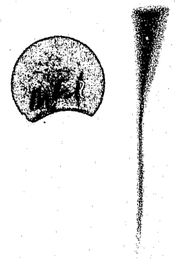



# THE AVAILABILITY OF A PRIVATE CAUSE OF ACTION TO REMEDY A VIOLATION OF THE JAIL REMOVAL PROVISION OF THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT: A REVIEW AND ANALYSIS



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## INTRODUCTION

The Juvenile Justice and Delinquency Prevention Act [P.L. 93-415] was enacted in 1974 by the United States Congress and signed into law by President Ford.[1] The Act (JJDPA) establishes a program of cooperative federalism whereby states, in order to obtain federal funds, agree to conform their practices to the federal requirements set forth in the legislation. The Act provided for a three-year authorization of $350 million and the creation of the Office of Juvenile Justice and Delinquency Prevention (DJJDP) within the Law Enforcement Assistance Agency to coordinate all federal juvenile justice programs. The Act also provided for the awarding of formula grants to states as well as discretionary grants to public and private agencies in participating states for the development of innovative approaches to the prevention and treatment of juvenile delinquency.

The primary condition for receiving these funds was an agreement by the participating state to deinstitutionalize all status offenders and non-offenders and to assure that juveniles and adults were completely separated when held in the same facility.[2] In 1980 Congress amended the Act to require that all juveniles be removed from adult jails and lockups by December 8, 1985 [Juvenile Justice Amendments of 1980, P.L. 96-509].[3] Failure of a state to achieve compliance with this jail removal provision could result in the termination of that state's eligibility for formula grant funds.[4]

It is generally believed that the termination of federal funds is the sole consequence for a state's failure to remove all juveniles from adult jails. Recent U.S. Supreme Court decisions, however, have held that federal statutes which are primarily funding in nature and which do not expressly authorize a private right of action by an aggrieved individual for deprivation caused by a violation of the statute may be construed to impliedly provide such a remedy.

This paper will examine these cases to determine whether the JJDP Act meets the criteria set forth by the Court with respect to an implied cause of action.

## U.S. SUPREME COURT DECISIONS RELATING TO IMPLIED CAUSE OF ACTION

The earliest instance of a U.S. Supreme Court decision infering a private right of action is Texas & Pacific R. Co. v Rigsby 241 US 33 (1915). In that case the Court stated:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover damages from the party in default is implied....[5]



A series of subsequent cases built upon and refined this principle. These various criteria were brought together in Cort v Ash 422 US 66 (1975). This case is now considered the prevailing test for determining whether there exists an implied private remedy for the violation of a federal statute. Four factors must be considered and analyzed:

> 1. Was the statute enacted for the benefit of a special class of which the plaintiff is a member?
>
> 2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> 3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
>
> 4. 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 soley on federal law?

The importance of the judicial history of this issue is that with one unique exception, the U.S. Supreme Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons which included the plaintiff in a case.[6]

In 1979, in Cannon v University of Chicago, 441 US 677, the U.S. Supreme Court applied the four Cort factors to hold that Title IX of the Education Amendments of 1972 created an implied cause of action to enforce that law's prohibition of the use of federal funds in programs which discriminates on the basis of sex. Cannon is an important case to analyze in this context, not only to illuminate how the Court applies the Cort factors, but also because of the significant similarities between the law under consideration in this case and the JJDP Act. Title IX, like the JJDP Act, was enacted pursuant to Congress' spending authority; it prohibits certain activities by the recipients of those funds; it contains an express remedy for violations of the law which is limited to the termination of federal funds; and, it does not expressly authorize a private right of action for aggrieved individuals.

