

WHY DO PLAINTIFFS SUE PRIVATE PARTIES UNDER SECTION 1983?

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INTRODUCTION

The subject of this article is why people make federal cases, under section 1983,¹ out of claims they have against private parties. Section 1983 provides a cause of action against “any person” who, while acting “under color of” state law, subjects or causes the plaintiff to be subjected to a violation of federal constitutional or statutory rights. The requirement that the defendant act under color of law means that the typical section 1983 claim is brought against state and local government officials or entities, not against private individuals or entities. However, there are situations in which a private party (i.e. a party that is not a state or local government employee or entity) acts under color of law in a way that causes the plaintiff to be deprived of a federal right, allowing the private party to be sued under section 1983. While the color of law requirement is the most significant of the complications that section 1983 adds to litigation, there are others. For example, because section 1983 is a federal statute creating a federal claim largely against state officials, federalism concerns provoke courts to be very cautious about extending section 1983 into areas that are seen as better addressed by state law, such as the common law of torts.

Why, in light of these complications, would a plaintiff choose to sue a private defendant under section 1983 rather than under other law that is more clearly directed at private parties? While it might be tempting to answer this question by asking attorneys and litigants directly why they decided to bring their claims under section 1983, I have chosen to pursue the somewhat less direct path of looking at the incentives in the law for using section 1983. Assuming that litigants and their clients are behaving rationally, and that success in the litigation is measured by the amount of recovery (or by the value of a non-monetary remedy), the fact that claims are brought is a strong

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¹ 42 U.S.C. § 1983 (2000).

indication that the law provides incentives to bring them.²

Section 1983 has both procedural and substantive attractions. These attractions, which are discussed extensively in this paper, lead plaintiffs to take the risk that their claims ultimately will fail, as many section 1983 claims against private parties do. In order to understand why plaintiffs bring section 1983 claims against private parties, it is first necessary to understand why plaintiffs bring section 1983 claims against traditional state actors, such as state and local officials and entities. To that end, after Part I of this article explores some preliminaries regarding the role of section 1983 litigation against private defendants, Part II addresses the reasons that plaintiffs bring their claims against state and local government officials under section 1983 rather than (or in addition to) state law. Part III explores why plaintiffs invoke section 1983 against private defendants. It describes the different types of claims that plaintiffs typically bring against private defendants under section 1983 and analyzes why plaintiffs choose to bring each type of claim under section 1983 rather than under state law. Part IV concludes with some general observations about the prospects for success of section 1983 litigation against private defendants.

I. PUBLIC VALUES AND SECTION 1983 ALTERNATIVES

Preliminary to a full exploration of the reasons why litigants sue private defendants under section 1983, it is worthwhile to address the context within which this use of section 1983 occurs. This section looks at a pair of contextualizing issues: first, the potential of section 1983 litigation to inject public norms into otherwise private situations, especially those involving privatization; and second, the fate of another provision of the Civil Rights Act of 1871 (from which section 1983 is derived) that might have been a better source of claims against private defendants alleged to have violated or contributed to a violation of a plaintiff's federal constitutional rights, section 1985(3).

A. *Public Values and Section 1983*

Section 1983 litigation against private defendants brings legal norms developed with regard to the conduct of public institutions and

² This assumption may, of course, not always reflect reality. Parties may misjudge the benefits of litigating or may pursue litigation for reasons unrelated to the probability of prevailing on the merits and receiving a favorable judgment. In general, however, it is safe to assume that parties take the likelihood of prevailing on the merits into account when they decide whether and how intensively to pursue litigation.

officials into the private sphere. Norms such as due process and freedom of speech do not regularly apply against private parties, except perhaps where the parties have agreed to observe them through private contracts and other devices of private ordering. Insofar as section 1983 litigation subjects some private defendants to public norms, the domain of these norms will tend to increase, perhaps ultimately spilling over into private contexts that are not subject to section 1983 litigation. This is especially relevant in the privatization context, in which private parties (such as the operators of a private prison) may be subject to section 1983 liability because they perform a government function.

In an example that should be familiar to students of section 1983 litigation against private parties, a private doctor under contract to provide medical care to state prisoners is subject to section 1983 litigation over the adequacy of the medical care provided.³ The norms governing the government's obligation to provide medical care to incarcerated individuals under the Fifth, Eighth, and Fourteenth Amendments⁴ were developed with regard to state actors and are quite different from the norms that apply in medical malpractice litigation and other private care controversies. Section 1983 litigation against private doctors subjects ostensibly private persons to public norms.

This application of public norms to private conduct presents the possibility that such norms could become more broadly applicable to private parties much like a similar phenomenon that occurred in the area of anti-discrimination norms.⁵ Governments in the United States have long been subject to norms against racial discrimination. These norms seeped into the private sphere through executive orders that applied first to the employment practices of World War II-era defense contractors and then later to all government contractors. The original orders, issued by President Franklin D. Roosevelt, were strengthened by President John F. Kennedy.⁶ Given the volume of government contracting covered by these executive orders, the existence of these orders eased the way for the application of similar norms contained in the Civil Rights Act of 1964 to a much broader sphere of private employment practices. Today, the application of anti-discrimination law in the private employment context is a well-accepted feature of the law of the

³ *West v. Atkins*, 487 U.S. 42 (1988).

⁴ The Fifth and Fourteenth Amendments' due process clauses govern the rights of pre-trial detainees to adequate medical care. See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983). The Eighth Amendment governs the rights of post-conviction prisoners. See *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁵ For a fuller discussion of this point, with references, see Jack M. Beerman, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1730-34 (2002).

⁶ Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943); Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943); Exec Order No. 10,925, 2 C.F.R. 329 (1995).

United States.

It is of course pure speculation to suggest that section 1983 litigation against private defendants, based on constitutional norms such as due process, reasonableness in searches and seizures, freedom of speech and freedom from cruel and unusual punishment, might similarly pave the way for the application of such norms to private conduct generally. At a minimum, however, such litigation entails the application of public norms to that limited segment of the private sphere that satisfies “state action” and “under color of” requirements.

B. *Section 1983’s Alternative: Section 1985(3)*

Another preliminary issue worthy of discussion is our absent friend section 1985(3).⁷ A detailed explication of section 1985(3) is beyond the scope of this article, but a few observations are in order.⁸ Confronted with continued private racial violence directed at African-Americans and their friends and supporters, Congress included section 1985(3) in the 1871 Civil Rights Act. Section 1985(3) granted a damages action against private conspiracies to deprive “any person or class of persons of the equal protection of the laws, or of equal privileges and immunities of the laws.”⁹ Section 1985(3) was indisputably designed to apply to private conduct. It was directed at conspiracies of two or more “persons” and contained no “under color of law” requirement akin to that contained in section 1983. It also applied to persons who “go in disguise on the highway” which (as the Supreme Court only temporarily forgot) referred to a private organization, the Ku Klux Klan.¹⁰

Section 1985(3) has had very little effect for three separate reasons. First, although the Supreme Court now construes section 1985(3) to cover private conduct,¹¹ it allows for section 1985(3) liability against private defendants only when the defendants violate a constitutional

⁷ 42 U.S.C. § 1985(3) (2000).

