The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983

*Susan L. Kay**

I. INTRODUCTION

Prisoners often seek redress in federal courts through causes of action brought under 42 U.S.C. Section 1983[1] for violations of their constitutional rights caused by the overall condition of their confinement[2] or by one specific condition[3] or incident.[4] Although

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* Instructor in Clinical Law, Vanderbilt University School of Law. B.A., Williams; J.D., Vanderbilt. The author wishes to thank Julie Genovese and Brenda G. Siniard for their assistance in the preparation of this Article.

1. 42 U.S.C. § 1983 (1982) states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. . . .

2. *E.g.*, Finney v. Hutto, 410 F. Supp. 251 (E.D. Ark. 1976), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

3. *E.g.*, Bounds v. Smith, 430 U.S. 817 (1977) (inmates' right of access to the courts includes access to a law library); Cruz v. Beto, 405 U.S. 319 (1972) (asserting right of non-

commentators disagree over the extent to which these cases burden federal district courts,[5] they agree that prisoner litigation constitutes a large percentage of the civil rights litigation in district courts.[6] One of the attractions of prison privatization for state and local governments is the belief that contracting prison management to private firms will relieve the government of the burden of defending the multitude of individual and class-wide civil rights actions and the expense of complying with comprehensive and often financially burdensome court orders.[7]

Several reasons may explain the inmates' choice to litigate constitutional claims in federal court rather than litigating them as tort actions in state court, but two reasons predominate. First, most state legislatures have immunized state officials from suit in state court for actions arising from their official conduct.[8] Inmates either have no recourse in state court[9] or are forced to proceed in a manner other than a trial before a jury.[10] Second, and possibly even more important, prisoners perceive that federal courts possess

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Christian inmates to hold religious services in prison chapel); Shabbaz v. Barnauskas, 790 F.2d 1536 (11th Cir.) (cballenging, on grounds of the first amendment right to religious freedom, requirement that inmate shave his beard), *cert. denied,* 107 S. Ct. 655 (1986); Beyah v. Coughlin, 789 F.2d 986 (2d Cir. 1986) (challenging, on first amendment religious freedom grounds, state officials' refusal to allow inmate to use soap that did not contain pork products); Novak v. Beto, 453 F.2d 661 (5th Cir. 1971) (challenging conditions of solitary confinement), *cert. denied,* 409 U.S. 968 (1972); *accord* Love v. Summitt County, 776 F.2d 908 (10th Cir. 1985), *cert. denied,* 107 S. Ct. 66 (1986); Ganey v. Edwards, 759 F.2d 337 (4th Cir. 1985).

4. *E.g.,* Albers v. Whitley, 546 F. Supp. 726 (D. Or. 1982), *aff'd in part, rev'd in part,* 743 F.2d 1372 (9th Cir. 1984), *rev'd,* 475 U.S. 312 (1986).

5. Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study,* 67 CORNELL L. REV. 482 (1982) (compare footnote 212: Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois,* 6 LOY. U. CHI. L.J. 527 (1975); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in Federal Courts,* 92 HARV. L. REV. 610 (1979) with footnote 168: Lewis v. County of Lehigh, 516 F. Supp. 1369, 1372 (E.D. Pa. 1981); Sloan v. Southampton Correctional Center, 476 F. Supp. 196, 197 (E.D. Va. 1979); Comment, *State Courts and Federalism in the 1980's,* 22 WM. & MARY L. REV. 821, 822 (1981)).

6. Eisenberg, *supra* note 5.

7. *See generally* Cody & Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience,* 40 VAND. L. REV. 829 (1987).

8. *E.g.,* PA. STAT. ANN. tit. 42, §§ 8521-8522 (Purdon 1982 & Supp. 1987) (providing sovereign immunity unless conduct falls within eight narrow exceptions); S.D. CODIFIED LAWS ANN. §§ 21-32A-2 to -3 (Supp. 1986) (immunizing employees, officers, and agents from suit, except insofar as insurance is provided).

9. *E.g.,* ALA. CONST. art. I, § 14 (providing that the State shall never be made a defendant in any court of law or equity); UTAH CODE ANN. § 63-30-10(j) (1986) (explicitly excepting prisoners' suits from waiver of sovereign immunity).

10. *E.g.,* LA. REV. STAT. ANN. §§ 15:1171 to :1176 (West Supp. 1987) (requiring exhaustion of administrative remedies).

an aura of justice and dignity that they find lacking in state courts.[11] Because of this fascination with federal court, there is every reason to expect that if private contractors operate state or local correctional facilities, prisoners will continue to seek redress in federal court through Section 1983, despite an enhanced ability to bring a state court action against a prison operator occasioned by diminished immunity for a private contractor.[12]

Section 1983 requires a plaintiff to establish: (1) that he or she was deprived of a right or privilege secured by the Constitution or laws of the United States;[13] and 2) that the deprivation arose under color of state law.[14] This Article will focus on the consequences of the entrance of private contractors as defendants in prisoner litigation under Section 1983. More specifically, the topics covered are the issues surrounding state action, sovereign immunity, and qualified immunity. Although the impact of these issues on cases brought against private contractors in the state prison systems is the major consideration, this Article discusses the points at which the implications would be different if the public contracting authority were a municipality.[15]

II. THE PRIVATE CONTRACTOR AS STATE ACTOR[16]

Section 1983 applies only to constitutional violations by persons "acting under color of state law." The only conduct actionable under the fourteenth amendment is "state action." The Supreme Court has held that, for most purposes, action under color of state law is coextensive with conduct that constitutes state action.[17] This

11. Quite possibly, this fascination with federal courts flows from the fact that the inmates were convicted in state court and therefore find the procedures and results in that forum to be inadequate.

12. For example, Tennessee law denies the private contractor any sovereign immunity defenses. 1986 Tenn. Pub. Acts 932, § 7(b). Although other states have not legislated directly, common-law notions of sovereign immunity would not extend necessarily to a private contractor performing a service for the government. See *infra* notes 65-74 and accompanying text for discussion of the immunity defenses available to private contractors.

13. The substantive claims that prisoners in private facilities might raise and the difference between these claims and the claims of prisoners in public facilities will not be discussed in this Article.

14. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978).

15. For example, one municipality, Hamilton County, Tennessee, has contracted with Corrections Corporation of America to operate the workhouse in Chattanooga, Tennessee. *See* Press, "*A Person, Not a Number,*" NEWSWEEK, June 29, 1987, at 63.

16. For purposes of this section of the analysis, whether the § 1983 plaintiff sues a private company or one of its employees is of no legal significance.

17. Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982). Although grammatically speaking, the phrase "under color of state law," appears more encompassing than

analysis merges, at least in part, the findings necessary to sustain a claim under the fourteenth amendment with the jurisdictional prerequisite to a claim under Section 1983.[18]

The Court's most complete reassessment of the state action/under color of state law requirement occurred on June 25, 1982 when the Court decided *Lugar v. Edmondson Oil*,[19] *Rendell-Baker v. Kohn*,[20] and *Blum v. Yaretsky*.[21] In these three cases, the Court considered several alternative tests for determining whether a private party's conduct can convert the private actor into a state actor for purposes of Section 1983 liability. In *Rendell-Baker* and *Blum* the Court examined whether the government regulated or funded the activity; whether a symbiotic relationship or mutual interdependence existed between the government and the private actor; and, finally, whether the private actor performed a state function.[22] More commonly, these factors have been collapsed into three tests:[23] the symbiosis test, the nexus test, and the public

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"state action," they are derived from the same source—the fourteenth amendment. The due process clause renders unconstitutional only conduct that is attributable to the state. Section 1983 was enacted under § 5 of the fourteenth amendment, which gives Congress the power to enforce the due process clause. It would be ironic if conduct were actionable under the enforcement clause, but not unconstitutional under the amendment itself.

18. *But cf. Polk County v. Dodson*, 454 U.S. 312 (1981). In *Polk County*, the Court held that a public defender—state employee—was not acting under color of state law when she represented indigent criminal defendants. The Court grounded its holding in *Polk County* on the relationship between the public defender, her client, and the state. Although paid by the state, the public defender is the client's advocate and is charged specifically with being the adversary of the very state that pays his or her salary. Thus, in representing the client, the public defender is not acting on behalf of the state. *Polk County* left unanswered the question whether a public defender is a state actor when he or she performs other functions, *e.g.*, hiring and firing assistant public defenders.

19. 457 U.S. 922 (1982).

20. 457 U.S. 830 (1982).

21. 457 U.S. 991 (1982). For a discussion of these three cases, see Note, *Tower of Babel Revisited: State Action and the 1982 Supreme Court*, 10 N. KY. L. REV. 305 (1982).

22. These factors first were utilized by the Court in *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), in which Justice Douglas criticized severely the seriatim approach to the state action/under color of state law analysis. *Id.* at 359 (Douglas, J., dissenting). In keeping with *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), Justice Douglas argued, the test must assess the facts in total: "As our subsequent discussion in *Burton* made clear, the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility." *Jackson*, 419 U.S. at 360 (Douglas, J., dissenting); *see also Burton*, 365 U.S. at 722-26. Justice Douglas continued, stating: "It is not enough to examine seriatim each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling." *Jackson*, 419 U.S. at 360 (Douglas, J., dissenting).

23. In addition to finding one of these alternative prerequisites, the Court in *Lugar*

function test.[24]

A. The Symbiosis Test

In analyzing whether a private actor enjoys a symbiotic relationship—one of mutual interdependence—with the state, the Court continues to pay lip service to the broad definition of symbiosis articulated in *Burton v. Wilmington Parking Authority*.[25] In *Burton* the plaintiff claimed that a privately owned restaurant's practice of refusing to serve blacks violated the fourteenth amendment. The restaurant was located in a municipal parking garage. Although the diner did not open into the garage, the Court found that its location and financial arrangement with the city created a situation of mutual interdependence, thus making the restaurant a

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suggested a first prong which must be met even prior to determining the existence of symbiosis, nexus, or public function:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In *Sniadach, Fuentes, W.T. Grant,* and *North Georgia,* for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he bas acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

Lugar, 457 U.S. at 937. The decisions in *Rendell-Baker* and *Blum*, issued on the same day, never discuss their first prong. For further discussion of this *Lugar* analysis, see *infra* note 55 and accompanying text.

24. An additional theory finds state action when private parties act in concert or conspire with state officials to violate constitutional rights. This theory was referred to as joint participation. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); *see also* Dennis v. Sparks, 449 U.S. 24 (1980). This theory has not been discussed separately because, for the most part, the symbiosis test has subsumed much of joint participation. Indeed, the *Burton* Court itself referred to symbiosis as joint participation. *See infra* note 25. This theory still might apply, however, in cases in which a contractor performed functions in conjunction with the state. For example, where a contractor provided the guards under the supervision of a state employed shift supervisor. If the supervisor and guard together violated rights, a court might find them to be joint participants. The less involvement the state has in the day-to-day operations, however, the less likely a court would be to find joint participation.

25. 365 U.S. 715 (1961). As the Court defined it, symbiosis occurs when "[t]he State has so far insinuated itself into a position of interdependence with [the private actor] that it must be recoguized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Id.* at 725.

state actor, subject to suit for constitutional deprivations. Subsequently, however, the Court has narrowed the fact patterns that will satisfy the *Burton* symbiosis standard.[26] Indeed, since the Court decided *Burton*, it has not found symbiosis to exist in any other case.[27]

Despite the Court's reluctance to find a symbiotic relationship, privatizing a correctional facility might create such a relationship even under the Court's narrow definition. As the Court stated in *Burton*, the symbiosis analysis is fact based.[28] In the case of private prisons, a reviewing court should consider the financial arrangement between the state and the private contractor, whether the private contractor owned the prisons or leased them from the state, and the extent to which the state supervised the contractor in the everyday operation of the facility. Obviously, the more particularized the state's supervision or regulation, the more likely a court would find state action under this theory. In addition, the very fact that the state statute vests custody of persons in the state