In Cannon the Court stated that the answer to the first Cort factor would be found in an analysis of the language of the statute, itself.[7] Because the Court has been reluctant to imply a private cause of action under statutes which create benefits for the general public, as opposed to those enacted for the benefit of a special class, an examination of the exact words used by Congress is essential. The Court stated that had Congress written the law to

reflect a total ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices, it would be unlikely that an implied private cause of action would be found.[8]

The Court's analysis of the statute in question, however, resulted in a holding that Congress expressly identified the class it intended to benefit through the Act's language:

> "...No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..."[9]

This statutory language placed "an unmistakable focus" on a benefited class of persons discriminated against on the basis of sex. Since the plaintiff was found to be a member of that class, the first Cort test was met.[10]

The Court then reviewed the legislative history of Title IX and determined that Congress intended to pattern it after Title VI of the Civil Rights Act of 1964.[11] As is true of Title IX, Title VI provides an administrative mechanism for terminating federal funds for violations and does not expressly mention a private remedy. Referring to the Congressional Record transcript of the congressional debate over Title IX, the Court held that the drafters explicitly assumed that Title IX would be interpreted and applied as Title VI had during the previous eight years, i.e., a private remedy was implied.[12] Further,

> "...in situations such as the present one in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of an action would be controlling."[13]

Thus, if the legislative history of a particular enactment reflects an intent to deny or prohibit a private cause of action, the Court would not be favorable toward an argument that such a remedy should nevertheless be implied.

Cannon clarified the third Cort factor as follows:

> "Third, under Cort, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme. On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute."[14]



The clear purpose of Title IX, according to the Court, was two-fold. First, Congress wanted to avoid the use of federal resources to support discriminatory practices. Second, Congress wanted to provide individual citizens effective protection against discriminatory practices.[15]

> "The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred. In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded. Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute."[16]

Thus, the Court found no inconsistency between the public remedy explicitly stated in Title IX and an implied private remedy under that Act. The Court also agreed with HEW (the federal agency responsible for administering Title IX) that a private remedy would provide the agency with effective assistance in achieving the law's purposes, especially in light of the agency's statement to the Court that it did not possess the resources necessary to enforce the law in a number of circumstances.[17]

This holding reinforced the Court's earlier decision in Rosado v Wyman, 397 US 397 (1970), where it held that the Court would be "most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program,"[18] even if the agency has the statutory power to cut off funds for non-compliance. This reluctance was, in part, founded on the perception that a funds cutoff is a drastic remedy with injurious consequences to the supposed beneficiaries of the Act.

The fourth Cort factor, whether the subject matter is an issue basically the concern of the states, posed no problem for the Cannon Court. Since the Civil War, the federal government and federal courts have been primarily responsible for protecting citizens against discrimination of any sort.[19] Moreover,

> "...it is the expenditure of federal funds that provides the justification for this particular statutory prohibition."[20]

In 1979 the Court held in Chapman v. Houston Welfare Rights Organization, 441 U.S. 672, that 42 U.S.C. sec. 1983 protections apply to all rights secured by federal statutes "unless there is clear indication in a particular statute that its remedial provisions are exclusive or that for various other reasons a 1983 action is inconsistent with congressional intention."[21]

The following year the Court held in Maine v. Thiboutot, 448 U.S. 1 (1980), that 42 U.S.C. sec. 1983 provides a cause of action for state deprivations of "rights secured" by "the laws" of the United States. Such a remedy, however, is not available where the governing statute provides an exclusive remedy for violations of its terms.[22]

In 1981 the Court essentially expanded the criteria for enforcing substantive rights in federal courts in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (hereafter cited as Pennhurst 1). The issue before the Court was whether the "bill of rights" section of the Developmentally Disabled Assistance and Bill of Rights Act created enforceable individual rights. The Court first determined that the Act was enacted pursuant to Congress' spending power under Article I, section 8, clause 1 of the Constitution.[23] Unlike laws enacted under the Fourteenth Amendment, "spending power" laws which impose conditions for the receipt of federal funds are essentially contracts:

> "The rule of statutory construction that Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds, applies with greatest force where, as here, a State's potential obligations under the Act are largely indeterminate. The crucial inquiry here is not whether a State would knowingly undertake the obligation to provide "appropriate treatment" in the "least restrictive" setting, but whether Congress spoke so clearly that it can fairly be said that the State could make an informed choice. In this case, Congress fell well short of providing clear notice to the States that by accepting funds under the Act they would be obligated to comply with section 6010."[24]



