

Private Actor Liability Under 42 U.S.C. § 1983 –  
All The Risks Without The Armor?

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## **Private Party Liability under 42 U.S.C. § 1983**

We in the business of defending law enforcement are abundantly familiar with governmental actor liability under 42 U.S.C §1983. Less understood is the risk private entities and persons face under the act when they engage in quasi-governmental activities.

### **I. Foundations of Potential Liability**

In the wake of ever-expanding governmental activities and involvement in public and private affairs, and the increasingly intertwining of public and private actors, private entities stand at the brink of a marked increase in claims under 42 U.S.C §1983. Those claims bring risks that private individuals and organizations must recognize and be ready to combat.

Derived from the Civil Rights Act of 1871, 42 U.S.C. § 1983 (the “Act”) imposes civil liability, including legal and equitable remedies, on one

“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 to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws....”

The Act "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights elsewhere conferred. . . ." Baker v. McCollan, 443 U.S. 144, n. 3 (1979). In essence, the Act provides citizens a means of confronting violations of their federal rights when those violations occurred as

a result of the behavior of actors at the state level. Prior to the Act, citizens had no means of enforcing federal protections violated by state actors or their private collaborators. The early history of the Act, accordingly, primarily involved challenges to state actors' deprivation of federal rights through segregationist behavior.

Private actor liability must, like public actor liability, deprive a plaintiff of a right "secured by the Constitution and laws" of the United States. Significantly, such federal protections run far beyond traditional constitutional protections as most commonly embodied in the Bill of Rights and the Fourteenth Amendment. They encompass a vast network of federal protections sprinkled throughout the United States Code. It is in this labyrinth of protections that much of the potential private liability under the Act lurks, coiled and ready to strike.

Causing a deprivation, however, only leads to liability for private actors when they act within the ambit of state authority. The second element of a liability claim under the Act requires a showing that the actor deprived the plaintiff of one these federal protections "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." The "under color of law" element is the last and most formidable line of defense for a private actor in a claims under the Act. The issue, then, is when do private actors cease acting in a private mode and commence working while cloaked with the authority of the state?

While generally not applicable to private parties, to act “under color” of law does not require that the accused be an officer of the state; it is enough that he is a willful participant in joint activity with the state or its agents. Dennis v. Sparks, 449 U.S. 24, 29 (1980). In determining if a private party acted under color of law, courts generally start with the presumption that private conduct does not constitute governmental action. Sutton v. Providence St. Joseph Medical Center, 192 F.3d 826, 835 (9<sup>th</sup> Cir. 1999); see also Price v. Hawaii, 939 F.2d 702, 707-08 (9<sup>th</sup> Cir. 1991). “§ 1983 excludes from its reach private conduct, no matter how discriminatory or wrong.” Sutton, 192 F.3d at 835. Action taken by private individuals may be “under color of state law” only where there is “significant” state involvement in the action. Howerton v. Gabica, 708 F.2d 380, 382, (9<sup>th</sup> Cir. 1983).

The Ninth Circuit recognizes at least four different criteria or tests to evaluate whether a private actor has engaged in “significant” state action: (1) public function, (2) joint action, (3) compulsion or coercion, and (4) governmental nexus. Kirtley v. Rainey, 326 F.3d 1088, 1092; *see also* Sutton, 192 F.3d at 835-36; Johnson v. Knowles, 113 F.3d 1114, 118, (9<sup>th</sup> Cir. 1996); Howerton, 708 F.2d at 382-83. In Brunette v. Humane Society of Ventura County, 294 F.3d 1205 (9<sup>th</sup> Cir. 2002), the court potentially expanded those criteria by applying what it called the symbiotic relationship test.

Satisfaction of any one of the tests is sufficient to find state action by a private actor. Lee v. Katz, 276 F.3d 550, at 554 (9<sup>th</sup> Cir. 2002). The Ninth Circuit also stressed that although it has recognized these tests to determine where state action lies, the central question still remains whether the alleged infringement of federal rights is fairly attributable to the government. Kirtley, 326 F.3d at 1096.

**A. Public Function Test.**

Private activity becomes a “public function” only if that action has been “traditionally the exclusive prerogative of the state.” Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). If private actors hold elections, govern a town, or serve as an international peacekeeping force, they have been held responsible as state actors. Brunette, 294 F.3d at 1214. On the other hand, if private actors educate “maladjusted” youth, or resolve credit disputes, they have not been held to perform an exclusive prerogative of the state, and thus, are not responsible as state actors. Id. The public function test is satisfied only on a showing that the function at issue is “both traditionally and exclusively governmental.” Kirtley, 326 F.3d at 1093.