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26. There may be historical justification for this constriction of the test. *Burton* was a racial discrimination case decided before the Civil Rights Act of 1964 had been passed. Thus, the only way to find unlawful the apparently private discrimination by persons providing public accommodation in *Burton* was to establish that the conduct was state action and thus litigable under § 1983. *See* Civil Rights Cases, 109 U.S. 3 (1883). Once Congress passed the 1964 Act under the aegis of the commerce clause, the need no longer existed to find state action in *Burton*-type situations since the conduct was presumptively actionable under the new statute. In addition, racial discrimination, like that evidenced in *Burton*, was exactly the type of evil Congress intended § 1983 to remedy. Following the philosophy of *Burton*, the Second Circuit has created a separate, less stringent test for state action in racial discrimination cases. *See, e.g.*, Wagner v. Sheltz, 471 F. Supp. 903, 907 (D. Conn. 1979), *citing* Jackson v. Statler Found., 496 F.2d 623, 629 (2d Cir. 1973); Grafton v. Brooklyn Law School, 478 F.2d 1137, 1142 (2d Cir. 1973).

27. In *Perez v Sugarman*, 499 F.2d 761 (2d Cir. 1974), the Second Circuit found that a symbiotic relationship existed between the State of New York and private agencies which provided foster care to children who were in the state's custody. The factors pertinent to this holding were: (1) the existence of a statute that made the state responsible for the care of all children in need of assistance; (2) the pervasiveness of the state's control over the operation of the private agency, including mandatory visitation, inspection and supervision; (3) the detailed records that the private agency must provide to the state; and (4) the state's ability to remove the children from the institution at any time. The court stated:

> This comprehensive statute thus establishes that while the State may have yielded physical possession of the children, at no time did it, or indeed could it, relinquish effective legal control over them .... [T]hese private entities are an integral part of the public operation of providing assistance. And, as the Supreme Court has pointed out in Burton v. Wilmington Parking Authority, . . . the dependence of the State on private parties is a factor which tends to establish the intimacy requisite to a finding of "state action."

Id. at 766.

28. 365 U.S. at 722 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.").

provides a strong indication of symbiosis.[29]

B. The Nexus Test

Under the nexus test, a court would look to the same facts considered under the symbiosis test, but would focus "on [the] state involvement in the challenged activity itself," rather than "on the overall relationship between the state and the private entity."[30] In deciding whether the private contractor's conduct is state action, the court would look to specific state regulations and statutes to see how severely they limit the private contractor's discretion. Under this theory, the state effectively could shield the private contractor from civil rights liability by giving the contractor little statutory or regulatory guidance in its role as custodian of the prisoners. By limiting its regulation of the contractor, however, the state might increase its own liability on the theory that it did not comply sufficiently with its responsibility to assure the proper care of the prisoners placed in its custody.[31]

In addition, under the nexus theory of state action, certain aspects of a private contractor's conduct could constitute state action, while other aspects could be deemed purely private. For example, if a state had legislated in the area of prison conditions but did not regulate the private contractor's relationship with its employees, Section 1983 would provide a cause of action for an inmate, but not an employee, aggrieved by the private party's unconstitutional treatment.

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29. *Perez*, 499 F. Supp. at 766.

30. Martin v. Delaware Law School, 625 F. Supp. 1288, 1301 (D. Del. 1985). This requirement of state involvement for the nexus test is derived from *Blum* and *Jackson:*

> First, although it is apparent that nursing homes in New York are extensively regulated, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." The complaining party must also show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the state is *responsible* for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original), *quoting* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 351 (1974).

31. Since the statute gives custody to the state, the state would have a duty to ensure that the prisoners were treated in a constitutional manner. Arguably, the state may have a nondelegable duty to ensure the proper treatment of prisoners, thereby making the state liable any time a prisoner—in whoever's custody—is treated unconstitutionally. This duty has not yet been addressed by any court.

In *Milonas v. Williams*,[32] for example, two students alleged that a private school violated their eighth amendment rights. Provo Canyon School for Boys was a private facility established to educate boys who required a restricted, therapeutic environment. The students claimed that the school's excessive use of bebavior modification techniques and the school's treatment of its students amounted to cruel and unusual punishment.

The district court found the requisite state action based on its determination that the school was, in effect, a detention facility subject to significant funding and regulation by the state. The school restricted the students to the grounds and hunted the students down and returned them to custody if they left. On appeal, the Tenth Circuit affirmed the finding of state action. The appellate court's analysis, through inartful juxtaposition of terms, seemed to combine a symbiosis/joint participation analysis with the nexus test. Citing *Burton*, the court found that the state had "so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions."[33] The evidence of this relationship included detailed contracts between the school and the local school districts that placed boys at Provo Canyon, significant state funding of the institution, extensive regulation of the school, and the juvenile court's practice of committing boys to the school often with the consent of the boy's parents. The court concluded: "These facts demonstrate that there was a sufficiently close nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983."[34]

While recognizing that under *Rendell-Baker*[35] these facts did not appear to support a finding of state action, the court, nonetheless, distinguished *Milonas'* fact situation from *Rendell-Baker*'s, in which the plaintiffs claimed that the private school fired them without procedural due process and for constitutionally impermissible reasons. In *Rendell-Baker* the Supreme Court found that the State of Massachusetts had very little involvement in the employment decisions of the private school.[36] In *Milonas,* by contrast, the plaintiffs complained of the very activity that the state regulated heavily. Thus, despite its apparent espousal of both the symbiosis

32. 691 F.2d 931 (10th Cir. 1982).
33. *Id.* at 940.
34. *Id.*
35. 457 U.S. 830 (1982).
36. *Id.* at 841.

and nexus tests, the court, in effect, resolved the issue based solely on the nexus test because the court emphasized the connection between the specific conduct at issue and the state's regulation.[37]

C. *The Public Function Test*

Private contractors are most likely to be held accountable under Section 1983 by application of the public function doctrine. As articulated in *Rendell-Baker*, the doctrine allows a private entity to be deemed a state actor if it performs a function that "has been 'traditionally the *exclusive* prerogative of the State.' "[38] In *Rendell-Baker* the Supreme Court held that, although traditionally a function of the state, education had never been an exclusive public function.[39]

Involuntary detention, conversely, traditionally has been considered an exclusive state function. The issue has arisen specifically in the context of the decision to commit a mentally ill person. Because of the prevalence of private psychiatric hospitals and nonstate employed psychiatrists who are authorized to participate in the commitment process, several courts have had the opportunity to review the character of these parties' actions.