⁸ For a more detailed look at section 1985(3), see Jack M. Beermann, *The Supreme Court’s Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199.

⁹ 42 U.S.C. § 1985(3)

¹⁰ The Court initially recognized that section 1985(3) was aimed at private conduct and for that reason held section 1985(3)’s criminal counterpart unconstitutional. *United States v. Harris*, 106 U.S. 629 (1883). Almost seventy years later, the Court held that section 1985(3) was not unconstitutional because it reached only state action. *See Collins v. Hardyman*, 341 U.S. 651 (1951). Then twenty years after that, the Court reverted to its initial understanding and held that section 1985(3) did, after all, reach private conduct, but only with regard to the narrow category of rights that were capable of being violated by private parties. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971).

¹¹ *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *see also supra* note 10.

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provision that applies to private conduct.¹² Second, the Forty-Second Congress failed to anticipate the state action doctrine, which restricts the application of most constitutional norms to state actors. Third, while the Forty-Second Congress may have anticipated that the citizenship and privileges and immunities provisions of the Fourteenth Amendment would create broad rights to federal protection against private interference with civil rights, the Supreme Court has read those provisions so narrowly as to render them virtually useless.¹³

Paradigmatic private conduct that the framers of section 1985(3) may have viewed as violations of that statute include violence and threats of violence designed to discourage African-Americans from asserting their legal rights against whites, and from voting, owning property, and engaging in business and other activities that would have been viewed as among the privileges and immunities of citizens of the United States. In fact, the values behind such litigation would have been viewed as public values, close cousins of the values underpinning section 1983.

In the absence of these restrictive decisions, section 1985(3) might have provided a viable remedy for many instances of private interference with Fourteenth Amendment and related rights. Had the Court read section 1985(3) and the Fourteenth Amendment (including the privileges and immunities clause) more broadly, difficult section 1983 cases against private parties might have presented more straightforward section 1985(3) claims. Alas, we will never know whether section 1985(3) could have provided a simpler alternative to the section 1983 action against private defendants, given how unlikely it is that the Court's jurisprudence on these two fronts will change in that direction.

II. WHY PLAINTIFFS USE SECTION 1983 AGAINST PUBLIC OFFICIALS

In order to evaluate why plaintiffs bring section 1983 claims against private defendants, it is helpful to look first at the general incentives for bringing claims against government defendants under section 1983 rather than under other, predominately state law, devices. These incentives are both procedural and substantive, although the

¹² See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993). The only constitutional rights that have been found to apply against private impairment are the right to travel and the right to be free from involuntary servitude. See *Griffin*, 403 U.S. at 104-06.

¹³ For a very interesting elaboration of the role the citizenship clause of the Fourteenth Amendment might have played in supporting Congress's power to legislate civil rights, see Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717 (2003).

division between the two categories is not completely clear. The major procedural incentives include: the availability of attorney's fees for prevailing plaintiffs; the ability to bring claims in federal court rather than in state court or in a state claims tribunal; a potentially longer statute of limitations; a potentially more generous measure of damages (including the possibility of punitive damages); and the inapplicability of various state procedural impediments, such as notice of claim requirements or mandatory pre-screening where inadequate medical care is alleged. There are also less significant procedural reasons why some cases are brought under section 1983. For example, some litigants, such as state prisoners, may feel more comfortable bringing federal claims against their state antagonists, or section 1983 may be one of numerous claims added to a complaint in which the litigant piles on all remotely available claims.

While procedural factors, especially the potential for an award of attorney's fees, are often very important to the decision to pursue section 1983 claims rather than state law remedies, in many cases the predominant attraction of section 1983 is substantive. The most fundamental substantive reason for seeking remedies under section 1983 is that there may be no liability under state law for much of the conduct that gives rise to section 1983 claims. State law also frequently grants immunities to defendants that are inapplicable in federal section 1983 cases. Better remedies, such as a more generous measure of damages and the possibility of punitive damages, may also be characterized as substantive rather than procedural because they directly implicate the value of the substantive claim. The remainder of this part elaborates on the principal procedural and substantive attractions of section 1983.

A. *Attorney's Fees*

Under the Civil Rights Attorney's Fees Awards Act of 1976 (Attorney's Fees Statute)¹⁴ prevailing plaintiffs in section 1983 cases are routinely awarded attorney's fees. On the whole, the Supreme Court has construed this statute to favor plaintiffs, providing a significant incentive to potential plaintiffs to bring section 1983 claims.

The Attorney's Fees Statute grants federal district courts discretion to award "reasonable" fees to the "prevailing party" in cases arising under enumerated civil rights statutes, including section 1983. Despite its neutral language, the Supreme Court has read the statute to mean that prevailing plaintiffs have a virtual entitlement to attorney's fees, while

¹⁴ 42 U.S.C. § 1988(b) (2000).

prevailing defendants are entitled to an award only in extreme cases of claims brought wholly without merit.¹⁵ The Court has also applied the statute liberally in cases in which plaintiffs prevail on only some of their claims, both as to whether they are considered “prevailing” for purposes of entitlement to any fee award and as to how billable hours are to be divided between claims on which the plaintiff prevailed and claims on which the defendant prevailed, for purposes of calculating the size of the award.¹⁶ The Court’s basic measure for determining the size of the award, the number of hours spent times a reasonable hourly fee,¹⁷ is also liberal in that it holds the potential for awards much higher than the traditional one-third contingent fee charged by attorneys in non-section 1983 injury cases. Although the fee award may be reduced if the size of the award is out of proportion to the degree of the plaintiff’s success, the Court has nevertheless approved awards that exceed the amount of the plaintiff’s damages recovery where the Court perceived that the litigation served public interests beyond the plaintiff’s personal interest in compensation.¹⁸

There have been some restrictive decisions regarding fees in civil rights cases, but not enough to significantly dampen the attractiveness of section 1983 to plaintiffs and, more importantly, their attorneys. In one notable recent restrictive decision, the Court firmly rejected the “catalyst” theory, under which the plaintiff was awarded attorney’s fees without a final judgment in his or her favor on the theory that the lawsuit contributed to the defendant’s decision to cease the challenged conduct.¹⁹ The Court held instead that only plaintiffs who prevail via a court judgment are entitled to fees as prevailing parties, even if the defendant would not have halted the illegal conduct without the filing of the lawsuit.²⁰ In a second restrictive decision, the Court held that a plaintiff who is awarded only nominal damages in a case in which substantial damages were requested is ordinarily not entitled to a fee award. The Court reasoned that, even though that plaintiff is technically a prevailing party, under that circumstance an award would not be “reasonable” as required by the Attorney’s Fees Statute.²¹ Finally, the Court has decided that settlement agreements waiving attorney’s fees are enforceable.²² This places the plaintiff’s attorney in the awkward position of being ethically required to transmit a settlement offer to his

¹⁵ See *Hensley v. Eckerhart*, 461 U.S. 424, 429 & n.2 (1983).

¹⁶ See *Tex. State Teachers v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989).

¹⁷ See *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

¹⁸ See *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

¹⁹ *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598 (2001).

²⁰ *Id.*

²¹ *Farrar v. Hobby*, 506 U.S. 103 (1992).