**B. Joint Action Test.**

To be engaged in joint action, a private party must be a “willful participant” with the state or its agents in an activity which deprives others of constitutional rights. Dennis, 449 U.S. at 27. A private party is liable under this

theory, however, only if its particular actions are “inextricably intertwined” with those of the government. Brunette, 294 F.3d at 1211. Substantial cooperation between the private party and the state must be shown. Mathis v. Pac. Gas & Elec. Co., 75 F.3d 498, 503 (9<sup>th</sup> Cir. 1996). An agreement between government and a private party for some governmental-type action can create state action. Johnson, 113 F.3d at 1119.

“Joint action” or “substantial cooperation” can also be shown where a conspiracy can be established between the private party and the state. *See*, United Steelworkers of America v. Phelps Dodge Corporation, 865 F.2d 1539, 1546-47 (9<sup>th</sup> Cir. 1989). To prove a conspiracy, the plaintiff must show an agreement or “meeting of the minds” to violate constitutional rights. Id. at 1540-41. To be liable, each participant in the conspiracy need not know the details of the plan, but each participant must at the very least share the common objective of the conspiracy. Id. at 1541. Evidence that police failed to exercise independent judgment will support an inference of conspiracy with a private party. Id.

### **C. Compulsion/Coercion Test.**

State action may be found under the state compulsion test where the state has “exercised coercive power or has provided such significant encouragement, either overt or covert, that the [private actor’s] choice must in law be deemed to be that of the state.” Johnson, 113 F.3d at 1119, (*quoting* Blum v. Yaretsky, 457

U.S. 991, 1004, (1982)). A plaintiff must establish that a state regulation or custom having the force of law “compelled, coerced, or encouraged” the defendant to discriminate against the plaintiff. Johnson, 113 F.3d at 1119. However, acting under lawful or legitimate law does not convert a private individual’s actions into state action. Id.

**D. Nexus Test.**

The nexus test asks whether “there is such a close nexus between the state and the challenged action that the seemingly private behavior may be fairly treated as that of the state itself.” Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288, 295 (2001) *see also* Jackson v. Metropolitan Edison, Co., 419 U.S. 345, 351, (1974). The Ninth circuit admits that this test is the vaguest of its approaches. Kirtley, 326 F.3d at 1094.

**E. Symbiotic Relationship Test.**

The symbiotic relationship test is a derivative of the joint action test and asks whether the government has “so far insinuated itself into a position of interdependence (with the private entity) that it must be recognized as a joint participant in the challenged activity.” Brunette, 294 F.3d at 1213, (*quoting* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)). Substantial coordination and integration between the private party and the government are the essence of a symbiotic relationship. Id. A significant financial integration may form the nexus of a symbiotic relationship. Rendell-Baker, 457 U.S. at

842-43. A symbiotic relationship may also arise from of the government's exercise of control over the private party's actions. Brunette, 294 F.3d at 1213.

These tests, a klatch of ambiguity, appear to be purposefully so. "While these factors are helpful in determining the significance of state involvement, there is no specific formula for defining state action." Sutton, 192 F.3d at 836 (*quoting*, Howerton, 708, F.2d at 383.) The inquiry into whether a private person is subject to § 1983 liability is, accordingly, a maddeningly a fact-bound one. Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982). "Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed its true significance." Howerton, 708 F.2d at 383, (*quoting*, Burton, 365 U.S. at 722). In other words, courts have tremendous discretion in applying the criterion to the peril of private actors.

## **II. EXAMPLES OF PRIVATE PARTIES HELD TO BE LIABLE UNDER 42 U.S.C. § 1983**

### **A. Off-duty police officers.**

- In Rossignol v. Vooraar, 316 F.3d 516 (4<sup>th</sup> Cir. 2003), off-duty sheriffs deputies, the sheriff and a political candidate were held to have acted under color of state law when they interfered with a newspaper publisher's First Amendment rights by conspiring and carrying out a plan to buy all newspapers in the community because they were critical of the sheriff, deputies, and the political candidate. The conspiracy was

partially planned while officers were on-duty and the officers were recognized as “police” during their late night newspaper buying spree.

- In Memphis v. City of Memphis, 361 F.3d 898 (2004), the court found evidence that supported a conspiracy between a private employer, the city police officers, and a private security company that hired the off-duty officers to violate the civil rights of the employer’s striking workers. The employer, the city, the off-duty officers and the security company were subject to liability under § 1983.