Although courts differ as to when the physician's action carries the compulsion of detention and thus becomes state action, they have been fairly uniform in finding that a mere recommendation to send a person to a mental institution for evaluation is not state action. This recommendation may be evidenced by the physician signing a certificate requiring the person to be evaluated.[40] Recommending commitment is not uniquely a public function; both private individuals and the state have the power to make this recommendation. Family members and friends, as well as physicians or state employees, can file a certificate or other paper requesting

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37. The court's confusion is understandable because the same facts may give rise to an inference of both symbiosis and nexus. The key difference, as articulated in *Martin v. Delaware Law School*, 625 F. Supp. 1288, 1301 (D. Del. 1985), is the state's force behind the particular decision or action that is the crux of the lawsuit.

38. 457 U.S. at 842, *quoting Blum*, 457 U.S. at 1011 (emphasis in original).

39. Activities that courts have found to be public functions include: operation of a park, *see* Evans v. Newton, 382 U.S. 296 (1966); process serving, *see* United States v. Wiseman, 445 F.2d 792 (2d Cir. 1971); and care of foster children, *see* Perez v Sugarman, 499 F.2d 761 (2d Cir. 1974).

40. *See, e.g.*, Willacy v. Lewis, 598 F. Supp. 346 (D. D.C. 1984), *citing* Byrne v. Kysar, 347 F.2d 734, 736 (7th Cir. 1965); Landry v. Odom, 559 F. Supp. 514, 517-18 (E.D. La. 1983); Watkins v. Roche, 529 F. Supp. 327, 330 (S.D. Ga. 1981); Green v. Truman, 459 F. Supp. 342, 344 (D. Mass. 1978); Orlando v. Wizel, 443 F. Supp. 744, 751 (W.D. Ark. 1978).

that a person be transported to a psychiatric facility for evaluation. The moment that this recommendation transforms into detention is determined by state statutes and the procedures followed in any particular jurisdiction. State action is present when the state gives a private actor the legal authority to detain a person against his or her will.[41] In some states this transfer of legal authority may occur when the physician or private hospital has authority to detain the person for a lengthy evaluation; in other states it may not occur until a hospital formally commits a person for an indefinite period of time. The overarching theme, however, is that detention of a person against his or her will is essentially and traditionally within the exclusive power of the state.[42]

The only court to address the issue of the private contractor's role as detainer of inmates held that the company was a state actor because it provided a public function. In *Medina v. O'Neill*[43] Chief Judge Singleton of the Southern District of Texas found that a private security firm hired by the Immigration and Naturalization Service to detain aliens for a short term was a state actor for the purposes of liability in a *Bivens* action.[44] The court held specifically that immigration and detention were exclusive government functions.[45]

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41. *Compare* Watkins v. Roche, 560 F. Supp. 416 (S.D. Ga. 1983) (finding that a physician who determined that a patient needed to stay for further evaluation and a physician who treated the patient were state actors because tbe state, through regulation, bad so immersed itself in the process that the physicians were in effect working for the state) *with* Watkins v. Roche, 529 F. Supp. 327 (S.D. Ga. 1982) (dismissing, for lack of state action, a civil rights complaint against the physician who signed the certificate authorizing the initial transportation of the patient to a state facility).

42. "This power of detention is the type of power normally and historically exercised by sovereign states and other government entities. [The statutes] confer upon a physician the power to do something which he otherwise would not have the right to do as an individual." Kay v. Benson, 472 F. Supp. 851, 851 (D. N.H. 1979).

Another court agreed:

> The defendants do not challenge, nor is there a real issue that, when physicians and hospitals confine persons pursuant to a mental commitment statute, they are exercising the power of detention delegated to them by the state. Because this power is one historically exercised by the government, the acts of the physicians and hospitals in this connection constitute state action.

Brown v. Jensen, 572 F. Supp. 193 (D. Colo. 1983) (citations omitted).

43. 589 F. Supp. 1028 (S.D. Tex. 1984).

44. A *Bivens* action is a lawsuit against a federal official alleging that the defendant's act has deprived the plaintiff of a right secured by the United States Constitution. It is, in essence, the federal actor counterpart of a § 1983 action, and, consequently, the requirement of state action is identical. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

45. As the *Medina* court stated:

> This case implicated two spheres of power: immigration and detention. As this court

For many years, the states have used private sources to provide services, other than those related to detention, for correctional institutions. Most commonly, state prison administrators contract with physicians to provide medical care for prison inmates. This contracting gives rise to prisoners' claims against private physicians for eighth amendment violations. The inmates claim that by providing inadequate care, the physicians have subjected the prisoners to cruel and unusual punishment. The Supreme Court has adopted, as the standard of care in these medical cases, whether the provider has been deliberately indifferent to the inmates' serious medical needs.[46]

The Eleventh Circuit Court of Appeals has, on several occasions, found that the conduct of these private physicians amounts to state action because the physicians perform the state's constitutionally mandated function of providing for the physical health of the inmates.[47] Indeed, a district court has analogized this finding of state action in the eighth and fourteenth amendment context to the fourteenth amendment rights of involuntarily committed mental patients, and thereby found that the private physicians who provide medical care to committed mental patients perform a state function.[48]

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found above, immigration, which includes "the power to expel or exclude aliens," is a fundamental sovereign attribute exercised exclusively by the legislative and executive branches of the United States Government. Therefore, this court finds state action because Congress dictated and compelled action on the part of the INS and the carrier.

Likewise, detention is a power reserved to the government, and is an exclusive prerogative of the state. As the Supreme Court stated,

> While as a factual matter any person with sufficient physical power may deprive a person of his [life, liberty or] property, only a state or private person whose action "may be fairly treated as that of the State itself," may deprive him of "an interest encompassed within the [Fifth or] Fourteenth Amendment's protection," . . . .

