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The Privatization of the Civil Commitment Process and the State Action Doctrine: Have the Mentally Ill Been Systematically Stripped of Their Fourteenth Amendment Rights?

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INTRODUCTION

Civil commitment constitutes a significant deprivation of liberty that requires due process protection.[1] The Supreme Court has recognized that a mentally ill person's interest in avoiding wrongful deprivation of liberty is "almost uniquely compelling."[2] The degree of interference with personal liberty that an individual suffers when he is involuntarily hospitalized is essentially the same as the deprivation of liberty that one suffers after conviction in a criminal trial.[3] Hence, civil commitments "present an extraordinary possibility of abuse to individual liberty."[4] Accordingly, both the Supreme Court and other courts have universally recognized that a state's ability to involuntarily hospitalize an allegedly mentally ill individual is subject to limitations set forth by the substantive and procedural components of the Due Process Clause of the Fourteenth Amendment.[5]

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1. Addington v. Texas, 441 U.S. 418, 425 (1979).

2. Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

3. Ughetto v. Acrish, 518 N.Y.S.2d 398, 402 (N.Y. App. Div. 1987). Admittedly, a number of courts have concluded that a civil commitment proceeding should not be equated with a criminal prosecution. *E.g.*, Project Release v. Prevost, 722 F.2d 960, 974-75 (2d Cir. 1983); Goetz v. Crosson, 967 F.2d 29, 34-35 (2d Cir. 1992). However, the rationale for this conclusion is not that the deprivations suffered by an individual subject to the civil commitment process are less severe than those suffered by a convicted criminal defendant but that civil commitment proceedings are less adversarial in nature because one of the purposes of commitment is to provide mental health treatment that will benefit the subject of commitment. *See Goetz*, 967 F.2d at 34-35; *Ughetto*, 518 N.Y.S.2d at 403.

4. Spencer v. Lee, 864 F.2d 1376, 1382 (7th Cir. 1989) (en banc) (Ripple, J. concurring in part, dissenting in part).

5. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975); Suzuki v. Yuen, 617 F.2d 173, 178 (9th Cir. 1980); Stamus v. Leonhardt, 414 F. Supp. 439, 446-51 (D. Iowa 1976); Doremus v. Farrell, 407 F. Supp. 509, 514-17 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378, 386-92 (M.D. Ala. 1974); Bell v. Wayne County Gen. Hosp. at Eloise, 384 F. Supp. 1085, 1092-98 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1084-103 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *reinstated and enforced*, 379 F. Supp. 1376

Every state has a statute that authorizes the confinement of mentally ill individuals.[6] Very often, an allegedly mentally ill person's involuntary hospitalization is effectuated when one or more physicians certify that the individual requires hospitalization.[7] Significantly, the commitment laws of most states fail to distinguish between certification by government and private physicians and state commitment laws that authorize private physicians to deprive mentally ill individuals of liberty by confining them in private hospitals.[8] However, " 'most rights secured by the Constitution are protected only against infringements by governments.' "[9] Consequently, this leads to the rather significant issue of whether there are two classes of individuals who are subject to the civil commitment process: (1) those whom physicians commit to government hospitals and whom the Constitution protects; and (2) those whom physicians commit to private hospitals and hence, are not protected by the Constitution.

The Supreme Court has recognized that in some instances the conduct of private parties will be subject to the strictures of the Fourteenth Amendment.[10] However, "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer."[11] State action litigation has generated an extensive amount of case law at the Supreme Court, circuit court, and district court levels.[12]

Not surprisingly, once the Supreme Court and other courts recognized that psychiatric hospitals could effectuate a person's

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(1974), *vacated on other grounds*, 421 U.S. 957 (1975), *reinstated* 413 F. Supp. 1318 (E.D. Wis. 1976).

6. Terri Keville, *The Power to Confine: Private Involuntary Civil Commitment as State Action*, 19 N.E. J. CRIM. & CIV. CONFINEMENT 61, 71 (1993); *See also* Samuel Jan Brakel, John Parry, Barbara Weiner, *The Mentally Disabled and the Law*, 76-81, 101-26 (3rd ed. 1985) (detailing state-by state commitment provisions).

7. *See* Brakel, Parry, Weiner, *supra* note 6 at 101-05, 159-60 (detailing state commitment statutes that authorize confinement upon the certificates of one or more physicians).

8. *See, e.g.*, 405 ILL. COMP. STAT. ANN. 15/2 (Matthew Bender 2001); MASS ANN. LAWS ch. 123 § 12; N.Y. MENTAL HYG. LAW §§ 9.27, 9.37, 9.39 (McKinney 1996); 50 PA CONS. STAT. ANN. § 4404 (West 1997); S.C. CODE ANN. § 44-17-410 (Law. Co-op. 1985); TEX. HEALTH & SAFETY CODE ANN. § 573.022 (West 1992).

9. Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (quoting Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1982)).

10. *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 508-09 (1946); Terry v. Adams, 345 U.S. 461, 469-70 (1953).

11. Jackson v. Metro. Edison Co., 419 U.S. 345, 349-50 (1974).

12. For a detailed summary of state action case law *see* Schwartz & Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees*, §§ 5.10-5.20 (3rd ed. 1997).

involuntary hospitalization only pursuant to substantive and procedural constraints of the Fourteenth Amendment, courts were required to address the question of whether physicians who civilly committed allegedly mentally ill individuals to private psychiatric hospitals engaged in state action. Initially, most federal district courts held that the physicians were state actors.[13] However, in 1989, an en banc panel of the Seventh Circuit in held that civil commitment does not constitute state action.[14] Since *Spencer*, seven other circuits have addressed this question and all have concluded that physicians who involuntarily hospitalize an allegedly mentally ill individual to a private hospital pursuant to a state's civil commitment laws do not engage in state action.[15] The upshot of these cases is that thousands of individuals have been stripped of federal Constitutional protection when they have been involuntarily hospitalized.[16]

This article will first briefly examine the impact of the privatization movement on the process of psychiatric hospitalization. The article will then address state action jurisprudence of the Supreme Court, followed by an examination and comparison of district court and courts of appeals cases that have addressed the issue of whether civil commitment constitutes state action. Next, this article will analyze the issue at hand under Supreme Court state action jurisprudence in general. The article

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13. *See* Davenport v. Saint Mary Hosp., 633 F. Supp. 1228, 1237 (E.D. Pa. 1986); Plain v. Flicker, 645 F. Supp. 898, 908 (D.N.J. 1986); Willacy v. Lewis, 598 F. Supp. 346, 349 (D.D.C. 1984); Brown v. Jenson, 572 F. Supp. 193, 197 n.1 (D. Colo. 1983); Kay v. Benson, 472 F. Supp. 850, 851 (D.N.H. 1979); Ruffler v. Phelps Mem. Hosp., 453 F. Supp. 1062, 1068-70 (S.D.N.Y. 1978); *but see* Landry v. Odom, 559 F. Supp. 514 (E.D.La. 1983); Watkins v. Roche, 529 F. Supp. 327 (S.D. Ga. 1981).

14. Spencer v. Lee, 864 F.2d 1376 (7th Cir. 1989) (en banc).

15. Bass v. Parkwood Hosp., 180 F.3d 234 (5th Cir. 1999); Okunieff v. Rosenberg, 166 F.3d 507 (2d Cir. 1999), *aff'g* 996 F. Supp. 343 (S.D.N.Y. 1998); S.P. v. City of Takoma Park, Md., 134 F.3d 260 (4th Cir. 1998); Pino v. Higgs, 75 F.3d 1461 (10th Cir. 1996); Ellison v. Garbarino, 48 F.3d 192 (6th Cir. 1995); Rockwell v. Cape Cod Hosp., 26 F.3d 254 (1st Cir. 1994); Janicsko v. Pellman, 774 F. Supp. 331 (M.D. Pa. 1991), *aff'd. without opinion*, 970 F.2d 899 (3d Cir. 1992); Harvey v. Harvey, 949 F.2d 1127 (11th Cir. 1992). Only recently, did a circuit court, based upon the facts in the particular case, hold that physicians who involuntarily hospitalized a mentally ill person at a private psychiatric hospital were state actors. Jensen v. Lane County, 222 F.3d 579 (9th Cir. 2000).

16. In 1990, over 32,000 people were hospitalized in private psychiatric hospitals and 38,000 people were psychiatrically hospitalized in general hospitals. Center for Mental Health Studies, *Mental Health, United States* 103 (1994). While not all such individuals were involuntarily hospitalized, one can assume that a significant number of individuals were. Likewise, these figures do not distinguish between private and public general hospitals. Again, one can assume that a significant number of individuals were hospitalized at private general hospitals.

will detail why, based upon well-established Supreme Court state action jurisprudence, it almost borders on the absurd to conclude that civil commitment does not constitute state action. In so arguing, this article will not, as some authorities have done, assert that the present state action doctrine needs to be reformulated.[17] Rather, this article accepts, as a given, the present state of Supreme Court jurisprudence. To correct the present state of the law, it is incumbent on the Supreme Court to address this issue, or the circuit courts to reevaluate this issue, and hold that private physicians who act under the authority of the state to involuntarily hospitalize a mentally ill individual engage in state action.[18]

I. THE PRIVATIZATION OF THE CIVIL COMMITMENT PROCESS

Over the last two decades, governments have moved to privatize many traditional governmental activities such as tax collection, the operation of prisons, the operation of hospitals, fire prevention and dispute resolution.[19] However, the greatest shift of traditionally governmental activity from the public to private sector may have occurred in the mental health area.

Over the last few decades, while psychiatric admissions to state hospitals have decreased, non-government general hospitals have become the primary site for in-patient psychiatric care.[20] During this period, there has been "unprecedented growth" in the number of psychiatric hospitals, particularly those operated for profit.[21]

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17. *See, e.g.*, Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 536 (1985); Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L. J. 683 (1984); Ronna Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV. 1150 (1985).

18. At times this article will cite with approval some of the district court cases in which the court found state action. A critic can rightfully assert that it is inappropriate to cite such authority when criticizing a line of cases that have overruled these decisions. However, this article does not cite the holdings of these cases as much as the rationale underlying some of the opinions. It is up to the reader to determine the extent to which the rationale of the district courts is consistent with Supreme Court jurisprudence. I believe that it is.

19. *See* Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 52 VAND. L. REV. 489, 492-94 (1999).

20. John Petrila, *Redefining Mental Health Law: Thoughts on a New Agenda*, 16 LAW HUMAN BEHAV. 89, 91 (1992); Richard J. Goldberg and Barry S. Fogel, *Integration of General Hospital Psychiatric Services with Freestanding Private Psychiatric Hospitals*, 40 HOSP. & COMM. PSYCH. 1057, 1057 (1989).

21. Goldberg & Fogel, *supra* note 20 at 1057. By 1994, 16 for-profit hospital chains owned or managed 831 hospitals and staffed 121,385 beds. John Petrila, *Ethics, Money, and the Problem of Coercion in Managed Behavioral Health Care*, 40 ST. LOUIS U. L. J. 359, 362 n.10 (1996). This amounted to a 11.2% increase in the number of hospitals and a 5.6% in the

Indeed, over a five-year period, the number of private psychiatric hospitals in the United States more than doubled, increasing from 17,157 in 1983 to 42,615 in 1988.[22] Presently, few states rely solely on public institutions and "[w]hen psychiatric hospitalization does occur, it is likely to be at a private psychiatric hospital or to a psychiatric unit of a general hospital."[23]

An examination of mental health care in New York State illustrates how the provision of psychiatric treatment is part of one unified public-private partnership in which the state, local governments, and private hospitals share responsibility for the care and treatment of mentally ill individuals. Under New York law, the State Office of Mental Health must plan and work with, *inter alia*, local governments and public and private providers of psychiatric services, including general hospitals, "to develop an effective, integrated, comprehensive system for the delivery of all services to the mentally ill."[24]

As part of this comprehensive plan, the State Office of Mental Health has decreed "[c]ommunity-based general hospitals have a greater role in acute care and *are the providers of choice.*"[25] Over the last decade in New York, "psychiatric beds in local general hospitals have increased by nearly 25%."[26] Likewise, the State Office of Mental Health has redefined the role of state facilities as intermediate and long-term care hospitals.[27] The State Office of Mental Health has anticipated that its policies will result in the "virtual elimination" of state involvement in the provision of acute care in New York City.[28]

In promulgating this cooperative effort, the New York Legislature has required private hospitals to obtain an operating certificate as a condition of providing psychiatric services.[29] As a result of

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number of beds over a one-year period. *Id.*

22. Gregg Timmons, *Crisis in the Mental Health Care Industry: An Analysis of the Practices of Private, For-Profit Psychiatric Hospitals and the Governmental Response*, 31 HOUSTON L. REV. 323, 325-26 (1994); *see also* Lynn Simons, *Privatization and the Mental Health System*, AMERICAN PSYCHOLOGIST, August 1989, 1138 (stating although institutionalization resulted in a 75% decrease in state hospital beds, beds in private psychiatric facilities more than tripled).

23. John Petrila, *Redefining Mental Health Law*, 16 LAW & HUMAN BEHAV. 89, 91 (1992).

24. N.Y. MENTAL HYG. LAW §§ 1.03(5), 7.01 (McKinney's 1996).

25. Office of Mental Health, *Statewide Comprehensive Plan for Mental Health Services 1993-1997* 1 (October 1, 1992) ["*Statewide Comprehensive Plan*"] ("emphasis added").

26. *Id.* at 2.

27. *Id.* at 63.

28. *Id.* at 125.

29. N.Y. MENTAL HYG. LAW § 31.02.

relatively recent changes in the law, when a hospital renews its operating certificate, the State Office of Mental Health allows all hospitals, public and private, to service a catchment, *i.e.*, geographic area for involuntary psychiatric admissions.[30] Hence, as a condition of providing in-patient psychiatric services, the state allows general hospitals, public and private, to assume primary responsibility for emergency psychiatric admissions, an activity that the state would ordinarily assume.[31]

Moreover, the State Office of Mental Health has also undertaken "several initiatives which are intended to achieve increased participation of general hospitals in acute psychiatric care."[32] Community based general hospitals receive financial incentives for serving people with serious mental illness.[33] This includes the development of Medicaid rate methodologies designed to "increase the number of patients treated."[34] This use of Medicaid funds to cover psychiatric care has been a significant factor in the shift of the provision of acute psychiatry from state hospitals to other types of facilities.[35]

The increase in private, for-profit hospitalization has resulted in the proliferation of pernicious actions designed to increase the profitability of hospitals. Psychiatric hospitals have lured individuals into psychiatric treatment by instituting massive advertising campaigns designed to promote the benefits of treatment.[36] However, once hospitalized, patients found it not so easy to leave, at times facing intimidation from hospital staff when they decided they no longer wanted to receive in-patient care and treatment.[37]

Moreover, the attempts to increase revenue by private psychiatric hospitals have not stopped with attempts to procure voluntary admissions. Private hospitals seek to maintain certain census levels on the wards.[38] Some hospitals have used "bounty hunters" to transport possible candidates for involuntary hospitalization.[39]

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30. *Id.* at §§ 9.39; 9.40.
31. *See Id.* at § 7.07.
32. *Statewide Comprehensive Plan* at 30.
33. *Id.* at 1.
34. *Id.* at 10.
35. *See* Petrila, *supra* note 21 at 371-72, n.27.
36. Timmons, *supra* note 22 at 328.
37. *Id.* at 336-37.
38. Peter Kerr, *Paying for Fraud: Mental Hospital Chains Accused of Much Cheating on Insurance*, N.Y. TIMES, November 24, 1991, at A1.
39. Timmons, *supra* note 22 at 333-34; Peter Kerr, *Psychiatry For Profit: Trouble at*

Hospitals have based the length of a patient's confinement not on the individual's clinical condition but on the length of insurance coverage, discharging individuals when insurance has expired.[40] Not surprisingly, the emphasis on profits has resulted in private hospitals admitting individuals who did not need in-patient hospitalization.[41]

Such abusive practices led, in one instance, to a settlement of a civil action instituted by the Texas Attorney General in which a hospital chain agreed not to pay school officials for referrals and not reward employees based upon the number of patients hospitalized.[42] While the settlement helped eliminate unsavory practices in Texas, the problems resulting from actions of private hospitals have been described as "national in scope."[43]

II. An Overview of Supreme Court State Action Jurisprudence

The Supreme Court detailed the limitations of the scope of the Fourteenth Amendment in *The Civil Rights Cases*,[44] in which the Court held that acts of private individuals unsupported by state authority do not violate civil rights that the Constitution protects.[45] However, beginning in the 1920's, the Supreme Court began to examine if, and under what circumstances, a court should attribute actions of private individuals to the state. Accordingly, such attribution makes applicable to the situation at hand both the First

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Private Hospitals, N.Y. Times, October 22, 1991, at A1. Once they transported the civil commitment candidate, bounty hunters received payment for their actions. Timmons, *supra* note 22 at 333-34.

40. Timmons, *supra* note 22 at 335-36; Peter Kerr, *Psychiatry For Profit: Trouble at Private Hospitals*, N.Y. Times, October 22, 1991, at A1; *see also* Peter Kerr, *U.S. Study of Mental Care Finds Widespread Abuses*, N.Y. Times, April 29, 1992, at D1 (former hospital employees testify before the House of Representatives of widespread practice of changing a patient's diagnosis to be cured on the day insurance coverage expired); Peter Kerr, *Psychiatry For Profit: Trouble at Private Hospitals*, N.Y. Times, October 22, 1991, at A1 (concession by doctor at one private hospital that the facility admitted people who did not need treatment because their insurance covered in-patient care).

41. *See* Peter Kerr, *U.S. Study of Mental Care Finds Widespread Abuses*, N.Y. Times, April 29, 1992, at D1; Peter Kerr, *Paying for Fraud: Mental Hospital Chains Accused of Much Cheating on Insurance*, N.Y. Times, November 24, 1991, at Section 1, page 1.

42. Peter Kerr, *Mental Hospital Operator Settles Lawsuit with Texas*, N.Y. Times, June 5, 1992, at D6.

43. Peter Kerr, *U.S. Study of Mental Care Finds Widespread Abuses*, N.Y. Times, April 29, 1992, at D1.

44. 109 U.S. 3 (1883).

45. 109 U.S. at 17. Prior to *The Civil Rights Cases*, the Supreme Court twice recognized that the constraints of the Fourteenth Amendment applied only to the states and not to private individuals. *See* Virginia v Rives, 100 U.S. 313, 318 (1879); United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

and Fourteenth Amendments, constitutional provisions that, on their face, apply only to the government. When the actions of private individuals are attributable to the state, the individuals are said to have engaged in state action.[46] Since it began examining the state action issue, the Supreme Court has analyzed the issue in numerous contexts.

The many different contexts in which the Supreme Court has been required to determine whether private individuals have engaged in state action helps to explain why the state action question can be complex and confusing.[47] The first type of state action case addressed the issue of whether the Equal Protection Clause of the Fourteenth Amendment prohibits discriminatory conduct by private political parties.[48] The Court was next required to examine whether private property had attributes that were sufficiently similar to public property maintained by the government as to provide constitutional protection for those individuals who sought to exercise their First Amendment rights on the private property.[49]

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46. *See* Lugar v. Edmondson Oil, Inc., 457 U.S. 922 (1982). In assessing attribution to the State, a court must find that the deprivation must first be caused by "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state." *Id.* at 937. Second, the person who caused the deprivation must be deemed a state actor. *Id.* A person is deemed to be a state actor when, *inter alia*, his conduct is "otherwise chargeable to the State." *Id.* These two criteria collapse into each other in cases in which the claim is made against individuals who have acted under apparent authority of state law as to lend the weight of the state to their decisions. *Id.* Civil commitment is such a case. *See infra* notes 229 through 243 and accompanying text.

47. *See generally, e.g., supra* note 17.

48. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). In each of these cases, the Court determined that the actions of private political parties constituted state action.

49. *See* Marsh v. Alabama, 326 U.S. 501 (1946). In *Marsh*, the Court held that the owners of a company town could not prohibit a Jehovah's Witness from distributing religious literature since whether a corporation or municipality owns or possesses the town, the public has an identical interest in the channels of communication remaining open. *Id.* at 507. In so holding, the Court recognized that in order to act as good citizens, the residents of Chickasaw, Alabama must be informed, which required the provision of uncensored information: "There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen." *Id.* at 508-09.

After Marsh, the Court again addressed this type of state action issue in *Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), and *Hudgens v. NLRB*, 424 U.S. 507 (1976). In *Amalgamated Food* the Court held that a shopping center resembled a business area of a municipality, which resulted in a holding that the First Amendment protected picketing of union employees. *Amalgamated Food*, 391 U.S. at 315, 319. However, in *Lloyd Corp.*, the Court held that the First Amendment did not protect individuals who sought to distribute

Although in 1952 the Court concluded that actions of a private utility constituted state action,[50] in *Jackson v. Metropolitan Edison Company*,[51] the Court reached the opposite conclusion that the private utility company was not a state actor. *Jackson* can be considered the beginning of modern state action jurisprudence. While prior to *Jackson*, the Burger Court chipped away and limited the liberal state action views of the Warren Court,[52] in *Jackson*, the Court began to formulate what can be considered modern day state action jurisprudence by analyzing and narrowly interpreting its prior state action decisions. In so doing, the Court began to develop a *seriatim* approach to determining whether private entities have engaged in state action.

This approach has resulted in the Court "articulat[ing] a number of factors, or tests in different contexts" to determine whether private individuals engaged in state action.[53] These tests include the "public function" test, the "state compulsion" test, the "nexus" test, and the "joint action" test.[54] The public function test examines "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' "[55] The nexus test examines "whether there is a sufficiently close nexus between the challenged action" of the private party so that the action of the private party "may be fairly treated as that of the State itself."[56] The state compulsion test examines whether a state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State."[57] The joint action test focuses on whether the private party "jointly engaged with state officials in the prohibited action."[58]

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pamphlets that were unrelated to the actions of the shopping center. *Lloyd Corp.*, 407 U.S. at 569-70. In *Hudgens*, the Supreme Court interpreted *Lloyd Corp.* as overruling *Logan Valley* as the Court noted that the "rationale of *Logan Valley* did not survive the Court's opinion in the *Lloyd* case." *Hudgens*, 424 U.S. at 518.

50. *See* Public Utils. Comm'n. v. Pollak, 343 U.S. 451 (1952).

51. 419 U.S. 345 (1974).

52. *See, e.g.*, Moose Lodge v. Irvis, 407 U.S. 163 (1972). For a detailed comparison of the manner in which the Warren and Burger courts addressed the state action doctrine, *see* Schneider, *supra* note 17 at 758-84.

53. *Lugar*, 457 U.S. at 939.

54. *Id.*

55. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (emphasis in original) (internal quotes omitted).

56. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

57. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

58. Adickes v. Kress & Co., 398 U.S. 144, 152 (1970). Recently, the Court determined that a private not-for-profit organization that regulated interscholastic sports was a state actor because of the substantial entwinement of public officials and public schools within its

In addition to these tests, the Supreme Court has also recognized that state action can exist under what it has characterized as the "abuse of authority doctrine."[59] Likewise, the Court has addressed the state action issue without any reference to any of these tests. Instead, the Court has developed a functional approach to state action jurisprudence by examining the role played by the private defendant *viz-a-viz* the state.[60]

In *Jackson*, the Court attempted to analyze prior state action case law and concluded that the Supreme Court has "found state action present in the exercise by a private entity of powers traditionally exclusively reserved to the state."[61] The Court concluded that the provision of utility service is not "traditionally associated with sovereignty" since Pennsylvania law does not impose an obligation on the state to provide utility service.[62]

Flagg Brothers, Inc. v. Brooks,[63] was the first, and probably most significant, of a number of cases in which the Court examined whether the actions taken by private creditors constituted state action.[64] In *Flagg Brothers*, a number of debtors sought damages and an injunction against a creditor who threatened to sell off the belongings of the debtors that the creditors had stored.[65] They argued that the State of New York had delegated to the creditor, Flagg Brothers, "a power 'traditionally exclusively reserved to the State,' "[66] namely, the resolution of private disputes.

The Supreme Court rejected this contention. The Court evaluated its prior public function case law and noted, "the conduct of the elections themselves is an exclusively public function."[67] The Court then noted that *Marsh v. Alabama*[68] and *Amalgamated Food*

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organization. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 121 S. Ct. 924 (2001). It remains to be seen whether this examination of entwinement becomes an additional state action test. *See id.*, at 940 (Thomas, J., dissenting).

59. *Lugar*, 457 U.S. at 940. For a discussion of how this standard relates to civil commitment, *see infra* notes 232-90 and accompanying text.

60. *See infra* notes 291-314 and accompanying text.

61. *Jackson*, 419 U.S. at 352. In reaching this conclusion, the Court cited, *inter alia*, *Nixon v. Condon*, 286 U.S. 73 (1932) (involving elections); *Marsh v. Alabama*, 326 U.S. 510 (1946) (dealing with a company town); and *Evans v. Newton*, 382 U.S. 296 (1966) (involving a municipal park).

62. *Jackson*, 419 U.S. at 353.

63. 436 U.S. 149 (1978).

64. The Court also examined the actions of private creditors in *Lugar* and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

65. *Flagg Bros.*, 436 U.S. at 153.

66. *Id.* at 157.

67. *Id.* at 158.

68. 326 U.S. 501 (1946).

presented a second type of state action cases. Both these types of cases had "in common the feature of exclusivity."[69] However, whereas the elections held by the Democratic Party and its affiliates were the only meaningful elections in Texas and the streets owned by Gulf Shipbuilding Company were the only streets in Chickasaw, the sale of property was not the sole means of resolving the private dispute at hand.[70]

More significantly, the Court reaffirmed that any state action analysis requires recognition of the " 'essential dichotomy'. . . between public and private acts."[71] The activity at hand was private. New York law created a "system of rights and remedies [that] recogniz[ed] the traditional place of private arrangements in ordering relationships in the commercial world, [which] can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign."[72]

The Supreme Court has also determined when professionals whose activities have some connection to the state will be deemed state actors. In *Polk County v. Dodson*,[73] the Court concluded that public defenders do not engage in state action when they represent defendants in criminal prosecutions.[74] The Court first recognized that an individual "acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[75] However, the actions of the public defender

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69. *Flagg Bros.*, 436 U.S. at 159.

70. *Id.* at 159-60.

71. *Id.* at 165 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974)).

72. *Id.* at 160. The Court's characterization of the utilization of remedies by creditors as not being a delegation of "an exclusive prerogative of the sovereign," as opposed to being an exclusive function of the government, is significant. *See infra* notes 315-32 and accompanying text.

Unlike *Flagg Brothers*, the Supreme Court in *Lugar* and *Tulsa Professional Collection Services* found state action. The Court distinguished private use of state-sanctioned remedies, which did not constitute state action from situations in which private parties invoke state procedures with significant assistance from state officials. *See Tulsa Prof'l Collection Servs.*, 485 U.S. at 485. In *Tulsa Collection*, the Supreme Court held that the involvement of the state's probate court in connection with the appointment of an executor required that notice be provided to an estate's creditor in order to satisfy due process. *Id.* at 488. In *Lugar*, the Court concluded that because private creditors could dispose of property only with the involvement of state officials, the Constitution governed the actions of the creditor. *Lugar*, 457 U.S. at 941.

73. 454 U.S. 312 (1981).

74. In *Polk County*, the Court recognized that under a different set of circumstances, such as when making employment decisions on behalf of the state, actions of a public defender might be deemed state action. *Polk County*, 454 U.S. at 325.

75. *Polk County*, 454 U.S. at 317-18 (quoting U.S. v. Classic, 313 U.S. 299, 326 (1941)). A

"entailed functions and obligations in no way dependent on state authority."[76] Except for the source of payment, the public defender is in the same position as any other attorney who represents a criminal defendant.[77] The Court rejected the idea that state action existed because of the employment relationship that existed between the professional and the state. Notwithstanding the payment of a public defender by the government, a public defender owes a duty of "undivided loyalty" to his client that places him in an adversarial position with the state.[78]

In *Blum v. Yaretsky*,[79] the Court concluded that decisions by private nursing homes to discharge Medicaid patients did not constitute state action.[80] Like the situation in *Polk County*, any decision to discharge Medicaid patients "turn[ed] on medical judgments made by private parties according to professional standards that have not been established by the State."[81] Likewise, as was the case in *Polk County*, the professionals in *Blum* made decisions pursuant to their professional canons of ethics and were not dictated by a rule of conduct imposed by the State.[82] Accordingly, a decision to transfer a Medicaid recipient was "purely a medical judgment."[83] Consequently, such transfer decisions were not "the kind of decisions traditionally and exclusively made by the sovereign for and on behalf of the public."[84]

However, in *West v. Atkins*,[85] the Supreme Court ruled that a physician, under contract with a State to provide medical services to a prisoner, engaged in state action when he provided such medical services.[86] While the provision of medical services is traditionally a private function, "the context" in which the prison doctor performed medical services for the State, namely the provision of medical services in a prison, distinguished the situation at hand from the "ordinary physician-patient

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person engages in state action when he acts under color of state law. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 182 n.4 (1988); Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982); *Lugar*, 457 U.S. at 935-37 n.18.

76. *Polk County*, 454 U.S. at 318.
77. *Id.*
78. *Id.* at 319-20.
79. 457 U.S. 991 (1982).
80. *Blum*, 457 U.S. at 1012.
81. *Id.* at 1008.
82. *Id.* at 1009.
83. *Id.* at 1006 n.16.
84. *Id.* at 1012.
85. 487 U.S. 42 (1988).
86. *West*, 487 U.S. at 54.

relationship."[87]

In *Rendell-Baker v. Kohn*,[88] the Supreme Court concluded that a decision to discharge teachers at a private school for maladjusted students did not constitute state action.[89] The Court first equated the school with other private corporations that conducted business with the government.[90] The Court then analogized the school to the public defender in *Polk County*. Just as the relationship between the public defender and her client was no different than any other attorney-client relationship, the payment of student tuition by the state did not change the relationship between the school and its teachers.[91]

The Court further concluded that the school did not perform the type of "public function" that would render it a state actor. The Court emphasized that the public function test is satisfied when the function performed "has been 'traditionally the *exclusive* prerogative of the State.' "[92] However, until recently, the State had not provided education for students whom the traditional public schools could not serve.[93]

In *Rendell-Baker*, the Court also equated the school with other private corporations that conducted business with the government. The actions of such private parties did not become acts of the government because of public contracts. Similarly, just as the public defender in *Polk County* did not engage in state action because the attorney-client relationship involving the public defender was no different than any other lawyer-client relationship, the relationship between the teachers and the school did not change simply because the state paid the tuition of the students.[94]

Justice White concurred in the judgment in *Rendell-Baker*. He emphasized that the teachers challenged an employment decision of the state. Because employment decisions of the school were not subject to extensive state regulation, the school did not base its employment decision to discharge the teachers "upon some rule of

87. *Id.* at 56-57 n.15.

88. 457 U.S. 830 (1982).

89. *Rendell-Baker*, 457 U.S. at 832, 837.

90. *Id.* at 840-41.

91. *Id.* at 841.

92. *Id.* at 842 (quoting *Jackson*, 419 U.S. at 353) (emphasis in original).

93. *Id.* Put another way, private parties were at liberty to establish schools that educated students whom traditional public schools could not serve. For a discussion as to the interrelationship between common law liberty and the state action doctrine, *see infra* notes 245-46 and accompanying text.

94. *Rendell-Baker*, 457 U.S. at 832, 837.

conduct or policy put forth by the State."[95] Accordingly, the decision to discharge the teachers remained a private decision not attributable to the state.[96]

The Supreme Court has also examined how the interrelationship between state officials and a private enterprise impacted upon a determination of state action. In *National Collegiate Athletic Association v. Tarkanian*,[97] a state university sought to discipline its basketball coach pursuant to the disciplinary procedures of the National Collegiate Athletic Association ("NCAA"), an unincorporated athletic association consisting of public and private universities.[98] The Supreme Court concluded that the actions of the NCAA did not constitute state action.[99]

In analyzing the issue at hand, the Court noted that the case "uniquely mirror[ed] the traditional state action case."[100] In such a traditional state action case, a private party has taken the decisive step that caused harm to a plaintiff and a court must ask whether the State provided the authority that enhanced the power of the private party.[101]

In *Tarkanian*, a state university, acting in accordance with NCAA rules, intended to punish its basketball coach.[102] However, the university's planned actions did not turn the NCAA into a state actor. The source of the NCAA's policies was not any state law but its collective membership, which was independent of any particular state.[103] Moreover, the state university had vigorously opposed sanctions that the NCAA had sought to impose.[104] Hence, the actions of the NCAA were deemed private and actions taken pursuant to NCAA rules were not taken under color of state law.[105]

In the Supreme Court's most recent term, the Court concluded in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[106] that a private not-for-profit organization that regulated interscholastic sports within the state engaged in state

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95. *Id.* at 844 (White, J., concurring).
96. *Id.* (White, J., concurring).
97. 488 U.S. 179 (1988).
98. *Tarkanian*, 488 U.S. at 186-87.
99. *Id.* at 199.
100. *Id.* at 192.
101. *Id.*
102. The plaintiff had yet to suffer harm as he sought declaratory and injunctive relief before the university could impose sanctions. *See Tarkanian*, 488 U.S. at 187.
103. *Id.* at 193.
104. *Tarkanian*, 488 U.S. at 199.
105. *Id.*
106. 121 S. Ct. 924 (2001).

action when it sanctioned a private school for recruiting violations.[107] Because 84% of the corporation's membership consisted of public schools, there was substantial entwinement of public officials and public schools within the private organization and the corporation could be said to exercise the authority of the public schools to meet the corporation's responsibilities.[108]

Three years after *Tarkanian*, in *Edmonson v. Leesville Concrete Company*,[109] the Supreme Court relied upon a number of indices of government involvement with private litigants to conclude that the discriminatory use of peremptory challenges in jury selection violated the Equal Protection Clause.[110] In so holding, the Court did not strictly apply any of its state action "tests." Instead, the Court relied on various portions of the public function test, the joint action test and the abuse of authority doctrine.[111] The Court found that the use of peremptory challenges could exist only with the participation of the government because the government administers the jury system,[112] and the use of a jury "involves the performance of a traditional function of the government."[113] Finally, the Court noted that the use of discriminatory peremptory challenges "is aggravated in a unique way by the incidents of governmental authority"[114] because the government permits this discrimination in its courthouse.[115]

Prior to *Brentwood Academy*, the Supreme Court last re-visited the state action issue in *American Manufacturers Mutual Insurance Company v. Sullivan*.[116] In *American Manufacturers*, the Court addressed the issue of whether or not private insurers, which provided coverage under a state's workers' compensation laws, engaged in state action when the insurer suspended payment pending a review of the reasonableness or necessity of the treatment provided.[117]

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107. *Brentwood Acad.*, 121 S.Ct. at 932-34.
108. *Id.* at 932-33.
109. 500 U.S. 614 (1991).
110. *Edmonson*, 500 U.S. at 625-30.
111. *Id.* at 620-22.
112. *Id.* at 622.
113. *Id.* at 624.
114. *Id.* at 622.
115. *Edmonson*, 500 U.S. at 628.
116. 119 S. Ct. 977 (1999).
117. *Am. Mfrs.*, 119 S.Ct. at 982-83. Under the state law, an insurer could request a utilization review by forwarding a one-page document to the Workers' Compensation Bureau of the Pennsylvania Department of Labor and Industry. *Id.* The Compensation Bureau then forwards the request to a utilization review organization ("URO"), a private health care

The Court framed the case as a "dispute between an insurer and an employee". The Court also characterized the state law that authorized the withholding of payment pending review as the restoration to insurers of an option, historically available to employers and insurers, to withhold payment of a medical bill until it had been substantiated.[118] Use of the URO process constituted "a remedy for wrongful conduct" and the "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action."[119]

In *American Manufacturers*, the Court rejected two other arguments by the plaintiffs. First, it distinguished *West*, because in *West*, the state was constitutionally obligated to provide medical treatment to prisoners and the delegation of this traditionally exclusive public function gave rise to a finding of state action.[120] Second, the decision-making authority to determine whether or not to suspend payment for disputed medical treatment was not a traditionally exclusive governmental function.[121]

III. Resolution of the Issue to Date by Federal Courts

Prior to the Supreme Court concluding that the government could not effectuate civil commitment absent substantive and procedural safeguards,[122] a number of federal courts concluded that civil commitment did not constitute state action. However, the rationale behind these holdings is so erroneous and outdated that these cases should, and generally do, serve as historical (and law review) footnotes.[123]

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provider that had the same or similar specialty as the provider of treatment under review. *Id.* at 983. If the URO found in favor of the employer, the employee could appeal to a workers' compensation judge for a *de novo* review. *Id.*

118. *Id.* at 987.

119. *Id.* at 986 (quoting *Tulsa Prof'l*, 485 U.S. at 485).

120. *Id.* at 988.

121. *Id.* at 987-88.

122. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975); Addington v. Texas, 441 U.S. 418, 425 (1979).

123. In *Spampinato v. Breger & Co.*, 270 F.2d 46 (2d Cir. 1959), a *pro se* plaintiff asserted that a number of individuals induced a psychiatrist associated with a hospital operated by New York City to certify him for hospitalization at the hospital where he remained for seventeen days until a judge ordered his release. In affirming the dismissal of the plaintiff's complaint, the court first held that the physician who certified the plaintiff for hospitalization acted in his capacity as a private citizen. *Id.* at 49. The court then noted that the plaintiff failed to assert that the actions of the defendants deprived him of due process of law, and in the absence of such allegations, the complaint, at most, stated a claim under state law. *Id.*

The Court in *Spampinato* failed to make clear the relationship of the psychiatrist who

A. The District Courts Find State Action in Civil Commitment Cases

From the late 1970s through the middle 1990s a number of district courts were required to examine the state action issue. Most, but not all of those courts held that private physicians who civilly committed individuals to private hospitals engaged in state action.[124] The holdings were based on a number of separate but related factors.

First, physicians who involuntarily hospitalize mentally ill individuals are clothed with state authority.[125] More specifically, the

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certified the plaintiff to the state. The court simply noted that the psychiatrist was "associated" with the City hospital. If the City employed the physician, no one would seriously assert that the doctor was not liable under § 1983 and hence, a state actor. *See, e.g.*, Rodriguez v. City of New York, 72 F.3d 1051, 1062-63 (2d Cir. 1995); Demarco v. Sadiker, 897 F. Supp. 693, 698-700 (E.D.N.Y. 1995).

In *Joyce v. Ferrazzi*, 323 F.2d 931 (1st Cir. 1963), an allegedly mentally ill individual sued, *inter alia*, a private physician who committed him under Massachusetts' civil commitment laws. In granting summary judgment to the defendants, the court, relying upon *Spampinato*, noted in a conclusory fashion that the doctor's action was that of a private citizen. *Id.* at 933.

In *Duzynski v. Nosal*, 324 F.2d 924 (7th Cir. 1963), an individual who was committed to the Chicago State Hospital sued, *inter alia*, a physician who certified her for involuntary hospitalization under Illinois' civil commitment laws, and a court clerk who presented the certification to a judge. The plaintiff also sued two physicians who examined the plaintiff pursuant to a court order and recommended her hospitalization. After granting judicial immunity to the physicians who examined the plaintiff pursuant to a court order, the court held that the court clerk did not act in his official position but that of a private citizen. *Id.* at 930. The court then held that although the Cook County Mental Health Clinic employed the committing physician, the physician did not act in his capacity as a county official but a private physician and did not engage in state action. *Id.*

In *Byrne v. Kysar*, 347 F.2d. 734 (7th Cir. 1965), a civilly committed individual sued a number of people involved in his hospitalization, including the physician who certified him for hospitalization and the physicians whom a court appointed to examine him. The court relied on *Duzynski* to summarily hold that the certifying physician acted in his private capacity even though the City of Chicago employed him. *Id.* at 736. The other physicians were entitled to judicial immunity since they were members of the court. *Id.*

Only *Dyzynski* and *Byrne* have retained any significance. Their significance rests on the reliance by the Seventh Circuit in *Spencer v. Lee*, 864 F.2d 1376 (7th Cir. 1989) (en banc) when it attempted to justify its decision that civil commitment constitutes state action. *See infra* note 395 and accompanying text.

124. *See* Plain v. Flicker, 645 F. Supp. 898, 908 (D.N.J. 1986); Brown v. Jensen, 572 F. Supp. 193, 197 n.1 (D. Colo. 1983); Watkins v. Roche, 560 F. Supp. 416, 419 (S.D. Ga. 1983); Kay v. Benson, 472 F. Supp. 850, 851 (D.N.H. 1979); Ruffler v. Phelps Mem. Hosp., 453 F. Supp. 1062, 1068-70 (S.D.N.Y. 1978). In *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984), and *Davenport v. Saint Mary Hospital*, 633 F. Supp. 1228, 1237 (E.D. Pa. 1986), the court strongly suggested that private physicians who certify mentally ill individuals for hospitalization engage in state action but held that the parties had to develop a greater factual record before the court could reach a final decision on this question. *Willacy*, 598 F. Supp. at 349-50; *Davenport*, 633 F. Supp. at 1237.

125. *Davenport*, 633 F. Supp. at 1237; *Willacy*, 598 F. Supp. at 349; *Watkins*, 560 F.

use of state authority results in the deprivation of liberty.[126] Likewise, the commitment of mentally ill individuals is an exercise of the state's *parens patriae* or police powers.[127] The courts also found state action because the state's civil commitment laws were part of an overall comprehensive regulatory scheme.[128] Finally, some courts have recognized that a finding that civil commitment does not constitute state action would permit a state to avoid its constitutional obligations that arise when that state confines a mentally ill individual.[129]

Even after a number of circuit courts held that physicians who civilly commit an individual to a private hospital do not engage in state action,[130] a number of district courts held that such doctors were state actors. In *Rubenstein v. Benedictine Hospital*,[131] the court concluded that the power of detention is normally and historically exercised by the government through it *parens patriae* or police powers.[132] In *Moore v. Wyoming Medical Center*,[133] a

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Supp. at 419; *Kay*, 472 F. Supp. at 851.

126. *Plain*, 645 F. Supp. at 907; *Brown*, 572 F. Supp. at 197 n.1. Similarly, the Supreme Court of Nevada in *Cummings v. Charter Hospital of Las Vegas*, 896 P.2d 1137 (Nev. 1995) and a New York intermediate appeals court in *Snyder v. Albany Medical Center Hospital*, 615 N.Y.S.2d 139 (N.Y. App. Div. 1994) both held that civil commitment is state action because of the state authority provided to private hospitals that enabled such hospitals to confine an allegedly mentally ill person. *Cummings*, 896 P.2d at 1144-45; *Snyder*, 615 N.Y.S. 2d at 140.

127. *Plain*, 645 F. Supp. at 907; *Willacy*, 598 F. Supp. at 349; *Ruffler*, 453 F. Supp. at 1070.

128. *Ruffler*, 453 F. Supp. at 1069. In so holding, the court concluded that:

> the statutory scheme expressly contemplates that in performing this public function of caring for [the mentally disabled] the State may utilize private entities of the sort we have here. This is precisely what the [county] officials did when they transferred [plaintiff] to the care of [New York Hospital]. But, as the statute makes incontrovertibly clear, it is the State, which in effect is providing the care *through* the private institutions. This exercise of the administrative placing prerogative does not affect in any way the State's ultimate responsibility for the well-being of the [plaintiff] and, consequently, the public nature of the function being performed.

Id. (quoting Perez v. Sugarman, 499 F. 2d 761, 765 (2d Cir. 1974) (emphasis in Perez) (bracketed material in Ruffler)).

129. *Davenport*, 633 F. Supp. at 1234; *Plain*, 645 F. Supp. at 908. On the other hand, the courts in *Landry v. Odom*, 559 F. Supp. 514, 518 (E.D. La. 1983) and *Watkins v. Roche*, 529 F. Supp. 327, 330 (S.D. Ga. 1981), held that a finding that civil commitment is state action would chill physicians in the exercise of their medical judgment in emergency situations.

130. *See infra* notes 139-81 and accompanying text.

131. 790 F. Supp. 396 (N.D.N.Y. 1992).

132. *Rubenstein*, 790 F. Supp. at 406. The court further recognized that because New York's civil commitment scheme was part of the state's comprehensive scheme to provide services to mentally ill individuals and the commitment of individuals is a public function, involuntary hospitalization satisfied both the "public function" and "close nexus" tests. *Id.* at 405.

number of factors warranted a finding of state action. First, the county and the private hospital that involuntarily hospitalized the plaintiff were financially interdependent. Second, under the terms of its lease with the county, the private hospital had a duty to provide services to indigent patients. Another factor was the county retained responsibility for the hospital.[134] Finally, the court further concluded that state action would also exist because the private hospital acted in concert with police officers to detain the plaintiff.[135]

B. The Circuit Courts Go the Other Way and Find No State Action in Civil Commitment

In *Burch v. Apalachee Community Mental Health Services, Inc.*,[136] the Eleventh Circuit became the first appeals court to address the state action issue in the modern state action era. The court held that the confinement of a mentally ill individual to a facility designated by the state to receive mentally ill individuals constituted state action.[137] The court reasoned that the private mental health facility could confine the mentally ill person only because the facility was clothed with the authority of state law and the facility had authority to confine the individual for periods of time that no private citizen possessed.[138]

Notwithstanding *Burch*, in *Spencer*, the Seventh Circuit concluded that physicians who civilly commit an individual to a private hospital do not engage in state action. In concluding that civil commitment does not constitute state action, the Seventh

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133. 825 F. Supp. 1531 (D. Wyo. 1993).

134. *Moore*, 825 F. Supp. at 1541.

135. *Id.* at 1542. Unlike the courts in *Moore* and *Rubenstein*, the court in *Lewis v. Law-Yone*, 813 F. Supp. 1247 (N.D. Tex. 1993) held that civil commitment is not state action. The government did not insinuate itself with the private defendants as to make them state actors. *Lewis*, 813 F. Supp. at 1254. Nor was civil commitment a power exclusively reserved to the state. *Id.* at 1255. Finally, the state neither coerced nor significantly encouraged private physicians to civilly commit the plaintiff. *Id.* Like the court in *Law-Yone*, the court in *Landry*, held in a conclusory fashion that the actions of a private physician did not satisfy either the public function or state compulsion tests. *Landry*, 559 F. Supp. at 518. The court in *Watkins* also concluded that civil commitment does not constitute state action. The court reasoned that because ordinary citizens can initiate the civil commitment process, physicians who civilly commit a mentally ill person do not perform a public function. *Watkins*, 529 F. Supp. at 330. Moreover, the state's civil commitment statute did not require physicians to execute a civil commitment certificate. *Id.* at 330-31.

