

5-1-2012

No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond

Emily Chiang

S.J. Quinney College of Law at the University of Utah

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Education Law Commons](#), and the [Torts Commons](#)

Recommended Citation

Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 Buff. L. Rev. 615 (2012).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol60/iss3/2>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

BUFFALO LAW REVIEW

VOLUME 60

MAY 2012

NUMBER 3

No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond

EMILY CHIANG†

INTRODUCTION

In 2002, as part of a growing national trend, the Atlanta Public School system hired a private, for-profit company to run an alternative school in Atlanta for children with behavioral and disciplinary issues.¹ The school's main goal was not without merit: the district wanted to rehabilitate troublesome students by removing them from its regular schools and providing them with a learning environment tailored to their needs, while permitting mainstream teachers and students to teach and learn without distraction.²

In practice, however, the school became a warehouse for poor African American children, providing them with subpar educational services in a chaotic and often violent

† Associate Professor, S.J. Quinney College of Law at the University of Utah. The author served as lead counsel in a lawsuit filed in 2008 by the American Civil Liberties Union against a school publicly funded by the Atlanta Public System and privately run by Community Education Partners, Inc. ("CEP"). Many thanks to Quinney Fellows Ian Atzet, Ruth Hackford-Peer, and Adrienne McKelvey.

1. The company the school hired, Community Education Partners, Inc., was founded by Randle Richardson and Phil Baggett in Houston in the mid-1990s. Annette Fuentes, *Failing Students, Rising Profits*, THE NATION, Sept. 19, 2005, at 18, 20. Notably, one of CEP's key initial investors, Tom Beasley, founded the Corrections Corporation of America ("CCA"), *id.* at 20—the largest provider of privatized prison services in the United States. *Investor Relations*, CORRECTIONS CORP. OF AM., <http://ir.correctionscorp.com> (last visited Apr. 15, 2012).

2. *Cf. infra* Part I.C (describing the rationale behind alternative schools).

environment.³ The school also violated students' constitutional rights to due process upon being disciplined and to be free from unreasonable searches.⁴ Female students, for example, were required to “pop” their bras each day before being granted entry to the school, pulling their bra straps out away from their bodies and snapping them back in, to prove that they were not concealing any contraband in their bras.⁵

The privately-run publicly-funded disciplinary alternative school—in Atlanta and elsewhere—sits at the intersection of two important phenomena in modern society: the privatization of once core government services, such as education; and the funneling of children (primarily poor and of color) into the criminal justice system rather than the educational system via a trajectory commonly referred to as the “school-to-prison pipeline.”⁶ Children referred to these schools can find it extremely difficult to return to mainstream education; discipline and order-maintenance techniques used at these schools often serve to prepare students for entry into the criminal justice system by mimicking the techniques used in correctional facilities;⁷ and students at these schools are routinely referred directly to the criminal justice system for school infractions.⁸

3. A complaint filed by the American Civil Liberties Union on behalf of students at the school alleged, for example, rampant violence at the school, including instances of staff members physically assaulting students. Verified Second Amended Complaint—Class Action at ¶ 6, *M.H. v. Atlanta Indep. Sch. Sys.*, No. 1:08-cv-1435-BBM (N.D. Ga. Mar. 31, 2009). The complaint also alleged that the school barred students from taking textbooks home with them, had a no-homework policy, did not contain a library, and did not have regular art, music, or physical education classes. *Id.* ¶¶ 79, 82, 83.

4. *Id.* ¶¶ 7-9.

5. *Id.* ¶ 44.

6. For an excellent discussion of the various manifestations of the school-to-prison pipeline, see generally CATHERINE Y. KIM ET AL., *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2010).

7. See, e.g., Complaint at ¶¶ 1-2, *A.M. v. Jackson Pub. Sch. Bd. of Trs.*, No. 3:11 CV 344 TSL-MTP (S.D. Miss. June 8, 2011) (alleging that students were shackled and handcuffed to a railing for violations of minor school rules); see also Heather Cobb, *Separate and Unequal: The Disparate Impact of School-Based Referrals to Juvenile Court*, 44 HARV. C.R.-C.L. L. REV. 581, 582-88 (2009) (discussing security procedures and police involvement in school discipline).

8. See *infra* Part I.B.

Parents and reformers seeking to address conditions at these schools can bring an action for damages under any number of legal theories, including various state law claims that sound in tort. Unfortunately, these actions provide only retrospective relief, in the form of compensation for injuries already suffered. They do not afford the same opportunity to fix underlying problems, such as unconstitutional school policies and practices or lack of staff training. In order to procure forward-looking, prospective relief to change conditions at these facilities over the long-term, would-be litigants must seek equitable relief, i.e., declaratory or injunctive relief. Such relief is the only way to enjoin schools from particular practices, to order facilities to adopt particular policies or procedures, and to declare unconstitutional certain practices.

Would-be litigants must turn, in other words, to § 1983 of the Civil Rights Act, which provides the only civil cause of action sounding both in equity and damages for plaintiffs seeking redress of constitutional rights violations.⁹ The problem is that relief under § 1983 may only be granted against parties acting “under color of” state law, or state actors,¹⁰ and publicly-funded privately-run disciplinary alternative schools present a classic state action problem: the government entity is likely to maintain that the private company is the responsible party, and the private company is likely to maintain that it is not a state actor. If defendants prevail or plaintiffs are discouraged by the state action doctrine, it can be nearly impossible to obtain prospective injunctive relief.

Publicly-funded privately-run disciplinary alternative schools exemplify the type of privatization about which we should be most concerned: the privatization of institutions that serve populations of people whose attendance the state has compelled and who have constitutional rights that are particularly vulnerable to infringement. This Article explores the reaches of the state action doctrine through the lens of these schools and seeks to provide a doctrinal framework through which to view the state action that characterizes similar institutions. Part I introduces the phenomena of disciplinary alternative schools and the privatization of education; Part II lays out the fundamental

9. 42 U.S.C. § 1983 (2006).

10. *Id.*

constitutional rights of students at these schools that are particularly vulnerable to infringement; Part III explores the applicable state action doctrine as it exists; Part IV explains the importance of finding state action and obtaining injunctive relief; and Part V proposes a doctrinal test for identifying state action in the disciplinary alternative school context and beyond.

I. PRIVATIZATION MEETS THE SCHOOL-TO-PRISON PIPELINE

A. *The Privatization Phenomenon*

Many have noted in recent years the increased privatization of public services,¹¹ and some have argued that such privatization departs meaningfully from this country's long history of public-private partnerships.¹² A combination of economic factors and policy choices has resulted in the outsourcing of services once provided exclusively by government,¹³ ranging from services once considered core government functions—like the detention and care of prisoners—to services that, while perhaps not essential, have nevertheless been identified with government, like the operation of public libraries.¹⁴

11. See, e.g., Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1451-52 (2009); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1289 (2003); Myriam Gilles, Introduction to Symposium, *Private Parties as Defendants in Civil Rights Litigation*, 26 CARDOZO L. REV. 1, 2 (2004); Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 863-85 (2000).

12. See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1240-41 (2003) (categorizing recent public-private initiatives as a departure from traditional public-private partnerships).

13. *Id.* at 1236 (“New uses of vouchers, government contracts, and public-private ventures afford a chance to draw upon the strengths of different societal sectors, to stimulate competition and innovation, and to embrace pluralism and tolerance as important public values.”).

14. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 450-62 (2005) (describing the emergence of privatized prisons); Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 275-83 (discussing prosecution outsourcing); David Streitfeld, *Outsourcing Fairly Healthy Public*

This Article uses the term “privatization” to mean the transfer of functions culturally associated with government to private entities, most typically and frequently via contracts between government agencies or sub-divisions and these private entities (which may be for-profit or non-profit).¹⁵ Unlike some other proffered definitions, “privatization” as used by this Article does not necessarily involve or require market-style competition.¹⁶ Indeed, as indicated in the discussion of privatization as applied specifically to disciplinary alternative schools and other similar institutions, one of the factors driving both privatization and the abuse thereof in that context is the lack of a sufficiently large market to drive or permit market-style competition.¹⁷

It is also worth noting that definitions of “privatization” that center upon the term “public function” can beg the

Libraries, Town Hears a Roar, N.Y. TIMES, Sept. 27, 2010, at A1; *see also* Gilles, *supra* note 11, at 2 (“Privatization is occurring in the administration of child welfare services, corrections facilities, education, emergency medical services, environmental protection, fire fighting, juvenile rehabilitation, local libraries, parking enforcement, parks and recreations, road maintenance, transportation, water treatment, waste and recycling services, and welfare administration.”).

15. Other definitions abound. *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003) (“[A common model of privatization consists of] government use of private entities to implement government programs or to provide services to others on the government’s behalf.”). Ronald Cass has divided privatization more generally into four categories: the divestiture of government assets, contracting out of functions, deregulation and vouchers, and tax reductions. Ronald A. Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449, 456-62 (1988). This Article is interested only in the second category, and the definition it proffers of that category is informed by Martha Minow’s definition of “privatization” as encompassing “the range of efforts by governments to move public functions into private hands and to use market-style competition,” Minow, *supra* note 12, at 1230, but seeks to offer some refinement and flexibility. It is also somewhat less of a mouthful than the definition used by the organizers of a symposium on privatization at the Benjamin N. Cardozo School of Law: “[A] shift toward provision by nongovernmental organizations of certain classes of goods and services, or performance by those organizations of certain classes of functions, for the provision or performance of which we’ve been accustomed to relying exclusively or mainly on government offices and agencies.” Frank I. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1063 (2000) (referring to the definition of “privatization” provided by organizers of the symposium).

16. *See, e.g.*, Minow, *supra* note 12, at 1230.

17. *See infra* Part IV.B.1.c.

question in the context of the state action doctrine.¹⁸ Much would seem to depend on what, precisely, a public function is—for if it is a task traditionally reserved exclusively to the government, as defined by traditional state action doctrine—public functions moved into private hands would necessarily constitute state action, which would make moot the inquiry of this Article.

