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THE IMPLICATIONS OF 42 U.S.C. § 1983 FOR THE  
PRIVATIZATION OF PRISONS†

CHARLES W. THOMAS\* AND LINDA S. CALVERT HANSON\*\*

*More than 900,000 people are currently confined in local jails and state and federal prisons. Since the early 1980's government officials, faced with the rising costs of providing for these individuals, have considered privatizing correctional facilities. Essential to government's interest and to the private sector's willingness to provide correctional facilities is a resolution of the liability each will be exposed to as a result of lawsuits brought by inmates confined in private facilities. In this Article, Professor Thomas and Ms. Calvert Hanson provide an overview of how courts will most likely apply 42 U.S.C. § 1983 in such cases.*

**T**HIS Article examines how the single most influential element of constitutional tort jurisprudence—42 U.S.C. § 1983<sup>1</sup>—is likely to

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1. 42 U.S.C. § 1983 (1982) reads as follows:

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 an action at law, suit in equity, or other proper proceeding for redress.

Precisely when section 1983 actions began to be described quite routinely as "constitutional torts" is uncertain, but at least one commentator, Professor Susanah Mead, has suggested that Professor Marshall Shapo first coined the term in his article entitled *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 *Nw. U.L. REV.* 277, 323-24 (1965). See Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved from Extinction?*, 55 *FORDHAM L. REV.* 1, 2 n.8 (1986).

shape the civil liability exposure of the growing number of private firms that contract with state and local agencies for the full-scale management<sup>2</sup> of correctional facilities.<sup>3</sup> A growing number of government officials view privatization<sup>4</sup> as a means of addressing such critical concerns as overcrowding and rapidly rising correctional costs,<sup>5</sup> but they are uncertain about the magnitude of the liability risks they will encounter if they privatize their correctional facilities. Private corrections firms, in turn, are seeking an understanding of the liability exposure they are likely to encounter under section 1983.

Although the viability of privatization has been the subject of much debate and commentary,<sup>6</sup> the extent of the liability of a private

2. Privatization in the correctional arena comes in two general forms. Partial privatization refers to local units of government contracting with the private sector for the provision of services such as those relating to education, food, medical care, and vocational training. Full privatization refers to units of government contracting with the private sector for the complete management of a correctional facility. Although this analysis is primarily concerned with full privatization, most if not all of the analysis would be equally relevant to partially privatized operations.

3. Between 1972 and 1982, the "total dollar amount of local government contract awards with private firms [increased] from [approximately] \$22 billion to \$65 billion [and] every indication is that this number has continued to rise since 1982." DUDEK & COMPANY, *PRIVATIZATION AND PUBLIC EMPLOYEES: THE IMPACT OF CITY AND COUNTY CONTRACTING OUT ON GOVERNMENT WORKERS* 8 (1988) (report for the National Commission for Employment Policy). The fraction of government expenditures for correctional privatization cannot be established precisely, however. What can fairly be said is that the growth rate of private corrections firms during the 1980's has been remarkably high.

4. Privatization can be defined quite generally as "the attainment of any public policy goal through the participation of the private sector." *Id.* at 7. Although correctional privatization most commonly comes in the form of decisions by units of government to contract with the private sector for services it otherwise would be obliged to provide itself, privatization can be accomplished in such other ways as the sale of government assets and the creation of voucher systems by government which permit those receiving vouchers to procure various services from the vendor of their choice.

5. The perceived advantages of various forms of privatization are numerous. A recent national survey revealed that 74% of the governmental entities responding emphasized cost savings and that 33% noted improved service quality. TOUCHE ROSS & COMPANY, *PRIVATIZATION IN AMERICA: AN OPINION SURVEY OF CITY AND COUNTY GOVERNMENTS ON THEIR USE OF PRIVATIZATION AND THEIR INFRASTRUCTURE NEEDS* 5 (1987). Interestingly, 34% viewed the risk sharing feature of privatization as an important advantage of contracting out for services. *Id.* For a more focused consideration of the perceived advantages of correctional privatization, see C. CAMP & G. CAMP, *PRIVATE SECTOR INVOLVEMENT IN PRISON SERVICES AND OPERATIONS* (1984); Logan & Rausch, *Punish and Profit: The Emergence of Private Enterprise Prisons*, 2 JUST. Q. 303 (1985); Mullen, *Corrections and the Private Sector*, 65 PRISON J. 1 (1985); Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889 (1987).

6. See, e.g., J. HACKETT, H. HATRY, R. LEVINSON, J. ALLEN, K. CHI, & E. FEIGENBAUM, *ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS* (1987); C. LOGAN, *PRIVATE PRISONS: CONS AND PROS* (1988) [hereinafter C. LOGAN, *PRIVATE PRISONS*]; J. MULLEN, K. CHABOTAR, & D. CHARROW, *THE PRIVATIZATION OF CORRECTIONS* (1985); C. RING, *CONTRACTING FOR THE OPERATION OF PRIVATE PRISONS: PROS AND CONS* (1987); I. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION* (1988) [hereinafter I. ROBBINS, *PRIVATE INCAR-*

corrections firm under section 1983 is presently unclear. At the very core of section 1983 litigation are the "state action" and "color-of-state-law" requirements that permit plaintiffs to name private parties as defendants only under limited circumstances. Notwithstanding the United States Supreme Court's widely analyzed efforts to clarify these requirements,<sup>7</sup> the circumstances under which private persons or entities will encounter civil liability for constitutional torts are not easily defined.<sup>8</sup> Uncertainty also arises when one attempts to deal with such issues as whether employees of private corrections firms will be permitted to raise the various immunity defenses presently available to their public sector counterparts.

The objective of this Article is to provide an overview of how the courts will most likely apply section 1983 in suits brought by inmates in correctional facilities being managed on behalf of state and local government by private corrections firms.<sup>9</sup> The first section of this analysis reviews the historical development of section 1983. Following a review of some of the fundamental aspects of section 1983 jurisprudence, the third section addresses whether and under what circumstances the conduct of private corrections firms will be deemed state action, thereby qualifying the firms as section 1983 defendants. The next section reviews the immunity defenses that are now available to public sector employees and examines whether private correctional employees are likely to have access to any of these defenses. The fifth section briefly illustrates the circumstances under which an inmate injured in a private corrections facility may be able to sue the contracting unit of government. The final section reviews the conclusions

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CERATION]; C. THOMAS, L. LANZA-KADUCE, L. CALVERT HANSON, & K. DUFFY, *THE PRIVATIZATION OF AMERICAN CORRECTIONS: AN ASSESSMENT OF ITS LEGAL IMPLICATIONS* (1988); Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867 (1987); Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987); Woolley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 DICK. L. REV. 307 (1985); Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986); Note, *Private Prisons*, 36 EMORY L.J. 253 (1987).

7. See *National Collegiate Athletic Ass'n v. Tarkanian*, 109 S. Ct. 454 (1988); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

8. Recent experience with the full-scale privatization of local and state correctional facilities yields little directly relevant case law. Indeed, *West v. Atkins*, 108 S. Ct. 2250 (1988), is the only section 1983 case involving a private provider of correctional services that has been decided by the United States Supreme Court. For a discussion of *West*, see *infra* text accompanying notes 73-90.

9. Most features of this analysis will apply more generally to the fairly wide array of other settings in which government has contracted with the private sector for services traditionally supplied by government directly.

reached and suggests their implications for the privatization of corrections.

### I. HISTORICAL DEVELOPMENT OF SECTION 1983

The origin of section 1983 as a protection against the unlawful deprivation of the rights of citizens by the State dates back to the period immediately after the Civil War and the ratification of the thirteenth, fourteenth, and fifteenth amendments to the United States Constitution.<sup>10</sup> The Civil Rights Act of 1871,<sup>11</sup> the precursor to section 1983,<sup>12</sup> was intended to be a civil enforcement mechanism for section one of the fourteenth amendment.<sup>13</sup> The purposes of the original version of section 1983 were at least three-fold: to negate any state laws which sought to draw invidious distinctions between categories of citizens on the basis of race; to provide a federal remedy for those suffering constitutional deprivations in settings where state law clearly provided no adequate remedy; and to provide a federal remedy for those suffering constitutional deprivations in settings where state law, although arguably providing an adequate remedy on its face, was inadequate as applied.<sup>14</sup>

Only a small number of civil rights cases came before federal courts until landmark decisions by the Supreme Court during the past three decades significantly expanded the utility of section 1983.<sup>15</sup> For example, in 1960, the year before the Court's landmark decision in *Monroe v. Pape*,<sup>16</sup> there were only "287 suits filed in, or removed to, federal district court under the federal civil rights statutes, not including suits by or against the United States or its officers."<sup>17</sup> Four developments

10. See *Monell v. Department of Social Servs.*, 436 U.S. 658, 664-65 (1977).

11. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3) (1982)) (Ku Klux Klan Act).

