THE EVOLUTION OF PRIVATE PARTY LIABILITY IN 42 U.S.C. § 1983

CAUSES OF ACTION – A CONSTANTLY SHIFTING LEGAL ENVIRONMENT

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I.

History of Private Liability for Alleged Civil Rights Violations

Over the past thirty (30) to forty (40) years, there has been considerable tension over the extent of private liability for alleged civil rights violations. In the middle 1900s, the United Supreme Court was primarily concerned with protecting voting rights and the right to associate in political parties. However, in the early 1960s, the Warren Court expanded the scope of 42 U.S.C. §1983, in a series of narrow decisions, to alleviate some of the private ills of discrimination, forcing private entities to reluctantly end discriminatory practices. Thus, the acts of private entities and citizens were deemed to be conduct under "color of state law" and/or the result of "state action"; the United States Supreme Court giving life to 42 U.S.C. §1983 to correct private discriminatory practices.

In the course of this legal journey, a lively debate occurred amongst the justices on theories of private/public action and the context of the modern relationship between government and private entities and individuals. This debate still resonates today. The lines between government and private actors/entities blurs and the United States Supreme Court continues to try and develop a balance between civil rights and the increasingly complex interaction of government and the private sector; especially with the idea of "privatization" taking a firm hold in public policy administration. It is also a debate that is still unsettled, particularly with so many of these decisions "hanging" in the balance of bare 5-4 majorities.

A. Early Voting and First Amendment Cases

In ***Nixon v. Condon,*** 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932) (5-4), the United State Supreme Court struck down the Texas State Democratic Party's discriminatory organizational structure. At the time, the Texas State Democratic Party was organized under a statute designating the creation of an "Executive Committee" which used its power to

exclude membership in the Democratic Party. Justice Cardozo, writing for a five (5) person majority, found this amounted to "state" action and violated the 15th Amendment. He pointed out that the "body" of the Party was powerless to affect change, because of the State's creation of an omnipotent Executive Committee:

> **. . . a resolution once adopted by the committee must continue to be binding upon the judges of election though the party in convention may have sought to override it, unless the committee, yielding to the moral force of numbers, shall revoke its earlier action and obey the party will. Power so intrenched is statutory, not inherent. If the state had not conferred it, there would be hardly color of right to give a basis for its exercise.**

Id., 286 U.S. at 85; *see also,* ***Smith v. Allwright,*** 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (Exclusion based on race, of potential voters in otherwise state primary elections, was unconstitutional "state action.")

Then, in ***Marsh v. State of Ala.,*** 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), the Court expanded the reach of §1983 to a "company town" seeking to enforce trespass laws against citizens seeking to exercise their 1st Amendment rights. At the time, there were citizens living in communities wholly owned by a company. Plaintiffs, members of the Jehovah's Witnesses, were subsequently arrested for trespass, while trying to petition local citizens about their religious beliefs inside the jurisdiction of this "town."

Justice Black found two (2) reasons why these arrests violated plaintiffs' 1st Amendment freedom of religion provision. First, the company town performed a "public function" having all of the characteristics of a municipality: **"Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public**

function, it is subject to state regulation."[1] **Id.,** 326 U.S. at 506. Second, the State apparatus was being used, by the arrests, to frustrate fundamental 1st Amendment rights; "**Insofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand**." ***Id.,*** 326 U.S. at 509.

In ***Terry v. Adams,*** 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), *reh. den.,* 345 U.S. 1003, 73 S.Ct. 1128, 97 L.Ed. 1408 (1953) (3-3-1), once again, the justices had occasion to revisit the State of Texas' Democratic Party, and its history of exclusion. Again, the decision was by a bare majority; this one was even **MORE** fractured than in ***Nixon,*** with Justice Black writing a plurality opinion, joined by Justices Burton and Douglas, Justice Frankfurter writing a separate concurring opinion, Justice Clark writing a separate concurring opinion, joined by Chief Justice Reed, Justice Jackson, and Justice Minton dissenting. Strains of these differing opinions resonate today.

Factually, the "Jaybird Democratic Party" existed as a shadow private organization to the Democratic Party; the Jaybird Party had an official policy of exclusion based on race, the State party did not. At the time of the opinion, since 1889, the Jaybird Party's nominees to the Democratic Party were unchallenged in primary and general elections. Consequently, the Jaybird Party's official policy had the practical impact of absolute exclusion of African-Americans from the Texas Democratic Party and elected positions.

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[1]In ***Local 590 v. Logan Valley Plaza, Inc.,*** 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), the "public function" was extended to a shopping mall for purposes of union picketing. However, in ***Lloyd Corp. v. Tanner,*** 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972), limitations on handbilling to protest the war inside the mall, were held not to involve "state action." And just eight (8) years after ***Logan*** was decided, in ***Hudgens v. N. L. R. B.,*** 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), overruled it and limited ***Marsh*** to the facts of its case, as to the "public function" holding.

Justice Black found that the "individual actions" violated the 15th Amendment – he focuses on the **results** of the discrimination and the **impact** on the right to vote:

> **The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded. It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county. The effect of the whole procedure, Jaybird primary plus Democratic primary plus general election, is to do precisely that which the Fifteenth Amendment forbids--strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.**

Id., 345 U.S. at 469.

Justice Frankfurter focused on the involvement or complicity of County election officials, as the basis for Court intervention. He agreed with the result, but found a **"nexus"** between government and private action, in the indirect exclusion sanctioned by the State of Texas, permitting the Court to reach the constitutional issue concerning the intentional discrimination against African-Americans:

> **The exclusion of the Negroes from meaningful participation in the only primary scheme set up by the State was not an accidental, unsought consequence of the exercise of civic rights by voters to make their common viewpoint count. It was the design, the very purpose of this arrangement that the Jaybird primary in May exclude Negro participation in July. That it was the action in part of the election officials charged by Texas law with the fair administration of the primaries, brings it within the reach of the law. The officials made themselves party to means whereby the machinery with which they are entrusted does not discharge the functions for which it was designed.**

Id., 345 U.S. at 476-77.

Justice Clark also concurred with the result, but focused on the **symbiotic relationship** between the private organization and the public party apparatus. Thus, he

found:

> **There, as here, we dealt with an organization that took the form of "voluntary association"of unofficial character. But because in fact it functioned as a part of the state's electoral machinery, we held it controlled by the same constitutional limitations that ruled the official general election.**

Id., 345 U.S. at 481-82.

Hence, Justice Black's approach was to concentrate on the **impact** on an important governmental activity; Justice Frankfurter's test was a "**nexus**"; and, Justice Clark authored a "**symbiotic relationship**" test. Even today these tests, in their various permutations, still exist.

B. Early Discrimination Cases

Eventually, to combat the vestiges of racial discrimination, the United States Supreme Court expanded the reach of §1983 beyond voting rights cases. But, not before passing on an opportunity to do so when it examined employment discrimination in the hiring of Louisiana harbor pilots in ***Kotch v. Board of River Port Pilot Commissioners for Port of New Orleans***, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093 (1947). Louisiana had a state sanctioned policy, for the selection of harbor pilots, of letting the selection be based on blood and friends. Justice Black, again focusing on the result, concluded that the State had a goal of efficiency and safety and this policy of selection was not **"unrelated to this objective."** ***Id.,*** at 330 U.S. at 564.

Justice Rutledge, in dissent, also focusing on the result, complained that the impact of exclusion of race was unconstitutional. **"But when the test adopted and applied in fact is race or consanguinity, it cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment. That is not a test; it is a wholly arbitrary exercise of power."** ***Id.,*** at 330 U.S. at 566. The fact that

this form of selection might make sense for pilots could be equally applied to other jobs or professions.

However, the next year, the Supreme Court started to wrestle with "property-based" racial discrimination and took a decidedly more aggressive approach. In ***Shelley v. Kraemer,*** 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, 3 A.L.R.2d 441 (1948), the Supreme Court was confronted with restrictive covenants based on race, that were being enforced judicially. Justice Vinson, speaking for an unanimous court (a rarity in this area of constitutional law), noted that, if done by the State, such action clearly violated the 14th Amendment's Equal Protection clause. Private covenants, enforced privately, would not involve State action and, thus, the 14th Amendment would not apply. The question presented, then, was whether or not resorting to judicial enforcement was sufficient state action to trigger the 14th Amendment.

Justice Vinson found that it did, given the specific language in the 14th Amendment concerning enjoyment of property rights – thus, judicial action is State action:

> **These are not cases, as has been suggested, in which the States have merely abstained from taking private individuals to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.**

Id., 334 U.S. at 19.

The Warren Court expanded further on the concept of state action in ***Burton v. Wilmington Parking Authority,*** 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Here, the Wilmington Parking Authority (WPA) was a publicly created entity with the ability to

develop property, tax-free, from government funds, and with limited bond powers. It entered into a lease arrangement with a private entity/club, "Eagle," which refused to serve or permit minorities to enter its restaurant or become members of the entity/club. As a result of this lease, Eagle enjoyed non-tax status as to improvements to the "plant," WPA maintained the premises, and WPA provided parking and signage benefits to Eagle. However, the land was still publicly owned by WPA and the development clearly had a public purpose.

Justice Clark found this to be "joint action," state action, and an unconstitutional delegation and abdication of State authority:

> **But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment.**

Id., 365 U.S. at 725; *accord,* ***Lombard v. State of La.***, 373 U.S. 267, 273-74, 83 S.Ct. 1122, 10 L.Ed.2d 338 (1963) (Local police and ordinance cannot be used to enforce private discrimination in a restaurant).

Just a few years later, in ***Griffin v. State of Md.,*** 378 U.S. 130, 84 S.Ct. 1770, 12 L.Ed.2d 754 (1964), the Court, for the first time, looked at whether or not the actions of a private citizen can result in an actionable constitutional violation. A deputized private security guard at a private amusement park arrested plaintiffs, who were intentionally testing the park's policy of exclusion on race. They were charged with "trespassing" and

convicted of criminal charges. Chief Justice Warren, writing for the majority, found that the security guard, since he had been deputized by the local sheriff and was seeking to enforce a criminal statute, was acting "under color of state law." ***Id.,*** 378 U.S. at 136-37; *accord,* ***Adickes v. Kress & Co.,*** 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) (Private business acted "under color of state law" in conjunction with law enforcement to deny plaintiff's equal protection rights when she was refused service at a restaurant).