**B. Conspiracy with the courts.**

- In Dennis v. Sparks, 449 U.S. 24 (1980), the Court found that although the judge involved in an alleged conspiracy had absolute immunity from suit, the other participants in the conspiracy could be subject to § 1983 liability and the judge would be required to testify in the action. In Dennis, the plaintiffs were enjoined from the production of oil by an illegally issued injunction. The court held that the other participants in the conspiracy to issue the illegal injunction, other than the judge, were subject to liability under § 1983 – “there but for the grace of God . . .,” the court may have uttered.
- In DuBose v. Kelly, 187 F.3d 999 (8<sup>th</sup> Cir. 1999), the court held that private attorneys who conspired with the court to deprive a client of his due process rights could be held liable under § 1983. The attorneys

and a state court judge “fixed” a legal malpractice case by the plaintiff against his previous legal counsel, and broke the seal on private § 1983 liability.

**C. Private businesses operating in state owned facilities.**

- In Lee v. Katz, 276 F.3d 550 (9<sup>th</sup> Cir. 2002), a private lessee of a public outdoor area owned by the city was held to be performing a “public function” by regulating free speech activities on a portion of the property that was open to public speech and thus was subject to suit under § 1983.
- In Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), the Court held that the refusal of a restaurant located in a public parking garage to serve minorities constituted state action. The Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. Further, the Court concluded that the state profited from the restaurant’s discriminatory conduct.

**D. Press/media coverage of a search and seizure with law enforcement officers.**

- In Berger v. Hanlon, 129 F.3d 505 (9<sup>th</sup> Cir. 1997), *vacated and remanded by* 526 U.S. 808 (1999), *judgment reinstated by* 188 F.3d 1155 (9<sup>th</sup> Cir. 1999), Cable News Network (CNN) was held to have acted

together with the United States Fish & Wildlife Service (USFWS) in executing a criminal search warrant. CNN and an assistant U.S. Attorney entered into a letter of agreement to allow CNN to film the execution of the search warrant. The court found that CNN was inextricably involved with both the planning and execution of the search and thus subject to § 1983 liability. On the other hand, in Brunette v. Humane Society of Ventura County, 294 F.3d 1205 (9<sup>th</sup> Cir. 2002), the court found that mere videotaping and photographing by the media during a search and seizure on invitation by the government agency was not a public function and the newspaper was not subject to liability under § 1983.

**E. Private contract doctors for county mental health facility.**

- In Jensen v. Lane County, 222 F.3d 570 (9<sup>th</sup> Cir. 2000) a private physician to the county was held to be a state actor and subject to § 1983 liability because of the contract services he provided to a county owned and operated mental health treatment facility. The court found that the physician and the other county employees involved had undertaken a complex and deeply intertwined process of evaluating and detaining individuals believed to be mentally ill and of a danger, which process led to the alleged deprivation. However, in Blum v. Yaretsky, 457 U.S. 991 (1982) the Court found no state action where

private nursing homes, which were heavily regulated and licensed, and received significant state funding, downgraded the care of patients. The decision in Blum turned on medical judgments made by private parties according to professional standards not established by the state.

**F. Private detoxification facility interacting with law enforcement officials.**

- In Anaya v. Crossroads Managed Care Systems, 195 F.3d 584 (10<sup>th</sup> Cir. 1999), the court found factual issues as to whether the private operator of a detoxification facility was a state actor and subject to liability under § 1983. The issue was whether the operators of the detoxification center directly participated in creation of a city policy that resulted in the detention of individuals without probable cause. The board for the facility was closely associated with members of the city police department, including the chief of police.

**G. Private operators of prison facilities.**

- In Rosborough v. Management & Training Corp., 350 F.3d 459 (5<sup>th</sup> Cir. 2003), a private prison management corporation and its employees were deemed to perform a public function and as such could be sued under § 1983.

**H. Private non-profit state wide athletic association working on behalf of public schools.**

- In Brentwood Academy v. Tennessee Secondary School Athletic Assoc., 531 U.S. 288 (2001), the Court found that a private not-for-profit corporation organized to regulate interscholastic sports among both public and private high schools had acted under color of state law when it imposed sanctions on the plaintiff's athletic activities. The Court found a pervasive entwinement of the state school officials and the private athletic association.