12. See *Monell*, 436 U.S. at 665.

13. *Id.* This section provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

14. *Monroe v. Pape*, 365 U.S. 167, 173-74 (1961).

15. One commentator has suggested that section 1983 as a federal remedy "was largely ignored for the first 70 years of its existence" and was first given its modern interpretation by the United States Supreme Court in *Hague v. Committee for Indust. Org.*, 307 U.S. 496 (1939) (right to assemble and distribute literature protected against the states by the fourteenth amendment through § 1983). Friedman, *Constitutional Torts*, in SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES, 1987: CURRENT DEVELOPMENTS 393, 396 (Practising Law Inst. ed. 1987).

16. 365 U.S. 167 (1961).

17. T. EISENBERG, CIVIL RIGHTS LITIGATION: CASES AND MATERIALS 74 (1981).

over the past twenty-five years, however, increased the appeal of section 1983 to potential plaintiffs in constitutional tort cases.

The first was the *Monroe* decision, in which the Supreme Court held that section 1983 provides a federal remedy independent of existing state judicial remedies.<sup>18</sup> Coupled with the holding of *Patsy v. Board of Regents*<sup>19</sup> that available administrative remedies need not be exhausted prior to the filing of claims under section 1983,<sup>20</sup> the opportunity to bring claims under section 1983 increased substantially.

Second, the enactment of the Civil Rights Attorney's Fees Award Act of 1976<sup>21</sup> enhanced the appeal of section 1983 suits—to attorneys in particular. Although the Supreme Court has set limits on section 1988 claims,<sup>22</sup> the Court's general interpretation of section 1988 has been generous. For example, the Court has held that plaintiffs need only "succeed on any significant issue in litigation which achieves some of the benefit [the parties] sought in bringing suit"<sup>23</sup> and that a plaintiff may meet the "prevailing party test" for purposes of section 1988 when a settlement is reached before his or her federal constitutional claim has been fully litigated.<sup>24</sup> The Court has also held that there is no requirement that fee awards under section 1988 be proportional to any damages recovered.<sup>25</sup>

The third development is of critical significance for those concerned with the liability of local- rather than state-level correctional facilities. In *Monell v. Department of Social Services*<sup>26</sup> the Court overruled the

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18. 365 U.S. at 183.

19. 457 U.S. 496 (1982).

20. *Id.* at 516.

21. 42 U.S.C. § 1988 (1982) ("In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

22. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987) (use of various mechanisms for seeking unreasonably high attorneys' fees are not permitted); *North Carolina Dep't of Transp. v. Crest St. Community Council, Inc.*, 479 U.S. 6 (1986) (plaintiffs who rely on available administrative mechanisms rather than on § 1983 as a remedy may not subsequently bring a § 1983 action purely as a means of seeking to recover attorney fees).

23. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

24. *Maier v. Gagne*, 448 U.S. 122, 129-30 (1980). More specifically, a plaintiff meets the "prevailing party test" when the case is settled in such a way as to affect "*the behavior of the defendant towards the plaintiff.*" *Hewitt v. Helms*, 107 S. Ct. 2672, 2676 (1987) (emphasis in original). For a thorough consideration of the many issues presented in section 1988 cases prior to *Hewitt*, see Kirklín, *The Recovery of Attorney's Fees in Civil Rights Cases Pursuant to 42 U.S.C. Section 1983*, in SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES, 1987: CURRENT DEVELOPMENTS 727 (Practising Law Inst. ed. 1987).

25. *City of Riverside v. Rivera*, 477 U.S. 561, 570 (1986).

26. 436 U.S. 658 (1978).

portion of *Monroe v. Pape*<sup>27</sup> which held that municipalities were not "persons" subject to suit within the meaning of section 1983.<sup>28</sup> More specifically, for the majority in *Monell* Justice Brennan wrote the following:

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 . . . where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.<sup>29</sup>

This decision is of major significance for local-level operations of government for at least two reasons. The obvious reason is that local units of government became suitable section 1983 defendants following *Monell*. A less obvious reason is that local units of government do not enjoy the eleventh amendment immunity from suits for monetary damages enjoyed by their state-level counterparts.<sup>30</sup> Thus, a very important effect of *Monell* was to create a "deep pocket" defendant for an exceedingly large pool of potential plaintiffs.

Finally, in *Maine v. Thiboutot*,<sup>31</sup> decided in 1980, the Court held that section 1983 suits may be brought for deprivation of rights conferred by statutes generally in addition to rights conferred by "civil-rights" statutes.<sup>32</sup> However, the Court subsequently retreated from what initially seemed to be a generous interpretation of the range of rights protected by section 1983. In several cases since, for instance, the Court has held that the exclusive remedy for some violations of federal statutes is found in those specific statutes rather than in section 1983.<sup>33</sup> Notwithstanding these and other limitations on definitions

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27. 365 U.S. 167 (1961).

28. *Id.* at 190-91.

29. *Monell*, 436 U.S. at 690 (footnote omitted) (emphasis in original).

30. *See id.* n.54.

31. 448 U.S. 1 (1980).

32. The Court rejected a contention that "the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*" language of section 1983 means only a deprivation of civil rights or equal protection laws and held that it must be read more broadly. *Id.* at 4 (emphasis in original).

33. *See, e.g.,* *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (distinguishing between federal laws which only establish policies—thus denying § 1983 claims—and federal laws that actually create federal rights—thus permitting § 1983 claims); *Ring v. Crisp County Hosp. Auth.*, 652 F. Supp. 477 (M.D. Ga. 1987) (Age Discrimination in Employment Act provides an exclusive remedy for claims of age discrimination; consequently, such claims do not give rise to a cause of action under § 1983.).

of federal constitutional rights protected by section 1983,<sup>34</sup> *Thiboutot* broadened the gate through which plaintiffs could move in their quest for section 1983 remedies.

These and related developments have contributed to an enormous growth of section 1983 cases. In 1989, for example, approximately 40,000 or more filings—roughly twenty percent of the total workload of the federal courts—will involve alleged violations of civil rights.<sup>35</sup> A substantial proportion of these cases will be brought by inmates in local jails and state prisons.<sup>36</sup> Indeed, the evidence reveals that the number of civil rights suits filed by inmate plaintiffs has been rising rapidly: data presented in a recent report show that the number of civil rights actions filed by state inmates in 1981 was 15,639, and that the number had increased by 46.89% during 1987 to a total of 22,972.<sup>37</sup>

The costs to government associated with this volume of litigation will be substantial. Thus, to the degree that private corporations could provide a buffer for the existing liability exposure of government either directly—for example, by including significant indemnification clauses in their contracts with government, or indirectly—for example, by improving the efficiency and effectiveness of correctional operations and thereby decreasing the likelihood of successful inmate suits—the benefits of privatization would be very significant.

## II. FUNDAMENTAL ASPECTS OF SECTION 1983 JURISPRUDENCE

The need for an overview of fundamental aspects of section 1983 actions, unfortunately, presents a broad array of problems. The cases dealing with section 1983 are many, the substantive issues they address reach far beyond concerns with the rights of confined persons, and, perhaps largely because the legal standards appropriate for section 1983 cases remain unsettled, it is exceedingly difficult to derive general principles from existing case law.<sup>38</sup> What follows, therefore, is not an

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34. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983).

35. Thomas, *Inmate Litigation: Using the Courts or Abusing Them?*, 50 CORRECTIONS TODAY 124, 125-26 (1988). Importantly, the data reported do not reveal an increase in the rate with which such actions are being brought by state inmates. The number of civil rights suits reported for 1981 per 100 inmates is 4.69. The per 100 inmate figure for 1987 is 4.39. *Id.* Thus, the rise in the total number of suits filed appears to be largely an artifact of the rapid growth in the number of state inmates being confined rather than an increased willingness on the part of inmates to initiate civil rights suits.

36. *Id.*

37. *Id.*

38. Case law in this area is complicated partially because of the diversity of specific interests implicated by state action. The risk of error can be considerable when one encounters an issue that has not been addressed directly within a jail or prison context by prior section 1983 cases, and one is limited to drawing reasonable inferences from cases decided in quite dissimilar areas.



exhaustive statement of section 1983 jurisprudence, but rather a summary of four basic principles.