136. 840 F.2d 797 (11th Cir. 1988) (en banc).

137. *Burch*, 840 F.2d at 803.

138. *Id.* at 803 n.12.

Circuit first noted that state law was not passed to encourage commitments.[139] The court then rejected the argument that civil commitment is state action because of the detainment of the individual. In ancient Greece and Rome, and England until the nineteenth century, private individuals made most arrests and prosecutions. Hence, arrest has never been an exclusive government function.[140] Then, without citing any authority, the court concluded that "[n]ot all state-authorized coercion is government action."[141] Accordingly, civil commitment was no different than the eviction of trespassers, the repossession of chattels, or a citizen's arrest.[142]

In *Spencer*, the court next examined the history of psychiatric hospitalization to determine whether it was an exclusive governmental function and found that, historically, Illinois law permitted confinement by a private person for ten days.[143] The court then cited history books that found that friends or relatives could commit a mentally ill person. As a result, the Court found that civil commitment was not an exclusive function of the government.[144]

Four judges on the *en banc* panel in *Spencer* concluded that civil commitment is state action. Judges Ripple and Flaum recognized that misuse of state power that is made possible only because the wrongdoer is clothed with authority under state law constitutes action "under color of law."[145] Judges Cummings and Cudahy recognized that the state could not escape responsibility for a violation of constitutional rights when it delegates a sovereign function.[146]

Three years later, in *Harvey v. Harvey*,[147] the Eleventh Circuit repudiated its decision in *Burch* and became the next circuit to hold that civil commitment is not state action. First, the court opined that civil commitment is not state action because, *inter alia*, the Georgia statutes neither compelled nor encouraged civil commitment.[148] Next, the court concluded that civil commitment is

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139. *Spencer*, 864 F.2d at 1379.
140. *Id.* at 1380.
141. *Id.*
142. *Id.* 1380-81.
143. *Id.* at 1380.
144. *Spencer*, 864 F.2d at 1381.
145. *Id.* at 1385.
146. *Id.* at 1388 (citing *West*, 487 U.S. at 55-56).
147. 949 F.2d 1127 (11th Cir. 1992).
148. *Harvey*, 949 F.2d at 1130.

not "so reserved to the state that action under the commitment statute transforms a private actor into a state actor."[149] The court further noted that state law acts as a licensing provision, which is insufficient to transform private hospitals into state actors.[150] Finally, the court concluded that commitment decisions are medical judgments made according to professional standards that are not established by the state.[151]

In *Janicsko v. Pellman*,[152] the Third Circuit joined the other circuits in holding that civil commitment does not constitute state action. The court affirmed a district court opinion that concluded that state law permitted doctor's to exercise their professional discretion, and under *Blum*, their decisions could not be considered that of the state.[153]

In *Rockwell v. Cape Cod Hospital*,[154] the First Circuit concluded that the involuntary hospitalization of a mentally ill person did not satisfy the state compulsion, nexus/joint action or public function tests. The state compulsion test was not satisfied because state law did not compel or encourage commitment.[155] The nexus/joint action test was not satisfied because extensive government regulation and the receipt of federal funds did not convert private action to action taken under color of state law.[156]

In concluding that involuntary hospitalization did not satisfy civil commitment the court distinguished between involuntary "admission" and "commitment". Historically, only commitment required action by a judge.[157] On the other hand, since the Colonial era, private individuals provided care for mentally ill individuals and since the turn of the century, both private individuals and physicians could arrange for the admission of mentally ill individuals.[158]

In *Ellison v. Garbarino*,[159] the Sixth Circuit concluded that the

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149. *Id.* at 1131.
150. *Id.* at 1132.
151. *Id.*
152. 970 F.2d 899 (3d Cir. 1992) *aff'g without opinion*, 774 F. Supp. 331 (M.D. Pa. 1991).
153. *Janicsko*, 774 F. Supp. at 339. In *Janicsko*, private doctors were required to determine whether a mentally ill person's capacity to exercise self-control, judgment, and discretion in the conduct of his affairs is impaired. *Id.* at 337.
154. 26 F.3d 254 (1st Cir. 1994).
155. *Rockwell*, 26 F.3d at 258.
156. *Id.*
157. *Id.* at 259.
158. *Id.* at 260.
159. 48 F.3d 192 (6th Cir. 1995).

Tennessee commitment statutes did not compel or encourage private involuntary commitments.[160] Nor did civil commitment satisfy the public function test. The court reasoned that analysis of this question is state specific, and the plaintiff bore the burden of establishing that commitment in Tennessee is a public function. Because the plaintiff did not offer any legal analysis on this issue, the court rejected the public function test as a basis for finding state action.[161] Finally, the court rejected *West* as authority because, unlike the physician in *West*, the defendants in the present case were not under contract with the state.[162]

In *Pino v. Higgs*,[163] the Tenth Circuit concluded that physicians who certified a patient for involuntary hospitalization did not engage in state action because any decision to commit was a medical judgment and not a decision that the doctors made pursuant to professional standards established by the state.[164] The court added that for reasons similar to those given by the courts in *Harvey* and *Spencer*, the certification by a private physician did not constitute state action.[165]

In *S.P. v. City of Takoma Park*,[166] an involuntarily hospitalized individual asserted that private physicians were state actors because state law encouraged civil commitments.[167] The court rejected this argument noting that another provision of the commitment law provided that a petition for involuntary hospitalization *may* be made if a petitioner believes that the patient poses a danger to himself or others.[168] Like the courts in *Harvey* and *Pino*, the court in *S.P.* concluded that any decision to commit constituted a medical judgment that was not made pursuant to professional standards established by the state.[169]

Subsequently, in *Okunieff v. Rosenberg*,[170] the Second Circuit affirmed the district court decision that held that civil commitment

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160. *Ellison*, 48 F.3d at 196.

161. *Id.*

162. *Id.* at 197.

163. 75 F.3d 1461 (10th Cir. 1996).

164. *Pino*, 75 F.3d at 1466.

165. *Id.* at 1466-67.

166. 134 F.3d 260 (4th Cir. 1998).

167. *S.P.*, 134 F.3d at 268-69. The plaintiff asserted that under state law, if a patient met the standards for involuntary admission, the examining physician shall take steps for his involuntary admission. *Id.*

168. *Id.* at 270. The court also relied on *Spencer*, *Pino*, *Harvey*, and *Janicsko* to conclude that the defendants were not state actors. *Id.* at 269-70.

169. *Id.* at 270.

170. 166 F.3d 507 (2d Cir. 1999).

is not state action for "substantially" the same reasons given by the district court.[171] The district court had first concluded that civil commitment did not satisfy the state compulsion test because the state does not compel civil commitments.[172] In reaching this decision, the court concluded that notwithstanding the existence of legal standards under the Mental Hygiene Law, when determining whether or not to commit, physicians employed medical judgments based upon standards in the medical community.[173]

Next, the court in *Okunieff* held that civil commitment did not satisfy the close nexus/joint action test because a person's hospitalization did not involve a situation in which the state is a joint participant in the "enterprise."[174] The court further held that civil commitment did not satisfy the public function test because the committing physicians did not exercise powers "that were 'traditionally the exclusive prerogative of the State.' "[175] Consequently, the court, relying on *Spencer*, equated civil commitment to a citizen's arrest, the repossession of chattels, and the ejection of trespassers.[176]

Finally, the court rejected the position of *Rubenstein Benedictine Hospital* that civil commitment constitutes state action because the state provides authority to deprive a person of liberty.[177] Rather, the district court concluded that the authority which private physicians and private hospitals use to commit an individual is derived from the professional medical standard of the community where the physicians' medical judgments are based.[178]

The Fifth Circuit, in *Bass v. Parkwood Hospital*,[179] became the next circuit to hold that physicians who civilly commit a mentally ill person do not engage in state action. First, the court reasoned that the State of Mississippi's commitment statutes neither compelled nor encouraged the private initiation of commitment proceedings.[180] The court then concluded that civil commitment has not been a function exclusively reserved to the state.[181]

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171. *Id.*
172. Okunieff v. Rosenberg, 996 F. Supp. 343, 349 (S.D.N.Y. 1998).
173. *Id.* at 351.
174. *Id.* at 352.
175. *Id.* at 353 (quoting *Jackson*, 419 U.S. at 353).
176. *Id.* at 356.
177. *Okunieff*, 996 F. Supp. at 354.
178. *Id.*
179. 180 F.3d 234 (5th Cir. 1999).
180. *Bass*, 180 F.3d at 243.
181. *Id.* In so holding, the court recognized that the Mississippi Constitution imposes a

In *Jensen v. Lane County*,[182] the Ninth Circuit became the first circuit court to conclude that private physicians who civilly committed a mentally ill individual engaged in state action. The court found that the plaintiff satisfied the state action test because the state "so deeply insinuated itself" into the civil commitment process as to result in a sufficiently close nexus between the state and the actions of the private defendant.[183] County employees initiated the evaluation process, significant consultation took place between county and private mental health professionals, and the private medical group helped to develop and maintain mental health policies at the county hospital at which the plaintiff was initially detained.[184] The Ninth Circuit did not cite or refer to any of the adverse authority from other circuit courts and simply noted that this case fell "between lines drawn in other jurisdictions."[185]

IV. Underlying Considerations When Reevaluating the Applicability of the State Action Doctrine to the Civil Commitment Process

A. *Framing the State Action Question*

The outcome of any legal dispute may well depend on how one frames the legal issue at hand.[186] Hence, it is no surprise that in state action litigation, the parties and/or the courts have, at times, framed the challenged activity differently.[187]

The decisions by the Third Circuit and the Supreme Court in *American Manufacturers Mutual Insurance Company* illustrate how characterization of the activity of the private defendants can virtually dictate a particular result. The Third Circuit characterized

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duty on the state to care for the mentally ill. However, in *Bacon v. Bacon*, 24 So. 968 (Miss. 1899), the Mississippi Supreme Court upheld a lawsuit against two physicians who filed two commitment certificates even though the physicians were not the individuals legally charged with making commitment decisions. This decision, the Circuit Court held, reflected that "private citizens in Mississippi had been participating in the commitment process for over one hundred years." *Id.*

182. 222 F.3d 570 (9th Cir. 2000).

183. *Id.*

184. *Id.* at 573, 575.

185. *Id.* at 574-75.

186. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (recognizing that any determination of whether or not the Constitution protects a particular activity may well turn on whether a court characterizes the activity in question as the exercise of a fundamental right; whether an activity is deemed to be an exercise of a fundamental right depends upon how a court characterizes the actions in question).

187. *See, e.g.*, *Flagg Bros.*, 436 U.S. at 157, 162-63.

the actions of the defendants as "providing public benefits which honor state entitlements."[188] On the other hand, the Supreme Court characterized the actions of the defendants as "a *private insurer's* decision to withhold payment for disputed medical treatment."[189]

It appears that the Supreme Court has not given much thought as to how to frame the actions of private parties. While the court in *Flagg Brothers* framed the actions of the private defendants as creditors who engaged in private commercial transactions and undertook self-help remedies,[190] Justice Marshall in his dissent characterized the conduct of the creditor as "the execution of a lien . . . [an action that] . . . traditionally has been the function of the Sheriff."[191] Likewise, in *Rendell-Baker* the majority equated a private school with many private corporations whose business depended on governmental contracts.[192] On the other hand, the Court's dissenters characterized the activity of the private school as the statutorily imposed duty to educate children that had been delegated by the government.[193] In neither of these cases, nor in any other state action case, did any justice address the appropriate methodology characterizing the challenged activity.

It is easy to see how the characterization of the actions that result in the involuntary hospitalization of a mentally ill individual can have a significant impact on the resolution of this issue. On one hand, civil commitment involves the provision of psychiatric treatment to those in need of such assistance.[194] Hence, one can characterize civil commitment as the provision of medical care.[195] On the other hand, civil commitment constitutes a significant deprivation of liberty.[196] Hence, one can also frame the question at hand as whether the deprivation of physical liberty constitutes state

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188. *Am. Mfrs.*, 119 S.Ct. at 987 (quoting 139 F.2d 158, 168 (3d Cir. 1998)).

189. *Id.* at 986 (emphasis in original); *see also West*, 487 U.S. at 46 n.6 (noting that the court of appeals equated the medical care given to a prisoner with the medical care provided to Medicaid recipients in *Blum v. Yaretsky*, 457 U.S. 991 (1982), which appeals court characterized as the "day-to-day rendering of medical services by a physician").

190. *Flagg Bros.*, 436 U.S. at 161-63, 162 n.12.

191. *Id.* at 167-68 (Marshall, J., dissenting) (quoting Blye v. Globe-Wernicke Realty Co., 300 N.E.2d 710, 713-14 (N.Y. 1973)).

192. *Rendell-Baker*, 457 U.S. at 840-41.

193. *Id.* at 844 (Marshall, J. dissenting).

194. *See* Goetz v. Crosson, 967 F.2d 29, 34-35 (2d Cir. 1992).

195. *See Okunieff*, 996 F. Supp. at 356 (equating actions of physicians who involuntarily confine a patient with actions of a private general hospital). Certainly, framing the issue in this matter virtually preordains a holding that civil commitment is not state action as "the provision of medical services is a function traditionally performed by private individuals." *West*, 487 U.S. at 56 n.15.

196. *See supra* note 3 and accompanying text.

action.

However, all deprivations of liberty are not the same. A citizen's arrest in which a person is detained and promptly turned over to the police differs greatly from a situation in which police officers collaborate with private individuals to arrest and prosecute someone for a crime that results in a prison sentence.[197] Because civil commitment often results in a deprivation for a number of weeks prior to any court hearing,[198] one can more accurately characterize the issue as whether the deprivation of physical liberty for an extended period of time constitutes state action.[199]

A private physician who involuntarily hospitalizes a mentally ill individual does so for the purposes of providing treatment to a mentally ill person and protecting either the public from the dangerous tendencies of the mentally ill person or the person from the risk of harm that he may pose to himself.[200] Accordingly, civil commitment is simply not a situation in which an individual receives medical services. Rather, the decision to commit is an exercise of the state's *parens patriae* and police powers.[201]

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197. *See, e.g.*, Griffin v. Maryland, 376 U.S. 130 (1964).

198. *See, e.g.*, Goetz v. Crosson, 41 F.3d 800, 804 (2d Cir. 1994) (recognizing that the appointment of an independent expert can delay civil commitment hearings a month or longer); French v. Blackburn, 428 F. Supp. 1351, 1355 (M.D.N.C. 1977) (holding that confinement for 10 days with opportunity for additional continuances does not violate the Constitution); Logan v. Arafeh, 346 F. Supp. 1265, 1268-70 (D. Conn. 1972) (authorizing 45 day confinement without hearing).

199. These two characterizations of the civil commitment process can result in different outcomes. The deprivation of *any* physical liberty is not a power that has been traditionally exclusively reserved to the states as private citizens have had the right to make citizens' arrests. *See Spencer*, 864 F.2d at 1380; *Okunieff*, 996 F. Supp. at 353 (noting arrest, search and detention are not exclusively reserved to the state). While common law and now statutory law have permitted the short-term detainment of a shoplifter in defense of one's property, under both common and statutory law, once a private individual arrested a purported lawbreaker, the arrestor was required to promptly transport the arrestee to government authorities. *See, e.g., Spencer*, 864 F.2d at 1388 (Cummings, J. dissenting); Hendrix v. Manhattan Beach Dev. Co., 168 N.Y.S. 316, 321 (N.Y. App. Div. 1917); People v. Ostrosky, 160 N.Y.S. 493, 496 (N.Y. Crim. Ct. 1916); N.Y. CRIM. PROC. LAW § 140.40(1). Accordingly, when looking at the scope of a private person's authority to deprive another individual of physical liberty, a vast difference exists between the temporary detainment of a shoplifter whom the store quickly turns over to the police and the confinement and custodial investigation of the same shoplifter for seventy-two hours. However, if a court characterizes the question as simply arrest and detainment, that court fails to distinguish between these two types of deprivations of liberty.

200. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 426 (1979); Project Release v. Prevost, 722 F.2d 960, 973 (2d Cir. 1983).

201. Brakel, Parry & Weiner, *supra* note 6 at 24. For an illustration as to how the framing of the issue in this context can impact on the resolution of the issue at hand, *see infra* notes 396-406 and accompanying text.

The Supreme Court has concluded in the substantive due process context that the need to avoid arbitrary decision-making by courts requires courts to characterize rights at issue at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[202] Such a standard is appropriate in the substantive due process context since a resolution of this issue requires a court to examine whether history and tradition have protected a particular legal right.[203] While utilizing an objective, legally specific standard to frame the issue at hand may help to minimize arbitrary decision-making, in the state action context, history and tradition are not always particularly relevant considerations.[204] However, since the state action doctrine aims to determine whether the actions of private individuals infringe upon a plaintiff's constitutional rights, one can look at the most specific context at which the Supreme Court has engaged in constitutional adjudication.[205]

On the other hand, in the state action context, the Constitution does not always specifically address the existence of a right for which a plaintiff seeks constitutional protection.[206] Furthermore, when framing the state action issue, the Supreme Court has frequently looked, not at particular rights, but at particular actions

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202. *Michael H.*, 491 U.S. at 127 n.6. In *Michael H*, the Supreme Court examined whether the substantive component of the Due Process Clause protected extra-marital sexual relations. *Id.* at 124. This required the Court to frame the conduct for which the plaintiffs sought protection. In framing the issue as whether or not the law traditionally protected the exercise of extra-marital sexual activity, the Court concluded that it should not characterize the action in question as the performance of consensual sexual activity. Rather, principled constitutional analysis dictated that the Court characterize the conduct at the most specific level of generality that the law protected or failed to protect. *Id.* at 127 n.6.

203. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

204. These considerations *are* relevant when a court applies the public function test. *See infra* notes 316-40 and accompanying text. However, when a court applies the other state action criteria, history and tradition are certainly not as pivotal as they are in substantive due process analysis.

205. *See West*, 487 U.S. at 53-54, 56 n.15 (recognizing that the Constitution requires the provision of minimally adequate medical services to prisoners and distinguishing between the provision of medical services to prisoners and the provision of medical services in general); *Marsh*, 326 U.S. at 508-09 (recognizing that the First Amendment protects the right to petition on the street corner). Resort to an examination of the relevant constitutional protection is particularly relevant if one believes that the Constitution completely reserves a zone of activities to state control. *See* Chemerinsky, *supra* note 17 at 542.

206. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (involving provision of utility service); Blum v. Yaretsky, 457 U.S. 991 (1982) (involving provision of medical care to general population).

of private defendants.[207] However, the idea of developing a standard for the framing of activity by a private defendant can help to eliminate the arbitrary characterization of private actions that can enable a court to reach any particular result that it wishes to reach based upon the particular preferences of the judges deciding the case.[208]

It is not easy to set forth a concrete method for characterizing private activity because plaintiffs have asserted many different bases for a finding of state action.[209] However, when attempting to characterize the conduct of defendants, one can adhere to the concept of specificity by looking at the most specific level at which the law has set limits on the type of conduct in which the defendants have engaged.

Whether one attempts to frame the state action issue by looking at the most specific level at which the Supreme Court has engaged in constitutional adjudication or the most specific level at which the law has set forth limits on the defendants' conduct, in the civil commitment context, the result is the same. The Supreme Court has held that the Due Process Clause provides substantive and procedural protections to subjects of the civil commitment process.[210] On the other hand, historically, courts have addressed the right of an allegedly ill person to remain free from compulsory in-patient treatment and have placed limits on an individual's authority to confine such mentally ill person.[211]

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207. *See, e.g., Flagg Bros.*, 436 U.S. at 157; *Am. Mfrs.*, 119 S.Ct. at 987.

208. Admittedly, some problems exist with the concept of applying particular levels of generality to state action analysis. First, two members of the majority in *Michael H.*, Justices O'Connor and Kennedy, have noted that the approach set forth by the majority in *Michael H.* will not necessarily be the single mode of constitutional analysis. *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring). Moreover, these justices now believe that when attempting to define the scope of the substantive component of the Due Process Clause, the mode of constitutional analysis taken by the majority in *Michael H.*, is "inconsistent with our law." Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992). Secondly, this approach also creates the potential for arbitrary application when one must determine how one moves from one level of generality to the next. *See* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1090-91 (1990). However, notwithstanding these concerns, the concept of attempting to define the examined activity of defendants in the narrowest appropriate context can help eliminate arbitrary decision-making when a court attempts to frame the state action issue.

209. *See* Blum, 457 U.S. at 1003-04 (detailing different bases for a possible finding of state action).

210. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (holding due process prohibits the confinement of a mentally ill individual who can live safely in the community with the help of others); *Addington*, 441 U.S. at 432-33 (requiring clear and convincing evidentiary standard in commitment hearings).

211. *See, e.g.*, D.A. Cox, Annotation, *Right, Without Judicial Proceeding, to Arrest and*

Accordingly, whether one chooses to frame the issue by reference to relevant constitutional rights or by the conduct of the private wrongdoers, an attempt to frame the issue at hand in the narrowest and most accurate manner results in the framing of the issue as follows: whether physicians at private hospitals engage in state action when they involuntarily confine an allegedly mentally ill person for compulsory treatment, *i.e.*, when they civilly commit an allegedly mentally ill individual.

B. The Interrelationship Between Civil Commitment by Private Physicians and the Policies Underlying the State Action Doctrine

The application of any legal doctrine to a particular situation requires an examination of the purposes underlying such doctrine. Such examination is particularly necessary when addressing the issue at hand since there has been substantial disagreement among the courts that have addressed the issue of whether or not civil commitment is state action. While an examination of the purposes underlying the state action doctrine does not, in and of itself, resolve the issue, it is a factor to consider when scrutinizing the legal framework governing this issue.

The state action doctrine first seeks to ensure "that there is no '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[212] Second, an object of the Constitution "is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law."[213] Hence, the state action doctrine also seeks to preserve individual freedom by limiting the reach of federal law.[214] The state action doctrine also avoids imposing responsibility on the state for conduct for which it

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Detain one who is, or is Suspected of Being, Mentally Deranged, 92 A.L.R. 2d 570, § 6, at 580-81 (1963) (and cases cited therein).

212. Int'l Soc'y for Krishna Consciousness, Inc., v. Air Canada, 727 F.2d 253, 255 (2d Cir. 1984) (quoting *Lugar*, 457 U.S. at 929). The goal of protecting against the exercise of governmental authority by private individuals is relevant to both the abuse of authority doctrine and cases in which parties act on behalf of the government.

213. *Edmonson*, 500 U.S. at 619.

