated that more than 1,100 juveniles had been detained in Utah adult jails during the previous year.<sup>11</sup> A thirty day survey by the Community Research Forum in 1979 confirmed that, at least in rural areas, juveniles continue to be detained in adult jails on a regular basis.<sup>12</sup>

This Article will discuss the nature and extent of the legal liability local and state officials in Utah may incur for detaining juveniles in adult jails. For purposes of comparison, reference will be made to five other states.<sup>13</sup> This Article will specifically

9. *Id.* § 5633(a)(12).

10. *Id.* § 5633(a)(13). In addition, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5037 (1976), which applies to juveniles prosecuted in federal courts, provides:

A juvenile alleged to be delinquent may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community. *The Attorney General shall not cause any juvenile alleged to be delinquent to be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or waiting trial on criminal charges.* Insofar as possible, alleged delinquents shall be kept separate from adjudicated delinquents. Every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

*Id.* § 5035 (emphasis added).

11. JOHN HOWARD ASSOCIATION, UNIFIED CORRECTIONS STUDY OF STATE OF UTAH: FINAL REPORT. A STUDY FOR THE SOCIAL SERVICES STUDY COMMITTEE OF THE LEGISLATURE OF THE STATE OF UTAH 88 (1976). In 1977 in Colorado, 4,541 juveniles were held in jails. Of this number, 3,318 were held in jails lacking adequate separation from adults. DIVISION OF CRIMINAL JUSTICE, STATE OF COLORADO, 1980 JUVENILE JUSTICE AND DELINQUENCY PREVENTION PLAN 383 (1979). In 1977 in North Carolina, 2,644 juveniles were held in adult jails. An additional 4,002 were held in juvenile detention facilities. JUVENILE CODE REVISION COMMITTEE, 1979 REPORT, 374-75 (1979).

12. COMMUNITY RESEARCH FORUM, PRELIMINARY REPORT TO THE UTAH STATE JUVENILE JUSTICE ADVISORY GROUP: REMOVAL OF JUVENILES FROM ADULT JAILS IN RURAL UTAH (1979).

13. These states are Colorado, New Mexico, North Carolina, Oregon, and Washington. See note 6 *supra*.

discuss the injuries suffered by children detained in adult jails, the bases for liability under state and federal law of local and state officials who have legal responsibility for juveniles detained in jails, and the immunity and indemnification provisions applicable to such local and state officials. Finally, this Article will summarize the relevant public policy considerations and draw conclusions as to the liability of local and state officials who illegally detain juveniles in adult jails.

## II. INJURIES SUFFERED BY CHILDREN IN ADULT JAILS

Virtually every national organization concerned with law enforcement and the judicial system—including the American Bar Association, the Institute for Judicial Administration, the National Advisory Commission on Law Enforcement, the National Council on Crime and Delinquency, and the National Sheriffs' Association— has recommended standards that prohibit the jailing of children. This near unanimous censure of the jailing of children stems from the conclusion that such a practice harms the very persons the juvenile justice system is designed to protect and assist. A Senate subcommittee concluded that “[r]egardless of the reasons that might be brought forth to justify jailing juveniles, the practice is destructive for the child who is incarcerated and dangerous for the community that permits [it].”<sup>14</sup>

Incarcerating children harms them in several ways. The most widely recognized harm is the physical and sexual abuse such children suffer at the hands of adults in the same facility. The cases of assault and rape of jailed juveniles are too numerous to list and too common to be denied. Even short term or pretrial detention in an adult jail exposes male and female juveniles not only to sexual assault and exploitation but to physical injury as well. One authority describes the plight of juveniles in some jails in the following terms:

Most of the children in these jails have done nothing, yet they are subjected to the cruelest of abuses. They are confined in overcrowded facilities, forced to perform brutal exercise routines, punished by beatings by staff and peers, put in isolation, and whipped. They have their heads held under water in toi-

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14. *Detention and Jailing of Juveniles: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

lets. They are raped by both staff and peers, gassed in their cells, and sometimes stomped or beaten to death by adult prisoners. A number of youths not killed by others end up killing themselves.<sup>15</sup>

Often local officials isolate the child from contact with others in an attempt to protect him from attack by adult detainees. However, such well-meaning measures may themselves be harmful to the child. Dr. Joseph R. Noshpitz, past president of the American Association for Children's Residential Centers and Secretary of the American Academy of Child Psychiatry, has noted that placing juveniles in jail often causes serious emotional distress and even illness:

[E]xtended isolation of a youngster exposes him to conditions equivalent to "sensory deprivation." This is a state of affairs which will cause a normal adult to begin experiencing psychotic-like symptoms, and will push a troubled person in the direction of serious emotional illness.

What is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressure than mature adults; isolation is a condition of extraordinarily severe psychic stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.<sup>16</sup>

Jails that were constructed to accommodate adults who have committed criminal acts cannot provide an environment suitable for the care and detention of delinquents or status offenders. Adult detention facilities do not take into account the child's perception of time and space or his naivete regarding the purpose and duration of his stay in a locked facility. The lack of sensory stimuli, extended periods of absolute silence or outbreaks of hostility, foul odors and public commodes, as well as inactivity and empty time constitute an intolerable environment for a child.

The juvenile offender confined with adults is exposed to a society that encourages his delinquent behavior, schools him in sophisticated criminal techniques, and provides him with criminal contacts. High recidivism rates belie the widespread belief

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15. BARTOLLAS & MILLER, *THE JUVENILE OFFENDER: CONTROL, CORRECTION AND TREATMENT* 212 (1978).

16. *Lollis v. New York State Dep't of Social Servs.*, 322 F. Supp. 473, 481 (S.D.N.Y. 1970).

that the unpleasant experience of incarceration will have a deterrant effect on the child's future delinquent acts. To the contrary, "[i]f a youngster is made to feel like a prisoner, then he will soon begin to behave like a prisoner, assuming all the attributes and characteristics which he has learned from fellow inmates and from previous exposure to the media."<sup>17</sup>

Being treated like a prisoner also reinforces the delinquent or truant child's negative self-image. It confirms what many delinquent children already suspect about their lack of social acceptance and self-worth. In its *Standards and Guides for the Detention of Children and Youth*, the National Council on Crime and Delinquency concluded:

The case against the use of jails for children rests upon the fact that youngsters of juvenile court age are still in the process of development and are still subject to change, however large they may be physically or however sophisticated their behavior. To place them behind bars at a time when the whole world seems to turn against them, and belief in themselves is shattered or distorted merely confirms the criminal role in which they see themselves. Jailing delinquent youngsters plays directly into their hands by giving them delinquency status among their peers. If they resent being treated like confirmed adult criminals, they may—and often do—strike back violently against society after release. The public tends to ignore that every youngster placed behind bars will return to the society which placed him there.<sup>18</sup>

Additionally, incarceration carries with it a criminal stigma. A community seldom has higher regard for those in jail than it does for the jail itself. This is especially detrimental to a youth from a rural or less sophisticated small community.

The juvenile justice system was expressly created to remove children from the punitive forces of the criminal justice system. The practice of jailing juveniles, however, directly contravenes this purpose. Exposing a boy or girl to the punitive conditions of jail may jeopardize his or her emotional and physical well-being and may handicap future rehabilitation efforts.

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17. Komisaruk, *Psychiatric Issues in the Incarceration of Juveniles*, 21 JUV. COURT J. 117, 118 (1971).

18. NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *STANDARDS AND GUIDES FOR THE DETENTION OF CHILDREN AND YOUTH* 13 (2d ed. 1961).



### III. LIABILITY OF LOCAL AND STATE OFFICIALS FOR DETENTION OF JUVENILES IN ADULT JAILS

Local and state officials who detain juveniles in adult jails may incur liability in two ways. First, officials who authorize or allow such detention in derogation of statute, or who fail to prevent or terminate such detention when under a legal duty to do so, may incur liability from the very fact that the detention occurs. Second, such officials may incur liability for the physical or mental injuries sustained by juveniles as a result of their being jailed with adults. Such liability may be incurred under both federal and state law. However, before discussing the legal theories under which state and local officials can be held liable for detaining juveniles in adult jails, a discussion regarding which state and local officials are legally responsible for such detentions is essential.

#### A. *Statutory Obligations of Local and State Officials*

##### 1. *County commissioners*

In Utah, the primary responsibility for providing for juveniles detained prior to legal proceedings rests upon the county commissioners.<sup>19</sup> This obligation includes the development of detention homes or other facilities in compliance with the department of social services' minimum detention standards. If the county commissioners develop their own detention facilities, they must provide "suitable premises entirely distinct and separate from the ordinary jails, lockups or police cells."<sup>20</sup>

Like Utah, most of the other states reviewed here place the

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19. UTAH CODE ANN. § 55-11a-1 (Supp. 1979) provides:

It shall be the duty of counties, with the assistance of the state department of public welfare, to make provision for the custody and detention of such children and other children under the age of eighteen years who shall be in need of detention care prior to their trial or examination or while awaiting assignment to a home or facility in such places as shall meet minimum standards of detention care to be established by the state department of public welfare either by arrangement with some person or society willing to undertake the responsibility of such temporary custody or detention on such terms as may be agreed upon, or by providing suitable premises entirely distinct and separate from the ordinary jails, lockups or police cells.

Furthermore, the next section specifically designates the county commissioners as the individuals responsible for detention facilities. UTAH CODE ANN. § 55-11a-2 (Supp. 1979).

20. UTAH CODE ANN. § 55-11a-2 (Supp. 1979). UTAH CODE ANN. § 55-11a-3 (Supp. 1979) provides that county commissioners may also contract with other counties for detention services.

primary responsibility for providing juvenile detention facilities on the county.<sup>21</sup> Two exceptions are Colorado, which places the entire responsibility on the Department of Institutions,<sup>22</sup> and Oregon, which places ultimate responsibility for facilities' personnel on the juvenile court judge.<sup>23</sup> The responsibility to provide juvenile detention facilities includes the construction, maintenance, and staffing of the facilities.<sup>24</sup> In New Mexico and North Carolina the facilities must comply with minimum standards set by a state agency.<sup>25</sup>

## 2. Sheriffs

Juveniles brought to adult jails generally fall within the custody of the local sheriffs, who therefore have immediate responsibility for their welfare and the conditions of their detention.<sup>26</sup>

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21. See N.M. STAT. ANN. § 33-6-1 (1978) (county commissioners obligated to establish and equip "juvenile detention homes"); N.C. GEN. STAT. § 153A-217(5) (1978) (county commissioners responsible to construct, maintain, and operate "local confinement facilities," which include "juvenile detention home[s]"); WASH. REV. CODE ANN. §§ 13.04.135, 13.16.030 (1962) (construction and maintenance of separate detention facilities for juveniles a mandatory county function). Occasionally counties are assisted by other agencies. Under recent legislation in North Carolina, for example, the Department of Human Resources has developed regional detention facilities to augment those operated by counties. N.C. GEN. STAT. § 134A-37 (Supp. 1979).

22. COLO. REV. STAT. §§ 19-8-117 to 120 (1978). The county commissioners do have responsibility, however, for those juveniles held in adult jails when "no other suitable place of confinement is available." *Id.* § 19-2-103(6).

23. OR. REV. STAT. § 419.612(1) (1977). Counties are authorized, however, to construct and operate detention facilities for dependent children as well as delinquents. The board of county commissioners is also empowered to build local correctional facilities that may house pre-trial detainees including juveniles. *Id.* §§ 169.010, .150, .220, 419.575.