Thus, the legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the "contract", the conditions of which must be stated "unambiguously".[25] Since the Court determined that this contractual standard was not met in this instance, the "bill of rights" was not enforceable, through a private cause of action. Further, the Court found no language in the Act suggesting that compliance with the "bill of rights" was a condition for the receipt of federal funds.[26]

The Pennhurst I Court also made a significant distinction with respect to the conditions contained in congressional enactments. Noting that legislation enacted under the Fourteenth Amendment involved statutes which simply prohibit certain kinds of state conduct:

> "The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on the States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States."[27]

In this instance the Court determined that the affirmative statements in the "bill of rights" were intended to encourage, rather than mandate, the provision of better services to the developmentally disabled.[28]

Later that same year the Court further developed its Thiboutot decision in Middlesex Co. Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). The issue before the Court was whether either of two federal Acts prohibiting pollutant discharges without a permit provided an implied cause of action in addition to the elaborate enforcement provisions provided for in the Acts. These included authorization for criminal and civil penalties for violators and the right of both government and private citizens to sue for prospective relief. Neither Act mention the right to sue for damages resulting from a violation of either Act. Rather, the Acts contain a savings clause which states that aggrieved citizens could avail themselves of all remedies available under other laws. The Court held that there would not be a sec. 1983 remedy against state officials when (1) Congress has foreclosed the 1983 remedy in the enactment, itself, or (2) the statute at issue did not create enforceable rights:

> "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under sec. 1983."[29]

Since the first new criterion was met by virtue of the comprehensive enforcement provisions in the Act, itself, the Court held that a private sec. 1983 remedy was not available. Having decided the case on that basis, the Court declined to address the second criterion.

Finally, for the purposes of this examination, the First Circuit Court of Appeals affirmed in October, 1983, the order of the District Court [ Lynch v. King, 550 F. Supp. 325 (D. Mass 1982)] which ordered Massachusetts to alter its state-wide system of foster care for children. This decision, Lynch v. Dukakis, 719 F. 2d 504 (1983), dismissed the state's claim that Title IV-E of the Social Security Act was not enforceable through a private cause of action under sec. 1983. The district court had relied primarily on Rosado and had determined that portions of the Social Security Act were unenforceable under sec. 1983 because there was no indication that Congress intended to create individual rights. This was not the case, however, with respect to Title IV-E [section 671(b)]. According to the Court of Appeals, this section provides the government with the authority to withhold funds from states which do not comply with the section's conditions, but "in no way purports to limit the availability of relief under any other provision:"[30]

> "In view of the Court's consistent holding that section 1983 provides a cause of action for violations of the Social Security Act, and in view of the fact that the Court has required express statutory language for the SSA remedies to preclude other remedies, there must be a strong showing before we will hold that the section 1983 remedy is unavailable here."[31]

The state had argued on appeal that the federal fund withholding power precluded individual enforcement of fights against the state and that this power would be weakened by allowing private litigation. This contention was rejected by the Court of Appeals which, in reviewing the SSA caselaw since 1968, held that the existence of the power to withhold funds did not preclude private actions to enforce individual rights:

> "[Appellants] can refer us to no expression of congressional intent, in that statute or in the legislative history, that would indicate either the Congress intended for section 671(b) to be exclusive or that the Secretary's enforcement discretion is of such great scope that individuals may not enforce their rights under 1983."[32]

The Court of Appeals also rejected the state's analogy of the SSA to the Developmentally Disabled Assistance and Bill of Rights Act, indicating that the district court had properly found that the SSA created rights in individuals against the states which are enforceable under sec. 1983.[33]



## ANALYSIS OF THE JAIL REMOVAL SECTION OF THE JJDPA

The cases discussed above provide the framework in which the jail removal section of the JJDPA [42 U.S.C. sec. 5633(a)(14)] must be analyzed. The issue to be resolved is whether a juvenile held in an adult jail in Wisconsin in violation of the jail removal provision of the Act may seek relief through an implied private cause of action. The analysis which follows assumes the following:

1. The JJDP Act was enacted pursuant to Congress' spending power. [Note: This assumption is not intended to preclude an argument in another context that the jail removal provision of the Act was enacted under Congress' Fourteenth Amendment authority.]

