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SYMPOSIUM

INTRODUCTION

PRIVATE PARTIES AS DEFENDANTS IN CIVIL RIGHTS LITIGATION

Myriam Gilles*

Civil rights litigation tends to follow the familiar pattern of an individual or class of individuals bringing suit against a governmental entity or official seeking monetary or injunctive relief for violations of their constitutional rights as protected under a state or federal statute. The plaintiffs in these cases are from every walk of life and represent every group and sub-group of American society. The defendants, however, share one important characteristic: when engaged in the complained-of activity, they must be acting “under color of state law.”

What does it mean to act “under color of state law”? At the simplest level, governments and their officials act under color of state law when engaged in injurious activity that is either authorized by the state or “cloaked in the authority of the state.”¹ This understanding of state action as exclusively relating to governmental activity squares with our generally held view that the Constitution’s prohibitions run only against the government.² This view is, however, becoming increasingly outdated as more and more governmental functions are privatized, contracted-out, outsourced, or transferred from the public to the private sector.

Champions of privatization argue that private firms are more efficient than government because of economies of scale, higher labor

* Professor, Benjamin N. Cardozo School of Law. I would like to thank all the authors for participating in this symposium and members of the Civil Rights Section for attending the panel discussion last January; the Association of American Law Schools for its support of the Section; and the students of the Cardozo Law Review for their hard work.

² The Civil Rights Cases, 109 U.S. 3 (1883) (“C]ivil rights, such as are guarantied by the constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings.”).
productivity, and fewer legal constraints. As these arguments gain favor and force, nearly every aspect of governmental services becomes a potential candidate for privatization. Privatization is occurring in the administration of child welfare services, corrections facilities, education, emergency medical services, environmental protection, fire fighting, juvenile rehabilitation, local libraries, parking enforcement, parks and recreations, road maintenance, transportation, water treatment, waste and recycling services, and welfare administration.

As one commentator aptly notes, “privatization is now virtually a national obsession.”

But even as supporters of privatization argue about market-based efficiencies and choice-creation models, skeptics raise important concerns about the potential effects of privatization on the legal system. Process-based questions of how the legal system should address claims brought by the victims of privatization’s inevitable problems of abuse, fraud, and negligence lead naturally to substantive questions about the legal status of private entities in these cases, the standards by which these private firms will be adjudged, and the damages they will be forced to factor into their cost-based analyses.

To be sure, some of these questions are not necessarily new: it has been long-established that, in certain circumstances, private actors may be said to have acted “under color of state law” and held liable for civil rights violations. For example, a private prison management corporation hired to run a state’s prison system is a state actor for purposes of the inevitable 42 U.S.C. § 1983 claim alleging Fourth, Eighth and Fourteenth Amendment violations brought by an inmate against a private guard (who is also a state actor for these purposes).

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3 Critics of privatization are less idealistic: they argue that the nature of government services makes many of them inappropriate for privatization, and that contracting may entail hidden information costs, require increased monitoring, and may even start a race to the bottom in the form of “low-ball” bidding. See, e.g., ELLIOTSCLAR, YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (2000); PAUL STARR, THE LIMITS OF PRIVATIZATION (Economic Policy Institute, 1987).

4 “Recent privatization efforts, particularly in health care and welfare programs, public education, and prisons, reveal a trend of greater discretion and broader responsibilities being delegated to private hands.” Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1369 (2003).

5 More information about privatization efforts in each of these categories at the local, state, and federal level is available at http://www.privatization.org/database/policyissues.html.

6 Metzger, supra note 4, at 1369.

7 See, e.g., Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982) (finding that private defendants invoking a state-created attachment statute act “under color of state law” within the meaning of § 1983 if their actions are “fairly attributable to the State”); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) (“[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act.”).

8 In recent years, private prisons have been the most visible reflections of the potential downfalls of privatization. The private prison industry’s sales pitch sounds good—it saves tax dollars and shields government from lawsuits—but the reality may not live up to the promise.
And some pieces of federal civil rights legislation do not require state action and therefore have been applied, without pause, to private parties.9

But other legal questions raised by the tidal wave of privatization are completely novel, as courts are only beginning to address these issues in a systematic way. For this reason, the articles in this timely symposium issue serve as an important resource for those considering the framework of public claims brought against private actors and the substantive reach and impact of those claims on outsourcing policies.