For the purposes of this Article, then, the privatization of public functions will be used to refer more broadly to public functions as used in popular thought and writing to understand a type of activity traditionally associated with government. Thus, while the Supreme Court has made clear that it does not understand the provision of education to be a public function within the meaning of the state action doctrine, because it is not a task traditionally reserved exclusively to government,¹⁹ most scholars and citizens would associate public education with government. The same goes for libraries, the operation of the criminal justice system, and the care provided to wards of the state—in contrast to the performance of construction projects and procurement of supplies for government offices.

This Article does not take sides in the normative debate over privatization, the pros and cons of which are amply and ably represented in the scholarship.²⁰ Neither is it particularly invested in or dependent upon the breadth of the phenomenon, as its focus is on whether and what state action doctrine should apply when disciplinary alternative schools are in fact privatized.

18. See, e.g., Minow, *supra* note 12, at 1230.

19. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); see also discussion *infra* Part III.B.1.

20. For example, Minow notes the core positions of both sides of the debate. Weighing in favor of privatization are improved quality and effectiveness, competition and incentives for improvement, pluralism, and new knowledge and infrastructure. Minow, *supra* note 12, at 1242-46. Weighing against it are concerns regarding the dilution of public values, the potential mismatch between competition and social provision, and the dangers of divisiveness and loss of common institutions. *Id.* at 1246-55. For a purely pro-privatization viewpoint taken from the private industry perspective, see generally GUILBERT C. HENTSCHE ET AL., REASON FOUND., EDUCATION MANAGEMENT ORGANIZATIONS: GROWING A FOR-PROFIT EDUCATION INDUSTRY WITH CHOICE, COMPETITION, AND INNOVATION (2002), <http://www.reason.org/files/86f373eefe12bf11ff614e1305ff3362.pdf>.

B. *The School-to-Prison Pipeline*

The “school-to-prison pipeline”²¹ is a term used by academics, advocates, and civil rights reformers to describe the phenomenon by which children are funneled out of the school system and into the juvenile and criminal justice systems.²² The funneling can take place at any number of junctures within the education system and via any number of policies and practices, such as zero tolerance policies that operate to require expulsion or suspension of students meeting certain criteria;²³ referral of students to the criminal justice system for infractions that were traditionally handled by the schools;²⁴ the placement of police officers and other law enforcement officials on school grounds;²⁵ and increased school security measures, like the use of metal detectors, canine units, cameras, and tasers.²⁶ Students may also be denied an education entirely at the

21. Also referred to as “schoolhouse to the jailhouse.”

22. See, e.g., ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 11 (2005) [hereinafter EDUCATION ON LOCKDOWN]; Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENN. L. REV. 265, 268 (2008).

23. EDUCATION ON LOCKDOWN, *supra* note 22, at 7. Advancement Project notes that after passage of the Gun-Free Schools Act in 1994, many states “went above and beyond the federal mandate, passing laws that required expulsion or suspension for the possession of all weapons, drugs and other serious violations on or around school grounds.” *Id.*; see also CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY & ADVANCEMENT PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES 1 (2000) [hereinafter OPPORTUNITIES SUSPENDED] (“Zero Tolerance has become a philosophy that has permeated our schools; it employs a brutally strict disciplinary model that embraces harsh punishment over education.”); Eric Blumenson & Eva S. Nilsen, *One Strike and You’re Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L.Q. 65, 68-75 (2003).

24. EDUCATION ON LOCKDOWN, *supra* note 22, at 7; KIM, *supra* note 6, at 3, 113; OPPORTUNITIES SUSPENDED, *supra* note 23, at 13 (noting the use of mandatory referrals for aggravated assault for all fist fights in some school districts and other referrals to law enforcement for “disturbing schools,” or possession of a paging device).

25. EDUCATION ON LOCKDOWN, *supra* note 22, at 17; KIM, *supra* note 6, at 3, 113.

26. EDUCATION ON LOCKDOWN, *supra* note 22, at 17.

point of enrollment,²⁷ via non-disciplinary exclusions²⁸ and disciplinary “push-outs.”²⁹

Some of these policies and practices are motivated by safety and security concerns.³⁰ Others may be an unintended consequence of the No Child Left Behind Act of 2001,³¹ which raised the student testing stakes for schools across the country and heightened school incentives to remove low-performing children.³² Regardless, these policies function together as pipelines to the juvenile and criminal justice systems in several ways.³³ First, they push students out of the school system via expulsions and suspensions,³⁴ often leaving students with no education alternatives or alternatives that are inferior to regular school—which in turn leads to a higher likelihood of juvenile incarceration.³⁵ Second, they refer students directly to the juvenile and criminal justice systems, by having them arrested on the premises of the school if need be.³⁶ And third, they operate to acclimatize students to the juvenile and criminal justice systems, with diminished privacy expectations and a culture of punishment and discipline.³⁷

27. See KIM, *supra* note 6, at 26-29.

28. *Id.* at 30-31.

29. Rivkin, *supra* note 22, at 277.

30. See EDUCATION ON LOCKDOWN, *supra* note 22, at 15.

31. 20 U.S.C. § 6301 (2006).

32. KIM, *supra* note 6, at 1, 26; David N. Figlio, *Testing, Crime and Punishment*, 90 J. PUB. ECON. 837, 839 (2005); Elisa Hyman, *School Push-Outs: An Urban Case Study*, 38 CLEARINGHOUSE REV. 684, 684 (2005).

33. A number of lawsuits have been filed challenging these practices. See, e.g., *RV v. N.Y.C. Dep't of Educ.*, 321 F. Supp. 2d 538 (E.D.N.Y. 2004) (challenging push-out policies that either discharged students from high schools or forced them into GED programs).

34. EDUCATION ON LOCKDOWN, *supra* note 22, at 11 (noting also the effects of discouragement and high-stakes testing); Rivkin, *supra* note 22, at 270-71.

35. EDUCATION ON LOCKDOWN, *supra* note 22, at 18. Decreased attendance at school also leads, of course, to decreased school performance, which can itself result in a vicious cycle of disengagement from the educational system. See, e.g., Michael A. Clump et al., *To Attend or Not to Attend: Is that a Good Question?*, 30 J. INSTRUCTIONAL PSYCHOL. 220, 220, 222 (2003).

36. See EDUCATION ON LOCKDOWN, *supra* note 22, at 11.

37. See *id.* at 11-12.

A number of researchers and advocates have noted the disproportionate effect these policies and practices have on the most vulnerable students in society, namely students of color, students with disabilities, low-income students, English language learners, and students who are homeless or in foster care.³⁸ The effects of the school-to-prison pipeline on students of color and those with disabilities is particularly pronounced.³⁹ For example, the Advancement Project states:

Across the board, the data shows that Black and Latino students are more likely than their White peers to be arrested in school, regardless of the demographics of the school's enrollment. Researchers conclude that racial disparities cannot be accounted for by the socioeconomic status of students. Nor is there any evidence that Black and Latino students misbehave more than their White peers. Race does, however, correlate with the severity of the punishment imposed with students of color receiving harsher punishments for less severe behavior.⁴⁰

38. *Id.* at 16; KIM, *supra* note 6, at 1; Rivkin, *supra* note 22, at 270, 272. *The School-to-Prison Pipeline: Structuring Legal Reform* also gathers studies indicating that racial disparities in the imposition of school discipline have increased over the past thirty years. KIM, *supra* note 6, at 2. See also Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317, 318-20, 335 (2002), where the authors collected studies providing “evidence of socio-economic and racial disproportionality in the administration of school discipline” and provided conclusions of their own study. *The Color of Discipline* also collected studies indicating that African American students—and African American male students in particular—are more frequently subjected to harsher disciplinary strategies, like corporal punishment, than their white counterparts. *Id.* at 319-20; see also OPPORTUNITIES SUSPENDED, *supra* note 23, at 6.

39. KIM, *supra* note 6, at 34-35, 51-53; see also Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 77 (2002); Blumenson & Nilsen, *supra* note 23, at 83-85.

40. EDUCATION ON LOCKDOWN, *supra* note 22, at 8; see also KIM, *supra* note 6, at 2 (“[S]tudies show that African American students are more likely than their white peers to be suspended, expelled, or arrested for the *same kind* of conduct at school.”); OPPORTUNITIES SUSPENDED, *supra* note 23, at 7; Skiba et al., *supra* note 38, at 322 (citing studies on this phenomenon). The study conducted by Skiba and the other authors of *The Color of Discipline* also found that white students were likely to be disciplined for “smoking, leaving without permission, obscene language, and vandalism,” while black students were disciplined for offenses like “disrespect, excessive noise, threat, and loitering.” *Id.* at 334 (emphasis omitted). The authors note that “[t]he majority of reasons for which

A 2010 study reports that in some cities, over half of African American males are suspended at least once in a school year.⁴¹ African American and Native American students are also more likely to be categorized as “disabled,” and thereby segregated from mainstream educational services.⁴²

Not graduating from high school has been linked to higher unemployment, lower wages, and higher risk of involvement with the criminal justice system.⁴³ Graduation rates for students of color as a result of the policies discussed are extraordinarily low. According to a 2006 report written for the Department of Labor, “[h]alf of all black students in the country do not graduate from high school and for boys the graduation rate is an astonishing 43 percent. Rates among Hispanics and American Indians are also low at 48 and 47 percent, respectively.”⁴⁴ Students with disabilities did little better, with only 54% graduating with a diploma in 2005.⁴⁵ In contrast, 74.9% of white students graduate from high school.⁴⁶

white students are referred more frequently seem to be based on an objective event . . . that leaves a permanent product. Reasons for black referrals . . . are infractions . . . that would seem to require a good deal more subjective judgment on the part of the referring agent.” *Id.*

41. KIM, *supra* note 6, at 2 (citing DANIEL J. LOSEN & RUSSELL J. SKIBA, SOUTHERN POVERTY LAW CENTER, *SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS* (2010)).

42. *Id.* at 53-54.

43. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf> (“68% of State prison inmates did not receive a high school diploma.”); see also Blumenson & Nilsen, *supra* note 39, at 72 & nn.57-58, 76 & n.76 (gathering data on the education level of prisoners).

44. LAUDAN Y. ARON, THE URBAN INSTITUTE, AN OVERVIEW OF ALTERNATIVE EDUCATION (2006), available at <http://www.ncee.org/wp-content/uploads/2010/04/OverviewAltEd.pdf>; see also GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS 2 (2004), available at http://www.urban.org/uploadedpdf/410936_LosingOurFuture.pdf.

45. KIM, *supra* note 6, at 52.

46. ORFIELD ET AL., *supra* note 44, at 2.

C. *Publicly-Funded, Privately-Run Disciplinary Alternative Schools*

1. *Alternative Schools in General.* Defined most broadly, alternative schools encompass all education that takes place outside of the mainstream public school system, including charter schools, special needs schools, and schools for the gifted and talented.⁴⁷ They may represent “innovation; small-scale, informal ambiance; and departure from bureaucratic rules and procedures.”⁴⁸ A popular typology offered by Mary Anne Raywid breaks down alternative schools into three categories: Type I schools are schools of choice, they seek to innovate, may resemble magnet schools, and are usually sought after by parents.⁴⁹ Type II schools are last chance programs that typically “focus on behavior modification” rather than pedagogy, and include in-school suspension programs as well as longer term placements for the chronically disruptive.⁵⁰ Type III schools are remedial in their focus, providing academic and/or social rehabilitation to students in the hopes of returning them to mainstream education.⁵¹

This Article focuses upon those alternative schools that occupy a juncture of the school-to-prison pipeline, namely Type II schools—including those masquerading as Type III.

47. The U.S. Department of Education defines an alternative school as “[a] public elementary/secondary school that: 1) addresses the needs of students that typically cannot be met in a regular school; 2) provides nontraditional education; 3) serves as an adjunct to a regular school; and 4) falls outside of the categories of regular, special education, or vocational education.” NAT’L CTR. OF EDUC. STATISTICS, U.S. DEP’T OF EDUC., NCES 2002-351, CHARACTERISTICS OF THE 100 LARGEST ELEMENTARY AND SECONDARY SCHOOL DISTRICTS IN THE UNITED STATES: 2000-01, at 37 tbl.2 (2002).

48. Mary Anne Raywid, *Alternative Schools: The State of the Art*, EDUC. LEADERSHIP, Sept. 1994, at 26.

49. *Id.* at 27.

50. *Id.*

51. *Id.* Raywid notes that these boundaries may be fluid, as “a compassionate staff, for example, may give a Type II program Type III overtones. Or a committed Type III staff may venture into programmatic innovations that mark a Type I.” *Id.*; see also Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN’S J. LEGAL COMMENT. 73, 82 (2006) (“The literature defines three models of alternative education: an innovative model; a punitive model; and a developmental model.”).

As defined by the U.S. Department of Education, these schools are those which

are designed to address the needs of students that typically cannot be met in regular schools. The students who attend alternative schools and programs are typically at risk of educational failure (as indicated by poor grades, truancy, disruptive behavior, pregnancy, or similar factors associated with temporary or permanent withdrawal from school).⁵²

Alternative schools and programs are not inherently bad,⁵³ and they are certainly increasingly popular.⁵⁴ In principle, there is much to recommend the idea that students struggling in the mainstream education system be provided with alternatives to that system, particularly if those alternatives involve the provision of additional resources. In practice, however, many alternative schools operate as “holding pens for children considered to be

52. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT' OF EDUC., NCES 2010-026, ALTERNATIVE SCHOOLS AND PROGRAMS FOR PUBLIC SCHOOL STUDENTS AT RISK OF EDUCATIONAL FAILURE: 2007-08, at 1 (2010), *available at* <http://nces.ed.gov/pubs2010/2010026.pdf> [hereinafter NCES 2010 REPORT]. Survey data from the report reflects that students are typically referred for behavior such as physical attacks or fights; the possession, distribution or use of alcohol or drugs; disruptive verbal behavior; academic failure; chronic truancy; and possession or use of a weapon. *Id.* at 4.

53. See David J. D'Agata, *Alternative Education Programs: A Return to "Separate but Equal?"*, 29 NOVA L. REV. 635, 640-43 (2005) (summarizing commentary by proponents and opponents of alternative education).

54. According to the National Center for Education Statistics (the primary federal entity charged with collecting, analyzing, and reporting education related data), 64% of public school districts in the country provided at least one alternative school or program for at risk students, administered either by the district or by another entity. NCES 2010 REPORT, *supra* note 52, at 5 tbl.1. Another study found that by 2003, out of fifty states and the District of Columbia, forty-eight “had some type of legislation regarding alternative schools or programs.” CAMILLA A. LEHR ET AL., INSTITUTE ON COMMUNITY INTEGRATION, ALTERNATIVE SCHOOLS: POLICY AND LEGISLATION ACROSS THE UNITED STATES: RESEARCH REPORT 1, at 5 (2003), *available at* http://www.ici.umn.edu/products/docs/Alternative_Schools_Report_1.pdf. For a discussion of state policies on alternative education, see also OLEG SILCHENKO, EDUCATION COMMISSION OF THE STATES, STATE POLICIES RELATED TO ALTERNATIVE EDUCATION (2005), *available at* <http://www.ecs.org/clearinghouse/65/77/6577.pdf>.

troublemakers,”⁵⁵ a means by which school districts can shunt (or funnel) students out of mainstream education.⁵⁶

According to the National Center for Education Statistics, 17% of students enrolled in an alternative school operated by the school district dropped out of school, and 5% were transferred to a criminal justice facility.⁵⁷ The dropout rates increased to 30% in school districts in cities.⁵⁸ In contrast, the overall national dropout rate is roughly 8%.⁵⁹ Referral rates to the criminal justice system in alternative schools also doubled in school districts in which children of color were 50% or more of the student population.⁶⁰ Although higher dropout rates and referrals to the criminal justice system may be explained in part by the fact that students attending alternative schools are there precisely because they are at higher risk of dropping out or of being referred to the criminal justice system, the very vulnerability of this student population militates in favor of more accountability for the entities that run such schools and not less.

2. *The Disciplinary Alternative School.* Disciplinary alternative schools, or Type II alternative schools in

55. OPPORTUNITIES SUSPENDED, *supra* note 23, at 12.

56. Part of the problem may be the failure of school districts to require additional training or certification for teachers in alternative schools, which are presumably populated by a more difficult student population with special needs. Only 30% of school districts administering an alternative school have specific requirements for teaching in alternative schools and programs in addition to regular teacher requirements. NCES 2010 REPORT, *supra* note 52, at 4. And only 48% have professional development requirements for such teachers in addition to those required of all teachers. *Id.* These percentages dip even lower when the data is limited to city school districts or districts with greater student of color enrollment. *Id.* at 18 tbl.14.

57. *Id.* at 4. Rates of referral to the criminal justice system may have something to do with the fact that 80% of school districts operating an alternative school or program collaborate with the criminal justice system to provide services for enrolled students and 69% with the local sheriff's department. *Id.* In contrast, only 46% collaborate with job placement centers and 55% with crisis intervention centers. *Id.* at 19 tbl.15.

58. *Id.* at 16.

59. *Fast Facts—Dropout Rates*, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., <http://nces.ed.gov/fastfacts/display.asp?id=16> (last visited Apr. 23, 2012).

60. NCES 2010 REPORT, *supra* note 52, at 16.

Raywid's terminology, are one means that school districts use to deal with a number of ailments, some perceived and many real, such as violence in schools, unruly and/or disruptive students,⁶¹ and students with special needs.⁶² As such, they sit at a critical juncture on the school-to-prison pipeline.⁶³

First, they funnel a particularly vulnerable⁶⁴ segment of the student population out of mainstream public education,⁶⁵ increasing the risk that those students will drop out of school altogether.⁶⁶ Second, these schools typically engage in more intensive disciplinary practices than regular public schools, with more intrusive searches, harsher discipline imposed for more minor infractions, etc.⁶⁷ Some guidelines used in these schools function both to preserve discipline and to accustom children to the restrictions

61. See Jonathan Wren, Note, "Alternative Schools for Disruptive Youths"—A Cure for What Ails School Districts Plagued by Violence?, 2 VA. J. SOC. POL'Y & L. 307, 310-12 (1995) (collecting school violence data).

62. For a more sinister take on the increasing popularity of these schools, see Reyes, *supra* note 51, at 73. Reyes states:

[I]t has been in the interests of builders of prisons and detention facilities to exploit children's proclivities for defying authority and failing to conform to societal expectations. Simultaneously, this pattern appeals to educators, allowing them to remove troubled youth from school rolls, where, especially in states where financial resources and prestige factors determine the success of schools and school personnel, their likely-poor test performance will pull down averages.

Id. at 77-78.

63. For a sample of academic commentary critiquing these schools, see *id.* at 82-83, which contends that disciplinary alternative schools suffer from limited state supervision, questionable teacher certification, a lack of student testing, inferior curricula and teaching staff, and that the schools disrupt student education.

64. NCES 2010 REPORT, *supra* note 52, at 17 (noting that 35% of alternative schools in 2007-08 had minority enrollments of 50% or more and that 40% of these schools had 20% or more students below the poverty level).

65. See *supra* Part I.B; see also Reyes, *supra* note 51, at 81 & n.32. The incentives to refer poorly performing children to such schools are heightened by the fact that states enrolling students in alternative schools for less than an academic year are exempt from reporting requirements under the No Child Left Behind Act for those students. KIM, *supra* note 6, at 100.