24. New Mexico, for example, makes counties responsible for obtaining federal funds for juvenile detention facilities, contracting to build the facilities, maintaining the facilities, making rules for the administration of the facilities, and appointing and training the staff. N.M. STAT. ANN. § 32-1-6 (1978). In Washington, the duty of maintaining such facilities includes the hiring of an adequate staff and "furnishing suitable food, clothing and recreational facilities for dependent, delinquent and wayward children." WASH. REV. CODE ANN. §§ 13.16.040, .050 (1962).

25. Juvenile detention facility standards in New Mexico are set by the New Mexico Criminal Justice Department. N.M. STAT. ANN. §§ 33-6-3, -4, -5, -6, -10. In North Carolina, they are set by the Department of Human Resources. N.C. GEN. STAT. § 7A-576(b) (Supp. 1979). Should a child be detained in an adult jail, the jail must be one containing a juvenile holdover facility and must also be approved by the Department of Human Resources. *Id.* § 7A-576(b).

26. See UTAH CODE ANN. §§ 78-3a-29 to 30 (1953). See also COLO. REV. STAT. §§ 30-10-501, -511, -514 (1977); N.M. STAT. ANN. § 33-3-1 (1978); OR. REV. STAT. §§ 169.140, .220, .320 (1977). The county sheriff in North Carolina may appoint someone besides himself to operate or "keep" the jail, if he so desires. Alternatively, he may request the county commissioners to appoint some other person to operate the jail. N.C. GEN. STAT.

Utah law prohibits a sheriff taking a juvenile into custody from detaining him any longer than is reasonably necessary to obtain his name, age, residence, and other necessary information and to contact his parents, guardian, or custodian. After the sheriff has obtained such information, he must either release the juvenile or take him without unnecessary delay to the court or to a place of detention designated by the court.<sup>27</sup> In all instances when the youth is not released, the sheriff must notify the parents or guardian of the right to a prompt hearing to determine the justification for any further detention.<sup>28</sup>

### 3. *Departments of social services*

The Division of Family Services, as part of the Utah Department of Social Services, has overall responsibility for individual and family services in the state, including services for delinquent children.<sup>29</sup> The division also has authority to develop and operate community centers for services, such as group home care, and to rent, purchase, or build facilities to carry out the functions of such centers.<sup>30</sup>

The Department of Social Services, acting through the Division of Family Services, is specifically authorized to assist counties in establishing detention centers<sup>31</sup> and is directed to develop detention facilities where the counties have not provided adequate facilities. To enable the department to carry out this mandate, the legislature has authorized it to approve payment by the

§ 162-22 (1978). In Washington, however, where juveniles may not be held in jails or other adult detention facilities, sheriffs have no responsibility for them. WASH. REV. CODE ANN. §§ 70.48.020(1), (2), (4), .090 (Supp. 1978).

27. Specifically, Utah law states:

A sheriff, warden, or other official in charge of a jail or other facility for the detention of adult offenders or persons charged with crime, shall immediately notify the juvenile court when a child who is or appears to be under eighteen years of age is received at the facility, and shall make arrangements for the transfer of the child to a detention facility, unless otherwise ordered by the juvenile court. . . .

UTAH CODE ANN. 78-3a-31 (1953).

A similar responsibility exists under New Mexico law, which, through its Children's Code, specifically charges sheriffs to inform the court within four working days (or 48 consecutive hours, if shorter) whenever an individual who appears to be under eighteen is received at the jail. N.M. STAT. ANN. § 32-1-25(F) (1978).

28. UTAH CODE ANN. 78-3a-30 (1953).

29. The basic responsibilities of the Division are set forth in UTAH CODE ANN. § 55-15b-6 (1953 & Supp. 1979).

30. *Id.* § 55-15b-14.

31. *Id.* § 55-11a-4 (Supp. 1979).

state of up to fifty percent of the total net expenditure for capital improvements and operation and maintenance of detention facilities by the counties, and to assist the counties in developing plans to provide suitable housing and other physical facilities to meet their detention requirements.<sup>32</sup>

The legislative response in New Mexico has been entirely different. In 1978, the legislature created the detention facility grant fund, under which the state criminal justice department was given the authority to approve applications for grants to counties and municipalities for the purpose of constructing new facilities or modifying existing facilities to create sight and sound separation of juveniles from adults.<sup>33</sup>

The Department of Human Resources, its Secretary, and the Social Services Commission in North Carolina have substantial responsibilities regarding local confinement facilities. The department provides technical assistance, develops minimum standards for construction and operation, visits and inspects the facilities semi-annually, and makes written reports.<sup>34</sup> All standards for the operation of the facilities must be approved by the commission and the Governor.<sup>35</sup> The secretary is responsible for corrective action in the event an inspection discloses that a facility fails to meet minimum standards.<sup>36</sup> The department also approves holdover facilities for juveniles located in adult jails and sets standards for the operation of juvenile detention homes.<sup>37</sup> Most importantly, however, the North Carolina Department of Human Services is responsible for the development and operation of regional juvenile detention facilities, and the development of a subsidy program for county juvenile detention homes.<sup>38</sup>

#### 4. *Juvenile court judges*

In most states juvenile court judges exercise exclusive original jurisdiction over all juveniles who violate federal, state, or

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32. *Id.* §§ 55-11a-4 to -6.

33. N.M. STAT. ANN. § 32-2B-1 to 5 (Supp. 1978). The department of social services (Human Services Dep't) has no responsibility for detention care in New Mexico.

34. N.C. GEN. STAT. § 153A-220 (1978). Local confinement facilities include juvenile detention homes. *Id.* § 153A-217(5).

35. *Id.* § 153A-221(c).

36. *Id.* § 153A-223.

37. *Id.* § 7A-576(b) (Supp. 1979).

38. *Id.* § 134A-36 to 37.

local law.<sup>39</sup> In Utah, the Board of Juvenile Court Judges, comprised of all the state's juvenile court judges, is statutorily directed to consider and deal with problems that arise in connection with the operation of the juvenile courts in any district.<sup>40</sup> In some other states, the judiciary actually manages the juvenile detention facilities. In Washington, for instance, the superior court judges in the larger counties either appoint a board of managers to administer detention services for those youth under juvenile court jurisdiction or transfer this responsibility to the county executive.<sup>41</sup> In Oregon, the juvenile court judges hire counselors for the county juvenile department as well as a director of the department to administer the juvenile detention facilities.<sup>42</sup>

### B. Liability Under Federal Law

#### 1. Juvenile Justice and Delinquency Prevention Act

The Juvenile Justice and Delinquency Prevention Act<sup>43</sup> is primarily a funding statute. States receive federal funds to implement the goals of the Act, but become ineligible for continued funding if they fail to comply within a specified time period.<sup>44</sup> The Act does not specifically provide for private lawsuits by aggrieved individuals, *e.g.*, individual status offenders detained in secure facilities, or individual juveniles incarcerated in adult jails.

Recent case law, however, indicates that individual juveniles may be able to maintain private causes of action under the Act. In *Cannon v. University of Chicago*,<sup>45</sup> the United States Supreme Court considered the question of whether an aggrieved individual can maintain a private cause of action under section 901(a) of Title IX of the Education Amendments of 1972.<sup>46</sup> Section 901 provides that no person shall be subjected to discrimi-

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39. See, *e.g.*, COLO. REV. STAT. § 19-1-104 (1978); N.M. STAT. ANN. § 32-1-9 (1978); OR. REV. STAT. § 419.476(1) (1977); UTAH CODE ANN. § 78-3a-16 (1973); WASH. REV. CODE ANN. § 13.04.030 (1962).

40. UTAH CODE ANN. § 78-3a-10 (1973).

41. WASH. REV. CODE ANN. §§ 13.20.010-.50 (1962).

42. OR. REV. STAT. §§ 419.604-.616 (1977).

43. 42 U.S.C. §§ 5601-5751 (1976). See notes 8-10 and accompanying text *supra*.

44. 42 U.S.C. § 5633(a), (c). The states of Colorado, New Mexico, North Carolina, Oregon, Utah, and Washington receive funding under the Act.

45. 441 U.S. 677 (1979).

46. 20 U.S.C. § 1681 (1976).

nation on the basis of sex under any education program or activity receiving federal financial assistance. Plaintiff Geraldine Cannon claimed that she had been denied admission to two medical schools receiving federal assistance because of her sex and filed suit against the schools for violation of section 901.

Like the Juvenile Justice and Delinquency Prevention Act, Title IX is primarily designed as a funding statute and contains no express authorization of private lawsuits for violations of the law. Nevertheless, the Supreme Court ruled that a statute may be construed to provide a private remedy if four specific factors are satisfied:

*“In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff ‘one of the class for whose especial benefit the statute was enacted,’—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?”<sup>47</sup>*

The Supreme Court concluded that because these four factors were satisfied, Title IX should be construed to allow private lawsuits.

The Court’s use of these four factors and its discussion in the *Cannon* opinion strongly indicate that aggrieved individuals can maintain private causes of action under the Juvenile Justice and Delinquency Prevention Act. In terms of these four factors, it is evident, first, that juveniles confined in adult jails are “of the class for whose especial benefit the statute was enacted.” One of the primary provisions of the Act<sup>48</sup> specifically prohibits the incarceration of juveniles in jails with adults. The second and third factors require an analysis of the legislative history of the Act. The legislative history is replete with references concerning the importance of prohibiting the detention of juveniles in adult jails. Indeed, much of the legislative history describes

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47. 441 U.S. at 688 n.9 (emphasis added)(quoting *Cort v. Ash*, 422 U.S. 66, 78 (1975)) (citations omitted).

48. 42 U.S.C. § 5633(a)(13) (1976).

the operative provisions of the Act in terms of enforceable civil rights. Thus, in introducing S. 3146 (the predecessor of S. 821, which became the Juvenile Justice and Delinquency Prevention Act), Senator Bayh declared that the bill contained "an *absolute prohibition*" against detention or confinement of children in institutions with adults.<sup>49</sup> During floor debate on the Act in 1974, Senator Bayh declared that Congress was "establishing a national standard for *due process* in the system of juvenile justice" through the legislation.<sup>50</sup> In urging enactment of the provisions of the Federal Juvenile Delinquency Act that were passed as amendments to the Juvenile Justice and Delinquency Prevention Act and which prohibit confinement of juveniles in jails with adults, Senator Kennedy stated that the legislation enacted "the guarantee of *basic rights* to detained juveniles."<sup>51</sup>

With respect to the fourth factor, it may be argued that the welfare and protection of juveniles is traditionally a matter for state law, and thus it may be inappropriate to infer a cause of action under federal law. Nevertheless, the welfare of juveniles is not solely a matter of state concern. Indeed, federal legislation has operated in this area for more than sixty years, including the Children's Bureau Act of 1912,<sup>52</sup> the Social Security Act of 1935,<sup>53</sup> The Child Health Act of 1967,<sup>54</sup> the Child Nutrition Act of 1966,<sup>55</sup> the Crippled Children Services Act,<sup>56</sup> the Juvenile Delinquency Prevention and Control Act of 1968,<sup>57</sup> the Juvenile Delinquency and Youth Offenses Control Act of 1961,<sup>58</sup> and the Child Abuse Prevention and Treatment Act of 1974.<sup>59</sup>

In addition, the Supreme Court's decision in *Cannon* notes two other reasons why a federal remedy is appropriate. First, "[s]ince the Civil War, the Federal Government and the federal courts have been the '*primary* and powerful reliances' in protecting citizens against" violations of civil rights.<sup>60</sup> Second, "it is

49. 118 CONG. REC. 3049 (1972) (emphasis added).

50. 120 CONG. REC. 25165 (1974) (emphasis added).

51. 120 CONG. REC. 25184 (1974) (emphasis added).