In ***Evans v. Newton,*** 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), the Court determined that judicial imprimatur on discriminatory practices can trigger "state action." A large swath of land was deeded, as a "charitable trust" pursuant to Georgia statute, to be a park to be maintained by city of Macon and to remain segregated based on race. The City attempted to avoid the impact of the restrictive covenant on the deed, by withdrawing as a trustee and discontinuing the maintenance of the park. Nevertheless Justice Douglas found sufficient state action to enjoin the discrimination on two (2) basis – 1) Municipal involvement in management and maintenance of park is so "inextricably intertwined"; and, 2) the "public" character of a park:

> **The service rendered even by a private park of this character is municipal in nature. . . . . Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain, *Watson v. Memphis,* 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529; and state courts that aid private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment.**

Id., 382 U.S. at 301-302.

In ***Moose Lodge No. 107 v. Irvis,*** 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), the swath of Justice Douglas' expansive views of what constitutes "public action" was

cut somewhat short. Moose Lodge had a discriminatory constitution, through its national charter. Pennsylvania regulated the sale of liquor and required that private clubs adhere to their constitutions. Justice Rehnquist found that this ***statutory*** provision amounted to a 14th Amendment violation, because it ***required*** that Moose Lodge discriminate, but refused to hold that there was State action under Justice Douglas' "joint venture" test in the broader manner of granting liquor licenses: **"However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise."** ***Id.,*** 407 U.S. at 176-77.

In dissent, Justice Douglas continued to argue that there was a "public domain" impact (echoing the plurality opinion from ***Terry***) on the regulation of liquor licenses; Justice Brennan found state action (akin to Justice Clark's "symbiotic relationship" test from ***Terry***) in the pervasiveness of state regulation over the liquor industry in Pennsylvania, and concluded, **"Our prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement in those pertinent private acts of discrimination that subsequently occur."** ***Id.,*** 407 U.S. at 190.

Two (2) years later, in ***Gilmore v. City of Montgomery, Ala.,*** 417 U.S. 556, 94 S.Ct. 2416, 41 L.Ed.2d 304 (1974), the United States Supreme Court returned to this issue of joint action. In this case, there was a long history of the City of Montgomery frustrating the affect of court order's geared towards desegregating the public school system. Approximately sixteen (16) years after the courts first stepped in, the City entered into an "exclusive" use provision, permitting the local YMCA to run and manage its park system.

The YMCA, in turn, prohibited desegrated use of the parks and park facilities, thus perpetuating a "dual" but "unequal" system for both public and private school use.

In reviewing this scheme, Justice Blackmun concluded that it was just a ruse to circumvent the prior desegregation order:

> **Here, the exclusive use and control of city recreational facilities, however temporary, by private segregated schools were little different from the city's agreement with the YMCA to run a 'coordinated" but, in effect, segregated recreational program. Such use and control carried the brand of "separate but equal" and, in the circumstances of this case, were properly terminated by the District Court.**

Id., 417 U.S. at 567-68. He went on to point out the City's constitutional obligation to root out the last vestiges of unconstitutional segregation; and, that this delegation of power to YMCA unlawfully shirked this duty. Contrasting this case to ***Moose Lodge,*** where no state action was found for purposes of §1983, he explained why there was state action in this case:

> **In Moose Lodge the litigation was directly against a private organization, and it was alleged that the organization's racially discriminatory policies constituted state action. We held that there was no state action in the mere fact that the fraternal organization's beverage bar was licensed and regulated by the State. In contrast, here, as in Burton, the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities, and in whether that involvement makes the city "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourt**

Id., 417 U.S. at 573.

C. Defining what is "state action" and what is not

In the 1970s and early 1980s, the Burger Court found it increasingly difficult to make fine distinctions between state action and purely private action. Initially, in ***Fuentes v. Shevin,*** 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), *reh. den.,* 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165 (1972), and, ***Parham v. Cortese,*** 409 U.S. 902, 93 S.Ct. 180, 34

L.Ed.2d 165 (1972), Florida and Pennsylvania replevin statutes were held unconstitutional to the extent that they provided for prejudgment interest without any due process guarantees.

Yet, just six (6) years later, in ***Flagg Bros. Inc. v. Brooks,*** 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), Justice Rehnquist determined that a New York statute providing for automatic assessment of storage fees and eventual sale of personal property seized by the City Marshall, and stored with Flagg Brothers, pursuant to eviction proceedings, did **NOT** involve state action. In doing so, he required a test of "properly attributing" the constitutional violation to the State of New York. And, he ignored the effect of statutory authority, finding that this case did not involve a traditional state prerogative, *i.e.,* public function test, since a traditional lien was merely being codified as a statutory one and there was no actual bar to the court system being used for the relief requested. Finally, inaction or failure to act cannot be "fairly attributed" to State action. The statute merely permits sale, but does not require it. That is because this is not an "exclusive" state function at issue.

However, Rehnquist took pains to limit the impact of his opinion. While he offered no guidance as to what it might mean, he noted that it did not apply:

> **. . . in the context of state and municipal programs which benefitted private schools engaging in racially discriminatory admissions practices following judicial decrees desegregating public school systems. And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of *Marsh* which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment. The mere**

> **recitation of these possible permutations and combinations of factual situations suffices to caution us that their resolution should abide the necessity of deciding them.**

Id., 436 U.S. at 163-64; *c.f.,* ***Jeffries v. Georgia Residential Finance Authority,*** 678 F.2d 919, 923 (11th Cir. 1982) (**"The private citizen's conduct may be attributable to the state where the government affirmatively facilitates, encourages, or authorizes the objectionable practice."**)

Justices Marshall's and Stevens' vigorous dissents both questioned the wisdom of this decision. Justice Stevens, in particular, saw this as a case challenging the constitutionality of a statute, as opposed to the individual private actor's decision to act (or not) pursuant to the authority granted by the state. Thus, **"Whether termed 'traditional,''exclusive,' or 'significant,' the state power to order binding, nonconsensual resolution of a conflict between debtor and creditor is exactly the sort of power with which the Due Process Clause is concerned. And the State's delegation of that power to a private party is, accordingly, subject to due process scrutiny."** ***Id.,*** 436 U.S. at 176.

In ***Jackson v. Metropolitan Ed. Co.,*** 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), two (2) years before ***Flagg Bros.,*** Justice Rehnquist more fully explored the nature of the separation between the state and a public entity. In this case, a statutory scheme permitted the utility company to terminate electrical service for non-payment. He conceded that this was a "monopoly" encouraged and sanctioned by State action and statutory scheme, but he called this a "natural" monopoly. But, the combination of regulation and a contract between private business and government did not create a sufficient nexus to support a finding of "state action," as mere "heavy regulation," as with other public service industries like doctor and lawyers, would not be automatically considered "state" actors. *See also,*

Blum v. Yaretsky, 457 U.S. 991, 1005, 102 S.Ct. 2777, 2786, 73 L.Ed.2d 534 (1982) (No state action implicated by decision by heavily regulated nursing home's decisions concerning medicaid patients).

The next question he addressed, was whether or not Metropolitan was exercising "powers traditionally reserved to the State." Going through the long line of cases dealing with this proposition, ***Nixon, Terry, Marsh, Evans,*** he found that it did not, noting, "**If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."**[2] ***Jackson,*** *supra,* 419 U.S. at 352-53.

Justices Douglas and Marshall both wrote vigorous dissents. Justice Douglas characterized this situation as a state-sanctioned monopoly, involving a "necessity" in modern life. He further bemoaned the Court's retreat from civil rights protection:

> **Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect actions, a State, acting "in cahoots" with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely.**

Id., 419 U.S. at 363-64.

Justice Marshall picked up on Douglas' theme about electricity being a modern "necessity." He pointed out that, where there was a "marriage" of a matter of such "public

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[2]Of course, as we now know, even "eminent domain" can have, essentially, a private purpose for which there is no constitutional recourse. ***Kelo v. City of New London, Conn.,*** 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), *reh. den.,* 126 S.Ct. 24 (2005) (Use of eminent domain power to create a private development project satisfies "public use" doctrine of the "takings" clause.)

interest," heavy regulation, and an otherwise private actor, there would be "state action":

> **. . . the State has determined that if private companies wish to enter the field, they will have to surrender many of the prerogatives normally associated with private enterprise and behave in many ways like a governmental body. And when the State's regulatory scheme has gone that far, it seems entirely consistent to impose on the public utility the constitutional burdens normally reserved for the State.**

Id., 419 U.S. at 372.[3]

At least one court has noted the unique and specific purpose of combating racial discrimination behind the extension §1983 causes of action to include private individuals or entities. ***Greco v. Orange Memorial Hospital Corporation,*** 515 F.2d 1183 (5th Cir. 1975), *cert. den.,* ***Greco v. Orange Memorial Hospital Corporation,*** 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975).[4] Consequently, this court observed **"The most obvious distinguishing factor is that Orange Memorial Hospital is not accused of racial discrimination. The doctrine of state action developed primarily in the area of racial discrimination."** ***Id.,*** 515 F.2d at 779. Evidently, this led the 5th Circuit Court of Appeals to conclude that a physician's right to provide abortion services to his patients, or the patients' right to have access to abortion services, at a county chartered hospital, was not a significant enough constitutional right to merit the same civil rights' protections as used to combat racial discrimination:

> **The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in**

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[3]He was also concerned with the discriminatory impact of delegating authority to the utility company, where the poor and unsophisticated were the main victims of the power delegated by the State of Pennsylvania.

[4]Pursuant to ***Bonner v. City of Pritchard,*** 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*) this case, decided by the former Fifth Circuit, is binding precedent in the Eleventh Circuit.

