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Liability of State Officials and Prison Corporations for Excessive Use of Force Against Inmates of Private Prisons

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INTRODUCTION

Privatization of correctional institutions has emerged in response to the growing problem of prison overcrowding and the increasing cost of providing correctional services.[1] Although it offers solutions to pressing social and financial problems, privatization raises two significant legal questions. First, how much force may a prison guard, hired by a private corrections corporation, use against a prisoner; and second, who will be liable when that guard uses excessive force?[2]

This Note analyzes the issues surrounding the liability of both state and private corrections corporations for the excessive use of force by private prison guards. Part II examines the imposition of Section 1983 liability on private actors through the state action doctrine. Part III addresses the constitutional limitations on the use of force against incarcerated individuals, focusing on three issues that affect the liability of state and corporate officials: the basis for supervisory liability, the availability of immunity defenses, and the ability of a state to delegate its responsibility for prisoner safety. Part IV examines the United States Supreme Court's prohibition of federal adjudication of pendant state law claims against state officials. Part V examines the liability of state officials and corporate managers for excessive use of force by private prison employees and suggests a rationale for treating private corrections corporations similarly to state corrections agencies. Finally, Part VI concludes that the viability of private prisons may depend on a determination that a private entity which is a substitute for the

1. AMERICAN BAR ASSOCIATION SECTION OF CRIMINAL JUSTICE, REPORT TO HOUSE OF DELEGATES, at 2 (Feb. 1986) [hereinafter ABA CRIMINAL JUSTICE REPORT].

2. *Id.* at 4.

state with respect to liability should also stand in the state's shoes with respect to common law immunity.

II. State Action: A Prerequisite For Section 1983 Liability

A. State Action Analysis

The eighth and fourteenth amendments[3] provide constitutional protection for inmates against excessive use of force by the state.[4] Any constitutional limitation on the amount of force that a private prison employee may inflict on a prisoner, therefore, must be based on a finding that the private corporation's action is "state action" under the Constitution.[5] Once state action is established, an inmate may sue a private corporation under 42 United States Code Section 1983,[6] which establishes a private right of action against those who violate constitutionally secured rights. Courts have recognized four theories under which private action may be deemed state action. A discussion of each of these theories follows.

1. Public Function Theory

The Supreme Court formulated the public function theory in *Marsh v. Alabama*[7], which concerned an appeal by a Jehovah's Witness of a criminal trespass conviction for distributing religious literature in the business district of a company-owned town.[8] The Court, reasoning that town administration traditionally is carried out by local government, held that the corporation had assumed a public function. The privately governed town, therefore, could not interfere with the constitutional freedoms of expression and religion of its citizens.[9]

Marsh stands for the proposition that a privately controlled

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3. The eighth amendment protects prisoners from cruel and unusual punishment, and the fourteenth amendment guarantees them due process of law. U.S. Const. amends. VIII, XIV. *See infra* notes 59-124 and accompanying text.

4. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (involving inmate protection under the eighth amendment), *cert. denied*, 434 U.S. 974 (1977); Johnson v. Glick, 481 F.2d 1028 (2d Cir.) (involving inmate protection under the fourteenth amendment), *cert. denied*, 414 U.S. 1033 (1973).

5. Flagg Bros. Inc. v. Brooks, 436 U.S. 149 (1978).

6. U.S.C. § 1983 (1982). For a discussion of the historical context from which § 1983 arose, see Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323 (1952). For the text of § 1983, see *infra* note 61.

7. 326 U.S. 501 (1946).

8. *Id.* at 502.

9. *Id.* at 506-09.

city must afford its inhabitants the same constitutional protections that a traditional municipality must afford to its citizens. In *Amalgamated Food Employees Union v. Logan Valley Plaza Inc.*[10] the Court extended the public function test to shopping centers. *Logan Valley* concerned an appeal by labor picketers who had been enjoined from picketing on the shopping center's sidewalk and parking lot to protest the practices of a store in the shopping center.[11] The Court held that because the shopping center had supplanted the municipally-maintained business block on which protests otherwise would have occurred, the shopping center owner could not prohibit members of the public from exercising those constitutional rights that were directly related to the proper purpose of the center.[12]

The Court later overruled *Logan Valley*, but held to its position in *Marsh*.[13] In *Lloyd Corp. v. Tanner*[14] antiwar protestors who had been handing out leaflets in a shopping mall appealed a trespass conviction.[15] The Court purported to distinguish *Logan Valley* on the basis that the protest in *Lloyd* was not directly related to the activity of the shopping center.[16] In *Hudgens v. NLRB*[17] the Court recognized the weakness of this distinction. Under facts similar to those in *Logan Valley*, *Hudgens* held that a shopping center could not be equated with a municipality because the shopping center did not effectively displace the municipality in a significant number of its traditional functions.[18] The *Hudgens* opinion also stated that *Lloyd* had implicitly overruled *Logan Valley*.[19] The public function test as applied in *Lloyd* and *Hudgens* limits a finding of state action to situations in which the private actor performs all, or almost all, of the functions of the traditional governing en-

10. 391 U.S. 308 (1968).

11. *Id.* at 311-12.

12. *Id.* at 315.

13. *See* Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

14. 407 U.S. 551 (1972).

15. *Id.* at 556.

16. *Id.* at 562-63. The Court noted that in *Logan Valley* the labor dispute between the picketers and a tenant of the shopping center was related to the "proper purpose" of the center. In *Lloyd*, the Court found no such relationship between the antiwar protestors and the purpose of the center. *Id.*

17. 424 U.S. at 507.

18. *Id.* at 520-21.

19. *Id.* at 518-21. The *Lloyd* Court explicitly stated that it was not overruling *Logan Valley*. 407 U.S. at 561-67. The *Lloyd* dissent, however, recognized the full implication of the majority's holding. *Id.* at 581 (Marshall, J., dissenting).

tity to the aggrieved party.[20]

2. State-Created Monopoly Theory

Proponents of the state-created monopoly theory argue that holders of state-created or state-protected monopoly power should be subject to the same constitutional restraints as the state.[21] Once a court establishes that monopoly action is equivalent to state action, these proponents argue, the prohibitions of the fourteenth amendment apply, and a cause of action under Section 1983 is available.

The Supreme Court greeted the state-created monopoly theory with hostility. In *Moose Lodge No. 107 v. Irvis*[22] a private club refused to serve a member's black guest. The guest argued that the state, by its licensing power, had created a monopoly over those who could sell liquor.[23] The Court denied that the state had created a monopoly and held that the Liquor Control Board's regulatory involvement did not implicate the state in the policies of the club to an extent that warranted a finding of state action.[24] In *Jackson v. Metropolitan Edison Co.*[25] a customer asserted that the termination of her electric service by a utility company that enjoyed state-created monopoly protection constituted state action.[26] The Court disagreed and noted that the challenged activity, in this case and in *Moose Lodge*, was insufficiently related to the monopoly powers of the private entity.[27] The Court remarked that it would have been more amenable to finding state action if the challenged activity had been a traditional state function.[28]

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20. *See Lloyd*, 407 U.S. at 568-69; *see also Hudgens*, 424 U.S. at 519. Professor McCoy asserts that although the majority in *Hudgens* suggests that *Marsh* stands for the proposition that a private enterprise must assume *all* of the attributes of the state, the more reasonable conclusion from these cases is that the shopping centers "had not sufficiently displaced the traditional municipally controlled alternative forums for communications." McCoy, *Current State Action Theories, the* Jackson *Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 800 (1978).

21. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

22. 407 U.S. 163 (1972).

23. *Id.* at 177.

24. *Id.*

25. 419 U.S. 345 (1974).

26. *Id.* at 347-48.

27. *Id.* at 358-59. At least one commentator found this explanation unsatisfactory, noting that in both *Jackson* and *Moose Lodge* the private entities possessed state-protected control only over the challenged aspect of their businesses. *See* McCoy, *supra* note 20, at 807.

28. *Jackson*, 419 U.S. at 352-53.

3. Symbiosis Theory

The Supreme Court developed another strand of state action analysis in *Burton v. Wilmington Parking Authority*.[29] In *Burton* a private restaurant that leased space in a state-owned parking garage refused to serve a black customer. The customer claimed that the restaurant's refusal to serve him violated the equal protection clause of the fourteenth amendment.[30] The Court determined that the relationship between the state and the restaurant was "symbiotic"[31] and characterized by "economic interdependence."[32] Neither the state-owned garage nor the privately-owned restaurant could exist without the other. Because the state had placed itself in a position of economic interdependence with the restaurant, the Court found that the actions of the restaurant constituted state action.[33]

Although subsequent cases have advocated the *Burton* symbiosis theory, the Court generally has distinguished rather than followed *Burton*.[34] These distinctions have led to speculation on the vitality of the symbiosis principle. The factual settings presented by the subsequent cases have involved a regulatory state agency and a regulated private party, rather than instances of true economic interdependence as in *Burton*. The *Burton* theory has been criticized for providing judges with too much discretion in deciding what facts will establish a symbiotic relationship between a private entity and the state.[35]

4. State Aid/State Regulation Theory

Cases in which individuals have asserted that the activities of private entities amounted to state action because the state substantially regulated or funded the activities generally have been unsuccessful.[36] In *Blum v. Yaretsky*[37] a group of Medicaid patients alleged that a private nursing home violated their fourteenth amendment due process rights by changing their Medicaid classifi-

29. 365 U.S. 715 (1961).
30. *Id.* at 716.
31. *Id.* at 725.
32. *Id.*
33. *Id.*
34. McCoy, *supra* note 20, at 808-09.
35. *Id.* at 808-09 & n.98.
36. *See* Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
37. 457 U.S. 991 (1982).

cation and reducing their benefits accordingly.[38] The Court rejected the state action argument, noting that it would characterize private decisions as state action only if the state provided "significant encouragement" or exercised "coercive power" over the private entity.[39] The Court implied that state action existed only in cases in which the service provided was one traditionally provided by the state; conversely, providing services that the state ordinarily would not provide would not constitute state action even though the entities were heavily subsidized and regulated by the state.[40]

In *Rendell-Baker v. Kohn*[41] the Court held that a private school was not acting as the state in discharging certain employees even though the school was the recipient of state funds and subject to state regulation.[42] The Court noted that although the state heavily regulated the school, the state imposed few regulations on the school employees.[43] The decision implies that certain activities of private entities constitute state action with respect to the intended beneficiaries of state aid or regulation but not with respect to those who are not intended beneficiaries.[44]

B. State Action Analysis Applied to Private Detention Entities

Plaintiffs have successfully applied traditional state action analyses in two Section 1983 actions alleging excessive use of force by employees of private detention entities.[45] In *Milonas v. Williams*[46] the Tenth Circuit decided that a private entity which inflicts excessive force on its charges acts as the state. Students attending a private school for troubled youths brought a Section

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38. *Id.* at 993-98. The Medicaid patients were reclassified and subsequently transferred from skilled nursing facilities to less expensive facilities. The patients argued that the reclassification process denied them procedural due process. *Id.*

39. *Id.* at 1004. The Court did not define any standard against which to measure "significant encouragement" or "coercive power." *Id.*

40. *Id.* at 1004-05. This implication is reminiscent of the public function theory, although the Court did not cite *Marsh* or its progeny. *Id.*

41. 457 U.S. 830 (1982).

