Civil Rights & Civil Liberties Litigation

A guide for lawyers, judges, and all others who must deal with 42 USC §1983, a significant federal civil rights statute which accounts for a substantial portion of all civil rights and civil liberties litigation. The book examines and analyzes the positions taken by the courts on every aspect of suits brought under this statute. Section 1983 provides a vehicle for obtaining redress for violation of any constitutional right; it does not create rights by itself. Because of this, the Guide concentrates on the procedural and technical issues common to all §1983 litigation, instead of trying to catalog or discuss all the numerous different deprivations of rights that can lead to a §1983 suit. However, since substantive constitutional law is important, a Table of Leading Constitutional Law Cases has been included. The Table serves to guide interested readers into the particular constitutional law areas which arise in the constant stream of §1983 situations.

1 volume, $55.00 plus $1.50 postage and handling, 30 day return privilege. Add appropriate sales tax. Approximately 375 pages, hardbound, 1979 edition, periodic supplementation is planned.

Sheldon H. Nahmod is a Professor and Associate Dean at the Illinois Institute of Technology, Chicago-Kent College of Law. He is a scholar holding LL.B. and LL.M. degrees from Harvard, and previously a practicing attorney in Illinois. Professor Nahmod has written several legal articles on this and other topics.

Shepard's/ McGraw-Hill
P. O. BOX 1235, COLORADO SPRINGS
COLORADO 80901  (303) 475-7230

Please send me Civil Rights & Civil Liberties Litigation $55.00 plus $1.50 postage and handling.
Purchase includes my order for future upkeep service.
I would like to examine for 30 days without obligation.
I have your representative call on me.
No future upkeep wanted.
Charge my Shepard's account. Account No.
Bill me. Bill Firm

NAME: ________________________________
ADDRESS: ___________________________
CITY: ____________________ STATE: ______ ZIP: ______

SIGNATURE: _________________________

Orders subject to acceptance in Colorado Springs. Title remains with vendor until paid in full. Terms available, no carrying charges.

U.S. Department of Justice
National Institute of Justice

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by Brigham Young Law Review to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.
Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails

Mark Soler
Michael J. Dale
Kathleen Flake

† 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.


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 Israel shall hear, and fear.

Deuteronomy 21:18-21 (King James).

* Mark Soler is director and Michael J. Dale is former director of the Juvenile Justice Legal Advocacy Project, a project of the Youth Law Center, San Francisco, California. Kathleen Flake, a graduate of the University of Utah College of Law, has worked with the Project as a legal intern.

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 litigation 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.1 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.2

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.3 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.4

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 subhuman 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, confinement...5

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).
4. Id. at 119.
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. 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 crime.

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. 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.

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. This Article will specifically

9. Id. § 5631(a)(12).
10. Id. § 5631(a)(13). In addition, the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5622-5627 (1976), which applies to juveniles prosecuted in state and 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 awaiting trial on criminal charges. Insure 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.

11. JOHN HOWARD ASSOCIATION, UNIFIED CORRECTIONS STUDY OF STATE OF UTAH: PRELIMINARY REPORT TO THE UTAH STATE JUVENILE JUSTICE ADVISORY GROUP: REMOVAL OF JUVENILES FROM ADULT JAILS IN URBAN UTAH (1979).

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

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

I. DETENTION OF CHILDREN

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

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

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 phobic stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.\(^1^6\)

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 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 that the unpleasant experience of incarceration will have a deterrent 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."\(^1^7\)

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:

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

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.

\(^{15}\) Barton & Miller, The Juvenile Offender: Control, Correction and Treatment 312 (1978).