> **areas unaffected by racial considerations has led courts to define more precisely the applicability of the state action doctrine. *[Citations omitted.]* The policy of the Orange Memorial Hospital Corporation does not impinge upon the rights of a racial group seeking admittance and treatment, but rather affects primarily only the internal affairs of the facility. A secondary effect of the corporation's policy is admittedly to discriminate against persons seeking to obtain and physicians desiring to perform elective abortions. We feel, however, that the interest of the hospital in ordering its internal administrative affairs outweighs the interest of the people disadvantaged in this case.**

Id., 515 F.2d at 779-880.

II.

Modern Entanglements of Private Parties/Entities and State Action

A. What is meant by "state action" versus acting "under color of state law"

The terms "state action" and "under color of state law" have been used somewhat inconsistently and interchangeably by the courts. Regardless, constitutionally, these terms "merge" for purposes of conferring §1983 liability on private individuals or entities for alleged 14th Amendment violations. ***American Mfrs. Mut. Ins. Co. v. Sullivan,*** 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *accord,* ***Lugar v. Edmondson Oil Co., Inc.,*** 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) (5-4); and, ***United States v. Price,*** 383 U.S. 787, 794, n. 7, 86 S.Ct. 1152, 1157 n.7, 16 L.Ed.2d 267 (1966).

In particular, these issues merge where there is either some type of "joint" action or the judicial system is abused for a private individual's benefit. In ***Lugar,*** the defendant used a Virginia, pre-judgment attachment statute to file a "writ" of attachment with the clerk of court. This "writ" automatically required an order be entered by the clerk, *ex parte* and without immediate judicial overview or scrutiny, prohibiting the plaintiff from making use of or disposing of the contested property until a hearing could be held; ultimately, the writ

was dismissed after a judge reviewed the procedures and found them wanting.

The lower courts, alternatively, found no state action or that the defendant had acted under "color of state law," dismissing plaintiff's §1983 claim for either reason. Justice White, writing for another bare five (5) justice majority, found no distinction between "state action" and "acting under color of state statute, at least, to the extent that the claim was grounded on an unconstitutional statute (as opposed to misuse of a constitutional statute) utilized by defendant:

> **While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action, if the second element of the state-action requirement is met as well. . . . In summary, petitioner was deprived of his property through state action; respondents were, therefore, acting under color of state law in participating in that deprivation. Petitioner did present a valid cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute.**

Lugar, supra, 457 U.S. at 941.

The broad sweep suggested in ***Lugar,*** might not be this certain, especially given that Justice White was writing for such a fragile majority.[5] For instance, in ***American Mfrs. Mut. Ins., supra,*** 526 U.S. 40, no state action was found pursuant to a Pennsylvania statute permitting an insurer to unilaterally withhold payment for disputed health services, pursuant to a worker's compensation statute's "utilization review" process; presumably, these providers then, in turn, would take action against the employees for the cost of the

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[5]In ***Lugar,*** in footnote 23, Justice White suggested that any concerns of an "innocent" actor, relying on a statute subsequently ruled unconstitutional, could be protected from suit by an affirmative defense of "good faith." Arguably, then, the defendant in ***Lugar*** would **NOT** be protected from suit, because he had improperly used the judicial system, for his private ends, in *"bad faith*."

disputed services. Writing for another extremely fractured majority, Chief Justice Rehnquist explained that proof of "state action" required a finding of a constitutional violation *and* **"the party charged with the deprivation must be a person who may fairly be said to be a state actor."** ***Id.,*** 526 U.S. at 50 (*quoting* ***Lugar***). Hearkening back to ***Blum, Flagg Bros.,*** and ***Jackson,*** Chief Justice Rehnquist found no state action or encouragement in the statute's acquiescence to permit insurer's to withhold payment of disputed medical bills, pending judicial review. Thus, he summarized prior precedent as being consistent with this position:

> **We have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it. The State's decision to allow insurers to withhold payments pending review can just as easily be seen as state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary.[6]**

Id., 526 U.S. at 53.

Ultimately, then, modern courts seem to provide governments with the widest berth to enter into contractual arrangements with private entities, without implicating the "state action" provisions in §1983. Thus, in ***Campbell v. Civil Air Patrol,*** 131 F.Supp.2d 1303 (M.D.Ala. 2001), the plaintiff complained that his 1st Amendment rights were violated when he was fired for speaking out against discrimination in his workplace. He was employed by "Civilian Air Patrol" (CAP) which contracted with the Air Force as a civilian "auxiliary" to assist with drug interdiction. Presupposing that its responsibilities involved "exclusive

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[6]With respect to "nexus" or "joint action," evidently, there was no state action because there is a distinction between merely filing a form, as in this case, and having a clerk issue a "writ," *ex parte,* as in ***Lugar.*** With respect to improper delegation, the Worker's Compensation Statute was not an "exclusive state prerogative."

governmental prerogatives," the Court found no *Bivens* action, because CAP's *decision to fire plaintiff* was not made under "color of state law," *i.e.,* the employment decision was unrelated to any "state action" or mandate. ***Id.,*** 131 F.Supp. at 1313-15. Thus, the purely *administrative* employment decision had no connection CAP's quasi-governmental responsibilities. ***Id.,*** 131 F.Supp. at 1312-13; *accord,* ***Allocco v. City of Coral Gables,*** 221 F.Supp.2d 1317 (S.D.Fla. 2002) (Private University was not engaged in state action in its administrative decision to fire one of its private campus police officers for alleged 1st Amendment, "whistle-blower," statements).

B. Conspiracy with a State Actor

Proof of a "conspiracy" between a state actor and a private individual or entity, may be sufficient proof of state action to maintain a §1983 claim. ***Adickes, supra***. In ***Dennis v. Sparks,*** 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980), *cert. den.,* 449 U.S. 1021, 101 S.Ct. 588, 66 L.Ed.2d 483 (1980), the Supreme Court spoke with surprising unanimity. Here, there was an allegation that a State Judge conspired (he was "bribed") with private parties in illegally granting an injunction which denied plaintiff the temporary use of oil and gas rights. The judge was protected by judicial immunity; but, Justice White concluded that, based on his historical common law review of the concept of immunities *circa* 1871, this did not "shield" the private conspirator from liability. Justice White noted that judges can be subjected to criminal prosecutions and have no immunity from testifying or being impacted by a civil rights' lawsuit as a witness. He contrasted his historical findings with forms of legislative immunity that are more absolute and wide-ranging. Thus, he concluded that private individuals conspiring with judges were subject to suit, despite concerns about how such lawsuits might impact on judicial administration:

These concerns are not insubstantial, either for the judge or for the

> **public, but we agree with the Court of Appeals that the potential harm to the public from denying immunity to private co-conspirators is outweighed by the benefits of providing a remedy against those private persons who participate in subverting the judicial process and in so doing inflict injury on other persons.**

Id., 449 U.S. at 31-32.

The ***Dennis*** rationale has been successfully applied in other factual scenarios. In a foreshadowing, pre-***Dennis*** decision, ***Smith v. Brookshire Bros., Inc.,*** 519 F.2d 93 (5th Cir. 1975) (*per curiam*), *cert. den.,* ***Brookshire Bros., Inc. v. Smith,*** 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed.2d 320 (1976), the "pre-arranged" custom, of store employees calling local law enforcement who would arrest alleged shoplifters without further investigation or any other formal particulars, violated plaintiff's civil rights. Because of this agreement, the state action, constituted in the arrest, meant the store could be treated as a "state actor" for purposes of the subsequent §1983 lawsuit.

In ***Polk County v. Dodson,*** 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), the Court refused to permit public defenders to be subject to §1983, reasoning that, although technically "employed" by the State, their ethical obligations were often in conflict with the State.[7] However, only three (3) years later, in ***Tower v. Glover,*** 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984), the Court held that public defenders **ARE** subject to suit, and acting under "color of state law," pursuant to §1983, to the extent that a public defender acts as a co-conspirator with a state official.

In the 11th Circuit Court of Appeals, the test for proving "state action" conspiracy, involves the parties reaching **"'an understanding' to deny the plaintiff his or her rights. [citations omitted]. The conspiratorial acts must impinge upon the**

[7]This is one of those instances where "bad" facts, yield a "bad" result, as the plaintiff was suing, primarily, to try and get his conviction overturned.

federal right." ***N.A.A.C.P. v. Hunt,*** 891 F.2d 1555, 1563 (11th Cir.1990). There is no requirement that a plaintiff bring forth a **"smoking gun,"** as **"nothing more than an 'understanding' and 'willful participation' between private and state defendants is necessary to show the kind of joint action that will subject private parties to § 1983 liability."** ***Bendiburg v. Dempsey,*** 909 F.2d 463, 469 (11th Cir. 1990), *cert. den.*, ***Dempsey v. Bendiburg,*** 500 U.S. 932, 111 S.Ct. 2053, 114 L.Ed.2d 459 (1991). Consequently, there was sufficient proof of a "conspiracy" with a state actor, where state family services case worker and a doctor allegedly intentionally exaggerated the seriousness of a son's medical condition, depriving the father of the right to make a critical medical decision on his son's behalf, and the son died as a result of family services having temporary custody of the son, and overruling father's objection to a medical procedure. ***Ibid.***

On the other hand, for a conspiracy claim to survive a motion for summary judgment, **"[a] mere 'scintilla' of evidence . . . will not suffice; there must be enough of a showing that the jury could reasonably find for that party."** ***Rowe v. City of Ft. Lauderdale,*** 279 F.3d 1271, 1284 (11th Cir. 2002); *quoting,* ***Walker v. Darby,*** 911 F.2d 1573 (11th Cir. 1990). This means that, while there *was proof* of a conspiracy between plaintiff's ex-wife and his daughter to fabricate false evidence leading to his prosecution and incarceration for child molestation, there *was no proof* that this conspiracy extended to any state actor or entity. ***Rowe, supra,*** 279 F.3d at 1284. Similarly, where a treating emergency doctor, reported to investigating homicide detectives that a toddler homicide victim had "old" injuries, consistent with past child abuse, and "new" hemorrhaging consistent with "shaken baby syndrome," there was no evidence of a conspiracy to falsely convict plaintiff of murder/aggravated child abuse. ***Arline v. City of Jacksonville,*** 359 F.Supp.2d 1300 (M.D.Fla. 2005).