**I. Eviction by private landlord.**

- In Howerton v. Gabica, 708 F.2d 380 (9<sup>th</sup> Cir. 1983), a private landlord was held to have acted under color of state law when she (with police aid) used self-help to evict tenants without providing proper notice and a prior judicial hearing. The police officer was not only used for serving the eviction notice and utility shut-off notice by request of the landlord but also returned later to warn the tenants not to make trouble. The police officer involved was also a tenant of the landlord.

**J. Private party's involvement with defective state statute for seizure of property for debt owed.**

- In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), a private party creditor's joint participation with state officials in the seizure of property under a statutory scheme that was procedurally defective under the Due Process Clause and created a valid cause of action under

§1983 for the plaintiff debtor. The Court leaves open whether or not the private party would have some immunity or defense to action taken subject to law.

**K. Conspiracy between corporation and law enforcement officers to deprive striking union workers of their constitutional rights.**

- In United Steelworkers of America v. Phelps Dodge Corporation, 865 F.2d 1539 (9<sup>th</sup> Cir. 1989), a corporation that wielded significant power particularly with local law enforcement in a small mining town was held subject to liability under § 1983 as a joint conspirator along with local law enforcement against striking union workers. The court determined that the corporation had been instrumental in a decision to issue warrants for striking workers and then to set excessive bail. Strike breakers, hired by the corporation, who had also been involved in the incidents received lesser charges and lower bail levels.

It is clear that a myriad of private party involvement with government actors or organizations can lead to liability for the nongovernmental organization under the Act. The risk of such liability varies greatly depending upon the nature of the task being performed, the degree of governmental involvement and/or supervision, whether the project is funded by governmental dollars, and the nature of the government-style impact the action has on the citizenry.

**III. THE RAMIFICATIONS FOR PRIVATE ACTORS.**

Unfortunately for unsuspecting parties, the Act packs a wallop. Private entities without significant knowledge of governmental liability in general, and more precisely potential liability under the Act, will likely be unaware of the substantial risks presented by such a claim. Risks include punitive damages and attorney fees, not readily available against private parties in most states.

Private defendants will also be required to defend on their own dime, unlike governmental actors with public support for defense costs.

### **III. The role of traditional defenses in private party § 1983 actions.**

Experienced practitioners are well aware of the unique defenses and strategies that accompany the defense of a civil rights action against a government actor – foremost qualified immunity for individuals and the strict requirements of *Monell* for their employing jurisdictions. Whether similar defenses exist for private actors is far murkier.

A private person who is sued under 42 U.S.C. § 1983 is not entitled to the same qualified immunity as the government official. While the Supreme Court has addressed this issue, it arguably has not given the lower courts much direction. Although some of the circuits in limited circumstances recognize qualified immunity for private parties subject to liability under 42 U.S.C. § 1983, the Ninth Circuit generally does not.

**A. Qualified immunity for individual private actors.**

While it has blazed a trail for private actor liability under the Act, the Supreme Court has not clearly answered whether a private person could invoke the qualified immunity defense. *See, e.g., Lugar v Edmondson Oil Co.*, 457 U.S. 922, n. 23 (1982); *Wyatt v. Cole*, 504 U.S. 158 (1992); *Richardson v. McKnight*, 521 U.S. 399 (1997).

The U.S. Supreme Court has addressed qualified immunity for private actors on several occasions, but without much useful direction for future litigants. In *Wyatt v. Cole*, 504 U.S. 158 (1992) the Court decided a narrow question: whether qualified immunity was available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment or attachment statute. *Id.* at 168. The Court answered no. *Id.* at 169. But it did not foreclose the possibility that a private defendant faced with § 1983 liability for relying on a state statute later found to be invalid could be entitled to an affirmative defense based on good faith and/or probable cause. *Id.* The Court juked the issue, proclaiming that “[b]ecause those issues are not fairly before us... we leave them for another day.” *Id.*

The Supreme Court again addressed whether private actors had available to them qualified immunity from § 1983 in *Richardson v. McKnight*, 521 U.S. 399 (1997). But like its decision in *Wyatt*, the question answered was a narrow one. In *Richardson*, the court described the circumstances as “one in which a private

firm, systematically organized to assume a major lengthy administrative task (managing an institution) which limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms.” Id. at 413. The Court found that privately employed prison guards were not entitled to qualified immunity. Id.

In Richardson, like Wyatt, the court pointed out that they had answered the immunity question narrowly, and only in the context in which it arose. Richardson, 521 U.S. at 413. The Richardson court, like Wyatt, also stressed that whether or not in general private defendants may assert a good faith defense in § 1983 suits was not before the court and as such those issues were left for another day. Id.