III. LIABILITY OF LOCAL AND STATE OFFICIALS FOR DETENTION OF JUVENILES IN ADULTrical

Local and state officials who detain juveniles in adult jails may incur liability in two ways. First, officials who authorize or terminate detention 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 detention 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. 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." Like Utah, most of the other states reviewed here place the

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 having the necessary facilities, making rules for the administration of the facilities, and appointing and training the staff. N.M. Stat. Ann. §§ 22-1-4 (1986). 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. §§ 13.16.010, .050, .220, 419.1175. 22. 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. §§ 33-6-1 (1978). County commissioners are also empowered to build local correctional facilities that may house pre-trial detainees including juveniles. Id. §§ 105-010, 150, 220, 419.975. 23. In New Mexico, the facilities must comply with minimum standards set by a state agency. 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. § 13A-1-37 (Supp. 1979). 24. See N.M. Stat. Ann. §§ 33-6-1 (1978) (county commissioners obligated to establish and equip "juvenile detention homes"); N.C. Gen. Stat. § 15A-217(b) (1978) (county commissioners responsible to construct, maintain, and operate "local confinement facilities"); Utah Code Ann. §§ 13.04.115, 13.16.030 (1992) (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. § 13A-1-37 (Supp. 1979).

21. Colo. Rev. Stat. §§ 19-6-117 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. §§ 19-6-10305.

22. Or. Rev. Stat. § 419.011(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. §§ 109-010, 150, 220, 419.975.

23. Juvenile detention facility standards in New Mexico are set by the New Mexico Criminal Justice Department. N.M. Stat. Ann. §§ 33-6-3, -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, he must be one containing a juvenile detention facility and must also be approved by the Department of Human Resources. Id. § 7A-576(b).

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. 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.

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. 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.

The Department of Social Services, acting through the Division of Family Services, is specifically authorized to assist counties in establishing detention centers 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 counties and municipalities for the construction of new facilities or modifying existing facilities to create sight and sound separation of juveniles from adults.

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. All standards for the operation of the facilities must be approved by the commission and the Governor. The secretary is responsible for corrective action in the event an inspection discloses that a facility fails to meet minimum standards. The department also approves holdover facilities for juveniles located in adult jails and sets standards for the operation of juvenile detention homes. 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.

4. Juvenile court judges

In most states juvenile court judges exercise exclusive original jurisdiction over all juveniles who violate federal, state, or local laws.
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?"

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 specifies 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

---

64. 42 U.S.C. § 1983(a) (c). The states of Colorado, New Mexico, North Carolina, Oregon, Utah, and Washington receive funding under the Act.
67. 441 U.S. at 688 n.9 (emphasis added) (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)) (citations omitted).
the operative provisions of the Act in terms of enforceable civil rights. Thus, in introducing § 3146 (the predecessor of § 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. 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. 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." With respect to the fourth factor, it may be argued that the welfare and protection of juveniles is traditionally a matter for 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 Child Welfare Act of 1912, the Social Security Act of 1935, the Child Health and Welfare Act of 1937, the Crippled Children Services Act, the Juvenile Delinquency Prevention and Control Act of 1956, the Juvenile Delinquency and Youth Offenses Control Act of 1961, and the Child Abuse Prevention and Treatment Act of 1974. 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." Second, "it is

61. Id. at 708-09 (emphasis added).
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."74 He concluded that a writ of habeas corpus should be available to test the adequacy of treatment received in an individual case.75

In 1966 in Rouse v. Cameron,76 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.77 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,"78 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."79 The court listed several ways in which confinement without treatment might violate constitutional standards. For example, where commitment may violate the individual's right to procedural due process, the court noted that if Rouse had been convicted of an offense, at the time of the decision, however, he had been periodically confined for four years, with no end in sight. This differential in questions, but also issues under due process of law since it was not met. Finally, confinement for an indefinite period without treatment of one could not criminally responsible may be so indefinite as to constitute "cruel and unusual punishment."80 In 1971 in Wyatt v. Stickney,81 the court went one step further; a hospital did have a constitutional right to treat:

The patients in Bryce Hospital, for the most part, were involuntarily committed through nontreatment procedures and were 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 him 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."82

...
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." He concluded that a writ of habeas corpus should be available to test the adequacy of treatment received in an individual case.

In 1966 in *Rouse v. Cameron*, 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.

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," 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." The court listed 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. 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.

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." In 1971 in *Wyatt v. Stickney*, 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 *Bryne 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."
The court's decision in Wyatt, which was affirmed by the Fifth Circuit, generated a great deal of discussion among legal scholars, and was followed by a number of other courts. 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 Wyat in holding that a patient has a "constitutional right to

§ 1963, for deprivation of constitutional rights.