214. *Id.* A desire to limit the reach of federal law explains why the Supreme Court found no state action when a private school discharged teachers in *Rendell-Baker*, when debtors and a creditor engaged in a dispute in *Flagg Brothers* and in *Jackson* when a customer of a utility company sought damages because of an allegedly wrongful termination of services.

cannot be blamed.[215]

A finding that individuals who involuntary hospitalize someone at a private hospital engage in state action is consistent with the purposes underlying the state action doctrine. No one can seriously dispute that state law provides physicians with the authority to commit allegedly mentally ill individuals.[216] Individuals who have sued private physicians pursuant to 42 U.S.C. § 1983 have alleged that those physicians have abused their state authority by violating their constitutional rights.[217] A finding of state action provides such individuals with a remedy when physicians have misused authority granted to them by state law.[218]

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215. *Id.* This function of the state action doctrine is rarely implicated. It arises only in those rare instances, such as in *Blum*, when plaintiffs seek to hold the government accountable for the actions of private individuals with whom there is little connection. This situation must be distinguished from those situations in which government officials act in tandem with private individuals and there is no dispute that the government officials will be held accountable for their conduct. *See Am. Mfrs.*, 119 S. Ct. at 985-86.

216. *See, e.g.*, N.Y. MENTAL HYG. LAW § 9.03 (McKinney 1996 and Supp. 2000) (prohibiting psychiatric hospitals from admitting patients except pursuant to the provisions of the state's civil commitment laws); *see also Ellison*, 48 F.3d at 195 (acknowledging that state law provides private physicians with authority to confine an allegedly mentally ill person); *S.P.*, 134 F.3d at 270.

217. *See, e.g., Okunieff*, 996 F. Supp. at 346; *Rockwell*, 26 F.3d at 256.

218. *See* Owen v. City of Independence, 445 U.S. 622, 651 (1980) (noting purpose of §1983 is to provide compensation); Felder v. Casey, 487 U.S. 131, 139 (1988). Admittedly, the common law claim of false imprisonment may provide some protection against any abuse of authority. However, Congress intended that § 1983 provide a remedy that is independent of any remedies under state law. *See* Mitchum v. Foster, 407 U.S. 225, 239 (1972); *Felder*, 487 U.S. at 141-43.

Moreover, for a number of reasons, a false imprisonment claim will often fall short of providing adequate protection for abuse of state authority. First, a mentally ill individual may seek to enjoin a systemic abuse of state authority by private hospitals or private physicians. A common law damage remedy may not serve as a vehicle to obtain prospective relief. Second, the statute of limitations for a § 1983 lawsuit may exceed the limitations period for a common law claim. *See* William M. Brooks, *Reevaluating Substantive Due Process as a Source of Protection for Psychiatric Patients to Refuse Drugs*, 31 IND. L. REV. 937, 941 (1998). Particularly because mentally ill individuals may lack knowledge of their rights, or an ability to procure legal assistance, the existence of a longer limitations period could result in a person having a § 1983 claim when he would not have a claim under state law. *See Felder*, 487 U.S. at 141-42.

Finally, 42 U.S.C. § 1988 authorizes the awarding of attorney's fees to the prevailing party in a § 1983 action. Many subjects of civil commitment lack the ability to work because of their illness. *Cf.* Mental Health Ass'n. of Minn. v. Schweiker, 554 F. Supp. 157, 162 (D. Minn. 1982), *aff'd.*, 720 F.2d 965 (8th Cir. 1983). Moreover, their confinement may not last for an extended period of time, particularly if the subject of commitment seeks a judicial hearing to challenge his hospitalization and a court finds that the subject of commitment did not satisfy the civil commitment criteria. *See, e.g., Okunieff*, 996 F. Supp. at 347 (noting that state court directed the release of plaintiff in civil commitment proceeding). Hence, for many individuals who have been wrongfully confined, the prospect of a large damages award is not particularly great. These circumstances may limit the ability of someone to obtain legal

Furthermore, the actions of private physicians or private hospitals are possible *only* because the state's civil commitment laws have authorized physicians to confine allegedly mentally ill individuals. Without the express authority of state law, physicians would not be in a position to exercise their medical judgment to effectuate the involuntary hospitalization of mentally ill individuals.[219]

A finding of state action does not adversely impact upon the citizens' ability to structure their private relations as they see fit, subject only to the constraints of statutory or decisional law. If I choose to teach at a private university, I understand that I may not have the same level of job protection that I would have if I worked for a state university.[220] Nevertheless, I weigh the comparative advantages and disadvantages between the two jobs and act as I see fit.

However, under no circumstances does civil commitment involve two parties choosing to structure their relationship in a particular manner. When a private physician certifies a person for commitment, the mentally ill person is detained and/or transported to a private hospital and is not given a choice in the matter.[221]

As one authority has noted, it is not particularly appropriate to examine the degree of individual liberty preserved because an increase of liberty for a party to a legal dispute that implicates the state action doctrine results in a concomitant decrease in liberty for the other party.[222] Accordingly, since the state action doctrine seeks to preserve individual freedom as a whole, it is appropriate to resolve any state action question in a way that, to the greatest extent possible, furthers the concept of liberty for one party to the legal dispute at hand while not inappropriately limiting the liberty of the other party. To this extent, it is no doubt useful to examine the scope of liberty that both sides of the legal dispute have under common law.[223]

The Constitution permits physicians to confine mentally ill

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representation. The potential for an award of attorney's fees may make it substantially easier for someone who has been wrongfully confined to obtain legal assistance to redress abuses of state authority. Brooks, at 941-42.

219. *See infra* notes 245-47 and accompanying text (detailing limitations on the power to confine under common law).

220. *See* Perry v. Sindermann, 408 U.S. 593, 596-98 (1972).

221. *See, e.g., Okunieff*, 996 F. Supp. at 347; *S.P.*, 134 F.3d at 264-65.

222. *See* Chemerinsky, *supra* note 17 at 536.

223. *Cf. Flagg Bros.*, 436 U.S. at 162 n.12 (noting that Supreme Court looks to rights of creditors under common law when resolving state action issue).

individuals pursuant to state authority under circumstances that the common law did not. The common law permitted physicians (and anyone else) to confine a mentally ill person only when the threatened harm was imminent. Moreover, the Constitution permits physicians to confine a mentally ill person when the threatened harm is not immediate and somewhat more remote.[224] On the other hand, both the Constitution and state law set forth the boundaries of the authority to civilly commit. Because state commitment laws broadened the authority of physicians to commit even after such laws were limited to a degree by the Due Process Clause,[225] a finding that civil commitment does not entail state action intolerably broadens the liberty of physicians because it eliminates restrictions against physicians who wish to confine mentally ill individuals under circumstances not permitted by either the common law or the Constitution.[226] For the same reason, a finding that civil commitment does not entail state action intolerably diminishes the liberty of those individuals subject to private civil commitments.

Finally, a finding that civil commitment constitutes state action does not impose responsibility on a state for conduct for which it cannot be blamed. Generally, this issue has arisen in the context of individuals seeking damages from private physicians.[227] In these situations, the plaintiff does not seek to hold the state accountable

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224. *See infra* note 248 and accompanying text.

225. *See id.*

226. Such a result is particularly pernicious because physicians want to treat mentally ill individuals and have felt frustrated by the limitations on their ability to treat imposed by the Constitution. *See, e.g.*, Donald Treffert, *"Dying with Their Rights On,"* 139 AM. J. PSYCH. 1041, 1041 (1973). At times, physicians have tried to evade limitations on their ability to treat imposed by the Constitution. *See, e.g.*, David B.Wexler & Samuel E. Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 100-01 (1971) (finding that physicians labeled mentally ill individuals as dangerous in order to further their ability to treat); Edward P. Mulvey & Charles W. Lidz, *Back to Basics: A Critical Analysis of Dangerousness Research in a New Legal Environment*, 9 L. & HUMAN BEHAV. 209, 214 (1985) (stating incorrect assessments of dangerousness is a function of doctors labeling an individual dangerous as a method of ensuring treatment); John Monahan, *The Clinical Prediction of Violent Behavior* 51, National Institute of Mental Health Monograph (1981). Similarly, in looking at physicians' ability to administer medication notwithstanding court decisions that recognized a right to refuse medication, one prominent psychiatrist noted that "[n]o matter what the law does, we'll always [d]rug all the people we want. I hate to say that, but that's my experience. By hook or by crook, most of the patients will continue to be [drugged]." Sheldon Gelman, *The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1290 n.318 (1995) (quoting Dr. Loren Roth). (or Loren Roth *in Conference report, Refusing Treatment in Mental Health Institutions: Values in Conflict*, 32 HOSP. & COMMUNITY PSYCHIATRY 255, 257 (1981)).

227. *See, e.g., Spencer*, 864 F.2d at 1377; *Okunieff*, 996 F. Supp. at 346.

in any way.

However, one can envision a situation in which a plaintiff or class of plaintiffs seeks to remedy unlawful practices that both public and private physicians are undertaking.[228] Because the ability of private physicians to provide compulsory in-patient treatment depends on the authority conferred upon them by state law, the actions of the state can be deemed to be the proximate cause of challenged conduct.[229] In such a situation, the state action doctrine enables a court to hold private parties accountable in the same manner that it would hold public entities accountable and imposes similar constraints on both the state and private parties when performing a sovereign function.

V. Why Civil Commitment Constitutes State Action

A. *Civil Commitment Entails the Exercise of Coercive State Authority*

The circuit courts that have addressed the state action question in the civil commitment context have generally applied the traditional state action tests.[230] These courts have failed to recognize the existence of the "abuse of authority doctrine" that applies when private individuals have "the weight of the State behind their private decisions."[231]

Accordingly, the Supreme Court has concluded that an individual acts "under color of" state law, and hence, engages in state action, when he carries a "badge of authority and represents the state in some capacity,"[232] or participates in activity that "results from the

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228. *See, e.g.*, Monaco v. Stone, No. CV-98-3386 (E.D.N.Y. filed May 4, 1998) (challenging the manner in which psychiatrists evaluate civil commitment subjects in both public and private hospitals).

229. *Cf.* Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 24 (2d Cir. 1979) (utilizing a "but for" test to determine whether actions of private entity are governmental in nature).

230. *See supra* notes 139-81 and accompanying text.

231. *Lugar*, 457 U.S. at 940.

232. *Tarkanian*, 488 U.S. at 191. The Supreme Court has concluded that while conduct that satisfies the state action requirement also satisfies the under color of law requirement, it does not follow that conduct that satisfies the under color of law requirement also satisfies the state action standards. *Lugar*, 457 U.S. at 935, n.18. However, the Court has cited *Lugar* to conclude that "in § 1983 actions the statutory requirement of action 'under color of state law' is just as broad as the Fourteenth's Amendment's 'state action' requirement." Hafer v. Melo, 502 U.S. 21, 28 (1991) (quoting *Lugar*, 457 U.S. at 929). However, the latter language from *Lugar* referred to instances when an action was brought against a state official. *See Lugar*, 457 U.S. at 929. On the other hand, the former quote referenced instances when a

State's exercise of 'coercive power.' "[233] Thus, in what the Court has characterized as the "usual" state action case, a court must determine "whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor."[234] Indeed, a finding of state action as a result of an exercise of state authority does not fall within one of the four traditional state action tests. However, an exercise of state authority can be considered the quintessential basis for a finding of state action since, when examining the scope of Fourteenth Amendment protections, the Supreme Court concluded that whether or not the Constitution protects against certain unlawful activity depends on whether the wrongdoer exercised state authority: "[c]ivil rights, such as are guaranteed by the Constitution . . . cannot be impaired by the wrongful acts of individuals, *unsupported by State authority* in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such

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litigant sued private officials. *See Id.* at 935 n.18. However, in a subsequent action involving the state action status of a private entity, the Court concluded that the under-color-of-law requirement of 42 U.S.C. § 1983 and the state action requirement of the Fourteenth Amendment are the same. *Tarkanian*, 488 U.S. at 182 n.4. Accordingly, while it is not completely clear as to whether or not the state action and under color of law requirements are the same, when a plaintiff sues a private defendant, at the very least, the under color of law cases serve as very persuasive authority when addressing the state action issue.

233. *Brentwood Acad.*, 121 S. Ct. at 930.

234. *Tarkanian*, 488 U.S. at 192. The Court's characterization of those situations in which a state has provided a mantle of authority as "the usual" state action case is interesting. Certainly, such a case does not fit within the four traditional tests. The characterization of such a case as "usual" can mean only that the Court recognizes that in addition to the four tests, state action exists when a state acts in a coercive manner when representing the state, including when it "delegates its authority to the private actor." *Id.* It is noteworthy that in the cases in which the Supreme Court applied the traditional state action tests the plaintiffs did not assert that the private defendants exercised state authority. *See, e.g.*, Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) (providing utility services); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (involving utilization of self-help remedy by creditors); Blum v. Yaretsky, 457 U.S. 991 (1982) (discharging of medical patients pursuant to Medicaid law); San Francisco Arts & Athletics v. Olympic Comm., 483 U.S. 522 (1987) (dealing with conduct and coordination of amateur athletics).

The closest defendants came to exercising state authority in a coercive manner was in *Jackson* when a private utility terminated its services. However, the Court concluded that under state law, the furnishing of utility services was neither a state function nor a municipal duty. *Jackson*, 419 U.S. at 353. Indeed, the Supreme Court noted in *Jackson* that "[i]f we were dealing with the exercise by Metropolitan of some power *delegated to it* by the State which is traditionally associated with sovereignty . . . our case would be quite a different one." *Id.* at 352-53 (emphasis added). Likewise, the Court's decision in *Rendell-Baker* that the provision of education to maladjusted high school students is not state action is consistent with the Court's pronouncement in *Jackson* that states did not have the authority to prohibit the implementation of parochial educational systems by different religious sects. *Id.* at 354 n.9.

authority, is simply a private wrong."[235] Accordingly, an individual acts under color of law, and hence, engages in state action, when he exercises power " 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "[236] Indeed, as the Supreme Court has recognized, and the Second Circuit has reiterated, " '[i]f an individual *is possessed of state authority and purports to act under that authority, his action is state action.*' "[237]

The involuntary commitment of an allegedly mentally ill individual is an exercise of sovereign power. "Under English law at the time of the settling of the American colonies, the King had the authority to act as 'the general guardian of all infants, idiots, and lunatics.' "[238] This authority was known as *parens patriae.*[239] After the American Revolution, the *parens patriae* power was vested in state legislatures.[240] The state's police power, also part of the state's sovereign authority, is invoked through the civil commitment process to protect the general public.[241] Hence, any confinement by a private individual is an act that has been delegated by the sovereign since "[t]he State's power to commit individuals rests on the inherent attributes of sovereignty and may be traced to two separate aspects of sovereign authority:" the state's *parens patriae* and police powers.[242]

Although the tracing of the power to confine a mentally ill individual forecloses serious discussion about whether the act of civil commitment is an exercise of state authority, it is instructive to examine the scope of a person's authority to confine a mentally ill individual under common law.[243] If at common law a party was

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235. The Civil Rights Cases, 109 U.S. 3, 17 (1883) (emphasis added).

236. *West*, 487 U.S. at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

237. Coleman v. Wagner Coll., 429 F. 2d 1120, 1125 (2d Cir. 1970) (quoting Griffin v. Maryland, 378 U.S. 130, 135 (1963) (emphasis in Coleman)); *See also* Polk County v. Dodson, 454 U.S. 312, 318 (1981) (concluding that duties of public defender "entailed functions and obligations in no way dependent on state authority").

238. *Developments in the Law-Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207 (1974) ("Developments in the Law") (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972)).

239. Developments in the Law, *supra* note 238 at 1208.

240. *Id.*

241. *Id.* at 1222.

242. Brakel, Parry & Weiner, *supra* note 6 at 24; *see also Addington*, 441 U.S. at 426 (recognizing civil commitment involves exercise of state's police and *parens patriae* powers).

243. *See Am. Mfrs.*, 119 S.Ct. at 988 (concluding that under common law private insurers could withhold payment pending a determination of the necessity of such treatment "without any authorization or involvement of the State"); *see also Jackson*, 419 U.S. at 354

at liberty to effectuate the involuntary hospitalization of a mentally ill individual under circumstances not authorized by state law, then arguably governmental authority is not required for the act of civil commitment. However, if the government has traditionally placed limitations on the power to civilly commit, then any such confinement should be construed as an exercise of state authority. This is particularly true when, as is the case of civil commitment, the act of commitment is an exercise of the state's police or *parens patriae* power.[244]

At common law, absent state authority, neither physicians nor anyone else could detain a mentally ill individual for a period of time not authorized by a state's civil commitment laws. At common law, if someone restrained an allegedly mentally ill person, it would have been the duty of the restrainer to "at once . . . invoke the agencies established by law for the care and protection of the insane, and to institute that proceeding which was required to authorize her further detention."[245]

Moreover, common law authorized an individual to restrain a mentally ill person only when the mentally ill person was at immediate risk of suffering injury.[246] However, under existing state commitment laws and the federal Constitution, a person is committable upon the mere threat of harm, as long as the threat is substantial.[247] Accordingly, under a state's civil commitment laws, a

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n.9 (holding that utility company was at liberty to build a business and provide utility services); *Rendell-Baker*, 457 U.S. at 840-41 (private school not fundamentally different than other corporations that contract with the government). In this regard, a determination of whether the power to engage in a particular activity turns on the meaning of liberty within the Constitution. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting liberty includes the right to engage in common occupations of life and common law privileges that are essential to orderly pursuit of happiness).

244. *See supra* notes 238-41 and accompanying text.

245. Emmerich v. Thorley, 54 N.Y.S. 791, 794 (N.Y. App. Div. 1898); *see also* Cox, *supra* note 202 at 580-81 (citing, *inter alia*, Colby v. Jackson, 12 N.H. 526 (1842)) (rejecting defendant's contention that indefinite private confinement was permissible as long as person was dangerous; any confinement had to be sanctioned by law).

246. *See, e.g.*, Matter of Josiah Oakes, 8 Law Rep. 123, 125 (Mass. 1845); Emmerich v. Thorley, 54 N.Y.S. 791, 794 (N.Y. App. Div. 1898); Warner v. New York, 79 N.E.2d 459, 462 (N.Y. 1948); Furrh v. Ariz. Bd. of Regents, 676 P.2d 1141, 1145-46 (Ariz. Ct. App. 1983) (citing Crawford v. Brown, 151 N.E. 911 (Ill. 1926)); Appeal of Sleeper, 87 A.2d 115, 120 (Me. 1952); Stizza v. Essex County Juvenile and Domestic Relations Court, 40 A.2d 567, 569 (N.J. Super. Ct. App. Div. 1945); Re Allen, 73 A. 1078 (Vt. 1909). *Emmerich* illustrates the type of harm that the common law authorized as the mentally ill person "was actually in the act of throwing herself out a window to escape fancied pursuers." *Warner*, 79 N.E.2d at 462.

247. *See, e.g.*, Matter of Jasmer, 447 N.W.2d 192, 195-96 (Minn. 1989); In re Interest of McDonnell, 427 N.W. 2d 779, 781 (Neb. 1988); *In re* Carl C., 511 N.Y.S. 2d 144, 145 (N.Y. App. Div. 1987); Matter of Harry M., 468 N.Y.S.2d 359, 363 (N.Y. App. Div. 1983); *see also* Interest

hospital may confine a person who is not creating an imminent risk of harm, but who poses a threat of harm in the future.[248] Hence, utilization of a state's civil commitment is state action because it enables a physician "to assert sovereign authority over any individual."[249]

Finally, even if common law authorized private individuals to detain those deemed mentally ill for extended periods of time, it is doubtful that such a practice would eliminate the provision of state authority as a source for finding state action. If an individual possesses state authority and acts under such authority, " '[i]t is irrelevant that he might have taken the same action had he acted in a purely private capacity.' "[250]

Particularly, because the authority to civilly commit is broader under a state's civil commitment laws than it was under the common law,[251] no one can seriously argue that when a private physician certifies a person for involuntary hospitalization under a

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of J.S., 545 N.W. 2d 145, 147 (N.D. 1996) (concluding risk of harm must be serious).

248. *See, e.g.*, People v. Hager, 625 N.E.2d. 232, 236 (Ill. App. Ct. 1994) (noting threat of harm required for commitment need not be imminent); Matter of Albright, 836 P.2d 1, 3-5 (Kan. Ct. App. 1992) (same); Hatcher v. Wachtel, 269 S.E. 2d 849, 852 (W. Va. 1980); Seltzer v. Hogue, 594 N.Y.S.2d 781, 785 (N.Y. App. Div. 1993) (holding hospital may confine patient who is not presently harmful but who may cause harm in the future because of history of non-compliance with medication).

The present limitations on a physician's ability to involuntarily hospitalize a mentally ill person are a result of an historical evolution. Originally at common law, mentally ill individuals were subject to commitment only if they were dangerous. *See supra* notes 245-46 and accompanying text. However, beginning in the last quarter of the nineteenth century, states enacted civil commitment statutes that authorized hospitalization to facilitate the provision of treatment. Albert Deutsch, *The Mentally Ill in America* 432 (1949). Hence, many years later when mentally ill individuals began challenging the constitutionality of civil commitment statutes, courts examined statutes that authorized confinement when a patient was in need of treatment, whether or not the patient was dangerous. *See, e.g.*, Project Release v. Prevost, 722 F.2d 960, 973 (2d Cir. 1983). Beginning in the 1970s, courts began invalidating these statutes finding that, at the very least, the Constitution required a finding of some threat of harm before a mentally ill person could be committed. *See* Suzuki v. Yuen, 617 F. 2d 173, 178 (9th Cir 1980) (concluding commitment was permissible only when danger is imminent); Stamus v. Leonhardt, 414 F. Supp. 439, 450-51 (D. Iowa 1976); Doremus v. Farrell, 407 F. Supp. 509, 514-15 (D. Neb. 1975); Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974) (requiring a finding, for due process purposes, that a mentally ill individual pose a real and present threat of substantial harm to self or others); Bell v. Wayne County Gen. Hosp. at Eloise, 384 F. Supp. 1085, 1095-96 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1084-86 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *reinstated and enforced*, 379 F. Supp. 1376, *vacated on other grounds*, 421 U.S. 957 (1975), *reinstated* 413 F. Supp. 1318 (E.D. Wis. 1976) (holding state may not confine a non-dangerous individual).

249. *Tarkanian*, 488 U.S. at 197.

250. *West*, 487 U.S. at 56 n.15 (quoting Griffin, 378 U.S. at 135).

251. *See supra* notes 246-47 and accompanying text.

state's civil commitment laws, the physician possesses authority under state law and is acting under that authority. Indeed, compliance with the Mental Hygiene Law " 'is the single means by which an individual . . . can be committed and confined against his will by a private institution.' "[252] Hence, when a private physician hospitalizes an allegedly mentally ill person, the physician's conduct has been made possible only because he exercised this authority[253] and the state has enhanced the power of the "harm-causing" physician.[254] Accordingly, just as state action existed in *West* in part because "the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration[,]"[255] the involuntary hospitalization of a mentally ill individual is caused by the delegation of the state's police and *parens patriae* powers.

Nor can it be argued that the abuse of authority doctrine is limited to those situations in which public employees exceeded their authority.[256] The Supreme Court in *West* recognized that when

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252. *Rubenstein*, 790 F. Supp. at 405 (quoting *Ruffler*, 453 F. Supp. at 1070). It was for this reason in part that these courts concluded that physicians who involuntarily hospitalize a mentally ill person are state actors.

253. *West*, 487 U.S. at 49.

254. *Tarkanian*, 488 U.S. at 192.