52. 42 U.S.C. §§ 191-194 (1976).

53. *Id.* §§ 301-306.

54. *Id.* §§ 701-715, 729.

55. *Id.* §§ 1771-1786.

56. *Id.* §§ 701-716.

57. *Id.* § 3801.

58. *Id.* §§ 2541-2548.

59. *Id.* § 5101.

60. 441 U.S. at 708 (emphasis in original).

the expenditure of *federal* funds that provides the justification for this particular statutory prohibition. There can be no question but that this . . . analysis supports the implication of a private federal remedy."<sup>61</sup> Like Title IX, the Juvenile Justice and Delinquency Prevention Act provides federal funds to the states in order to foster and protect the civil rights of individuals. Accordingly, it appears likely that a private right of action also exists under the Juvenile Justice and Delinquency Prevention Act, thereby enabling a juvenile confined in an adult jail to sue those responsible in federal court.<sup>62</sup>

## 2. *The right to treatment and section 1983*

a. *Origins and development of the right to treatment.* In recent years there has been a growing recognition by courts and commentators that individuals involuntarily committed to institutions for treatment have a "right" to such treatment, and that those who do not in fact receive treatment suffer a violation of that right. The first discussion of a so-called right to treatment is generally credited to Dr. Morton Birnbaum.<sup>63</sup> Dr. Birnbaum was particularly concerned about the unavailability of psychotherapy for mental patients committed to state hospitals for the ostensible purpose of treatment. He proposed

that the courts under their traditional powers to protect the constitutional rights of our citizens begin to consider the problem of whether or not a person who has been institutionalized solely because he is sufficiently mentally ill to require institu-

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61. *Id.* at 708-09 (emphasis added). See *Cort v. Ash*, 422 U.S. 66 (1975).

62. See also *Coleman v. Darden*, 595 F.2d 533 (10th Cir. 1979), holding that handicapped persons may not bring private lawsuits against *federal* agencies for alleged violations of the Rehabilitation Act of 1973, although, as the court noted, "[e]very Circuit Court of Appeals which has addressed the issue has held that a private cause of action can be implied from the statute against the proper defendants." *Id.* at 538. See, e.g., *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977). See also *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104, 1109 (N.D. Cal. 1979); *Doe v. Marshall*, 459 F. Supp. 1190, 1192 (S.D. Tex. 1978); *Lora v. Board of Educ.* 456 F. Supp. 1211, 1228-30 (E.D.N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791, 797-98 (E.D. Pa. 1978); *Bartels v. Biernat*, 427 F. Supp. 226, 229-30 (E.D. Wis. 1977); *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D.W. Va. 1976); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W. Va. 1976); *Cherry v. Matthews*, 419 F. Supp. 922 (D.D.C. 1976); *Gurmankin v. Costanza*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977). Arguably, juveniles may now sue under 42 U.S.C. § 1983 for violations of the statutory rights afforded them by the Juvenile Justice and Delinquency Prevention Act. See *Maine v. Thiboutot*, 100 S. Ct. 2502, 2520 (1980) (Powell, J., concurring).

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



tionalization for care and treatment actually does receive adequate medical treatment so that he may regain his health, and therefore his liberty, as soon as possible; that the courts do this by means of recognizing and enforcing the right to treatment; and that the courts do this, independent of any action by any legislature, as a necessary and overdue development of our present concept of due process of law.<sup>64</sup>

Dr. Birnbaum did not rigorously explore the constitutional bases for the right to treatment or the limits of the substantive right. Instead, he argued generally that "substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison."<sup>65</sup> He concluded that a writ of habeas corpus should be available to test the adequacy of treatment received in an individual case.<sup>66</sup>

In 1966 in *Rouse v. Cameron*,<sup>67</sup> the United States Court of Appeals for the District of Columbia Circuit became the first federal court to recognize the right to treatment as a basis for releasing an involuntarily committed individual. Charles Rouse, tried on charges of carrying a dangerous weapon, was found not guilty by reason of insanity and was committed to Saint Elizabeth's Hospital. He challenged his confinement in a habeas corpus proceeding, claiming that his right to treatment was being violated because he had received no psychiatric treatment.<sup>68</sup> Chief Judge Bazelon, writing for a divided court, found that Congress had "established a *statutory* 'right to treatment' in the 1964 Hospitalization of the Mentally Ill Act,"<sup>69</sup> and remanded the case for further proceedings to determine whether Rouse had, in fact, received adequate treatment during his confinement.

More noteworthy than the statutory holding in *Rouse* was the court's discussion in dictum regarding the potential constitutional issues. The court stated that "[a]bsence of treatment 'might draw into question "the constitutionality of [this] mandatory commitment section"' as applied."<sup>70</sup> The court listed

64. *Id.* at 503.

65. *Id.*

66. *Id.*

67. 373 F.2d 451 (D.C. Cir. 1966).

68. *Id.* at 452.

69. *Id.* at 453 (emphasis in original).

70. *Id.* The court quoted *Darnell v. Carmeron*, 348 F.2d 64, 68 (D.C. Cir. 1965), in which it had earlier noted that the absence of treatment might raise constitutional ques-

several ways in which confinement without treatment might violate constitutional standards. For example, where commitment is summary, without procedural safeguards, such commitment may violate the individual's right to procedural due process.<sup>71</sup> In addition, the court noted that if Rouse had been convicted of the crime charged he could have been confined for a maximum of one year. At the time of the decision, however, he had been confined for four years, with no end in sight. This differential in periods of confinement raises not only obvious equal protection questions, but also issues under due process of law since it depends solely on the need for treatment that allegedly was not met.<sup>72</sup> Finally, confinement for an indefinite period without treatment of one found not criminally responsible may be so inhumane as to constitute "cruel and unusual punishment."<sup>73</sup>

In 1971 in *Wyatt v. Stickney*,<sup>74</sup> the court went one step further than *Rouse* and held that patients involuntarily confined in a hospital did have a constitutional right to treatment:

The patients in Bryce Hospital, for the most part, were involuntarily committed through noncriminal procedures and without the constitutional protections that are afforded defendants in criminal proceedings. When patients are so committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition. . . . Adequate and effective treatment is constitutionally required because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense."<sup>75</sup>

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tions. It also cited Dr. Birnbaum's article in the American Bar Association Journal. 373 F.2d at 453 n.6.

71. 373 F.2d at 453; see *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring).

72. 373 F.2d at 453; see *Sas v. Maryland*, 334 F.2d 506, 509 (4th Cir. 1964).

73. 373 F.2d at 453. See also *Robinson v. California*, 370 U.S. 660 (1962); *Easter v. District of Columbia*, 361 F.2d 50 (1966). The *Rouse* decision provoked a considerable amount of discussion by legal commentators. See, e.g., Bazelon, *Implementing the Right to Treatment*, 36 U. CHI. L. REV. 742 (1969); *Symposium—The Right to Treatment*, 57 GEO. L.J. 673 (1969); Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967); Note, *Civil Restraint, Mental Illness and the Right to Treatment*, 77 YALE L.J. 87 (1967).

74. 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

75. *Id.* at 784 (citations omitted) (quoting *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960)). In contrast to Charles Rouse, who sought his release through habeas corpus, the inmates in *Wyatt* brought suit under the Federal Civil Rights Act, 42 U.S.C.

The court's decision in *Wyatt*, which was affirmed by the Fifth Circuit,<sup>76</sup> generated a great deal of discussion among legal scholars,<sup>77</sup> and was followed by a number of other courts.<sup>78</sup>

While *Wyatt v. Stickney* was being litigated, Kenneth Donaldson, a patient in the Florida State Hospital, sued his attending physicians and the superintendent of the facility on the grounds that he had been involuntarily confined for fifteen years without treatment. At trial the jury awarded Donaldson \$48,000. On appeal the Fifth Circuit used the lower court's language in *Wyatt* in holding that a patient has a "constitutional right to

§ 1983, for deprivation of constitutional rights.

76. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

77. See, e.g., Bailey & Pyfer, *Deprivation of Liberty and the Right to Treatment*, 7 CLEARINGHOUSE REV. 519 (1974); Birnbaum, *Some Remarks on the Right to Treatment*, 23 ALA. L. REV. 623 (1971); Drake, *Enforcing the Right to Treatment: Wyatt v. Stickney*, 10 AM. CRIM. L. REV. 587 (1972); Gough, *The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox*, 16 ST. LOUIS U.L.J. 182 (1971); Hoffman & Dunn, *Beyond Rouse and Wyatt: An Administrative-Law Model for Expanding and Implementing the Mental Patient's Right to Treatment*, 61 VA. L. REV. 297 (1975); Schwitzgebel, *Right to Treatment for the Mentally Disabled: The Need for Realistic Standards and Objective Criteria*, 8 HARV. C.R.-C.L.L. REV. 513 (1973); *Symposium—Observations on the Right to Treatment*, 10 DUQ. L. REV. 553 (1972); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as *Developments*]; Comment, *Adequate Psychiatric Treatment—A Constitutional Right?*, 19 CATH. LAW. 322 (1973); Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1282 (1973); Note, *Guaranteeing Treatment for the Committed Mental Patient: The Troubled Enforcement of an Elusive Right*, 32 MD. L. REV. 42 (1972); Comment, *Reflections on the Right to Treatment*, 8 NEW ENG. L. REV. 231 (1973); Note, *Wyatt v. Stickney—A Constitutional Right to Treatment for the Mentally Ill*, 34 U. PITT. L. REV. 79 (1972); 27 OKLA. L. REV. 238 (1974).

78. See, e.g., *In re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd*, 550 F.2d 1122 (8th Cir. 1977); *Kesselbrenner v. Anonymous*, 33 N.Y. 2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973); *Renelli v. Department of Mental Hygiene*, 73 Misc. 2d 261, 340 N.Y.S.2d 498 (Sup. Ct. 1973). See also *Saville v. Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974); *Smith v. Wendell*, 390 F. Supp. 260 (E.D. Pa. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 451-52 (E.D. Wis. 1974); *Stachulak v. Coughlin*, 364 F. Supp. 686, 687 (N.D. Ill. 1973); *In re Jones*, 338 F. Supp. 428 (D.D.C. 1972); *In re D.D.*, 118 N.J. Super. 1, 6, 285 A.2d 283, 286 (App. Div. 1971).

The court in *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), initially rejected the concept of a constitutional right to treatment in favor of an eighth amendment right for patients to be free from harm. The court ultimately recognized in a later opinion that "there is no bright line" separating the right to treatment, the right to care, and the right to be free from harm. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975). See also *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Eubanks v. Clarke*, 434 F. Supp. 1022 (E.D. Pa. 1977); *Woe v. Matthews*, 408 F. Supp. 419 (E.D.N.Y. 1976), *aff'd sub nom. Woe v. Weinberger*, 562 F.2d 40 (2d Cir. 1977).

such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition.”<sup>79</sup> When the Supreme Court heard the case, it did not reach the broad issue of the right to treatment, rather it unanimously ruled on a single narrower issue in the case. The Court held that “[a] State cannot constitutionally confine [on the basis of mental illness alone] a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”<sup>80</sup>

The United States Supreme Court has never decided whether a constitutionally-based right to treatment exists. However, in *Kent v. United States*,<sup>81</sup> the Court commented on the plight of children in the juvenile justice system, noting that “[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>82</sup> And later, in *In re Gault*,<sup>83</sup> the Court “reiterate[d] the view” of *Kent* that juvenile justice procedures need not meet the constitutional requirements of adult criminal trials, but must provide essential “due process and fair treatment.”<sup>84</sup>

In the absence of definitive guidance by the Supreme Court, the lower courts have adopted a variety of approaches in finding a constitutional basis for the right to treatment.<sup>85</sup> Following

79. *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated on other grounds and remanded*, 422 U.S. 563 (1975).