66. See, e.g., Reyes, *supra* note 51, at 78 & n.20 (collecting sources).

67. See Cobb, *supra* note 7, at 581.

prisoners face in correctional facilities. Finally, these schools tend to refer students more frequently to the juvenile or adult criminal justice system, serving as a direct pipeline from school to prison.⁶⁸

3. *The Publicly-Funded Privately-Run Alternative School.* In its 2007-08 survey on alternative education, the Department of Education began asking school districts about alternative education options administered by entities other than the district—35% of districts reported using at least one alternative school or program administered by another entity.⁶⁹ Of those districts, 26% reported that the program was operated by a private entity under contract with the school district (the remaining were operated by other public entities or a two- or four-year postsecondary institution).⁷⁰

Publicly-funded privately-run disciplinary alternative schools take place within a larger context of the increasing use of public funds to contract with education management organizations (“EMOs”).⁷¹ These organizations, which are typically for-profit corporations, often operate on a combination of school district money and venture capital to operate charter schools.⁷² The phenomenon of charter schools, which shows no signs of slowing down, is not the focus of this Article.⁷³ But their popularity, coupled with their dependence upon private corporations and the fact

68. EDUCATION ON LOCKDOWN, *supra* note 22, at 11.

69. NCES 2010 REPORT, *supra* note 52, at 3.

70. *Id.*

71. In a report on for-profit EMOs operating public schools for the 2009-10 school year, the National Education Policy Center noted that EMOs operated in thirty-one states and served more than 350,000 students, that the number of these EMOs had increased to ninety-eight from fourteen in the 1997-98 school year, and that the largest EMO managed seventy-nine schools. ALEX MOLNAR ET AL., NAT'L EDUC. POLICY CTR., PROFILES OF FOR-PROFIT EDUCATION MANAGEMENT ORGANIZATIONS (2010), available at <http://nepc.colorado.edu/publication/EMO-FP-09-10>. See generally *id.* for a comprehensive list of EMOs and information such as size, geographic location(s), schools operated, and student enrollment.

72. *See id.*

73. According to a 2010 report published by pro-privatization group, the Reason Foundation, there are 5000 charter schools in the United States, serving 1.7 million children. LISA SNELL, REASON FOUND., ANNUAL PRIVATIZATION REPORT 2010: EDUCATION 11 (Leonard Gilroy ed., 2011).

that some of these corporations also operate disciplinary alternative schools, serves as a noteworthy backdrop.⁷⁴

The key difference between charter schools and the disciplinary alternative schools upon which this Article focuses is that attendance at charter schools is not only voluntary, but typically highly desired.⁷⁵ Parents with children enrolled in charter schools are always free to return them to regular public school, whereas attendance at a disciplinary alternative school is nearly always involuntary, as students are frequently referred either by the school district, their local public school, or the juvenile justice system.⁷⁶ The alternative to a court or school district referred disciplinary alternative education is typically either private school (which is no alternative at all for parents without the financial means) or no school at all.

Although there is much that distinguishes these schools from privately run prisons, some key aspects of both types of institutions are notably similar: both serve vulnerable populations whose presence at the institution is involuntary, both revolve around a disciplinary component, and both contain built-in incentives to economize.⁷⁷ As one

74. Per the National Education Policy Center, “charter schools account for 93.4% of all EMO-managed schools.” MOLNAR ET AL., *supra* note 71, at 7. Much has been written about the advisability, success or failure, and public policy implications of charter schools. See, e.g., F. Howard Nelson & Nancy Van Meter, *What Does Private Management Offer Public Education?*, 11 STAN. L. & POL’Y REV. 271, 272 (2000) (arguing against the advisability of charter schools on grounds of poor performance).

75. That said, see Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 PENN ST. L. REV. 43 (2004), for a general overview of litigation over charter schools.

76. Cf. Vanessa Ann Countryman, *School Choice Programs Do Not Render Participant Private Schools “State Actors,”* 2004 U. CHI. LEGAL F. 525, 544 (arguing private schools participating in school choice programs should not be considered state actors in large part because attendance at such schools is voluntary).

77. The line between residential juvenile detention facilities and disciplinary alternative schools is not a particularly clear one, as the vast majority of such facilities offer some type of education services. See NAT’L EVALUATION & TECHNICAL ASSISTANCE CTR., 2010 JUVENILE JUSTICE FACILITIES FACT SHEET 2 (2010), available at http://www.neglected-delinquent.org/nd/docs/factsheet_facilities.pdf. There are a striking number of such facilities across the country, a significant percentage of which are privately operated. See SARAH HOCKENBERRY ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION,

commentator explains in the private prison context, contractors are often tempted to save money (and thereby increase profit) by reducing the amount spent on inmate needs and by cutting the cost of labor.⁷⁸

Just as privately-run prisons may try to save money on inmate medical care and access to rehabilitative programming,⁷⁹ privately run disciplinary alternative schools are incentivized to save money on student services such as counseling, rehabilitation, and support services for those with special needs. Labor cost-cutting in such schools may come in the form of non-unionized teachers and other staff, teachers and staff with fewer certifications or educational attainments than at mainstream schools, and reductions in training for teachers and staff. All of these cost savings arguably impact the quality of education received by students at disciplinary alternative schools even more than they would students at mainstream schools; students at disciplinary alternative schools are, after all, placed in such schools precisely because they have needs greater to or different from students at mainstream schools.

II. STUDENT CONSTITUTIONAL RIGHTS VULNERABLE TO INFRINGEMENT AT DISCIPLINARY ALTERNATIVE SCHOOLS

Much like other institutions serving vulnerable populations, disciplinary alternative schools are a setting particularly ripe for abuses of constitutional rights: the student body is relatively powerless,⁸⁰ students often have a history of disciplinary or behavioral issues, and the hiring of staff is usually not as regulated as for mainstream public schools.⁸¹ This Part briefly enumerates the types of rights

JUVENILE RESIDENTIAL FACILITY CENSUS, 2008: SELECTED FINDINGS 2 (2011), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/231683.pdf> (data collected from 2860 juvenile facilities).

78. Dolovich, *supra* note 14, at 474-75.

79. *Id.* at 474.

80. *See supra* Part I.B.

81. Reyes, *supra* note 51, at 108 (“[Disciplinary alternative] schools operate virtually free of state supervision with regard to education impact, teacher performance, or other system controls.”). For a discussion of how the profit motive in cases involving disciplinary alternative schools run by private, for-profit entities may further affect student rights, see *infra* Part IV.B.1.b.

violations one would expect to find at disciplinary alternative schools, as evidenced by the types of claims filed on behalf of students at such schools and as predicted by the educational environment.⁸² It is worth noting that however watered-down student constitutional rights may seem when compared to their adult counterparts, the allegations raised against many educational facilities in this context would easily surmount the bars set by courts. And, of course, for the purposes of this Article's state action inquiry, the existence of a rights violation is assumed, with the key question being only who may be held liable.

The purpose of this Part is not to chronicle the particular legal claims that may be filed by students subject to each of the below rights violations or to delve into the wealth of lower court cases on student rights,⁸³ but rather to indicate the breadth and depth of the rights applicable to students—and thereby to highlight their vulnerability to deprivations committed by private parties not subject to constitutional limitation.⁸⁴ In each instance, the concern is that a school employee under contract with the private company, not the state, violates student rights. Under traditional state action analysis, it is unclear whether such actions are susceptible to constitutional limits or whether the sole recourse for injured students is an action in tort or other common law.

As discussed further in Part IV.C, such common law claims may succeed in procuring damages relief for injuries such as a one-off unconstitutional search, but they are largely incapable of addressing the types of systemic failures that result in repeated and ongoing constitutional violations. For example, inappropriate school search policies and guidelines coupled with a lack of training for school staff in proper search techniques can result in a pattern and practice of illegal searches. Damages recovery for any one

82. See *infra* Part III.C for a discussion of lower court cases involving allegations against privately-run educational facilities and a flavor of the types of claims that are typically brought.

83. For that, see generally KIM, *supra* note 6, at 78-96, which discusses legal claims relevant to challenging suspensions and expulsions.

84. This Part focuses, moreover, only on that law which is relatively clear as stated by the Supreme Court. It does not delve into lower court cases or, perhaps more significantly for would-be plaintiffs and advocates for reform, state constitutional protections.

particular student subject to these practices provides relief only for that particular student, means that other students seeking relief must wait until they have been injured to file similar claims, and does not necessarily alleviate the risk that future students face of further such searches.

A. *First Amendment: Speech and Establishment Clauses*

Although the Supreme Court's (in)famous proclamation in 1969, in *Tinker v. Des Moines Independent Community School District*,⁸⁵ that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"⁸⁶ has been much watered down in recent years, students do still have First Amendment rights—and these rights are particularly subject to infringement in a disciplinary alternative school environment.⁸⁷

Students continue to have the right to express core political opinions and other beliefs that may be unpopular,⁸⁸ as long as such speech does not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁸⁹ School officials interested in order maintenance and discipline may be especially inclined to impose viewpoint or content based restrictions on student speech,⁹⁰ regardless of whether there

85. 393 U.S. 503 (1969).

86. *Id.* at 506.

87. *See, e.g.*, Amended Complaint ¶ 107, *D.L. v. Youth Servs. Int'l Inc.*, 2011 WL 1303167 (S.D. Fla. Mar. 31, 2011) (No. 0:10-cv-61902-KMM) [hereinafter Amended Complaint, *D.L.*] (“Defendants['] . . . practice of intimidating, threatening, harassing, and punishing youth for exercising their right to speak to attorneys and access the courts violates Plaintiffs’ First Amendment right to free speech”); Amended Complaint ¶ 156, *Brian B. v. Stalder*, 2005 WL 1847000 (M.D. La. Aug. 2, 2005) (No. 3:98-cv-00886-JJB-SCR) [hereinafter Amended Complaint, *Brian B.*] (alleging freedom of speech and association violation).

88. *Tinker*, 393 U.S. at 509 (“In order for . . . school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”).

89. *Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966)).