255. *West*, 487 U.S. at 55.

256. In *Tarkanian*, when the Court noted that individuals who carry a badge of authority and act in accordance with such authority engage in state action, the Court cited *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Hence, one can argue that this misuse of authority doctrine applies not to those situations in which private parties act pursuant to government authority but when a government official exceeds the authority given to him under state law. This is not correct. Most significantly, when elaborating on this abuse of authority doctrine in *Tarkanian*, the court placed substantial reliance upon *West*, a case in which the government delegated its authority to a private individual. *See infra* note 257 and accompanying text.

One court has concluded that as a result of the Supreme Court's decision in *Lugar*, the "abuse of authority" doctrine does not apply when a plaintiff challenges the actions of private parties. Collins v. Womancare, 878 F.2d 1145, 1152 (9th Cir. 1989). The court in *Collins* reasoned that in *Lugar* the Supreme Court held that a plaintiff who alleges a misuse of a state statute, but who does not challenge the constitutionality of the statute itself, asserts that the defendants acted contrary to relevant state policy. *Collins*, 878 F.2d at 1152.

Accordingly, in the civil commitment context, a plaintiff who does not allege that a state's civil commitment laws are unconstitutional but alleges that private physicians have acted unlawfully, is, by definition, asserting that the physicians have acted contrary to state policy since the state policy is concededly lawful. Hence, if one accepts the Ninth Circuit's analysis of *Lugar*, then the abuse of authority doctrine does not apply except when a plaintiff alleges that the private physician acted pursuant to an unconstitutional statute. However, the Ninth Circuit's analysis of *Lugar* appears to be overstated.

Lugar involved a defendant acting pursuant to a state's attachment law. *See Lugar*, 457 U.S. at 525. Such a statute sets forth rights and remedies of two parties to a purely private commercial dispute. *See Flagg Bros.*, 436 U.S. at 160. Accordingly, one cannot attribute to

one becomes clothed with state authority as a result of a relationship between a private citizen and the state that was effectuated by state law, the private individual becomes a state actor.[257]

One cannot argue that the physician in *West* became clothed with authority and hence, a state actor, simply because the state paid him. First, the Court in *West* expressly rejected the physician's source of remuneration as a relevant consideration when assessing the state action status of the physician.[258] Second, in other contexts, the existence of a financial relationship between the state and a private party has had no bearing on the state action status of the private party.[259]

Although the Supreme Court found state action in *Griffin v. Maryland*,[260] a greater indicia of state action exists when private physicians utilize a state's civil commitment authority. In *Griffin*, a private security guard had been deputized as a sheriff under state law and arrested a number of individuals for trespassing.[261] The security guard had arrested the individuals to effectuate the amusement park's policy of segregation.[262] The Court found that the private security guard engaged in state action because he possessed and exercised state authority.[263]

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the state acts taken in contravention of state policy governing debtor/creditor transactions. On the other hand, physicians who civilly commit someone have acted pursuant to a delegation of a state's police or *parens patriae* powers. *See supra* notes 238-41 and accompanying text. Because private physicians have acted pursuant to a delegation of a state's police or *parens patriae* powers and can confine an allegedly mentally ill person a period of time far longer than they could under common law, private physicians are individuals "for whom the State is responsible." *Lugar*, 457 U.S. at 937.

257. *West*, 487 U.S. at 55.

258. *See Id.* at 56 n.15.

259. *See Polk County*, 454 U.S. at 319; *Rendell-Baker*, 457 U.S. at 840-41. It is of little consequence that *Polk County* was the only case in which the Supreme Court has held that a government employee is not a state actor. In nearly all instances, when a government employee acts, he or she represents the government.

260. 378 U.S. 130 (1964).

261. *Griffin*, 378 U.S. at 132 n.1.

262. *Id.* at 131.

263. *Id.* at 135. One can argue that *Griffin* is an outdated case from the Warren Court whose precedential value is weak and the badge of authority language in *Tarkanian* is simply dicta. However, such an assertion ignores the foundation upon which the Supreme Court built its opinion in *West*. If the Court wanted, it could have decided the case by applying the public function test. *See Am. Mfrs.*, 119 S.Ct. at 987-88. Instead, the Court concluded, at least implicitly, that a determination of state action rested on the conferral of state authority on the private physician. *See West*, 487 U.S. at 55-56. Since the Court in *West* quoted *Griffin* with approval, *see id.* at 56 n.15, it is difficult to assert that *Griffin* is no longer good authority.

There is simply no difference between the government deputizing a private individual, which resulted in him taking certain coercive conduct against private individuals, and a state delegating its civil commitment authority to private physicians. In each case, there is an authorization of governmental power that has enabled private individuals to act in instances when it otherwise could not have acted.[264] However, because the State of Maryland did not sanction discrimination, the deputy sheriff in *Griffin* used his governmental authority to further only private interests. When a private physician uses his state delegated authority to civilly commit an individual, the physician acts to further the interests of the state.[265]

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264. One can argue that unlike the situation in *Griffin*, historically, many private physicians civilly committed individuals. *See, e.g., Spencer*, 864 F.2d at 1379-81; *Rockwell*, 26 F.3d at 259. However, while the provision of treatment is arguably relevant when applying the public function test to the state action context (and this article will demonstrate *infra* that it is not), the issue of the provision of treatment has no bearing when examining the abuse of authority doctrine. *See supra* notes 232-35 and accompanying text.

265. The following hypothetical situation is more than a little instructive. Because of fiscal difficulties, a county must lay off forty percent of its police force. The county legislature directs that all private security guards patrolling shopping malls must patrol a three-mile radius surrounding the mall in lieu of a fifty percent property tax hike. The private security firms then assume most of the responsibility previously undertaken by the county police, including the arrest of suspected lawbreakers. Would anyone doubt that the county could delegate such responsibilities without the probable cause requirement governing the actions of the private police officers?

Could the county authorize the private detention of such suspected lawbreakers for a period of time not to exceed the maximum sentence for any suspected criminal activity? If the security officers, pursuant to their delegated authority, randomly stopped and searched cars without any cause to believe there was contraband on board and then found contraband, could the police detain the occupants of the car up to a week with little sleep in an attempt to obtain a confession without running afoul of the Constitution?

An application of the four state actions tests leads to a holding that such conduct is not state action. The private officials have not acted jointly with the county police. *See, e.g.*, Adickes v. S.H. Kress Co., 398 U.S. 144 (1970); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961). Nor did the county government compel or even encourage the private police to act in the manner that they did. *See, e.g., Okunieff*, 996 F. Supp. at 349-52. The public function test is not satisfied because arrest and detention have not been exclusively reserved to the states. *See, e.g., Id.* at 353. Finally, this is not a case where there is such interdependence between the private party and the government that the close nexus test is satisfied. *See, e.g., Id.* at 352-53. However, does anyone doubt that under the authority in Griffin the provisions of the Fourth and Fourteenth amendments would govern the conduct of the private police?

In a case similar to this, an inmate filed a § 1983 lawsuit against hospital police who arrested the plaintiff outside of Columbia Presbyterian Hospital. *Temple v. Albert*, 719 F. Supp. 265, 266 (S.D.N.Y. 1989). While the hospital paid the police, they were also designated "Special Patrolmen" appointed by the New York City Police Commissioner pursuant to the New York City Administrative Code. Pursuant to the code, these special officers possessed all the duties the New York City police possessed. *Temple*, 719 F. Supp. at 267. The court looked to the source of authority, recognized that such authority existed by virtue of a grant from the state, and held that the special patrolmen were state actors. *Id.*

The express delegation of state authority distinguishes detainment and confinement pursuant to a state's civil commitment laws from the temporary detainment that exists when private individuals effectuate the confinement of a person such as when they make a citizen's arrest.[266] In the absence of such authority, private physicians could not confine mentally ill individuals for the periods of time that state law now authorizes.[267] The private individual who makes a citizens arrest is simply exercising power under common law that belongs to all citizens.[268] Such power is to be distinguished from instances when the government has expressly delegated authority to someone and such delegation of authority has resulted in the conferral of authority that the private individual would not have possessed except for such delegation of authority.[269] The private citizen who effectuates a citizen's arrest can be viewed as an "interloper" and should be contrasted with someone to whom the state has delegated its authority.[270]

The manner in which courts examined the relationship among state authority, arrest and bail bondsmen further supports the proposition that the reliance on state authority to detain someone results in a finding of state action. The courts finding bail bondsmen engaging in state action have grounded their decisions on the reliance by the private bail bondsman of an arrest warrant

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266. *See* Davenport v. Saint Mary Hosp., 633 F. Supp. 1228, 1236 (E.D. Pa. 1986) (concluding that group of individuals become state actors when state gives them "powers that are traditionally exercised by the state and not possessed by the general citizenry"); Dahl v. Akin, 630 F.2d 277, 281 (5th Cir. 1980) (holding daughter who facilitated commitment of her father not a state actor because all citizens could apply for the commitment of a relative).

267. *See supra* notes 246-48 and accompanying text.

268. *See, e.g.*, Weyandt v. Mason's Stores, Inc., 279 F. Supp. 283, 287 (W.D. Pa. 1968).

269. *Id.* Instructive to this issue is *Williams v. U.S.*, 341 U.S. 97 (1951). In *Williams*, the Court held that a private detective who had been vested with the powers of a city police officer pursuant to city policy had acted under color of law. *Williams*, 341 U.S. at 99-100. Evidence established that the private official had acted under the authority of Florida law and was not acting in the role of a private citizen. *Id.*

270. *See Williams*, 341 U.S. at 100. No one can seriously dispute that a private physician who civilly commits someone acts pursuant to authority granted to him or her and not as a private citizen. First, a private citizen would have to turn over the mentally ill person to lawful authorities. *See supra* note 245 and accompanying text. Second, the physician acts pursuant to a state policy that integrates public and private mental health services into one unitary scheme. *See supra* notes 24-35 and accompanying text. Pursuant to this unitary scheme, physicians complete commitment forms promulgated by the State Office of Mental Health. *See, e.g.*, Okunieff v. Rosenberg, No. 98-7803, Joint Appendix at 368-69. While the Supreme Court has noted that the use of forms, in and of itself does not convert the actions of physicians to state action, *see Blum*, 457 U.S. at 1006-1007, the use of state forms evinces the public nature of the actions of the committing physicians.

to support the arrest of a defendant.[271] Those courts that have found that bail bondsmen were not state actors reached their conclusion on the ground that the bondsmen were not exercising state authority.[272]

Somewhat surprisingly, with the exception of *Okunieff*, none of the circuit courts that addressed whether civil commitment is state action addressed the applicability of this strain of state action case law. The court in *Okunieff* concluded, without citing any legal authority, that "[t]he private physician is not exercising governmental authority when he or she uses medical judgment in assessing the dangerousness of an individual for commitment purposes."[273] Rather the authority relied upon by the private physician "is the professional medical standard of the community where the physicians' medical judgments are based."[274]

The court in *Okunieff* could not cite any authority because none exists. In reaching this conclusion, the court ignored an unyielding line of cases that recognize that the Constitution sets forth limits

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271. *See* Jackson v. Pantazes, 810 F.2d 426, 429 (4th Cir. 1987) (apprehending fugitive by bondsman "was exercising powers conferred on him by state law."); Maynard v. Kear, 474 F. Supp. 794, 800-03 (N.D. Ohio 1979) (concluding bondsman was a state actor because he acted pursuant to authority of a judicial bench warrant); Hill v. Toll, 320 F. Supp. 185, 187 (E.D. Pa. 1970) (holding bail bondsmen are state actors because they possess privilege to arrest, which the general citizenry does not possess).

272. *See* Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204 (5th Cir. 1996) (stating bondsman "did not purport to act pursuant to the [arrest] warrant in any respect"); Ouzts v. Maryland Nat'l Ins. Co., 505 F. 2d 547, 554 (9th Cir. 1974) (holding none of the defendants "held any vestige of authority from any state or any political subdivision thereof").

A series of decisions in the procedural due process area further supports this analysis. In *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984) the Supreme Court held that random deprivations of property did not implicate the Due Process Clause. In so holding, the Court recognized that the State could not be held responsible for the unauthorized conduct because the deprivation of property is in almost all cases beyond the control of the state. *Parratt*, 451 U.S. at 541. On the other hand, when state officials at a state psychiatric hospital acted pursuant to state authority when they deprived a person of liberty, the Fourteenth Amendment protected the individual because, *inter alia*, the State delegated to the hospital officials the authority to effectuate the deprivation about which the mentally ill person complained and it was foreseeable that the state mental health officials might abuse their authority. Zinermon v. Burch, 494 U.S. 113, 135-38 (1990). Hence, the Court in *Parratt* and *Hudson* failed to attribute the conduct of individuals employed by the state to the state because the state did not authorize such conduct; when the actions of government employees were authorized, the distinct possibility existed that some officials to whom the state delegated its authority would abuse this authority and the Court imposed responsibility on the state. It is no different when the state delegates its sovereign authority to private physicians. If the authorization to act resulted in the attribution of state responsibility in *Zinermon*, then the same attribution of authority must exist when private physicians act pursuant to the state's delegation of authority and civilly commit mentally ill individuals.

273. *Okunieff*, 996 F. Supp. at 354.

274. *Id.*

on a physician's authority to confine a mentally ill person[275] and an equally long line of cases that recognize that under the doctrine of informed consent, any decision pertaining to purportedly necessary medical care rests with the patient.[276] Rather, this article has shown that the court in *Kay v. Benson*[277] correctly noted that "[the] power of detention is the type of power normally and historically exercised by sovereign states and other governmental entities . . . [The state's commitment statutes] confer upon a physician the power to do something which he otherwise would not have the right to do as an individual."[278]

The failure of courts to examine the impact of the exercise of state authority when examining whether or not civil commitment is state action can be contrasted with those cases in which government employees engaged in tortious conduct and the question arose as to whether or not such individuals acted under color of law. In these cases, whether or not the defendant acted under color of law invariably depended upon whether or not the defendants were exercising their government authority. For instance, in *Revene v. Charles Commissioners*[279] the court refused to dismiss a complaint filed against the off-duty deputy sheriffs. The court held that even when off-duty deputy sheriffs retain authority to conduct police action, "any action purportedly taken pursuant to this authority would be under color of state law."[280]

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275. *See supra* notes 5 & 248 and accompanying texts.

276. *See, e.g.*, Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129-30 (1914); Pratt v. Davis, 118 Ill. App. 161, 166 (1905); Natanson v. Kline, 350 P. 2d 1093, 1103-06 (Kan. 1960); Canterbury v. Spence, 464 F.2d 772, 780-82 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972); Cobbs v. Grant, 502 P. 2d 1, 8-11 (Cal. 1972).

277. 472 F. Supp. 850 (D.N.H. 1979).

278. *Kay*, 472 F. Supp. at 851.

279. 882 F.2d 870 (4th Cir. 1989).

280. *Revene*, 882 F.2d at 873; *see also* Jojola v. Chavez, 55 F.3d 488, 493-94 (10th Cir. 1995) (concluding that school custodian who sexually molested student did not act under color of law because there was no "real nexus" between actions of custodian and misuse of authority as government employee); Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) (holding whether or not off-duty police officers exercise official authority determines whether the officers have acted under color of law); Pitchell v. Callan, 13 F.3d 545, 548 (2d Cir. 1994) (deciding that off-duty police officer who shot another person did not engage in state action because, *inter alia*, he did not invoke authority of police department); Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995) (police officer who accidentally shot fellow officer did not engage in state action because he "did not exercise, or purport to exercise, any power (real or pretended) possessed by virtue of state law"); Gibson v. City of Chicago, 910 F. 2d 1510, 1518 (7th Cir. 1990) (stating that off-duty police officer who was previously stripped of authority by police department did not act under color of law because "one cannot misuse power that one no longer possesses"); Poulson v. City of N. Tonawanda, 811 F. Supp. 884, 895 (W.D.N.Y. 1993) (whether or not a government employee acts under color

Likewise, when determining whether a police officer engaged in state action when he shot a fellow officer at the station house, a court concluded that the "key determinant" was whether the officer exercised official responsibilities pursuant to state law.[281] In a different but analogous context, in *Roby v. Skupien*,[282] a court found that railroad police employed by private railroad engaged in state action because "railroad policemen are 'cloaked with authority of the state.' "[283]

Finally, one should distinguish between an exercise of state authority as a result of governmental delegation and the authorization of private conduct by the government when a private party is involved in a dispute with another private party in the private side of the public/private dichotomy.[284] One authority clearly delineated this distinction:

> "What the state authorizes, the state does" may reflect a confusion between two senses in which a state can be said to "authorize" private action: delegation and permission. When the state authorizes a private individual to perform some action *on its behalf*—when, that is, it delegates the performance of a government function—constitutional responsibility for that action rests essentially on agency principles. But when the state only permits or allows (and, in that far weaker sense, "authorizes") private individuals to perform actions on their own behalf, the basis for attributing such action to the state is, to say the least, obscure.[285]

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of law when engaging in sexual harassment of a fellow employee depends on whether harasser has some authority over victim and exercises that authority); Keller v. District of Columbia, 809 F. Supp. 432, 436 (E.D. Va. 1993) (holding that police officers who arrested individual in another jurisdiction acted under color of law because they appeared to be exercising authority); Hill v. Barbour, 787 F. Supp. 146, 149 (N.D. Ill. 1992) (holding that off-duty sheriff who shot prowler did not engage in state action after examining whether sheriff's conduct was related to performance of police duty); Thomas v. Cannon, 751 F. Supp. 763, 768 (N.D. Ill. 1990) (city transit worker did not engage in state action when he raped two minors while on duty since such action was not related to the performance of his job); Manning v. Jones, 696 F. Supp. 1231, 1235 (S.D. Ind. 1988) (deciding that off-duty police officers acted as private citizens when they engaged in altercation in highway because these actions were not clothed with authority of state law and police did not exercise responsibilities pursuant to state law).

281. Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995).

282. 758 F. Supp. 471, 473 (N.D. Ill. 1991).

283. *Roby*, 758 F. Supp. at 473 (quoting U.S. v. Hoffman, 498 F.2d 879, 881 (7th Cir. 1974)).

284. *See Am. Mfrs.*, 119 S.Ct. at 986.

285. Richard S. Kay, *The State Action Doctrine, The Public-Private Distinction, and*

Accordingly, when state law authorizes a private party to take certain action that results in another private party suffering a deprivation of liberty or property, such authorization, in and of itself, does not constitute state action.[286] On the other hand, when a private individual exercises governmental authority at behest of the government, he acts on behalf of the state. Hence, when in *West*, the Supreme Court noted that an individual engaged in state action when he exercised power by virtue of state law, such a rule referenced an exercise of governmental authority that had been delegated to private individuals.[287]

Civil commitment is not a private dispute but an exercise of governmental authority.[288] As a result of the doctrine of informed consent, private physicians have no valid legal interest, proprietary or otherwise, in involuntarily hospitalizing a mentally ill person since neither physicians nor hospitals have a right to treat people who do not consent to treatment.[289] The failure to recognize this blurs the "essential dichotomy" between public and private acts.[290]

B. A Function of a Doctor who Works at a Private Hospital and Commits Mentally Ill Individuals is to Serve the Interests of the State

The Supreme Court has recognized that when a state action question arises out of actions of the government in its role as sovereign, a resolution of the state action question depends on the relationship between the state and a private defendant who has harmed a plaintiff.[291] In these instances, the Supreme Court has

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the Independence of Constitutional Law, 10 CONST. COMMENT. 329, 348-49 (1993) (quoting Frank I Goodman, *Professor Brest on State Action and Liberal Theory, and a Postscript to Professor Stone*, 130 U. PA. L. REV. 1331, 1338 (1982)) (emphasis by Professor Kay).

286. *See Tulsa Prof'l*, 485 U.S. at 485 (stating "[p]rivate use of state-sanctioned private remedies or procedures does not rise to the level of state action"); *Flagg Bros.*, 436 U.S. at 362 n.12 (state authorization of private self-help remedy does not warrant a finding of state action). Hence, simply because the state has "chosen sides" by expanding the rights of one private party at the expense of another does not mean that the private litigant has exercised state authority.

287. *See Tarkanian*, 488 U.S. at 192 (citing *West* to support the proposition that state action may occur if state "delegates it authority to the private actor"); West, 487 U.S. at 56 n.15 (noting that employment status of physician to whom state delegated authority is irrelevant).

288. *See supra* notes 276-78 and accompanying text; *see also Davenport*, 633 F. Supp. at 1236 ("[i]t is obvious that civil commitment statutes do not exist to resolve purely private disputes").

289. *See supra* note 276 and accompanying text.

290. *See supra* note 71 and accompanying text.

291. As detailed *infra*, in *West*, the government had incarcerated a convicted defendant

looked at the "function" of the private defendant to determine whether or not a private defendant has engaged in state action.[292] Resolution of the Supreme Court's decisions in those cases in which the Court has taken a functional approach to the state action question, namely *West*, *Polk County*, and, to a lesser extent, *Rendell-Baker*, also warrants a finding that the physicians who civilly commit individuals engage in state action.

In *West*, the Supreme Court concluded that a doctor who is under contract with the state to provide medical services in a prison engages in state action not because the state pays him, but because of the "relationship among the State, the physician and the prisoner."[293] In so holding, the Court explicitly noted that "the *context* in which respondent [physician] performs these services for the State (*quite apart from the source of remuneration*) distinguishes the relationship between respondent and West from the ordinary physician-patient relationship."[294] State action existed because the doctor helped the state fulfill "its constitutional duty to provide adequate medical treatment to those in its custody."[295] In sum, a private doctor under contract with the state who works in prisons fulfills the role of the state in providing medical care.

Two related concerns helped drive the Court's decision in *West*. First, the Court did not want a state to evade its constitutional obligation to provide medical services to prisoners by contracting with private doctors to provide those services.[296] Second, the Court did not want a state to deny prisoners a means of vindicating their constitutional rights by contracting out the provision of medical services, which the Constitution required the state to provide.[297]

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and was required to provide medical services to him. In *Polk County*, the Court examined the role of a public defender when the state was prosecuting a criminal defendant.

292. *Polk County*, 454 U.S. at 318.

293. *West*, 487 U.S. at 56.

294. *Id.* at 56 n.15 (emphasis added).

295. *Id.* at 56.

296. *Id.*

297. *Id.* On the surface, this rationale of the Supreme Court appears circular. Because the Fourteenth Amendment governs actions of state officials, *see, e.g.*, *supra* note 45 and accompanying text, one can argue that a prisoner's constitutional rights cease to exist when a state chooses to have a private party provide medical services. Obviously, the rationale underlying the holding of *West* forecloses this contention.