One of the first questions that arises in this context is whether the private entity is subject to suit under the applicable civil rights statute. In short, in what circumstances can it be said that a private defendant has acted “under color of law”? Michael Wells’s provocative paper, Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context, uses the Supreme Court’s recent decision in Brentwood Academy v. Tennessee Secondary School Athletic Association10 to address this question and to highlight the problems with current “state action” jurisprudence.

The Justices in Brentwood, as in most modern state action cases, engaged in a search for any and all indicia of state participation, involvement, coercion, control, delegation, entwinement or encouragement of the private activity that led to the constitutional violation. According to Professor Wells, this search is unnecessary and results in an understanding of “state action” as a stand-alone doctrine—a barrier to litigation—without regard to the substantive constitutional issues raised by the individual case. Wells argues that this leaves us with a morass of conflicting case law—in each subsequent case, the state action line becomes more difficult to draw and the distinctions more difficult to articulate.

Instead of searching for state action with a checklist and a clipboard, Professor Wells urges greater focus on the substantive constitutional issues raised in each individual case. For example, in a First Amendment case involving a private association made up of public and private members, rather than ask whether the membership was so “entwined” as to evidence state action, Professor Wells would ask a court to consider whether the substantive First Amendment claim should be subject to a stronger or a weaker constraint in the particular case. A focus on the substantive context, he forcefully argues, would result in a more fertile jurisprudence based mainly on the merits of constitutional claims, rather than the niceties of state action doctrine.11

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11 Michael Wells, Identifying State Actors in Constitutional Litigation: Reviving the Role of
In many ways, Professor Wells’s recommendation is reminiscent of another movement in section 1983 jurisprudence: in the 1960s and 1970s, the Supreme Court’s qualified immunity jurisprudence became mired in a complex and indeterminate analysis of a state actor’s intent, good faith, and knowledge of the law. By the late 1990s, however, the Court had changed its focus in qualified immunity analysis away from subjective intent to a Wellsian concentration on substantive constitutional doctrine;\(^\text{12}\) this development helped clarify the doctrine of qualified immunity—which, like the state action requirement, serves as a constraint on litigation—as well as to revivify constitutional tort litigation by adding substance to its procedural bones.

Once we have determined that a private actor is indeed acting “under color of” state law, and is therefore a proper defendant under civil rights statutes, what framework should we use to determine whether that private actor ought to be held liable? In particular, do the rules of municipal liability jurisprudence apply to private entities and their employees? Barbara Kritchevsky tackles this broad and far-reaching question in her article, *Civil Rights Liability of Private Entities*.

Professor Kritchevsky notes that while the Supreme Court has decided cases in which the traditional rules governing section 1983 liability apply seamlessly to suits against private individuals—namely, cases in which private individuals seek the qualified immunity often accorded governmental actors\(^\text{13}\)—the Court has not yet dealt with a host of more difficult questions that arise when trying to apply its municipal liability jurisprudence to private employers. What standards ought to apply where a plaintiff sues both the private individual/employee and the private employer? Should such a case be decided on *Monell* grounds, or do policy, economics and history dictate a different outcome? What, if any, immunities may private entities claim in civil rights cases? Should punitive damages be available? In what circumstances may a private entity claim state sovereign immunity under the Eleventh Amendment?

Professor Kritchevsky helpfully analyzes the lower federal court decisions on the liability of private defendants under section 1983. She concludes that the current jurisprudence is flawed because courts “generally analogize private and government entities for purposes of determining the scope of entity liability, but compare private entities and private individuals for immunity analysis.”\(^\text{14}\) This approach leads

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\(^{13}\) *See* Wyatt, 504 U.S. 158; Richardson, 521 U.S. 399.

to unfair and conflicting results, as municipal liability jurisprudence does not answer all the questions that arise in cases involving private entities. Professor Kritchevsky suggests that rather than attempt to import all of section 1983 jurisprudence into the increasing number of cases involving private entities, courts should instead focus on private corporations’ historic liability and the policies underlying civil rights legislation.