²² *Evans v. Jeff D.*, 475 U.S. 717 (1986).

or her client that is clearly against the attorney's own financial interests. This may make the attorney less willing to represent civil rights plaintiffs in the future.

While the availability of attorney's fees in section 1983 cases has been diminished somewhat by these rulings, fees still provide a strong incentive to use section 1983. In fact, it seems clear that sometimes section 1983 is added as a basis for relief merely to support a fee award even when relatively straightforward claims exist under other federal statutes or even state law.²³ In at least one case, the possibility of a fee award led the Supreme Court to decide that Congress intended to displace section 1983 liability with a more specific statute not providing for the award of attorney's fees.²⁴

B. *State Procedural Rules*

Inhospitable state procedural rules may also make section 1983 an attractive alternative to state law. One set of such state rules involves statutes of limitations and special procedures that apply in certain cases brought against the government. The Supreme Court has held, under a choice of law provision that was part of the Civil Rights Act of 1871,²⁵ that general state personal injury statutes of limitations govern section 1983 claims brought in federal court.²⁶ This period may, in many cases, be longer than the limitations period for suing government entities or

²³ A good example of this phenomenon involves cases in which a cellular telephone company sues a local government over the government's refusal to allow the telephone company to erect a cellular tower in a city or town. A provision of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (2000), creates federal rights in such cases. In addition to asserting their rights under the Telecommunications Act, plaintiffs have added section 1983 "and laws" claims against the local government on the basis that the local government and its officials violated the Act under color of law. See, e.g., *APT Minneapolis, Inc. v. City of Maplewood*, No. Civ. 97-2082 (Jrt/RLE), 1998 WL 634224 (D. Minn. Aug. 12, 1998) (allowing section 1983 claim and attorney's fees in cell tower case); *Sprint Spectrum v. Town of Easton*, 982 F. Supp. 47 (D. Mass. 1997) (same). Because section 1983 did not add anything substantive to the rights asserted by the plaintiffs in those cases, it appears that the only reason a section 1983 claim was pursued in addition to the rights arising under the Telecommunications Act was to secure attorney's fees. A co-author and I have expressed the view that attorney's fees should not be available in such cases because, among other reasons, the Telecommunications Act provides a complete remedy. See Clive B. Jacques & Jack M. Beermann, *Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. REV. 735 (2001). The two federal courts of appeals to address this issue agree that fees should not be awarded in such cases. See *PrimeCo Pers. Communications, Ltd. P'ship v. City of Mequon*, 352 F.3d 1147 (7th Cir. 2003); *Nextel Partners Inc. v. Kingston Tp.*, 286 F.3d 687 (3d Cir. 2002).

²⁴ See *Smith v. Robinson*, 462 U.S. 992 (1983). It appears that Congress disagreed with the Court's view. See 20 U.S.C. § 1415(i)(3)(1999), providing that the statute involved in *Smith v. Robinson* should not be read to foreclose relief under any federal law.

²⁵ 42 U.S.C. § 1988(a) (2000).

²⁶ *Wilson v. Garcia*, 471 U.S. 261 (1985).

officials under state law.

Section 1983 has a number of other procedural advantages. Under some state tort claims provisions, a claim against an official might be deemed a claim against the state and the only forum for such a claim may be a state claims tribunal such as a court of claims. By contrast, in most contexts, section 1983 provides for an immediate action in federal or state court without any requirement that alternate remedies be exhausted or pursued.²⁷ State notice of claim provisions, which require plaintiffs suing state and local government entities to provide advance notice of their claim and to wait a prescribed period for the government to try to resolve the claim, do not apply to section 1983 cases, including those brought in state court.²⁸ Section 1983 claims involving medical care while in state custody do not have to be presented to a medical review panel, as some states require for malpractice claims.²⁹ This ability to go directly to court means that a section 1983 plaintiff can take immediate advantage of liberal discovery rules and other favorable procedures that apply in court but might not apply in an agency or claims tribunal.

Although some section 1983 plaintiffs bring their claims in state court, many others choose federal court. Some plaintiffs may not trust state courts and might view federal court as their only chance for a fair shake, especially when their claims are against government entities and officials. These plaintiffs may use supplemental jurisdiction to bring both state and federal claims in federal court, even if their strongest substantive claims arise under state law.³⁰ The reasons for preferring federal court go back to the parity debate, and involve a perception that federal courts are of higher quality and are likely to be more sympathetic to federal claims than state courts.³¹

It should not be surprising that federal courts may be more sympathetic to plaintiffs with federal section 1983 claims than state courts. State judges are part of the same political community whose actions or laws are being challenged by federal law. Federal judges may develop a more national perspective. Their detachment from the state political system, together with the structural protections of independence they enjoy under the Federal Constitution, make them more likely than state courts to recognize federal claims against state

²⁷ *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982).

²⁸ *Felder v. Casey*, 487 U.S. 131 (1988).

²⁹ For example, in Indiana, “under Indiana’s Medical Malpractice Act, a medical malpractice action may not be brought against a health care provider until the claimant’s proposed complaint has been filed with the Department of Insurance and an opinion has been issued by a medical review panel.” *Mayfield v. Cont’l Rehab. Hosp. of Terre Haute*, 690 N.E.2d 738, 740 (Ind. App. 1998) (citing Ind. Code §§ 27-12-7-1, 27-12-8-4).

³⁰ See 28 U.S.C. § 1367 (2000).

³¹ See Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988).

and local government.

C. *Substantive Reasons for Choosing Section 1983*

While it is broadly recognized that procedural factors provide significant incentives to bring claims under section 1983, substantive factors may be an equally important incentive. Simply put, there are many situations in which plaintiffs have no alternative to section 1983 because state law does not provide a realistic avenue of relief. For example, in many section 1983 cases, the plaintiff argues that official action of state or local officials or entities is unconstitutional. While all state constitutions contain provisions that parallel those of the Federal Constitution, both theory and experience suggest that state courts are not likely to take the lead in declaring state policy or the actions of state officials unconstitutional.

The simplest cases that illustrate this point involve situations in which state law immunizes tortious conduct by government officials. In such cases, plaintiffs may choose to bring section 1983 claims because these immunities make recovery under state law impossible. Although state immunities do not apply in section 1983 cases, it may be difficult to make out a section 1983 claim on the merits when the essence of the claim is a state law tort. In one example, a state prisoner made a federal case out of a simple personal injury claim when state law immunized the prison guards whose careless conduct led to his injuries.³² In another example, a victim of tortious conduct by an Ohio police officer who was pursuing a suspect brought her claim under section 1983 because an Ohio statute immunized local governments and local police and fire officials from damages caused by negligence during emergencies.³³ The victim in that case had no state law alternative to section 1983. These immunities and others like them mean that the plaintiff will receive no compensation for injuries caused by the conduct of the government entities or officials unless a federal claim is successful. It should be noted, however, that because the due process

³² See *Daniels v. Williams*, 474 U.S. 327 (1986).