Rather, *West*, and *Marsh v. Alabama*, 326 U.S. 510 (1946), stand for the proposition that certain constitutional interests are so basic that a person will not lose them as a result of circumstances that are beyond the individual's control. Determining just what rights fall within this protection under *West* and *Marsh* is somewhat difficult. The rationale of *West* and *Marsh* suggest that citizens will not lose those rights that the Bill of Rights has specifically referenced and that the Fourteenth Amendment has incorporated. On the other hand, some

The relationship between the state, private physician, and inmate can be contrasted with the relationship between the state and public defender in *Polk County*. In that case, the Supreme Court held that a public defender did not act under color of law when representing a criminal defendant even though the state paid the attorney's salary.[298] Unlike, the physician in *West*, the actions of a public defender when representing an indigent criminal defendant "entailed functions and obligations in no way dependent on state authority."[299] Rather, a public defender must engage in such actions as entering not guilty pleas, moving to suppress the state's evidence and cross-examining adverse witnesses.[300] In sum, the public defender is in an adverse relationship with the state.[301]

Significantly, the Supreme Court in *Polk County* contrasted the functions of a public defender with that of a director and physician

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constitutional rights exist only because the state has been involved in some activity. *Compare* Jackson v. Metro. Edison, 419 U.S. 345 (1974) (holding no constitutional right to utility service) *with* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9-12 (1978) (concluding constitutional right to procedural protections when government operated utility service terminates service).

While the limitations on a state's civil commitment authority fall between these two types of rights, such limitations are closer to former type of right. Because, the Constitution prohibits the confinement of a non-dangerous mentally ill person, *see supra* note 248, such right falls within the substantive component of the Due Process Clause "that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " Zinermon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). The unwillingness of the Supreme Court to generally find substantive protections, *see, e.g.*, Collins v. Harker Heights, 503 U.S. 115, 125 (1992), suggests the importance of those rights that fit within this component of the Due Process Clause. More significantly, physical liberty has always been one of the most cherished rights within this nation's constitutional system. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 86 (1992) (suggesting that the right to physical liberty is fundamental); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26-27 (1981) (recognizing that physical liberty is different than other constitutional deprivations and holding that the right to counsel presumptively attaches only when one's physical liberty is at stake). Accordingly, *West* and *Marsh* suggest that the Supreme Court would look askance at government action that can result in the elimination of constitutional protections that would otherwise exist but for the government's abdication of its sovereign role.

298. *Polk County*, at 319-20.

299. *Id.* at 318.

300. *Id.* at 320.

301. *See Id* at 320-22, 323 n.13. *West* can be contrasted with *Jackson* and *American Manufacturers*. In *Jackson*, the Court found that state law did not impose a duty on the state to provide utility services. *Jackson*, 419 U.S. at 353. In *American Manufacturers*, state law did not require the state to provide to injured workers either medical treatment or workman compensation benefits. *Am. Mfrs.*, 119 S. Ct. at 988. Because there was no obligation to provide services in *Jackson* and *American Manufacturers*, there was no delegation of sovereign authority, and hence, no need to examine the relationship among the state, the private defendant who stood in the shoes of the state, and the plaintiff who had been injured by the actions of the private defendant.

of a state operated psychiatric hospital.[302] The functions of a doctor who involuntarily hospitalizes patients are to "protect *the interest of the public* as well as that of his wards."[303] In other words, "[i]nstitutional physicians assume an obligation to the mission that the State, through the institution, attempts to achieve."[304] If a physician at a state hospital is a state actor because of his relationship with the state,[305] and not the result of employment or payment on a contract basis, then one must look at the function of a private physician who commits a mentally ill person.[306] Through its civil commitment laws, the State has delegated its authority to confine individuals to doctors at private hospitals and patients are hospitalized pursuant to this delegation of authority.[307]

The difference between the provision medical services in *West* and the constraints imposed upon a physician who civilly commits mentally ill individuals does not warrant a result different from *West*. Civil commitment implicates a component of the Due Process Clause different than that in *West*. In *West*, a duty to provide medical services existed because the state confined a prisoner, and such action created an obligation on the part of the state to provide such services.[308] However, there is no duty if the provision of services is the exception to the general rule that the state need not provide services to its citizens.[309] Rather, the Due Process Clause protects against deliberate "decisions of government officials to *deprive* a person of life, liberty or property."[310] As such, the Constitution has been described as a "charter of negative rather than positive liberties."[311] Accordingly, the Constitution clearly

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302. *Polk County*, 454 U.S. at 319-20.

303. *Id.* at 319 (emphasis added).

304. *Id.* at 320.

305. *Id.* at 320-21.

306. Indeed, if a public defender is not an "agent" of the state because she is the state's adversary (*see Brentwood Acad.*, 121 S. Ct. at 934), then it becomes difficult to imagine how a private physician who acts on behalf of the state, and only on behalf of the state, is not an "agent" of the state and hence, a state actor.

307. *See supra* notes 238-41 and accompanying text. In *Rendell-Baker*, the Supreme Court, foreshadowing its analysis in *West*, was willing to look at the relationship among the private school teachers, the school itself and the state. Just as in *Polk County* the relationship between the public defender and her client was identical to any other lawyer-client relationship, the relationship between the school and its teachers did not change because the state paid the tuition of the students. *Rendell-Baker*, 457 U.S. at 841.

308. *See West*, 487 U.S. at 56.

309. *See* DeShaney v. Winnebago County, 489 U.S. 189, 198-99 (1989).

310. *Collins*, 503 U.S. at 127 n.10 (emphasis added).

311. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983). In characterizing the Constitution in this manner, the Seventh Circuit noted that "[t]he men who wrote the Bill of

serves as a source of protection against unlawful decisions to deprive a person of liberty by means of involuntary hospitalization.[312]

Hence, from a constitutional standpoint, there is no difference between an obligation to provide medical services to prisoners and an obligation not to confine non-dangerous mentally ill individuals.[313] If, as the Supreme Court concluded in *West*, the state action doctrine serves to provide citizens with an opportunity to vindicate their constitutional rights when they have been victimized by private individuals who have been carrying out a sovereign function, then it is indefensible to conclude that involuntarily hospitalizing mentally ill individuals is not state action.[314]

Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services." *Id.* at 1203.

312. *See e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 576 (1975); *see also Rodriguez*, 72 F.3d at 1062-63; Demarco v. Sadiker, 897 F. Supp. 693, 698-700 (E.D.N.Y. 1995).

313. The Court in *Okunieff* rejected this contention noting that *West* was distinguishable because "[t]he State bore an affirmative, constitutional duty to provide medical treatment to those in custody." *Okunieff*, 996 F. Supp. at 355. However, by limiting the state's ability to evade constitutional limitations through delegation to private individuals in only those situations in which there is an obligation of the state to act, the court in *Okunieff* ignored the primary purpose of the Fourteenth Amendment. *See supra* note 311 and accompanying text.

314. As one court has noted, to hold that the involuntary hospitalization of a mentally ill individual does not constitute state action "would allow the state to avoid its constitutional obligations simply by delegating to private hospitals its responsibilities for the care of individuals it involuntarily confines." Davenport v. Saint Mary Hosp., 633 F. Supp. 1228, 1234 (E.D. Pa. 1986).

It may well be that the functional approach and abuse of authority standard are flip sides of the same argument. When applying both standards to the civil commitment context, a finding of state action exists because the state has delegated its authority to private individuals who, when acting on behalf of the state, have caused a deprivation of constitutional rights. *See supra* notes 251-56 and accompanying text. However, the abuse of authority doctrine will arise when the private defendant exercises state authority to act in a coercive manner. This may not be enough to differentiate the two state action theories. I have chosen to frame these arguments as separate standards because the Supreme Court has referenced them as such. *See, e.g. Lugar*, 457 U.S. at 929, 940 (referencing abuse of authority standard, the Supreme Court fails to mention the functional approach set forth in *Polk County*). Other than satisfying academic purists, it may be unnecessary to resolve the question of whether these standards are really the same since the Supreme Court has evinced a willingness to leave unanswered the question of whether the Court's different state action tests "are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry". *Lugar*, 457 U.S. at 939.

C. *Civil Commitment is an Exercise of a Power Traditionally Exclusively Reserved to the State*

The public function test seeks to determine "whether a private citizen is doing the state's business and should be treated as an employee or other formal agent of the state."[315] Any determination of the public function test first requires an analysis of what the public function standard really means.

The Supreme Court has characterized the public function test in a number of similar, but slightly different, ways. In initially formulating this standard in *Jackson*, the Court first asked whether the private entity exercised "*powers* traditionally exclusively reserved to the State."[316] The Court then termed its inquiry as whether the private entity exercises "power delegated to it by the State which is traditionally associated with sovereignty."[317] Finally, the Court framed its inquiry as whether the private party engaged in action that was "traditionally the exclusive prerogative of the State."[318]

In *Flagg Brothers* the Court framed the public function determination as whether the State has delegated to a private party "an exclusive prerogative of the sovereign."[319] However, the Court also noted that "[w]hile many *functions* have been traditionally performed by governments, very few have been 'exclusively reserved to the State.' " [320]Recently, the Court looked at whether the state delegated to private defendants a "traditionally exclusive governmental function."[321]

In the context of civil commitment, the difference between an exclusive governmental power and exclusive governmental function is significant. Civil commitment is an exercise of an exclusive governmental power.[322] On the other hand, both the government and private entities have civilly committed individuals.[323] Hence, if the relevant inquiry becomes whether the government had exclusively performed civil commitment then one reaches a different result than if one asks whether civil commitment is an

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315. *Spencer*, 864 F.2d at 1380 (en banc).
316. *Jackson*, 419 U.S. at 352 (emphasis added).
317. *Id.* at 353.
318. *Id.*
319. *Flagg Bros.*, 436 U.S. at 160.
320. *Id.* at 158 (quoting *Jackson*, 419 U.S. at 352) (emphasis added).
321. *Am. Mfrs.*, 119 S. Ct. at 988.
322. *See supra* notes 245-49 and accompanying text.
323. *See, e.g., Okunieff*, 996 F. Supp. at 355-56.

exercise of a power traditionally reserved to the government. The failure of a court to recognize this distinction can result in a court framing the inquiry as whether private physicians exercised a traditionally exclusive governmental power and then reaching a decision by looking at whether the government exclusively performed the activity of civil commitment.[324]

It is doubtful that the Supreme Court ever intended to modify the standard it first enunciated in *Jackson*. First, in *Jackson*, the Court went out of its way to recognize that a difference exists between exclusive government authority over a particular matter and an exclusive government function. The Court noted that one function of government is providing education but the government lacks the authority to prohibit other groups from providing education to others.[325] Furthermore, in *Flagg Brothers*, when the Court spoke of a function, it was clearly distinguishing between the engaging in private political activity and the power to regulate elections.[326] Moreover, the Court in *Jackson* cited *Evans v. Newton*,[327] when it examined the jurisprudential landscape from which the public function evolved.[328] In *Evans*, the court concluded, "when private individuals or groups are endowed by the government with *powers or functions* governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[329]

A reading of *Jackson* strongly suggests that the Court intended its definition of the public function test to constitute a synthesis of its previous public function cases. If this is the case, one can assume the relevant inquiry is whether civil commitment is an exercise of a prerogative that has been traditionally exclusively reserved to the government.

Prerogative means "a sovereign right inhering in a state."[330] Indeed, one court has recognized that " '[o]ne of the paradigmatic means by which a private party becomes subject to section 1983 is through the government's conferral upon that party of what is, at core, sovereign power.' "[331] In other words, a determination of

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324. *See Rockwell*, 26 F.3d at 258-60; *Okunieff*, 996 F. Supp. at 353-56.

325. *Jackson*, 419 U.S. at 354 n.9.

326. *See Flagg Bros.*, 436 U.S. at 158.

327. 382 U.S. 296 (1966).

328. *See Jackson*, 419 U.S. at 352.

329. *Evans*, 382 U.S. at 299 (emphasis added).

330. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1791 (1981).

331. Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 342 (4th Cir. 2000) (quoting United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 906 (4th Cir. 1995)).

whether the government has conferred upon a private party its sovereign power is another way of examining whether the function performed is an exclusive prerogative of the state.[332] As detailed earlier, the confinement of a mentally ill person beyond the briefest period of time is a power that has been exclusively reserved to the government.[333]

The need to distinguish between an exclusive sovereign power and the exercise of such power by private individuals can be evinced in a comparison between civil commitment state action cases and both election and fire protection state action cases. Courts that have found civil commitment is not an exclusive governmental prerogative detailed how, historically, private hospitals treated mentally ill individuals.[334] In other words, these courts focused on whether private entities performed the activity of providing in-patient care and treatment to mentally ill individuals.

On the other hand, in *Jackson*, the Supreme Court examined previous state action cases and concluded that state action was present in primary elections involving private entities because the elections "involved *powers* traditionally exclusively reserved to the State."[335] In finding that the actions of private political parties constituted state action, the Supreme Court noted that private primary elections are conducted by private political parties under state statutory authority. In addition, state courts are given exclusive jurisdiction over contested elections, state statutes imposed duties on the political parties and "the duties do not become matters of private law because they are *performed* by a political party."[336] Under the Supreme Court's analysis, the process

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332. *Goldstein*, 218 F.3d at 342.

333. *See supra* notes 245-49 and accompanying text.

334. *See Okunieff*, 996 F. Supp. at 356-57; *Rockwell*, 26 F.3d at 259-60; *Spencer*, 864 F.2d at 1380-81.

335. *Jackson*, 419 U.S. at 352 (emphasis added).

336. Smith v. Allwright, 321 U.S. 649, 663 (1944) (emphasis added); *see also* Rockefeller v. Powers, 74 F.3d 1367, 1375 (2d Cir. 1995) (stating that state's "delegation to the various parties of the right to nominate candidates for special elections renders the party selection process state action").

The need to distinguish between an exclusive state power and an exclusive function can also be evinced in the area of prosecutions. One court has concluded that because private prosecutors "have been used in a variety of settings and jurisdictions in this country. . .[t]he prosecutorial function is not, therefore, the exclusive prerogative of the state." Rochez v. Mittleton, 839 F. Supp. 1075, 1081 (S.D.N.Y. 1993). However, it is clear that the government retains authority over prosecutions by private parties. *See* Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 808-09 (1987) (per Justice Brennan with three Justices concurring and one Justice concurring in judgment); State of New Jersey v. Imperiale, 773 F. Supp. 747, 752-53 (D.N.J. 1991). Accordingly, no one can seriously dispute that any private prosecution would

involving involuntary hospitalization parallels that of the election process. Private physicians can hospitalize patients only under state statutory authority, state courts determine whether or not patients satisfy the statutory requirements for commitment,[337] and state statutes and regulations impose duties on the committing hospitals in areas ranging from treatment to the assumption of primary responsibility for emergency psychiatric admissions.[338]

Likewise, in finding that a volunteer fire department is a state actor, the Second Circuit did not look at whether the activity of fire protection has been performed exclusively by government officials. Rather, the court recognized that resolution of this question required a determination of whether "the function is one which is traditionally within the exclusive province of government."[339] A volunteer fire department was a state actor because fire protection "is sufficiently 'associated with sovereignty.' "[340]

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be subject to constitutional constraints. *See Imperiale*, 773 F. Supp. at 754-55. Such constraints would not be necessary if private prosecutors were not state actors.

337. N.Y. MENTAL HYG. LAW § 9.31 (McKinney 1996).

338. For example, in New York, the state Office of Mental Health must plan and work with, *inter alia*, local governments and public and private providers of psychiatric services, including general hospitals, "to develop an effective, integrated, comprehensive system for the delivery of all services to the mentally ill." N.Y. MENTAL HYG. LAW §§ 1.03(5), 7.01. Likewise, under state law, private hospitals must obtain an operating certificate in order to provide psychiatric services. N.Y. MENTAL HYG. LAW § 31.02. As a condition of renewal of an operating certificate, a private hospital must agree to service a catchment, *i.e.*, geographic, area for involuntary psychiatric admissions pursuant to New York Mental Hygiene Law §§ 9.39 and 9.40.

Finally, state law authorizes the state Office of Mental Health to set "standards of quality and adequacy of facilities, equipment, personnel, services, records, and programs for the rendering of services pursuant to an operating certificate." N.Y. MENTAL HYG. LAW § 31.04(a)(2). State regulations contain detailed standards that govern, *inter alia*, the transfer of patients from one hospital to another, 14 NYCRR Part 517, the rights of patients in all licensed hospitals, 14 NYCRR Part 527, the operation of psychiatric wards in general hospitals, 14 NYCRR Part 580, and the operation of comprehensive psychiatric emergency programs. 14 NYCRR Part 590.

339. Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 23 (2d Cir. 1979).

340. *Janusaitis*, 607 F.2d at 23 (quoting *Jackson*, 419 U.S. at 353). In reaching this conclusion, the court further examined how state law impacted the operations and actions of the volunteer fire department. State law authorized a fire department officer to direct any person to leave any building in the vicinity of a fire and inspect state owned buildings within its jurisdiction. *Id.* at 24. Accordingly, state law recognized that fire fighting was "essentially the exclusive function of the government, but a function which may be *delegated* to a volunteer group." *Id.* (emphasis added); *see also Goldstein*, 218 F.3d at 345 (holding volunteer fire department a state actor because, *inter alia*, state delegated to fire department "incidents of sovereignty" related to fire fighting).

One can arguably assert that in some instances, application of the functional approach taken by the Court in *West* and the public function test produce identical analysis and

In finding that civil commitment has not been an exclusive public function some courts have cited nineteenth century laws that authorized private physicians to certify a mentally ill person for a specific period of days.[341] However, these courts should have been asking whether this was a power traditionally associated with sovereignty and whether these physicians could have acted in the same manner in the absence of state law. It is noteworthy that when applying the public function test in other contexts, courts that have found state action have concluded that the private defendants assumed powers traditionally belonging to the state.[342]

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results. Any power exclusively reserved to the state confers upon the state a role in a particular governmental area, *e.g.*, adherence to societal norms through the use of the state's prosecutorial powers. Accordingly, if a private party has exercised a power that has been traditionally reserved to, although not necessarily performed by, the state, then the private party has acted on behalf of the state. Indeed, while the Supreme Court never mentioned the public function test when it decided *West*, subsequently, the Court recognized that "the State was constitutionally obligated to provide medical treatment to injured inmates" and characterized this provision of treatment as a "traditionally exclusive public function." *Am. Mfrs.*, 119 S.Ct. at 987-88.

However, the functional approach necessarily involves an examination of whether the private defendant is acting on behalf of the state. *See West*, 487 U.S. at 56, *Polk County*, 454 U.S. at 320. On the other hand, while the functional approach focuses on the relationship among the state, plaintiff and private defendant, the public function test simply looks at the activity in question. For instance, some courts have applied the public function test to conclude that volunteer fire fighters are state actors. *See, e.g.*, Mark v. Borough of Hatboro, 51 F.3d 1137, 1141-47 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 165 (1995); *Janusaitis*, 607 F.2d at 21-24 (2d Cir. 1979). Other courts have held that they are not. *See, e.g.*, Yeager v. City of McGregor, 980 F. 2d 337, 340-41 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993). A finding of state action can lead to new found constitutional protections, such as concluding that the First Amendment protects speech of the volunteer fire fighters. *See Janusaitis*, 607 F.2d at 25. On the other hand, a finding that volunteer fire fighters are not state actors can result in fire companies conducting administrative searches in the absence of lawful authority and victims of such searches having no redress under the Constitution.

In this regard, application of the public function test differs from the abuse of authority standard. The abuse of authority standard serves as a check on official power when the government has delegated sovereign authority to individuals who, when acting on behalf of the state, have exercised this delegation to deprive individuals of a constitutionally protected right. On the other hand, the public function test can be utilized by those who exercise sovereign authority, such as volunteer fire fighters, when they believe that the organization for which they work has deprived them of rights protected by the Constitution. Certainly, action is far more attributable to the state when a person suffers a deprivation of rights that results from an exercise of state authority that had been delegated to private individuals than when an individual suffers a deprivation following a delegation of a sovereign prerogative but which is unrelated to any such delegation, *e.g.*, when physicians who have the power to civilly commit individuals allege that their own rights have been violated when they have been fired from their job at a private hospital.

341. *Okunieff*, 996 F. Supp. at 356; *Rockwell*, 26 F.3d at 259; *Spencer*, 864 F.2d at 1380.

342. *See, e.g.*, Warner v. Grand County, 57 F.3d 962, 964 (10th Cir. 1995) (concluding individual who engaged in strip search exercised power traditionally reserved to the state); Rodrigues v. Furtado, 950 F.2d 805, 814 (1st Cir. 1991) (holding vaginal search of criminal

An examination of the evolution of the public function test further illustrates why a court should focus on exclusivity of power and not exclusivity of performance. The modern public function test became crystallized in *Jackson* and *Flagg Brothers* when the Supreme Court emphasized the necessity of exclusivity.[343] In laying out the requirement of exclusivity, the Court in *Flagg Brothers* acknowledged the existence of two lines of state action cases: those involving the conduct of elections, and municipal function cases involving *Marsh* and its progeny.[344] Both lines of cases had "in common the feature of exclusivity."[345] While the Supreme Court never explained why exclusivity is a necessary component of the public function doctrine, it is useful to try to understand the purpose underlying the exclusivity requirement.

The state action doctrine can be viewed as an attempt to maximize individual freedom in situations in which it is often difficult to determine how to maximize liberty.[346] It does so by recognizing that the Constitution aims to permit individuals to structure their relationships with a minimum of interference from the government.[347] Accordingly, the state action doctrine will not protect an individual when he or she consensually enters into a relationship with another private party.[348] On the other hand, the Constitution guarantees certain individual rights and when an individual loses constitutional protection through no fault of his own, the state action doctrine will provide protection for the individual.[349]

The concept of exclusivity protects individual rights when through no choice of her own, a person finds herself in an arrangement in which she has lost the opportunity to develop relationships in a way that will ensure the protection of individual rights. In *Marsh*, the aggrieved individuals did not have the ability to exercise their First Amendment rights within their community

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defendant amounted to an exercise of "the power of search traditionally reserved exclusively to the State").

343. *See Jackson*, 419 U.S. at 352-53; *Flagg Bros.*, 436 U.S. at 157-60.

344. *Flagg Bros.*, 436 U.S. at 157-59.

345. *Id.* at 159.

346. *See* Chemerinsky, *supra* note 17 at 536.

347. *Cf. Edmonson*, 500 U.S. at 619.

348. *See, e.g., Flagg Bros.*, 436 U.S. at 160 (involving commercial transaction between two private parties); *Rendell-Baker*, 457 U.S. at 841 (dealing with employment dispute between private school and its teachers).

349. *See West*, 487 U.S. at 56.

because a private company owned the entire town.[350] On the other hand, those who sought to exercise their First Amendment rights in *Hudgens v. NLRB*[351] had ample opportunity to exercise their rights in the community in which they lived. Likewise, particularly because the resolution of primary elections determined the winner of the general elections, actions that resulted in the loss of a citizen's vote in the primary necessitated a finding of state action in order to ensure that the citizen could meaningfully participate in the electoral process.[352]

Once one recognizes that the concept of exclusivity serves to ensure that those individuals who desire can structure their relationships in a way that maximizes constitutional rights, it becomes that much clearer that civil commitment satisfies the public function test. Just as prisoners in *West* could not choose their own medical coverage,[353] and the petitioners in *Marsh* had little opportunity to exercise their First Amendment rights on a street corner, a person subject to involuntary hospitalization has not chosen to enter into an arrangement with the physicians who have hospitalized him.[354]

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350. *See Marsh*, 326 U.S. at 502-03

351. 424 U.S. 507 (1976).

352. *See Flagg Bros.*, 436 U.S. at 158 (interpreting state action election cases as turning on the dispositive nature of primary elections).

353. *West*, 487 U.S. at 55.