42. *Id.* at 841-42. The discharged employee alleged violations of free speech and procedural due process. *Id.*

43. *Id.* at 834, 836.

44. McCoy, *supra* note 20, at 823. The concept of the "intended beneficiary" or the "individual impacted by the state action" is useful in explaining the sometimes seemingly inconsistent holdings in state action cases. Under the intended beneficiary concept, a school would be acting as the state with respect to students who were intended beneficiaries of state aid, but not in relation to employees who were not. *Id.*

45. Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983); Medina v. O'Neill, 589 F. Supp. 1028 (S.D. Tex. 1984).

46. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983).

1983 class action against the owners and operators of the school, alleging that the school's personnel used excessive force in violation of the first and fourteenth amendments.[47] Using the symbiosis theory developed in *Burton*, the Tenth Circuit concluded that the private school's owners and operators were engaged in state action because the state had "so insinuated itself" with the school that it should be considered a "joint participant" in the offensive action.[48] The court considered the facts that the state had drawn up detailed contracts, significantly funded tuition, and heavily regulated the educational program at the school to be determinative.[49] According to the Court, these facts demonstrated a sufficient nexus between the state's involvement in the school and the conduct of the school officials to support a Section 1983 claim.[50]

The second case in which plaintiffs successfully applied state action analysis to the actions of a private detention entity is *Medina v. O'Neill*,[51] in which a group of illegal aliens brought a fifth amendment due process claim alleging that conditions at the facilities in which they were detained by a private security firm violated their constitutional rights.[52] The court found state action on the part of both the Immigration and Naturalization Service (INS) and the private security facility which detained the illegal aliens on behalf of the INS.[53] The district court applied the public function test and noted that when the state delegates power traditionally reserved exclusively for itself, the recipient of that power necessarily engages in state action.[54] The court then analyzed the powers

47. *Id.* The former students brought the class action suit for injunctive relief as well as for money damages, alleging excessive use of force, use of a polygraph machine, censoring of student mail, and other practices that they deemed objectionable. *Id.*

48. *Id.* at 940, *citing* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); *see supra* notes 29-35 and accompanying text.

49. *Milonas*, 691 F.2d at 940.

50. *Id.* The court rejected the school's reliance on *Rendell-Baker*, asserting that a similar school in that case was held *not* to be acting "under color of state law." Pointing to dicta in *Rendell-Baker* that suggest that the students would have had a stronger state action argument than the employee plaintiffs, the court declined to follow the *Rendell-Baker* holding. The court also noted the following facts in favor of a state action finding: (1) some of the students were involuntarily placed in the school by state officials; and (2) the state officials were aware of and approved the practices under attack. *Id.*

51. 589 F. Supp. 1028 (S.D. Tex. 1984). The aliens complained that the detention center kept 16 aliens in a room with only six beds and provided no opportunity for recreation. The aliens also complained that an escape attempt resulted in the accidental killing of one alien by a private guard. *Id.* at 1031-32 & n.7.

52. *Id.* at 1030-33.

53. *Id.* at 1038.

54. *Id.*

at issue to determine whether they were traditionally reserved exclusively to the state.[55] The court implied that the congressional delegation of the power of alien detention to the INS indicated that detention was a traditional governmental function.[56]

Although *Milonas* and *Medina* are not the ultimate authority on the issue of state action by private detention entities, their analysis and conclusions are consistent with the state action theories adopted by the Supreme Court and followed by the lower courts.[57] Thus, courts should have little difficulty finding that the actions of a private prison employee constitute state action.[58] After finding state action, a court must determine whether the conduct of the employee violated constitutional norms, which is addressed in the next section of this Note.

III. Constitutional Limitations on the Use of Force Against Prisoners

A. *Historical Background*

A prisoner does not relinquish all constitutional rights upon entering a correctional institution, but maintains those rights that can be exercised consistently with his imprisonment.[59] A prisoner's rights include the fourteenth amendment rights to due process and equal protection and the eighth amendment right to be free of cruel and unusual punishment.[60] Because constitutional rights are not self-enforcing, Congress enacted Section 1983[61] creating a pri-

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55. *Id.*

56. *Id.*

57. *See supra* notes 51-55 and accompanying text.

58. *See infra* notes 284-91 and accompanying text.

59. *See* Meachum v. Fano, 427 U.S. 215 (1976); *see also* Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983). In *Sampley*, the court remarked:

> When sentenced to a prison term, an inmate loses the portion of his liberty interest that is inconsistent with imprisonment. In particular, he loses his liberty interest in being free from his jailer's use of force that appears reasonably necessary to maintain or restore discipline. However, the prisoner does not surrender his constitutional rights that can be exercised consistently with his imprisonment. This includes the portion of his pre-existing liberty interest to be free from arbitrary, unnecessary violence perpetrated by state officials.

Id. at 495 n.6 (citations omitted).

60. Robinson v. California, 370 U.S. 660 (1962) (holding that a state statute making drug addiction a crime violated the eighth and fourteenth amendments).

61. 42 U.S.C. § 1983 (1982). Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

vate right of action for violation of those rights.[62]

A prisoner can bring a Section 1983 claim for excessive use of force under the due process clause of the fourteenth amendment or the cruel and unusual punishment clause of the eighth amendment.[63] The drafters designed the eighth amendment to prohibit torture and other barbaric methods of punishment.[64] The Supreme Court has expanded the scope of the amendment's protection to include grossly unfair punishment.[65] At least one lower court has stated that the eighth amendment guarantees "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[66] Prisoners may invoke the fourteenth amendment due process clause when the facts of their case do not conform to the eighth amendment framework as in one Second Circuit case which held that the eighth amendment applied only to incarcerated individuals and not to pretrial detainees.[67]

B. Standards Concerning the Use of Force

1. Legal Background

In *Johnson v. Glick* the Second Circuit set forth a standard for determining whether the use of force against an inmate violates the prisoner's constitutional rights.[68] Although the court ultimately decided *Johnson* on fourteenth amendment grounds,[69] other cir-

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to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or any proper proceeding for redress.

Id.

62. *See* Note, *Applying the Eighth Amendment to the Use of Force Against Prison Inmates*, 60 B.U.L. REV. 332, 340 (1980).

63. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976) (holding that deliberate indifference by prison personnel to prisoner's serious illness or injury a contravention of eighth amendment), *cert. denied*, 434 U.S. 974 (1977); Johnson v. Glick, 481 F.2d 1028 (2d Cir.) (applying fourteenth amendment due process analysis to partially successful claim alleging excessive use of force by prison guard), *cert. denied*, 414 U.S. 1033 (1973). Many claims brought under § 1983 alleged violations of both the fourteenth and the eighth amendments. *See, e.g.*, McRorie v. Shimoda, 795 F.2d 780 (9th Cir. 1986) (brutality by a prison guard, if true as alleged, states a § 1983 claim under both the fourteenth amendment due process and the eighth amendment cruel and unusual punishment clauses).

64. *Estelle*, 429 U.S. at 102. Early eighth amendment cases applied the amendment to various methods of execution. *See, e.g., In re* Kemmler, 136 U.S. 436 (1890).

65. Weems v. United States, 217 U.S. 349 (1910) (holding that 15 years of hard labor was excessive punishment for the crime of falsifying a public document).

66. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

67. *Johnson*, 481 F.2d at 1032-33.

68. *Id.*

69. *Id.* at 1032-33.

cuits have adopted the *Johnson* standard in determining eighth amendment claims.[70] The court set forth the following factors to determine whether force against inmates had crossed the constitutional line: the need for application of the force; the relationship between the need and the extent of force used; the extent of the resulting injury; and whether the motive behind the force was based on a good faith effort to maintain or restore discipline or on a malicious desire to cause harm.[71]

The court emphasized that not every use of force which seems unnecessary in retrospect is a constitutional violation.[72] The *Johnson* court pointed out that the constitutional protection against the excessive use of force cannot be as extensive as the common law torts of assault and battery[73] because prison guards must deal with large numbers of uncooperative men and women in an environment that might require the use of intentional force.[74]

The *Johnson* test often is used in conjunction with other standards.[75] The Supreme Court set forth one of these standards three years after *Johnson* in *Gregg v. Georgia.*[76] The plaintiff in *Gregg* alleged that imposition of the death penalty under the Georgia death penalty statute[77] constituted cruel and unusual punishment

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70. *See, e.g.*, Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983) (applying the *Johnson* factors in an eighth amendment context in conjunction with another standard); Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) (using *Johnson* factors as the focus of inquiry to determine whether the use of force violated the eighth amendment and gave rise to a cause of action under § 1983); Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980) (quoting the *Johnson* test as a basis for reversing summary judgment in an eighth amendment-based § 1983 claim); Martinez v. Rosado, 614 F.2d 829 (2d Cir. 1980) (quoting the *Johnson* test in reversing a grant of summary judgment for failure to state claim under § 1983 and the eighth amendment); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975) (quoting *Johnson* factors in reversing dismissal for failure to state a claim under § 1983 and the eighth amendment).

71. *Johnson*, 481 F.2d at 1033.