C. Using a state entity for an unconstitutional purpose

Even where there is not a conspiracy, *per se,* the use of a state's judicial system can convert private action into "state action" for the purposes of a lawsuit brought pursuant to §1983. ***Wyatt v. Cole,*** 504 U.S. 158, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992). However, without the active and knowing involvement of the State actor or entity, there will be no state action: **"Through its false affidavit, Davis-Parmer effectively hoodwinked the state court into granting prejudgment attachment and garnishment. Under *Lugar*, Davis-Parmer's malicious and unlawful conduct cannot properly be attributed to the state for section 1983's under color of state law purposes."** ***Gene Thompson Lumber Co., Inc. v. Davis Parmer Lumber Co., Inc.,*** 984 F.2d 401, 404 (11th Cir. 1993).

The distinction is whether or not the State actor/entity is somehow implicated in the "wrong," such as where the statute invoked for private action is unconstitutional, versus just a wrong-doer who is abusing the court system. *C.f.,* ***Wyatt, supra,*** 504 U.S. 158 (A private person, invoking a replevin statute later deemed unconstitutional, could be liable for a constitutional violation of due process).

The distinction between purely private action and state action can be very fine. The conversion from private to public does not require a conspiracy, merely making utilizing law enforcement for "self-help," as opposed to law enforcement merely standing by to "protect the peace," can complete this transformation. ***Bevan v. Scott,*** 2005 WL 2219433 (M.D.Fla. Sep 13, 2005), *recon. den.,* ***Bevan v. Scott,*** 2005 WL 2656582 (M.D.Fla. Oct 18, 2005).

The same is true for private legal decisions, such as a civil litigant's racially motivated use of peremptory strikes during jury selection in a civil case. ***Edmondson v. Leesville***

Concrete, Co., 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). And, this prohibition has even been extended to defendant's racially motivated use of peremptory strikes during jury selection in a criminal case. ***Georgia v. McCollum,*** 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992). In both cases, the theory is that the decision to exercise a peremptory strike is a state action because of the *context and venue* of the decision, *i.e.,* a jury trial. But there are limits to such an argument. Thus, in ***Brown v. Phillip Morris,*** 250 F.3d 789 (3rd Cir. 2001), the Third Circuit Court of Appeals refused to let a civil rights lawsuit proceed where the allegation was made that tobacco companies conspired to violate rights of black smokers.

D. State action in the context of educational field and athletic associations

One area where the Court has had increasing difficulty, in defining the reach of §1983 to private actors, is in the context of either education and/or athletic associations. The Court first took up this issue in ***Rendell-Baker v. Kohn***, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), a case involving a private school for "maladjusted" children, regulated the local school district, largely funded by State/local tax dollars. The students were funneled into this school primarily from the local public schools and required to abide by non-specific, educational, State regulations. The lawsuit revolved around a complaint that a school administrator had fired a teacher/counselor without due process and in violation of First Amendment rights after supporting a student petition. The State unsuccessfully attempted to intercede and influence the school to reverse the termination decision.

Chief Justice Burger wrote the majority decision finding there was no state action. He noted several significant factors, all of which he dispensed with: 1) subsidized with public funds (but, no fundamental difference from other forms of private

contractors/corporations); 2) extensive regulation (but, not to the particular employment decision); 3) public function (but, not "traditionally the *exclusive* prerogative of the State"); and, finally, 4) symbiotic relationship as expressed in ***Burton*** (but, not sufficiently linked without any substantive discussion of why not). ***Id.,*** 457 U.S. at 840-84 .[8]

Justice Marshall's dissent looked at the same facts and reached the inapposite conclusion. He argued that there was a "symbiotic" relationship between the State/school district and the private school in a "joint venture." He felt that providing an education was **"one of the most important tasks performed by government: it ranks at the very apex of the function of a State."** ***Id.,*** 457 U.S. at 848. And, for this reason, **"the fact that a private entity is performing a vital public function, when coupled with other factors demonstrating a close connection with the State, may justify a finding of state action."** ***Id.,*** 457 U.S. at 849. Thus, where there was such a close relationship, for an imperative and nondelegable State function, there was State action.

Five (5) years later, in ***San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee,*** 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987), the Supreme Court considered "state action" issues from Congress' creation of a national coordinator for the Olympics, the United States Olympic Committee, to reverse the slippage of performance of American athletes in the Olympics. The USOC received some funding from the federal treasury, but a significant source of its income, and advantage, was the exclusive use and ownership (commercial and noncommercial) of the word "Olympic." The San Francisco Arts and Athletics, a private nonprofit corporation, attempted to hold a "Gay Olympic Games,"

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[8]Justice White's concurring opinion, might have been the sounder argument, *i.e.,* **"For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State."** ***Id.,*** 457 U.S. at 844.

but the USOC filed suit to enjoin use of "Olympics" by it.

While legally the case is really about the "trademark" privilege to use the word "Olympics," the true issue concerned the definition of state action. Justice Powell wrote the majority opinion finding no state action because this was just a routine governmental delegation, through a private corporation, where there has been no governmental prerogative, nor governmental control, once the USOC was created:

> **The fact that Congress granted it a corporate charter does not render the USOC a Government agent. All corporations act under charters granted by a government, usually by a State. They do not thereby lose their essentially private character. Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government. . . . The Government may subsidize private entities without assuming constitutional responsibility for their actions. . . . This Court also has found action to be governmental action when the challenged entity performs functions that have been 'traditionally the exclusive prerogative' of the Federal Government. . . . The Act merely authorized the USOC to coordinate activities that always have been performed by private entities. Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.**

Id., 483 U.S. at 543-44.

Justice Brennan's dissent ran through the litany of recent decisions, finding this case "unique" because of the creation of a monopoly right for a private entity created to further an important governmental function. He focused on the USOC's role in molding the nation's athletic performance in a competition of significant international and political consequences.[9] Thus he concluded:

> **The function of the USOC is obviously and fundamentally different**

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[9]This case was decided only seven (7) years after President Carter ordered the 1980 Summer Olympics boycotted. While Justice Powell found that President Carter did not have the power to actual ban American participation in the Olympics, Justice Brennan felt that the President's ability to successfully order the boycott showed just the opposite.

> **than that of the private nursing homes in *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982), or the private school in *Rendell-Baker v. Kohn,* 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982), or the private *Moose Lodge in Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), or even the public utility in *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Unlike those entities, which merely provided public services, the USOC has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representational role. The better analogy, then, is to the company town in *Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), or to the private political party in *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). Like those entities, the USOC is a private organization on whom the Government has bestowed inherently public powers and responsibilities. Its actions, like theirs, ought to be subject to constitutional limits.**[10]

Id., 483 U.S. at 555-56.

In ***National Collegiate Athletic Ass'n v. Tarkanian,*** 488 U.S. 179, 109 S.Ct. 454, 102 L.Ed.2d 469 (1988) (5-4), the Court was once again faced with deciding whether or not a purportedly private athletic organization was a state actor or a strictly private one. Coach Jerry Tarkanian was fired by the University of Nevada – Las Vegas, a state funded university, following a National Collegiate Athletic Association (NCAA) investigation finding violations committed by him and his basketball program. The NCAA threatened the University with further institutional penalties if Coach Tarkanian was not fired; so, it fired him. The Nevada state courts found this firing was a violation of Coach Tarkanian's constitutional rights; the case landed in Federal Court over attorney's fees assessed against

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[10]Brennan went on to argue, **"The Government is free, of course, to 'privatize' some functions it would otherwise perform. But such privatization ought not automatically release those who perform Government functions from constitutional obligations."** ***San Francisco Arts, supra,*** 483 U.S. at 560.

the NCAA.[11]

In a close decision, Justice Stevens wrote the majority opinion finding no state action on the NCAA's part. He felt that the NCAA was not a state actor, *per se,* because it was a voluntary collection of private and public institution, with no overt state control over its membership or policy. Thus, any State action ended with the University's non-compulsory decision to fire Coach Tarkanian. ***NCAA, supra,*** 488 U.S. at 193*; see also,* ***Langston By and Through Langston v. ACT,*** 890 F.2d 380 (11th Cir. 1989) (Achievement test is not a state actor because of use of state facilities to conduct tests, nor because a state university requires the test be taken for admission.). However, in footnote 13, he, presciently, noted **"The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."**[12] ***NCAA,*** *supra,* 488 U.S. at 193, footnote 13.

Finally, in ***Brentwood Academy v. Tennessee Secondary School Athletic Ass'n,*** 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), the scenario envisioned by Justice Stevens, *i.e.,* an athletic association within a single state, was presented to the United States Supreme Court. As the footnote foreshadowed, Justice Souter's majority decision found that **"the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the**

[11]The University actually supported Coach Tarkanian's position that the NCAA was a state actor.

[12]Justice White's dissenting opinion found that the University's decision to fire Coach Tarkanian lacked a real choice and, for this reason, the NCAA and the University were acting jointly.

structure of the association."[13] ***Id.,*** 531 U.S. at 291. However, his ultimate argument may have broken new legal ground, introducing a stronger version of the previously muddled formulation theory for finding state action, *i.e.,* **"Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it."**[14] ***Id.,*** 531 U.S. at 302; *contra,* ***Sammons v. National Com'n on Certification of Physician Assistants, Inc.,*** 104 F.Supp.2d 1379 (N.D.Ga. 2000) (Private, not-for-profit certification agency for Physician's Assistant is not a state actor under joint action/nexus test.) It remains to be seen whether or not this "entwinement" test will have any significant scholarly impact on the debate.

III.

Modern Formulation of Private Entity Liability

A. The 11th Circuit test for the first element – "state action" committed "under color of state law"

The first element for holding a private actor liable for purported civil rights violation is to determine whether not there was any "state action" and/or action "under color of state law.".[15] In ***National Broadcasting Co., Inc. v. Communications Workers of***

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[13]A significant part of the justification for this holding was the almost uniform agreement with this conclusion amongst the states and other federal courts.