³³ See Ohio R.C. § 2744.02(B)(1)(a) (2004). I participated in the litigation of a section 1983 case challenging this statute as applied to an innocent bystander whose automobile was destroyed by the negligent conduct of a city police officer. The plaintiff was left without a remedy under state law, so a claim was brought under section 1983. The effort was unsuccessful as both the district court and the court of appeals upheld the statute. See *Dworkin v. City of Columbus*, No. C-2-94-1217 (D. Ohio 1997). In fact, the court of appeals found the case so easy, it affirmed from the bench and did not issue an opinion in the case. *Dworkin v. City of Columbus*, 162 F.3d 1161 (6th Cir. 1998) (tbl). I am still amazed that state law can authorize a local government to negligently destroy a private citizen's property without violating any federal guarantee, such as the takings or due process clauses.

clause has been construed not to apply to negligent conduct, it is very difficult to prevail on a federal claim in these circumstances.³⁴

Section 1983 may also be an attractive alternative to state remedies limited by caps on compensatory and punitive damages. Damages caps are common in claims against government entities. Although complete governmental and charitable immunities were pulled back throughout the United States in the second half of the twentieth century, many states replaced complete immunity with liability limitations. For example, Massachusetts has a \$100,000 limit on municipal liability and a total bar against punitive damages in personal injury cases against government entities, including those against municipalities.³⁵ In contrast, section 1983 damages provide for complete compensation and are not limited by state law. Of course, the difficulty of making out a claim remains, but adding a section 1983 claim to a state tort claim that is limited by a damages cap may present at least a glimmer of hope that damages in excess of the cap might be recovered. In states that have legislatively limited punitive damages, the limitations will not apply to federal section 1983 claims, although section 1983 itself does not allow punitive damages against municipalities.³⁶

More fundamentally, many provisions of federal law that are enforceable through section 1983 suits may have no state law analog. For example, consider the First Amendment rights asserted in the *Brentwood Academy* case that Michael Wells discusses in his article for this symposium.³⁷ There, a school claimed that an interscholastic athletic organization's rule restricting recruiting contacts with prospective student athletes violated free speech rights under the First and Fourteenth Amendments. In such a case, there simply may be no colorable state law claim available which means that a constitutionally-based section 1983 claim is the plaintiff's only realistic choice. The likelihood that no state law claim exists is greatest when state law itself is alleged to violate the Federal Constitution, but it also exists when state official conduct unguided by state law is alleged to be

³⁴ In the Ohio case discussed above, an effort was made to convince the court to focus on the immunity rather than on the negligent conduct of the officer. This was based on a suggestion in an article I published on the subject, that immunities violate the Takings Clause insofar as they result in property loss or damage without compensation in circumstances under which damages would be recoverable against a non-governmental tortfeasor. See Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277 (1988). The district judge held that insofar as the immunity precluded recovery, the victim was not truly the owner of the property. This seems to me to be a radical reorientation of property law under which the state can statutorily eliminate property rights without paying compensation.

³⁵ See M.G.L.A. c. 258 § 2 (2002).

³⁶ See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

³⁷ Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 CARDOZO L. REV. 99 (2004).

unconstitutional. In the former situation, it is very unlikely that a state court would hold that a party has violated state law by following state law, and such cases present the most obvious need for section 1983. However, there are innumerable instances of official conduct that may violate the Federal Constitution but would not give rise to any claim at all under state law.

Of course, there is always the possibility that state courts could develop state constitutional norms under their own constitutions and provide relief. State constitutions all have provisions that recognize rights similar, if not identical, to the rights contained in the Federal Constitution, and some state courts recognize greater rights than those recognized by federal law. In many situations, however, the state constitution at best parallels the Federal Constitution, and the possibility that the state constitution has been violated seems frequently not even to be considered.³⁸ In my view, this is because state courts are oriented to support the state, not to constrain state action. While state courts do sometimes recognize state law rights against state action, a plaintiff who has a choice could rationally conclude that his or her chances are better in federal court under federal law than in state court, particularly given the history of civil rights litigation.

III. COMPARATIVE INCENTIVES IN PRIVATE SECTION 1983 LITIGATION

In this part I compare the incentives for section 1983 litigation against private parties with the incentives for bringing section 1983 litigation against government officials and entities (as discussed in Part II, *supra*). I describe the different types of section 1983 cases that are brought against private parties, and then discuss the incentives for using section 1983, rather than state law, in each type of case.

A. *Self-help*

One category of section 1983 cases brought against private defendants arises out of self-help actions, like evictions, repossessions and warehouse sales.³⁹ In these situations, state law establishes the

³⁸ For example, in *Moorman v. Wood*, 504 F. Supp. 467 (E.D. Ky. 1980), residents of Covington, Kentucky claimed that a Kentucky statutory procedure for detaching areas from one city and annexing them to another violated their federal constitutional rights. The local government context of the case suggests that the state courts might be expected to develop their own norms pursuant to the state constitution. However, there is no evidence from the opinion in the case that anyone even considered that the statutory procedure might violate the state constitution even if it did not violate the Federal Constitution.

³⁹ See, e.g., *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).

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procedures under which the private party acts, and the usual claim is that the procedure for carrying out the auction, repossession or other action violates due process. Typical claims attack the procedure as written in state law, but sometimes the claim is directed more specifically at the particular procedure employed, because either state law does not cover the issue involved or because the defendant departed from state law in some respect. The fact that a private defendant was engaged in self-help pursuant to a finely wrought procedure spelled out in state law is not enough to establish that the defendant acted “under color of” state law as required by section 1983. Rather, the state must actively participate, for example by police assistance in an eviction or by state officials conducting the sale of warehoused goods.

Why would a plaintiff try to bring a claim against a private actor involved in self-help (as understood in this category) under section 1983? The best explanation is that state law is unlikely to be favorable to the plaintiff, especially in those cases where the plaintiff alleges that the state law violates due process and that the defendant followed state law to the letter. It is very unlikely, if not unheard of, for a state court to award damages against a defendant who followed state statutory law. The statute would presumably provide a defense to any state tort claim arising out of the defendants’ conduct. The plaintiff might have a contract claim if the defendant’s actions were contrary to something in a contract between the parties, but in most of the cases in this category, any contract is likely to be a standard form with terms favorable to the landlord or repossessioning party.

A subcategory of cases related to the self-help cases (and straddling the government function category discussed in Part III.B, *infra*) involve private police and private security guards, which for convenience I will refer to as “private police.”⁴⁰ Many establishments, including retail stores, restaurants, health care facilities, hotels, apartment buildings, entertainment venues, and schools employ private police to monitor the behavior of people using the premises. When a large establishment, such as a shopping mall, housing development, or university employs a substantial number of private police, the group may resemble a police force. In some cases, these private police forces are granted actual police powers by local authorities.

Individuals bringing claims against private police generally allege that they were detained, harassed, physically abused, or otherwise injured by private police. Specific allegations include arrest and detention without sufficient cause, racial profiling, or harassment and discrimination against minorities in stores, assault and battery in

⁴⁰ For examples of cases in this category, see *Chapman v. Higbee Co.*, 319 F.3d 825 (6th Cir. 2003); *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975); *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 559 (8th Cir. 1989).

physical altercations with private police, and various additional possibilities. Such claims can give rise to section 1983 litigation when the private police act under color of law, for example by acting jointly with local police, by exercising police powers granted by statute or by the local police, and when private security is provided by off-duty police in their official uniforms.