72. *Id.*

73. *Id.* "[T]he common law tort action for battery . . . makes actionable any intentional and unpermitted contact with the plaintiff's person or anything attached to it . . . ." *Id., citing* W. PROSSER, HANDBOOK ON THE LAW OF TORTS, § 9 (4th ed. 1971). "[T]he common law tort action for assault . . . redress[es] '[a]ny act of such a nature as to excite an apprehensive of battery.'" *Johnson*, 481 F.2d at 1033, *quoting* W. PROSSER, *supra*, § 10, at 38.

74. *Johnson*, 481 F.2d at 1033.

75. *See, e.g.*, Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1984).

76. 428 U.S. 153 (1976).

77. *Id.* The Georgia statute was amended following *Furman v. Georgia*, 408 U.S. 238 (1972), in which the Court held that statutes extending broad discretion to juries to impose or withhold the death penalty violated the eighth and fourteenth amendments. The statute as amended after *Furman* allows the death penalty in six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. *Gregg*, 428 U.S. at 162-63 (plurality opinion).

under the eighth and fourteenth amendments.[78] The Court stated that a penalty should not be excessive but rather should be in "accord with 'the dignity of man.' "[79] The court set forth two criteria for determining excessiveness. First, the punishment must involve "unnecessary and wanton infliction of pain."[80] Second, the punishment must be out of all proportion to the severity of the crime.[81]

The first *Gregg* criterion has been applied to Section 1983 claims brought against prison personnel.[82] In *Sampley v. Ruettgers*[83] the Tenth Circuit held that the use of force by a prison guard against an inmate violated the eighth amendment only if it involved "the unnecessary and wanton infliction of pain."[84] The court read *Gregg* to require that the guards intend to harm the inmate, that the force appear to be more than reasonably necessary at the time, and that the attack result in either severe pain or lasting injury.[85] The *Sampley* court cited the *Johnson* factors as guidelines for applying the *Gregg* criteria.[86] The court based its narrow reading of *Gregg* on a recognition that prison guards often must make quick decisions regarding the use of force and should not be required to second guess the court.[87]

The Tenth Circuit again combined the *Gregg* and *Johnson* tests in *El'Amin v. Pearce*,[88] in which the court determined whether retaliatory beatings by corrections personnel and a subsequent denial of medical treatment constituted cruel and unusual punishment.[89] The court applied the *Johnson* and *Gregg* criteria to that part of the eighth amendment claim which alleged a beating by prison personnel and held that the prisoner had stated a claim under Section 1983.[90] The court applied a different stan-

78. *Id.* at 162.

79. *Id.* at 173 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

80. *Id.* (citing *Furman*, 408 U.S. at 392-93 (Burger, C.J., dissenting)).

81. *Id.* (citing dictum in *Trop*, 356 U.S. at 100).

82. *See, e.g.*, El'Amin v. Pearce, 750 F.2d 829 (10th Cir. 1984); Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983); Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979).

83. 704 F.2d 491 (10th Cir. 1983).

84. *Id.* at 495 (quoting *Gregg*, 428 U.S. at 173 (plurality opinion)).

85. *Sampley*, 704 F.2d at 495.

86. *Id.* at 495-96.

87. *Id.* at 496.

88. 750 F.2d 829 (10th Cir. 1984).

89. *Id.* The plaintiff alleged that he was beaten in retaliation for filing a complaint against the prison chaplain's staff. He brought a § 1983 action claiming that both the beating and the subsequent denial of medical treatment constituted cruel and unusual punishment. *Id.* at 830.

90. *Id.* at 831-32.

dard—established in *Estelle v. Gamble*[91]—to that part of the claim alleging a subsequent denial of medical treatment.[92] In *Estelle* an inmate in a Texas prison alleged that the prison staff provided him with inadequate medical care after he had injured himself unloading a bale of cotton.[93] The Supreme Court held that "deliberate indifference" to the serious medical needs of prisoners violated the eighth amendment's proscription against cruel and unusual punishment.[94] Applying the *Estelle* standard, the *El'Amin* court found that the failure by the prison's medical personnel to order an x-ray did not rise to the level of deliberate indifference.[95] Thus, the prison personnel's conduct did not establish a constitutional claim.[96]

The Supreme Court twice has rejected the proposition that negligence alone can support a Section 1983 claim.[97] In *Davidson v. Cannon*[98] an inmate alleged that prison officials negligently failed to protect him from the violent actions of another inmate. The inmate sensed that he was in danger and sent a note to a high-level prison official asking for protection. The official sent the note to the "corrections sergeant." Although informed of the nature of the note's request, the sergeant neither read the message nor acted upon its contents. The court held that when a government official is merely negligent in causing an injury, no procedure for compensation is constitutionally required.[99] In *Daniels v. Williams*[100] an inmate in a Richmond, Virginia jail slipped on a pillow negligently left on a stairway by a deputy. The Court refused to allow a Section 1983 suit and again declined to allow negligence to trigger a constitutionally based cause of action.[101]

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91. 429 U.S. 97 (1976).

92. *El'Amin*, 750 F.2d at 832.

93. *Estelle*, 429 U.S. at 104.

94. *Id.*

95. *El'Amin*, 750 F.2d at 832-33.

96. *Id.*

97. Davidson v. Cannon, 106 S. Ct. 662 (1986); Daniels v. Williams, 106 S. Ct. 668 (1986). The Court decided *Daniels* and *Davidson* on the same day.

98. 106 S. Ct. 668 (1986).

99. *Id.* at 670. Justices Brennan and Blackmun filed separate dissents. Justice Brennan suggested that recklessness could support a § 1983 claim under the fourteenth amendment and that the complaint alleged facts sufficient to support a finding of recklessness. *Id.* at 671. (Brennan, J., dissenting). Justice Blackmun stated that negligence in some cases could constitute a deprivation of liberty under the fourteenth amendment and thus could support a § 1983 claim. *Id.* at 671-77 (Blackmun, J., dissenting).

100. 106 S. Ct. 662 (1986).

101. *Id.* at 663-67. Justice Blackmun concurred in the judgment. He reconciled his position in *Daniels* with his *Davidson* dissent by distinguishing the facts in the two cases:

2. Current Standard: *Whitley v. Albers*

In *Whitley v. Albers*[102] the Supreme Court considered a Section 1983 claim brought against prison officials by an inmate alleging violations of his eighth and fourteenth amendment rights.[103] The inmate sustained serious injury to his leg from a shot fired by a prison guard during the implementation of a plan by officials to restore security during a riot.[104] The Court held that the shooting violated neither the eighth nor the fourteenth amendment.[105]

In *Whitley* the Court recognized the need to apply different standards to different kinds of eighth amendment claims.[106] The Court refused to apply the "deliberate indifference" standard adopted in the medical negligence context[107] and established a standard for use in the context of prison disturbances. The Court held that in order to establish an eighth amendment violation, a plaintiff generally must show unnecessary and wanton infliction of pain.[108] The Court determined that in a prison disturbance setting, the question of whether the action taken inflicted unnecessary pain depends on whether the actor applied the force in a good faith effort to restore discipline or for the "very purpose of causing harm."[109] The Court set forth five factors relevant to the determi-

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"[I]t is one thing to hold that a commonplace slip and fall . . . does not rise to the dignified level of a constitutional violation. It is a somewhat different thing to say that negligence that permits anticipated inmate violence . . . does not implicate the Constitution's guarantee of due process." *Davidson*, 106 S. Ct. at 671 (Blackmun, J., dissenting).

102. 106 S. Ct. 1078 (1986).

103. *Id.* The inmate, Albers, was injured during a disturbance in Block A of the Oregon State Penitentiary. Some prisoners in that cellblock had become agitated about perceived mistreatment of other inmates by prison guards. Because of the general agitation, the guards ordered the inmates into their cells early. One inmate became particularly upset and assaulted one or two of the guards attempting to enforce this order. *Id.*

104. *Id.* After one assaulted guard escaped, another guard was taken hostage, but some helpful prisoners eventually moved him to a safer area. The prison authorities discovered the guard's predicament, and Whitley, the assistant prison superintendent, made several unsuccessful attempts to reason with the belligerent inmate. Prison officials developed a plan to invade the cellblock with an armed squad after falsely being informed that one prisoner had been killed and that other deaths would follow. Albers and other inmates were injured during the subsequent rescue effort. *Id.* at 1081-82.

105. *Id.* at 1087-88.

106. *Id.* at 1084. The Court observed that constitutional standards should "be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." *Id.*

107. *See* Estelle v. Gamble, 429 U.S. 97 (1976); *supra* notes 91-94 and accompanying text.

108. *Whitley*, 106 S. Ct. at 1084. The Court also noted, however, that a plaintiff may prevail without a showing of an express intent to inflict unnecessary pain. *Id.*

109. *Id.* at 1085. (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*,

nation of this question: the need for the use of force;[110] the relationship between that need and the force actually used;[111] the extent of the injury inflicted;[112] the extent of the threat to the safety of prison personnel and other inmates;[113] and efforts made to lessen the severity of the use of force.[114] The Court was careful to note that not every infliction of pain that in retrospect appears unnecessary constitutes a constitutional violation.[115]

Applying these principles to the facts of *Whitley*, the Court concluded that the prison officials had a "plausible basis" for their belief that the extent of force used was necessary under the circumstances.[116] Thus, the basic rescue plan did not constitute cruel and unusual punishment.[117] Turning to the question of the shooting itself, the Court noted that the inmate's burden of showing that the shooting constituted an eighth amendment violation was extremely heavy.[118] The Court concluded that the instant circumstances indicated that the shooting was an integral part of a good faith effort to restore prison security and did not violate the inmate's eighth amendment rights.[119]

With regard to the inmate's fourteenth amendment claim, the Court found that the circumstances of the case did not entitle him to additional procedural due process.[120] The Court did find, however, that the inmate raised a valid substantive due process claim.[121] After consideration of this claim as an alternative basis for affirmance, the Court held that the eighth amendment is di-

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414 U.S. 1033 (1973)).

110. *Id.* at 1085. The Court borrowed this factor and the next two factors from *Johnson*, 481 F.2d at 1033.