[14]This did not go unnoticed by Justice Rehnquist who wrote a lengthy dissenting opinion objecting to the introduction of what he characterized as a brand new "entwinement" theory. Thus, he returned to the echo of his previous concern, **"this entwinement test may extend to other organizations that are composed of, or controlled by, public officials or public entities, such as firefighters, policemen, teachers, cities, or counties."** ***Brentwood, supra,*** 531 U.S. at 314.

[15]In considering potential civil rights lawsuits, the full panoply of potential causes of action should always be examined, *in addition to* 42 U.S.C. §1983, *i.e.,* 42 U.S.C.

America, AFL-CIO, 860 F.2d 1022 (11th Cir. 1988), the Eleventh Circuit Court of Appeals divined a three-part test, from United States Supreme Court opinions, for analyzing whether or not a private individual/entity acted "under color of state law."[16] Thus, the Court **"discerned three primary tests used by the Supreme Court in evaluating state action: (1) the public function test; (2) the state compulsion test; and (3) the nexus/joint action test."** ***NBC, supra,*** 860 F.2d at 1026. As to the "public function" test, it found that it **"covers only private actors performing functions 'traditionally the exclusive prerogative of the State.'"** ***Id.,*** 860 F.2d at 1026. The state compulsion test involves **"instances in which the government has coerced or at least significantly encouraged the action alleged to violate the Constitution."** ***Id.,*** 860 F.2d at 1026. And, the nexus/joint action test involves a **"symbiotic relationship"** which **"involve[s] the alleged constitutional violation."** ***Id.,*** 860 F.2d at 1027. [17]

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§1981, 42 U.S.C. §1982, 42 U.S.C. §1985, the American's with Disabilities Act, Title III, 42 U.S.C.A. § 12181, et. seq., other, employment discrimination statutes, and, of course, state causes of action. However, the issue of "state action" analysis for the purposes of the *civil rights* statues will be the same.

[16]This case was decided prior to Justice Souter's opinion from ***Brentwood.*** It remains to be seen whether or not the "entwinement" theory of liability has broken any new ground.

[17]The 4th Circuit Court of Appeals has adopted a four-part test, e.g.:

> 1) when the state has coerced the private actor to commit an act that would be unconstitutional if done by the state;
>
> (2) when the state has sought to evade a clear constitutional duty through delegation to a private actor;
>
> (3) when the state has delegated a traditionally and exclusively public function to a private actor; or
>
> (4) when the state has committed an unconstitutional act in the course of enforcing a right of a private citizen.

The importance of being able to find "state action," triggering the protections of §1983, is illustrated by the United States Supreme Court's confusing plurality opinion in ***Bray v. Alexandria Women's Health Clinic,*** 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993).[18] Here, absent state action, the Supreme Court found no cause of action, in a splintered decision, pursuant to 42 U.S.C. §1985, for "invidious" gender discrimination stemming from a purely private conspiracy to block women's right to access an abortion clinic. ***Id.,*** 506 U.S. at 274-278.

B. Examples of "state action" in different contexts

1. First Amendment issues

Following the overruling of ***Logan*** and the limitations placed on ***Marsh,*** it is not clear exactly where the United States Supreme Court stands on 1st Amendment issues, *i.e.,* whether or not any extra protection exists for 1st Amendment complaints, as with racial discrimination. What is certain is that 1st Amendment claims, against otherwise private actors/entities, generally will fail in employment situations. *See, e.g.,* ***Willis v. University Health Services, Inc.,*** 993 F.2d 837 (11th Cir. 1993); ***Greco, sura,*** 515 F.2d 1183; and, ***Campbell, supra,*** 131 F.Supp.2d 1303; *but, see,* ***Goldstein v. Chestnut Ridge Volunteer Fire Department,*** 218 F.3d 337 (4th Cir. 2000); ***Janusaitis v. Middlebury Volunteer Fire Department,*** 607 F.2d 17 (2nd Cir. 1979) (Disciplinary actions against volunteer fireman were "state actions" for purposes of civil rights violation, given the exclusively state function of fire departments.); and, ***Riester v. Riverside Community***

Andrews v. Federal Home Loan Bank of Atlanta, 998 F.2d 214, 217 (4th Cir. 1993).

[18]There were five (5) votes for the plurality opinion, two (2) special concurring opinions, and two (2) dissenting opinions written in this case.

School, 257 F. Supp. 2d 968 (S.D. Ohio 2002) (Private charter school and its principal/employee were state actors when firing teacher, allegedly in violation of 1st Amendment rights.).

In ***Willis,*** the defendant, University Health Services, leased the hospital from the county, with some restrictions on its use. Nothing in the lease contract reserved any employment rights to the county. A nurse was fired for writing a letter to the editor criticizing the obstetric care at UHS and complained that this violated her First Amendment rights. Yet, the substance of her claim was never reached, as applying the three-part test from ***NBC,*** there was insufficient "intertwining" of UHS and the county for a finding of State action.

However, a private entity can be deemed a state actor, for 1st Amendment purposes. *C.f.,* ***Tool Box v. Ogden City Corp.,*** 316 F.3d 1167 (10th Cir. 2003) (City's decision to enter into restrictive covenants, with private review authority to enforce the covenants, to deny use of land for strip club, violated 1st Amendment rights and authority's decisions were "state action"); ***Lee v. Katz,*** 276 F.3d 550 (9th Cir. 2002) (Private entity, leasing public land, was state actor and violated 1st Amendment rights by its regulation on free speech, as land was "public forum"); and, ***Demarest v. Athol/Orange Community Television, Inc.,*** 188 F. Supp. 2d 82 (D. Mass. 2002) (Public educational cable channel controlled by City, advancing political positions, violated 1st Amendment rights from City's relationship with private cable operator, which engaged in "state action" from this relationship.). Thus, if the governmental entity **"contractually requires the private actor to take particular actions – e.g., to reject proposed advertisements under certain specifically delineated circumstances."** ***Focus on the Family v. Pinellas SunCoast Transit Authority,*** 344 F.3d 1263, 1278-79 (11th Cir. 2003). Pinellas SunCoast

Transit Authority (PTSA) was a county authority and clearly a state actor. It contracted with Eller to manage transit booths and advertising. There were very explicit rules attached to the advertising, with PTSA having final approval authority over any content.

Focus wanted to advertise its convention to support families and denounce homosexuality at some of PTSA's booths. This request was rejected under Eller's impression of the contractual requirements for PTSA to approve such an advertisement. Under a nexus/joint action test, the Court found Eller's actions to be PTSA's actions since **"there is palpable evidence that this is not a case where a private actor in a contractual relationship with a governmental entity acted independently in harming a third party, but rather that the state, acting through the private entity, caused the third party's harm."**[19] ***Id.,*** 344 F.3d at 1278.

2. Medical treatment issues

There has been a considerable amount of litigation concerning what circumstances an individual/entity was a state actor in the medical field, with or without respect to complaints of improper medical treatment. Generally, absent a prison setting, courts find no such state action. This is especially true with respect to decisions made by a hospital concerning "employment," "certification," or "hospital privileges." ***Willis, supra.,*** 993

[19]This case may not have been properly decided, even though the legal principles stated were correct. PTSA, as a governmental entity, could only be liable for an unconstitutional custom or policy. Eller was not a party to the case, so the court was actually **NOT** deciding the private entity's liability, even though its analysis would suggest Eller's liability. It is presumed, by the Court's ultimate ruling, that it found the existence of an unconstitutional policy or custom. It is also not clear exactly how far this analysis can be stretched, even in the First Amendment/Free Speech context. For example, in ***Debauche v. Trani,*** 191 F.3d 499 (4th Cir. 1999), the 4th Circuit Court of Appeals declined to find there was state action, where a private university agreed to sponsor and host a debate between candidates, to the exclusion of a Reform Party (Third Party) Candidate.

F.2d 837; ***Patrick v. Floyd Medical Center,*** 201 F.3d 1313 (11th Cir. 2000), ***Greco, supra,*** 515 F.2d 1183; and, ***Sammons, supra,*** 104 F.Supp.2d 1379. However, it is clear that, in a prison or jail setting, privately employed, contract doctors and medical personnel are state actors. *C.f.,* ***West v. Atkins,*** 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); ***Farrow v. West,*** 320 F.3d 1235 (11th Cir.2003) (Private doctor contracted with prison to provide medical services for inmates was "state actor" and "deliberately indifferent" to inmate's "serious medical needs" for unreasonable fifteen month delay in providing plaintiff with dentures); ***Hinson v. Edmond,*** 192 F.3d 1342 (11th Cir. 1999), *op. amended by,* 205 F.3d 1264 (11th Cir. 2000); ***McElligott v. Foley,*** 182 F.3d 1248 (11th Cir. 1999); ***Ancata v. Prison Health Services, Inc.,*** 769 F.2d 700 (11th Cir. 1985); ***Nelson v. Prison Health Services, Inc.,*** 991 F.Supp. 1452 (M.D.Fla. 1997); and, ***Carswell v. Bay County,*** 854 F.2d 454 (11th Cir. 1988) (Doctor under contract to county jail was liable for failure to treat diabetic inmate, as opposed to failure to diagnose.)

For instance, applying the ***NBC*** test, in ***Patrick, supra,*** 201 F.3d 1313, the Court found there was no State action. Floyd County, through Hospital Authority of Floyd County (HAFC), entered into management agreement with the private entity, Floyd Healthcare Management, Inc. (FHM), to manage and operate its hospital, Floyd Medical Center. The County maintained some control over the management of the hospital, but personnel matters were strictly up to FHM. Patrick, a doctor, sued for staff privileges, alleging that Floyd County doctors had, allegedly, conspired through the creation of FHM, and the power granted by the County, to create a monopoly to "freeze" out competitors. The Court found FHM did not engage in any cognizable state action, because the County was not directly involved any unconstitutional violation, *i.e.,* the County had nothing to do with any employment, administrative, or policy decisions leading to any unconstitutional result**,**

"There is no evidence that HAFC received any benefit from FHM's decision to deny Patrick's application. . . . Nor has Patrick produced any evidence that HAFC endorsed the constitutional violations about which Patrick complains." ***Id.,*** 201 F.3d at 1316.