State tort law is likely to provide remedies for many injuries inflicted by private police. Claims such as false arrest, false imprisonment, assault and battery, and intentional infliction of emotional distress may be available under state law for many of the situations in which plaintiffs choose to sue private police. On the other hand, there are also cases in which state law is not readily available. For example, if private police are involved in suppressing speech and assembly, the only apparent option for suit may be a constitutionally-based section 1983 claim.

The reasons for bringing claims involving private police under section 1983 mirror the reasons in other situations. Attorney's fees and the ability to litigate in federal court are likely to be big attractions. The nature of these claims may, however, make the monetary remedies available under section 1983 attractive. Cases involving excessive force, false arrest and race-based harassment, for example, are likely to present good claims for substantial compensatory and possible punitive damages under section 1983. While section 1983 damages are supposed to reflect the same sorts of injuries protected by tort remedies, it seems that damages also are available under section 1983 for the deprivation of a right, as long as damages are not awarded for the abstract importance of the right to our legal system.⁴¹ For example, the Court has approved damages for the deprivation of the right to vote even though the actual value of such a right is difficult to determine.⁴² Constitutional claims may add value to a case simply by providing an additional compensable injury—the denial of a right.

The possibility of receiving punitive damages also makes section 1983 attractive. While the Supreme Court has recently held that punitive damages of more than nine times compensatory damages are very likely to violate due process limits on permissible remedies in civil cases,⁴³ some states have limited punitive damages even more severely.⁴⁴ Punitive damages under section 1983, however, are not

⁴¹ See *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299 (1986).

⁴² See *Nixon v. Herndon*, 273 U.S. 536 (1927) (cited with approval in *Memphis Cmty. Sch. Dist.*, 477 U.S. at 312 n.14).

⁴³ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

⁴⁴ The Supreme Court, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 n.6 (2001), citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 614-19 (1996) (Ginsburg, J. dissenting), noted Justice Ginsburg's earlier enumeration of many states that had passed punitive damages reform legislation and noted that in the intervening five years, four more

subject to state law limits. For example, while North Carolina limits punitive damages to \$250,000 or three times compensatory damages, whichever is larger,⁴⁵ a plaintiff with a claim for compensatory damages worth more than approximately \$30,000 might be eligible to a larger punitive award under section 1983 than under North Carolina state law.

B. *Privatization*

Another category of cases in which private defendants act under color of law and thus are subject to section 1983 liability is that of privatization of government functions.⁴⁶ These cases involve the private operation of prisons, the contracting out of various services (such as medical care) within prisons, the private operation of public schools, private security services in public buildings, and private welfare benefits and service providers. In some cases in this category, such as those involving private prison operators finding action under color of law is relatively easy. Other types of cases are less simple, but examples do arise in which plaintiffs claim that defendants in this category have denied their federal rights under color of law.

Why would plaintiffs bringing cases in this category pursue federal section 1983 litigation rather than or in addition to the claims available to them under state law? Other factors may be at work besides the availability of federal court jurisdiction, liberal compensatory and punitive damages measures, and attorney's fees. When a state assigns a public function to a private party, it may also extend public immunities and procedures to such defendants. While states are free to create immunities and special procedures in litigation under state law, they cannot immunize their own officials or entities from section 1983 liability and cannot create procedural barriers to section 1983 litigation. There are also situations in this category in which the existence of state substantive law to redress injuries suffered at the hands of private defendants may be unclear, and federal law enforced via section 1983 may be the only, or at least the most clearly, available remedy. In some cases, such as claims involving medical care provided to incarcerated persons, procedural and substantive barriers to state medical malpractice litigation may make section 1983 liability an attractive alternative or addition.

Are there reasons for bringing these claims under section 1983 that

states had passed statutes limiting punitive damages.

⁴⁵ N.C. Gen. Stat. § 1D-25 (2003). This limit was upheld as constitutional under the North Carolina constitution in *Rhyne v. K-Mart Corp.*, 562 S.E.2d 82 (N.C. App. 2002).

⁴⁶ For more on privatization and public values, see Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507 (2001) and Beermann, *supra* note 5.

differ from the reasons why persons incarcerated in publicly run prisons would bring section 1983 claims? There are two relevant potential differences. First, it may be easier to impose liability on an entity running a prison when the prison is private than when the prison is public. All state agencies are protected by sovereign immunity and thus can never be sued under section 1983, in state or federal court, without their consent.⁴⁷ Local governments are not immune but can only be held liable under the Supreme Court's "municipal liability" test,⁴⁸ a strict standard of causation and culpability under which vicarious liability is not allowed.⁴⁹ Some lower federal courts have applied the Court's limits on municipal liability to private entities,⁵⁰ but the Supreme Court has never done so. Further, there are Supreme Court section 1983 decisions holding private entities liable without reference to the municipal liability test.⁵¹ In those cases, the Court may assume that normal common law vicarious liability standards should govern private entity liability, just as the Court has applied common law doctrines to fill gaps in section 1983 in other contexts.⁵² If the law ultimately settles this way, it will be much easier to hold private entities liable than it is to hold government entities liable.

Second, the Supreme Court has decided that private section 1983 defendants are not entitled to the qualified immunity that applies in section 1983 litigation against government employees.⁵³ It seems odd that a private person acting under color of law may be easier to sue than a public official. After all, the primary focus of the drafters of section 1983 focus was the conduct of public officials. The Supreme Court has, however, left open the possibility that private section 1983 defendants are entitled to a different good faith defense, and as we have seen in

⁴⁷ There are two related doctrinal bases for this. First, federal court section 1983 cases against states were prevented by the Court's ruling that states and state agencies are immune from liability under the Court's Eleventh Amendment jurisprudence. *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that a state has Eleventh Amendment immunity from section 1983 suit in federal court). Second, section 1983 litigation against states in state court was eliminated by the Court's holding that states and state agencies are not persons under section 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989) (concluding that a state is not a "person" under section 1983 and thus may not be sued under section 1983 in any court).

⁴⁸ The standard for municipal liability is usually referred to as a requirement that a municipal policy or custom be the cause of the violation. As I have explained elsewhere, this is no longer an accurate description of the legal standard. Under current law, a municipality may be held liable either based on a policy or custom or a determination that a stringent standard of causation and culpability has been met. For an elaboration of this view, see Jack M. Beermann, *Municipal Responsibility for Constitutional Torts*, 48 DEPAUL L. REV. 627-68 (1999).

⁴⁹ *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

⁵⁰ *See Iskander v. Vill. of Forest Park*, 690 F.2d 126, 128-29 (7th Cir. 1982).

⁵¹ *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

⁵² *See, e.g., Smith v. Wade*, 461 U.S. 30 (1983) (referring to common law to construct standard for punitive damages under § 1983).

⁵³ *See Richardson v. McKnight*, 521 U.S. 399 (1997).

Sheldon Nahmod's paper in this symposium,⁵⁴ the lower federal courts have recognized such a defense.⁵⁵ If this immunity mirrors that enjoyed by government officials, then the lack of official immunities for private defendants will obviously not matter.