76. Wyatt v. Addeilt, 503 F.2d 1056 (5th Cir. 1974).


The court in New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 397 F. Supp. 752 (E.D.N.Y. 1975), 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 concluded 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, 399 F. Supp. 715, 723 (E.D.N.Y. 1975). See also Scott v. Plants, 422 F.2d 809 (6th Cir. 1970); Rubekis v. Clark, 434 F. Supp. 1022 (E.D. Pa. 1977); Woe v. Whetnberger, 562 F.2d 40 (3d Cir. 1977).

such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition. 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.

The United States Supreme Court has never decided whether a constitutionally-based right to treatment exists. However, in Kent v. United States, 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. And later, in In re Gault, 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."

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. Following
Judge Bazelon’s lead in _Rouse v. Cameron_, 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. Other courts have adopted Judge Bazelon’s invocation of the due process clause. Wyatt _v. Stickney_ was the first case to hold that the failure to provide adequate treatment is a violation of the due process clause. The due process clause requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is held. This argument is grounded on the rule articulated by the Supreme Court in _Jackson v. Indiana_ that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”

Several courts have found a constitutional basis for the right to treatment in the eighth amendment’s prohibition against cruel and unusual punishment. The reasoning of these
drawn in jails are not dependent upon a ritual incarceration of the prisoner “right to treatment,” or upon a “right to treatment” analysis of the issue. Such detention may be challenged directly as violations of constitutional guarantees such as due process and freedom from cruel and unusual punishment. Wyatt _v. Stickney_ (D.C. Cir. 1966). See text accompanying note 71 supra.

77. See text accompanying notes 102-11 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 “quid pro quo. See, Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories, 20 AMER. L. REV. 1 (1978).

78. See text accompanying note 72 supra.
92. Id. at 736. 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 1328. See also Nebbia _v. New York_, 291 U.S. 502, 525 (1934); Meyer _v. Nebraska_, 262 U.S. 390 (1923).
94. Wyatt _v. Stickney_.
95. 373 F.2d 451 (D.C. Cir. 1966). See text accompanying note 71 supra.
96. See text accompanying note 71 infra. Some courts have registered approval of the basic rationale. Wyatt _v. Stickney_. This argument is grounded on the rule articulated by the Supreme Court in _Jackson v. Indiana_ that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”

According to this rationale, the state violates an individual’s constitutional rights when it confines and fails to provide minimally adequate treatment and habitation in the least restrictive setting possible.

Finally, a number of courts have followed _Rouse v. Cameron_.

98. Id. at 488 (footnotes omitted).
directly\textsuperscript{100} and have found a basis for the right to treatment in state statutory and constitutional provisions.\textsuperscript{101}

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.\textsuperscript{102} 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.\textsuperscript{103}

The courts have recognized this principle. In one of the earliest cases considering the right to treatment, White v. Reid,\textsuperscript{104} 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."\textsuperscript{105}

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 reasonings has been invoked by several courts. In Morgan v. Sproat,\textsuperscript{106} 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-

\textsuperscript{100} See text accompanying note 60 supra.
\textsuperscript{101} See notes 131-34 and accompanying text infra.
\textsuperscript{105} Id. at 650.
\textsuperscript{106} 432 F. Supp. 1130 (S.D. Miss. 1977).
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, 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 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.

Other courts have found a more general basis for the right to treatment in the due process clause. In Penno v. New York State Division for Youth, 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.

Several courts have found a basis for juveniles’ right to treatment in the eighth amendment prohibition against cruel and unusual punishment. In Cox v. Turley, the court specifically 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.”