Once we have decided that a private entity is an appropriate defendant and figured out the standards and rules that should govern a determination of liability, we must ask a final question: what defenses are available to these parties? Enter Professor Sheldon Nahmod, whose article, *The Emerging Section 1983 Private Party Defense*, focuses on the availability and scope of the good faith defense to private individuals who are named as defendants in civil rights litigation. In particular, Professor Nahmod is interested in whether the good faith defense for private actors is akin to the qualified immunity accorded governmental actors. Tracing the Supreme Court’s analysis from *Lugar v. Edmondson Oil*, *Wyatt v. Cole*, and *Richardson v. McKnight*, Professor Nahmod persuasively argues that the rationale for extending a good faith defense to private actors in civil rights suits was first based on the common law background of malicious prosecution and abuse of process. From these roots, that rationale transmogrified into a “normative judicial intuition . . . that damages liability be based on fault.”

This intuition, Professor Nahmod suggests, “implicates a private person’s duty to know constitutional law in appropriate circumstances,” and as such, differs significantly from the “instrumental, policy concerns” that serve as the basis for qualified immunity.

Principles of fault, Professor Nahmod concludes, are therefore very much at play in private party civil rights litigation and the good faith defense is appropriate because it makes private parties engage in “harm-causing unconstitutional” behavior liable for damages “only when they act with fault, that is, without an honest and reasonable belief in the constitutionality of their conduct.”

Finally, Professor Jack Beermann has written a detailed exploration of the underlying motivations of plaintiffs who bring section 1983 cases against private parties. Rather than engage in an extended survey of practitioners, Professor Beermann examines the incentives these plaintiffs have to bring their claims under both section 1983 and state law. He then compares these incentives with each other and with

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16 *Id.* at 89.
17 *Id.* at 94.
those for bringing a traditional section 1983 action against a public entity. Despite the “long odds” faced by plaintiffs bringing private section 1983 cases, Professor Beermann suspects that these plaintiffs might be partially motivated by the “symbolic” value of the litigation, “in which public interest oriented litigants or lawyers use the legal system to pursue normative goals.” 18 These plaintiffs, consciously or not, may be making the point that “[w]hat is important are the constitutional values at stake, not the identity of the party threatening them.” 19

These articles are important contributions to the ongoing debate over the wisdom of privatization as a panacea for all social ills. As this symposium goes to press, that debate has moved beyond the domestic sphere and into the international with the graphic news of abuses of Iraqi prisoners by American troops and private security personnel at Abu Ghraib prison. 20 Private contractors have previously been used in wartime, but never to the extent as they are currently deployed in Iraq. 21 As allegations about the involvement of private contractors 22 continue to surface it seems evident that, even abroad, we spread privatization more easily than democracy. While American courts struggle to resolve domestic issues surrounding the liability of private defendants under civil rights laws, questions concerning the potential liability of private contractors, their employers, and the United States government itself are

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19 Id.
20 Of the thirty seven interrogators at Abu Ghraib prison, twenty seven were employed by a Virginia private contractor called CACI International.
21 Outsourcing of services to the armed forces has been on the rise since the end of the Cold War and the concomitant downsizing of the world’s huge standing armies. In 1991, the U.S. military numbered 2 million; today, it’s 1.5 million. Thousands of newly unemployed special forces and intelligence officers signed up with the burgeoning private security industry. The difference is that a decade ago, the industry was mainly used by multinational corporations and oil companies operating in high-risk regions. Today, after 9/11 and the war on terror, its biggest client is the Pentagon. There are hundreds of for-profit companies, mainly American, some British, with about 20,000 personnel in Iraq, doing traditional military work, including intelligence. That makes private contractors the largest contingent after the U.S. military, far outnumbering the British forces. Many analysts believe that it was the under-deployment of troops (only 130,000 were sent, whereas the military recommended deploying over 250,000) that led to the unprecedented number of private contractors being used in Iraq. See, e.g., Spencer E. Ante, The Other Army, Bus. Wk., May 31, 2004, at 76.
22 Private contractors (also called private military firms, or PMFs) have been active in Iraq since the start of the war, and their presence has only increased with the beginning of the reconstruction. These firms—the largest of which is Kellogg, Brown and Root, a subsidiary of Halliburton, formerly headed by Vice-President Dick Cheney—are used for feeding the troops, guarding key sites, managing logistics, training military and police forces and providing security; in short, everything short of front-line combat. And apparently, independent contractors were also used to “interrogate” prisoners at Abu Ghraib and elsewhere in Iraq. See generally P.W. Singer, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 6, 8 (2003).
quickly becoming even more pressing on the international front. How has the legal system addressed these questions? Will it address them? Local prosecution is not a likely option. Iraq lacks a functioning judiciary, and even if one rises from the rubble, private contractors are immune from criminal liability. Domestic criminal liability is equally unlikely. While seven reservist guards currently face criminal trials and/or court marshal, the private contractors allegedly involved are not subject to military law and the Justice Department seems unlikely to prosecute them. Civil rights claims by victims of the abuse, were such claims ever to be filed, would also likely fail under the “government contractor” defense which shields government contractors from liability when they provide services in accordance with government specifications. Given Major General Antonio Taguba’s report on the abuses at Abu Ghraib, and his finding that military intelligence officials worked with private contractors in perpetuating these abuses, that defense would be quite strong. Other statutory claims—under the War Crimes Act of 1966 or the Military Extrajurisdictional Act also face significant obstacles.