111. *Whitley*, 106 S. Ct. at 1085.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1084.

116. *Id.* at 1086.

117. *Id.* at 1087. The Court explained that "[a]n expert's after-the-fact opinion that danger was not 'imminent' in no way establishes that there was no danger, or that a conclusion by the officers that it *was* imminent would have been wholly unreasonable." *Id.* at 1086 (emphasis in original).

118. *Id.* at 1087.

119. *Id.* at 1087-88.

120. *Id.* at 1088. The Supreme Court upheld the district court's ruling that the state was not obliged to afford the inmate "some kind of hearing either before or after he was shot." *Id.*; *see* Albers v. Whitley, 546 F. Supp. 726, 732 n.1 (D. Or. 1082), *aff'd in part, rev'd in part*, 743 F.2d 1372 (9th Cir. 1984), *cert. granted*, 472 U.S. 1007 (1985), *rev'd*, 475 U.S. 312 (1986).

121. *Whitley*, 106 S. Ct. at 1088.

rected specifically to the protection of prisoners.[122] The eighth amendment, the Court concluded, provides the primary source of prisoners' substantive protection in cases alleging the excessive use of force.[123] In such cases, therefore, the general language of the fourteenth amendment can provide no greater protection than the specific language of the eighth amendment.[124]

C. *The Use of Force and Entity and Supervisor Liability*

The state action doctrine[125] and Section 1983 combine to give an inmate a powerful weapon against the private prison guard who crosses the line between reasonable and excessive use of force. Liability, however, does not always stop at the subordinate level. Managers, and sometimes the corporation itself, may be directly liable to an inmate for damages caused by a subordinate. Courts have been hostile so far to the imposition of derivative liability under a *respondeat superior* theory.[126]

Entity and supervisor liability are not automatic. Targets of liability may avail themselves of immunity defenses based either on the eleventh amendment[127] or the common law.[128] This Part discusses the theories under which an inmate may sue a manager or a corporation and the immunity defenses available to those targets.

1. Theoretical Bases of Entity and Supervisor Liability

a. Entity Liability

Courts generally have refused to impose Section 1983 liability on employers on the basis of the *respondeat superior* doctrine.[129]

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122. *Id.*

123. *Id.* (citing *Estelle*, 429 U.S. at 103, 106).

124. *Id.*

125. *See supra* notes 5-58 and accompanying text.

126. *See infra* notes 129-35 and accompanying text.

127. *See infra* notes 167-200 and accompanying text.

128. *See infra* notes 201-47 and accompanying text.

129. *See, e.g.*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 691 (1978) (holding that a municipality cannot he held liable under § 1983 on a *respondeat superior* theory); Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984), *cert. denied sub nom.* Reed v. Slakan, 470 U.S. 1035 (1985) (holding prison supervisors liable for § 1983 violation under a theory of direct liability, but not under *respondeat superior*); Pearl v. Dobbs, 649 F.2d 608 (8th Cir. 1981) (affirming the district court's dismissal for failure to state a claim under § 1983 because the doctrine of *respondeat superior* did not apply); *Johnson*, 481 F.2d at 1034 (following the Second Circuit rule "tbat when monetary damages are sought under § 1983, the general doctrine of *respondeat superior* does not suffice and a sbowing of some personal responsibility of the defendant is required").

In *Monell v. New York City Department of Social Services*[130] the Supreme Court held that a municipality could not be liable in a Section 1983 action on the basis of *respondeat superior* alone.[131] The Court found that Section 1983's language—"any person who. . .*shall subject or cause to be subjected,* any person. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall be liable thereto]"[132]—imposed liability only when the person actually effects the deprivation or causes another to do so.[133] The Court interpreted the causation language to mean that Congress did not intend Section 1983 liability to attach when causation was absent.[134] The Court further inferred that creation of a federal *respondeat superior* doctrine could be unconstitutional.[135]

Although a municipality may not be liable under the *respondeat superior* theory, an employer may be liable if the injury occurs during the execution of policies or customs. In *Monell* female employees of New York City's Department of Social Services and the Board of Education brought suit under Section 1983 for damages caused by official policies of the Department and the Board forcing pregnant women to take unpaid leaves before they were medically required to quit working.[136] The Court held the city liable, stating that when the execution of a government's policy inflicts injury and that policy is the "moving force" behind a constitutional violation, the government is responsible under Section 1983.[137] The Court elaborated on this standard seven years later in

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Each of the cases concerned public defendants. If the cases concerned private defendants and if state action were present, then the rational of these cases ostensibly would apply to private actors.

130. 436 U.S. 658 (1978).

131. *Id.* at 691.

132. *Id.* at 691-92 (quoting 42 U.S.C. § 1983 (1976) (emphasis added)).

133. *Id.* at 692.

134. *Id.* The Court supported this construction of the statute with legislative history, citing congressional rejection of the Sherman Amendment, which would have imposed a type of vicarious liability on municipalities. Although noting that the legislative history was inconclusive as to legislative intent, the Court determined that the Sherman Amendment was the only form of vicarious liability presented to the legislature. Its rejection, together with the absence of any language in the statute creating *respondeat superior* liability, created a strong inference that Congress did not intend to impose this type of liahility. *Id.* at 692 n.57.

135. *Id.* at 693-94. The Court noted that Congress indicated that a federally-imposed affirmative obligation on local governments would be unconstitutional. *Id.*

136. *Id.* at 660-61 & n.2.

137. *Id.* at 694.

Kentucky v. Graham.[138]

In *Graham* the Commissioner of the Kentucky State Police was directly involved in a warrantless raid on the house of the father of a murder suspect. The police ransacked the house and brutally beat its inhabitants, who eventually sued the Commissioner "individually and as Commissioner of the Bureau of State Police."[139] The defendant settled, and the district court awarded attorney's fees[140] against the Commonwealth of Kentucky.[141] The Sixth Circuit affirmed the award.[142] The Supreme Court reversed, distinguishing between official and personal capacity suits against public officials.[143] A suit in one's official capacity, the Court held, is essentially a suit against the entity represented by the individual.[144] Section 1983 liability in this type of suit must be predicated on a policy or custom of that entity which signifies that the entity was the "moving force" behind the constitutional deprivation.[145] A personal-capacity suit[146] is one brought against the official's own assets and requires that while acting under color of state law the official caused a citizen to be deprived of a constitutional right.[147] Thus, *Graham* and *Monell* stand for the proposition that a plaintiff cannot maintain a suit under Section 1983 against a defendant in the defendant's official capacity unless the entity represented by the defendant was the moving force behind the violation.

b. Supervisor Liability

Supervisory or management-level employees may be liable for injuries caused by their subordinates under several theories. First, if a supervisor directly contributes to a violation of an inmate's constitutional rights, he will be liable to the person whose rights were violated.[148] Second, a supervisor may be liable if he sets in motion certain procedures that improperly deprive an inmate of a

138. 473 U.S. 159 (1985).

139. *Id.* at 162.

140. Section 1988 of Title 42 of the *United States Code* provides that a court may award reasonable attorney's fees to a prevailing party in a § 1983 action. 42 U.S.C. § 1988 (1982).

141. *Graham,* 473 U.S. at 163.

142. Graham v. Wilson, 742 F.2d 1455 (6th Cir. 1984), *rev'd sub nom.* Kentucky v. Graham, 473 U.S. 159 (1985).

143. *Graham,* 473 U.S. at 165-68.

144. *Id.* at 165 (citing *Monell,* 436 U.S. at 690 n.55).

145. *Id.* at 166 (quoting *Monell,* 436 U.S. at 694).

146. This also is referred to as an "individual-capacity" action. *Id.* at 165 n.10.

147. *Id.* at 166; *see* Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978).

148. *See Johnson,* 588 F.2d at 744.

property interest. In *Johnson v. Duffy*[149] a prisoner whose honor camp wages[150] were taken away sued the sheriff in charge of administering the county jail facilities. The inmate claimed that the county authorities did not follow certain procedures that were prerequisites under state law to a forfeiture of honor camp wages. In California, a transfer from a honor camp to a jail results in the forfeiture of accumulated wages.[151] State law charges a county committee with determining whether a prisoner ought to be transferred.[152] The plaintiff in *Johnson* claimed, and the defendant conceded, that the committee never met. Thus, the plaintiff argued, the transfer violated his right not to be deprived of property without due process of law.[153] The defendant sheriff was chairman of the committee but had no input into the improperly made decision to transfer the plaintiff.[154] The Court noted that a showing of direct participation in the deprivation of a right is not the only way to demonstrate the causation requirement of Section 1983. A person may be liable under that section if he "sets in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury."[155] Thus, the court found the sheriff liable.

Third, a supervisor may be liable to an inmate for a subordinate's violations of the inmate's rights if the applicable state law would make the supervisor liable in tort for the subordinate's misconduct. In *Hesselgesser v. Reilly*[156] a deputy delivered a prisoner's habeas corpus petition to the prosecutor instead of the court. The prisoner remained in jail longer than he would have if the deputy had delivered the petition correctly. The sheriff had no knowledge of his deputy's actions.[157] The court held that if state law provided for a sheriff's liability for the torts of his deputies, then a prisoner could bring a Section 1983 action against the sheriff for the deputy's violation of the prisoner's constitu-

149. *Id.*

150. Prisoners in honor camps earn wages of no more than $2.00 per day. The prisoner in this case had accumulated $177.83 in wages at the time of forfeiture. *Id.* at 742.

151. Under California law, a prisoner may be transferred from an honor camp to a prison if he refuses to work or to abide by camp rules. CAL. PENAL CODE § 4131 (West 1982).

152. *Id.*

153. Plaintiff's claim was based on a denial of procedural due process. 588 F.2d at 742.

154. The opinion does not state clearly who ordered the prisoner's transfer.

155. *Johnson*, 588 F.2d at 743-44.

156. 440 F.2d 901 (9th Cir. 1971).