90. Some lower courts have upheld school suspensions where officials can “demonstrate[] a concrete threat of substantial disruption” that is linked to a

is a showing of material and substantial interference, whether the speech might reasonably be perceived as being the official speech of the school,⁹¹ promotes illegal drug use,⁹² or is sexual, vulgar, or offensive.⁹³

Students at disciplinary alternative schools may also be particularly susceptible to infringement of the Establishment Clause and of their Free Exercise rights. It is well-settled that if after-school clubs are generally permitted, religious clubs must be permitted as well;⁹⁴ that school officials may not use public schools to proselytize, and that formal school prayers are unconstitutional.⁹⁵ The root of the Court's concern for the vulnerability of students

history of past events. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 247, 262 (3d Cir. 2002) (upholding suspension of a student wearing a t-shirt with Confederate flag and "redneck" written on it in light of history of racial hostilities at school). However, the mere fact that many students attending disciplinary alternative schools may have a history of disciplinary infractions does not mean that school officials may impose limits on their speech without any demonstration that such limits are necessary to prevent actual disruption. *See Tinker*, 393 U.S. at 513.

91. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (permitting limits on speech that may reasonably be perceived as being official school speech in context of school newspaper).

92. *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (permitting limits on student speech that may be interpreted as promoting illegal drug use).

93. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (permitting limits on speech of a sexual or vulgar nature).

94. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995). Whether strict dress codes that conflict with student religious beliefs and practices may violate student Free Exercise rights remains to be seen. *See, e.g., A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010) (finding dress code prohibiting long hair violated Texas Religious Freedom Act right of student whose religious beliefs prohibited hair cutting); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 439-40 (9th Cir. 2008) (finding dress code did not infringe on student's Free Exercise rights because it applied to students equally regardless of their religious beliefs, and prohibited conduct, not free exercise).

95. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294, 317 (2000) (holding that school policy permitting student-led prayers before high school football games violated Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 592-93 (1992) (noting that the Constitution is violated when schools "employ the machinery of the State to enforce a religious orthodoxy" and finding unconstitutional clergy-led prayer at public school graduation).

in the context of the Establishment Clause may be further amplified in the context of a disciplinary alternative school, in which coercive pressures are arguably even stronger than in regular public schools given the inherent emphasis on discipline and obeying authority.⁹⁶

If a state entity contracts with an overtly religious company to operate a publicly-funded overtly religious school, the action of entering the contract is undoubtedly state action and thus subject to constitutional limit. However, the paradigmatic cause for concern would be the state contract with a secular company that happens to hire a proselytizing employee who provides religiously based instruction or requires prayer in the classroom, or where the company is secular in theory but religious in practice.⁹⁷ Whether that employee's actions are constrained by the Constitution is the question this Article seeks to address.

Finally, it is also worth noting that the Court's repeatedly expressed deference to local school boards in its post-*Tinker* opinions may not be as salient where the school's decision-making authority rests with an operating entity that is arguably not politically accountable at all, but rather a private, for-profit corporation.⁹⁸

B. *Fourth Amendment: Searches by School Officials*

According to the National Center for Education Statistics, 61% of public high schools use random dog sniffs to look for drugs, and almost one-third use at least one other type of random search to detect contraband.⁹⁹ The

96. See *Lee*, 505 U.S. at 593 (noting that public pressure and peer pressure, "though subtle and indirect, can be as real as any overt compulsion").

97. For example, the founder of Youth Services International Inc., a large-scale provider of education and behavioral modification programs for troubled youth, has spoken about the impact of his religious faith on his trajectory from orphanages to CEO of the company. John Dorfman, *King of Reform Schools Eyes Orphanages*, WALL ST. J., Feb. 1, 1995, at B1.

98. See, e.g., *Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); cf. *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989) (noting that decisions regarding student speech are "best left to the locally elected school board, not to a distant life-tenured judiciary").

99. RACHEL DINKES ET AL., NAT'L CTR. FOR EDUC. STATISTICS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2007, at 113-14 (2007).

Supreme Court held in *New Jersey v. T.L.O.* that students have a legitimate interest in privacy, although school officials need only reasonable suspicion (rather than probable cause) to conduct a search.¹⁰⁰ The Court has noted that “the search as actually conducted [must be] reasonably related in scope to the circumstances which justified the interference in the first place,” and that the scope of the search may not be “excessively intrusive in light of the age and sex of the student and the nature of the infraction.”¹⁰¹

The Court has further acknowledged the difference inherent in searching adults compared to students, whose “adolescent vulnerability intensifies the patent intrusiveness of the exposure,” and determined that the reasonableness of a student’s expectation of privacy “is indicated by the consistent experiences of other young people similarly searched.”¹⁰² Thus, a strip search conducted in an effort to find ibuprofen pills without any indication that the pills were actually hidden in a student’s underwear, is unconstitutional.¹⁰³

Although the Court has found permissible mandatory drug testing (without any individualized suspicion) for student athletes, it has emphasized that student athletes participate in extracurricular sports voluntarily,¹⁰⁴ and that schools should not assume

that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.¹⁰⁵

100. 469 U.S. 325, 337, 341-42 (1985) (“[A] search . . . will be ‘justified at its inception’ when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”).

101. *Id.* at 341-42.

102. *Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2641 (2009).

103. *Id.* at 2642 (“Here, the content of the suspicion failed to match the degree of the intrusion.”).

104. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995).

105. *Id.* at 665. The Court has subsequently permitted mandatory drug testing of all students participating in extracurricular activities, but specifically noted

As evidenced by the complaints filed by parents of students at disciplinary alternative schools, the urge to search students at such schools in the absence of individualized suspicion (or participation in an extracurricular activity) can be almost overwhelming. In the Community Education Partners case, for example, students alleged that they were subjected to routine invasive searches each day prior to entering the school, and that those searches included not only the use of metal detectors, but also required that they remove their belts and shoes, submit to pat downs, and open their mouths for searching.¹⁰⁶

If conducted by a police officer on school grounds, an unreasonable search is clearly state action. Whether the Constitution applies when the search is conducted by a school resource officer is somewhat less clear,¹⁰⁷ and the state action problem is compounded if employees hired by the private company under contract with the state then subcontract school safety matters to another private company.

C. *Fifth and Sixth Amendments: Questioning by School Officials and Access to Counsel*

One aspect of the school-to-prison pipeline that frequently manifests itself in the context of disciplinary alternative schools is the referral of students to the juvenile or adult criminal justice system for infractions that take place on school grounds.¹⁰⁸ Such referrals are often made without appropriate Fifth and Sixth Amendment protections,¹⁰⁹ which the Court first found applicable to juveniles in *In re Gault*.¹¹⁰

that under the testing scheme it upheld “the test results are not turned over to any law enforcement authority. Nor do the test results . . . lead to the imposition of discipline or have any academic consequences.” Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 833 (2002).

106. Verified Second Amended Complaint, *supra* note 3, ¶¶ 40-49; *see also* Amended Complaint, *Brian B.*, *supra* note 87, ¶ 85 (alleging strip searches of students with “little or no justification”).

107. KIM, *supra* note 6, at 120-22.

108. *See supra* Part I.B.

109. *See, e.g.*, Amended Complaint, *D.L.*, *supra* note 87, ¶ 67 (alleging deprivation of right to contact attorneys and to maintain confidential communications with counsel); Complaint at ¶¶ 4-9, *Antoine ex rel Milk v. Winner Sch. Dist. 59-2*, 2006 WL 3007375 (D.S.D. Oct. 20, 2006) (No. Civ. 06-

The Fifth Amendment protection against self-incrimination applies to students questioned if they face potential criminal liability or a juvenile delinquency petition¹¹¹: “It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children.”¹¹² The Sixth Amendment additionally requires that timely notice be provided to juveniles and their parents of the specific charges and allegations, and that they be informed of the child’s right to counsel.¹¹³

When questioning may have juvenile law consequences, the Court has also cautioned that extra care must be taken “to assure that [an] admission was voluntary, in the sense not only that it has not been coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”¹¹⁴ Similarly, any waiver of a juvenile’s rights must take into account the totality of the circumstances, which include the juvenile’s age, education, experiences, intelligence, background, and

3007) (alleging school administrators coerced student confessions, which were then handed over to the police department for use in prosecution); Amended Complaint, *Brian B.*, *supra* note 87, ¶¶ 140-41 (alleging improper restriction of access to the courts by failing to provide youth with access to a law library or assistance from a person trained in the law, and violation of right to confidential communications with counsel).

110. 387 U.S. 1, 55 (1967).

111. *See Kastigar v. United States*, 406 U.S. 441, 444 (1972) (“[T]he Fifth Amendment privilege against compulsory self-incrimination . . . can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory”); *see also Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (“To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.”). The privilege would not, however, apply to questioning solely for school disciplinary purposes, although the Fourteenth Amendment’s due process protections may. *See infra* Part II.D.

112. *In re Gault*, 387 U.S. at 47; *see also id.* at 44 (“[C]lear and unequivocal evidence that [a self-incriminating] admission was made with knowledge that [the juvenile] was not obliged to speak and would not be penalized for remaining silent [is required for its admissibility].”).

113. *Id.* at 33-36.

114. *Id.* at 55.

whether he understands the warnings and consequences of waiving his rights.¹¹⁵

All of the concerns expressed by the Court are particularly salient when a student is being questioned by school officials, under which circumstances students may feel even less free to leave than adults being questioned by law enforcement officials, and when they may not understand that the questioning may have consequences outside of the school.¹¹⁶

D. *Fourteenth Amendment: Procedural and Substantive Due Process*¹¹⁷

Given the emphasis on discipline at many alternative schools, one nearly inevitable rights concern is that of procedural due process prior to the imposition of discipline.¹¹⁸ The Supreme Court has made clear in *Goss v.*

115. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979).

116. *Cf. Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that criminal defense attorneys must advise non-citizen clients of the immigration consequences that guilty pleas may have).

117. This Article does not discuss the procedural due process rights of students not to be referred to a disciplinary alternative school in the first place as there is no state action issue; the transferring entity is inevitably the state itself. *See, e.g., Langley v. Monroe Cnty. Sch. Dist.*, 264 F. App'x 366, 368 (5th Cir. 2008). Such challenges have had little success in the lower courts and typically must hinge on a claim that the education being provided by the alternative school is so inferior as to constitute a wholesale deprivation of the state right to a public education. *See, e.g., Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 27 (5th Cir. 1997); Order at 30-31, *M.H. v. Atlanta Indep. Sch. Sys.*, No. 1:08-cv-1435-BBM (N.D. Ga. Mar. 31, 2009).