First, section 1983 does not create any new substantive rights. Instead, it provides a legal remedy for deprivations of preexisting legal rights found in the Constitution<sup>39</sup> or in federal statutes that reach beyond a declaration of policy and do not themselves provide an exclusive remedy.<sup>40</sup>

Second, a section 1983 plaintiff need not be a "person" in the ordinary sense of that term<sup>41</sup> or a "citizen" in the legal sense of that term.<sup>42</sup>

Third, although the vast majority of section 1983 cases initially come before federal district courts in accordance with one or more provisions of federal law,<sup>43</sup> section 1983 claims also may be brought before a state court.<sup>44</sup> It is unclear why the dominant preference is for a federal rather than a state forum. On a general level, of course, it has long been felt that federal courts provide a more responsive forum than do state courts for plaintiffs who wish to pursue federal constitutional issues. Additionally, however, the preference for a federal forum almost surely flows from more complex tactical considerations such as mechanisms for drawing prospective jurors in the federal versus state jurisdictions.<sup>45</sup>

Fourth, plaintiffs prevailing under section 1983 may be granted actual damages in an amount typically determined by relevant principles of tort law. These include nominal damages when a constitutional deprivation causes no actual injury,<sup>46</sup> punitive damages when there is

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39. See *Parratt v. Taylor*, 451 U.S. 527, 535 (1980).

40. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1980).

41. See, e.g., *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. 1981) (church could maintain civil rights action on behalf of its members).

42. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 212 (1982) (equal protection clause provides that no state shall deny the equal protection of the laws to *any person* within its jurisdiction).

43. E.g., 28 U.S.C. § 1331 (Supp. II 1984).

44. See *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980).

45. In state courts, for example, prospective jurors are often drawn from lists of registered voters within the respective county. See, e.g., FLA. STAT. § 40.01 (1987). In federal court, by contrast, prospective jurors are drawn from lists of registered voters or actual voters within the entire district. 28 U.S.C. § 1863(b)(2) (1982). In addition to drawing prospective jurors from a larger geographical area, federal courts allow sources of names other than voter registration lists to be used where necessary to guarantee to federal litigants the right "to juries selected at random from a fair cross section of the community." *Id.* § 1861. Imagine that you have been called upon to represent an inmate plaintiff confined in a prison located in a rural county who alleges that state correctional officials have shown a constitutionally unacceptable degree of indifference to his or her legitimate medical needs. Obviously the interests of such a plaintiff would not be served by bringing such a claim before a state court with a jury selected from the citizens of the rural county in which the prison is located—a county whose largest employer might well be a department of corrections and whose judge might well be an elected official.

46. *Carey v. Phipus*, 435 U.S. 247, 254 (1978).

evidence that the defendant's conduct was "motivated by evil motive or intent or . . . involves reckless or callous indifference to the federally protected rights of others,"<sup>47</sup> and injunctive and declaratory relief.<sup>48</sup> The availability of these various forms of relief varies with the character of the defendant as well as, of course, the character of the constitutional injury suffered.<sup>49</sup>

In addition to the above-described fundamental aspects of section 1983, there are two more complex dimensions to discuss: the under-color-of-state-law requirement and the availability of immunity defenses. Whether private correctional facilities will meet the under-color-of-state-law requirement, and whether they or their employees will be accorded some type of immunity defense, will largely shape their liability exposure under section 1983.

### III. THE UNDER-COLOR-OF-STATE-LAW AND STATE ACTION REQUIREMENTS

The plain language of section 1983 requires that plaintiffs offer proof that their injuries were caused by a person acting "under color of any statute, ordinance, regulation, custom, or usage of any State."<sup>50</sup> Additionally, the remedy provided by section 1983 is available only for the "deprivation of any rights, privileges, or immunities, secured by the Constitution and laws [of the United States]."<sup>51</sup> When a plaintiff brings a section 1983 action, the plaintiff must prove that the conduct constitutes state action as an element of the underlying constitutional violation. In such a case, the action must not only be taken under color of state law; it must also constitute state action for purposes of the fourteenth amendment.<sup>52</sup>

The Supreme Court has not yet clarified all aspects of the relationship between the section 1983 under-color-of-state-law requirement and the fourteenth amendment state action requirement. The Court did give some guidance, however, in its *Lugar v. Edmondson Oil Co.*<sup>53</sup>

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47. *Smith v. Wade*, 461 U.S. 30, 56 (1983). *But see* *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (municipality immune from punitive damages).

48. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

49. An illustration of how the remedy depends in part on the character of the defendant is provided by section 1983 actions for monetary damages filed by state inmate plaintiffs against a state, a state agency, or a state official being sued in his or her official capacity. Such suits are generally barred by the eleventh amendment. *See Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). By contrast, suits for monetary damages are possible when they are brought against local units of government. *Id.*

50. 42 U.S.C. § 1983 (1982).

51. *Id.*

52. *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978).

53. 457 U.S. 922 (1982).

decision. The Court observed that although it had treated the two requirements as identical in some of its previous cases,<sup>54</sup> the two elements are analytically distinct.<sup>55</sup> Despite this analytical distinction, the Court concluded that conduct satisfying the fourteenth amendment state action requirement would also satisfy the section 1983 under-color-of-state-law requirement.<sup>56</sup> The Court pointed out, however, that conduct which satisfies the section 1983 under-color-of-state-law requirement will not necessarily meet the fourteenth amendment state action requirement.<sup>57</sup>

Because most inmate suits are predicated on alleged violations of constitutional rights secured by or through the fourteenth amendment, the controlling question will be whether the conduct complained of constitutes state action.<sup>58</sup> In *Lugar*, the Court established a two-part test for determining whether conduct is state action. 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."<sup>59</sup> Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."<sup>60</sup>

Prior to *Lugar*, the Court had developed at least four standards for determining whether the conduct of a private actor constitutes state action. The joint participation test focuses on the degree to which private parties acted in concert with or conspired with government offi-

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54. *Id.* at 928-29.

55. *Id.* at 935-36 n.18.

56. *Id.* at 934. The Court reasoned that since the predecessor statute to section 1983 was enacted to enforce the provisions of the fourteenth amendment, it would be inconsistent with Congressional intent for the Court to "read the 'under color of any statute' language of the Act in such a way as to impose a limit on these fourteenth amendment violations that may be redressed by the § 1983 cause of action." *Id.*

57. *Id.* The Court's conclusion is significant in section 1983 cases predicated on constitutional or statutory provisions which—unlike the fourteenth amendment—contain no state-action requirement. As the Court recognized, in such cases the under-color-of-state-law requirement will be "a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right." *Id.*

58. Thus, it will be unnecessary for the courts to determine whether the conduct falls within the potentially more expansive reach of action under color of state law.

59. *Id.*

60. *Id.* Although this language appears to require a two-part analysis, the Court in *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), did not utilize the first prong. One commentator has suggested that the first prong might be 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. *Kay*, *supra* note 6, at 879 n.55.

cial.<sup>61</sup> The symbiotic relationship test directs attention toward the overall relationship that exists between government and a private entity.<sup>62</sup> The close nexus test focuses more directly on the linkage between government and the particular actions taken by a private entity.<sup>63</sup> Finally, the public function test considers whether the private entity's role is one "traditionally associated with sovereignty."<sup>64</sup>

Although a private corrections firm working on behalf of and under contract with a state or local unit of government might satisfy any one of the above four tests,<sup>65</sup> the public function test offers the most persuasive means of finding that conduct of a private corrections firm constitutes state action. As articulated in *Rendell-Baker v. Kohn*,<sup>66</sup> the public function test turns primarily on whether a private entity is performing a function that "has been 'traditionally the exclusive prerogative of the state.'"<sup>67</sup>

In *Medina v. O'Neil*,<sup>68</sup> for example, the District Court for the Southern District of Texas, applying the public function test, held that conduct of a private firm hired by the United States Immigration and Naturalization Service to detain aliens on a short-term basis was state action for the purposes of a *Bivens* action.<sup>69</sup> Although the role of the private firm in *Medina* encompassed two functions "traditionally the exclusive prerogative of the state" (immigration and detention),<sup>70</sup> the opinion of the court suggests that fulfillment of the detention function alone would have qualified the defendant's conduct as state action:

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61. See *Dennis v. Sparks*, 449 U.S. 24 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

62. See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Perez v. Sugarman*, 499 F.2d 761 (2d Cir. 1974).

63. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

64. *Id.* at 353.

65. For an application of these tests to the private corrections context, see Kay, *supra* note 6, at 871-880. See also Little, McPherson & Healey, *Section 1983 Liability of Municipalities and Private Entities Operating Under Color of Municipal Law*, 14 *STET. L. REV.* 565, 571-92 (1985).

66. 457 U.S. 830 (1982).

67. *Rendell-Baker*, 457 U.S. at 842 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982)) (emphasis in original). In *Rendell-Baker* the Court held that while education had traditionally been a function of the state, it had never been an exclusive public function. *Id.*

68. 589 F. Supp. 1028 (S.D. Tex. 1984), *vacated in part, rev'd in part on other grounds*, 838 F.2d 800 (5th Cir. 1988). As the Court of Appeals decided there was no underlying statutory or constitutional violation, it did not reach the state action question.

69. *Id.* at 1038. A *Bivens* action is a lawsuit against a federal actor alleging that the defendant's act deprived the plaintiff of a right secured by the United States Constitution. It is, essentially, the federal actor counterpart of a section 1983 action; the requirement of state action is identical. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

70. *Medina*, 589 F. Supp. at 1038.