589 F. Supp. at 1038 (citations omitted).

46. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (establishing the "deliberate indifference" standard). Gamble involved a state-employed physician rather than an independent contractor.

Pretrial detainees' right to adequate medical care arises under the due process clause, rather than the eighth amendment. *See* City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239 (1983). The standard of care in due process cases is, arguably, higher than the standard of care in eighth amendment cases. The analysis of state action, however, would be identical under the two amendments.

47. *See, e.g.*, Ort v. Pinchback, 786 F.2d 1105 (11th Cir. 1986); Ancata v. Prison Health Servs., Inc., 769 F.2d 700 (11th Cir. 1985); Morrison v. Washington County, Ala., 700 F.2d 678 (11th Cir.), *cert. denied*, 464 U.S. 864 (1983).

48. Lombard v. Eunice Kennedy Shriver Center for Mental Retardation, Inc., 556 F. Supp. 677, 678 (D. Mass. 1983) ("The critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because

The Fourth Circuit Court of Appeals has reached the opposite result when examining the conduct of a private doctor in a prison setting. In *Calvert v. Sharp*[49] the court held that the doctor did not perform a puhlic function because, historically, the state had allowed sick prisoners to seek medical attention at private facilities if the prison facilities were inadequate.[50] The prisoner, the prisoner's family, prison funds, or the incarcerating county, city, or town would then pay for the prisoner's private medical care. The court thus completely ignored the possibility that a state function may arise by operation of the Constitution as well as by operation of state statute. The Fourth Circuit's analysis also ignored the issue of ultimate responsibility. Because the prisoner has a constitutional right to adequate health care,[51] the state must retain ultimate responsibility for providing the care. If the community or the family fails to provide for inmates' medical needs, that responsibility necessarily and ultimately must fall upon the state.

In addition, the *Calvert* court based its finding of no state action on the nature of the doctor's relationship with his patient. The court found that this relationship was analogous to the public defender's relationship with her client in *Polk County v. Dodson.*[52] The doctor's affiliation, like the public defender's, was weighted more heavily toward his patient than toward the state.[53] The privately contracted doctor distinguished himself from the state employed physician in *Estelle v. Gamble*[54] because the former had no supervisory or custodial functions.[55]

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they reside in state institutions.").

49. 748 F.2d 861 (4th Cir. 1984).

50. *Id.* at 864.

51. *See Estelle*, 429 U.S. at 104; *see also City of Revere*, 463 U.S. at 244.

52. 454 U.S. 312 (1981).

53. 748 F.2d at 863. Arguahly, this comparison is ill-considered. The crux of the attorney's unilateral affiliation with her client arose because of the adversary nature of the judicial process. The state pays the public defender to oppose the state in court. This particularized advocacy function is the distinguishing feature of the public defender's employment. While it is true that a doctor, like a lawyer, has ultimate responsibility only to the client (patient) and not to an administrative superior, these professionals are not hired specifically to oppose their employers or the agency paying them under a service contract. The private doctor's position is more analogous to that of a prison ombudsman: a lawyer bired by the state to assist inmates with their legal problems, but not to represent the client in actions against the state.

54. 429 U.S. 97 (1976).

55. Another court has reached the same conclusion as *Calvert* using a slightly different rationale. The United States District Court for Vermont held that the language of *Lugar v. Edmondson Oil*, 457 U.S. 922 (1982), requires not only that the person be a state actor, deemed so by virtue of performing a state function, but that the conduct have its source in

The Fourth Circuit, in a more recent opinion, has left open the question whether *Calvert*'s analysis might also apply to a state employed physician.[56] While *Calvert* clearly grounded its holding, at least in part, on Maryland's historical record of providing medical services to prisoners, courts construing *Calvert* have relied more heavily on the nature of the relationship between the patient and the doctor.[57] Such limited reasoning is specious, however, since it only becomes necessary to consider this relationship once the court has decided that, in other respects, the private actor is performing a public function. The special relationship between these professionals and their patients and clients can be considered only as an exception to the generalized rules regarding the relationship between private actors and state action.

Nothing in the *Calvert* decision or its progeny suggests any retreat from the uniformly held view that detention is a public function. Even *Calvert* quickly disclaimed any possibility that a private doctor performing custodial duties could avoid liability under Section 1983.

Calvert, however, does raise questions about whether a court would consider a private company engaged in the many facets of prison administration to be the equivalent of the state in each of these facets. Traditionally, "public function" analysis has looked at

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state law. The court, quoting from *Lugar*, stated:

> First, the deprivation must he caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the state is responsible. . . . Second the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Nasb v. Wennar, 645 F. Supp. 238, 241 (D. Vt. 1986), *quoting Lugar*, 457 U.S. at 937. In order to meet tbe first prong of the test, the district court beld that the doctor must be acting in conformity with state regulations, be performing custodial or administrative actions, or be encouraged by the state to perform tbe action that is the basis of the lawsuit. *Nash*, 645 F. Supp. at 241-42.

Although the language of *Lugar* might suggest such a two-part analysis, the decisions in *Blum* and *Rendell-Baker* do not utilize tbe first prong. Possibly, the first prong is necessary only in joint participation cases in which the actor becomes vested with state power only on two conditions: use of state law and overt participation of state officials.

56. The court stated:

> The District Court found tbat altbough Dr. Kapil was employed full-time by the state, he had no supervisory or custodial duties regarding inmates and be made his medical decisions based on bis own medical judgment. On these facts, tbe district court concluded tbat Dr. Kapil did not act under color of state law and dismissed the complaint on that basis. . . . We find tbat even if Dr. Kapil were acting under color of state law, a question we do not decide, Jones has not shown that Dr. Kapil was deliberately indifferent to his serious medical needs.

Jones v. Kapil, 803 F.2d 1181 (4th Cir. 1986).