2. The JJDP Act is voluntary. States are free to participate or not, or to withdraw from participation at any time.

3. Certain provisions of the JJDP Act are unenforceable. For example, in Cruz v. Collazo, 84 F.R.D. 307 (D.C.P.R. 1979), the Court held that the JJDPA does not provide an implied cause of action relating to rehabilitation in the least restrictive setting.

Finally, the analysis does not assume a particular method of litigation or advocacy in seeking relief. Rather, it subjects the jail removal provision to all of the criteria set forth in the existing caselaw.

Criterion 1

Was the jail removal provision of the JJDPA enacted for the benefit of a special class of which the (potential) plaintiff is a member?

Analysis: The Cannon Court held that the answer to this question is found in the language of the Act, itself. The provision states, in part, "...no juvenile shall be detained or confined in any jail or lockup for adults..." A limited 24-hour exception for certain offenders detained in non-metropolitan areas is provided. The class thus identified, i.e., juveniles subject to incarceration, is much more narrowly defined than the classes protected by either Title IX (the Act under consideration in Cannon) or the Voting Rights Act to which the Cannon Court analogized Title IX.

The legislative history of this particular section supports the notion that Congress intended to protect juveniles from potential harm by conferring the right to be free from detention in adult facilities:

> "Research has demonstrated that exposing juveniles to the environment of adult jails has adverse effects on them -- both in terms of their becoming involved in further delinquent and criminal acts and in terms of preserving their physical and mental well-being." (Rep. Coleman)[34]
>
> "Recognizing the detrimental effect of allowing close contact with convicted criminals, this act requires participating states to remove juveniles from adult jails." (Rep. Corrada)[35]
>
> "One of the most significant provisions of this legislation is the program to completely remove juveniles from secure correctional facilities....Some young people simply lack the maturity to cope with the adult offender, and as a matter of fact many of them have even committed suicide rather than continue to endure abuse." (Rep. Railsback)[36]
>
> "In particular, the requirement that juveniles be removed from adult prisons and lockups is critically important....Witnesses stated that during 1978 the suicide rate for juveniles incarcerated in adult jails was about seven times the rate for children in juvenile facilities." (Rep. Weiss)[37]
>
> "Mr. Chairman, no one doubts that incarcerated youth will be much better off when they are completely removed from adult prisons." (Rep. Coleman)[38]

[Note: The Senate record is not discussed here because that body subsequently receded to the House bill which became law.]

Conclusion: The jail removal provision of the JJDPA was enacted for the benefit of a special class, i.e., all juveniles subject to incarceration.

Criterion 2

Is there any indication of congressional intent, explicit or implicit, either to create or deny a private remedy?

Analysis: The Cannon Court held that where Criterion 1 above was satisfied, it was only necessary to demonstrate a congressional intent to deny a private



cause of action to defeat the plaintiff's claim. An exhaustive review of the legislative history of the Juvenile Justice Amendments of 1980 evidences no intent to deny a private cause of action.

In analyzing Title IX's legislative history on this point, the Cannon Court relied heavily on judicial decisions, made prior to Title IX's enactment, which found that individuals had a private cause of action under Title VI of the Civil Rights Act of 1964. The Court held that Congress could be expected to be aware of these decisions under Title VI and, in enacting Title IX with similar language, expressed its intent to continue the implication of a private cause of action under these statutes.[39]

The Juvenile Justice Amendments were passed by Congress in November 1980, one and one-half years after the Supreme Court handed down its decision in Cannon. Not only did Cannon immediately become a leading decision on the availability of a private cause of action under federal statutes, the decision was the subject of considerable attention in the period of time prior to the JJA enactment.[40] Moreover, less than six months prior to the JJA enactment, Justice Powell, dissenting in Thiboutot, listed a number of federal statutes which under the majority's holding might give rise to a sec. 1983 action -- the JJDPA is specifically referenced in this list.[41] Given the Cannon Court's premise that "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important procedents from this and other federal courts...,"[42] one would expect to see an explicit denial of a private remedy in the language of the JJA. The absence of such a denial, however, gives greater weight to the view that Congress expected its enactment to be interpreted in conformity with these prior judicial holdings.