[D]etention is a power reserved to the government, and is an exclusive prerogative of the State. As the Supreme Court stated, "[w]hile 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."<sup>71</sup>

The court in *Medina*, in addition to considering the government's traditionally exclusive role in involuntary detention, emphasized that the government authorized the contracting firm to detain suspected illegal aliens generally and ordered the firm to detain these suspects in particular.<sup>72</sup>

A private corrections scenario would appear to encompass all three circumstances. The contracting facility would be fulfilling a traditionally exclusive governmental role, the government would authorize the private facility to detain generally by the terms of the contract, and the government would in essence order the facility to detain particular inmates by sentencing them. Based on the facts of *Medina*, a private corrections facility would thus appear to satisfy the public function test. Consequently, its conduct would be considered state action for the purposes of section 1983.

To the extent the underlying constitutional violation is a failure to provide constitutionally mandated services, the Supreme Court's recent holding in *West v. Atkins*<sup>73</sup> supports this conclusion as well. In *West*, the Supreme Court addressed the question whether the conduct of private physicians working under contract to units of government in correctional settings was conduct "under color of state law" and therefore state action for the purposes of section 1983.<sup>74</sup> The Eleventh Circuit Court of Appeals had been at odds with the Fourth Circuit Court of Appeals regarding this question.<sup>75</sup> In *Ancata v. Prison*

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71. *Id.* at 1038 (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978)) (citations and quotations omitted).

72. *Id.* at 1039.

73. 108 S. Ct. 2250 (1988).

74. *Id.* at 2252. Although the Court framed its analysis in terms of "under color of state law," in the opinion's concluding paragraph the Court stated that "we conclude that respondent's delivery of medical treatment to West was state action." *Id.* at 2260. Thus, the decision may be read as ultimately grounded on a finding of state action.

75. Compare *West v. Atkins*, 815 F.2d 993 (4th Cir. 1987), *rev'd*, 108 S. Ct. 2250 (1988) and *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985) with *Ort v. Pinchback*, 786 F.2d 1105 (11th Cir. 1986) and *Ancata v. Prison Health Servs.*, 769 F.2d 700 (11th Cir. 1985). Before the United States Supreme Court decided *West*, other federal circuits had implicitly concluded that prison physicians may act under color of state law. See *West v. Atkins*, 108 S. Ct. 2250, 2254 n.7 (1988) (citing *Miranda v. Munoz*, 770 F.2d 255 (1st Cir. 1985);

*Health Services*,<sup>76</sup> relying in large measure on *Estelle v. Gamble*,<sup>77</sup> the Eleventh Circuit had held that the conduct of a private provider of medical services to inmates satisfied the under-color-of-state-law requirement.<sup>78</sup> The Fourth Circuit, relying most directly on its own previous holding in *Calvert v. Sharp*,<sup>79</sup> had held to the contrary in *West v. Atkins*.<sup>80</sup> To reach this quite strained holding, the Fourth Circuit began by noting that in *Polk County v. Dodson*<sup>81</sup> the Supreme Court held that attorneys working for the state as public defenders did not meet the under-color-of-state-law requirement and thus could not be named as defendants in section 1983 actions.<sup>82</sup> Largely ignoring that this prior Supreme Court holding was grounded almost entirely on a recognition that public defenders are in an adversarial position to the state as a matter of professional obligation,<sup>83</sup> the Fourth Circuit sought to create what amounted to an exception for an ambiguously defined class of professional persons who work under contract with units of government. The apparent definition of the class would be those professional persons who retain the power to exercise their best professional judgment and who exercise no custodial or supervisory control over inmates.<sup>84</sup>

In *West*, a unanimous Supreme Court reversed the Fourth Circuit.<sup>85</sup> Instead of looking at whether the actors were state employees at the time they were alleged to have caused a constitutional deprivation, the Court focused on the nature of the service any person, whether a public or a private employee, was charged with providing at the time of an alleged deprivation.<sup>86</sup> If the service was one the state itself was constitutionally mandated to provide and the state merely chose to meet

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Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978); Murrell v. Bennett, 615 F.2d 306 (5th Cir. 1980); Byrd v. Wilson, 701 F.2d 592 (6th Cir. 1983); Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981); Kelsey v. Ewing, 652 F.2d 4 (8th Cir. 1981)).

76. 769 F.2d 700 (11th Cir. 1985).

77. 429 U.S. 97 (1976) (deliberate indifference to the medical needs of inmates violated the constitutional rights accorded inmates by the eighth and fourteenth amendments).

78. *Ancata*, 769 F.2d at 703.

79. 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985).

80. 815 F.2d 993 (4th Cir. 1987), *rev'd*, 108 S. Ct. 2250 (1988).

81. 454 U.S. 312 (1981).

82. *West*, 815 F.2d at 995.

83. *Polk County*, 454 U.S. at 320.

84. In *Calvert v. Sharp*, 748 F.2d 861 (4th Cir. 1984), *cert. denied*, 471 U.S. 1132 (1985), for example, the court described a private physician working under contract in a Maryland prison as one who "did not have any custodial or supervisory duties" and whose obligation "was not to the mission of the state but to treat patients referred to him by other physicians." *Id.* at 864. The court then concluded that he therefore "did not act under color of state law." *Id.*

85. *West v. Atkins*, 108 S. Ct. 2250, 2260 (1988).

86. *Id.* at 2259.

its obligation via contracting with a private entity for the service, then those providing the service acted under color of state law for purposes of section 1983.<sup>87</sup> More specifically, the Court observed that:

It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State . . . . [C]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.<sup>88</sup>

Although *West* directly addressed only the question of whether private physicians working under contract to provide medical services to state inmates satisfies the section 1983 under-color-of state-law requirement, it appears to follow from this holding that under some circumstances the conduct of private correctional employees would subject those employees, and, under appropriate circumstances, their employers,<sup>89</sup> to liability for constitutional torts. Those who are involuntarily confined in local jails while awaiting trial or serving sentences and those who are confined in state prisons following conviction are constitutionally entitled to various types of services—including adequate food, proper medical care, and sufficient space in which to live.<sup>90</sup> When and if the types or levels of services that the state is constitutionally mandated to provide are not provided, it appears that those who encounter such deprivations can turn to section 1983 in their quest for a legal remedy.

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87. *Id.*

88. *Id.* In addition, the Court observed that "the State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract." *Id.* This emphasis on what the State is obliged to do, and by logical implication what the State is obliged to refrain from doing, is at the core of the Court's holding. Whether the State discharges its responsibilities to inmates itself or via the actions of a private entity with whom it has formed a contractual relationship should not be dispositive as to whether inmates have a cause of action under section 1983—although it might be quite relevant when considering against whom an action might be brought.

89. Plaintiffs may not predicate a section 1983 action on absolute liability, vicarious liability, or *respondeat superior* theories. There is no reason to believe that such prohibitions would be lifted merely because a section 1983 suit was brought against a private person or entity whose relationship with a unit of government was sufficient to qualify it as a state actor. Thus, the section 1983 liability of a private correctional employee would not in and of itself establish the liability of the employee's employer.

90. The view, advanced many years ago in *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871), that an inmate is nothing more than a "slave of the State," *Id.* at 796, whose constitutional rights vanish as he or she walks through the gates of a jail or prison, is no longer held. Consequently, rights secured by various constitutional provisions, while subject to significant limitations, cannot be abridged by either public or private prison officials.

#### IV. AVAILABILITY OF IMMUNITY DEFENSES UNDER SECTION 1983

Although section 1983 has no immunity provisions, governmental defendants have traditionally been accorded some type of immunity from suit. It is presently unclear whether these immunity defenses will be extended to private corrections firms or their employees.

##### A. Availability of Immunity Defenses to Governmental Defendants

A consideration of selected defenses and immunities available to section 1983 defendants is a sometimes awkward and complex task. Part of the reason for this complexity is that some categories of government actors are absolutely immune from suit—such as judges,<sup>91</sup> certain limited categories of persons who exercise quasi-judicial powers,<sup>92</sup> prosecutors,<sup>93</sup> parole officials,<sup>94</sup> and witnesses.<sup>95</sup> Many more categories of government actors—including, under most circumstances, police officers and correctional officers—enjoy a qualified rather than an absolute immunity from suit.<sup>96</sup>

Another reason for the complexity is the variety of circumstances under which attention focuses on the character of the activity rather than on the position of the person engaging in the activity. In the recent case of *Arteaga v. State*,<sup>97</sup> for example, the initiation of disciplinary proceedings by state correctional officers was held to be a quasi-judicial act and the officers were thus shielded from suit by absolute immunity.<sup>98</sup> However narrow the value of cases like *Arteaga* may prove to be, the fact remains that the Supreme Court recently has favored a close analysis of the functions performed by officials and how those functions would be enhanced or diminished via officials' being accorded access to an immunity defense.<sup>99</sup>

Finally, the matter is further complicated because section 1983 contains no provision for any kind of immunity. Nevertheless, the availa-

91. *Stump v. Sparkman*, 435 U.S. 349 (1978); see Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879.