Even if there are some differences between section 1983 litigation against public defendants and that against private defendants, why do plaintiffs choose section 1983 and not state law claims in cases against private defendants engaged in privatization? Here again, in addition to attorney's fees, federal court jurisdiction and remedies, substantive law may play a large part in making section 1983 attractive to plaintiffs. Claims involving procedural due process, First Amendment freedoms and other claims directed at private defendants may not have clear state law equivalents. State law may not, for example, subject privately employed public school teachers and administrators, welfare caseworkers, or prison administrators to the same restraints to which they are subjected by federal constitutional law, and section 1983 may be the best or only available method of asserting claims deriving from these restraints. In the case of a privately employed (or even publicly employed) prison doctor, the denial of needed medical care may not present a viable claim under state tort law. Normally, medical malpractice involves mistakes in medical care, not simple failure to provide care. Section 1983 may provide substantial damages for the failure of a doctor under contract with the state to provide constitutionally adequate care to a plaintiff in government, or government-authorized, custody.

Plaintiffs may also have procedural reasons for preferring section 1983 litigation. As noted above, there are procedural impediments to asserting medical malpractice claims in many state courts, such as case screening by a medical panel, that do not apply to section 1983 litigation.⁵⁶ Further, state law might apply the same procedures in suits

⁵⁴ Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 *CARDOZO L. REV.* 81 (2004).

⁵⁵ Extended commentary on immunities for private section 1983 defendants is beyond the scope of this paper. I must state, however, that it seems completely inconsistent with the historical and policy bases of the section 1983 immunities to extend any sort of immunity to private defendants. The immunities are based on a common law tradition of immunity and the public interest in the performance of public officials. There is no corresponding history or public interest regarding the conduct of private individuals. If private individuals violate constitutional rights under color of law, the courts have no basis for creating a defense to liability, whether it is the qualified immunity that government defendants receive or some new similar good faith defense. Courts recognizing a good faith defense for private section 1983 defendants may be concerned with fairness to the private defendant who does not realize that his or her conduct may transgress constitutional limits. In response to this concern, it is important to note that the nature of the conduct that gives rise to private defendant section 1983 liability is such that the private actors should realize that there is a risk of some kind of liability. Most cases arise in contexts involving obvious conflict where litigation should not be surprising.

⁵⁶ *See supra* note 29.

against private entities performing state functions that apply in suits against the states, including short periods of limitation and notice of claims requirements. Section 1983, in contrast, provides a relatively long limitations period, the general personal injury period of the forum state,⁵⁷ and notice of claim provisions do not apply in section 1983 litigation.⁵⁸ In general, section 1983 provides a simple, easy, and direct route to court.

C. *Public Function*

Another category of cases that may give rise to section 1983 litigation against private parties falls under the rubric of “public function” or “government function.” These cases are those in which a private party has allegedly violated the Constitution in the course of performing an *exclusively* public or governmental function. The reasoning underlying these cases is that a private party who engages in a function that is exclusively governmental should be subject to constitutional restraints on governmental power. There are two categories of potentially successful public function cases: cases in which the exercise of private property rights is challenged under a constitutional norm and cases involving privately administered elections, such as party primaries. In truth, there is not very much to the first category. The reasons plaintiffs bring section 1983 claims against private parties in these categories are largely, if not exclusively, substantive.⁵⁹

Cases applying the public function doctrine to the exercise of private property rights are few and far between, and it is unclear if the doctrine would still be so applied without entanglement between the private property owner and the government. While Justice Black’s opinion in *Marsh v. Alabama*,⁶⁰ a case in which the Supreme Court held that a state could not criminalize the distribution of religious literature in a privately owned company town, makes no mention of the public

⁵⁷ *Wilson v. Garcia*, 471 U.S. 261 (1985).

⁵⁸ *Felder v. Casey*, 487 U.S. 131 (1988).

⁵⁹ While many of the cases discussed in this section allege constitutional violations, those which arose before section 1983 was revived in the early 1960s may not have been brought under section 1983. In some of the opinions, no mention is made of the basis for the plaintiff’s suit. Federal courts of the time may have taken for granted that a claim of unconstitutional conduct was available under general federal question jurisdiction and not paid much attention to the finer points of the statutory basis for the claim. The absence of any explicit mention of section 1983 does not affect the analysis here, because the reasons for bringing a federal constitutional claim track those for preferring section 1983 to a state law claim. Any case in which state action was found could have been brought under section 1983, and likely would be today.

⁶⁰ 326 U.S. 501 (1946).

function doctrine, it was later characterized as relying on that doctrine.⁶¹ *Marsh* is instead a straightforward appraisal of the need to limit private power to curtail the civil liberties of the inhabitants of company towns. *Marsh* was later severely limited by a series of cases in which the Court held that privately owned shopping centers were not state actors and therefore were not required to respect First Amendment freedoms.⁶²

In the only other surviving Supreme Court application of the public function doctrine to private property, a park had been entrusted to a city under the will of a segregationist Senator. The Court held that the city could not avoid its duty to end segregation in the publicly administered park by resigning as trustee to make way for the appointment of a private trustee.⁶³ The Court ostensibly relied on the public function doctrine, but in my view it was not the abstract notion that administration of a park in a city is an exclusively governmental function but the “momentum [the park] acquired as a public facility”⁶⁴ after years of public administration, coupled with indications that the city had continued to maintain it even after the appointment of a private trustee, that led to the Court’s holding. After the Court’s decision, the Georgia courts ruled that the Senator’s trust had failed because he would not have created a trust for an integrated park. The Supreme Court upheld the reversion of the park to the Senator’s heirs, finding that the Georgia courts had applied settled law in a racially neutral way.⁶⁵

The second area in which the public function doctrine has been used to find state action involves privately conducted elections, such as party primaries. The Supreme Court has consistently relied on the notion that conducting a primary election is a government function to find state action in order to subject those conducting the elections to constitutional norms.⁶⁶ Thus ended racially discriminatory primary elections.

In the private property public function cases, the primary reason for invoking constitutional norms (via section 1983 or any other vehicle) is substantive. State property law clearly conflicts with federal constitutional norms. The only way that constitutional rights will be recognized on private property (like the free speech rights at issue in the company town and shopping center cases) is if the property owner is held to be a state actor. It is otherwise very rare for state law to recognize rights analogous to First Amendment speech rights on private

⁶¹ See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974); see also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 499 (2d ed. 2002).

⁶² See *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁶³ *Evans v. Newton*, 382 U.S. 296 (1966).

⁶⁴ *Id.* at 301.

⁶⁵ *Evans v. Abney*, 396 U.S. 435 (1970).

⁶⁶ See *Smith v. Allwright*, 321 U.S. 649 (1944).

property, except for the owner's own First Amendment right to control speech on the property.⁶⁷ Making out a federal case may entail procedural advantages as well, but a potential plaintiff really has no choice between federal and state law. In these cases, it is federal law or nothing.

The reasons for making federal constitutional cases over racial exclusion in primary elections are similarly substantive. The first of these cases, which hit the Supreme Court in 1927, involved a Texas state statute which prohibited blacks from voting in the Democratic party primary, leaving the plaintiffs with no real alternative to a federal claim.⁶⁸ In 1935, after another failed attempt by Texas to officially exclude blacks from voting in the Democratic primary, the state handed control over voter qualifications to the Democratic party itself,⁶⁹ an arrangement upheld for lack of a state actor.⁷⁰ That arrangement lasted nine years until, in 1944, the Supreme Court held that the Democratic Party was engaged in a public function when it conducted its primary election, and that it was unconstitutional for it to exclude blacks from voting.⁷¹ This doctrine was reaffirmed and applied expansively in 1953 in another case from Texas.⁷² Texas law likely did not prohibit racial exclusion from primary elections at that time. Even if it had progressed to that point in the 25 years after the U.S. Supreme Court struck down *de jure* discrimination in state-run primaries, the federal forum probably appeared much more hospitable to the challenge to privately held discriminatory primaries than the Texas state court system.