Conclusion: There is no indication of any congressional intent to deny a private cause of action. To the contrary, given the widely known precedents favoring the implication of such a remedy existing at the time of the enactment of the jail removal provision, there is greater evidence to suggest that Congress intended to establish such an action consistent with these judicial precedents.

Criterion 3

Is an implied private remedy consistent with the underlying purposes of the legislative enactment?

Analysis: The JJDPA's purpose with respect to jail removal is clearly stated in the Act:

> "It is the purpose of this Act...to assist States and local governments in removing juveniles from jails and lockups for adults."[43]

When a state agrees to participate in the JJDPA, it receives a formula grant which may be used for a variety of juvenile projects, including jail removal. Failure to achieve compliance with the jail removal mandate in the required timeframe could result in termination of these federal funds. This remedy is severe, and in cases of minimal of partial non-compliance, such termination would act to defeat the stated purpose of the Act.

A private remedy which seeks to remove an individual juvenile from a jail in a non-complying unit of local government would, on the other hand, act to achieve the Act's purpose. Moreover, as was the case in Cannon, it places an unfair burden on an individual juvenile, whose only interest is in his or her release from a local adult facility, to require that juvenile to demonstrate that the state is in violation of the mandate. First, that situation may not exist; for example, the county in which the juvenile is held may be the only county not in compliance. Second, even if the juvenile were successful in demonstrating state non-compliance, the remedy of fund termination and the state's subsequent non-participation in the JJDPA would defeat the juvenile's interest in release. In either event, the purpose of the Act would be defeated.

Conclusion: The implication of a private remedy would be consistent with the stated purpose of the JJDPA.

Criterion 4

Does the subject matter of the enactment under which a private remedy is sought involve an area basically of concern to the states?

Analysis: The areas of child welfare and juvenile justice have traditionally been a state concern, however, the federal government has also traditionally played a major role in these areas, as well, for at least the past 70 years.[44] Furthermore, the necessity of federal involvement in this area is explicitly expressed in the JJDPA:

> "The Congress hereby finds that...States and local communities which experience directly the devastating failures of the juvenile justice system do not presently have sufficient technical expertise of adequate resources to deal comprehensively with the problem of juvenile delinquency."[45]

Thus was created the concept of cooperative federalism in the area of juvenile justice.



The appropriate role of the federal government in this area was also the subject of discussion in the congressional debate over the Juvenile Justice Amendments of 1980. There was no disagreement with Rep. Coleman's statement that,

> "...juvenile justice is properly a State function. In requiring the States to adopt certain practices relating to their juvenile courts, Congress sought to improve the treatment of juveniles in the States."[46]

This view of the cooperative federal role in improving the operation of state juvenile justice systems was supported by Rep. Railsback who had been involved in the original formulation of the JJDPA:

> "In 1974 we thought that it was important to develop a comprehensive program for a coordinated Federal effort to combat one of the most serious aspects of crime in our country, namely, youthful crime."[47]

This theme of cooperative federalism was further echoed by Rep. Coleman as well.[48]

Finally, Cannon held that the expenditure of federal funds justifies the federal statutory requirements. Under the JJDPA both the granting and termination of federal formula grant funds is directly tied to the Acts mandates, one of which is jail removal.[49]

Conclusion: The area of juvenile justice is of basic concern to both the state and the federal government.

Criterion 5

Is there a clear indication in the JJDPA that the explicitly stated remedy of fund termination for non-compliance is exclusive?

Analysis: The language of 42 U.S.C. sec. 5633(c) which confers authority to terminate federal formulas grant funds to a state in non-compliance with the Act's mandates is similar to the language of other statutes, such as 20 U.S.C. sec. 1682 [relating to termination of federal funds for violation of Title IX of the Education Amendments of 1972] and 42 U.S.C. sec. 671(b) [relating to termination of funds for state non-compliance with Title IV-E of the Social Security Act]. And like these other statutes, this remedy is the only expressly stated in the law. Nevertheless, as reflected in the caselaw discussion above, the Court has traditionally *hald that an implied private remedy exists.