In Swansey v. Elrod, 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.” 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.” The court observed that thirteen to sixteen year olds “are not merely smaller versions of the adults incarcerated in [the] Cook County jail” 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, 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-
sence of any attempt at rehabilitation.128 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.129 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,130 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."131

The "protection from harm" rationale for the right to treatment132 and the principle of the "least restrictive alternative"133 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,134 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 "established not only an important policy objective, but, in an appropriate case, a legal right to a custody that is not inconsistent with the parents' parens patriae power of the law.135 Similarly, in Nelson v. Heyne,136 the Seventh Circuit ruled that the Indiana Juvenile Court Act provided a statutory basis for the right to rehabilitative treatment.137 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. Along with its jurisdictional counterpart, 28

---


131. Id. at 480. See 168 U.L.A. 340 (1971). There has been considerable discussion whether the eighth amendment ban on 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 jail. See A. Clark, Civil and Criminal Penalites and Forfeitures: A Framework for Constitutional Analysis, 60 Minn. L. Rev. 379, 489 (1976); Spence, supra note 87, at 17-28. Developments, supra note 77, at 1209-64. In Inghram 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 664-65. 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.27. Since detention of children in jail 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 jail. See generally Roberts, Right to Treatment under the Civilly Confined: A New Eighth Amendment Basis, 45 U. Chi. L. Rev. 731 (1978).

132. See notes 96-98 and accompanying text supra.

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


135. 379 F.2d 106 (D.C. Cir. 1977).

136. Id. at 111.

137. See generally supra note 87; Developments, supra note 77.


139. Id. at 360 n.12. See McElhendron v. Wilson, 253 F.3d 707 (3d Cir. 1976).


141. A right to rehabilitative treatment is implicit in Utah law. The purpose of the Utah Juvenile Court Act of 1965 is stated in Utah Const. Art. 7 § 30-1 (1903).

142. In the purpose of this statute 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.

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

144. 40 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. 140 section 1983 authorizes lawsuits to be brought in federal courts for violations of "rights, privileges, or immunities secured by the Constitution and laws." 141 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, 142 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. 143 Hence, juveniles may bring 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.


Section 1988 144 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. 145 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 Brazer v. Cherry, 146 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 statute 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. 147

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. 148 Thus, even if the Juvenile Justice and...
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 1983 by applying Utah tort law and the substantive provisions of sections 55-11a-1 and 78-3a-30 of the Utah Code, 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. 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.”

In Benally the court cited Thomas v. Williams for “an excellent and accurate statement of an officer’s duty to a prisoner in his custody.” 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

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.

In Sheffield v. Turner, 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 willful or malicious wrongful act which they knew or should know would result in injury.” 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 “transcends[es] 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
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. 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 in an adult jail. Since county commissioners are specifically charged by state law with the responsibility of providing adequate detention facilities, 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

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 hold.


157. Id. at 149, 263 P.2d at 290-91 (quoting Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 1220, 1229 (1937)).

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


IV. IMMUNITY OF STATE AND LOCAL OFFICIALS

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

156. 1 Utah 2d 143, 263 P.2d 297 (1955).

157. Id. at 148-49, 263 P.2d at 290-91 (quoting Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 1220, 1229 (1937)).

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

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. 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, 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


167. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Landreth v. McNair, 453 F.2d 805 (5th Cir. 1971).

168. Lynch v. Johnson, 342 F.2d 818 (6th Cir. 1965); Bausen v. Heisel, 351 F.2d 533 (7th Cir. 1965).


by the legislator.\textsuperscript{173} 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.\textsuperscript{174}

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 \textit{Barr v. Mattes},\textsuperscript{175} 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 \textit{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.\textsuperscript{176}

When government officials are accused of violating the constitutional rights of others, however, they enjoy only a qualified or limited immunity. In \textit{Scheuer v. Rhodes},\textsuperscript{177} 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 173. Id.


\textsuperscript{175} 380 U.S. 564 (1965).

\textsuperscript{176} See, e.g., Sowers v. Danzon, 437 F.2d 1182 (10th Cir. 1972); Estate of Burke v. Ross, 438 F.2d 320 (6th Cir. 1971).

\textsuperscript{177} 418 U.S. 232 (1974).

1] DETENTION OF CHILDREN

such error than not to decide or act at all.\textsuperscript{178}

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.\textsuperscript{179}

In \textit{Wood v. Strickland},\textsuperscript{180} 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:

\textit{[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

\textsuperscript{178} Id. at 241-42 (footnote omitted).

\textsuperscript{179} Id. at 247-48.