157. *Id.* at 901-02.

tional rights.[158] In this case, state law provided for exactly this type of derivative liability.[159] Thus, the sheriff was liable for the constitutional violations of his deputy, even though the sheriff himself did not violate the prisoner's right, did not cause them to be violated, and was not negligent in preventing their violation.[160]

A court also may impose liability on a supervisor who tacitly authorizes constitutional abuses by his subordinates. In *Slakan v. Porter*[161] guards in a North Carolina prison attacked a prisoner with high-pressure water hoses and billy clubs after the prisoner had slapped a guard through the bars of his cell. The prisoner sued the guards and three of the prisoner's supervisors—the warden, the secretary of corrections, and the director of prisons. The supervisors' own testimony indicated that they knew of the practice of hosing and bludgeoning prisoners for minor infractions.[162] The Fourth Circuit upheld a jury award of money damages against all of the defendants. The court held that although a supervisor could not be liable for the constitutional violations of his subordinates on a *respondeat superior* theory,[163] he could be liable if supervisory indifference or tacit authorization was a causative factor in the injury.[164] The court determined that an inmate must show first that he faced a pervasive and unreasonable risk of harm, and second that the supervisor's inaction amounted to deliberate indifference or tacit authorization.[165] A prisoner may not make the second

158. *Id.* at 903. The Court based its holding on a broad interpretation of § 1988, the companion statute of § 1983. *See* 42 U.S.C. § 1988 (1982). Section 1988 provides that when principles of federal law are unable to furnish suitable remedies for violations of § 1983, and certain other enumerated sections of Title 42, courts should apply principles of state law.

159. WASH. REV. CODE § 36.63.030 (1964).

160. The Supreme Court's decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), seriously undermines the holding of *Hesselgesser*. *Monell* held that a municipality may be sued when the execution of its policies by subordinates inflicts constitutional injuries, hut noted that the government's policies had to be the moving force behind the violation. *Monell*, 436 U.S. at 691-95; *see supra* notes 130-37 and accompanying text. *Monell* retained a requirement of causation and expressly rejected the strict liability theory of *respondeat superior*. *Id.* at 691. *Hesselgesser*, however, adopts a theory very close to the theory rejected in *Monell*. Because *Monell* does not mention *Hesselgesser* specifically, *Hesselgesser* perhaps retains some force.

161. 737 F.2d 368 (4th Cir. 1984).

162. *Id.* at 371.

163. *Id.* at 372 (citing *Monell*, 436 U.S. 658); *see supra* notes 130-37 and accompanying text.

164. *Slakan*, 737 F.2d at 372; *see also* Maclin v. Paulson, 627 F.2d 83 (7th Cir. 1980)(holding that a police chief would be liable if he acted recklessly or knew of the danger of plaintiffs being beaten by fellow inmates and failed to react reasonably).

165. *Slakan*, 737 F.2d at 373; *see also* Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), *cert. denied*, 450 U.S. 929 (1981).

showing by pointing to an isolated instance of brutality. A showing that a supervisor did not act in the face of documented widespread abuses will suffice.[166]

2. Constitutional and Common Law Immunities

The issue of immunity for defendants in a Section 1983 action encompasses two distinct questions. First, whether state and corporate defendants are eligible for sovereign immunity under the eleventh amendment; and second, whether the defendants are eligible for a qualified immunity based in the common law.

a. Legal Background of Eleventh Amendment Immunity

The fundamental purpose for the eleventh amendment[167] is to preserve the sovereignty that the states enjoyed before the adoption of the Constitution.[168] Although the amendment does not explicitly bar suits against a state by its own citizens, the Supreme Court has held consistently that such suits brought in federal court are barred unless the state consents to be sued.[169] This jurisdictional prohibition bars all suits brought against the state or any of its agencies or departments regardless of the relief sought.[170]

The Supreme Court has extended the rule of sovereign state immunity to preclude a suit for damages by a citizen in which the state, although not named, is the real party in interest.[171] A state is

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166. *Slakan*, 737 F.2d at 373. The Court noted that liability may extend to the highest official. The outer limits of liability "are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked." *Id.* The determination is one of fact. *Id.; see also* Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981).

167. U.S. CONST. amend. XI. The eleventh amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

168. In *Edelman v. Jordan*, 415 U.S. 651, 661 n.9 (1974), the Supreme Court concluded:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This. . .is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plain of the [Constitutional] convention, it will remain with the States. . . .

(quoting Alexander Hamilton's Federalist Papers No. 81) (emphasis in original).

169. *Id.* at 662-63; *see, e.g.*, Employees v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973) (superseded by statute as stated in Carey v. White, 407 F. Supp. 121 (D. Del. 1976)); Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); Hans v. Louisiana, 134 U.S. 1 (1890).

170. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984).

171. Ford Motor Co. v. Indiana Dep't of Treasury, 323 U.S. 459, 464 (1945). This rule

the real party in interest if the defendant is being sued in his official capacity[172] and, therefore, a prisoner ordinarily may not bring an official-capacity action against a state employee.[173] Thus, plaintiffs may not avoid eleventh amendment immunity by suing state officials instead of the state.[174]

In *Ex parte Young*[175] the Supreme Court held that the eleventh amendment does not bar an official-capacity suit for declaratory or injunctive relief. In that case the Court considered an action to enjoin state officials from enforcing an unconstitutional state statute.[176] The Court reasoned that the unconstitutional statute was void. Enforcement of a statute that the state had no authority to enact stripped the individual of his official authority and the sovereign immunity which he would otherwise enjoy.[177] Thus, the supreme authority of the federal government was preserved without invading the sovereignty of the state.[178]

Application of the *Young* theory is limited to cases involving prospective injunctive relief.[179] In *Edelman v. Jordan*[180] the Court held that certain types of injunctive relief were barred because the practical effect was too similar to a money judgment that would ultimately be paid out of the state treasury.[181] A class of beneficiaries brought an action for injunctive and declaratory relief against Illinois officials who administered the Aid to the Aged, Blind, and Disabled (AABD) programs, jointly funded by the state and federal governments.[182] The class alleged that the state officials violated the equal protection clause by following state regulations that were not in compliance with the federal time limit for processing applications and granting AABD aid.[183] The Court denied that portion of the claim which would require retrospective

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protects the public funds of a state from being depleted by private lawsuit. *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944); Kennecott Copper Corp. v. Utah Tax Comm'n, 327 U.S. 573 (1946).

172. Kentucky v. Graham, 473 U.S. 159 (1985).

173. *Id.* at 165-66.

174. *Id.* at 170-71.

175. 209 U.S. 123 (1908).

176. *Id.* The Court enjoined tbe Attorney General of Minnesota from bringing suit to enforce a state statute which allegedly violated the fourteentb amendment. *Id.* at 168.

177. *Id.* at 160.

178. *Id.*

179. *Id.*

180. 415 U.S. 651, 677 (1974).

181. *Id.*

182. *Id.* at 666-71.

183. *Id.* at 653.

payment of substantial funds out of the state treasury,[184] distinguishing the injunctive relief requested in this case from the type approved in *Young*.[185] Under *Young* an injunction's impact on the state treasury is a necessary result of future compliance with the Court's decree.[186] The relief requested in *Edelman*, however, required a form of compensation to those individuals whose applications were processed more slowly than required by federal law.[187] The Court concluded that the retrospective relief requested here had a much greater resemblance to a monetary award against the state than to the injunctive relief upheld in *Young*.[188] The Court thus held that the eleventh amendment prohibited retrospective injunctive relief.[189]

Prospective injunctive relief that approximates an award of damages can fall within the structures of the eleventh amendment. In *Quern v. Jordan*[190] the Supreme Court resolved an issue that arose out of the remand of the *Edelman* case. The Court remanded *Edelman* to the district court, which ordered the defendants to issue notices to individual class members informing them of their wrongful denial of benefits.[191] The court of appeals, sitting en banc, reversed, but at the same time determined that a mere explanatory notice advising applicants of the availability of a state administrative procedure for determination of their eligibility for past benefits would not be barred by the eleventh amendment.[192]

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184. *Id.* at 651.

185. *Id.* at 664, 677.

186. *Id.* at 657-68.

187. *Id.* at 668.

188. *Id.* at 665.

189. The Court noted:

> It is not pretended that these payments are to come from the personal resources of these appellants. Appellees expressly contemplate that they will, rather, involve substantial expenditures from the public funds of the state. . . .
>
> It is one thing to tell the [state official] that he must comply with the federal standards for the future. . . . It is quite another thing to order [him] to use state funds to make reparation for the past. The latter would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.

Id., *quoting* Rothstein v. Wyman, 467 F.2d 226, 236-38 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

190. 440 U.S. 332 (1979).

191. Jordan v. Trainor, 405 F. Supp. 802, 809 (N.D. Ill. 1975), *rev'd*, 551 F.2d 152 (7th Cir. 1977), *cert. granted*, 435 U.S. 904 (1978), *aff'd sub nom.* Quern v. Jordan, 440 U.S. 332 (1979).

192. Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977), *aff'd sub nom.* Quern v. Jordan, 440 U.S. 332 (1979). The court of appeals reasoned that such a notice purported to decide the issue of liability. *Id.* at 875.

The Supreme Court agreed with the court of appeals. The Court reasoned that this type of notice fell on the *Young* side of the eleventh amendment rather than on the *Edelman* side because state agencies, not federal courts, would make the determination of eligibility for past benefits.[193]

In *Green v. Mansour*[194] the Supreme Court refined the *Quern* rule and held that "notice relief" is available only if it is ancillary to an injunction.[195] In *Green* a plaintiff class brought an action against the Director of the Michigan Department of Social Services challenging state policies for determining eligibility for Aid to Families with Dependant Children (AFDC) benefits.[196] Congressional changes in the applicable federal statute mooted the request for an injunction, but the class continued to seek notice and declaratory relief.[197] The Court refused to allow notice relief without some other form of remedy, reasoning that because notice relief is not the type of remedy designed to prevent ongoing violations of federal law, the eleventh amendment prevents federal courts from ordering it as an independent form of relief.[198] The Court also refused to grant declaratory relief, reasoning that the usefulness of a declaratory judgment would be primarily in rendering the issue of liability res judicata in the state courts.[199] This effect would be prohibited by the eleventh amendment because the declaratory judgment would have much the same effect as a judgment for money damages.[200]

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193. *Quern*, 440 U.S. at 347-48.

194. 106 S. Ct. 423 (1985).

195. *Id.* at 423.