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An exception to this experience, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977), relating to Title I of the Indian Civil Rights Act of 1968, is instructive. In this case the Court found a legislative history indicative of a congressional intent to severely limit judicial interference in tribal affairs. Since the Court believed that federal remedies would interfere with matters traditionally relegated to the control of semisovereign Indian tribes, it held that no implied cause of action existed. The legislative history of federal involvement and congressional intent relating to juvenile justice is considerably different, as indicated above.

Another example of how this criterion would not be met is found in the types of statutes at issue in Middlesex. In that instance Congress created a comprehensive scheme of enforcement which included public and private criminal and civil remedies. The Court held that this was indicative of an intent to preclude any other remedy under those statutes. Clearly, no such scheme may be found in the JJDPA.

Conclusion: There does not exist any indication in the language of the JJDPA or in its legislative history that Congress intended federal funds termination to be an exclusive remedy.

Criterion 6

Does the jail removal section of the JJDPA create an enforceable right?

Analysis: This question must be answered in the framework of the Pennhurst I decision. The threshold question is whether the state clearly understands and knowingly accepts the conditions (which must be stated unambiguously) on the grant of federal funds. In other words, did Congress provide clear notice to the state that by accepting federal funds under the JJDPA it would be obligated to comply with the jail removal mandate, and if so, did the State clearly understand and knowingly accept this condition?

The first issue must be whether the language of the jail removal section is clearly stated and not ambiguous. Unlike other sections of the JJDPA which are stated in general or global terms, the language of 42 U.S.C. sec. 5633(a) (14) is quite specific:

1. A specific date -- December 8, 1985 -- is given by which compliance with the section is to be achieved.

2. The class affected and the specific mandate are identified in the section, i.e., "...no juvenile shall be detained or confined in any jail or lockup for adults..." This class -- juveniles subject to incarceration in adult jails and lockups -- is quantifiable. The state knew in 1980 how many juveniles were in jail,m the reasons for incarceration and the duration of incarceration. The impact of accepting the mandate was ascertainable.



The second issue must be whether the state clearly understood this condition on the receipt of federal funds and knowingly and voluntarily accepted it. The Act was re-authorized and amended in October 1984 [P.L. 98-473]. The jail removal mandate was significantly revised as it applies to the 24-hour exception for non-metropolitan counties. Again, the impact is ascertainable. Yet, as recently as March 5, 1985, Gov. Earl stated in a letter to the Chairman of the La Crosse County Human Services Committee,

> "While the states have the option to choose to participate in the Act, 46 states are currently doing so. Governors Lucey, Schreiber, and Dreyfus before me all chose to involve Wisconsin in the Act, and it is my intention to continue to seek our participation in the program. I believe that Wisconsin's compliance with the Act continues to offer us a constructive avenue which will result in further improvement of our juvenile justice system. Further, my own personal observations plus a growing body of evidence have convinced me that the decision by Congress to encourage the removal of juveniles from adult jails is worthy of our support."

In a subsequent letter to Douglas County Clerk Raymond H. Somerville [May 30, 1984], Gov. Earl stated, "Although the goal to remove juveniles from adult jails by December, 1985 has been part of the Act since 1980, I regret that the previous state executive administration failed to take an early leadership role in its implementation."

Third, Congress created the jail removal mandate by defining it as state conduct to be prohibited, rather than as an affirmative statement "encouraging" the states to achieve this objective. Although the JJDPA was enacted under Congress' spending power, it chose to draft this language in a manner more consistent with its authority under the Fourteenth Amendment.