Further examples of attempts to use the public function doctrine are mainly in the area of education.⁷³ The Supreme Court has refused to extend the public function doctrine to include either the provision of education or the regulation of interscholastic athletic competition, except in cases in which the governmental and private entities are entangled to such an extent that they appear to be acting jointly, a

⁶⁷ Some states may be more liberal in applying free speech norms to private entities under a public function type rationale. For example, the Massachusetts Civil Rights Act requires some private entities to respect free speech rights in circumstances similar to what might exist under a broad reading of the public function doctrine. See Mass. Gen. L. ch. 12, §§ 11H—I (1986); *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888 (1st Cir. 1988).

⁶⁸ See *Nixon v. Herndon*, 273 U.S. 536 (1927) (striking down white primary).

⁶⁹ *Grovey v. Townsend*, 295 U.S. 45 (1935).

⁷⁰ *Id.* at 45-55.

⁷¹ *Smith v. Allwright*, 321 U.S. 649 (1944).

⁷² *Terry v. Adams*, 345 U.S. 461 (1953).

⁷³ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), held that the public function doctrine did not make a state actor out of a private school that received almost all of its income from government payments to educate special needs students who could not be handled by the public schools. The plaintiff was a teacher who alleged that she was fired in retaliation for constitutionally protected speech. The Court also rejected an entanglement argument, that the school was so entangled with the state that it was a state actor.

situation discussed in the following section.⁷⁴ The reasons behind the attempt to expand the public function doctrine in this way seem substantive—there is no clear private law analog to the free speech and due process rights asserted against the private entities in these cases.

In sum, substantive considerations are the primary motivation for employing the public function doctrine to transform private parties into state actors for constitutional purposes, because the only realistic substantive claims that plaintiffs have in these situations appear to be federal constitutional claims involving free speech or due process.

D. *Joint Action, Entanglement, and Conspiracy Cases*

The final category of private defendant section 1983 cases addressed in this article are joint action, entanglement, and conspiracy cases. This category captures a disparate group of situations including cases in which public and private parties work together to perpetuate unconstitutional conduct; cases in which public and private parties actively conspire to deprive people of their constitutional rights; and cases involving private entities that are so entangled with government that they are considered to be state actors acting under color of law for Fourteenth Amendment and section 1983 purposes.

The most well known joint action case is *Adickes v. S.H. Kress & Co.*⁷⁵ In *Adickes*, the operators of a private department store allegedly worked jointly with the police to maintain racial segregation at the store's lunch counter. Merely calling the police to enforce the law is not sufficient to turn the private party into a state actor. Rather, there must be joint action so that the police and the private party are working together in a common plan.⁷⁶ The reason for suing under section 1983 in this case seems pretty clearly related to substantive law. During the 1960s when the case was brought, state law was very unlikely to provide a remedy against segregation in restaurants. In many places, such segregation was a strong custom and may have even been legally required.⁷⁷ Even if segregation was illegal by the late 1960s, it seems

⁷⁴ Compare *Nat'l Collegiate Athletic Ass'n. v. Tarkanian*, 488 U.S. 179 (1988) with *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001). In *Tarkanian* the Court held that the National Collegiate Athletic Association was not a state actor, partly on the ground that the regulation of intercollegiate athletics is not a purely government function. In *Brentwood Academy*, however, where eighty-four percent of the members of the state association were public schools and the public schools had a very strong influence on the rules applied by the private association, the Court found state action.

⁷⁵ 398 U.S. 144 (1970).

⁷⁶ See *id.*; *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975); *Barrett v. Harwood*, 189 F.3d 297, 304 (2d Cir. 1999).

⁷⁷ For example, in Birmingham, Alabama, people were repeatedly arrested for violating local law that required segregation in all facilities open to the public. After Major League Baseball

unlikely that a state judge applying state law would have been very aggressive in providing remedies to victims of unlawful racial segregation.

Joint action among state officials and private defendants is also the basis for finding action under color of law in the self-help cases involving repossessions, evictions, and warehouse sales. Such action is under color of law only when government officials take an active role in the defendant's conduct. Racial discrimination has also been behind some efforts to base section 1983 cases on private entanglement with the state. In one case, private owners of a restaurant on publicly owned property were held to be state actors when they refused to serve blacks.⁷⁸ In a contrasting case, a private club was held not to be a state actor merely because it held a state-granted liquor license.⁷⁹ And in a due process claim over termination of service, an electric company was held not to be a state actor despite its state-granted monopoly and extensive state regulation.⁸⁰ In all of these cases, the underlying merits of the claims, rather than any perceived procedural advantage to section 1983 litigation, were behind the choice to bring suit under section 1983.⁸¹ In the race cases, state law would not have provided a basis for relief against the alleged discrimination. In the electricity termination case, the utility presumably followed the procedures required by state law before terminating the service, and the plaintiff's only hope for relief was based on federal due process norms. It would be unusual for state law to condemn itself as unlawful.

Other joint action cases involve the eviction and related cases discussed above in the self-help section and also cases involving private security guards in stores, shopping centers, residential apartment buildings, businesses, and even university police. If the private police are granted police powers under state law, it is very likely that they act under color of law in all their official actions. If, however, they are purely private employees, then a finding of action under color of law depends on active government involvement in the activity. For example, private security guards do not act under color of law simply by

became integrated, this requirement prevented Major League exhibition games from being played in Birmingham, because the league would not play to a segregated audience. See DIANE McWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* 84-86 (2001).

⁷⁸ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁷⁹ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

⁸⁰ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

⁸¹ It is actually not clear from the opinion that section 1983 was the basis of *Burton*, but if it were brought today, it would be, since the constitutional issue was raised offensively by the plaintiff rather than as a defense to some other action by the defendant. Section 1983 has become the primary device for asserting constitutional claims against state and local officials (and private entities alleged to be acting under color of law).

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detaining a shoplifter and then calling police.⁸² However, if the police participate in the investigation and detention along with the private guards, then the private guards may be acting under color of law.

In the joint action cases involving private police, section 1983 has both substantive and procedural advantages to state law alternatives. In cases concerning police involvement in evictions and related self-help activities, using section 1983 to seek damages and declare the state law unconstitutional may provide the only substantive possibility since the participants may follow state law to a letter. In shoplifting and other arrest situations, procedural factors, including attorney's fees, availability of a federal forum, and a long statute of limitations, may predominate (or at least be very important) because state law torts such as malicious prosecution and false arrest present alternatives to section 1983 litigation.