23 Though local prosecutions seem unlikely from this vantage point, the recent trial and conviction of three Americans accused of torturing Afghans in a private jail in a Kabul court serves as a cautionary tale for making quick predictions. See Stephen Graham, Americans Sentenced in Afghan Torture, (Sept. 16, 2004), available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20040915/ap_on_re_as/afghan_us_vigilantes. The defense unsuccessfully argued that the trial failed to meet basic international standards of fairness, and pointed to the unfair sentences: the three-judge panel sentenced two Americans alleged to have participated in the torture to ten years, a journalist who filmed the incident to eight years and four Afghan accomplices to one year terms. Id. 24 Licensed contractors with the U.S. government sign agreements that provide them with immunity from prosecution under Iraqi law. In addition, in June 2003, Paul Bremer issued an order protecting contractors from any threat of civil or criminal suit in Iraqi courts, even for crimes such as murder, torture, and rape. Joanne Mariner, Private Contractors Who Torture, (June 17, 2004), available at http://www.cnn.com/2004/LAW/06/17/mariner.contractors/. As Ms. Mariner suggests, local prosecution remains theoretically possible since “torture is presumably not foreseen in the contract” between the firms and the government, so that the abuses at Abu Ghraib “could be deemed to have been committed outside of the contractors’ official activities.” Id. But in dismissing this possibility, she notes that the June 2003 Bremer order also provided that “crimes committed during the contractors’ free time can only be prosecuted by local officials” if Bremer himself gives his written consent, which he is very unlikely to do. Id. 25 The seven suspects are staff Sergeant Ivan L. Frederick II, Specialist Charles A. Graner, Sergeant Javal Davis, Specialist Megan Ambuhl, Specialist Sabrina Harman, Private Jeremy Sivits, and Private Lynndie England. Sergeant Frederick, the most senior military official charged, has said that “the military-intelligence teams, which included C.I.A. officers and linguists and interrogation specialists from private defense contractors, were the dominant force inside Abu Ghraib.” Seymour M. Hersch, The Torture at Abu Ghraib, THE NEW YORKER, May 10, 2004, at 42. 26 Josh White, Abuse Report Widens Scope of Culpability, WASH. POST, Aug. 26, 2004, at A1. 27 This statute essentially tracks the Geneva Convention’s definitions of war crimes. 28 According to Joanne Mariner, “MEJA, which was enacted primarily to protect American soldiers and their dependents living abroad, covers federal crimes punishable by more than one
Other more mundane penalties exist for private contractors. For example, private contracting firms whose employees have misbehaved or violated laws or treaties can be fired and barred from future bidding on government contracts. As Philip Carter notes: “Misbehaving firms can have their government contracts terminated; they can be barred from competing for future contracts; and they may also be subject to civil and criminal liability. However, nearly all of these penalties are at the discretion of the agency that issued the original contract. Procurement officials, political leaders, prosecutors, and judges get to decide whether to sanction contractors for allegedly breaking the law in Iraq.”

Philip Carter, How to Discipline Private Contractors, (May 4, 2004), available at http://slate.msn.com/id/2099954,

As we are constantly told by our elected officials, the world is a different place than it was before September 11th, and our responses to the changed circumstances carry greater consequences than ever before. It is imperative, as the articles in this symposium strongly suggest, for the legal system to address the questions of private entity liability for civil rights violations in this country. Then, perhaps, we can address the broader questions that arise as we enter other arenas where the stakes may be far higher.