80. *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975). In a concurring opinion, Chief Justice Burger argued against the existence of a constitutional right to treatment. *Id.* at 578 (Burger, C.J., concurring). The narrow holding of the case, and Burger's concurring opinion have been the subject of extensive comment and criticism. See, e.g., Baldwin, *O'Connor v. Donaldson: Involuntary Civil Commitment and the Right to Treatment*, 7 COLUM. HUMAN RIGHTS L. REV. 573 (1975); Schoenfeld, *Recent Developments in the Law Concerning the Mentally Ill—“A Corner-Stone of Legal Structure Laid in Mud,”* 9 U. TOL. L. REV. 1 (1977); Comment, *Donaldson, Dangerousness and the Right to Treatment*, 3 HASTINGS CONST. L.Q. 599 (1976); Note, “Without More”: A Constitutional Right to Treatment?, 22 LOY. L. REV. 373 (1976); Note, *Donaldson v. O'Connor: Constitutional Right to Treatment for the Involuntarily Civilly Committed*, 7 N.C. CENT. L.J. 174 (1975); Note, *The Supreme Court Sidesteps the Right to Treatment Question—O'Connor v. Donaldson*, 47 U. COLO. L. REV. 299 (1976); Note, *The Right to Treatment Case—That Wasn't*, 30 U. MIAMI L. REV. 486 (1976); 9 AKRON L. REV. 374 (1975).

81. 383 U.S. 541 (1966).

82. *Id.* at 556.

83. 387 U.S. 1 (1967).

84. *Id.* at 30. See also *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970).

85. It should be remembered that constitutional challenges to the detention of chil-

Judge Bazelon's lead in *Rouse v. Cameron*,<sup>86</sup> some courts have based the right to treatment on a procedural due process and "quid pro quo" rationale: if the state involuntarily commits mentally ill or otherwise incompetent individuals to its custody without the procedural safeguards to which they are entitled in criminal prosecutions, it must correspondingly provide treatment that will rehabilitate the individual from his illness or disability. Thus, while the individual loses constitutional procedural protections, he gains rehabilitative treatment.<sup>87</sup>

Other courts have adopted Judge Bazelon's invocation of the due process clause.<sup>88</sup> *Wyatt v. Stickney* was the first case to hold that the failure to provide adequate treatment is a violation of the constitutional right to due process: "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."<sup>89</sup> This argument is grounded on the rule articulated by the Supreme Court in *Jackson v. Indiana*<sup>90</sup> that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."<sup>91</sup>

Several courts have found a constitutional basis for the right to treatment in the eighth amendment's prohibition against cruel and unusual punishment.<sup>92</sup> The reasoning of these

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dren in jails are not dependent upon a ritual incantation of the phrase "right to treatment," or upon a "right to treatment" analysis of the issues. Such detention may be challenged directly as violations of constitutional guarantees such as due process and freedom from cruel and unusual punishment.

86. 373 F.2d 451 (D.C. Cir. 1966). See text accompanying note 71 *supra*.

87. See text accompanying notes 102-13 *infra*. One commentator has found three variations of the "quid pro quo" rationale as used by the courts: "paradigm" quid pro quo, "procedural" quid pro quo, and "pseudo" quid pro quo. Spece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1, 4 (1978).

88. See text accompanying note 72 *supra*.

89. 325 F. Supp. 781, 785 (M.D. Ala. 1971).

90. 406 U.S. 715 (1972).

91. *Id.* at 738. In an even broader sense, the argument is based upon the principle that legislative means must be rationally related to legislative ends. See *Developments, supra* note 77, at 1326. See also *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

92. See, e.g., *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. 1295, 1315 (E.D. Pa. 1977); *United States v. Johnston*, 317 F. Supp. 66, 68 (S.D.N.Y. 1970); *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *People v. Wilkins*, 23 App. Div. 178, 259 N.Y.S.2d 462 (1965). See also Spece, *supra* note 87, at 17.

courts rests on the principle established by the Supreme Court in *Robinson v. California*<sup>93</sup> that punishment of certain "statuses," such as drug addiction, constitutes cruel and unusual punishment. Under this rationale, mental illness or other incompetency is considered a status, and the drastic curtailment of liberty accompanying confinement without treatment is considered cruel and unusual punishment.<sup>94</sup>

Some courts have found that the state has a constitutional duty to protect involuntarily confined inmates from harm. At least one court has expanded this principle to include a right to at least a minimum level of psychological treatment;<sup>95</sup> other courts have registered approval of the basic rationale.<sup>96</sup>

Still other courts have based the right to treatment on the principle that the curtailment of fundamental liberties through involuntary confinement must follow the "least restrictive alternative" available. This principle was presented by the Supreme Court in *Shelton v. Tucker*.<sup>97</sup>

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>98</sup>

According to this rationale, the state violates an individual's constitutional rights when it confines him and fails to provide minimally adequate treatment and habitation in the least restrictive setting possible.<sup>99</sup>

Finally, a number of courts have followed *Rouse v. Cameron*

93. 370 U.S. 660 (1962). See Comment, *The Eighth Amendment Right to Treatment for Involuntarily Committed Mental Patients*, 61 IOWA L. REV. 1057 (1976).

94. See text accompanying notes 118-25 *infra*.

95. *New York Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973), *consent decree approved*, *New York Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975).

96. See, e.g., *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. at 1318; *Woe v. Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976). Cf. *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977) ("protection from harm" rationale applied in prison context). See Spece, *supra* note 87, at 28.

97. 364 U.S. 479 (1960).

98. *Id.* at 488 (footnotes omitted).

99. See *Halderman v. Pennhurst State School and Hosp.*, 446 F. Supp. at 1318; *Woe v. Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971).

directly<sup>100</sup> and have found a basis for the right to treatment in state statutory and constitutional provisions.<sup>101</sup>

*b. Confinement of children in jails.* The right to treatment doctrine, developed in cases involving persons involuntarily confined for mental illness, applies with equal force to the confinement of children in jails.<sup>102</sup> The juvenile justice system is premised on the goal of rehabilitation, and juvenile courts have always been considered analogous to social welfare agencies, designed to provide treatment and assistance for children who have violated criminal sanctions or demonstrated socially unacceptable behavior.<sup>103</sup>

The courts have recognized this principle. In one of the earliest cases considering the right to treatment, *White v. Reid*,<sup>104</sup> the petitioner was a juvenile being held in a District of Columbia jail as a result of an alleged parole violation. Although the decision was based on statutory grounds, the court noted that the commitment of the child to an adult jail rather than to a nonpunitive educational facility "cannot withstand an assault for violation of fundamental Constitutional safeguards."<sup>105</sup>

The constitutional bases adopted by courts in applying the right to treatment doctrine to juveniles have been as diverse as those invoked in the cases involving mental illness. The procedural due process/quid pro quo reasoning has been invoked by several courts. In *Morgan v. Sproat*,<sup>106</sup> the court concluded that juveniles who have been involuntarily committed have a constitutional right to treatment that emanates from two concepts. First, juveniles are incarcerated for the purpose of care and re-

100. See text accompanying note 69 *supra*.

101. See notes 131-34 and accompanying text *infra*.

102. See, e.g., Renn, *The Right to Treatment and the Juvenile*, 19 CRIME & DELINQUENCY 477 (1973); Note, *The Right to Treatment for Mentally Ill Juveniles in California*, 27 HASTINGS L.J. 865 (1976); Note, *A Right to Treatment for Juveniles?*, 1973 WASH. U.L.Q. 157.

103. See generally F. FAUST & P. BRANTINGTON, *JUVENILE JUSTICE PHILOSOPHY* (1974); A. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969); Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909); Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167; Piersma, Ganousis & Kramer, *The Juvenile Court: Current Problems, Legislative Proposals, and a Model Act*, 20 ST. LOUIS U.L.J. 1 (1975).

104. 125 F. Supp. 647 (D.D.C. 1954).

105. *Id.* at 650.

106. 432 F. Supp. 1130 (S.D. Miss. 1977).

habilitation. The reasoning of *Jackson v. Indiana*<sup>107</sup> requires that the program at the facility be reasonably related to that purpose. Second, juveniles are incarcerated without being provided all the due process protections afforded adults in criminal cases. "This denial of due process safeguards would be constitutionally impermissible unless the incarceration of juveniles serves beneficent, rather than punitive, purposes. . . . For these reasons, the courts have held that due process requires that the incarceration of juveniles be for rehabilitation and treatment."<sup>108</sup>

In *Gary W. v. Louisiana*,<sup>109</sup> the court based its decision on the theory that the state may curtail a person's liberty in a non-criminal context only if there is rehabilitative treatment exchanged for the equivalent denial of liberty. In defining this trade-off, the court concluded "[t]hat *quid pro quo* is care or treatment of the kind required to achieve the purpose of confinement."<sup>110</sup> The court found that there is a constitutional right to treatment; however, what constitutes proper treatment must be decided on an individual basis:

The constitutional right to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency.

. . . What the constitution requires as the state's due to the individual it confines is a program that is proper for that individual.<sup>111</sup>

Another federal court adopting the *quid pro quo* theory<sup>112</sup> concluded that juvenile adjudications do not contain all of the due process safeguards found in adult adjudications because the goals of the juvenile justice system differ from those of the criminal justice system. The purposes of the criminal justice system are punishment, deterrence, and retribution while the primary goal of the juvenile justice system is rehabilitation. "Thus due process in the juvenile justice system requires that the post-adjudicative stage of institutionalization further this goal of

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107. 406 U.S. 715 (1972).

108. 432 F. Supp. at 1136 (citation omitted).

109. 437 F. Supp. 1209 (E.D. La. 1976).

110. *Id.* at 1216.

111. *Id.* at 1219.

112. *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).



rehabilitation."<sup>113</sup>

The procedural due process/quid pro quo rationale has been employed to declare that the confinement of children in jails violates the children's constitutional rights. In *Baker v. Hamilton*,<sup>114</sup> the parents of two boys confined in a county jail for four days and four weeks respectively, brought a class action against the sheriff, the jail warden, and four juvenile court judges. The class action was commenced on behalf of the two boys and fifty-eight other boys who had been confined in the jail during 1971. After hearing expert testimony concerning the effects on juveniles of detention in the jail, and after personally visiting the jail, the judge ruled that the system of selective pre- and post-dispositional placement of juveniles in the jail constituted punishment of the juveniles as adults without the due process protections afforded adults. The court concluded that regardless of how well-intentioned the juvenile court judges may have been, their acts constituted violations of the fourteenth amendment.<sup>115</sup>

Other courts have found a more general basis for the right to treatment in the due process clause. In *Pena v. New York State Division for Youth*,<sup>116</sup> the court held that the absence of rehabilitative treatment of youth confined in the juvenile justice system constitutes a violation of due process rights guaranteed under the fourteenth amendment.<sup>117</sup>

Several courts have found the basis for juveniles' right to treatment in the eighth amendment prohibition against cruel and unusual punishment. In *Cox v. Turley*,<sup>118</sup> the court specifi-

113. *Id.* at 1364.

114. 345 F. Supp. 345 (W.D. Ky. 1972).