Fourth, the legislative history of the Act in general and the jail removal section in particular evidences a Congressional intent to create an enforceable right. In 1974 during the Senate debate on the creation of the Act, the bill's author, Sen. Birch Bayh, stated that Congress was "establishing a national standard for due process in the system of juvenile justice."[50] And during that same debate Sen. Ted Kennedy described the section prohibiting the confinement of juveniles in jails with adults as a "guarantee of basic rights to detained juveniles."[51]

In the House debate on the Juvenile Justice Amendments of 1980 Rep. Ashbrook, arguing for amendment allowing the jailing of certain juvenile contemptors, stated that "my amendment would preserve the traditional right of our Nation's

courts to enforce their own validity drawn court orders, a power now denied them under certain aspects of the Juvenile Justice and Delinquency Prevention Act."[52] (emphasis added) Rep. Ashbrook then continued to explain what his "valid court order" sought to accomplish:

> "As I have noted, the language would provide the courts with the needed flexibility to respond to youth who chronically refuse voluntary treatment, but at the same time it is carefully drawn to assure the continued protection of the basic rights of the youths."[53]

Rep. Ashbrook then stated that a court could utilize this exception only if the juvenile received their jue process rights. This amendment was passed by the Congress, and the "valid court order" exception procedure, including the litany of due process rights juveniles are to receive, is included in the administrative rule relating to the JJDPA.

Finally, the Wisconsin Council on Criminal Justice (WCCJ), which is responsible for the implementation of the Act in Wisconsin, annually reports to OJJDP on the progress toward achieving compliance with the jail removal mandate and of the state's plans to achieve full compliance. In its most recent state plan the WCCJ states:

> "The major emphasis of the 1985-87 Plan will be the compliance with Section 223(a)(14) of the [JJDPA] of 1974, as amended."[54]

Further, local project applicants are required to demonstrate county compliance with the mandates of the Act, and statewide public and private agencies "must include project methodology that will enhance the state's effort toward compliance with the JJDPA mandates."[55] Finally, Program I of the WCCJ's action funds allocation is devoted entirely to the removal of juveniles from adult jails and lockups.[56]

Conclusion: The "contract" criterion articulated in Pennhurst I has been met. The language of the jail removal section is precise, the state has demonstrated that it understands that language, and the state continues to voluntarily participate in the JJDPA. Further, the legislative history of the Act, as well as the manner in which the specific jail removal language was drafted, is indicative of congressional intent to establish an enforceable right.



CASE EXAMPLE

As is clear from the language of the jail removal section, the compliance date is December 8, 1985. An extension of three years is possible, however, provided the state demonstrates "substantial compliance" pursuant to the provisions of sec. 5633(c). Thus, it is possible that the implication of a private cause of action under sec. 5633(a)(14) as discussed in this paper, may not be determined by a court until 1989.

One of the other mandates under the Act, 42 U.S.C. sec. 5633(a)(12)(A), is, however, presently is effect. This section prohibits participating states from placing juveniles not accused of criminal acts or violations of valid court orders in secure detention or correctional facilities. Most participating states have enacted legislation prohibiting such incarceration or in some other manner assure that these non-offenders are not incarcerated.

In 1983 a juvenile held in Vermont's Waterbury Detention Unit requested the Superior Court of Washington County to release him pursuant to a writ of habeas corpus which alleged that he was being held unlawfully under sec. 5633(a)(12)(A) of the JJDPA. The state admitted that its action in this instance was in violation of the Act, but that the juvenile did not have a right to claim protection under the law.

The Superior Court reviewed the decisions in Pennhurst I, Thiboutot, and Collazo, and held that the juvenile did have standing to assert rights under the Act's provision; that the instant detention was in violation of that provision; that the state was obliged to comply with the provision; and, that such compliance "is not an open-ended or potentially burdensome obligation." the writ of habeas corpus was issued.[57] The state subsequently entered into a final order and judgement stipulation that it would abide by the provisions of the Act and end all secure detentions of non-offender youth unless it was expressly authorized under the Act[58]

This state court decision is not cited here as a judicial precedent, but rather as an instructive example of how certain provisions the JJDPA may be found to contain an implied cause of action.