196. *Id.* The plaintiff class alleged that Michigan's method of calculating earned income under the AFDC program violated federal law. Michigan prohibited deductions for child care costs and required inclusion of stepparent's income. These dual inclusions raised a family's earned income, and thus lowered the amount the family received from the AFDC program. While the complaint was pending, Congress amended certain provisions of the AFDC laws to require states to implement dual inclusion programs. As a result the class's request for an injunction became moot. *See id.* at 424-25.

197. *Id.* at 423.

198. *Id.* at 427.

199. *Id.* at 428.

200. *Id.*; *see also* Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (holding that declaratory judgments unavailable to determine the constitutionality of state taxes even though federal statutes specifically prohibited only injunctions); Samuels v. Mackell, 401 U.S. 66 (1971) (holding that declaratory judgments rendering a state criminal statute unconstitutional unavailable if the declaratory judgment would have the same effect as an injunction prohibiting enforcement of the statute).

b. Legal Background of Common Law "Qualified Immunity"

Common law immunity is available to certain government officials for public policy reasons.[201] Courts recognize two types of common law immunity, qualified and absolute. Absolute immunity protects an official from suit for any act done in the course of performing his duties;[202] qualified immunity protects him only from those acts done in good faith.[203] Police officers,[204] legislators,[205] judges,[206] governors,[207] prosecutors,[208] officials in the executive branch of the state[209] and federal governments,[210] and the President of the United States[211] all enjoy some form of immunity from tort suits at common law. Often this immunity extends to suits based on violations of constitutional rights brought under Section 1983.

The Supreme Court first considered the application of common-law immunities to Section 1983 cases in *Tenney v. Brandhove*.[212] In *Tenney* the plaintiff alleged that members of a state legislative committee had conspired to deprive him of his constitutional rights by calling him before the committee in order to intimidate him into silence.[213] The court upheld the district court's dismissal of the complaint, reasoning that Congress in enacting the civil rights law could not have intended silently to abrogate the long-standing tradition of legislative immunity.[214] The Court stressed that legislators enjoy absolute immunity for acts done pursuant to office and noted that an allegation of "unworthy

201. These reasons include: (1) the injustice of holding an officer liable who is charged by law to exercise discretion; and (2) the danger that the threat of liability would damper the officer's desire to perform his duties zealously. Scheuer v. Rbodes, 416 U.S. 232, 240 (1974).

202. *See, e.g.*, Griffith v. Slinkard, 146 Ind. 117, 44 N.E. 1001 (1896) (dismissing a claim against a public prosecutor on immunity grounds even though the claim alleged malice).

203. *See, e.g., Scheuer*, 416 U.S. at 245 (noting that the common law never granted police officers immunity for acts done in bad faith).

204. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967).

205. *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367 (1951).

206. *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871).

207. *See, e.g.*, Scbeuer v. Rhodes, 416 U.S. 232 (1974).

208. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976).

209. *See, e.g., Scheuer*, 416 U.S. 232.

210. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

211. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731 (1982).

212. 341 U.S. 367 (1951). When *Tenney* was decided, § 1983 was codified as 48 U.S.C. § 43. *Tenney*, 341 U.S. at 369.

213. *Id.* at 371.

214. *Id.* at 376.

purpose" does not destroy the privilege.[215] Legislators, the Court reasoned, should not he subject to the hazard of a jury award based on "speculation as to motives."[216]

Officials in the executive branches of the state and federal governments do not enjoy the absolute immunity of legislators. In *Scheuer v. Rhodes*[217] the Supreme Court considered a claim of immunity by officers in the executive branch of state government. The Court refused to uphold the district court's automatic finding of immunity and remanded the case for a determination of the scope of the officials' discretion, the responsibility of their offices, and the circumstances surrounding the violation.[218] The Court reasoned that the more discretion and responsibility an official has, the more sympathetic a court should be to a claim of immunity. If the defendant demonstrates that the defense should be available, he still must prove that he acted in good faith.[219]

In *Harlow v. Fitzgerald*[220] the Court considered an issue similar to the one presented in *Scheuer*. In *Harlow*, however, the defendants were officials in the executive branch of the federal government. The Court noted that executive officials should be entitled to absolute immunity only if their "special function or constitutional status requires complete protection from suit."[221] Thus, legislators,[222] judges,[223] prosecutors,[224] and the President of the United States[225] enjoy absolute immunity. Most executive officials, however, enjoy only a qualified immunity.[226] The *Harlow* Court altered the good faith test enunciated in previous cases[227] and held that an executive official would be liable only if a plaintiff could show that the official's conduct violated "clearly established statutory or constitutional rights of which a reasonable person

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215. *Id.* at 377.
216. *Id.*
217. 416 U.S. 232 (1974).
218. *Id.* at 248-50.
219. *Id.* at 247.
220. 457 U.S. 800 (1982).
221. *Id.* at 807.
222. *See, e.g.*, Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975), *vacated sub nom.* National Peace Action Coalition v. Committee on Internal Security, 517 F.2d 825 (D.C. Cir. 1975).
223. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978).
224. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978), *aff'd after remand*, 633 F.2d 203 (2d Cir. 1980).
225. *See, e.g.*, Nixon v. Fitzgerald, 357 U.S. 731 (1982).
226. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).
227. *See, e.g.*, Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975).

would have known."[228]

Even though the facts in *Harlow* concerned federal officials, the decision's language is broad enough to apply to state officials. The Fourth Circuit has applied the *Harlow* rule to determine whether several high-level state officials could avail themselves of an immunity defense. In *Slakan v. Porter*[229] a prisoner brought an action against three guards and three high-ranking supervisory officials[230] and alleged that the defendants used force against him in violation of his eighth amendment rights.[231] The guards allegedly used high-pressure water hoses, billy clubs, and tear gas to subdue the prisoner while he was confined in a one-man cell.[232] The suit against the supervisory officials alleged that the officials either had been deliberately indifferent or had given "tacit authorization" for such practices.[233] The evidence against the supervisory officials showed that each was aware of seven prior incidents involving the use of water hoses to subdue inmates in one-man cells;[234] that they had constitutional and statutory obligations to protect the prisoners from inhumane treatment;[235] that the potential severity of injuries that could be inflicted by the water was unpredictable;[236] and that the volatile prison environment necessitated clear guidelines for personnel with direct responsibility for prison discipline.[237] The court rejected the supervisory officials' claim of qualified immunity, noting that *Harlow* denies immunity when a defendant violates a clearly established right of which a reasonable person would have been aware.[238] The court emphasized that neither subjective good faith nor lack of actual knowledge of their legal duties absolved the state officials of Section 1983 liability.[239]

The Supreme Court expressly has reserved the issue of whether a private entity can enjoy a common law qualified immunity.[240] Circuit courts addressing the issue have split.[241] Those

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228. *Harlow*, 457 U.S. at 818.
229. 737 F.2d 368 (4th Cir. 1984).
230. *Id.* at 370. These officials included the prison warden, the director of prisons, and the secretary of corrections. *Id.*
231. *Id.*
232. *Id.* at 371.
233. *Id.*
234. *Slakan*, 737 F.2d at 371, 376.
235. *Id.* at 376.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23 (1982). In *Lugar* the

courts allowing qualified immunity have done so primarily in cases in which the party asserting the immunity has relied on the constitutionality of a state attachment statute.[242] In *Jones v. Preuit & Mauldin*,[243] the Eleventh Circuit relied on the common law defense of good faith in an action for wrongful attachment and downplayed the notion that a private entity could derive immunity from its relationship with the state. Under *Jones* a defendant's immunity is not technically an immunity at all; the defendant merely carries over his common law good faith defense to a Section 1983 action. Functionally, however, there is little difference between the qualified immunity and good faith defenses.

The *Jones* court reasoned that defendants in Section 1983-based wrongful attachment proceedings should not be penalized for resorting to the courts to enforce rights which they in good faith believed they possessed.[244] Courts that would deny immunity to private entities have marshalled a variety of arguments in support of the denial of liability. One court argued that an extension of immunity would eviscerate the already fragile protection afforded by Section 1983.[245] The same court noted that private actors, unlike government officials, are not confronted with the need

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Court made the following comments in response to its concern that private individuals, acting under seemingly valid state laws, would be held responsible for their actions if a court subsequently held those laws unconstitutional:

> In our view . . ., this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture.

Id.

241. Courts allowing the defense include the Eleventh Circuit, *see* Jones v. Preuit & Mauldin, 808 F.2d 1435 (11th Cir. 1987) (holding that qualified immunity is available to a private entity that acts in good faith reliance on a statute that is not clearly unconstitutional), the Eighth Circuit, *see* Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983) (holding that private defendants are entitled to qualified immunity if they neither knew nor reasonably should have known that their actions violated clearly established constitutional rights), and the Fifth Circuit, *see* Folsom Inv. Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982) (holding that a private party who attempts to secure rights under a presumptively valid statute may establish a qualified immunity from monetary damages).

Courts refusing to allow the defense include the Ninth Circuit, *see* Howerton v. Gabica, 708 F.2d 380 (1983) (holding that private defendants are not entitled to good faith immunity under § 1983), and the First Circuit, *see* Downs v. Sawtelle, 574 F.2d 1 (1st Cir.) (holding that private parties acting in concert with state officials cannot avail themselves of a qualified immunity defense), *cert. denied*, 439 U.S. 910 (1978).

242. *See Jones*, 808 F.2d at 1440; *Buller*, 706 F.2d at 851.

243. 808 F.2d 1435 (11th Cir. 1987).

244. *Id.* at 1440.

245. *Downs*, 574 F.2d at 15.

to make split-second decisions without fear of liability.[246] Another court made the point that one rationale for giving state officials immunity—to encourage competent people to accept public employment—does not carry over into the private sector.[247]

Related to the question of whether a private entity may enjoy common law immunity is the question of whether the state may be liable[248] for the constitutional violations of private prison employees. If a state cannot delegate its responsibility to care for its prisoners, then the state will be liable for the constitutional wrongs of the private corrections personnel.[249]

Support for the proposition that a state has a nondelegable duty to provide for the safety of prisoners lies in the nature of the relationship between the prisoner and the state. An individual who is incarcerated under state laws arguably is entitled to the state's protection during the period of his incarceration. An expansive reading of the eighth amendment might also lead to a finding of non-delegability. Courts have suggested that states have an eighth amendment obligation to protect prisoners from violence by other inmates.[250] The Supreme Court's willingness to apply the eighth amendment standard to injuries inflicted by other inmates[251] suggests that the states have an obligation to ensure prisoners' safety that goes beyond responsibility for the actions of state officials.[252] How far this obligation extends will not be clear until the issue has been tested judicially.