115. *Id.* at 352. See also *Fulwood v. Stone*, 394 F.2d 939 (D.C. Cir. 1967); *Creek v. Stone*, 379 F.2d 106 (D.C. Cir. 1967); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Kautter v. Reid*, 183 F. Supp. 352 (D.D.C. 1960). In *Kautter*, the district court held that since children have not been protected by the full mantle of constitutional safeguards, "[t]o put such a child in 'a place for [the] punishment of crimes' whose 'customary occupants are persons convicted of crime or awaiting trial for crime' would, therefore, raise a serious constitutional question." 183 F. Supp. at 354 (quoting *Benton v. Reid*, 231 F.2d 780, 782 (D.C. Cir. 1956)) (footnote omitted). Other courts have not hesitated to find that governments must provide something to a person in exchange for a loss of liberty following a procedure in which a person is denied the full panoply of due process safeguards. See *Jackson v. Indiana*, 406 U.S. 715 (1975); *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Commonwealth v. Page*, 339 Mass. 313, 159 N.E.2d 82 (1959).

116. 419 F. Supp. 203 (S.D.N.Y. 1976).

117. *Id.* at 206-07; *accord*, *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972).

118. 506 F.2d 1347 (6th Cir. 1974).

cally addressed the preadjudication detention of juveniles in county jails. The court held that the jailer's refusal to permit the boy to telephone his parents and the boy's confinement with the general jail population without a probable cause hearing, constituted cruel and unusual punishment. The court emphasized: "The worst and most illegal feature of all these proceedings [was] in lodging the child with the general population of the jail, without his ever seeing some official of the court."<sup>119</sup>

In *Swansey v. Elrod*,<sup>120</sup> juveniles between the ages of thirteen and sixteen, who had been confined in the Cook County jail pending prosecution, brought a civil rights action against the sheriff alleging that such incarceration constituted cruel and unusual punishment. The court heard expert testimony that the jail experience would cause a " 'devastating, overwhelming emotional trauma with potential consolidation of [these children] in the direction of criminal behavior.' "<sup>121</sup> The expert witness concluded that "the initial period of incarceration is crucial to the development of a young juvenile: if improperly treated the child will almost inevitably be converted into a hardened permanent criminal who will forever be destructive toward society and himself."<sup>122</sup> The court observed that thirteen to sixteen year olds "are not merely smaller versions of the adults incarcerated in [the] Cook County jail."<sup>123</sup> Because the incarceration was devastating to the juvenile and the physical conditions were reprehensible, the court found the incarcerations violated the eighth amendment. It concluded that the evolving standards of decency required more adequate conditions.

In *Baker v. Hamilton*,<sup>124</sup> the court also concluded that the detention of juveniles in adult jails constitutes cruel and unusual punishment. The court's discussion is particularly significant because many of the conditions present in the jail in that case are also present in the jails in rural areas of Utah and other states. The specific conditions mentioned include cramped quarters, poor illumination, poor air circulation, and broken locks; also cited were the lack of outdoor exercise or recreation and the ab-

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119. *Id.* at 1353.

120. 386 F. Supp. 1138 (N.D. Ill. 1975).

121. *Id.* at 1141.

122. *Id.*

123. *Id.* at 1143.

124. 345 F. Supp. 345 (W.D. Ky. 1972). See text accompanying notes 114-15 *supra*.

sense of any attempt at rehabilitation.<sup>125</sup>

Furthermore, juveniles who are assaulted by other inmates may sue for violation of their right to be reasonably protected from violence in the facility. Several courts have held that confinement that subjects those incarcerated to assaults and threats of violence constitutes cruel and unusual punishment.<sup>126</sup> In addition, juveniles who are separated from other inmates in order to protect them from assaults may suffer sensory deprivation and psychological damage in violation of their constitutional rights. In *Lollis v. New York State Department of Social Services*,<sup>127</sup> the court found that the isolation of a fourteen year-old girl in a bare room without reading materials or other forms of recreation constituted cruel and unusual punishment. The court relied on expert opinion that such isolation was "cruel and inhuman."<sup>128</sup>

The "protection from harm" rationale for the right to treatment<sup>129</sup> and the principle of the "least restrictive alternative"<sup>130</sup>

125. 345 F. Supp. at 353. See also *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *State v. Wilt*, 252 S.E.2d 168 (W. Va. 1979); *State v. Strickler*, 251 S.E.2d 222 (W. Va. 1979).

126. See, e.g., *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973); *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973); *Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866 (1971); *Bethea v. Crouse*, 417 F.2d 504 (10th Cir. 1969); *Penn v. Oliver*, 351 F. Supp. 1292 (E.D. Va. 1972); *Gates v. Collier*, 340 F. Supp. 881 (N.D. Miss. 1972); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Kish v. Milwaukee*, 48 F.R.D. 102 (E.D. Wis. 1969), *aff'd*, 441 F.2d 901 (7th Cir. 1971).

127. 322 F. Supp. 473 (S.D.N.Y. 1970).

128. *Id.* at 480. See 16 Sr. Louis U.L.J. 340 (1971). There has been considerable discussion whether the eighth amendment ban against cruel and unusual punishment is limited to punishment imposed as a result of conviction for crime, and thus does not apply to confinements such as civil commitments or detention of juveniles in jails. See *Clark, Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379, 489 (1976); *Spece, supra* note 87, at 17-28; *Developments, supra* note 77, at 1259-64. In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Supreme Court held that the eighth amendment does not apply to corporal punishment in public schools and indicated that it applies only to criminal punishments. *Id.* at 664-68. However, the Court explicitly did not consider "whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment." *Id.* at 669 n.37. Since detention of children in jails is closely analogous to criminal punishment, the constitutional protection should apply. In addition, the Court noted that public school children have little need for eighth amendment protection, in view of the "openness" of the institution, *id.* at 670, a consideration that cuts the opposite way in dealing with the detention of children in jails. See generally *Roberts, Right to Treatment for the Civilly Committed: A New Eighth Amendment Basis*, 45 U. CHI. L. REV. 731 (1978).

129. See notes 95-96 and accompanying text *supra*.

130. See notes 97-99 and accompanying text *supra*. See also *Gary W. v. Louisiana*,

have also been applied by several courts in the juvenile context.

Finally, a number of courts have found the right to treatment for juveniles grounded in *state* statutory or constitutional law. In *Creek v. Stone*,<sup>131</sup> a juvenile placed in a detention home prior to adjudication alleged that the home did not have facilities for the psychiatric care he needed. After analyzing the language of the District of Columbia Juvenile Court Act, the United States Court of Appeals for the District of Columbia Circuit concluded that the Act "establishe[d] not only an important policy objective, but, in an appropriate case, a legal right to a custody that is not inconsistent with the *parens patriae* premise of the law."<sup>132</sup> Similarly, in *Nelson v. Heyne*,<sup>133</sup> the Seventh Circuit ruled that the Indiana Juvenile Court Act provided a statutory basis for the right to rehabilitative treatment.<sup>134</sup>

c. *Enforcing the right to treatment—section 1983.* A juvenile's right to treatment may be enforced in a number of ways. The most commonly used vehicle for protecting civil rights is 42 U.S.C. § 1983.<sup>135</sup> Along with its jurisdictional counterpart, 28

437 F. Supp. 1209 (E.D. La. 1976); *Morales v. Turman*, 383 F. Supp. 53, 124 (E.D. Tex. 1974), *rev'd and remanded*, 535 F.2d 864 (5th Cir. 1976), *rev'd and remanded*, 430 U.S. 322 (1977), *remanded*, 562 F.2d 993 (5th Cir. 1977); *Welsch v. Likins*, 373 F. Supp. 387 (D. Minn. 1974).

131. 379 F.2d 106 (D.C. Cir. 1967).

132. *Id.* at 111.

133. 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

134. *Id.* at 360 n.12. See *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976); *Lavette M. v. Corporation Counsel of N.Y.*, 35 N.Y.2d 136, 316 N.E.2d 314, 359 N.Y.S.2d 20 (1974); *Ellery C. v. Redlich*, 32 N.Y.2d 588, 300 N.E.2d 424, 347 N.Y.S.2d 51 (1973). See also *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Lollis v. New York State Dep't of Social Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970).

A right to rehabilitative treatment is implicit in Utah law. The purpose of the Utah Juvenile Court Act of 1965 is stated in UTAH CODE ANN. § 78-3a-1 (1953):

It is the purpose of this act to secure for each child coming before the juvenile court such care, guidance, and control, preferably in his own home, as will serve his welfare and best interests of the state; to preserve and strengthen family ties whenever possible; to secure for any child who is removed from his home the care, guidance, and discipline required to assist him to develop into a responsible citizen, to improve the conditions and home environment responsible for his delinquency; and, at the same time, to protect the community and its individual citizens against juvenile violence and juvenile lawbreaking. To this end this act shall be liberally construed.

The doctrinal and practical difficulties inherent in the "right to treatment" principle have been debated at length. See, e.g., *Gartas, The Constitutional Right to Treatment for Involuntarily Committed Mental Patients—What Limitations?*, 14 WASHBURN L.J. 291 (1975); *Spece, supra* note 87; *Developments, supra* note 77, at 1316.

135. 42 U.S.C. § 1983 (1976). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen

U.S.C. § 1343,<sup>136</sup> section 1983 authorizes lawsuits to be brought in federal courts for violations of "rights, privileges, or immunities secured by the Constitution and laws."<sup>137</sup> Since the right to treatment is one of the rights "secured by the Constitution and laws," it is enforceable under section 1983.

Juveniles confined in jails, however, need not invoke the conceptual framework of the right to treatment cases in order to maintain a lawsuit for violation of their civil rights. They may file lawsuits in federal courts under section 1983 alleging violations of their eighth amendment right of freedom from cruel and unusual punishment and their fourteenth amendment right of due process of law. The federal courts have jurisdiction to hear such claims, just as they have jurisdiction to entertain lawsuits for alleged violations of the right to treatment.

Under the doctrine of pendent jurisdiction,<sup>138</sup> lawsuits filed under section 1983 in federal courts may also include claims under *state* law when such claims arise out of a common set of operative facts and form the basis for separate but parallel grounds for relief. Thus, civil rights violations brought under section 1983 may be joined with claims under state tort laws.

Juveniles confined in jails may also bring lawsuits in *state* courts. Such lawsuits can include claims under section 1983 as well as claims under state law.<sup>139</sup> Hence, juveniles may bring

of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

136. 28 U.S.C. § 1343 (1976). Section 1343 provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

.....  
 (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

137. 42 U.S.C. § 1983 (1976).

138. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

139. See *Maine v. Thiboutot*, 100 S. Ct. 2502 (1980); *Long v. District of Columbia*, 469 F.2d 927, 937 (D.C. Cir. 1972); *International Prisoners' Union v. Rizzo*, 356 F. Supp. 806, 810 (E.D. Pa. 1973); *Luker v. Nelson*, 341 F. Supp. 111, 116 (N.D. Ill. 1972); *New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 519 P.2d 169 (1974); *Williams v. Horvath*, 16 Cal. 3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976); *Brown v. Pitchess*, 13

lawsuits to protect their civil rights in either state or federal courts. The choice of forum will depend upon the nature of the claims involved, the applicable state or federal law, the experience of state or federal judges with juvenile civil rights litigation, and the relative delays in state or federal courts in bringing cases to trial.