354. Indeed, if exclusivity is important because it relates to the opportunity for citizens to vindicate their constitutional rights, then the problems that exist when a court examines whether the government exclusively performed a function, as opposed to examining whether the activity in question was an exercise of an exclusive government authority, become that much more apparent. To illustrate, in *Okunieff* the court concluded that civil commitment did not satisfy the public function test because, *inter alia*, a private facility, New York Hospital, was one of the first institutions to provide in-patient care. *Okunieff*, 996 F. Supp. at 356. Leaving aside for the moment the issue of coercion, perhaps in Westchester County, where New York Hospital was located, the government did not exclusively perform the function of providing in-patient care to the mentally ill. However, what about in the rest of the state? The availability of one private hospital does not mean that individuals around the rest of the state had the opportunity to choose between a public and private facility when choosing psychiatric care for either themselves or relatives in need. In *Marsh*, the local community served as the relevant geographic entity for determining whether a citizen could exercise constitutional rights. *Marsh*, 326 U.S. at 507-08. If for one hundred years only the government provided in-patient psychiatric care in Buffalo does the existence of a private hospital in Westchester mean that the provision of in-patient care is nevertheless to be considered a function that is not exclusively governmental?

D. Civil Commitment Constitutes State Action Because the State Has Created the Legal Framework Governing Civil Commitment Decisions

The Supreme Court has recognized that when "the government 'has create[d] the legal framework governing the [challenged] conduct' . . . it involves itself 'in a significant way' with the unlawful conduct."[355] Likewise, the Supreme Court has also concluded that its own state action jurisprudence also suggests "that the private party's challenged decisions could satisfy the state-action requirement if they were made on the basis of some rule of decision for which the State is responsible."[356]

In the civil commitment context, the state has created a rule of decision that physicians must follow. State law significantly limits the discretion of committing physicians. First, both state law and the Constitution prohibit the confinement of a non-dangerous, mentally ill person.[357] On the other hand, state law imposes a duty of care on all psychiatrists who in their professional judgment believe a mentally ill person is dangerous and a doctor is liable if he releases a patient whom he knew or should have known was dangerous.[358] Hence, an examining physician who believes a patient

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355. *Edmonson*, 500 U.S. at 624 (quoting *Tarkanian*, 488 U.S. at 192 ("challenged" bracketed in original)).

356. *West*, 487 U.S. at 52 n.10; *see also* Catanzano By Catanzano v. Dowling, 60 F.3d 113, 119 (2d Cir. 1995) (holding private home health care agencies engage in state action because, *inter alia*, agencies made decisions to terminate services pursuant to legal standards).

357. *See supra* note 248 (detailing cases that recognize that Constitution prohibits confinement of mentally ill individual who is not dangerous); Brakel, Parry & Weiner, *supra* note 6 at 101-05 (setting forth statutory schemes requiring finding of danger as a pre-requisite for commitment). Statements made by the New York State Office of Mental Health when it modified the civil commitment forms that physicians were required to complete when they involuntary hospitalized someone illustrate how the psychiatric community recognizes the obligation to conform clinical decisions to legal standards. In circulating new commitment forms in 1989, the Office of Mental Health noted that these forms "mark the culmination of an effort to make the forms consistent with current law." Okunieff v. Rosenberg, No. 98-7803, Joint Appendix at 363. Specifically, "the standard for involuntary hospitalization . . . has been amended to conform with judicial rulings in recent years which have required a showing of 'dangerousness.'" *Id.* at 364.

358. *See, e.g.*, Williams v. State, 127 N.E.2d 545, 549 (N.Y. 1955) (stating "[s]tate has frequently been liable for the consequences of its breach of duty to protect others from the acts of the mentally ill confined to State institutions"); Durflinger v. Artiles, 673 P.2d 86, 93-94 (Kan. 1983); Davis v. Lhim, 335 N.W.2d 481, 488 (Mich. Ct. App. 1983); Lipari v. Sears Roebuck & Co., 497 F. Supp. 185, 191 (D. Neb. 1980); Rattray v. State, 636 N.Y.S.2d 43, 44 (N.Y. App. Div. 1996); Dunn v. State, 312 N.Y.S.2d 61, 64 (N.Y. App. Div. 1970). These cases involved instances when clinical staff did not continue to confine mentally ill individuals whom they should have known were dangerous. In researching this article, I was unable to

is dangerous must commit the patient.

Admittedly, the Supreme Court's decision in *Blum* means that not every decision made pursuant to a statute amounts to state action. In *Blum*, residents of a private nursing home who were Medicaid recipients asserted that decisions to discharge them or place them on a lower level of care violated their procedural due process rights. The Court rejected this contention holding that the employees of the private nursing homes were not state actors.

In *Blum*, federal law required physicians to certify that patients were receiving "medically necessary services."[359] However, other than requiring that the services be medically necessary, federal law left the decision to discharge patients or lower their services to the discretion of the physician.[360] Hence, the decisions of the physicians were framed in accordance with canons of professional ethics and not "dictated by any rule of conduct imposed by the State."[361] Therefore, the existence of a statute that results in actions being taken by private officials is merely the starting point for any state action analysis. Unlike the situation in *Blum* in which discretion is left to the physician, in the civil commitment context, decisions to confine or not to confine rest on a determination of dangerousness, a standard imposed by the Constitution and which has been further interpreted and refined by courts.[362]

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uncover even one case in which a clinician chose to either release or not to continue to confine a mentally ill person whom the clinician believed was dangerous. The complete absence of such a case evinces an understanding on the part of clinicians that they must confine any mentally ill individual whom they believe is dangerous.

359. *Blum*, 457 U.S. at 1005-06 (citing 42 U.S.C. § 1396).

360. *Id.* at 1006 n.16.

361. *Id.* at 1009.

362. No one can seriously dispute that if state law prohibits the civil commitment of individuals unless they are dangerous, then physicians who certify individuals for commitment under a state's mental health laws are bound by how state courts define dangerousness. While the volume of case law defining what constitutes dangerousness does not come close to case law defining some elements in the criminal law, such as probable cause, there is some case law that further limits the discretion of committing physicians. *See, e.g.*, *In re* Bates, 734 N.E.2d 459 (Ill. App. Ct. 2000); Singletary v. State, 765 So. 2d 180 (Fla. Dist. Ct. App. 2000); T.G. v. State, 7 S.W.3d 248 (Tex. App. 1999); Interest of Breeden, 4 S.W. 3d 782 (Tex. Crim. App. 1999); Dwight J. v. Carmichael, 651 N.Y.S.2d 434 (N.Y. App. Div. 1996); Charles T. v. Sanchez, 626 N.Y.S. 2d 492 (N.Y. App. Div. 1995); Naila Y. v. Sanchez, 626 N.Y.S.2d 153 (N.Y. App. Div. 1995); Campbell v. State, 912 S.W.2d 446 (Ark. Ct. App. 1995); State v. Sea, 904 P.2d 182 (Or. Ct. App. 1995); Matter of McGaughey, 536 N.W.2d 621 (Minn. 1995); Seltzer v. Hogue, 594 N.Y.S. 2d 781 (N.Y. App. Div. 1989); *In re* Carl C., 511 N.Y.S. 2d 144 (N.Y. App. Div. 1987).

VI. The Illegitimacy of *Spencer v. Lee* and the Chain Reaction It Produced in State Action Jurisprudence

Some legal authorities view judges as neutral arbiters who blindly apply legal principles regardless of the parties involved.[363] However, more cynical authorities believe that courts base their decisions as to who wins a case upon a range of nonlegal factor that include class animus, political bias and the morality of the judges.[364] Under this view, "[t]he law is a major vehicle for the maintenance of existing social and power relations."[365] Even Benjamin Cardozo recognized that judges must make value choices and possess "subconscious loyalties" to those groups in which they are a part.[366]

In assessing the legitimacy of a judicial decision, it is assumed that a decision is justified only if reached through legal reasoning in which a court assesses all relevant factors that by themselves generate a particular outcome.[367] This is not to say that a mistake in adjudication is an example that a judge acted in a lawless fashion.[368] However, there are a number of clues that one can rely on when determining whether an erroneous decision is a court making an error when attempting to act in a neutral manner or a desire to reach a particular outcome in order to effectuate the judges' personal preferences. Does a court set forth legal propositions and yet cannot cite any authority for such statements?[369] How strained is the legal reasoning that the court

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363. *See, e.g.*, Lon Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 370-71, 394-95 (1978).

364. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law*, 40 Wm. & Mary L. Rev. 1623, 1651 (1999); *see also* Edward Rubin & Malcom Feeley, *Creating Legal Doctrine*, 69 S. Cal. L. Rev. 1989, 2003 (1996) (noting attitudes of federal judges may reflect the ideology of society's dominant elite).

365. David Kairys, "Introduction," in Politics of Law, p. 5; *see also* Paul D. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 226-27 (1984).

366. William J. Brennan, Jr., *Reason, Passion and "The Progress of the Law,"* 10 Cardozo L. Rev. 3, 4-5 (1988).

367. *See* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 30 (1984).

368. Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 748 (1982).

369. *Cf.* David A.J. Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 Ga. L. Rev. 1069, 1102 (1977) (recognizing that courts should base their decisions on principles reflected in previous cases and applicable to the case at hand). Such judicial decision-making is particularly pernicious because an assertion in a judicial opinion unsupported by any legal authority can subsequently serve as authority for another court; one that is attempting to act in a neutral manner. For an example of how the first federal appellate court that held that civil commitment is not state action, the Seventh Circuit in *Spencer*, set forth a legal principle

attempts to rely on to support its holding? Does the court make errors in reasoning for which there can be honest disagreement or does a court make errors that are simply indefensible?[370] Does a court make characterizations about governing authority that simply is not true? Is a court willing to ignore or mischaracterize existing precedent?[371]

Moreover, in the state action context, one must look at what bases for state action there were that were simply not addressed. Ordinarily when deciding a legal question, a court is confronted with a number of competing legal norms.[372] In these instances, a court must choose the one that is most applicable in order to resolve the issue at hand.[373] This is not the case in the state action area since a court does not need to choose the most applicable state action test. If under four state action tests, there is no state action; a finding of state action is nevertheless warranted if a fifth state action test is satisfied. Hence, it is not a question of what is the most applicable legal theory, but whether state action exists under any legal theory.

A detailed analysis of *Spencer*, the first federal appellate court case to hold that civil commitment is not state action, reveals that this decision was so filled with errors in legal reasoning and was otherwise so disingenuous and intellectually dishonest that one cannot help to conclude that the judges who ruled in favor of the private physician-defendants wanted to find for the private defendants and then looked for justification to support their holding. Regrettably, this case ignited a chain reaction in which *Spencer* and its progeny served as authority for one circuit court after another to hold that private physicians who involuntarily hospitalize physicians are not state actors.

When the Court of Appeals for the Seventh Circuit decided *Spencer*, numerous courts had already addressed the issue facing the court. However, in the first paragraph of the court's opinion,

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without citing any authority and such a principle became authority for another court, *see supra* notes 141-42 and accompanying text and note 176.

370. For instance, does a court misstate precedent in attempting to justify an opinion.

371. *See* Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 85 (1960). By precedent I do not necessarily mean binding precedent since technically, when an appeals court decides a case of first impression in its circuit there is no binding precedent. However, when a court decides a case of first impression in its jurisdiction, and numerous courts have decided identical issues, one would expect that the court would acknowledge the existence of such cases and explain why it agrees or disagrees with such decisions.

372. *See* Snyder, *supra* note 364 at 1655-56.

373. *Id.* at 1656.

the court took steps that enabled it to issue an opinion that failed to address the correctness of, or even cite, any of the previously decided cases. At this time, the Court of Appeals for the Eleventh Circuit had already decided *Burch*. One could have expected that the court would have either adopted *Burch* as authority to hold that civil commitment constitutes state action or explain why the Eleventh Circuit erred. The Seventh Circuit did neither. Rather, in what can be characterized as an act of judicial dishonesty, the court concluded that the Eleventh Circuit in *Burch* "devoted only three sentences to the issue and cited no authority for its conclusion."[374]

This assertion was simply not true. Rather, in framing the contours of state action analysis, the court in *Burch* methodically relied on Supreme Court jurisprudence.[375] The court then concluded that the actions of the private defendants were fairly attributable to the state because "only by being clothed with the authority of state law did the appellees possess the power to commit a person to a mental institution if that person provided voluntary, express and informed consent."[376] While the court did not cite authority for this statement at the end of the sentence, two pages earlier the court cited the Florida law from which the court reached this conclusion.[377] While the court failed to cite authority for the proposition that a private citizen could not confine a mentally ill person for 152 days, as the defendants in *Burch* did, such a contention was unquestionably correct.[378]

Having disposed of *Burch*, the Seventh Circuit attempted to further justify its holding by noting that "[t]he other courts that have addressed this issue agree with our position."[379] For support of this proposition, the court cited only *Hall v. Quillen*[380] "and

374. *Spencer*, 864 F.2d at 1377.

375. *See Burch*, 840 F.2d at 803. The court cited *Rendell-Baker* to conclude that the state action issue requires a determination of whether the actions of the private defendants are "fairly attributable" to the state. *Id.* The court then reasoned that a deprivation is "fairly attributable" to the state "when the claim of a constitutional deprivation is directed against a party whose official character is such as to lend the weight of the State to his decisions." *Id.* The court then relied on Supreme Court authority and held that " '[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law' constitute[d] state action for the purposes of the Fourteenth Amendment." *Id.* (quoting *Lugar*, 457 U.S. at 929).

376. *Id.*

377. *See Id.* at 801 (citing FLA. STAT. ANN. § 394.463(1)(d) (1981)).

378. *See supra* note 245.

379. *Spencer*, 864 F.2d at 1377.

380. 631 F.2d 1154 (4th Cir. 1980).

cases cited there."[381] However, *Hall* addressed an issue significantly different than what the courts in *Spencer* and *Burch* addressed. In *Hall*, an involuntarily hospitalized individual sued his lawyer, the judge who committed him, and a physician whom the court appointed to examine him in connection with the court hearing in which the plaintiff challenged his confinement.[382] Accordingly, the issue in *Hall* was not whether physicians who civilly commit a mentally ill individual engage in state action but "whether a state-appointed counsel or physician can be liable under section 1983 . . . or, otherwise stated, is the representation by the counsel and the action of the physician in such a situation state action?"[383] Obviously, this was not the issue that confronted the court in *Spencer*.[384] Furthermore, the cases cited in *Hall* did not address the issue of whether civil commitment constitutes state action but, as two of the dissenters in *Spencer* recognized, whether court-appointed counsel engaged in state action in the representation of the client.[385]

The court acted at the very least disingenuously when it cited *Dahl v. Akin*[386] and when it asserted that the Fifth Circuit reached the same conclusion that the court in *Spencer* did after a woman invoked her state's civil commitment laws to institutionalize her father.[387] The court in *Dahl* recognized that the daughter lacked the authority to effectuate the commitment by herself and grounded its

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381. *Spencer*, 864 F.2d at 1377.

382. *Hall*, 631 F.2d at 1145. On appeal, the plaintiff recognized that the doctrine of judicial immunity afforded complete immunity to the judge. *Id.* at 1155.

383. *Id.* at 1155.

384. The court's opinion in *Polk County v. Dodson*, 454 U.S. 312 (1981) highlights the differences in the two cases. A court appointed attorney does not engage in state action in his representation of the client because the "assignment entailed functions and obligations in no way dependent on state authority." *Id.* at 318. Accordingly, court-appointed counsel serves a role that is antagonistic to the state. *See Id.* 318-19. On the other hand, physicians who commit acts pursuant to state authority, *see supra* notes 238-41 and accompanying text, fulfill the aims of the state. *See Id.* at 319-20.

The court in *Hall* did not treat the court appointed physician differently than the lawyer. However, like the lawyer, the physician was "appointed by the court to render professional services to [the] plaintiff." Hall, 631 F.2d at 1156 (Winter, J., concurring in part, dissenting in part). Accordingly, the court-appointed physician was not acting on behalf of the state in any way.

385. *See Spencer*, 864 F.2d at 1384 (Rippple, J., dissenting) (citing, *inter alia*, Jackson v. Salon, 614 F.2d 15, 17 (1st Cir. 1980); Housand v. Heiman, 594 F.2d 923, 925-26 (2d Cir. 1979); U.S. *ex. rel.* Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976); Harkins v. Eldridge, 505 F.2d 802, 803 (8th Cir. 1974). In this regard, *Hall*, was far more akin to *Polk County* than it was to *Spencer*.

386. 630 F.2d 277 (5th Cir. 1980).

387. *Spencer*, 864 F.2d at 1381.

holding on the fact that the state did not confer upon the daughter any state authority.[388]

Not only did *Hall* and *Dahl* address issues different than the issue that faced the court in *Spencer*, but the court in *Spencer* committed additional error when it concluded that "[t]he other courts that have addressed this issue agree with our position."[389] At the time the court decided *Spencer*, the courts in *Plain v. Flicker*,[390] *Brown v. Jenson*,[391] *Kay v. Benson*,[392] and *Ruffler v. Phelps Memorial Hospital*[393] had concluded that physicians who involuntarily hospitalize an individual engage in state action.[394] Nor could the court claim ignorance of these cases since one of the dissenting opinions in *Spencer* cited *Willacy*, *Plain* and *Davenport*.[395]

Having eliminated the need to confront existing, adverse authority, the Seventh Circuit was then able to write on a clean slate. The court first rejected the plaintiff's contention that civil commitment was akin to an arrest and therefore state action.[396] Ignoring the difference between a temporary deprivation of liberty, and the potentially long-term confinement that results when the

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388. *Dahl*, 630 F.2d at 281.

389. *Spencer*, 864 F.2d at 1377.

390. 645 F. Supp. 898, 908 (D.N.J. 1986).

391. 572 F. Supp. 193, 197 n.1 (D. Colo. 1983).

392. 472 F. Supp. 850, 851 (D.N.H. 1979).

393. 453 F. Supp. 1062, 1068-70 (S.D.N.Y. 1978).

394. Likewise, by this time, the courts in *Willacy v. Lewis*, 598 F. Supp. 346, 349 (D.D.C. 1984), and *Davenport v. Saint Mary Hosp.*, 633 F. Supp. 1228, 1237 (E.D. Pa. 1986), had strongly suggested that civil commitment constitutes state action. In supporting its finding that civil commitment does not constitute state action, the Seventh Circuit recognized that Blackstone, writing in 1765, noted that in England individuals confined their mentally ill friends and relatives. *Spencer*, 864 F.2d at 1381. There is a certain absurdity to the court citing practices that occurred in England before the Untied States even became a country while ignoring recent federal court jurisprudence that addressed the identical issue at hand.

395. *Spencer*, 864 F.2d at 1388-92 (Cummings, J. dissenting). To further justify its holding, the majority in *Spencer* noted that it was adhering to its decisions in *Duzynski v. Nosal*, 324 F.2d 924 (7th Cir. 1963) and *Byrne v. Kysar*, 347 F .2d 734 (7th Cir. 1965). The court's reliance on these opinions evinces a desire to rely on any authority, regardless of the merits of the authority, to justify a holding. Not only was *Duzynski* and *Byrne* decided before any of the modern Supreme Court state action cases, but *Duzynski* also failed to cite *any* Supreme Court state action authority. Rather, the court relied on *Spampinato v. Breger*, 270 F.2d 46 (2d Cir.1959), *cert. denied* 361 U.S. 944 (1960), in which the court held that a physician employed by a New York City hospital was not a state actor. *See Duzynski*, 324 F.2d at 928-31. Likewise, the physicians who certified the plaintiff for hospitalization in *Byrne* were either court appointed and entitled to judicial immunity or employed by the City of Chicago. *See Byrne*, 347 F.2d at 736.

396. *Spencer*, 864 F.2d at 1380.

police arrest someone,[397] the court then reasoned that individuals who affect a citizen's arrest are not state actors,[398] and "[a]rrest has never been an exclusively governmental function."[399]

Once the court reached this conclusion, the court was then able to conclude that "[n]ot all state-authorized coercion is governmental action."[400] By so reasoning, the court was then able to conclude that "a private commitment is no more state action than a citizen's arrest, the repossession of chattels, or the ejectment of trespassers is."[401]

Such a statement trivializes a mentally ill person's liberty and has no basis in law or logic. Civil commitment involves the exercise of the state's police or *parens patriae* powers that results in the deprivation of liberty for an extended period of time.[402] The repossession of chattels is a remedy for a dispute between two private individuals that involves a creditor seizing the property of a debtor. Likewise, the ejectment of trespassers involves a party with lawful title to land forcibly removing those on the property.[403] In fact, only coercion is the common denominator between these two private remedies and civil commitment. Similarly, a citizen's arrest often involves a private party detaining someone in the protection of property until the police come. Furthermore, even in those

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397. *See supra* note 199.

398. *Spencer*, 864 F.2d at 1380.

399. *Id.*

400. *Id.*

401. *Id.* at 1381. Thus, the court equated the involuntary hospitalization of a mentally ill person with the repossession of goods from a defaulting debtor and concluded that the involuntary hospitalization by private parties constituted strong evidence that civil commitment did not constitute an exclusive public function. *Id.* In so noting, the court a committed a number of errors.

First, the court erred by equivocating between the concepts of exclusive prerogative and exclusive function. While the court initially recognized that certain powers are the exclusive *prerogative* of the state, the court subsequently concluded that state action did not exist because historically, the care of the mentally ill was not the exclusive *function* of the state. *Id.* at 1379-81. Furthermore, even if a private party historically engaged in certain conduct, such activity does not mean the actions of the private individual do not amount to state action. Rather, as the Supreme Court recognized in *Flagg Brothers* and *American Manufacturers*, the relevant inquiry is whether common law authorized the conduct engaged in by the private defendants. *See Flagg Bros.*, 436 U.S. at 162 n. 12; *Am. Mfrs.*, 119 S.Ct. at 988.

402. *See supra* notes 238-41 and accompanying text and 247-48 and accompanying text.

403. As one court noted, "[c]ivil commitment statutes are, however, of an entirely different nature from the commercial self-help statutes at issue in *Lugar* and *Flagg Brothers*. It is obvious that civil commitment statutes do not exist to resolve purely private disputes." *Davenport*, 633 F. Supp. at 1236; *see also* Willacy, 598 F. Supp. at 349 (physician who certifies a patient for hospitalization does not avail himself of a self-help remedy but instead exercises the state's power).

instances in which an arresting private party detains someone, the arrestor must promptly turn the arrestee over to the police.[404]

The majority also failed to distinguish between those private individuals who may have to immediately intervene to prevent a mentally ill person from causing harm and private physicians whom the state has authorized to confine a mentally ill person.[405] However, a significant difference exists between a private individual who, without the grant of authority from the state, takes steps to facilitate the confinement of a mentally ill individual, and the physician, who confines pursuant to state authority.[406]

The illegitimacy of the court's opinion can be further evinced by the statement that "[i]f Spencer thinks the eight days allowed by Illinois law for confinement prior to hearing is too much, he can challenge the constitutionality of the statute."[407] However, if the Constitution does not govern the certification of mentally ill individuals by private physicians, then a person who believes that he is aggrieved by a statute that authorizes his confinement would lack standing to challenge the constitutionality of any applicable law.