In my view, the private police and the athletic regulation cases illustrate that the joint action theory is a more promising theory than the public function doctrine for finding state action and action under color of law. Private police are ubiquitous, and any holding that policing is an exclusively public function would have far reaching implications for many institutions. It is only when the private police engage in joint activity with public police that they are held to act under color of law. The same is true with regard to regulation by voluntary associations, such as athletic boards. The difference between the NCAA in *Tarkanian* and the Tennessee High School board in *Brentwood Academy* was not the function they performed but the degree of state involvement in the regulatory process.⁸³ This reasoning could be extended to additional private entities, such as engineering associations, that promulgate building or traffic standards followed by governmental members—they are only state actors if the regulatory process is dominated by or heavily intertwined with state actors. In these cases, the substantive attraction of due process and free speech norms, rather than any procedural advantage, explains why section 1983 is used to challenge the decisions of such entities.

Another class of joint action cases involve conspiracies among private parties and government officials to violate constitutional rights. These cases tend to arise in criminal justice contexts. Convicted and sometimes exonerated criminals sue over alleged conspiracies among judges, prosecutors, police, defense attorneys, and witnesses to wrongfully prosecute and convict.⁸⁴ Private defendants, including

⁸² See *Youngblood v. Hy-Vee Food Stores*, 266 F.3d 851, 855 (8th Cir. 2001); *White v. Scrivner Corp.*, 594 F.2d 140, 143 (5th Cir. 1979).

⁸³ See *supra* note 74.

⁸⁴ *Tower v. Glover*, 467 U.S. 914 (1984). It sometimes appears that convicted criminals and criminal defendants are paranoid and sue everyone involved in their arrest and conviction. Given

defense attorneys and witnesses, act under color of law when they take part in such conspiracies. Here, there may be overlapping state remedies for malicious prosecution and such, but state law norms may not be identical to the constitutional restraints on such conspiracies. In any case, the prospects for prevailing in this type of litigation are very small: judges, witnesses, and prosecutors, while engaged in the prosecutorial aspects of the case, are absolutely immune from damages; other state officials, such as police officers and prosecutors engaged in investigation, have qualified immunity; and private defense attorneys and public defenders may be entitled to the good faith immunity that some courts have recognized for private section 1983 defendants.⁸⁵ It may be difficult to win using a good faith defense if a conspiracy to unjustly imprison the plaintiff is proven, but there are additional hurdles before any damages or injunctions would be awarded. First, section 1983 may not be used to procure release from state confinement—habeas corpus is the exclusive federal remedy for that.⁸⁶ Second, section 1983 damages are available only after the plaintiff has prevailed in the criminal proceedings,⁸⁷ a requirement stemming from the common law of malicious prosecution (and so likely to apply to state claims as well as section 1983 claims). That said, if all of the requirements are met, plaintiffs suing over wrongful convictions and prosecutions are likely to be powerfully attracted to section 1983's promise of attorney's fees, federal jurisdiction, and damages unlimited by state law restrictions. Favorable federal substantive law may also play a role in the decision to add a federal claim, and such plaintiffs are likely to raise both state and federal claims.⁸⁸

In sum, a combination of procedural and substantive factors explain why plaintiffs bring section 1983 claims against private defendants in the joint action, entanglement, and conspiracy contexts. In all these cases, however, substance appears to dominate over procedure because many of these types of section 1983 suits are brought

the number of exonerations of wrongfully convicted persons in recent years, including persons on death row, some of these section 1983 plaintiffs may be right, that everyone is after them for no good reason.

⁸⁵ See *supra* notes 54-55 and accompanying text.

⁸⁶ See *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

⁸⁷ See *Heck v. Humphrey*, 512 U.S. 477 (1994).

⁸⁸ The relationship between the common law tort of malicious prosecution and constitutional law is somewhat unclear. Some have argued that all malicious prosecution committed under color of law automatically violates the United States Constitution. A plurality Supreme Court opinion, in *Albright v. Oliver*, 510 U.S. 266, 270 n.4 (1994), observed that the lower courts are divided on this question, but the Court did not answer the question in that case. Rather, in *Albright*, the Court merely held that malicious prosecution does not necessarily violate substantive due process. This does not mean that malicious prosecution does not violate some other constitutional provision such as procedural due process or the Fourth Amendment. For a recent, extended discussion of the relationship between malicious prosecution and the Constitution, see *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc).

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when there is no well-established state tort law analog to the federal rights allegedly violated by the putative state acting private entity.

CONCLUSION: PROSPECTS FOR SUCCESS IN SECTION 1983 LITIGATION
AGAINST PRIVATE DEFENDANTS

The volume of section 1983 litigation against private defendants is substantial enough for there to have been significant doctrinal developments in the area, largely concerning state action and immunities for private defendants. Are the prospects for success in such litigation great enough to justify the volume of litigation? In general, plaintiffs should be less likely to prevail in section 1983 cases against private defendants than in cases against state officials because of the additional possibility of losing due to a finding of no state action or no action under color of law. In private entity cases that do get past the state action/under color of law hurdle, the plaintiff's prospects for success should mirror his or her prospects in state official litigation unless other issues turn out to be different in cases brought against private defendants.

The question of why plaintiffs sue private defendants under section 1983 cannot be answered by comparing litigation against public officials with that against private parties. Rather, the real issue is whether a plaintiff's prospects are better under section 1983 than under the alternatives, whether they be suits in tort, contract, or perhaps brought according to a state law claims process. Assuming that the decisions leading up to filing suit are rational, and taking both procedure and substance into account, then the simple fact that the cases are brought under section 1983 should be a strong indication that section 1983 presents a plaintiff's best choice.

In many cases, plaintiffs are likely to combine section 1983 claims with other claims. As long as the section 1983 claim is not frivolous (and thus unlikely to provoke a penalty from the court) it is relatively cheap to add to a set of other claims. The payoff from adding the section 1983 claim may be great, including the availability of federal jurisdiction and the possibility of an award of attorney's fees. So even if the most likely victorious claim is not the section 1983 claim, it should not be surprising that section 1983 claims are included in complaints stating multiple claims, and that resources are expended on litigating them.

In the categories of cases in which section 1983 provides the only realistic substantive claim on the merits, it is of course more likely to be successful than any alternatives. Further, if the plaintiff has missed a state filing deadline either under a statute of limitations or a notice of

claim provision, section 1983 may be the only realistic possibility left at the time of filing. Other procedural factors, such as the inapplicability of procedural impediments to filing medical malpractice claims, may make section 1983 preferable to state law alternatives.

Whether section 1983 is preferable to alternative claims brought against private defendants does not address whether section 1983 litigation against private defendants is very likely to be successful as an absolute matter. On one level, if success is highly unlikely, it would be difficult to explain why so many claims are filed. If it turns out that all defendants in such cases enjoy some sort of good faith immunity, and if private entities are protected by an analog to the *Monell* rule that protects municipalities, then the prospects for damages recovery against private defendants will be greatly reduced. These possibilities, combined with a relatively strict state action/under color of law requirement, would make it likely that good section 1983 claims against private actors would be few and far between. In the face of such long odds, continued section 1983 litigation against private defendants may indicate a symbolic use of litigation, in which public interest oriented litigants or lawyers use the legal system to pursue normative goals. In particular, litigants may be making a point relating to private use of state power, that when constitutional values are threatened by private actors, they ought to be subject to the same constraints as public actors. What is important are the constitutional values at stake, not the identity of the party threatening them.