## CONCLUSION

There exists an extensive history of judicial findings that acts of Congress impliedly confer individual rights which provide a private cause of action. Numerous criteria have been developed by the courts over this period of time to assess the existence of such an implied right. The jail removal section of the JJDPA appears to meet all of these criteria, and in some respects, is more specific than provisions of other federal enactments which have been found to imply a private cause of action. It is very likely that 42 U.S.C. sec. 5633(a)(14) will be determined to provide a private cause of action at such time as that provision becomes effective and an individual juvenile held in violation seeks release from an adult jail or lockup.



## FOOTNOTES

1 42 U.S.C. secs. 5601-5751

2 Id., sec. 5633(a)(12)(A)

3 Id., sec. 5633(a)(14)

4 Id., sec. 5633(c)

5 241 US 33, at 39

6 441 US, at 690-691, n. 13

7 Id., at 689

8 Id., at 691-692

9 20 U.S.C. sec. 1681

10 441 US, at 694

11 Id.

12 Id., at 699

13 Id., at 694

14 Id., at 703

15 Id., at 704

16 Id., at 704-705

17 Id., at 708

18 397 US 397, at 420

19 441 US, at 708

20 Id., at 708-709

21 441 US 672

22 448 US 1, at 28

23 451 US 1, at 16

24 Id., at 25

25 Id., at 17

26 Id., at 13

27 Id., at 16-17

28 Id., at 25

29 453 US 1, at 20

30 719 F.2d 504, at 510

31 Id., at 511

32 Id.

33 Id., at 512

34 Cong. Rec.-House 10921, 11/19/80

35 Id., at 10922

36 Id.

37 Id., at 10923

38 Id., at 10929

39 441 US 677, at 697-698

40 This attention was reflected, in part, in the plethoria of law review articles on the subject written within a brief period after the decision. For example, see Broadening Access to the Courts and Clarifying Judicial Standards: Sex Discrimination Cases in the 1978-1979 Supreme Court Term, 14 U. RICH. L. REV. 575 (1980); Note, Civil Rights and Private Wrongs: A New Remedy, 48 UMKC L. REV. 487 (1980); rivate Rights of Action Under Title IX of Education Amendments of 1972, 3 HARV. WOMEN'S LJ. 141 (1980); Hryszko, An Overview of Implied Rights of Action, 40 LA. L. REV. 1011 (1980); Harried, Implied Causes of Action: A Product of Statutory Construction or the Federal Common Law Power?, 51 U. COLO. L. REV. 355 (1980).

41 448 US 1, at 37

42 441 US 677, at 699

43 42 U.S.C. sec. 5602(a)(B)

44 Children's Bureau Act of 1912, 42 U.S.C. secs. 191-194; the Social Security Act of 1935, 42 U.S.C. secs. 301 et seq.; the Child Health Act of 1967, 42 U.S.C. secs. 701-715, 729; the Child Nutrition Act of 1966, 42 U.S.C. secs. 1771-1786; the Crippled Children Services Act, 42 U.S.C. secs. 701 et seq; the Juvenile DElinquency Prevention and Control Act of 1968, 42 U.S.C. 3801; the Juvenile Delinquency and Youth Offences Control Act of 1961, 42 U.S.C. secs. 2541-2548; the Social Security Amendments of 1972, Title XX, 42 U.S.C. sec. 1395; the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. sec. 5101; and, tne Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. secs. 1305 et seq., as well as the Juvenile Justice and Delinquency Prevention Act of 1974 and the Juvenile Justice Amendments of 1980, 42 U.S.C. secs. 5601 et seq..

45 Id., sec. 5601(a)(6)

46 Cong. Rec.-House 10922, 11/19/80

47 Id.

48 Id., at 10921

49 42 U.S.C. sec. 5633(c)

50 120 Cong. Rec. 25165

51 Id., at 25184

52 Cong. Rec.-House 10932, 11/19/80

53 Id.

54 Wisconsin Council on Criminal Justice Juvenile Justice Plan, 1985-1987 p. 3

55 Id., at p. 5

56 Id., p. 30 et seq.

57 D.B. v. Burchard, slip op., no. S5-83 (Vt. Super. Ct., 2/28/83)

58 P.D. v. Burchard, slip op., no. S-6-83 (Vt. Super. Ct. 1983)

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