118. *See, e.g., Complaint, supra* note 7, ¶¶ 32-33, 100 (alleging the use of handcuffs to punish students for non-criminal violations of school rules without a hearing or other opportunity to be heard); Complaint for Injunctive and Declaratory Relief ¶¶ 29-30, *D.W. v. Harrison Cnty.*, No. 1:09-cv-267-LG-RHN (S.D. Miss. Apr. 20, 2009) [hereinafter Complaint for Injunctive and Declaratory Relief, *D.W.*] (alleging arbitrary and excessive discipline by placing students in “lockdown” from three days to an entire week without any due process protections); Complaint ¶¶ 106-07, *A.A. v. Wackenhut Corr. Corp.*, No. 00-246-C-MI (M.D. La. Apr. 3, 2000) [hereinafter Complaint, *A.A.*] (“Defendants knowingly permit staff to engage in a series of abusive and demeaning disciplinary practices [without due process, including] forcing youth to wiggle across cold concrete on their bellies; . . . to squat naked with their buttocks apart for long periods of time during the conduct of searches; removing clothing and

Lopez that students are entitled to some level of due process prior to being disciplined, and that the process required escalates along with the discipline imposed.¹¹⁹

Thus, for short-term suspensions of ten days or less, a student must "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."¹²⁰ The Court further noted that "[l]onger suspensions [for more than ten days] or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required."¹²¹

Discipline is not always limited to the imposition of time-outs, suspensions, and expulsions, but may also include corporal punishment. The Court has held in the context of "paddling" that although "Fourteenth Amendment liberty interests are implicated," the practice of paddling is well within the common law tradition and that common law remedies are adequate to afford due process.¹²² However, the Court noted that it did not reach the question of "whether or under what circumstances corporal

mattresses as punishment; and, placing painful arm bars on youth in order to make them stand in the corner.").

119. 419 U.S. 565, 574 (1975) ("[A] student's legitimate entitlement to a public education [i]s a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."); *see also* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) ("[Courts must consider] the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

120. *Goss*, 419 U.S. at 581.

121. *Id.* at 584; *see also* *Wood v. Strickland*, 420 U.S. 308, 323 n.15 (1975) ("That is not to say that the requirements of procedural due process do not attach to expulsions. Over the past 13 years the Courts of Appeals have without exception held that procedural due process requirements must be satisfied if a student is to be expelled.").

122. *Ingraham v. Wright*, 430 U.S. 651, 674, 682 (1977).

punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause.”¹²³ The analysis is likely different for corporal punishment not “authorized and limited by the common law,”¹²⁴ such as that complained of at a number of disciplinary alternative schools.¹²⁵

Should discipline escalate to the level of referral to local law enforcement, additional, more stringent, due process protections apply.¹²⁶ And if the punishment imposed is for an infraction so poorly defined that students do not have notice of the conduct prohibited and/or that it encourages arbitrary and discriminatory enforcement, it may be void for vagueness.¹²⁷

Finally, although the Court has left open the question of whether the Fourteenth Amendment or the Eighth Amendment applies to complaints about conditions of confinement for juveniles,¹²⁸ the complaints about such

123. *Id.* at 679 n.47.

124. *See id.* at 682; *see also, e.g.,* Mahone v. Ben Hill Cnty. Sch. Sys., 377 F. App'x 913, 914, 917 (11th Cir. 2010) (finding that a gym teacher who rough-housed with a special education student did not violate the Fourteenth Amendment); Ellis *ex rel.* Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 695, 700 (6th Cir. 2006) (finding that a teacher who punished a student by slamming her head against the blackboard, throwing her to the ground and choking her violated the Fourteenth Amendment); Milonas v. Williams, 691 F.2d 931, 941-43 (10th Cir. 1982) (use of an isolation chamber and excessive force violated the Fourteenth Amendment).

125. Plaintiffs in the case against the Atlanta Independent School District, for example, alleged routine physical violence against students, committed both by other students and faculty and staff members. Verified Second Amended Complaint, *supra* note 3, ¶¶ 57-59 (“Teachers (and at least one administrator) routinely hit students, throw books at them, and throw students against walls or to the floor. . . . [S]chool resource officers and police officers, who are often physically aggressive, . . . have a practice of using chokeholds on the students.”).

126. *See In re Gault*, 387 U.S. 1, 33, 56 (1967). The Court notes that “due process of law requires notice . . . which would be deemed constitutionally adequate in a civil or criminal proceeding” and “confrontation and sworn testimony by witnesses available for cross-examination” where appropriate. *Id.*

127. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 679 (1986).

128. With the exception of the Seventh Circuit, the circuit courts have analyzed these claims under the Fourteenth Amendment. *Compare* Nelson v. Heyne, 491 F.2d 352, 354-56 (7th Cir. 1974) (analyzing school disciplinary measures under the Eighth Amendment), *with Ellis ex rel. Pendergrass*, 455

conditions evidence actionable claims under one or the other.¹²⁹

III. CURRENT STATE ACTION DOCTRINE

A. *An Overview of the State Action Requirement*

Setting aside criticism of the requirement for state action at all,¹³⁰ the state action doctrine at its most essential

F.3d at 700 (Sixth Circuit citing the Fourteenth Amendment), and *Milonas*, 691 F.2d at 939 (Tenth Circuit citing the Fourteenth Amendment).

129. See e.g., Complaint for Injunctive and Declaratory Relief ¶¶ 1, 17, 20-32, J.H. *ex rel.* Gray v. Hinds Cnty., 2011 WL 3047667 (S.D. Miss. July 25, 2011) (No. 3:11-cv-327-DPJ-FKB) (alleging facility subjected children to “sensory deprivation,” “inadequate mental health care,” and “verbal abuse”); Amended Complaint, *D.L.*, *supra* note 87, ¶¶ 3, 65 (alleging brutal and excessive physical force on a regular basis to intimidate and terrorize youth); Complaint for Injunctive and Declaratory Relief, *D.W.*, *supra* note 118, ¶ 1 (“The abusive conditions at the Juvenile Detention Center include punitive shackling, staff-on-youth assaults, 22-24 hour a day lock-down in filthy jail cells, unsanitary conditions resulting in widespread contraction of scabies and staph infections, dangerous overcrowding . . . , and inadequate mental health care.”); Amended Complaint, *Brian B.*, *supra* note 87, ¶¶ 1, 83, 84 (alleging use of excessive force and unreasonable restraints on Plaintiffs, failure to protect Plaintiffs from sexual abuse by staff, requiring students to “place their foreheads on a desk and remain in that position for hours at a time,” and forcing students to “stand *en masse* outside in the hot sun”); Complaint, *A.A.*, *supra* note 118, ¶¶ 83-95, 98-107 (alleging excessive force, unreasonable use of bodily restraints, excessive and harmful use of chemical gas, failure to protect from harm, and abusive and arbitrary disciplinary practices).

130. See, e.g., Charles L. Black, Jr., *Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69, 90 (1967) (“The ‘state action’ concept in the field to which I have limited myself has just one practical function; if and where it works, it immunizes racist practices from constitutional control.”); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505-06 (1985) (“It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government. . . . I contend that by any theory of rights . . . the state action requirement makes no sense.”). Frank Michelman presents a variation on the critique, suggesting that “[t]he prevailingly formalistic American state action doctrine . . . is, in significant degree, ideologically motivated”—and that the doctrine is therefore “potentially radically unstable under pressure of such novel developments in civil society as massive privatization.” Michelman, *supra* note 15, at 1080-81. For an analysis of this issue in the education context specifically, see Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F.

holds that the Constitution constrains only government behavior, not private behavior.¹³¹ Thus, parents are not subject to the First Amendment when disciplining their children for speaking out of line, or to the Fourth Amendment when searching their bedrooms. The Fourteenth Amendment (which prohibits states from violating federal constitutional rights) applies only to state government entities: “No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”¹³²

In the context of § 1983 litigation, the state action requirement is similarly made clear by the text of the statute itself:

Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . .*, 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, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress¹³³

The Supreme Court has noted that § 1983’s “under color” of law requirement is the same as the Fourteenth Amendment’s state action requirement.¹³⁴

In practice, the state action doctrine is largely known for (and taught in law schools via) its various exceptions. Here, again, criticism abounds for the doctrine’s lack of clarity,¹³⁵ but at its most essential, the doctrine provides

43, 73 (“[C]onstitutional doctrine . . . does not support a strong distinction between public and private schools.”).

131. *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

132. U.S. CONST. amend. XIV (emphasis added); *see also* *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

133. 42 U.S.C. § 1983 (2006) (emphasis added). This Article does not address the various doctrinal difficulties of prevailing in a § 1983 suit once the first hurdle—that of demonstrating state action—has been passed. It is worth noting, however, that many aspects of § 1983 doctrine overlap with state action doctrine. *See infra* Part V.A.2.

134. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

135. *See, e.g.*, Black, *supra* note 130, at 91 (“The literature of ‘state action’ is the literature of a non-concept.”); Chemerinsky, *supra* note 130, at 503-04

that seemingly private entities may be held liable as state actors when they play a government role, when the action was compelled by the state, when they are engaged in joint action with the government, or when they are otherwise entwined with the government. The inquiry is a highly fact-intensive one, but the overarching question is whether the action is “fairly attributable to the State.”¹³⁶

The first two of the traditional tests to determine state action are relatively straightforward, as they are designed to address those circumstances in which the private actor is functionally the state itself, or in which the private actor has been commanded by the state to take the complained-of action. First, the “public function” test attempts to determine whether the private actor has been delegated a public function by the state.¹³⁷ The continued viability of the public function test in an era of increased privatization is unclear. As government entities privatize functions once considered “public,” courts puzzling out the presence of state action under this test confront a catch-22: if the function was public, it would not have been subject to privatization in the first place, and yet it has, which is why

(“There still are no clear principles for determining whether state action exists.”). Others have focused on ways to refine or reconceptualize the doctrine itself to make it more coherent. *See, e.g.,* Sheila S. Kennedy, *When Is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 *GEO. MASON U. C.R. L.J.* 203, 219 (2001) (proposing an understanding of state action using conventional agency law analysis). Some contend that the doctrine is “frankly normative,” in that it is merely “the label for the conclusion reached after a decision not to decide in a certain category of cases.” Frederick Schauer, *Acts, Omissions, and Constitutionalism*, 105 *ETHICS* 916, 922-24 (1995); Michael L. Wells, *Identifying State Actors in Constitutional Litigation: Reviving the Role of Substantive Context*, 26 *CARDOZO L. REV.* 99, 111 (2004).