92. *Butz v. Economou*, 438 U.S. 478 (1978).

93. *Imbler v. Pachtman*, 424 U.S. 409 (1976).

94. *Sellers v. Procunier*, 641 F.2d 1295 (9th Cir.), cert. denied, 454 U.S. 1102 (1981).

95. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

96. See *Anderson v. Creighton*, 483 U.S. 635 (1987).

97. 72 N.Y.2d 212, 527 N.E.2d 1194, 532 N.Y.S.2d 57 (1988).

98. 72 N.Y.2d at 214, 527 N.E.2d at 1195, 532 N.Y.S.2d at 58. But see *Cleavinger v. Saxner*, 474 U.S. 193 (1985) (prison disciplinary committee members entitled to a qualified good faith immunity defense but not to absolute immunity); *Malley v. Briggs*, 475 U.S. 335 (1986) (police arrest decisions protected from suit by qualified good faith immunity but not by absolute immunity).

99. See, e.g., *Forrester v. White*, 484 U.S. 219 (1988); *Cleavinger v. Saxner*, 474 U.S. 193 (1985).



bility of absolute or qualified immunity from suit flows from the frequently expressed view of the Supreme Court that "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and . . . they likely intended these common-law principles to obtain [in section 1983 actions], absent specific provisions to the contrary."<sup>100</sup>

### 1. Individual Immunities

Individual immunity is granted only in those circumstances where overriding public policy considerations mandate that officials be shielded from personal liability to ensure their ability to perform their duties. This type of immunity may be either absolute or qualified. Traditionally, the privilege of absolute immunity functioned as a complete defense that entitled government officials to a summary judgment subject only to the requirement that their actions were within the scope of official duties.<sup>101</sup> Absolute immunity is thus granted in only a few limited cases. Federal legislative and executive officials sued in their individual capacities are protected by an absolute common law immunity.<sup>102</sup> A more modest number of state and local level officials sued in their individual capacities are protected by absolute immunity.<sup>103</sup>

There is, however, a clear shift toward limiting the circumstances under which either absolute or qualified immunity will be granted.<sup>104</sup>

100. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

101. *Chastain v. Sundquist*, 833 F.2d 311 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2914 (1988).

102. Although federal actors cannot be named as plaintiffs in a section 1983 claim, they are viable targets under other tort theories. Consequently, the immunity status of federal actors has been included in this analysis. Article I, section 6 of the United States Constitution—the speech and debate clause—affords absolute federal legislative immunity only for purely legislative functions. *See Barr v. Matteo*, 360 U.S. 564 (1959); *Browning v. Clerk of U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986). *But see Chastain*, 833 F.2d at 312 (congressmen not absolutely immune from suit for tort alleged to have been committed during the course of official duty but outside the scope of the speech or debate clause immunity). Additionally, although not founded in specific constitutional provisions, executive immunity has been recognized at common law and through judicial decisions. *See, e.g., Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (President has absolute immunity from civil liability for his official acts).

103. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors enjoy absolute immunity from claims for damages for prosecutorial acts within scope of their duties); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute legislative immunity extended to state legislators while performing legitimate legislative acts); *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983) (absolute legislative immunity granted to local legislators). *But see Williams v. Anderson*, 562 F.2d 1081 (8th Cir. 1977) (school board member denied absolute immunity); *Jones v. Diamond*, 519 F.2d 1090 (5th Cir. 1975) (county supervisor denied absolute immunity).

104. For example, judges' traditional enjoyment of absolute immunity, once thought necessary to promote uninhibited judicial decision-making, *see Stump v. Sparkman*, 435 U.S. 349

The granting of immunity, to be more specific, requires the presence of the following two elements: (1) a showing that the immunity being asserted was recognized at common law, and (2) evidence demonstrating that a strong public policy interest will be served by an immunity award.<sup>105</sup> With respect to the second element, the Supreme Court has emphasized the following two public policy concerns:

(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligation of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.<sup>106</sup>

In any event, the most common level of immunity afforded is that of a qualified immunity,<sup>107</sup> which the Supreme Court has extended to high-level state officials.<sup>108</sup>

*Harlow v. Fitzgerald*<sup>109</sup> expanded the scope of the qualified immunity defense available to government officials charged with a constitutional violation of civil rights actions for damages.<sup>110</sup> It did so by abolishing the previously accepted "subjective test" set forth in *Wood v. Strickland*.<sup>111</sup> Under the subjective test, immunity from personal liability for monetary damages was not recognized if the actions taken were malicious or if the official knew or should have known that the actions abridged a protected right.<sup>112</sup> The new standard enunciated in *Harlow* is that "government officials performing discretionary functions generally are shielded from liability for civil damages *insofar as their conduct does not violate clearly established statutory or constitu-*

(1978) (state court judge absolutely immune from liability for issuing an order for sterilization), has been somewhat curtailed. See *Guercio v. Brody*, 814 F.2d 1115 (6th Cir.) (immunity granted only for acts involving judicial discretion and not for those acts administrative in nature), *aff'd*, 823 F.2d 166 (6th Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 749 (1988).

105. See *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1973).

106. *Id.* at 240.

107. This type of immunity was first raised in the context of civil rights litigation in *Pierson v. Ray*, 386 U.S. 547 (1967), where the Court permitted a police officer to raise the common law defense of qualified good faith immunity against a claim of unconstitutional arrest of civil rights workers. The Court held that Congress did not intend section 1983 to abrogate the common law immunities traditionally afforded government officials. *Id.* at 554.

108. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (granting the governor of Ohio a qualified immunity for his decision to deploy National Guard troops to the Kent State campus during the Vietnam demonstrations).

109. 457 U.S. 800 (1982).

110. *Id.* at 818.

111. 420 U.S. 308 (1975).

112. *Id.* at 322.

tional rights of which a reasonable person would have known."<sup>113</sup> The adoption of this objective standard test, a question of law to be resolved by the court, represented a radical change from prior law in which the subjective standard was a mixed question of fact to be resolved by the jury and of law to be resolved by the court.<sup>114</sup> Although *Harlow* concerned the level of immunity to be afforded a federal official, the Court in dicta stated that the same level of immunity would apply to a state official sued for a constitutional violation under section 1983.<sup>115</sup>

The availability of qualified good faith immunity to prison officials has been recognized in cases such as *Procunier v. Navarette*<sup>116</sup> and *Cleavinger v. Saxner*.<sup>117</sup> The Court in *Procunier*, for example, held that prison officials were not entitled to immunity "if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm."<sup>118</sup> Because the constitutional right involved had not been established at the time the defendants acted, a qualified good faith immunity was available.<sup>119</sup> In *King v. Higgins*,<sup>120</sup> however, the First Circuit Court of Appeals ruled that a prison official was not shielded by qualified immunity when the official reasonably should have known that the inmate was entitled to due process which he did not receive.<sup>121</sup> In another First Circuit case decided on immunity grounds, the court disallowed the defense of qualified immunity, determining that the warden—a state prison official—would not be liable for a "merely negligent failure to act."<sup>122</sup> The official, however, could be held liable for a failure to act that reflected a "reckless or callous indifference to the rights and safety of the prisoners in his charge."<sup>123</sup> The good faith or qualified immunity defense

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113. 457 U.S. 800, 818 (1982) (emphasis added).

114. *Id.* at 815-18.

115. *Id.* at 818 n.30. After acknowledging that *Harlow* raised no issue concerning the immunity of state officials, the Court stated it had "found previously, however, that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials.'" *Id.* (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

116. 434 U.S. 555 (1978).

117. 474 U.S. 193 (1985). See Note, *Constitutional Law—Absolute Versus Qualified Immunity for Federal Prison Officials*—*Cleavinger v. Saxner*, 22 WAKE FOREST L. REV. 277 (1987).

118. 434 U.S. 555, 562 (1978).

119. *Id.* at 563.

120. 702 F.2d 18 (1st Cir.), *cert. denied*, 464 U.S. 965 (1983).

121. *Id.* at 20.

122. *Clark v. Taylor*, 710 F.2d 4, 9 (1st Cir. 1983).

123. *Id.* (citing *Smith v. Wade*, 461 U.S. 30 (1983)).

has also been afforded to sheriffs,<sup>124</sup> jailers,<sup>125</sup> and police officers<sup>126</sup> acting in their individual capacities.