IV. JURISDICTIONAL CONSTRAINTS: PROHIBITION OF FEDERAL ADJUDICATION OF PENDANT STATE LAW CLAIMS

In *Pennhurst State School and Hospital v. Halderman*[253] the Supreme Court addressed the issue of whether a federal court could adjudicate a pendant state law claim to determine if the con-

246. *Id.*

247. *Jones*, 808 F.2d at 1441; *see also Downs*, 574 F.2d at 15.

248. The State still may assert its sovereign immunity in state court and its eleventh amendment immunity in federal court. The state's common law immunity may be limited by a state tort claims acts specifically relinquishing such immunity.

249. *See supra* notes 3-6, 68-124 and accompanying text.

250. *See, e.g.*, Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980); Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 201 (8th Cir. 1974), *aff'd sub nom.* Hutto v. Finney, 437 U.S. 678 (1978).

251. *See* Davidson v. Cannon, 106 S. Ct. 668 (1986).

252. *Id.*

253. 465 U.S. 89 (1984).

duct of state officials complied with state law.[254] The Court held that adjudication of this type violated the eleventh amendment, even if the only relief sought was injunctive.[255] *Pennhurst* arose as a class action[256] suit for damages[257] and injunctive relief on behalf of residents and potential future residents of Pennhurst, a state institution for the care of the mentally retarded.[258] The named defendants included the school and several of its officials, the state department of public welfare and several of its officials, and certain county officials.[259] The claim alleged that conditions at Pennhurst violated the eighth and fourteenth amendments and specific federal and state statutes.[260]

The district court found that conditions at the school[261] violated the eighth and fourteenth amendments[262] and state[263] and federal[264] statutes. Based on these findings, the court ordered that the residents be removed from the school immediately and pro-

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254. *Id.*

255. *Id.* at 106.

256. *Id.* at 92. The plaintiff class consisted of all past or potential future residents of Pennhurst, the Pennsylvania Association for Retarded Citizens, and the United States. *Id.*

257. The district court found that the defendants were entitled to qualified immunity on the damage claim. *Id.* at 93 n.1.

258. *Id.* at 92.

259. *Id.*

260. *Id.* These statutes included the Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1982) [hereinafter Rehabilitation Act]; the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6081 [hereinafter Bill of Rights]; and the Pennsylvania Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (Purdon 1969 & Supp. 1983-84) [hereinafter MHMR Act].

261. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd in part, rev'd in part*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981), *prior judgment aff'd on remand*, 673 F.2d 647 (3d Cir. 1982), *rev'd*, 465 U.S. 89 (1984). The district court found that conditions at Pennhurst were dangerous to the residents because of frequent physical abuse and drugging of residents by staff members. The court also found that conditions were inadequate for habitation and that the "physical, intellectual and emotional health of many Pennhurst residents had deteriorated." *Pennhurst*, 446 F. Supp. at 1308-10.

262. *Pennhurst*, 446 F. Supp. at 1314-22. The eighth amendment violation stemmed from a rigbt to freedom from harm. Fourteenth amendment violations included deprivation of due process and equal protection. The district court found that plaintiffs had a right to nondiscriminatory habilitation and tbat if a state "undertakes habilitation of a retarded person, it must do so in the *least restrictive setting* consistent with that individual's habilitative needs." *Id.* at 1319 (emphasis added).

263. *Id.* at 1322. The court noted that the facility violated the MHMR Act, *see supra* note 260, because the residents had not been rendered "minimally adequate habilitation." *Pennhurst*, 446 F. Supp. at 1322.

264. *Id.* The federal statutory violation occurred under the Rehabilitation Act, *see supra* note 260; *Pennhurst*, 446 F. Supp. at 1323-24.

vided with suitable alternate living arrangements.[265] The court also appointed a special master with the power and responsibility to plan and implement the order.[266] On appeal, the Third Circuit affirmed.[267] The appellate court, however, based its decision solely on the state statute[268] and did not address the federal questions. The court rejected the defendant's assertion that the eleventh amendment barred the federal court's consideration of this pendant state law claim.[269]

The Supreme Court disagreed with the lower court's determination of the eleventh amendment issue and reversed.[270] Focusing on the need for the *Young* exception to insure state compliance with federal law, the Court concluded that the rationale of *Young* was inapplicable in a case alleging noncompliance with state law.[271] Because of the absence of the need to vindicate federal rights and insure state compliance with the supreme laws of the federal government,[272] the Court held that adjudication of the pendant state law claim violated the eleventh amendment.[273]

The Court also rejected the allegation that the state had waived its sovereign immunity.[274] While accepting the principle that a state may consent to be sued,[275] the Court required that consent be expressed unequivocally by the state.[276] The Court also acknowledged that Congress had the power to abrogate a state's

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265. *Pennhurst*, 446 F. Supp. at 1326-28.

266. *Id.*

267. Halderman v. Pennhurst State School & Hosp., 612 F.2d 84 (3d Cir. 1979) (en banc).

268. *Id.*; *see supra* note 260.

269. *Pennhurst*, 612 F.2d at 96. The court reasoned that under *Young*, the eleventh amendment did not bar federal injunctive relief against state officials based on federal claims. Thus, the same result would follow in a suit based on a pendant state law claims. For a discussion of *Young*, see *supra* notes 175-79 and accompanying text.

270. *Pennhurst*, 465 U.S. 89 (1984).

271. *Id.* at 106.

272. *Id.* at 105-06.

273. *Id.* at 106. The Court stated:

> This need to reconcile competing interests is wholly absent. . .when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retrospective, does not vindicate the supreme authority of federal law.

Id. (emphasis in original).

274. *Id.* at 103 n.12.

275. *Id.* at 99.

276. *Id.*; *see also* Edelman v. Jordan, 415 U.S. 651, 673 (1974). The Court consistently has held that a state's waiver of immunity in its own courts does not constitute a waiver of eleventh amendment immunity in federal court. *Pennhurst*, 465 U.S. at 99 n.9.

eleventh amendment immunity.[277] Such abrogation, however, only takes effect if Congress unequivocally expressed its intent to destroy immunity.[278] The Court pointed out that *Quern*[279] specifically held that Section 1983 does not implicitly override the state's eleventh amendment immunity.[280] The Court, therefore, found no waiver of the state's sovereign immunity, either by the state's express consent[281] or by Congress' override.[282]

V. Analysis of Legal Implications of Excessive Use of Force by Private Prison Employees

A. *Liability of the Corporation and Its Management Personnel*

An inmate can bring an excessive force claim against a private prison corporation and its personnel as a tort claim in state court or as a Section 1983 claim in federal court, possibly with a pendant state tort claim. Although the level of force required to establish liability for the tort claim is lower than for the constitutional claim, there are significant reasons for not bringing a tort claim in state court. These reasons include a perceived lack of sympathy for the litigant in state court, immunity in state court of any state defendants, and the possible *res judicata* effect of a state court tort claim decision on a potential Section 1983 claim.[283]

1. State Action

The threshold issue in a Section 1983 claim by private prison inmates alleging excessive use of force by corporate employees is whether that use of force can be characterized as state action.[284] The first issue in establishing state action is whether the type of activity in which a private entity engages is one that is normally considered a "traditional" state function.[285] In *Medina v. O'Neill*[286] a federal district court suggested that the detention of individuals pursuant to state law is a traditional state function. Under the

277. *Pennhurst*, 465 U.S. at 99; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
278. *Pennhurst*, 465 U.S. at 99; *see also* Quern v. Jordan, 440 U.S. 332, 342 (1979).
279. 440 U.S. 332 (1979).
280. *Pennhurst*, 465 U.S. at 99; *see Quern*, 440 U.S. at 342.
281. *Pennhurst*, 465 U.S. at 103 n.12. At the time that *Pennhurst* was filed, Pennsylvania consented to be sued only upon express authorization by the legislature. *Id.*
282. *Id.* at 103.
283. *See supra* notes 167-200 and accompanying text.
284. *See supra* notes 3-6 and accompanying text.
285. *See supra* notes 7-20 and accompanying text.
286. 589 F. Supp. 1028 (S.D. Tex. 1984).

public function test of *Marsh,* this finding alone satisfies the state action requirement. *Lloyd* and *Hudgens,* however, suggest that an entity must take on all, or almost all, of the functions of the state. Arguably, even though a private prison does not take on all of the functions of the state with respect to the population as a whole, it does take on all the functions of the state with respect to the prisoners.

The state-created monopoly theory may apply to the private prison corporation. Although historically reluctant to accept this theory of state action, the Supreme Court has remarked that it will be amenable to a finding of state action if the monopoly concerns state delegation to a private entity of a traditionally sovereign function.[287] State delegation of the power of detention to a private prison corporation is delegation to a private entity of a traditionally sovereign power.

The symbiosis or joint participant theory set forth in *Burton* also points to a finding of state action in the private prison context. In *Milonas*[288] the court extended the *Burton* theory to a private school that contracted with the state to provide detention services for troubled youths.[289] The similarities between a private prison corporation and a private detention center are many. Like the center in *Milonas,* a private prison would have a contract with the state, would be paid by the state, and would be regulated by the state.[290] A court applying the *Milonas* standard could easily find that the actions of a private prison constitute state action for the purposes of Section 1983 liability. The *Milonas* court suggested that the state aid/state regulation theory might have some validity.[291] The Court did not discuss whether these factors would be adequate to support a state action finding solely on the state aid/state regulation theory.

A private prison corporation potentially meets each state action test. A considered analysis leaves little room for anything but a finding that the actions of a private prison constitute state action. A prison corporation, therefore, should be required to act in

287. *See supra* notes 28, 54-56 and accompanying text. Although *Medina* involved a statutory duty of a federal agency, the discussion regarding the delegated power was cast in more general terms.

288. Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), *cert. denied,* 460 U.S. 1069 (1983); *see supra* notes 46-50 and accompanying text.

289. *See supra* notes 46-50 and accompanying text.

290. *Milonas,* 691 F.2d 931; *see supra* notes 46-50 and accompanying text.

291. *See supra* note 290.

conformity with the constitutional rights afforded prisoners in state prisons.

2. Constitutional Standard

In *Whitley v. Albers*[292] the Supreme Court established the standard for determining whether force used by prison personnel violates constitutional norms. The *Whitley* Court stated that when prison personnel use force to quell a disturbance, whether that force violates any constitutional right turns on the user's intent.[293] Good faith efforts to preserve discipline do not trigger Section 1983 liability, but malicious and sadistic attacks on prisoners do.[294] In making a determination of liability, a court also should consider the need for the application of force, the relationship between that need and the force actually used, the extent of the complaining prisoner's injuries, the extent of the threat that the disturbance presented to the staff and the inmates, and efforts by prison officials to lessen the severity of the use of force.[295] If a court determines that an official plan to use force did not violate the eighth amendment, the prisoners must show that the actual exercise of force by a guard pursuant to that plan violated the constitution.[296] *Whitley* also held that the fourteenth amendment provided no greater protection than the eighth amendment. Thus, if a prisoner fails to prove his case under the cruel and unusual punishment clause, he may not fall back on the due process clause.[297]

A corporation and its officials will be liable only if they "caused" the inmate to be deprived of his constitutional rights[298] such as when the corporation's official policy was a "moving force" behind the constitutional deprivation.[299] Corporate managers will be liable for excessive force used by subordinates if the managers directly contribute to the prisoner's injury,[300] set in motion a series of events that will probably result in a deprivation of rights,[301] are derivatively liable under state law for the acts of their subordi-

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292. 106 S. Ct. 1078 (1986).
293. *Id.* at 109; *see supra* note 109 and accompanying text.
294. *See supra* note 293.
295. *Whitley*, 106 S. Ct. at 1085; *see supra* notes 110-14 and accompanying text.
296. *See supra* note 19 and accompanying text.
297. *See supra* notes 122-24 and accompanying text.
298. *See supra* notes 132-34 and accompanying text.
299. *See supra* notes 137-45 and accompanying text.
300. *See supra* note 148 and accompanying text.
301. *See supra* notes 149-55 and accompanying text.

nates,[302] tacitly authorize the conduct which directly causes the harm,[303] or fail to perform legally required acts designed to prevent constitutional abuses.[304]

Neither a corporation nor its employees are entitled to eleventh amendment immunity.[305] The applicability of qualified immunity to private actors is not as clear. In circuits that grant immunity, the standards are not identical. In the Eleventh Circuit a defendant must show that he relied in good faith on a statute that is not clearly unconstitutional.[306] In the Eighth Circuit a defendant must show that he neither knew nor should have known that his actions violated clearly established constitutional rights.[307] The real uncertainty, however, lies in the circuits that do not usually allow private immunity. In circuits that have categorically denied an immunity defense to private actors, immunity may be available in the private prison context. The reasons for denying immunity to private actors generally are not as compelling in the private prison context. Courts have pointed out that private actors should not be able to assert immunity because an extension of immunity would eviscerate the already fragile protection afforded prisoners by Section 1983.[308] If immunity were extended to the private prison scenario, prisoners would have no less protection under Section 1983 than they enjoy now. Courts also have argued that immunity should not be extended because only government officials need to make split-second decisions without fear of liability.[309] This assertion, however, does not hold true in the context of a privately run prison. Finally, courts have asserted that immunity should not be extended because courts should not concern themselves with attracting personnel to the private sector.[310] Society is ill-served by a rule that frightens talent away from private enterprise. When private entities perform public functions, public policy mandates that personnel employed by those entities not live in fear of Section 1983 liability.

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302. *See supra* notes 156-60 and accompanying text.
303. *See supra* notes 161-66 and accompanying text.
304. *See supra* notes 165-66 and accompanying text.
305. *See supra* notes and 167-74 and accompanying text.
306. *See supra* notes 241-44 and accompanying text.
307. *See supra* note 241.
308. *See supra* note 245 and accompanying text.
309. *See supra* note 246 and accompanying text.
310. *See supra* note 249 and accompanying text.

3. Jurisdictional Constraints

Current law provides protection for the state from adjudication of Section 1983 claims for damages against the state in name or as the real party in interest.[311] Furthermore, *Pennhurst*[312] protects state officials from suit in federal court on pendant state tort claims. State officials also have the limited immunity provided by the qualified immunity doctrine.[313] Conversely, corporations have no eleventh amendment protections and no protection under *Pennhurst*. Corporations, therefore, are vulnerable to suit in federal court for a Section 1983 claim based on their participation in "state action." A suit stating a cause of action under Section 1983 and accompanied by a pendant state tort claim ultimately could be decided on the basis of the much lower common law tort standard unless legislative or judicial protection not presently in place is afforded the corporation. Currently, a corporation's only protection against a state tort claim in federal court is the possibility that the federal court will dismiss the state law question. In the state system, a private prison inmate could bring his state tort claim in state court and subject the corporation to common law tort liability under a comparably lower standard than would be required for a Section 1983 claim. State tort liability, however, could be limited by affirmative state action through either the legislature or the courts.

B. Liability of the State and Its Officials

A private prison inmate cannot bring a suit for damages against the state either in state or federal court[314] unless the state consents to be sued[315] or Congress expressly overrides the state's immunity.[316] Thus, the primary issue with regard to the state is whether its officials can be held liable for the acts of the corporate guard in a Section 1983 action on a direct liability theory. The answer to this question depends partially on whether the state has a nondelegable duty to protect prisoners. Although the nature of the state-prisoner relationship and the broad dictates of the eighth amendment arguably mandate a finding of nondelegability,[317] the

311. *See supra* notes 169-74 and accompanying text.
312. *See supra* notes 253-82 and accompanying text.
313. *See supra* notes 201-09 and accompanying text.
314. *See supra* notes 169-74 and accompanying text.
315. *See supra* notes 169, 274-76 and accompanying text.
316. *See supra* notes 277-78 and accompanying text.
317. *See supra* notes 250-52 and accompanying text.

question remains unresolved.

If the courts find that the state has a nondelegable responsibility for the safety of prisoners, state officials will be subject to suit under Section 1983 for excessive force by a corporate guard according to the *Whitley* standard. The state itself could be subject to suit for injunctive relief if the constitutional deprivation occurred because of the implementation of unconstitutional state standards or policies.[318] Relief in these cases would be limited to prospective injunctive[319] or notice relief.[320] If courts refuse to find a duty to protect prisoners, the state officials' liability will arise only from affirmative acts of those officials that directly cause the corporate prison guard to violate an inmate's right to be free of cruel and unusual punishment.[321]

C. A Proposal for Restrictions on Private Prison Liability

The entrance of private corporations into the field of prison management has led to serious consideration of legal methods by which a prison corporation might limit its liability. Exposure to the common law liability for the torts of assault and battery,[322] requiring only intentional and unpermitted contact or an apprehension of battery, would make nearly impossible the management of a prison, where discipline is critical to both the successful day-to-day operations and the safety of the prison population and staff.[323]

One solution to this problem lies in the restructuring of liability through contract provisions with the state. These contracts should provide that the state remains liable for all claims against the corporation resulting from corporate actions taken pursuant to state law or policy. The state would be in no worse position under this type of contract than if it ran the prison directly. The corporation would be able to defend itself against inmates' claims by argu-

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318. *See supra* notes 175-78 and accompanying text.

319. *See supra* notes 179-89 and accompanying text.

320. *See supra* notes 192-98 and accompanying text.

321. *See supra* note 148 and accompanying text.

322. *See supra* note 73 and accompanying text.

323. *See Johnson*, 481 F.2d at 1033. The court in *Johnson* made the following observation regarding the management of prisoners:

> The management by a few guards of large numhers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights.

Id.

ing that the state is the real party in interest[324] and that unless the state consented to suit,[325] the claim is barred both in state and federal courts. Contractual provisions for other less justifiable types of conduct by corporate employees and managers would be subject to public policy restraints and state reluctance to accept blanket responsibility for the corporate actions.

Deputizing corporate officials in order to give them the legal protections of the state[326] is another possible solution to the liability problem. This alternative would provide the corporation with the state's particular immunities from liability. However, both the interest of the corporation in maintaining its independence and the interest of the state in an arm's length relationship with its service providers may discourage the adoption of this solution.

A third alternative involves state and federal legislative action setting forth the express contours of state and corporate liability under the common law and Section 1983. Legislative delineation of legal duties could provide guidelines for determining which persons or entities will be liable and under what standards liability will be adjudged. Finally, a fourth possible solution to the prison corporation's exposure to unlimited liability could be brought about by a Supreme Court decision favoring qualified immunity for private entities that take on a high-risk traditional state function such as prison management.

VI. CONCLUSION

The private prison corporation's exposure to liability for the use of force against prison inmates is greater than the exposure of the state itself, even though both are engaged in the same prison management activity and deal with the same potentially volatile situations. The private prison corporation, though engaged in state action when it manages prisons, is not regarded as the state for purposes of eleventh amendment immunity. In addition, the corporation may not be able to assert a qualified immunity defense, which would protect the corporate management from liability for discretionary decisions made pursuant to established state policy or statute.

The exposure of the corporation to the low standards required in common law tort suits for assault and battery would seriously

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324. *See supra* note 171 and accompanying text.
325. *See supra* notes 275-76 and accompanying text.
326. *See supra* notes 167-239 and accompanying text.

undermine the authority of the prison corporation to use force when necessary to maintain or restore discipline. This authority is essential not only for management of prison disturbances, but also for the successful daily maintenance of a disciplined prison environment.

Some state legislatures will likely determine that private prisons are an acceptable solution to the problems in state prisons. If private prisons are to remain viable, however, courts and legislators must provide liability protection beyond that which the present law affords. Failure to do so may result in exposure to substantial liability, a serious disincentive to the proliferation of private correctional facilities.

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