57. *See Nash*, 645 F. Supp. at 241-42.

the principal role of the actor to determine whether the private party performs a public function. If the private actor was found to perform a public function, the court could then treat the actor as the state for purposes of all constitutional litigation—regardless whether the claimed constitutional deprivation related to the public function. For instance, in *Rendell-Baker v. Kohn*,[58] a discharged teacher sued the school principal for dismissing her without a hearing and for unconstitutional reasons. The claim did not relate to the purported public function of education. Nonetheless, the Court resolved the issue by finding that education did not constitute a traditional and exclusive function of the state. Certainly, if the challenged activity's lack of relation to the public function were conclusive, the Court could have disposed of the claim more easily. The Court's failure to disclaim the necessity of a connection between the state function and the challenged conduct certainly indicates that the connection is not dispositive of the issue.

The *Calvert* court's analysis suggests, alternatively, that one might separate the various functions that a private corrections firm would perform and then categorize the firm as a state actor only when it is performing those functions that the state traditionally has performed.[59] Aspects of correctional management such as food services, janitorial work, and construction might fall into the same category that the Fourth Circuit places medical care.[60] In contrast, activities that relate closely to the state's exclusive role in custody and administration of prisons would constitute public functions.

The Eleventh Circuit, which has found the provision of medical care to prisoners to be a public function,[61] has relied on the state's specific constitutional responsibility in the area of medical care rather than on the generalized function of detention.[62] The opinions do not determine clearly the public function status of other aspects of correctional management. Courts will have to assess whether public function analysis should continue to look at the totality of the private contractor's role and make every action a

58. 457 U.S. 830 (1982).

59. Although the Fourth Circuit relies principally on statutes to find that medical care of prisoners has not been historically the exclusive and traditional function of the state, other courts have relied on the Constitution to find sources for state responsibilities. *See supra* note 47 and accompanying text.

60. Obviously, the uniqueness of the relationship between doctor and patient mandated the result in *Calvert*. Other factors might affect which, if any, of these other functions would similarly be exempted from state function treatment.

61. *See supra* note 47 and accompanying text.

62. *Id.*

potential source of constitutional liability[63] or examine each individual aspect of the contractor's work and determine, piecemeal, whether each piece is quintessentially a state function.[64]

III. The Eleventh Amendment Immunities Available to Private Contractors

Even when state action analysis subjects a private actor to potential liability under Section 1983, the defendant might raise one of several immunity defenses.

A. The Eleventh Amendment

Courts have held that the eleventh amendment bars citizens from federal court suits against their own state or another state. Absent the state's waiver of immunity or a congressional abrogation of immunity,[65] citizens cannot name the state as a defendant

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63. In *Medina v. O'Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984), the district court seemed to view detention as the single basis for all correctional activities. The court did not differentiate between any of the various specific activities in which the detaining authority was engaged. The court did not necessarily need to reach this issue under the facts of the particular case, however, because the detainees were challenging the overall conditions of their confinement.

If courts were to separate the detaining authority's various functions, it would complicate significantly "conditions of confinement" lawsuits, in which courts have utilized the "totality of conditions" analysis. Under the eighth amendment, courts look to the entirety of the conditions of confinement to determine whether, examined together, they violate constitutional minima. *See, e.g.*, Hutto v. Finney, 437 U.S. 678 (1978). Were courts to determine that § 1983 subjects the private contractor to suit only in regard to some aspects of correctional management, inmate plaintiffs might be forced to separate their causes of action and try some claims as state tort claims and others as federal constitutional claims. This bifurcation might make it impossible for any one court to review the totality of conditions of confinement.

64. One interesting question might be how courts will view the rights of employees *vis-a-vis* the company. Under the totality approach, employees will have constitutional rights as against tbe employer, *e.g.*, the right to due process hearings prior to termination and the right not to be discharged for exercising their constitutional rights. Conversely, under a piecemeal approach, courts will have to decide whether employment is simply another function that a court must analyze separately, similar to food services or construction, or whether employment relates to the specific function that the employee is performing. Under this approach, employees working at the same facility but performing different functions might possess different rights against their common employer.

65. *See* Pennhurst State School & Hosp. v. Halderman, 465 U.S. 88 (1984). Sovereign immunity may be abrogated only by congressional action that explicitly subjects the states to suit in federal court. Such explicit authorization has been found in Title VII of the Civil Rights Act and in the Civil Rights Attorney's Fee Act, 42 U.S.C. § 1988 (1982). Although the authorization for such abrogation is found in § 5 of the fourteenth amendment, the same section under which § 1983 was legislated, the Supreme Court expressly has held that § 1983 does not abrogate the states' sovereign immunity. Edelman v. Jordan 415 U.S. 651 (1974).

in federal court.[66] Since the state can act only by its agents or employees, this immunity is extended to high ranking, policy-making officials who are in substance acting as the state. Citizens, however, may sue these high-ranking, state policymaking officials to challenge the constitutionality of their actions, even though a suit against a staff official is, in substance, a suit against the state. When a public official acts unconstitutionally, he or she loses the shield of sovereign immunity and becomes susceptible to suit.[67] While subject to suit, the state official, however, may be liable only for prospective injunctive relief.[68] Because the eleventh amendment speaks only of the state, lower ranking officials who do not personify the state for purposes of litigation cannot invoke the defense of sovereign immunity.

The eleventh amendment, by its very terms, protects only the state and those officials whose actions are considered to be the state's actions. Despite the fact that municipal governments exist only by operation of state law and exercise only the authority that the state delegates to them, municipal governments are not protected by eleventh amendment sovereign immunity. Therefore, Section 1983 allows citizens to sue local governments.[69]

A private company that manages a prison or prison system also could not assert the eleventh amendment defense.[70] Unlike the state, whose responsibility it undertakes, the corporation itself, and not just its individual employees, could be held liable in a Section 1983 action. The relief available against a private prison manager could include monetary damages as well as injunctive relief.

In addition, nothing would bar a plaintiff from raising pendant state law claims against either the corporation managing the prison or the corporation's employees in conjunction with the underlying constitutional claim. In *Pennhurst State School and Hospital v.*

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66. Alabama v. Pugh, 438 U.S. 781 (1978). Whether, and under what conditions, the state or its agents may be sued in state court is a legislative determination made by the state. *See supra* notes 8-10 and accompanying text.

67. *Ex Parte* Young, 209 U.S. 123 (1908).