### 3. 42 U.S.C. § 1988

Section 1988<sup>140</sup> is intended to provide an adequate federal remedy, where existing federal law is inadequate, by incorporating the law of the state in which the federal court sits into federal law.<sup>141</sup> It does not confer any substantive rights on individuals; rather, it is a hollow vessel that is "filled" by state substantive law. The sole function of section 1988 is to provide access to federal courts for persons whose civil rights are recognized by state law but not federal law. In *Brazier v. Cherry*,<sup>142</sup> the court described the function of section 1988 as follows:

Thus § 1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is automatically available, not because it is procedure rather than substance, but because Congress says so.<sup>143</sup>

A substantial number of courts have utilized section 1988, often in conjunction with section 1983, to fashion remedies for civil rights inadequately protected by federal law but adequately protected by state law.<sup>144</sup> Thus, even if the Juvenile Justice and

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Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975); *Gabaldon v. United Farm Workers Organizing Comm.*, 35 Cal. App. 3d 757, 762 n.4, 111 Cal. Rptr. 203, 206 n.4 (1973); *Dudley v. Bell*, 50 Mich. App. 678, 213 N.W.2d 805 (1973); *Clark v. Bond Stores, Inc.*, 41 App. Div. 2d 620, 340 N.Y.S.2d 847 (1973).

140. 42 U.S.C. § 1988 (1976).

141. *Moor v. County of Alameda*, 411 U.S. 693 (1973).

142. 293 F.2d 401 (5th Cir. 1961).

143. *Id.* at 409.

144. *See, e.g., Hall v. Wooten*, 506 F.2d 564 (6th Cir. 1974) (state law applied to allow maintenance of lawsuit against county jail officials for death of county prisoner who was brutally murdered by drunken fellow inmates); *Johnson v. Greer*, 477 F.2d 101 (5th Cir. 1973) (state law applied to hold administrator of psychiatric diagnostic clinic liable for false imprisonment of plaintiff); *Scott v. Vandiver*, 476 F.2d 238 (4th Cir. 1973) (state law applied to hold sheriff liable for assaults committed by temporary law enforcement officers acting under his supervision); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir.

Delinquency Prevention Act does not create a private right of action against local and state officials, a child detained in an adult jail in Utah could still sue local and state officials in federal court under section 1988 by adopting and incorporating Utah tort law and the substantive provisions of sections 55-11a-1 and 78-3a-30 of the Utah Code,<sup>145</sup> which prohibit confinement of juveniles in adult jails.

### C. *Liability Under State Tort Law*

As indicated earlier, local and state officials may incur liability under state tort law for injuries received by juveniles confined in adult jails, whether the injuries arise from the conditions of confinement in the jail or from assaults by other inmates. The general standard for tort liability was set forth by the Utah Supreme Court in *Benally v. Robinson*.<sup>146</sup> In that case the widow and daughter of the deceased, a prisoner fatally injured in a fall down the stairs at the city jail, sued the arresting officer and the two officers on duty at the jail for wrongful death. The general standard of care to which the officers were held under state law was "that of using the degree of care and caution which an ordinary reasonable and prudent person would use under the circumstances."<sup>147</sup>

In *Benally* the court cited *Thomas v. Williams*<sup>148</sup> for "an excellent and accurate statement of an officer's duty to a prisoner in his custody."<sup>149</sup> *Thomas v. Williams* was a wrongful death action brought against the chief of police by the wife of a man arrested for drunk driving. The arresting officer had placed the partially unconscious offender in a cell, but had left him in possession of matches and cigarettes. The mattress in the cell was later set ablaze, and the prisoner died of burns and smoke inhalation. The court articulated the applicable standard of care as follows:

"A sheriff owes to a prisoner placed in his custody a duty to keep the prisoner safely and free from harm, to render him medical aid when necessary, and to treat him humanely and

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1970) (federal court may resort to the state law of torts to supply the elements of § 1983 claim).

145. UTAH CODE ANN. §§ 55-11a-1, 78-3a-30 (1953 & Supp. 1979).

146. 14 Utah 2d 6, 376 P.2d 388 (1962).

147. *Id.* at 9, 376 P.2d at 390.

148. 105 Ga. App. 321, 124 S.E.2d 409 (1962).

149. 14 Utah 2d at 9 n.2, 376 P.2d at 390 n.2.

refrain from oppressing him; and where a sheriff is negligent in his care and custody of a prisoner and as a result the prisoner receives injury or meets his death, . . . the sheriff would, in a proper case, be liable . . . to the injured prisoner or to his dependents as the case might be."<sup>150</sup>

The court added:

In the performance of his duty to exercise ordinary diligence to keep his prisoner safe and free from harm, an officer having custody of a prisoner, when he has knowledge of facts from which it might be concluded that the prisoner may harm himself or others unless preclusive measures are taken, must use reasonable care to prevent such harm. In some circumstances reasonable care may require the officer to act affirmatively to fulfill his duty.<sup>151</sup>

In *Sheffield v. Turner*,<sup>152</sup> the Utah Supreme Court discussed whether an individual could be held liable under the state's sovereign immunity act and held that persons in charge of prisons or jails "could not be held liable unless they were guilty of some conduct which transcended the bounds of good faith performance of their duty by a wilful or malicious wrongful act which they know or should know would result in injury."<sup>153</sup> A sheriff who confines a child in an adult jail could be held liable for injuries sustained by the child as a consequence of that confinement. This result obtains for two reasons. First, confinement of a child in an adult jail "transcend[s] the bounds of good faith performance of [the sheriff's] duty," since it is directly contrary to state law. A sheriff cannot act within his duty in confining a child in an adult jail when state law specifically prohibits such confinement. Second, it is so widely acknowledged that confinement of juveniles in adult jails is seriously harmful to juveniles that the sheriff "knows or should know" that such confinement would result in injury to the child.

In order to establish liability under a common law tort theory, an injured juvenile would be required to prove that the sheriff was negligent for confining him in the jail, and that such negligence was the proximate cause of the juvenile's injuries. Since it would be reasonably foreseeable that a child confined in

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150. 105 Ga. App. at 326, 124 S.E.2d at 412-13 (quoting *Kendrick v. Adamson*, 51 Ga. App. 402, 180 S.E. 647 (1935)).

151. *Id.* at 327, 124 S.E.2d at 413.

152. 21 Utah 2d 314, 445 P.2d 367 (1968).

153. *Id.* at 317, 445 P.2d at 369.



an adult jail would suffer emotional, psychological, or physical injuries, the sheriff's negligent act in confining the child in the adult jail would be a proximate cause of the injuries. Moreover, the sheriff's violation of the clear statutory mandate would constitute negligence per se.<sup>154</sup> A sheriff who confines a juvenile in an adult jail is therefore extremely vulnerable in a lawsuit for damages on behalf of a confined juvenile.

It is more difficult to determine whether other officials, such as county commissioners, could be held liable in a tort action for injuries sustained by a juvenile incarcerated in an adult jail. Since county commissioners are specifically charged by state law with the responsibility of providing adequate detention facilities,<sup>155</sup> their failure to provide such facilities would constitute a dereliction of their duties under state law and would therefore constitute negligence.

The establishment of the proximate cause element in an action brought against county commissioners would appear to be more difficult because they do not have direct authority over specific juveniles detained in the jails. Aside from the possibility that failure to provide adequate detention facilities could be considered negligence per se, the critical issue is whether injuries to children are a foreseeable consequence of that failure to fulfill the statutory mandate. Under Utah law the county commissioners could be considered "early wrongdoers" for having initially failed to provide adequate detention facilities, while the sheriff could be considered a "later wrongdoer" for confining juveniles in the adult jail when adequate detention facilities were not available. Since both the county commissioners and the sheriff

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154. Prosser has said the following concerning per se violations of statutory mandate:

Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation—the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and "jurors have no dispensing power by which to relax it," except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence "per se," or in itself.

PROSSER, *HANDBOOK OF THE LAW OF TORTS* 200 (4th ed. 1971)(footnotes omitted). For a discussion of the principle of negligence per se under New Mexico law, see *Castillo v. United States*, 406 F. Supp. 585, 591 (D.N.M. 1975), *aff'd*, 552 F.2d 1385 (10th Cir. 1977).

155. UTAH CODE ANN. §§ 55-11a-1 to 2 (Supp. 1979).

would have violated state law, and therefore would be negligent, it appears that *both* the sheriff and the commissioners could be held liable if the injuries to juveniles are foreseeable. In the leading Utah case on proximate cause, *Hillyard v. Utah By-Products Co.*,<sup>156</sup> the Utah Supreme Court noted:

“The earlier of the two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff’s injury, is in most jurisdictions no longer relieved from responsibility merely because the later act of the other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant, was itself foreseeable.”<sup>157</sup>

Holding the county commissioners liable for the sheriff’s act of placing juveniles in adult jails would be “based upon the proposition that one cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs to cause an injury if the later act was a *legally foreseeable event*.”<sup>158</sup> Thus, the fact that the sheriff directly places a juvenile in an adult jail does not insulate the county commissioners from liability. Since their failure to provide adequate detention facilities is contrary to state law, and since injury to juveniles is foreseeable, they may be held liable in damage actions.

As indicated earlier, under the doctrine of pendent jurisdiction, state tort claims could be joined with federal civil rights claims in lawsuits filed in federal court. Hence, sheriffs or county commissioners could be sued in federal court for violations of federal law, the Juvenile Justice and Delinquency Prevention Act, and the federal Civil Rights Act. They could also be sued in the same action for negligence under state law.<sup>159</sup>

#### IV. IMMUNITY OF STATE AND LOCAL OFFICIALS

The current doctrines of sovereign immunity arose from power struggles in feudal England. The ancient English tradition

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156. 1 Utah 2d 143, 263 P.2d 287 (1953).

157. *Id.* at 148-49, 263 P.2d at 290-91 (quoting Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 1225, 1229 (1937)).

158. *Id.* at 149, 263 P.2d at 291 (footnote omitted) (emphasis in original).

159. See text accompanying notes 135-39 *supra*. Juveniles could also sue for false imprisonment. See *Douthit v. Jones*, 619 F.2d 527 (5th Cir. 1980).

that "the King could do no wrong," meant that he could not be sued on any grounds. Since the judges at the time were agents of the King, they too enjoyed absolute immunity. The English Parliament in 1688 conferred immunity upon itself in the Bill of Rights in order to protect its independence from the King.<sup>160</sup> The doctrine that the government cannot be sued took early root in the United States and is still stringently adhered to in some states.

It is important to remember that any applicable immunity usually only protects a public official from liability for *damages*; with few exceptions, public officials are not immune to lawsuits for declaratory and injunctive relief.

### A. *Immunity Under Federal Law for Violation of Civil Rights*

#### 1. *Immunity of judges, prosecutors, and legislators*

As a practical matter, judges, prosecutors, and legislators enjoy virtually absolute immunity for acts done in the performance of their official duties. Recent Supreme Court cases demonstrate the extensive breadth of this immunity. In *Stump v. Sparkman*,<sup>161</sup> a woman brought suit against an Indiana circuit court judge who had approved a petition by her mother to have the woman sterilized when she was only fifteen. The young girl went to the hospital ostensibly to have her appendix removed; in fact, a tubal ligation was performed. No hearing was held on the petition, and no one was appointed to represent the interests of the girl, who was never informed of the nature of the operation to be performed on her. She learned of the sterilization only after she married and attempted to have children. Nevertheless, the Supreme Court ruled that a judge enjoys absolute immunity unless the act done is "in clear absence of all jurisdiction" or is nonjudicial in nature. Since Indiana law gave circuit judges jurisdiction to act upon petitions for sterilization, the Supreme

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160. See generally Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U.L. REV. 526 (1977). Clearly, the doctrine of sovereign immunity has been substantially eroded in this country. This deterioration has been caused both by statutory changes and court rulings. The first state to abrogate the doctrine statutorily was New York in 1929. N.Y. Cr. Cl. Act § 8 (McKinney 1963). The federal government followed suit in 1946. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1970).

161. 435 U.S. 349 (1978).