136. *Lugar*, 457 U.S. at 937; *see also* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295-96 (2001) (“What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.”).

137. *See, e.g.,* *Terry v. Adams*, 345 U.S. 461, 468-69 (1953) (finding a private political association that excluded African American candidates was a state actor because they held pre-primary elections); *Marsh v. Alabama*, 326 U.S. 501, 507-09 (1946) (holding that a company-owned town was a state actor because it functioned like any other non privately-owned town).

there is a legal action before the court.¹³⁸ The second test, of state compulsion, attempts to determine whether the action at issue was the result of the state's exercise of coercive power or significant encouragement, or whether the private entity engaged in the action is otherwise controlled by the state.¹³⁹

Application of the next two tests is a little more opaque. They seek to determine whether the state was somehow sufficiently involved with the private actor and/or complained-of action such that state action exists. The nexus, or joint action, test attempts to determine whether the private actor has operated as a willful participant in joint activity with the state. The idea is that if the state and private actor have embarked on a mutual venture or have colluded with one another, state action is present.¹⁴⁰ Cases decided upon this ground have declined markedly since the passage of the 1963 Civil Rights Act and it is unclear the extent to which the doctrine has continued viability.¹⁴¹ In fact, much of the joint action inquiry now appears to turn upon the extent to which the state qua state has actively intervened or acted, blurring the distinction between this inquiry and that for state compulsion.¹⁴²

138. See Alfred C. Aman, Jr., *An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City*, 14 IND. J. GLOBAL LEGAL STUD. 301, 315 (2007) ("Functions once thought to be at the heart of a particular agency's responsibilities increasingly have now been turned over to private entities . . . the definition of what is and what is not inherently governmental has evolved considerably."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 579 (2000) ("Ironically, . . . the historical pervasiveness of private activity may be largely responsible for the 'remarkable uselessness' of state action doctrine in constraining the private role in governance.").

139. See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970).

140. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723 (1961) (finding restaurant that refused service to African American was a state actor because it had a symbiotic relationship with the state-owned parking garage in which it was located).

141. Compare *id.* at 723, with *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974) (finding public utility company not state actor despite heavy regulation), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-72 (1972) (holding private club's refusal to serve African American was not state action despite heavy regulation of liquor licensing).

142. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982) (finding no state action where a nursing home relied on private medical decisions not compelled

Finally, some have identified a fourth test, of entwinement, as a result of the Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.¹⁴³ The Court in *Brentwood* found the Tennessee Secondary School Athletic Association to be a state actor, notwithstanding the fact that it held itself out as a private group comprised of public and private high schools, on the grounds that it was "entwined" with government—84% of the association's members were public schools and Tennessee implicitly acknowledged the association's role in regulating interscholastic athletics in the state.¹⁴⁴ It remains to be seen whether this possible emergence of "entwinement" as a test for state action will functionally serve as a revival of the traditional nexus or joint action inquiry.

In practice, all of these various tests operate largely as indicators of state action.¹⁴⁵ There is no requirement that all the tests be met, but neither do they function completely independently from one another.¹⁴⁶ Much ink has been spilled on the topic of whether one type of entity or another should be considered a state actor and under what

by the state in moving Medicaid patients to a lower level of care). The Court in *Blum* notes that "constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* at 1004. Much depends on how broadly or narrowly you define "the specific conduct of which the plaintiff complains." See also *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), discussed *infra* Part III.B.

143. 531 U.S. 288 (2001).

144. *Id.* at 299-301. In his dissenting opinion, Justice Thomas argues that "entwinement" is a new test that "lacks any support in [the Court's] state-action jurisprudence." *Id.* at 312 (Thomas, J., dissenting). He notes that the Court had never before found state action based on "entwinement" alone. *Id.*

145. *Cf.* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) ("Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here.").

146. *Cf.* Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 337 (1995) ("When a particular defendant does not satisfy any one of the three state action tests, a reviewing court should step back and consider whether the defendant satisfies a sufficient portion of each of the three tests to support a state action finding, even if no single test is satisfied completely.").

circumstances,¹⁴⁷ and—of relevance to our inquiry—the Court has drawn increasingly fine lines between various types of contract and pseudo-government employees. Thus, for example, public defenders in the employ of the state are not considered state actors because they operate in opposition to the state,¹⁴⁸ unless they conspire with the state to deny a defendant his rights.¹⁴⁹

B. *State Action Doctrine as Applied to Schools: Rendell-Baker v. Kohn*

1. *The Court's Decision in Rendell-Baker v. Kohn.* Although the Supreme Court has held that private actors performing essential government functions may be held accountable for their actions, as when state prisons outsource the provision of medical care to inmates,¹⁵⁰ the legal landscape in the school context—and in the disciplinary alternative school context in particular—seems bleak. The Court held in *Rendell-Baker v. Kohn*¹⁵¹ that a private company running a public school in Massachusetts was not accountable as a state actor in a § 1983 action brought by school employees.¹⁵² In so holding, the Court specifically found public education not “traditionally the *exclusive* prerogative of the State,”¹⁵³ in marked contrast to the provision of medical services in prisons.¹⁵⁴

147. See, e.g., Richard L. Stone & Michael A. Perino, *Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law*, 1995 COLUM. BUS. L. REV. 453 (self-regulatory organizations should be considered state actors); Justin A. McCarty, Note, *The Volunteer Border Patrol: The Inevitable Disaster of the Minuteman Project*, 92 IOWA L. REV. 1459, 1481-86 (2007) (arguing that Minutemen should be considered state actors).

148. *Polk Cnty. v. Dodson*, 454 U.S. 312, 324-25 (1981).

149. *Tower v. Glover*, 467 U.S. 914, 916 (1984).

150. *West v. Atkins*, 487 U.S. 42, 56-57 (1988). Medical doctors under contract with the state to provide services to prison inmates are considered state employees and actors because inmates have no other alternative for medical care. *Id.* at 47.

151. 457 U.S. 830 (1982).

152. *Id.* at 840-43.

153. *Id.* at 842.

154. This formulation of the test begs the question of what happens once traditions have been eroded, when functions once performed exclusively by the

Rendell-Baker centered around a disciplinary alternative school that was publicly-funded in two senses: it received both general monies from a number of state and federal agencies and specific funds from nearby cities to finance the education of the particular students those cities had referred to the school.¹⁵⁵ Nearly all of the students at the school were referred to it by state entities.¹⁵⁶ The school was privately run, founded as a private institution and governed by a private board of directors.¹⁵⁷ And the school specialized “in dealing with students who have experienced difficulty completing public high schools; many have drug, alcohol, or behavioral problems, or other special needs.”¹⁵⁸ In other words, it was a publicly-funded privately-run disciplinary alternative school.

The plaintiffs in *Rendell-Baker* were school employees who claimed they had been wrongfully discharged without due process in retaliation for exercising their First Amendment rights.¹⁵⁹ They filed suit under § 1983, claiming violations of the First, Fifth, and Fourteenth Amendments.¹⁶⁰ The Court found they failed to state a claim for which relief under § 1983 could be granted because the decision to discharge them was not state action.¹⁶¹ In so holding, the Court considered four factors and determined that plaintiffs failed to make the necessary showing in any of them to support a finding of state action.

First, the Court found the school’s reliance upon public funding non-dispositive because such reliance was “not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the

states have been privatized for so long that they are no longer traditionally state functions.

155. *Rendell-Baker*, 457 U.S. at 832 (“In recent years, public funds have accounted for at least 90%, and in one year 99%, of respondent school’s operating budget.”).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 834.

160. *Id.* at 834-35.

161. *Id.* at 843.

government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”¹⁶²

Second, the Court found that the decision by the school that formed the locus of petitioners’ complaint—the decision to fire them—was not compelled or influenced by any state regulation.¹⁶³ Although the school itself was extensively regulated, “the various regulators showed relatively little interest in the school’s personnel matters” and the decision to discharge was made by private management.¹⁶⁴

Third, the Court found that the school did not perform a “public function” in the sense required by traditional state action doctrine.¹⁶⁵ It noted that the test “is not simply whether a private group is serving a public function” but rather “whether the function performed has been ‘traditionally the *exclusive* prerogative of the State.’”¹⁶⁶ The school in question failed to meet this test because although Massachusetts law made clear the state’s intent to pay for the education of maladjusted high school students, it did not make the provision of that education the “exclusive province” of the state.¹⁶⁷ In fact, as the Court pointed out, Massachusetts had only recently undertaken the financial burden of providing these services.¹⁶⁸

Finally, the Court found no symbiotic relationship between the school and the state, noting that the school’s fiscal relationship with the state was no different from that of any other contractor performing a service for the government.¹⁶⁹

2. *Distinguishing Rendell-Baker in the Context of Privately-Run Publicly-Funded Disciplinary Alternative Schools.* The Court’s primary concern in *Rendell-Baker* was in cabining the state action doctrine to ensure that the mere

162. *Id.* at 840-41.

163. *Id.* at 841.

164. *Id.* at 841-42.

165. *Id.* at 842.

166. *Id.* (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)).