While not specifically a medical case, the parents of a child killed while in foster care had no cause of action against the foster parents, because the relationship between the State and foster parents was not for the purpose of committing child abuse. ***Rayburn ex rel. Rayburn v. Hogue,*** 241 F.3d 1341 (11th Cir. 2001). Hence, while the State **"arguably has a symbiotic relationship with the Hogues, this relationship certainly does not encourage or sanction child abuse in any way."** ***Id.,*** 241 F.3d at 1348. *Accord,* ***Leshko v. Servis,*** 423 F.3d 337 (3rd Cir. 2005) (Foster parents are not state actors for purposes of liability under 42 U.S.C. § 1983.)

In another context involving children, a psychiatrist treating children for allegations of child abuse was not "acting in concert" with a detective who ultimately charged adults with child abuse, at the persistence of the mother. ***Lowe v. Aldridge,*** 958 F.2d 1565 (11th Cir. 1992). The Court held that **"plaintiffs must provide some evidence of an 'understanding' and 'willful participation' between the private and state defendants toward the goal of procuring the warrant for the search of the Smith and Oakes homes."** ***Id.,*** 958 F.2d at 1573. However they produced no evidence that the psychiatrist played any **"role in the preparation of the affidavit in support of the search warrants by Detective Davis."**[20] ***Id.,*** 958 F.2d at 1573.

3. Interaction with law enforcement/security guard

[20]This opinion went on to, wrongly, find that the "qualified immunity" would apply. *See,* ***Hinson, supra,*** 192 F.3d 1342.

At least one court has found that individual emergency medical personnel can become state actors, when they are following the direction of law enforcement. ***Williams v. Richmond County,*** 804 F.Supp. 1561 (S.D.Ga. 1992). The very fact of following these directions were a response to state direction and their actions were committed "under color of state law":

> **Under the Fourteenth Amendment, the State has an obligation to provide medical care that is not deliberately indifferent to the serious medical needs of detainees who have been injured while being apprehended by the police. *[Citation omitted]* Given this affirmative obligation, and the transfer of Ms. Williams in handcuffs from Sheriff's deputies to UHS personnel, it could be said there was state action present in the actions of Defendants Johnson and Sheppard [the paramedics].**

Id., 804 F.Supp. at 1567-68.

In another non-medical context, an Alabama security guard was found to be a state actor, because the private hospital's security guards had arrest powers by Alabama statute. ***Raby v. Baptist Medical Center,*** 21 F.Supp.2d 1341 (M.D.Ala. 1998). Thus, the act of causing a citizen to be shot could amount to "excessive force" and a 14th Amendment violation. *Compare,* **Gallagher v. Neil Young Freedom Concert,** 49 F.3d 1442 (10th Cir. 1995) (By permitting possibly illegal searches by private security for a concert, university and security guards were not state actors.).

Law enforcement officers may be considered acting under "color of law," even if off-duty. In ***Rivera v. La Porte,*** 896 F.2d 691 (2nd Cir. 1990), LaPorte was a NY City officer, involved in an off-duty "road rage" incident. He acted in the "role" of a police officer, leading to Rivera's arrest. Thus, the 2nd Circuit Court of Appeals held, **"Though the dispute that precipitated the arrest was private, the response, including the arrest and the use of excessive force, was unquestionably action under color of law."** *But see,*

Pitchell v. Callan, 13 F.3d 545 (2nd Cir. 1994) (Off-duty officer, in pointing a gun in a private residence, was not a state actor.).

4. Non-medical, non-prison, instances where state action was found

As noted earlier, even where a judge is protected by "absolute immunity," a private individual acting in concert with this judge can be liable for a violation of a plaintiff's civil rights. In ***Mauldin v. Burnette,*** 89 F.Supp.2d 1371 (M.D.Ga. 2000), the Court was faced with a factual scenario eerily similar to that in ***Dennis***. Here, a Probate Judge sentenced plaintiff to work with her brother as a sort-of unofficial work release program. Plaintiff received no monetary compensation for doing so. The Court held that the brother could be sued as a state actor, because his supervision of plaintiff was "custodial" in nature; **"A private person can be liable under § 1983 through their wilful participation in joint activity with State agents."** ***Id.,*** 89 F.Supp.2d at 1377.

A private actor "clothed" with governmental authority can also be a state actor for purposes of a civil rights lawsuit. ***Riester, supra,*** 257 F. Supp. 2d 968 (Private charter school and its principal/employee were state actors when firing teacher, allegedly in violation of 1st Amendment rights); and, ***Paz v. Weir,*** 137 F. Supp. 2d 782 (S.D. Tex. 2001) (Private contracted jail chaplain was state actor, due to state's delegation of authority to minster to inmates, in chaplain's interaction with female inmate).[21] Actions taken by volunteer fire departments will often be considered "state action," since the function of a fire department, as with other similar governmental functions (like law enforcement) is a

[21]For a seemingly contradictory holding in the context of fellow students' harassment of a classmate, see ***Mentavlos v. Anderson,*** 249 F.3d 301 (4th Cir. 2001). (Gender-based harassment and discrimination designed by individual male students to force a female cadet to withdraw from the college did not give rise to a civil rights violation.)

"traditional" role of government. As one court concluded:

> **Chestnut Ridge, a volunteer fire department in Maryland, is a state actor. We do so because Chestnut Ridge is: (1) carrying out functions, exercising powers, and benefitting from protections traditionally and exclusively reserved to the state; (2) receiving substantial state assistance; (3) subject to extensive state regulation; and (4) considered to be a state actor by the state itself. In the totality of the circumstances, Chestnut Ridge is a state actor whose actions must comport with the First Amendment**.

Goldstein v. Chestnut Ridge Volunteer Fire Department, *supra*. *See also,* ***Mark v. Borough of Hatboro****,* 51 F.3d 1137 (3rd Cir. 1995), Volunteer Fire Department is state actor for civil rights purposes.); and, ***Janusaitis v. Middlebury Volunteer Fire Department,*** supra.

In ***Baxter v. Fulton-DeKalb Hosp. Authority,*** 764 F.Supp. 1510 (N.D.Ga. 1991), one of the defendants was the medical director of emergency medical services, under contract with the County Hospital, and the medical director of the Hospital's emergency medical clinic. The plaintiff worked under the defendant/doctor as a paramedic. He was investigated for lying, suspended, cleared by a grievance hearing, and reinstated. The defendant/doctor participated in the grievance hearing in his role as the director of the emergency medical clinic; he refused to allow the plaintiff to be reinstated as a paramedic in his role as medical director of emergency medical services. Given his "dual" roles, and the hospital's refusal to allow the plaintiff to be reinstated, the defendant/doctor was a "state actor"; **"In both positions Slovis was exercising rights and privileges created by the state. His actions were possible only because he was clothed with the authority of state law and was performing functions which are traditionally the**

exclusive prerogative of the state."[22] ***Id.,*** 764 F.Supp. at 1517.

C. The second element – "deliberate indifference" to a "clearly established" constitutional right.

As discussed in Section E(1) below, private actors are not entitled to raise "qualified immunity" as a defense. *See,* ***Swann v. Southern Health Partners, Inc.,*** 388 F.3d 834, 837 (11th Cir. 2004) (**"While municipalities are protected from liability to some extent, they enjoy no immunity from suit. The same reasoning is applicable in § 1983 suits against non-governmental entities not entitled to qualified immunity. . . The parties agree that as a private entity, SHP is not entitled to assert a qualified immunity defense."**); ***Hinson, supra,*** 192 F.3d 1342; and, ***McDuffie v. Hopper,*** 982 F.Supp. 817, 824-25 (M.D.Ala. 1997) (**"It would strike this court as strange to find that private contractor doctors can claim the protections of qualified immunity, while private contractor guards cannot."**).[23] This is true because **"Private individuals who associate themselves with a public official to encroach on another's constitutional rights must bear the risk of trial."** ***Burrell v. Board of Trustees of Ga. Military College,*** 970 F.2d 785, 796 (11th Cir. 1992), *reh. den.,* ***Burrell v. Board of Trustees of Ga. Military College,*** 978 F.2d

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[22]Both the hospital and the executive director of the hospital, in whom final decision making authority was vested, also violated the plaintiff's civil rights by remaining silent with respect to the defendant/doctor's unconstitutional refusal to reinstate the plaintiff.

[23]Because there is no "qualified immunity defense," the 11th Circuit Court of Appeals does not require that civil rights complaints against private individuals/entities conform to the "heightened pleading requirements" for §1983 actions against pure public actors. ***Swann, supra,*** 388 F.3d at 837 (**"Therefore, under *Leatherman,* because SHP cannot raise qualified immunity as a defense, the Plaintiff need not satisfy any heightened pleading requirements when asserting § 1983 claims against it."**)

718 (11th Cir. 1992), *cert. den.,* ***Burrell v. Board of Trustees of Georgia Military College,*** 507 U.S. 1018, 113 S.Ct. 1814, 123 L.Ed.2d 445 (1993).

However, this really only relieves a civil rights plaintiff from proving that the private actors actions were "objectively unreasonable." A civil rights plaintiff still has to prove that his/her "clearly established" constitutional right were abridged. *C.f.,* ***Sandin v. Conner,*** 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). This is true because §1983 does not create a right to an independent "Federal tort" cause of action, it only provides remedies for constitutional violations.

And, such a plaintiff has to prove "deliberate indifference," which involves three (3) distinct **"components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence."** ***McElligott, supra,*** 182 F.3d at 1255. Thus, where an inmate attempts to sue for civil rights violations from improper medical treatment, the elements of the constitutional violation are that the **"official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."** ***Id.,*** 182 F.3d at 1255*; quoting,* ***Farmer v. Brennan***, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). This means that where the *failure to diagnose* may "only" be malpractice, the *failure to treat* pain and discomfort, even for a few hours, is more likely proof of deliberate indifference needed to show that a constitutional right has been abridged. ***McGilligott,*** *supra; accord,* ***Carswell, supra,*** 854 F.2d 454. However, where a doctor recommends surgery, but has no control over whether or not the surgery was performed, or if it was delayed, the medical treatment, though poor, might pass constitutional muster. ***Palermo v. Correctional Medical Services Inc.,*** 133

F.Supp.2d 1348 (S.D.Fla. 2001).