Court ruled that the judge could not be held liable.<sup>162</sup>

Similar principles apply to legislators and prosecutors. In *Tenney v. Brandhove*,<sup>163</sup> Brandhove had circulated a petition in the California legislature opposing the Tenney Committee on Un-American Activities. The Committee called Brandhove as a witness and prosecuted him when he refused to testify. In Brandhove's lawsuit against members of the Committee for violating his constitutional rights, the Supreme Court ruled that legislators could not be held liable for their official acts, even when they used the legislative process to punish the exercise of first amendment rights. In *Imbler v. Pachtman*,<sup>164</sup> the Court upheld the immunity of a prosecutor who knowingly used perjured evidence.

However, when judges, legislators, and prosecutors act outside of their official realm, they do not enjoy absolute immunity from liability. Courts have held judges liable where they issued orders not authorized by state law,<sup>165</sup> interfered with judicial proceedings after being disqualified,<sup>166</sup> assaulted a person in their courtroom,<sup>167</sup> or performed legislative or administrative (as opposed to judicial) functions.<sup>168</sup> In these situations, a qualified, "good faith" immunity applies, rather than absolute immunity.<sup>169</sup>

Concerning the acts of legislators, the courts have held that the following activities are not legislative in nature: distributing to the public materials gathered by a legislative committee,<sup>170</sup> accepting bribes in return for votes,<sup>171</sup> and enforcing or executing illegal legislative bills.<sup>172</sup> Any immunity that applies to legislators also encompasses their aides and employees performing legislative action that would be protected if performed directly

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162. See Note, *Judicial Immunity: An Unqualified Sanction of Tyranny From the Bench?*, 30 U. FLA. L. REV. 810 (1978).

163. 341 U.S. 367 (1951).

164. 424 U.S. 409 (1976).

165. *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971).

166. *Spires v. Bottorff*, 317 F.2d 273 (7th Cir. 1963).

167. *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974); *Lucarell v. McNair*, 453 F.2d 836 (6th Cir. 1972).

168. *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Atcherson v. Siebenmann*, 458 F. Supp. 526 (S.D. Iowa 1978), *modified*, 605 F.2d 1058 (8th Cir. 1979).

169. *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970).

170. *Doe v. McMillan*, 412 U.S. 306 (1973).

171. See *United States v. Brewster*, 408 U.S. 501 (1972).

172. *Gravel v. United States*, 408 U.S. 606 (1972).

by the legislator.<sup>173</sup> On the other hand, quasi-legislative officials like county commissioners or city council members are generally accorded only a qualified, "good faith" immunity similar to that enjoyed by executive officials.<sup>174</sup>

## 2. Immunity of executive officials

The courts have applied different types of immunity to executive officials, depending upon the nature of the wrong alleged. In *Barr v. Matteo*,<sup>175</sup> employees of the Federal Office of Rent Stabilization sued their superior for libelous statements contained in a press release he had issued. The Supreme Court held that a low-level federal administrative official who has been sued for defamation is absolutely immune from liability. Since *Barr*, the lower federal courts have extended the decision, conferring absolute immunity on federal executive officials for virtually all tort actions based on "discretionary" acts.<sup>176</sup>

When government officials are accused of violating the constitutional rights of others, however, they enjoy only a qualified or limited immunity. In *Scheuer v. Rhodes*,<sup>177</sup> the Governor of Ohio and other high state officials were accused of unnecessarily deploying National Guard troops at Kent State University, and thereby "intentionally, recklessly, willfully, and wantonly" violating the rights of four students who were killed in the resulting confrontation. The Supreme Court noted that there is leeway in the law for public officials to make mistakes:

Public officials, whether governors, mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from

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173. *Id.*

174. See *Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283 (1976); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Adler v. Lynch*, 415 F. Supp. 705 (D. Neb. 1976); *Oberhelman v. Schultze*, 371 F. Supp. 1089 (D. Minn. 1974), *aff'd without opinion*, 505 F.2d 736 (8th Cir. 1974). See also *Cobb v. City of Malden*, 202 F.2d 701, 705 (1st Cir. 1953) (Magruder, C.J., concurring).

175. 360 U.S. 564 (1959).

176. See, e.g., *Sowers v. Damron*, 457 F.2d 1182 (10th Cir. 1972); *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971).

177. 416 U.S. 232 (1974).

such error than not to decide or act at all.<sup>178</sup>

Moreover, the Court stated that high officials are granted more leeway than their subordinates: the higher the official position, the broader the range of duties and responsibilities of the official, and the greater the scope of allowable discretion.

The qualified immunity of an executive official, therefore, depends upon the particular position the official holds and the circumstances surrounding the official acts. The Supreme Court described the immunity as follows:

These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.<sup>179</sup>

In *Wood v. Strickland*,<sup>180</sup> a civil rights case brought by public high school students who claimed that they were expelled from school in violation of their constitutional rights, the Supreme Court clarified its description of limited executive immunity. Although the specific holding of the case relates to school board members, the standard for immunity should apply to other executive officials as well:

[W]e hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action

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178. *Id.* at 241-42 (footnote omitted).

179. *Id.* at 247-48.

180. 420 U.S. 308 (1975).

cannot reasonably be characterized as being in good faith.<sup>181</sup>

Thus, there are two critical questions after *Wood v. Strickland*: whether the official acted with malice, and whether the official's actions were reasonable in light of the information available and the existing state of the law. If the official acted with malice toward the plaintiff, or if the official's actions were unreasonable in light of the available information and the state of the law, there is no immunity.

Good faith conduct must be proven by the official asserting the immunity.<sup>182</sup> The lack of malice does not in and of itself establish good faith. Neither does a refusal to do what one knows or should know is legal because of a fear of the repercussions justify the conduct.<sup>183</sup> In addition, failure on the part of an official to take appropriate steps to avoid the injury complained of may defeat a "good faith" defense to a damage action even if the official did not act out of malice or ill will.<sup>184</sup> Finally, lack of good faith may be inferred from failure to act.<sup>185</sup>

In view of the explicit prohibitions in state and federal statutes against the confinement of juveniles in adult jails, it is doubtful that local executive officials could assert a "good faith" defense for such illegal incarceration.<sup>186</sup>

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181. *Id.* at 322 (citation omitted) (quoting *Pierson v. Ray*, 386 U.S. 547, 557 (1967)). See also *Procunier v. Navarette*, 434 U.S. 555 (1978).

182. *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53 (3d Cir. 1976); *Zweibon v. Mitchell*, 516 F.2d 594, 671 (D.C. Cir. 1975). According to the recent case of *Gomez v. Toledo*, 100 S. Ct. 1920 (1980), the plaintiff need not allege bad faith in his complaint.

183. See, e.g., *Schiff v. Williams*, 519 F.2d 257 (5th Cir. 1975); *Faraca v. Clements*, 506 F.2d 956 (5th Cir. 1975).

184. See, e.g., *Bryan v. Jones*, 530 F.2d 1210, 1215 (5th Cir. 1976).

185. See, e.g., *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976); *Harris v. Chancellor*, 537 F.2d 203 (5th Cir. 1976); *Downie v. Powers*, 193 F.2d 760 (10th Cir. 1951).

186. Regarding the scope of immunity of executive officials under *Scheuer v. Rhodes* and *Wood v. Strickland*, see Anson, *Implications of Goss v. Lopez and Wood v. Strickland for Educators*; *Proceedings of The National Institute of Education Conference*, 4 J.L. EDUC. 565 (1975); Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977); Marquardt & Plenck, *School Suspension and the Right of Due Process: The Effects of Goss and Wood in Utah Schools*, 3 J. CONTEMP. L. 85 (1976); Note, *Wood v. Strickland: Liability of School Board Members for Damages Resulting from a Deprivation of a Student's Civil Rights*, 13 CALIF. W.L. REV. 153 (1976); Note, *Immunity of Public Officials from Liability for Damages Under 52 U.S.C. § 1983*, 89 HARV. L. REV. 219 (1975); Note, *Wood v. Strickland: Issues and Implications for School Board Participation*, 15 J. FAM. L. 235 (1976); Note, *Sovereign Immunity—Scheuer v. Rhodes: Reconciling Section 1983 Damage Actions With Governmental Immunities*, 53 N.C.L. REV. 439 (1974); Comment, *Official Immunity from Damages in Section 1983 Suits: Wood v. Strickland*, 56 OR. L.

### 3. *Immunity of local governmental entities*

The Supreme Court initially held, in *Monroe v. Pape*,<sup>187</sup> that municipal bodies were not "persons" who could be held liable under section 1983 of the Civil Rights Act. However, in *Monell v. Department of Social Services of the City of New York*,<sup>188</sup> the Court overruled *Monroe v. Pape* and held that local government units do not enjoy an absolute immunity from liability. Thus, local governmental entities, including cities, towns, police departments, and city agencies can be sued directly under section 1983 for money damages and declaratory or injunctive relief. Such an action may be brought where the allegedly unconstitutional action implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that entity's officers, or where the action constitutes governmental "custom," even though such a custom has not received formal approval through the entity's official decision-making channels.

The Court imposed one limitation on the doctrine it announced in *Monell*: a municipality cannot be held liable under a theory of *respondeat superior* solely because it employs a person who causes harm to another. Thus, the basis for liability must be grounded upon an official act, declaration, or custom; the municipality cannot be held liable merely because one of its employees does something that injures another.<sup>189</sup>

### 4. *Liability of public officials and the eleventh amendment*

In 1798 Congress passed the eleventh amendment, which prohibits suits against the states by citizens or by foreign countries. In *Edelman v. Jordan*,<sup>190</sup> the Supreme Court held that where a lawsuit names a state official as a defendant and seeks money damages or restitution that will be paid out of the state treasury, a request for such relief is in effect a suit against the

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REV. 124 (1977); Comment, *Students' Rights Versus Administrators' Immunity*: Goss v. Lopez and Wood v. Strickland, 50 ST. JOHN'S L. REV. 102 (1975); Note, *Civil Rights—State Executive Officials Afforded Qualified Immunity From Liability in Suits Maintained Under Section 1983*, 20 VILL. L. REV. 1057 (1974-75).

187. 365 U.S. 167 (1961).

188. 436 U.S. 658 (1978).

189. *Id.*; Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979). The Supreme Court has recently held that municipalities cannot assert the good-faith defense available to executive officials. See *Owen v. City of Independence*, 100 S. Ct. 1398 (1980).

190. 415 U.S. 651 (1974).



state itself, and is therefore barred by the eleventh amendment.

The effect of the eleventh amendment on litigation against public officials involves the consideration of several important concepts. First, injunctive relief, as opposed to money damages, is not barred by the eleventh amendment, even though it may require significant expenditure of state funds.<sup>191</sup> Second, the eleventh amendment only bars money awards that would be paid out of the state treasury. Restitution or damage awards that would originate from a different source are not barred.<sup>192</sup> Moreover, state officials are usually sued *both* in their official *and* individual capacities. A judgment against an official in his individual capacity must be paid by the individual, not the state, and is therefore not barred by the eleventh amendment.<sup>193</sup> Finally, counties, cities, towns, and other municipal subdivisions of the state are *not* protected by the eleventh amendment.<sup>194</sup>

##### 5. *State governmental immunity acts*

State governmental immunity acts may bar litigation against state and local officials in state court for torts, but they do not immunize them from federal civil rights claims. In *Martinez v. California*,<sup>195</sup> the survivors of a fifteen year-old girl murdered by a parolee sued state officials for damages in state court. The Supreme Court held first that the California immunity statute was not unconstitutional when employed to deny a tort claim arising under state law. However, turning to the appellants' civil rights claim, the Court ruled that the state immunity statute did not control the section 1983 claim, even though that claim was being advanced in a state court proceeding.<sup>196</sup>

In *Hampton v. City of Chicago*,<sup>197</sup> the Seventh Circuit held that "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immu-

191. *Id.*; *Ex parte Young*, 209 U.S. 123 (1908); *McAuliffe v. Carlson*, 520 F.2d 1305 (2d Cir. 1975); *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975).