## 2. *Lack of Municipal Immunity*

The landmark case concerning municipal immunity is *Monell v. Department of Social Services*,<sup>127</sup> which held that a municipal social services department was not entitled to absolute immunity from a section 1983 claim. Local governing bodies, the Court concluded, can be sued directly under section 1983 for monetary, declaratory, or injunctive relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."<sup>128</sup>

Two years after *Monell*, in *Owen v. City of Independence*,<sup>129</sup> the Supreme Court ruled that the good faith immunity defense also was unavailable to municipalities.<sup>130</sup> The Court noted that although both judicial and legislative immunity were rooted in common law, municipal immunity was not.<sup>131</sup> As the Court explained, "neither history nor policy supports a construction of § 1983 that would justify . . . qualified immunity."<sup>132</sup> The justification offered in support of immunity was that the unavailability of a good faith defense would compel municipal officials to adopt practices and procedures to minimize "unintentional infringements of constitutional rights" and to prevent situations in which "many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense," thereby disavowing liability for injuries it may have caused.<sup>133</sup>

An obvious implication of this lack of immunity available to local governmental entities is an increased exposure to litigation from the operation of jails and correctional facilities. Circumstances exist

124. See *Turner v. Raynes*, 611 F.2d 92 (5th Cir.), cert. denied, 449 U.S. 900 (1980).

125. See *Fowler v. Cross*, 635 F.2d 476 (5th Cir. 1981).

126. See *Anderson v. Creighton*, 107 S. Ct. 3034 (1987) (qualified immunity available to police officers in the field as a defense to a fourth amendment warrantless search challenge).

127. 436 U.S. 658 (1978).

128. *Id.* at 690. Under *Monell*, local governments are held liable for unconstitutional acts that occur pursuant to "a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 694.

129. 445 U.S. 622 (1979).

130. *Id.* at 638.

131. *Id.* at 646-47.

132. *Id.* at 638.

133. *Id.* at 651-52. *Accord* *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (although qualified immunity defense could be enjoyed by an individual officer, defense could not shield local units of government from liability).

where the acts of the individual sued in his official capacity impute liability to the county. In *Blackburn v. Snow*,<sup>134</sup> for example, the court declined to grant qualified immunity to a sheriff who instituted a policy requiring all jail visitors to subject themselves to body cavity strip searches, a policy held to be objectively unreasonable and violative of the fourth amendment.<sup>135</sup> Moreover, the court upheld a damage award of \$177,040 against the county by reasoning that the sheriff's strip search constituted county policy because the sheriff was a county official elected by county voters to act on their behalf and to "exercise the powers created by state law."<sup>136</sup>

### 3. Sovereign Immunity for States

A discussion of state immunities requires at least a brief mention of the role of sovereign immunity, which, following *Martinez v. California*,<sup>137</sup> has been of little or no significance in the section 1983 context. The role of the eleventh amendment, which bars a citizen's suit for monetary damages against a state in federal court,<sup>138</sup> is more important. Although the fundamental purpose of the eleventh amendment is to preserve the state's sovereignty and to protect the state treasury,<sup>139</sup> there nevertheless are two ways in which a damage suit can be brought against a state in federal court. First, a state can consent to be sued and thus waive its sovereign immunity.<sup>140</sup> Second, Congress can supersede eleventh amendment immunity.<sup>141</sup> Section 1983, however, does not constitute a clearly focused remedy intended to override the eleventh amendment.<sup>142</sup> The protection of state immunity does not shield

134. 771 F.2d 556 (1st Cir. 1985).

135. *Id.* at 569.

136. *Id.* at 571. *See also* *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986) (sheriff not entitled to good faith immunity, and the county could also be held liable for body cavity strip searches of arrestees because the sheriff, the highest ranking law enforcement officer in the county, established the policy at the county level), *cert. denied*, 107 S. Ct. 3263 (1987).

137. 444 U.S. 277 (1980) (while state immunity statute can be validly applied to tort claims arising under state law, statute would not control a § 1983 action even in cases where the § 1983 claim was being raised in the state court).

138. *See, e.g.*, *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944); *Hans v. Louisiana*, 134 U.S. 1 (1890).

139. *See* *Edelman v. Jordan*, 415 U.S. 651 (1974) (barring suit against a state officer to enforce the state's statutory duty to pay improperly withheld welfare benefits as payment could be made only from state treasury).

140. *See, e.g.*, FLA. STAT. § 768.14 (1987) (suit by the state to recover tort damages waives sovereign immunity from liability to the extent of permitting the defendant to counterclaim for damages resulting from the same transaction or occurrence).

141. *See, e.g.*, *United States v. Union Gas Co.*, 832 F.2d 1343, 1349 (1987) (1968 Superfund Amendment and Reauthorization Act, 42 U.S.C.A. § 9601(20)(D) (West Supp. 1987), "clearly abrogates the states' 11th Amendment immunity from private suit.").

142. *See* *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

state agencies from significant financial risks, however. Injunctive relief, which may impose considerable requirements on states, is available to state inmates despite the protections of the eleventh amendment.<sup>143</sup>

*B. Availability of Immunity Defenses to Private Corrections Firms*

Resolution of the immunity issue could have a significant effect on costs of insurance, litigation, settlement, and damage awards in actions by inmates against private corrections facilities. Any effort to forecast how this problem ultimately will be resolved, however, is necessarily speculative, as the immunity issue has engendered conflict among the federal circuit courts of appeals.<sup>144</sup> Although the United States Supreme Court recognized the likelihood of conflict as early as 1982,<sup>145</sup> it has not yet addressed the issue directly.

Notwithstanding this diversity of opinion, it is our best judgment that the Supreme Court ultimately will resolve the present controversy by permitting private correctional firms and their employees to assert a qualified good faith immunity defense. We find the reasoning in cases which suggest a contrary conclusion to be flawed in that it relies far too rigidly on whether the common law accorded private defendants any immunity from suit. In *Duncan v. Peck*,<sup>146</sup> for example, Judge Kennedy flatly asserted that:

[p]rivate parties do not face the dilemma of being required by law to use their discretion in a way that might unfairly expose them to lawsuits . . . [and] a private party is governed only by self-interest and is not invested with the responsibility of executing the duties of a public official in the public interest.<sup>147</sup>

*Duncan*, however, presented a set of facts quite unlike those one would encounter in a correctional context.<sup>148</sup> Additionally, Judge Kennedy was focusing narrowly on the issues which came before him on appeal.

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143. See *id.*

144. Compare *Thorne v. City of El Segundo*, 802 F.2d 1131 (9th Cir. 1986) and *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978) with *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988) (en banc) and *Watertown Equip. Co. v. Norwest Bank Watertown, N.A.*, 830 F.2d 1487 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1723 (1988).

145. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982).

146. 844 F.2d 1261 (6th Cir. 1988).

147. *Id.* at 1264.

148. *Duncan* filed a section 1983 suit in the hope that a federal district court would enjoin execution of a default judgment and award damages associated with what *Duncan* claimed was an unlawfully executed prejudgment attachment of certain property. *Id.* at 1263.

A better approach, suggested by *Forrester v. White*<sup>149</sup> and *Cleavinger v. Saxner*,<sup>150</sup> is for less attention to be accorded the common-law status of private parties regarding immunity from suit and for more attention to be accorded the functions rather than the official status of those who seek to raise a qualified good faith immunity defense.<sup>151</sup> In *Forrester* the Court recognized once again that it "has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court."<sup>152</sup> The Court went on to note, however, that in relevant immunity cases one finds "a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment."<sup>153</sup> According to the Court, this approach requires an examination of "the functions with which a particular official or class of officials has been lawfully entrusted"<sup>154</sup> and a determination of "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."<sup>155</sup>

To be sure, the relevant Supreme Court cases have involved public officials rather than private persons working under contract with government. *Forrester*, for example, involved a suit brought against a state court judge<sup>156</sup> and *Cleavinger* involved a *Bivens* action brought against officials of a federal prison.<sup>157</sup> Nevertheless, it is widely recognized that private firms which provide correctional services are serving a function that previously has been exclusively served by government itself and that government would be obliged to provide in the absence of a private alternative.<sup>158</sup> We concur entirely with this view and are persuaded that the same public policy rationale advanced by the Supreme Court in all of its recent good faith immunity cases will be relied upon in an unaltered form in any future cases involving the availability of this defense to private correctional firms and their employees.

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149. 108 S. Ct. 538 (1988).

150. 474 U.S. 193 (1985).

151. The logic advanced here might not necessarily be limited to the availability of a qualified good faith immunity defense. If, for instance, a private provider of correctional services were charged by the terms of a contract with handling various phases of disciplinary processes that had a quasi-judicial character, the presence of such a contractually-based duty might well result in private employees and the private provider enjoying absolute immunity. See, e.g., *Myers v. Morris*, 810 F.2d 1437 (8th Cir.), cert. denied, 108 S. Ct. 97 (1987).

152. 108 S. Ct. at 542.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 541.