Despite using the "magic" language "clearly established," it does not appear that the courts have applied the same type of rigorous analysis used in purely state actions. *C.f.,* ***Hinson, supra,*** 192 F.3d 1342; *but see,* ***Leeks v. Cunningham,*** 997 F.2d 1330, 1334 (11th Cir. 1993), *cert. den.,* ***Leeks v. Cunningham,*** 510 U.S. 1014, 114 S.Ct. 609, 126 L.Ed.2d 573 (1993) (**"We are not convinced that *Vitek* and *Parham* clearly enunciated that a pretrial detainee such as appellee as of 1989 possessed a protectible liberty interest in not being subjected to involuntary antipsychotic medication."**) Typically, the main hurdle is proving the first element, *i.e.,* acting under "color of state law," as opposed to the constitutional violation. *C.f.,* ***Harvey v. Harvey,*** 949 F.2d 1127 (11th Cir. 1992). Obviously, if a constitutional right is "clearly established" against a purely state actor, so it is against a private actor. For a fairly thorough discussion/comparison of how the "clearly established" standard might be applied as to a private actor, *see* ***Raby, supra,*** 21 F.Supp.2d 1341.

D. "Good faith" defense

Private individuals, deemed state actors for purposes of determining civil rights liability, would appear to be able to raise a "good faith" defense as a parallel to a public actor's "qualified immunity." *In* ***Wyatt, supra,*** 504 U.S. 158, the underlying issue was the validity of a replevin statute, but there was also an extensive discussion of immunities. Speaking for the majority, Justice O'Connor established that there was no such thing as "private" "qualified immunity." In doing so, as with ***Dennis***, Justice O'Connor conducted a review of traditional immunities as of 1871, for private persons invoking a statute, and found none. She pointed out that in ***Harlow,*** the Court had crafted an "objective test" for summary judgment to permit early resolution of cases against government officials and

entities. Private parties would not have the need for such protection. She did, however, hold out that there might be a subjective ***"defense,"*** as opposed to an objective immunity, of "good faith" that a private person might be able to raise.[24]

This was made explicit in ***Britt v. Whitehall Income Fund,*** 891 F.Supp. 1578 (M.D.Ga. 1993). This case involved a property dispute over a security fence between businesses. The defendant obtained a warrant for arrest after a "pre-issuance hearing." At a "report-back" hearing, the state court found there was no probable cause for the issuance of the warrant. However, in the subsequent civil rights lawsuit in Federal Court, rather than try to decide if there was sufficient state action, the District Court adopted the "good faith" defense from the 5th Circuit and from ***Wyatt***, when it was decided on remand, *e.g.,* **"This Court adopts the Fifth Circuit's good faith test for a private defendant in a §1983 action, which has an objective and subjective component, in assessing whether Defendants are entitled to summary judgment."** ***Id.,*** 891 F.Supp. at 1584; *see, also,* ***Hinson, supra,*** 192 F.3d at 1347 (footnote 5).

E. Entity liability is subject to *Monell* analysis

As with a governmental *entity*, a private *entity* is only liable for unconstitutional customs or policies, as *respondeat superior* does not apply to §1983 lawsuits. ***Buckner v. Toro,*** (*per curiam*) 116 F.3d 450 (11th Cir. 1997), *cert. den.,* 522 U.S. 1018, 118 S.Ct. 608, 139 L.Ed.2d 495 (1997). Such an entity is not entitled to raise any immunity defenses and is subject to the same treatment as a governmental entity. *See, e.g.,* ***Blumel v. Mylander,***

[24]Justice Kennedy's concurring opinion looked at "malicious prosecution" torts to determine that there was no need for immunity. He pointed out that with this sort of tort, a plaintiff would have to prove subjective bad faith on the part of the defendant. His reasoning, and the historical need for a summary judgment immunity protection, is, perhaps, the sounder rationale.

954 F.Supp. 1547 (M.D.Fla. 1997).

Similarly, analogous to supervising government officials, privately employed supervisors of "bad" actors, acting "under color of state law," are potentially liable for their direct actions, causing injury, or through their role as a supervisor, adopting policies that are "deliberately indifferent" to a citizen's constitutional rights. ***Howell v. Evans,*** 922 F.2d 712, 723 (11th Cir. 1991), *vac. after settlement,* ***Howell v. Evans,*** 931 F.2d 711 (11th Cir. 1991), *appeal after rem.,* ***Howell v. Burden,*** 12 F.3d 190 (11th Cir. 1994) (**"The fact that it was his policy to seek proper treatment only when recommended by the medical personnel does not lessen his duty; an official does not insulate his potential liability for deliberately indifferent actions by instituting a policy of indifference. Indeed, it is well established that an official's policy can violate the constitution."**). In the 11th Circuit, such private supervisor liability is couched in a three-part test:

> **We apply a three-prong test to determine a supervisor's liability: (1) whether the supervisor's failure to adequately train and supervise subordinates constituted deliberate indifference to an inmate's medical needs: (2) whether a reasonable person in the supervisor's position would understand that the failure to train and supervise constituted deliberate indifference; and (3) whether the supervisor's conduct was causally related to the subordinates constitutional violation.**

Adams v. Poag, 61 F.3d 1537, 1544 (11th Cir. 1995).

For example, in ***Nelson, supra.,*** 991 F.Supp. 1452, the defendant entity, PHS, was held liable for the actions of its employees for having a custody or policy causing the alleged constitutional violation. The county had contracted with PHS to provide health care for its inmates. There had been a prior lawsuit about inadequate treatment, and the Court had appointed a medical administrator to monitor the medical treatment received in the jail. In

doing so, the monitor noted a number of continuing problems and, in particular, not providing necessary treatment for women from a number of gross and disgusting incidents. PHS wrote a number of memoranda to its nurses warning that need to see inmates and treat them professionally.

A female inmate, Nelson, was arrested with history of recent heart attack. Medications were noted in intake, but the chart was lost and the prescriptions were never properly verified by the nursing staff. Nelson deteriorated over several days, with complaints of pain, radiating down her arm, and described as ashen and sweating; the jail doctor on call was never called about her complaints and never saw Nelson. The jail doctor testified that these were classic signs of heart attack. One nurse, in particular, was grossly dismissive of Nelson's complaints, even using ammonia to try and expose her "malingering," before she realized, too late, that she needed to be taken to the hospital.

As should be clear from these facts, the nurses were deemed acting "under color of state law." They were deliberately indifferent to the needs of Nelson; which, of course, also meant malpractice was *ipso facto* proven. However, PHS was also liable, under a ***Monell***-analysis, for failing to correct the failings of the nurses and permitting an environment of indifference to pervade the jail medical staff. *Accord,* ***Hartman v. Correctional Medical Services, Inc.,*** 960 F.Supp. 1577 (M.D.Fla. 1996); *but see,* ***Palermo, supra,*** 133 F.Supp.2d 1348 (No evidence of custom or policy from review of policy merely every three years.)[25] It should also be noted that the County, having a non-delegable duty was *also* liable for the unconstitutional actions of PHS as either a "final policy-making official" or for the establishment of unconstitutional policies or customs.

[25]It does not appear that "final policy-making official" analysis applies to private entity liability.

And, in ***Smith v. U.S.,*** 896 F.Supp. 1183 (M.D.Fla. 1995), a private entity was not liable for the sexual abuse of an inmate by one of its employees, Wilson. Goodwill contracted with the State as a half-way house for prisoners being re-introduced back into society from prison. But, there was no policy defect alleged – there was a grievance procedure that was either not used by the inmates or was followed. Furthermore, the supervisor was not liable because he was not directly involved in the complained actions; Wilson was counseled by the supervisor who took appropriate actions once possible illegal actions came to light.

F. Private Prisons – a unique relationship between private individuals and entities and State actors.[26]

1. Individual liability

One area of the law that is "ripe" for potential civil rights litigation is where prisons employ private individuals or they are run by a private entity. In ***Richardson v. McKnight,*** 521 U.S. 399, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997), the United States Supreme Court definitively answered the question of civil rights liability for privately employed prison guards. First, they were clearly state actors. Second, they were not entitled to "qualified immunity" for their actions under "color of state law."

Justice Breyer's analysis on the application of "qualified immunity" looked to historical traditions of immunity, similar to Justice O'Connor's discussion in ***Wyatt;*** *e.g.,* immunity would be found only where the **"'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine.'"** ***Id.,*** 521 U.S. at 405. Justice Breyer, therefore, examined the underpinnings

[26]For an excellent survey and resource of case law concerning the private prison litigation, *see* "Rights of Prisoners in Private Prisons" 119 A.L.R.5th 1.

of immunity to determine if private persons were entitled to the protection of a theory of immunity. He found that, historically, especially in southern States, private entities were involved in "prison management, including labor and discipline." The historical case law he examined suggested there was no immunity from suit for private employees of prisons under State laws. He also found that, in English common law, lawsuits were permitted against private jailers for public correctional facilities.

After first determining there was no historical immunity, he moved on to consider to "create" a modern theory of immunity. He found that there was no reason to and rejected a "functional" test for immunities, i.e., while a state-employed prison guard would have the protection of "qualified immunity," a privately employed one would not**. "Indeed a purely functional approach bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery."** ***Id.,*** 521 U.S. at 409. And, the reasons for granting immunity to purely public employees, did not apply to private employees acting under color of state law, as the market forces in the private sector differed markedly from the public sector.