192. *Bowen v. Hackett*, 387 F. Supp. 1212 (D.R.I. 1975); *Shiff v. Williams*, 519 F.2d 257 (5th Cir. 1975).

193. *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Clegg v. Slater*, 420 F. Supp. 910 (W.D. Okla. 1976).

194. See *Wright v. Houston Independent School Dist.*, 393 F. Supp. 1149 (S.D. Tex. 1975), *vacated on other grounds*, 569 F.2d 1383 (2d Cir. 1978).

195. 48 U.S.L.W. 4076 (Sup. Ct. 1980).

196. *Id.* at 4077.

197. 484 F.2d 602 (7th Cir. 1973).

nized by state law.”<sup>198</sup> Plaintiffs alleged that fourteen Chicago police officers and fifteen other public officials had engaged in a conspiracy to deny their first amendment rights as members of the Black Panther Party by illegal forced entry, unjustifiable use of excessive and deadly force, and malicious prosecution. The trial court had relied on the Illinois Tort Immunity Act to dismiss the claims against the fifteen public officials, among whom were state attorneys who had assisted in the planning and execution of the police raid. The court of appeals held that such reliance was misplaced since “[a] construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.”<sup>199</sup>

In *Smith v. Losee*,<sup>200</sup> the defendant public officials appealed from a damages award in a section 1983 civil rights action brought because of their alleged denial of plaintiff’s rights to free speech and due process. While it held the defendant board of education immune from state liability for damages because of the doctrine of governmental immunity, the court of appeals affirmed the trial court’s award of actual and punitive damages against three individual defendants. In applying the doctrine of official privilege, the court observed:

[T]he rule [of official privilege] must be here recognized and applied. It is one which has been formulated and used in the federal courts; it must be a “federal” one because the federally created cause of action [§ 1983] cannot be restricted by state laws or rules relating to sovereign immunity nor to official privilege.<sup>201</sup>

Thus, state governmental immunity acts are not applicable to section 1983 suits for illegal detention brought by juveniles in either state or federal courts. The same reasoning applies to actions filed pursuant to section 1988 and the Juvenile Justice and Delinquency Prevention Act.

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198. *Id.* at 607.

199. *Id.* Some state statutes explicitly comply with the federal court rulings. See WASH. REV. CODE ANN. § 4.92.170 (Supp. 1978).

200. 485 F.2d 334 (10th Cir. 1973).

201. *Id.* at 341.

### B. Immunity Under State Law

Modern state laws governing the immunity of governmental officials, agencies, and units of government from suit for injury by private persons vary substantially. The Utah statute represents one response. It provides that all governmental entities are immune from suit for any injury resulting from the activities of the entity where the entity is engaged in the exercise and discharge of a governmental function, except as otherwise provided in the Governmental Immunity Act.<sup>202</sup> It further provides that immunity is waived where the injuries are caused by the negligent acts or omissions of employees committed within the scope of their employment, unless the injuries arise because of assault, battery, violation of civil rights, or incarceration of any person in any state prison, county or city jail, or other place of legal confinement.<sup>203</sup> Accordingly, the immunity of governmental entities is not waived as to injuries resulting from the illegal confinement of juveniles in adult jails.

Colorado law represents a different response. Under the Colorado Governmental Immunity Act,<sup>204</sup> public entities are generally immune from damage claims. However, there are six enumerated exceptions, one of which precludes the use of immunity as a defense in the operation of public hospitals, penitentiaries, reformatories or jails.<sup>205</sup> Thus, governmental immunity is waived as to injuries arising from the incarceration of juveniles in adult jails in Colorado.

Furthermore, the sovereign immunity defense is not available to public employees and governmental officials in Colorado. In *Kristensen v. Jones*,<sup>206</sup> the Colorado Supreme Court ruled that the immunity act only applies to public entities and not to employees, who may be sued individually under common law claims. The immunity act does provide, however, that the governmental entity may be liable for the costs of the defense of an employee sued for injuries sustained, provided the alleged act or omission occurred within the scope of employment and was neither willful nor wanton.<sup>207</sup>

The New Mexico Tort Claims Act falls somewhere in be-

202. UTAH CODE ANN. § 63-30-3 (1953).

203. *Id.* § 63-30-10.

204. COLO. REV. STAT. § 24-10-101 to 117 (1973).

205. *Id.* § 24-10-106.

206. 195 Colo. 122, 575 P.2d 854 (1978).

207. COLO. REV. STAT. § 24-10-110 (1973).

tween the Utah and Colorado acts. It provides that all governmental entities *and* public employees are immune from suit for any injury resulting from the activities of the entities or their employees while acting within the scope of their duties, except as otherwise provided in the Tort Claims Act.<sup>208</sup> However, immunity is waived when a claim is made against a public employee for any torts alleged to have been committed within the scope of his duty and involving any violation of property rights or any rights, privileges, or immunities secured by the Constitution and laws of the United States or the constitution and laws of New Mexico. If a tort committed by a public employee within the scope of his employment is malicious or fraudulent, the governmental entity is immune from suit but the employee is not.<sup>209</sup>

Thus it would appear that sheriffs in New Mexico, as law enforcement officials, may be liable for injuries arising from incarceration of juveniles in adult jails. Similarly, both sheriffs and county commissioners may be liable based upon the failure to adequately maintain and operate the jails. Even assuming for the sake of argument that sheriffs and county commissioners in New Mexico are immune for the above reasons, if they act *outside* the scope of their official duties, they may be held liable for injuries resulting from such activities.<sup>210</sup>

Since the incarceration of children in need of supervision and of neglected children in adult jails is prohibited by state statute, and since alleged juvenile delinquents may only be detained under precise and limited circumstances, it would appear that such incarceration does not fall within the scope of the official duties of any government official.<sup>211</sup> Accordingly, New Mexico government officials can be held liable for injuries resulting from illegal confinement of juveniles in adult jails.<sup>212</sup>

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208. N.M. STAT. ANN. § 41-4-4 (1978).

209. *Id.* § 41-4-4B.

210. See *Montoya v. City of Albuquerque*, 82 N.M. 90, 476 P.2d 60 (1970) (decided under prior law); *Salazar v. Town of Bernalillo*, 62 N.M. 199, 307 P.2d 186 (1956) (decided under prior law).

211. N.M. STAT. ANN. § 32-1-25(c), (e) (1978).

212. The Oregon tort claims law, *Or. Rev. Stat.* §§ 30.260-300 (1953), makes every public body liable for its torts and those of its officials acting within the scope of their employment except in areas expressly limited by the act. *Id.* § 30.265(1). The Oregon law also contains a "discretionary acts exception" that restores immunity for every public body and its officers, employees, and agents acting within the scope of their employment for acts deemed discretionary. The obvious difficulty is in distinguishing discretionary acts from ministerial or operational ones. See *Daugherty v. Oregon State Highway Comm.*, 270 Or. 144, 147, 526 P.2d 1005, 1006 (1974); *Smith v. Cooper*, 256 Or. 485, 499,

### C. Indemnification of Local and State Officials

Utah law provides that public employees who are the subject of lawsuits for activities within the scope of their employment may be defended by the public entity for which they work, and may be indemnified for money judgments against them resulting from such litigation.<sup>213</sup>

Local and state officials who are sued for confinement of juveniles in adult jails may not enjoy the benefits of the Utah Indemnification Act, however. These officials may be held personally liable for two reasons. First, since such activity is expressly prohibited by state law in Utah, such confinement is not within the legitimate scope of the officials' public employment. The rationale is the same in other states where alleged juvenile delinquents may be held in adult jails under circumstances where there is no sight and sound separation from adults.<sup>214</sup> Second, section 63-48-3 of the Utah Code expressly states that "[n]o public entity is obligated to pay any judgment based upon a claim against an officer or employee if it is established that the officer or employee acted or failed to act due to gross negligence, fraud, or malice."<sup>215</sup> Although "gross negligence" is not suscepti-

475 P.2d 78, 85 (1970). See also *Eldredge v. Kamp Kachess Youth Servs., Inc.*, 90 Wash. 2d 402, 583 P.2d 626 (1978); *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965). Washington also waived immunity by statute. WASH. REV. CODE ANN. §§ 4.92.010-.170 (1962 & Supp. 1978). It has maintained the discretionary acts exception through case law. *Hosea v. Seattle*, 64 Wash. 2d 678, 393 P.2d 967 (1964); *Loger v. Washington Timber Prods., Inc.*, 8 Wash. App. 921, 509 P.2d 1009 (1973). North Carolina has waived sovereign immunity and has established the North Carolina Industrial Commission as a court to hear and determine tort claims against state agencies. N.C. GEN. STAT. §§ 143-291 to 300.6 (1978). Arizona extinguished sovereign immunity in *Stone v. Arizona Highway Comm.*, 93 Ariz. 384, 381 P.2d 107 (1963). ARIZ. REV. STAT. § 12-821 (1956) provides the mechanism for filing negligence claims against the state and state entities. *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977).

For a general discussion of governmental immunity of state and local officials, see 57 AM. JUR. 2d *Negligence* §§ 54, 79, 91, 243, 321, 322 (1971); Annot., 60 A.L.R.2d 11 (1958); Annot., 163 A.L.R. 1435 (1946); Annot., 120 A.L.R. 1376 (1939); Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L. REV. 249 (1976); Comment, *The Colorado Governmental Immunity Act: A Prescription for Regression*, 49 DEN. L.J. 567 (1973); Comment, *The Colorado Governmental Immunity Act: A Judicial Challenge and the Legislative Response*, 44 U. COLO. L. REV. 449 (1972).

213. UTAH CODE ANN. §§ 63-48-1 to 7 (1953).

214. See, e.g., COLO. REV. STAT. § 24-10-110 (1973); N.M. STAT. ANN. § 41-4-4 (1978); OR. REV. STAT. § 30.285 (1977); WASH. REV. CODE ANN. §§ 4.92.010-.170 (1962 & Supp. 1978).

215. UTAH CODE ANN. § 63-48-3(4) (1953). The law is similar in New Mexico in both respects. See N.M. STAT. ANN. §§ 32-1-25, 41-4-4 (1978).

ble of precise definition,<sup>216</sup> the very significant danger of substantial harm to children from incarceration in adult jails may well qualify such confinement as gross negligence on the part of the officials responsible.

#### V. CONCLUSION

Though humanitarians have warned for more than a century of its potential adverse effects, children are still incarcerated in adult jails throughout the United States. The promise of the Juvenile Justice and Delinquency Prevention Act of 1974 has been carried forward with only limited enforcement. While children sit in dark, dirty cells, the prey of nearby adult inmates, local and state officials complain about the shrinking tax base and the inconvenience of reassigning law officers for transportation duties.

In this unconscionable situation, children and their legal advocates must press for vigorous enforcement of state and federal laws prohibiting the confinement of juveniles in adult jails. From the foregoing discussion, it is evident that local and state officials, particularly sheriffs and county commissioners, are subject to lawsuits for declaratory and injunctive relief, as well as damages. The executive and legislative branches of government have contented themselves with an attitude of benign neglect. Only by bringing the flagrant abuses of children's rights to the attention of the courts will children and their advocates effect meaningful and lasting change.

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216. See PROSSER, *HANDBOOK OF THE LAW OF TORTS* 183-84 (4th ed. 1971).