Finally, the failure of the majority to address any of the contentions of the dissenters is noteworthy. The dissenting opinions clearly explained why the majority misstated the holding of *Hall* and why the majority's analogy of civil commitment to a citizen's arrest was wrong.[408] However, the majority made no attempt to explain why any portion of the dissenting opinions was wrong. The failure of the majority to take issue with any aspect of the dissenting opinions is particularly noteworthy because the dissenting opinions argued that under the abuse of authority doctrine, the private defendants engaged in state action.[409] Moreover, if any legal theory supports a finding of state action, a court must find state action. The failure of the majority to address the merits of either the abuse of authority doctrine or the holdings of numerous district courts that civil commitment constitutes state

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404. *See supra* note 199; *see also Spencer*, 864 F.2d at 1389 (Cummings, J. dissenting).

405. *Spencer*, 864 F.2d at 1381. The court noted that "[t]he reasons for private commitment, as for self-defense, citizen's arrests, and other private remedies, are intensely practical. If a person displays symptoms of acute and violent mental illness, his family or physician-in an appropriate case a passerby or other stranger-may have to act immediately to restrain him from harming himself or others." *Id.*

406. *See Pino*, 75 F.3d at 1465; *Okunieff*, 996 F. Supp. at 357.

407. *Spencer*, 864 F.2d at 1381.

408. *See Id.* at 1384 (Ripple, J., dissenting); *Id.* at 1388-89 (Cummings, J., dissenting).

409. *See Id.* at 1385 (Ripple, J., dissenting); *Id.* at 1388, 1391 (Cummings, J., dissenting).

action is inexplicable unless one is willing to conclude that the court had a predisposition to find in favor of the defendant-physicians and then attempted to write an opinion to support what it wanted to hold.[410]

Judge Richard Posner, who wrote the majority opinion in *Spencer*, has recognized the potential for, and has warned against, judges injecting their "personal values" when engaging in constitutional adjudication.[411] Regrettably, it is hard not to conclude that the opinion in *Spencer* was a product of the personal values of Judge Posner and the rest of the majority. Thus, the court employed the state action doctrine in a way that other courts have done previously, to protect a privileged class, in this case physicians, against claims brought by a relatively powerless citizen, one who suffered from mental illness.[412]

In *Harvey*, the Eleventh Circuit became the next federal appellate court to address the state action issue. The court first eliminated the necessity of addressing the abuse of authority doctrine by noting that the Eleventh Circuit recognized three state action tests: the public function test, the state compulsion test and the nexus/joint action test.[413] The court then relied on *Spencer* and *Watkins v. Roche*[414] to conclude that state law neither compelled nor encouraged commitments.[415] The court then held that the state and private parties possessed co-extensive powers to commit, and hence, civil commitment was not a function exclusively reserved to the state.[416]

One would expect that confronted with a holding from the Seventh Circuit in *Spencer* and a holding from its own circuit it

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410. It is interesting to note that while the majority failed to examine whether the abuse of authority doctrine served as a basis for finding state action, one year later in *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), two of the judges in the majority in *Spencer*, judges Posner and Kanne, recognized the applicability of the abuse of authority doctrine to a state action determination when the court in *Gibson* concluded that a police officer who had been stripped of authority by the city police department was not a state actor because he no longer possessed governmental authority. *Gibson*, 910 F.2d at 1518.

411. Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 22, 25.

412. *See* Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1330 (1982).

413. *Harvey*, 949 F.2d at 1130.

414. 529 F. Supp. 327 (S.D. Ga. 1981).

415. *Harvey*, 949 F.2d at 1130-31.

416. *Id.* at 1131. The court disagreed with the holding of *Ruffler v. Phelps Memorial Hospital*, 453 F. Supp. 1062 (S.D.N.Y. 1978) on the ground that the court failed to determine whether the commitment function was an exclusive governmental function. *Harvey*, 949 F.2d at 1131 n.10.

Burch, the Eleventh Circuit would have believed that *Burch* controlled. It did not. The court rejected *Burch* as controlling authority by noting that the private defendants had asserted that it was an arm of the state, which meant that the parties had agreed that civil commitment constitutes state action.[417] The court cited a dissenting opinion in *Burch* to hold that the court " '*assume[d]* here that Burch was involuntarily institutionalized by persons acting under color of state law.' "[418] However, it was only the dissenters in *Burch* who "assumed" that the defendants in that case had acted under color of law.[419]

Even if the opinion in *Burch* did not constitute binding precedent, one would have expected the panel in *Harvey* to address whether or not the court in *Burch* was correct when it adopted the abuse of authority doctrine. The court in *Harvey* did not.

It is also troubling that the court failed to address the wisdom of those district court cases that held that civil commitment is state action. While it is understandable that the court would have first looked to a district court opinion in its circuit when deciding a question of law for which the court believed there was no binding precedent, it is highly questionable that the court did not at least address the substantial district court authority that differed from *Watkins*. This is particularly true since a number of district courts had relied on the abuse of authority doctrine,[420] the same rationale adopted by the circuit court in *Burch*.

The Eleventh Circuit's opinion, particularly in light of the court's rejection of *Burch* clearly shifted the direction of case law. Once two circuits held that civil commitment is not state action, the substantial district court authority to the contrary became less important. The Third Circuit became the next court of appeals to hold that civil commitment does not constitute state action when it affirmed without opinion a district court decision.[421] The district court had concluded that it found "the exhaustive analysis of the Seventh Circuit in *Spencer*, . . . finding involuntarily commitment not to be a traditional state function convincing."[422]

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417. *Id.* at 1132.

418. *Id.* (quoting *Burch*, 840 F.2d at 810 (Tjoflat, J. dissenting)) (emphasis in Harvey).

419. *See Burch*, 840 F.2d at 810 (Tjoflat, J. dissenting).

420. *See supra* note 125 and accompanying text.

421. Janicsko v. Pellman, 970 F. 2d 899 (3d Cir. 1992), *aff'g without opinion* 774 F. Supp. 331 (M.D. Pa. 1991).

422. *Janicsko*, 774 F. Supp. at 336 n.5. Here, the court rejected the decision of a sister

The First Circuit in *Rockwell* became the next court of appeals to follow the new trend begun by the court in *Spencer*. Like the courts in *Spencer* and *Harvey* the court did not apply the abuse of authority doctrine.[423] Instead, the court applied the state compulsion, nexus/joint action and public function tests.[424] In finding for the private defendants, the court relied on both *Spencer* and *Harvey*.[425]

In *Ellison*, the Court of Appeals for the Sixth Circuit became the next court to hold that civil commitment does not constitute state action. In *Ellison*, the court relied extensively on the previously decided circuit cases to justify its holding.[426] However, unlike the other circuits, the court addressed the applicability of *West* and promptly completely misread the case. The court held that "[f]or obvious reasons" *West* did not control because the defendants in *Ellison* were not "contractually bound to the state."[427] The court's interpretation of *West* was clearly wrong. The Supreme Court in *West* explicitly held that state action was present because of the authority conferred upon the physician to satisfy the state's constitutional mission to provide medical care to those in custody and not because of the contractual relationship between the physician and the state.[428]

Spencer and *Harvey* served as a basis for the Tenth's Circuit's holding in *Pino* that the physician who certified a mentally ill person for involuntary hospitalization was not a state actor.[429] The

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district court in *Davenport v. Saint Mary Hospital*, 633 F. Supp. 1228 (E.D.Pa. 1986). The court correctly concluded that the decision in *Davenport* served as dictum only and the court had concluded that civil commitment could be considered a traditional function of the state. *Janicsko*, 774 F. Supp. at 336 n.5. However, the court in *Davenport* had based its decision in part of the abuse of authority doctrine. *Davenport*, 633 F. Supp. at 1237 (stating "[c]ourts have held that when the state gives a select individual or group powers that are not traditionally exercised by the state and not possessed by the general citizenry, a person exercising these powers is clothed with the authority of state law") (internal quotes omitted). The district court in *Janicsko*, like the courts in *Spencer* and *Harvey* did not address the merits of this state action theory.

423. The court had no excuse for ignoring this doctrine because the appellant called it to the court's attention. *See* Rockwell v. Cape Cod Hosp., Brief of Appellant at 37.

424. *Rockwell*, 26 F.3d at 258-60.

425. *Id.* at 258.

426. *Ellison*, 48 F.3d at 195-96. The court relied on *Rockwell* and *Spencer* to conclude that civil commitment is not the exclusive prerogative of the state. *Id.* The court then relied on *Janicsko* to conclude that state law does not compel commitments. *Id.* at 196.

427. *Id.* at 197.

428. *See West*, 487 U.S. at 56; *see also Edmonson*, 500 U.S. at 627 (recognizing that physician's function within the state system and not terms of employment served as the basis for the Court's holding in *West*).

429. *Pino*, 75 F.3d at 1466-67.

court relied on *Spencer* and *Harvey* to conclude that state law neither compelled nor encouraged physicians to execute commitment certificates.[430]

The chain of legal dominos continued to fall when the court in *S.P.* held in the same manner as its sister circuits. *Spencer*, *Harvey*, and *Janicsko* all served as authority for the court's rationale that the state's commitment laws neither compelled nor encouraged commitments.[431]

The basis for the Second Circuit's holding in *Okunieff*, that private physicians who execute commitment certificates are not state actors, was somewhat unclear because the court summarily noted that it based its decision "substantially" on the same reasons given by the district court.[432] However, one can assume that the court adopted much of the district court's opinion.

The district court in *Okunieff* relied on *Rockwell*, *Harvey*, and *Janicsko* to reason that the state's civil commitment laws neither compelled nor encouraged hospitalization.[433] The court then relied on *Rockwell* and *Harvey* to conclude that civil commitment does not satisfy the close nexus/joint action test.[434] The court then relied in part of *Spencer* and *Rockwell* to conclude that civil commitment did not satisfy the public function standard.[435]

However, in its analysis of the public function test, the court addressed numerous other arguments asserted by the plaintiff. The court first rejected the plaintiff's assertion that *Edmonson* served

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430. *Id.*

431. *S.P.*, 134 F.3d at 270. The court rejected the patient's contention that state law mandated commitments if certain statutory criteria were satisfied. *Id.* The court acknowledged that state law provided that a hospital and physician "shall" commence treatment upon the finding of certain statutory criteria. *Id.* at 270 n.8. However, even though the Supreme Court recently held that "shall" generally means "must" it could also mean "should" or "may." Although the court did not attempt to determine when "shall" should be construed as a mandatory or precatory. Rather, the court reasoned, without citing any legislative history, that the legislature intended to protect the individual, *i.e.*, the mentally ill person, and the public, and not to coerce commitment. *Id.* However, it stands to reason that even if the legislature wanted to protect the individual and the public, the only way to do so would be to provide treatment. Obviously, if a mentally ill person would not voluntarily accept treatment, then coercion becomes necessary.

432. *Okunieff*, 166 F.3d at 508.

433. *Okunieff*, 996 F. Supp. at 349.

434. *Id.* at 352. In applying the state action criteria in the manner that it did, the Court appeared to merge two state action tests. The close nexus test is distinct from the joint action test, *compare* Blum v. Yaretsky, 457 U.S. 991 (1982) *with* Adickes v. Kress & Co., 398 U.S. 144 (1970). Whether or not the state has provided such encouragement or coercive power as to a private party as to create state action is part of the nexus test. *See Blum*, 457 U.S. at 1004.

435. *Okunieff*, 996 F. Supp. at 355.

as a finding of state action because *Edmonson* did not contain the exclusivity requirement.[436] Rather, the court concluded that *Edmonson* adopted the exclusivity requirement because " 'the peremptory challenge has no utility outside the jury system, a system which the government *alone* administers.' "[437] This is not correct.

In *Leesville*, the Court eschewed reliance on any particular state action test. Rather, the Court extracted a number of principles from previous state action litigation concluded that its precedents required an examination of the following: (1) the extent to which the actor relies on governmental assistance and benefits; (2) whether the actor is performing a traditional governmental function; and, (3) whether the injury caused is aggravated in unique way by the incidents of governmental authority.[438] The Court concluded that the government alone administers the jury system when examining the extent to which private litigants relied on governmental assistance.[439] The Court did not turn its attention to the second criteria, the traditional governmental function test, until two pages later in its opinion. At such time, the Court did not mention exclusivity at all.[440] Significantly, just as the government alone administers the jury system, the government alone administers the state's civil commitment system.[441]

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436. *Id.* at 353.

437. *Id.* (quoting *Edmonson*, 500 U.S. at 622) (emphasis in *Okunieff*).

438. *Leesville*, 500 U.S. at 621-22.

439. *Id.* at 622.

440. *See id.* at 624. The district court's opinion would have been more soundly based it if had cited the portion of the Supreme Court opinion that addressed the public function aspect of the opinion when the Court noted that a jury is an entity "that is a quintessential governmental body, having no attributes of a private actor." *Id.* However, the Supreme Court, at least *sub silento*, recognized the governmental prerogative/function distinction by noting that a jury exercises the power of the government. *Id.* Even though the government may delegate some portion of its authority to private litigants, such delegation "does not change the governmental character of the power exercised." *Id.* at 626. Accordingly, when a state confers its authority on a private body, the private body must adhere to constitutional constraints. *See id.* at 625 (stating "[i]f a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality").

441. *Cf. supra* notes 238-42 and accompanying text. In this regard, the court erred further when it rejected *Rubenstein v. Benedictine Hospital*, 790 F. Supp. 396 (N.D.N.Y. 1992) as persuasive authority. In *Rubenstein* the court asked rhetorically, "[i]f the State is not providing the authority to deny an individual his liberty what is providing the authority?" *Rubenstein*, 790 F. Supp. at 406 (quoting Plain v. Flicker, 645 F. Supp. 898, 905 (D.N.J. 1986)). The court in *Okunieff* answered this question, without citing any authority, by asserting that the professional medical standard of the community where the physician is based serves as the authority. Such an assertion is clearly incorrect. *See supra* notes 275-78 and

The court in *Okunieff* sought to distinguish *West* by noting that the patient in *West* "was not free to consult a physician of his choosing."[442] However, such an attempt to distinguish *West* borders on the preposterous, particularly when one recognizes that the state action doctrine serves to facilitate the structuring of private relationships as individuals desire.[443] Just as the prisoner in *West* had no say in the provision of his medical care, neither does a mentally ill person whom private physicians seize and then hospitalize.[444]

The decision in *Bass* continued the trend of the circuit courts. In that case, the court relied on *Spencer* to hold that civil commitment did not satisfy the public function test and the state compulsion test because the state commitment statutes "neither encouraged nor required the commitment of mentally ill individuals."[445]

Recently, the Ninth Circuit bucked the trend of its sister circuits when the court in *Jensen* held that a private physician engaged in state action when he detained a mentally ill person for psychiatric evaluation.[446] Like the court in *Okunieff*, the court applied a hybrid close nexus/joint action test.[447] The court reasoned that a deeply intertwined process of evaluating and detaining individuals existed between the county and the private medical practice with which the committing physician was affiliated.[448] While this case is more akin to *Moore* than any other civil commitment state action case, and the court noted that "this case falls between lines drawn in other jurisdictions,"[449] the court left itself open for criticism by not directly distinguishing its case from the substantial circuit precedent holding otherwise.

Would a different holding by the court in *Spencer have* resulted in the other circuit courts holding that civil commitment constitutes

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accompanying text.

442. *Okunieff*, 996 F. Supp. at 355.

443. *See supra* note 213 and accompanying text.

444. The court in *Okunieff* also distinguished *West* on the ground that because the prisoner relied entirely on the state for the provision of medical care, health care in prisons is the exclusive prerogative of the state. *Okunieff*, 996 F. Supp. at 355. While this is an accurate interpretation of *West*, *see Am. Mfrs.*, 119 S. Ct. at 987-88 (1999), the court in *Okunieff* did not go far enough in its analysis and failed to examine the interrelationship between the functional approach taken by the Supreme Court in *West* and the public function doctrine. *See supra* note 340.

445. *Bass*, 180 F.3d at 243; *see Spencer*, 864 F.2d at 1379.

446. *Jensen*, 222 F.3d at 574.

447. *Id.* at 575.

448. *Id.*

449. *Id.*

state action? If one is willing to conclude that in most cases the personal biases of judges do not completely corrupt the decision-making process, then ample reason exists to believe that a different holding by *Spencer* would have resulted in different holdings by the other circuit courts. If *Spencer* had been decided differently, then when the Eleventh Circuit decided *Harvey* there would have been one circuit court and numerous district courts holding that civil commitment constitutes state action, together with an Eleventh Circuit opinion reaching the same conclusion in dicta. It would have been difficult for the court to depart from such a line of authority. Just as *Spencer* and *Harvey* created a domino effect in one direction, more likely than not, if these cases had been decided differently, the other circuits, relying on these cases, also would have decided the other cases differently.

VII. The Ramifications of Finding That Civil Commitment Does Not Constitute State Action

A failure to reexamine the circuit court holdings that physicians who certify mentally ill individuals for civil commitment are not state actors will result in the elimination of constitutional protections on a scale perhaps unheard of to date.[450] The latest figures published by the federal government detail that in 1994 while state and county psychiatric hospitals operated 81,911 beds, private psychiatric hospitals operated 42, 399 beds.[451] Furthermore, there were also 52,948 beds maintained by non-federal general hospitals with separate psychiatric facilities.[452]

The numbers in New York State alone illustrate the critical role of private facilities in the operation of the state's civil commitment scheme. These are 123 psychiatric units at general hospitals and 13 private psychiatric hospitals in the state providing 5,315 and 1,315 beds respectfully for mentally ill individuals.[453] When one recognizes that general hospitals are designed to provide acute care,[454] which means that stays are short and patient turnover is

450. One can argue that individuals who have been confined by the actions of private physicians did not have constitutional protections in the first place. However, *West* counsels otherwise. *See supra* note 297 and accompanying text.

451. Center for Mental Health Services, *Mental Health, United States, 1998.* Manderscheid, R.W., and Henderson, M.J. eds. at 146 (1998).

452. *Id.* This figure includes beds operated by public and private general hospitals.

453. *Statewide Comprehensive Plan, supra* note 25, at 13.

454. *See id.* at 30.

rapid,[455] it becomes clear that many thousands of mentally ill individuals are civilly committed annually by private hospitals just in New York State alone.

In addition to the elimination of constitutional protection for thousands of mentally ill individuals, a determination that civil commitment does not constitute state action can create some rather anomalous situations. What if a court finds declares unconstitutional certain provisions of a state's mental health laws on substantive due process grounds, *i.e.*, because the law authorizes confinement under circumstances that the constitutional does not permit, such as when a patient is not dangerous?[456] Does a court issue a decree that grants relief only to only those individuals confined in government operated facilities?

In New York, courts recognized that the non-emergency provisions of the state's civil commitment law violate the Fourteenth Amendment because they authorize the confinement of a non-dangerous mentally ill person.[457] However, while this finding has resulted in courts interpreting the provisions of the statute in a constitutional manner,[458] the state legislature has never amended the statute in question, Mental Hygiene Law, section 9.27. Because the law authorizing the confinement of a non-dangerous mentally ill person remains on the books, does this mean that physicians at private hospitals can continue to certify patients for commitment who are not dangerous?

A finding that civil commitment does not constitute state action also calls into doubt any constitutional protection relating to treatment and the right to remain free from harm. As a result of the Supreme Court's decision in *Youngberg v. Romeo*,[459] it is well recognized that the Constitution affords civilly committed individuals the right to at least minimally adequate treatment and the right to remain free from harm.[460] Likewise, civilly committed individuals possess a liberty interest in refusing medication that enables these individuals to refuse anti-psychotic medication under

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455. *See id.* at 66.

456. *See, e.g., supra* note 248.

457. *In re* Scopes, 398 N.Y.S.2d 911, 913 (N.Y. App. Div. 1977); *In re* Harry M., 468 N.Y.S.2d 359, 365 (N.Y. App. Div. 1983).

458. *See, e.g., In re* Carl C., 511 N.Y.S.2d at 144.

459. 457 U.S. 307 (1982).

460. *See, e.g.*, Kulak v. City of New York, 88 F.3d 63, 75 (2d Cir. 1996); Estate of Porter by Nelson v. Illinois, 36 F.3d 684, 688 (7th Cir. 1994); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1143, 1144-47 (3d Cir. 1990).

certain circumstances.[461] However, if private physicians who commit mentally ill individuals to private facilities are not state actors, then little basis exists for concluding that the physicians who provide treatment to those same individuals are state actors.

One can argue that, at least in some instances, the provision of treatment and the forced administration of treatment differ from the act of involuntarily hospitalizing a mentally ill individual in that once hospitalized, a mentally ill individual can request a court hearing to challenge his confinement.[462] Arguably, once a state court judge confirms the decision of a committing physician that a person satisfies the civil commitment criteria; one can argue that the state has sufficiently injected itself into the commitment process as to become a joint participant in the commitment.[463] If this is the case, does this mean, on the one hand, that the Constitution governs treatment decisions pertaining to a patient who requests a court hearing and is found to satisfy the civil commitment criteria, but, on the other hand, does not govern the treatment decisions of a patient on the same ward who has not judicially challenged his confinement?

It may well be that at least some of the judges who concluded that civil commitment does not constitute state action have simply viewed their decision as a determination that a wrongfully confined mentally ill individual cannot seek damages pursuant to 42 U.S.C. §1983.[464] However, as seen, such a holding has ramifications well beyond any determination of the scope of a remedy for someone who believes that he or she has been wrongfully confined.

CONCLUSION

Prior to 1989, the clear trend among federal courts had been to find that civil commitment by private physicians to a private

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461. *E.g.*, Mills v. Rogers, 457 U.S. 291, 299-304 (1982); Rennie v. Klein, 720 F.2d 266, 269 (3d Cir. 1983); Project Release v. Prevost, 722 F.2d 960, 979-81 (2d Cir. 1983). Antipsychotic drugs are powerful mind-altering drugs, known as major tranquilizers that produce numerous long-term debilitating side effects. *See, e.g.*, *Brooks*, *supra* note 218, at 945-51.

462. *See, e.g.*, N.Y. MENTAL HYG. LAW § 9.31 (McKinney 1996).

463. This is so because if state law requires that a court release a patient who does not satisfy the civil commitment criteria, then once a patient requests a court hearing to challenge her confinement, then a private hospital can confine a mentally ill person only when a court specifically authorizes such confinement. In this manner, the state and the private facility have effectuated the commitment in tandem.

464. *See Spencer*, 864 F.2d at 1381 (suggesting that a mentally ill individual confined to a private hospital can challenge commitment procedures that he believes violate the Constitution).

psychiatric hospital constituted state action. However, once the Seventh Circuit in *Spencer* held otherwise, the federal judiciary, particularly the circuit courts, have followed the holding in *Spencer*. These courts have ignored the abuse of authority doctrine, treating it as if it did not exist, as well as the Supreme Court's decision in *West*. Just as significantly, these courts failed to recognize the unprincipled nature of the majority opinion in *Spencer*, an opinion that almost had to be so if it was going to buck the trend of the existing case law at that time as well as existing Supreme Court state action jurisprudence. Unless the Supreme Court decides to address this issue and correct the errors of the circuit courts, or the circuit courts are willing to reexamine recent precedent, thousands of mentally ill individuals will, in this age of privatization, lose constitutional protections simply as the result of a fortuity of being civilly committed to private psychiatric hospitals.