Similar reasoning was applied by the 11th Circuit Court of Appeals in ***Hinson, supra,*** 192 F.3d 1342. In this case, the Court was asked to consider the liability of privately contracted prison doctor for alleged "deliberate indifference" to a "serious medical need." The Court went through a lengthy ***Richardson***-analysis of the history of medical doctors any immunities to which they had been entitled, in a general State tort context. Finding none, and finding that market forces tended to suggest against granting such doctors any "qualified immunity," the Court held that, although acting "under color of state law," they would not be entitled to any special immunity; *e.g.,* **"We conclude that this case is**

similar enough to *Richardson* for *Richardson* to guide us, and no strong reason appears in this case to distinguish between privately employed prison guards and privately employed prison physicians. Therefore, Edmond is not entitled to advance the defense of qualified immunity."[27] ***Id.,*** 192 F.3d at 1347. *See also,* ***C.K. v. Northwestern Human Services d/b/a/ Northwestern Academy School,*** 255 F. Supp.2d 447 (E.D. PA. 2003) (Academy and its employees were performing contract services in a prison-like setting for juvenile detainees and therefore were acting under color of state law.); ***Street v. Corrections Corporation of America,*** 102 F.3d 810 (6th Cir. 1996), (Prison guard for private prison can be liable for deliberate indifference for injury suffered at hands of fellow detainee.); and, ***Milonas v. Williams,*** 691 F.2d 931 (10th Cir. 1982) (Sufficiently close nexus between the states sending boys to a private correctional institution for juvenile detainees and the conduct of the school authorities so as to support a claim under Section 1983.).

However, in a fractured opinion, the Supreme Court ruled there is no ***Bivens*** action against a *private corporation* employed through a Federal contract with the Bureau of Prisons. ***Correctional Services Corp. v. Malesko,*** 534 U.S. 61, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001).[28] Chief Justice Rehnquist, going through the same historical analysis as Justice Breyer had conducted in ***Richardson,*** found there was no pre-existing history of a Federal Tort for the complained of actions. The purpose of civil rights lawsuits were to

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[27]However, in footnote 5, the ***Hinson*** Court noted **"We express no view on the availability of a "good faith" defense to a private defendant under these circumstances."** ***Hinson, supra,*** 192 F.3d at 1347.

[28]Likewise, the 4th Circuit Court of Appeals has held that there is no ***Bivens*** action for inadequate medical care while housed in a private facility as a Federal prisoner, since Congress has not created such an action and there were adequate state remedies. ***Holly v. Scott,*** 434 F.3d 287 (4th Cir. 2006).

deter illegal actions of individual employees, not to expose corporations to liability.[29]

Justice Stevens' dissent exposed the inherent logical inconsistencies of Rehnquist's majority opinion. Namely, he pointed out that private corporations had no "market" incentives to avoid unconstitutional behavior, if only their employees could be held liable for civil rights violations. Hence, holding an individual employee liable would not be likely to deter a private entity from any unconstitutional policies or customs.

2. Private entity liability

A private entity cannot rely upon the actions, or inactions, of the public entity to escape liability for alleged civil rights violations. In ***Blumel, supra,*** 954 F.Supp. 1547, an inmate was held for 30 days without a probable cause hearing. He was arrested for violating a condition of judicial order which required that the plaintiff be brought before the judge immediately, if arrested for such violation.

Confronted with this situation, the District Court initially concluded that the plaintiff was arrested for indirect criminal contempt. This finding triggered greater constitutional protections then mere civil contempt. The defendant entity, CCA, claimed that its employees had no authority to release the plaintiff and that CCA had a policy requiring a court order to release after arrest, the arresting officer to make a decision to "unarrest" an inmate, or the district attorney's request for release.

In response, the District Court found that there was clearly a constitutional violation because the plaintiff had been held 28 days more than permitted without a probable cause hearing. Because there was a constitutional violation, the constitutional rights were

[29]Justice Scalia, in a concurring opinion joined by Justice Thomas, would have gone further. He argued that ***Bivens*** *itself* should be overruled as a "relic" of "heady" days of yesteryear. In this case, the only reason for not having traditional tort alternatives was because of strategic mistakes.

trumped by contractual obligations. Furthermore, the policy of not independently taking an arrestee for a probable cause hearing, or unilaterally release, absent order to do so, was objectively unreasonable and deliberately indifferent. The District Court further found that the Warden was "conscious" of violation, citing to Florida statute. Thus, CCA was liable for the plaintiff's unlawful detention, which was induced or caused by this unconstitutional policy or custom.

Similarly, in theory, a private corporation running a jail or prison could be held liable for constitutional injuries related to a policy or custom of overcrowding. ***Payne v. Monroe County,*** 779 F.Supp. 1330 (S.D.Fla.1991). In this case, the plaintiff claimed that the **"overcrowding depleted the number of available isolation cells in which to put inmates who were known, or should have been known, to have violent and/or erratic behavioral propensities."** ***Id.,*** 779 F.Supp. at 1332. While this allegation might have established liability, the plaintiff failed to show that any of the defendants had actual or subjective knowledge of the risk posed by the overcrowding and, therefore, the entity was entitled to the case against it being dismissed.[30] *See also,* ***C.K. v. Northwestern Human Services,*** *supra,* and, ***Milonas v. Williams,*** *supra.*

3. Governmental entity liability for private entity unconstitutional policies or customs

A county (or municipality) which contracts with a private entity can be liable for the unconstitutional policies or customs of the private entity. Thus, in ***Ancata, supra.,*** 769

[30]The District Court rested its dismissal on the principle that the plaintiff failed to establish th existence of any "deliberate indifference" on the part of any of the defendants, including the entity. However, that would not appear to be the correct analysis, as the entity's liability should have been analyzed based on the existence of any unconstitutional policy or custom.

F.2d at 705, a county was liable for the unconstitutional policies or customs of private company providing health services for inmates:

> **"This duty is not absolved by contracting with an entity such as Prison Health Services. Although Prison Health Services has contracted to perform an obligation owed by the county, the county itself remains liable for any constitutional deprivations caused by the policies or customs of the Health Service. In that sense, the county's duty is non-delegable."**

However, where there is no unconstitutional policy or custom, a county cannot be held liable through its contract with a private entity to provide health services. ***McElligott , supra,*** 182 F.3d 1248; *compare,* ***Nelson, supra.,*** 991 F.Supp. 1452 (County was liable for unconstitutional policies or customs of private entity contracted to provide medical services to inmates.)

4. Applicability of the Prison Litigation Reform Act (42 U.S.C.A. § 1997e)

The Prison Litigation Reform Act (PLRA) requires that an inmate or detainee exhaust all administrative remedies before filing suit in Federal Court, concerning conditions related to incarceration. 42 U.S.C.A. § 1997e. Neither the United States Supreme Court, nor the 11th Circuit Court of Appeals, has spoken to this issue as a requirement for suing a private individual or entity. However, courts from the 5th, 6th, 7th, 9th and 10th Circuits Court of Appeals, albeit many being "unofficial" opinions, **have** held that this was a prerequisite of a Federal lawsuit concerning a prison "condition." *See, e.g.,* ***Luong v. Hatt,*** 979 F. Supp. 481 (N.D. Tex. 1997); ***Dellis v. Corrections Corp. of America,*** 257 F.3d 508 (6th Cir. 2001); ***Butler v. Gardner,*** 71 Fed. Appx. 510 (6th Cir. 2003); ***Shabazz v. Rochell,*** 73 Fed. Appx. 806 (6th Cir. 2003); ***Pischke v. Litscher,*** 178 F.3d 497 (7th Cir. 1999); ***Healy v. Wisconsin,*** 65 Fed. Appx. 567 (7th Cir. 2003); ***Murphy v. Jones,*** 27 Fed. Appx. 826 (9th Cir. 2001); ***Jones v. Barry,*** 33 Fed. Appx. 967 (10th Cir. 2002); ***Milledge v. McCall,***

43 Fed. Appx. 196 (10th Cir. 2002); ***Florez v. Johnson***, 63 Fed. Appx. 432 (10th Cir. 2003); ***Herrera v. County of Santa Fe,*** 79 Fed. Appx. 422 (10th Cir. 2003); ***Mendoza v. Joe,*** 85 Fed. Appx. 58 (10th Cir. 2003). Given the current climate hostile to litigation of prisoner rights' lawsuits in Federal courts, it would be wise to insure compliance with the PLRA's grievance process, prior to filing such a lawsuit.

IV.

Looking Forward to Potential Litigation Against Private Entities in "New" Areas

As governments become increasingly aggressive in privatizing and expanding into the marketplace, courts are faced with new challenges to apply established precedent to these shifting factual scenarios. This is particularly true in the area of private prisons and/or prison medical services and/or private schools, where the privatization movement has proven particularly popular. It also remains to be seen what the courts will do with private probation companies; presumably, they will be deemed "state actors," given the delegation of a "traditional state prerogative," to supervise probationers, to a private entity. Finally, what are we to make of the "marriage" of private, "faith based," organizations with governmental objectives? What is to be done with private organizations that discriminate and receive private funds? *See,* ***Bob Jones University v. U.S.,*** 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

In short, the possibilities of private actors being held responsible for constitutional violations of individual civil rights continues to mushroom. With the increasing reliance on governments, and government service organizations, on religious communities to provide support and services for individuals, and the attempt by social conservatives to inject religiosity into government, we may be facing a new round of constitutional conundrums on

the horizon. It has been held to be a legitimate exercise of governmental prerogative to use the power of eminent domain to create a land development project, for the benefit of private entities. ***Kelo, supra,*** 125 S.Ct. 2655. But, what happens if there is an appearance of a conflict of interest between those with the power of eminent domain and those benefitting from the decision to use of that power? ***Wyatt, supra,*** 504 U.S. 158; ***Gilmore, supra,*** 417 U.S. 556; ***Tool Box, supra,*** 316 F.3d 1167; ***Lee, supra,*** 276 F.3d 550; and, ***Demarest, supra,*** 188 F. Supp. 2d 82.

These questions, however, are not easy to answer. What remains of early attempts to protect the sanctity of voting rights and end racial discrimination, even in private venues, is an often confusing body of case law. End results seem predicated on the intent to achieve a particular result, instead of adherence to a particular and consistent philosophy. The United States Supreme Court crusaded to end racial discrimination, reaching at even the actions and decisions of private entities to do so; but, more conservative courts, since then, have signaled a significant retreat, purportedly to protect private business from intrusive lawsuits. Nevertheless, it would appear that even conservative courts will need to 'adjust their compasses, ' as governments continue to delegate to private entities in the "privatization" frenzy of the past couple of decades; this is one area of civil rights law where the possibility to expand civil liberties might actual increase instead of shrinking.