After Wyatt and Richardson, a number of other circuits have distinguished cases where a private actor invokes state law in furtherance of his own self-interest from cases where the private actor is performing a government function or acting pursuant to a governmental request or order. In the latter category of cases, the courts have often held that qualified immunity is available to private actors. Generally those cases hold that where a private individual performs a government function pursuant to a state order or request he is entitled to qualified immunity if a state official performing the same function would have been entitled to qualified immunity. *Accord* Bartell v. Lohiser, 215

F.3d 550, 557 (6<sup>th</sup> Cir. 2000); Camilo-Robles v. Hoyos, 151 F.3d 1 (1<sup>st</sup> Cir. 1998); Cullinam v. Abramson, 128 F.3d 301 (6<sup>th</sup> Cir. 1997).

More recently courts seem to be dividing along the line of publicly directed versus public style action. In Meadows v. Rockford Housing Authority, 861 F.3d 672 (7<sup>th</sup> Cir. 2017) the court held that a director and deputy chief of a private security group that changed locks on a tenant in a city housing authority were acting under the direct supervision of the city. The court determined that because the governmental officials overseeing the acts would have been entitled to qualified immunity if they had changed the locks personally, the private security employees enjoyed the same protection.

The Meadows court distinguished the USSCT Richardson case, noting that the defendants there were part of a large, for-profit organization that was in effect operating under its own guidelines. The court distinguished in particular that the security personnel were acting on express direction of government authorities when they changed the locks. The court specifically noted that, like Richardson, its holding was narrow.

In George v. Edholm, 725 F.3d 1206 (9<sup>th</sup> Cir. 2014) the court did not specifically address private actor liability, but did consider whether governmental authorities could be liable for coercing a private actor to perform an act the public actor could not without court approval. The court remanded the issue of whether a doctor who removed a baggie of drugs from a suspect's body was a private or

public actor, and whether the officers could claim immunity. Of note, the court noted that the plaintiff would be required to show both that the doctor was induced to act in an essentially government function, and also that he “intended to assist” the officers in obtaining evidence for their investigation.

Of course, most private entity 1983 claims are summarily dismissed, though often not without an amusing start. Examples include performers suing private parties for breach of contract and violation of municipal law,<sup>1</sup> a suit against Google and its founders for cutting off a private email account<sup>2</sup> and an inmate’s claim against a college for refusing him an associate’s degree after a change of status in prison.<sup>3</sup> More traditionally, however, the claims tend to be aimed at private parties who work for or with governmental agencies on public service matters, e.g. attorneys who represent criminal defendants.<sup>4</sup>

## **B. Private employer liability under the Act.**

Where private organizations face potential liability under the Act for the actions of employees, however, the scene is decidedly more cheerful. It appears private employers are more likely than not entitled to the same protections from claims under the Act as governmental employers. Generally, the circuits have extended “municipal organizations” defenses to private employers, requiring plaintiffs to establish that the alleged deprivation at the hands of the private

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<sup>1</sup> Prasad v. City of Richmond, 2018 WL 3016288 (ED Virg. 2018)

<sup>2</sup> Abulkhair v. Google, LLC, 2018 WL 3038437 (3<sup>rd</sup> Cir. 2018)

<sup>3</sup> McCullough v. Holy Cross College, 2018 WL 2766111, at \*1 (N.D.Ind., 2018)

<sup>4</sup> Lewis v. Rafferty, 2018 WL 2145012, at \*1 (S.D.Miss., 2018)

employee was the result of a company policy, custom or practice for § 1983 liability to attach. *See, e.g., Street v. Corrections Corp. of America*, 102 F.3d 810, 818 (6<sup>th</sup> Cir. 1996); *Robinson v. City of San Bernardino Police Dept.*, 992 F. Supp. 1198, 1204 (C.D. Cal. 1998). Accordingly, a plaintiff must show the employee's action was actually tied to his or her employer's policies, rather than simply being the employee's individual actions or judgment.

Understanding the risks, and significantly the discretion of the courts that accompanies private liability under the Act is critical for any private entity engaging in a quasi-governmental undertaking. Understanding the federal protection issues at stake and undertaking appropriate training for personnel who interact with the public will yield tremendous preventative benefits. As governmental tasks increasingly touch upon and are shifting toward the private section, these concerns will become a burgeoning risk to a significantly broader cross section of the private community. Attorneys representing such entities would be well advised to counsel their clients on these issues.