68. *See Edelman*, 415 U.S. 651; Quern v. Jordan, 440 U.S. 332 (1979).

69. *See* Monnell v. Department of Social Servs., 436 U.S. 658 (1978).

70. Generally, firms contracting with governmental entities are able to share the government's immunity in tort actions for incidental injuries necessarily caused by the contracted work. Negligent and intentional torts generally have been excluded from this form of immunity. *See generally* Annot., *Right of Contractor with Federal, State, or Local Public Body to Latter's Immunity from Tort Liability*, 9 A.L.R.3d 382 (1966). This shared immunity necessarily would not apply to constitutional claims because even sovereign officials shed immunity when violating the Constitution. The shared immunity, however, might affect the contractor's liability for pendant tort claims.

Halderman[71] the Supreme Court stated that the eleventh amendment harred state law claims against a state or a high-ranking, policymaking state official. Because a plaintiff could not raise state law claims in the absence of the jurisdictional constitutional claim, the constitutional claim could not be used to bootstrap state law claims that otherwise would be barred by the eleventh amendment. The doctrine of *Ex Parte Young*,[72] allowing state policymakers to be sued when they violate the Constitution, would not be extended to any pendant claims.[73] The *Pennhurst* decision, however, obviously would have no bearing on the prison contracting firm or its employees. Because they are not protected by the eleventh amendment, they would be subject to pendant state law tort claims or claims arising from violation of a state statute as part of their exposure in Section 1983 suits.[74]

B. Qualified Immunity

In addition to the defense of sovereign immunity available to the state and its policy-making officials, individual state executive officials may rely on a defense of qualified immunity. Unless the official violated a law that was clearly established at the time of the challenged conduct, a court cannot hold the official liable for money damages.[75] The rationale behind this defense includes both the need of public officials to carry out their public charge without fear of personal monetary liability and to give them known, clear standards by which they may govern their conduct.[76]

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71. 465 U.S. 89 (1984).

72. 209 U.S. 123 (1908); *see supra* note 67 and accompanying text.

73. The Court held:

> In sum, contrary to the view implicit in decisions such as *Greene v. Louisville & Interurban, R. R.* Co., neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the state that is protected by the Eleventh Amendment. We now hold that the principle applies as well to state law claims brought into federal court under pendent jurisdiction.

Pennhurst, 465 U.S. at 121 (citations omitted).

74. Obviously, however, liability for these claims in state court might be affected by a state's grant of immunity to the firm on the state law claims.

75. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Although *Harlow* involved a claim against a federal official, the qualified immunity accorded state officials in § 1983 actions is decided on the identical standard. *Id.* at 818 n.30.

76. The *Harlow* court noted:

> Consistently with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government officials either to the

Traditionally, qualified or absolute immunity has been accorded only to public officials. The majority opinion in *Lugar v. Edmondson Oil*, however, suggests one exception to this tradition.[77] Justice Powell's dissent in *Lugar* disagreed with the policy of allowing a debtor to obtain money damages pursuant to a Section 1983 action against a creditor who simply relied on a state statute and enlisted the assistance of state officials to collect a just debt. The majority opinion responded to Justice Powell's dissent with the suggestion that an immunity defense, somewhat akin to qualified immunity, could possibly protect creditors in this situation.[78]

Two circuit courts have acted on the Supreme Court's suggestion. The Fifth Circuit Court of Appeals has adopted a form of immunity for creditors who rely on presumptively valid attachment statutes.[79] The court based its decision partly on the same policy consideration that guided the Supreme Court: it would be unfair to allow a damages action against a creditor who relied on an attachment statute that he or she had no reason to know was unconstitutional. In addition, the court considered the historical basis for such an immunity defense. In so doing, the court relied implicitly on the test expressed in *Owen v. City of Independence*[80] for determining whether any immunity is available in Section 1983 actions. *Owen* held that immunities that existed in 1871, the year in which Section 1983 was enacted, are incorporated into Section

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costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar a their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.

Harlow, 457 U.S. at 817-18 (citations omitted).

77. 457 U.S. 922 (1982).

78. The *Lugar* majority stated:

JUSTICE POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture.

Id. at 942 n.23.

79. Folsom Inv. Co., Inc. v. Moore, 681 F.2d 1032 (5th Cir. 1982).

80. 445 U.S. 622, 637 (1980).

1983 jurisprudence if "the tradition of immunity was so fairly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' "[81] When the Fifth Circuit applied this analysis it found that in 1871 a debtor whose property was attached could bring an action for malicious prosecution or malicious attachment against the creditor. In that action, the creditor had an absolute defense if he had acted in good faith. From this history, the court inferred that Congress must have assumed in 1871 that creditors who relied on presumptively valid attachment statutes would not be subject to liability so long as they had no reason to know that the law was unconstitutional.[82]

In adopting this new species of immunity, the Fifth Circuit incorporated the test from *Harlow v. Fitzgerald*[83] by holding that a creditor would receive immunity if it were not clearly established at the time of attachment that the attachment law was unconstitutional.[84] The court made clear, however, that this form of immunity was different from traditional qualified immunity and that the contours of this rule might very well develop differently from those of the traditional *Harlow* rule.[85]

Unlike the Fifth Circuit, the Eighth Circuit Court of Appeals has adopted a test for qualified immunity for private actors without expressly limiting the coverage to creditors. In the context of a challenge to an attachment proceeding, the court allowed the private defendant to assert the defense of qualified immunity rather than create a new type of immunity limited to the attachment situation.[86] The rule of law the Eighth Circuit adopted refers to private parties rather than to creditors. The court's reasoning, however, is situationally specific. In reviewing the history of immunity in this type of case, the court looked to the causes of action for malicious attachment and malicious prosecution, and in discussing the policy underlying its holding, relied heavily on the Supreme Court's reasoning in *Lugar* relating only to attachment situations.[87]

The Eighth Circuit Court of Appeals itself has not had the opportunity to decide explicitly whether this new form of qualified

81. *Id.*
82. *Folsom Inv. Co.*, 681 F.2d at 1038.
83. 457 U.S. 800 (1982).
84. *Folsom Inv. Co.*, 681 F.2d at 1037.
85. *Id.* at 1036-38.
86. Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983).
87. *Id.* at 850-52.