\textsuperscript{180} 420 U.S. 308 (1975).
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. The lack of malice does not in and of itself establish good faith. Neither does a refusal to do what one knows to be illegal justify the conduct. In addition, failure on the part of an official to take appropriate steps to avoid the injury may defeat a "good faith" defense to a damage action even if the official did not act with malice or ill will. Finally, lack of good faith may be inferred from failure to act.

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.

181. Id. at 322 (citation omitted) (quoting Pierson v. Ray, 386 U.S. 507, 517 (1967)).


184. See, e.g., Bryan v. Jones, 520 F.2d 1210, 1212 (5th Cir. 1975).

185. See, e.g., Sien v. Adams, 507 F.2d 829 (5th Cir. 1975); Harris v. Chandler, 507 F.2d 195 (5th Cir. 1975); Bryan v. Jones, 520 F.2d 1210, 1212 (5th Cir. 1975).

186. Regarding the scope of immunity of executive officials under Sherman v. Rhodes

187. The Supreme Court initially held in Monroe v. Pape, 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, 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.

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, 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 state.


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.\textsuperscript{143} Second, the eleventh amendment only bars money awards that would originate from a different source are not barred.\textsuperscript{144} Moreover, state officials are usually sued in both 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.\textsuperscript{145}

Finally, counties, cities, towns, and other municipal subdivisions of the state are not protected by the eleventh amendment.\textsuperscript{146}

\textbf{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 \textit{Martinez v. California},\textsuperscript{147} 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.\textsuperscript{148}

In \textit{Hampden v. City of Chicago},\textsuperscript{149} 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 immunized by state law."\textsuperscript{150} 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."\textsuperscript{151}

In \textit{Smith v. Losee,}\textsuperscript{152} 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.\textsuperscript{153}

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 1898 and the Juvenile Justice and Delinquency Prevention Act.

---

\textsuperscript{143} Id., Ex parte Young, 309 U.S. 135 (1930), McAuliffe v. Carlson, 320 F.2d 1305 (5th Cir. 1963); King v. Casey, 405 F. Supp. 41 (W.D.N.Y. 1975).

\textsuperscript{144} Boseen v. Hackett, 387 F. Supp. 1212 (D.R.I. 1975); White v. Williams, 519 F.3d 307 (6th Cir. 1975).


\textsuperscript{146} See Wright v. Houston Independent School Dist., 393 F. Supp. 1149 (S.D. Tex. 1975), accorded on other grounds, 569 F.2d 183 (5th Cir. 1978).

\textsuperscript{147} 48 U.S.L.W. 4076 (Sup. Ct. 1980).

\textsuperscript{148} Id. at 4077.

\textsuperscript{149} 484 F.2d 402 (7th Cir. 1973).

\textsuperscript{150} Id. at 607.

\textsuperscript{151} Id. Some state statutes explicitly comply with the federal court rulings. See \textit{Wards Rev. Com. Ann. § 4.82.170 (Supp. 1978)}.

\textsuperscript{152} 485 F.2d 354 (10th Cir. 1973).

\textsuperscript{153} Id. at 341.
B. Immunity Under State Law

Modern state laws governing the immunity of governmental officials, agencies, and units of government for suit 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. Further it 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. 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, 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. 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 officials. In *Kristensen v. Jones*, 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.

The New Mexico Tort Claims Act falls somewhere in between 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. 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.

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.

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. Accordingly, New Mexico government officials can be held liable for injuries resulting from illegal confinement of juveniles in adult jails.
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 indemnified for money judgments against them resulting from such litigation. 213 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 delinquents may be held in adult jails under circumstances within the legitimate scope of the officials' public employment. The rationale is the same in other states where delinquents may be held in adult jails under circumstances within the legitimate scope of the officials' public employment. 214 Second, section 65-48-3 of the Utah Code expressly states that "no 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." Although "gross negligence" is not susceptible of precise definition, 215 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.


214. For a general discussion of governmental immunity of state and local officials, see 57 AM. JUR. 2d Governmental Immunity 449 (1972). 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.

215. Although "gross negligence" is not susceptible of precise definition, 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.