157. *Cleavinger v. Saxner*, 474 U.S. 193, 198 (1985).

158. See I. ROBBINS, PRIVATE INCARCERATION, *supra* note 6, at 82-119.

Consider, for example, the typical setting involving a private corrections firm. Correctional officers working on behalf of the firm often are defined by statute in such a way as to impose on them the same legal rights and obligations as their counterparts in the public sector. Such private employees have an obligation to exercise their best professional judgment and discretion, and the same is true of the firms which employ them. The threat of suit clearly could create a danger that the private employees and firm itself would be deterred from discharging their responsibilities with "the decisiveness and the judgment required by the public good."<sup>159</sup>

Such circumstances have formed a persuasive rationale for according private actors immunity defenses ordinarily reserved exclusively for government officials. In *DeVargas v. Mason & Hanger-Silas Mason Co.*,<sup>160</sup> for example, the court observed that "not to allow immunity here [to private defendants] places defendants between Scylla and Charybdis—potentially liable either to plaintiffs for obeying the contract, or to governmental bodies for breaching it."<sup>161</sup> The *DeVargas* court consequently held that "when private party defendants act in accordance with the duties imposed by a contract with a governmental body, perform a governmental function, and are sued solely on the basis of those acts performed pursuant to contract, qualified immunity is proper."<sup>162</sup>

Importantly, even if private defendants are accorded the right to raise a qualified good faith immunity defense, private corrections firms and their employees would not automatically be in a position to raise such a defense whenever a plaintiff brought a section 1983 suit against them. Instead, the private corrections firms would bear the burden of showing that the actions challenged by plaintiffs were actions taken by the private corrections firms within the scope of their contractual obligations to government. For example, if plaintiffs were to allege that discretionary acts taken by a private firm were not merely reflections of an effort to comply with contractually-imposed obligations and were instead directed at enhancing corporate profits, the likelihood of the private defendant's being able to assert an immunity defense would probably be quite low.<sup>163</sup>

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159. *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974).

160. 844 F.2d 714 (10th Cir. 1988).

161. *Id.* at 722 (citation omitted). The court in *DeVargas*, however, indicated it was not addressing the propriety of according private correctional firms access to an immunity defense. *Id.* at n.11.

162. *Id.* (citations omitted).

163. *See, e.g., Kay, supra* note 6, at 883-88, *cited in DeVargas*, 844 F.2d at 722 n.11.



Access by private defendants to a qualified good faith immunity defense is, of course, but one of the issues which must be confronted when interpreting the similarities between public and private sector providers of correctional services. One also must determine whether other immunities enjoyed by government—absolute immunity, sovereign immunity, and eleventh amendment immunity—will have a private sector counterpart. Any predictions one might make in these areas are especially speculative given the present state of available case law. A quite preliminary judgment, however, is that there is no basis for private corrections firms' being accorded any eleventh amendment immunity from suits for monetary damages under section 1983. There is also little likelihood that any sovereign immunity defenses a state may enjoy will flow via the terms of a contract to a private entity.

If there is an issue in this general area that might give rise to serious litigation, it would appear to involve the possibility that private firms and their employees would be accorded absolute immunity from suit under some very narrowly defined circumstances of the type presented in cases such as *Arteaga v. State*.<sup>164</sup> For example, were an inmate plaintiff to challenge a discretionary decision made by private correctional officials to initiate or refuse to initiate a disciplinary hearing, it might be argued that such discretionary, quasi-judicial acts are immune from suit even though they were the acts of private rather than public employees. However, given recent decisions of the United States Supreme Court in such relevant cases as *Cleavinger v. Saxner*<sup>165</sup> and *Malley v. Briggs*,<sup>166</sup> it is unlikely that this argument will prevail. In *Cleavinger* the Court held that members of disciplinary committees in federal facilities could raise a qualified good faith but not an absolute immunity defense;<sup>167</sup> in *Malley* the Court reached the same conclusion regarding the defenses available to police officers making arrest decisions.<sup>168</sup> Thus, if the argument for absolute immunity were made with regard to some functions performed by private correctional employees, the scope of any supportive holdings would be very narrow.

## V. ILLUSTRATION OF AN UNRESOLVED ISSUE

Where all of this leaves us is only partly clear. It appears that private corrections firms will be suitable section 1983 defendants under

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164. 72 N.Y.2d 212, 527 N.E.2d 1194, 532 N.Y.S.2d 57 (1988).

165. 474 U.S. 193 (1985).

166. 475 U.S. 335 (1986).

167. *Cleavinger*, 474 U.S. at 206.

168. *Malley*, 475 U.S. at 343.

at least some circumstances. It also appears likely that a good faith immunity defense will be made available to these private parties. However, at least one question remains: will an inmate injured in a private jail or facility be able to sue the contracting governmental entity? In other words, under what circumstances will "the risk transmitted down from the municipality to the private entity . . . be transmitted back [to] the municipality"?<sup>169</sup>

The most helpful analytical framework is one the United States Supreme Court has developed for determining when a municipality may be held liable under section 1983.<sup>170</sup> This analytical framework has been constructed on the understanding that "municipal liability is limited to action for which the municipality is actually responsible . . . that is, [for] acts which the municipality has officially sanctioned or ordered."<sup>171</sup> A governmental entity is responsible under section 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy[,] inflicts the injury."<sup>172</sup> An inmate plaintiff seeking to sue a governmental entity for a constitutional deprivation suffered in a private correctional facility would have to show such an affirmative link between the governmental entity and the injury suffered.

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169. Little, McPherson, & Healy, *supra* note 65, at 592. Although the focus of the above analysis was exclusively on municipal-level applications of section 1983, substantially identical issues would arise when state-level units of government contract with private corrections firms. Differences in how section 1983 suits would be resolved when state-level contracts are at issue, however, would be non-trivial. The eleventh amendment immunity available to states, for example, precludes inmate plaintiffs from seeking monetary or punitive damage awards, but there appears to be no reason why an inmate who suffered a constitutional deprivation proximately caused by a private corrections firm working under contract for a state department of corrections could not sue the private firm for monetary and punitive damages under appropriate circumstances.

170. Although this framework is generally used in the context of imputing liability from an employee of government to government itself, at least one commentator has applied it to the present question. *See id.* at 592-600. Considerable care must be exercised in interpreting the scope of this dimension of section 1983 jurisprudence, especially regarding claims that inadequate training or supervision have established a foundation for a suit under section 1983. *See, e.g., City of Canton v. Harris*, 109 S. Ct. 1197 (1989) (inadequacy of police training establishes basis for § 1983 liability only when failure to train amounts to deliberate indifference to constitutional rights of citizens); *Rizzo v. Goode*, 423 U.S. 362 (1976) (the mere right of a supervisor to control and direct the activities of a subordinate does not in and of itself provide the foundation for a § 1983 claim, but the right of control coupled with an "affirmative link" between the misconduct of employees and the acts or omissions of a supervisor does give rise to liability on the part of the supervisor).

171. *Pembaur v. Cincinnati*, 475 U.S. 469, 479-80 (1986) (footnote omitted). Accordingly, a section 1983 action against a governmental entity cannot be predicated on a theory of vicarious liability or *respondeat superior*. *Id.*

172. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978).

Because of the paucity of relevant cases and the conceptual problems one confronts, we will illustrate the issue by distinguishing between what we believe will be the typical and atypical section 1983 cases which could arise within a private correctional facility. In the typical case one could envision an inmate in such a facility encountering a constitutional deprivation as a consequence of a private correctional employee's act or failure to act. Such a case might involve the private correctional employee's showing a deliberate indifference to the medical needs of the inmate despite the fact that the contract delegating the government's correctional function to the private firm called for the provision of adequate medical services to all inmates.<sup>173</sup>

On the strength of *West v. Atkins*,<sup>174</sup> it appears that the inmate could bring an action against the private employee whose deliberate indifference caused the injury and, if the deliberate indifference to his or her medical needs could be attributed to the private employer without relying upon a *respondeat superior* theory, to the private employer as well. Of course, the contracting unit of government would not be subject to suit under section 1983 based on a *respondeat superior* theory.<sup>175</sup> In order to sue the contracting governmental entity, the inmate plaintiff would be required to show that the private correctional employee's act or failure to act flowed from a "custom, policy or practice" of the governmental entity. In this instance, because the contract called for the private correctional facility to provide adequate medical care to all inmates, it would appear that liability for suit under section 1983 would not reach the contracting unit of government.

For the atypical case, assume that the terms of a contract between a contracting unit of government and a private corrections firm obligated the private firm to assume responsibility for all persons committed to one of its facilities.<sup>176</sup> Further assume that as a consequence the private firm was required to house significantly more inmates than the

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173. Critics of the privatization movement could easily imagine precisely such a situation. A general problem they see with privatizing correctional facilities is linked to the negative ramifications perceived in private firms' seeking to maximize profits with the effect of undermining the welfare of inmates. Thus, opponents might well hypothesize that a private firm might establish a custom, policy, or practice in the medical service area that would reflect a deliberate indifference to the medical needs of inmates in their facilities. Were this to happen, clearly an inmate plaintiff would have a cause of action against the private firm itself.