immunity will attach to all private parties or only to some subcategory of defendants including, at the very least, creditors who invoke presumptively valid attachment statutes.[88] A district court in the Eighth Circuit, however, has extended the doctrine to a non-attachment situation.[89] In that case, the plaintiff sued the state licensed detoxification center to which he had been transferred subsequent to his arrest for driving while intoxicated. The court found that the policies underlying qualified immunity dictated that the court should extend immunity to the detoxification center in this situation.[90]

If courts extend qualified immunity to employees of private corrections firms, the issue of whether the corporation itself is entitled to that immunity will remain. In *Owen v. City of Independence*[91] the Supreme Court held that municipal corporations, which exist only by operation of state law and which can perform only those functions delegated to them by the state, are not entitled to raise the defense of qualified immunity. The Court relied on the law in effect in 1871, which indicated that Congress did not intend to immunize municipal governments. Notwithstanding

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88. In *Chicago & Northwestern Transportation Co. v. Ulery*, 787 F.2d 1239 (8th Cir. 1986), the court declined to extend the rule of *Mitchell v. Forsyth*, 472 U.S. 511 (1985), allowing immediate appealability for a denial of qualified immunity to private parties. The decision does not indicate whether the issue in the case was related to attachment.

89. Carman v. City of Eden Prairie, 622 F. Supp. 963 (D. Minn. 1985).

90. *Id.* at 965-66. "Qualified immunity may be extended to private parties under certain circumstances. . . . The same public interest policies discussed in *Buller* persuade the court that Fairview should be entitled to raise the qualified immunity defense in this situation." *Id.*

The opinion ignores, however, the historical roots of the immunity defense as discussed by the Eighth Circuit. Those roots are applicable only to the defense in a challenge to an attachment proceeding. The Supreme Court has indicated that a defense of immunity will pertain only to § 1983 cases when it is clear from history that the defense was commonly used in 1871. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622 (1980).

Carman, apparently, is the only case to extend the doctrine of qualified immunity for private parties beyond the realm of challenges to attachment proceedings. The Ninth Circuit has rejected, without explanation, the extension of the defense of qualified immunity to any private parties. Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (landlord utilized assistance of police in evicting a tenant). The Eleventh Circuit has declined explicitly to reach the issue at this time. The court stated:

> Because of our disposition of this issue, we do not express any opinion on the question of whether in a § 1983 suit, private actors are entitled to the good-faith defense accorded to state officials. We do note, however, that the Supreme Court expressly reserved this question in *Lugar* . . . and that other courts have disagreed about the availability of such a defense . . . .

I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1550 n.11 (11th Cir. 1986) (citations omitted) (challenge to prejudgment attachment).

91. 445 U.S. 622 (1980).

Owen, the Federal District Court for the District of Minnesota has found that nonmunicipal corporations can assert the defense of qualified immunity.[92] The other courts that have granted immunity to private parties in attachment cases have not reached the question explicitly, although in each case the creditor being sued was a corporation. It certainly would be an ironic result if a municipality could contract with a private corrections firm and the corrections firm could assert a defense of qualified immunity unavailable to the municipal corporation.[93]

Conversely, one could look to the nature of the contracting government—state or municipal—to determine whether the firm would be able to assert a defense of qualified immunity. If the government could assert some form of immunity, then the firm would be able to claim some form of qualified immunity. Although this theory is appealing and easily applied, it would encourage firms to contract with states, at the expense of municipalities.

The policies underlying qualified immunity for state employees do not necessarily warrant the extension of that doctrine to the employees of firms engaged in corrections for profit. The doctrine encourages qualified and devoted people to become involved in government and to perform their jobs to the best of their ability without fear of unwarranted litigation. It envisions that state employees will have the good of the state as their goal. Employees of a private corrections firm are responsible for making a profit for the organization. They do not answer to the public at large as do state employees; rather, they answer to their superiors and, in the case of corporate employees, to their stockholders. Unlike state employees, corporate employees may be forced to choose between making money and safeguarding the rights of inmates. A defense of qualified immunity, if awarded to these private employees, might encourage them to cut corners to maximize profits. It has

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92. The court found the rationale of *Owen* inapplicable:

> One of the central rationales articulated by the *Owen* court, however, is that holding municipalities strictly liable for § 1983 damages would equitably spread the loss among the public for constitutional violations caused by executing public policies. This rationale is inapplicable when a private entity like Fairview is involved. Moreover, to deny a private party like Fairview good faith immunity would be unjust when it is required by state statute to exercise discretion. The failure to provide immunity might also deter such organizations from providing necessary services to the public.

Carman, 622 F. Supp. at 966 (citations omitted).

93. Conversely, when the private corporation contracts with the state, it subjects itself to liability that the state itself never faced because the state is protected by sovereign immunity. In that situation, granting qualified immunity to the corporation would not subject it to less liability than the state.

been suggested that a failure to provide the defense might deter good private individuals from providing services to the public.[94] This analysis would not be complete, however, without looking at whether a private actor is required to accept public responsibility, as a state is, or volunteers to enter the arena.

The situation of the employee of the private corrections company is categorically different from the private creditor, who has been clothed with immunity by two federal circuits. The creditor is using a state statute to recover a just debt. He has no choice but to use the statute if he wishes to recover the property. The private corrections firm, conversely, voluntarily has entered a field previously within the exclusive province of the state for the purpose of making a profit. It has accepted the responsibility for ensuring that the prisoners' constitutional rights are protected.

IV. CONCLUSION

In conclusion, although Section 1983 will continue to be a viable remedy for prisoners seeking to challenge the constitutionality of a private corrections provider's practices, the nature of the litigation certainly will reflect the change in governance of the prison system. Most likely, private corrections firms will be considered "state actors" and thus subject to liability under Section 1983. The need to make the state action determination, however, will add a new layer of litigation to the Section 1983 lawsuit. In addition, the liability of private contractors may be greater than that for public employees in comparable situations since the private party will be able to assert fewer immunity defenses.

94. *Carman*, 662 F. Supp. at 966.