174. 108 S. Ct. 2250 (1988).

175. See *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

176. This is not an uncommon contractual provision. Indeed, it is favored by both contracting units of government and private firms because it places complete control over commitment decisions exclusively in the hands of government. Such provisions preclude private firms from, among other things, selecting only those potential inmates they feel will cause them the fewest problems, a selection process often referred to as "creaming."

involved facility was designed to hold. As a result, assume that the facility became so overcrowded that one or more inmates brought a section 1983 suit in which it was alleged that conditions in the facility abridged rights secured by the eighth and fourteenth amendments. Would the inmate plaintiff be able to sue the private corrections firm, the contracting unit of government, or both the private firm and the unit of government?

The unconstitutional overcrowding would appear to flow directly from *both* the action taken by the private corrections firm which accepted responsibility for an excessive number of inmates *and* from a "custom, policy, or practice" of the contracting unit of government which expressed its policy decision in the language of its contract with the private firm. The important distinction between this atypical situation and the typical situation, of course, is that in this atypical situation a contracting unit of government would have caused a constitutional deprivation by its formal policy decision and therefore would appear to be liable for suit under section 1983. Whether any such liability would activate the indemnification clauses that are routinely incorporated into contracts between private firms and units of government would depend, of course, on the actual language of such indemnification clauses.

## VI. CONCLUSIONS

Notwithstanding the substantial appeal privatization has had to decisionmakers at all levels of government over the course of the past two decades or so, the relatively recent interest in privatizing adult correctional facilities has spawned an unusually heated debate. Opponents of correctional privatization have suggested that the liability exposure of government will expand significantly if government elects to contract with the private sector for the partial or complete privatization of correctional facilities.<sup>177</sup> Proponents of privatization have responded to this criticism by contending that corporate liability exposure will be minimized via the ability of the private firms to provide superior services more efficiently than does government and that the governmental liability exposure will be minimized to an even greater degree via the inclusion of liberal indemnification clauses in privatization contracts.<sup>178</sup> Opponents and proponents agree, however, that the major source of liability exposure for privatized correctional operations will flow from suits brought by inmate plaintiffs under section 1983.

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177. See, e.g., I. ROBBINS, *PRIVATE INCARCERATION*, *supra* note 6.

178. See, e.g., C. LOGAN, *PRIVATE PRISONS*, *supra* note 6.

Precisely how the relevant provisions of law will be applied in suits brought by inmate plaintiffs against private corrections firms under section 1983 is unclear at this time. Nevertheless, several conclusions can be drawn. First, whether inmates will be able to bring section 1983 actions against a private correctional facility will depend on whether the conduct of the private facility is deemed state action and therefore action under color of state law. As previously discussed, the conduct should be considered state action under the public function test. The Supreme Court's decision in *West v. Atkins*<sup>179</sup> supports this conclusion at least to the extent that the underlying violation is a failure to provide constitutionally mandated services. Second, the private facilities are unlikely to be accorded anything more protective than a qualified good faith immunity. Finally, as briefly illustrated here, whether a contracting unit of government may be held liable under section 1983 for a constitutional deprivation suffered by an inmate in a private corrections facility will most likely depend on whether the injury flowed from the private facility's execution of a governmental policy or custom.

The fact that private firms are capable of and likely to supply equal or greater quality correctional services<sup>180</sup> should reduce concerns by opponents of privatization regarding increased risks of legal liability. Consequently, to the degree that government exercises due caution in the selection of independent contractors and is equally prudent in its monitoring of compliance with its contracts, the liability risks and costs of government, if they move in any direction, should decrease.<sup>181</sup>

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179. 108 S. Ct. 2250 (1988).

180. The research literature available at this time, in addition to suggesting that private firms can provide equal or greater quality correctional services than can government, indicates that private corrections firms can do so at a lower cost. See, e.g., C. CAMP & G. CAMP, *PRIVATE SECTOR INVOLVEMENT IN PRISON SERVICES AND OPERATIONS* (1984); Brakel, "Privatization" in *Corrections: Radical Prison Chic or Mainstream Americana?*, 14 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 1 (1988); Camp & Camp, *Correctional Privatization in Perspective*, 65 *PRISON J.* 14 (1985).

181. Such a downward movement in liability risks coupled with a constant or improved quality of correctional services, however, cannot and must not be seen as automatic consequences of privatizing corrections. All contracting decisions necessarily involve, in effect, government's selecting a specific set of private employees to perform a function that otherwise would be performed by a specific set of public employees. Even though *some* sets of private employees can provide correctional services more efficiently and more effectively than can *some* sets of public employees, one cannot logically interpret the evidence to mean that *all* sets of private employees will be more efficient and effective than *all* sets of public employees. With regard to liability exposure and all other dimensions on which private and public correctional operations may be evaluated, therefore, decisions to contract or to refrain from contracting should flow from an objective assessment of the viability of specific options available—and not from mere ideological predispositions that favor or oppose privatization.

Whether the private alternative *should* be pursued, however, involves a significant social policy issue that cannot be resolved by any amount of legal analysis. There are thoughtful opponents to privatization, opponents who are strongly critical of any and all efforts that would have the effect of delegating the police powers of the state to profit-motivated private sector corporations.<sup>182</sup> Their extra-legal criticism, sometimes presented within the context of legal analysis, has a foundation that is far more political, philosophical, and symbolic than it is constitutional or legal.

Their criticism ought to be considered thoughtfully and seriously. The history of corrections, after all, is replete with illustrations of what were imagined to be creative innovations that later proved that one can jump from the frying pan only to land in the fire. Our own largely pragmatic views on privatization, however, are flatly contrary to those of such opponents. It may well be, as Blake McKelvey has suggested,<sup>183</sup> that the history of penology and corrections in the United States is a history of good intentions. Good intentions, however, do not necessarily yield good results. Today some 650,000 adult men and women are confined in our state and federal prisons.<sup>184</sup> Another 250,000 are confined in local jails as they await trial or serve sentences.<sup>185</sup> Many if not most of these men and women confront conditions of confinement that are at least as likely to foster as they are to lessen the likelihood of recidivism. Each day the facilities in which they are housed become more and more overcrowded. Each day life "on the inside" becomes more and more difficult.<sup>186</sup> As one commentator observed recently, "few abstract philosophical or political speculations enter [inmates'] perceptions" of their keepers.<sup>187</sup> "More likely," he suggests:

the prisoner wonders whether the wearer of the badge is available when needed, will want to help him, and is fair, knowledgeable,

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182. See, e.g., I. ROBBINS, PRIVATE INCARCERATION, *supra* note 6.

183. B. MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS (1977).

184. Telephone interview with representative of Justice Statistics Clearinghouse, Washington, D.C. (April, 1989).

185. *Id.*

186. This unfortunate reality has not escaped the attention of the courts. Recently, for example, Professor Ira P. Robbins commented on the growing crisis in corrections by observing that "[t]hirty six states, the District of Columbia, Puerto Rico, and the Virgin Islands are operating prisons under court orders because of violations of the constitutional rights of prisoners. Each of these orders has been issued in connection with total conditions of confinement and/or overcrowding which resulted in prisoners being subjected to cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution." I. ROBBINS, PRISONERS AND THE LAW app. A, at 3 (1988).

187. McConville, *Aid from Industry? Private Corrections and Prison Overcrowding*, in AMERICA'S CORRECTIONAL CRISIS 221, 230-31 (1987).

competent, and a decent human being. Conversely, the malign prisoner might wish to know if his guard is lazy, weak, timid, stupid, corruptible, and likely to be an aid or hindrance to his illegitimate scheme. These are practical—indeed, too often life-and-death—matters. It is likely that the vast majority of prisoners are completely indifferent to symbolism, and wholly concerned with what happens and with the quality of the officials with whom they come in contact rather than with the organizational affiliation of such persons.<sup>188</sup>

The very difficult set of social policy issues raised by the privatization debate ought to be resolved by moving in whichever direction has a reasonable likelihood of yielding the more efficient and effective means of improving the quality of correctional services. Moving in such a direction carries with it the promise of better protecting the rights of confined persons in the immediate future and the broader public interest in the longer term. To favor traditional means of providing correctional services merely as a consequence of habit or from a preference for symbolic representations of the power of the State is just as absurd as to favor privatization merely because of some abstract value one might impute to profit motives. The option to be favored is the option that proves its ability to get done the job at hand. That option is not necessarily the option which wears a department of corrections badge on its state-issued shirt.

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188. *Id.*