167. *Id.*

168. *Id.*

169. *Id.* at 842-43.

fact of contractual engagement by a government entity did not convert private actors into state actors, making their every action state action. The Court understandably wished to avoid a situation in which the “private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government” would be exposed to new liability, particularly for actions wholly unrelated to the subject of the government contracts.¹⁷⁰ A world in which businesses must surrender their private status for all dealings with the citizenry merely because they take on a government contract is clearly untenable.

The holding in *Rendell-Baker* would appear to be a nearly insurmountable barrier to finding state action against publicly-funded privately-run disciplinary alternative schools. This Article contends, however, that *Rendell-Baker* is in fact on its face inapplicable to the situation contemplated, in which redress is sought on behalf of students involuntarily placed in an institution that violated their constitutional rights. Just as it cannot be that every action taken by a government contractor is state action, neither can it be no action taken by a government contractor is ever state action. The question is where the line ought to be drawn.

a. The Nature of the Service Provided. Where the action in question—the violation of students’ constitutional rights—goes to the core of the contracted-for government service, the Court’s expressed concerns are not implicated. Thus, in *West v. Atkins*, the Court held a private doctor under contract with the state to provide medical services to prison inmates to have acted under color of state law when he treated an inmate, i.e., when he performed (albeit with deliberate indifference) the very services for which he was contracted.¹⁷¹

In contrast, Plaintiffs’ claims in *Rendell-Baker* had nothing to do with the underlying government contract, which required Defendants to provide educational services to maladjusted high school students. Their claim of wrongful discharge could have arisen in any employment context and had nothing to do with the nature of the school

170. *Id.* at 840-41.

171. 487 U.S. 42, 57 (1988).

or the services being provided by the school. In other words, there was no evidence that the school had authority to wrongfully discharge petitioners solely by virtue of being cloaked with that authority from the state.

As the majority makes clear, to the extent the state had in fact acted, its action was centered upon ensuring that students at the school received an appropriate education and not that personnel at the school would be treated in any particular way: “[T]he decisions to discharge the petitioners were not compelled or even influenced by any state regulation. Indeed, in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school’s personnel matters.”¹⁷²

The focus on the nature of the service provided is separate and distinct from an argument about the public/non-public or essential/non-essential nature of that service. The argument is not that the private actor operating the school is a state actor because education is an essential public service (an argument the Court has quite clearly rejected), but rather that the private actor becomes a state actor where its actions have been taken jointly with or compelled or influenced in some way by the state. It is not that the complained-of private action is a “public function,” but that the action is indistinguishable from that taken by the state itself.

b. Voluntary vs. Involuntary Attendance. Another critical factor in distinguishing the suit brought by school employees in *Rendell-Baker* and a hypothetical suit brought by students, is that the employees are not obligated by law to work at that particular school, or even to work at all. Students, in contrast, are subject to compulsory education laws, and students attending disciplinary alternative schools are often required by the state (whether via court order or school board referral) to attend that particular school.

The First Circuit’s preceding opinion further underscores the difference between employees of a school,

172. *Rendell-Baker*, 457 U.S. at 841. Justice White’s concurrence further underscores this important distinction: “For me, the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State. . . . The employment decision remains, therefore, a private decision not fairly attributable to the State.” *Id.* at 844 (White, J., concurring).

who are free to leave, and students who attend involuntarily:

The “public function” concept is strongest, moreover, when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those students of the [school] who were placed there by their local school committee, particularly those who are compelled to attend under the state’s compulsory education laws, would have a stronger argument than do plaintiffs that the school’s action towards them is taken “under color of” state law,¹⁷³ since the school derives its authority over them from the state.

Students who have been involuntarily referred to a disciplinary alternative school, in other words, are forced to rely upon the state for educational services much as the prison inmate in *West v. Atkins* was forced to rely upon the state-contracted doctor for medical services. As some commentators have noted, the critical distinction between the Court’s finding in *West*, where the provision of medical care to inmates was considered state action, and *Rendell-Baker*, where the provision of education was not, was the voluntariness of attendance at the institution in question and thus the monopoly the state functionally maintained on the services provided.¹⁷⁴

The *Rendell-Baker* dissent systematically builds a case for a “symbiotic relationship” in which the school and the state were “participants in a joint venture,”¹⁷⁵ relying upon the “cumulative impact” of the state funding and supervision.¹⁷⁶ The Court’s categorical rejection of this approach may mean the death of the joint action test for state action at its broadest interpretation, under which participation in a joint venture with the government converts all private activities in connection with the joint venture into state action.

173. *Rendell-Baker v. New Perspectives Sch. Inc.*, 641 F.2d 14, 26 (1st Cir. 1981) (emphasis omitted), *aff’d*, 457 U.S. 830 (1982).

174. Countryman, *supra* note 76, at 534.

175. *Rendell-Baker*, 457 U.S. at 847 (Marshall, J., dissenting).

176. *Id.* at 848 n.1. In fact, commentators who advocate for a looser interpretation of state action doctrine, in the form of “meta-analysis,” point to *Rendell-Baker* as an example of a case that would come out differently. *See, e.g.*, Krotoszynski, *supra* note 146, at 343-44.

Speculation aside, *Rendell-Baker* makes the Court's current position clear: even if the joint action test survives, it does so in a much narrower form than previously applied by the Court, and confers state action status only upon those particular activities in which the state was actually a joint participant. The action in question—in *Rendell-Baker*, the decision to discharge the employees—must itself be the product of joint action. Whether this reading of the joint action test constitutes a departure from the Court's previous interpretations or is so narrow as to make meaningless the distinction between the joint action and state compulsion tests, is irrelevant to our inquiry.

The fact that the school in *Rendell-Baker* happened to be a privately-run publicly-funded disciplinary alternative school is thus no more relevant to our inquiry than the NCAA arrangements addressed by the Court in *NCAA v. Tarkanian*¹⁷⁷ or the Tennessee Secondary School Athletic Association's issues addressed by *Brentwood*.¹⁷⁸ Although each of these cases took place in a school context, the claims were not *particular* to that context. *Rendell-Baker* is a red herring in the context of disciplinary alternative schools with respect to claims brought by students involuntarily referred to the school and who seek redress for violation of rights that go to the core of the underlying government contract.

C. *Post Rendell-Baker in the Lower Courts: A Circuit Split*

In the wake of the Supreme Court's decision in *Rendell-Baker*, lower courts dealing with student suits against similar schools have taken different approaches to the state action issue. There is little agreement on the extent to which *Rendell-Baker* directly governs and/or precludes student-initiated suits.

In fact, although this Article does not discuss cases in which a school employee files suit, which are ostensibly governed by *Rendell-Baker*, there is little agreement amongst the lower court cases even on that front.¹⁷⁹

177. 488 U.S. 179 (1988).

178. 531 U.S. 288 (2001).

179. Compare, e.g., Caviness v. Horizon Cmty. Learning Ctr., 590 F.3d 806, 814-15 (9th Cir. 2010) (finding a private non-profit corporation running charter school was not a state actor in employment action and citing *Rendell-Baker*),

Similarly, this Article does not deal with purely private schools unaffiliated in any way with the state or with post-secondary education, as attendance at those schools is completely voluntary,¹⁸⁰ but there is some disagreement in the lower court cases with respect to those cases as well—particularly with regard to post-secondary education.¹⁸¹ And, of course, there are some lower court opinions that reach

Johnson v. Pinkerton Acad., 861 F.2d 335, 337-38 (1st Cir. 1988) (relying on *Rendell-Baker* to find private school not state actor), and McCann v. Tex. Vocational Sch., 2005 WL 1653084, at *4 (S.D. Tex. July 8, 2005) (finding vocational school was not a state actor in employment action because plaintiff did not allege a “symbiotic relationship” or “close nexus”), with *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968, 972-73 (S.D. Ohio 2002) (finding privately-run public school was a state actor because school provided free public education, and distinguishing *Rendell-Baker*).

180. *Cf. infra* Part III.C.1.

181. Regarding private schools, see, for example, *Cummings v. Office of Catholic Educ.*, No. Civ.A. 05-104, 2005 WL 1124103, at *2 (E.D. Pa. May 11, 2005) (private Catholic school not state actor); *Watson v. St. Luke Acad.*, No. 04 C 2472, 2005 WL 281227, at *5 (N.D. Ill. Feb. 2, 2005) (private religious school not state actor); *Nobles v. Ala. Christian Acad.*, 917 F. Supp. 786, 789 (M.D. Ala. 1996) (rejecting plaintiff’s argument that state exercised “such a coercive influence over private schools as to make the school’s decisions those of the state”). *But see* *Curran v. Bureau of Special Educ. Appeals*, 3 Mass. L. Rep. 1, 1-2 (Mass Super. Ct. 1994) (finding private school state actor). Regarding post-secondary education, compare *Pik v. Univ. of Pa.*, No. 08-5164, 2010 WL 3933275, at *7 (E.D. Pa. Oct. 7, 2010) (University of Pennsylvania not state actor), *Becker v. City Univ. of Seattle*, 723 F. Supp. 2d 807, 810 (E.D. Pa. 2010) (City University of Seattle not state actor), *Curto v. Smith*, 248 F. Supp. 2d 132, 139-40 (N.D.N.Y. 2003) (veterinary school not state actor), *Johnson v. Suffolk Univ.*, No. Civ.A. 02-12603-PBS, 2002 WL 31426734, at *1 (D. Mass. Oct. 28, 2002) (Suffolk University not state actor), *Hack v. President & Fellows of Yale Coll.*, 16 F. Supp. 2d 183, 192 (D. Conn. 1998) (Yale College not state actor), *Tynecki v. Tufts Univ. Sch. of Dental Med.*, 875 F. Supp. 26, 33 (D. Mass. 1994) (private dental school not state actor), and *Stone v. Dartmouth Coll.*, 682 F. Supp. 106, 110 (D.N.H. 1988) (Dartmouth College not state actor), with *Albert v. Carovano*, 824 F.2d 1333, 1341 (2d Cir. 1987) (Hamilton College state actor), *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 103 (3d Cir. 1984) (University of Pittsburgh and Temple University state actors), and *McGrath v. Dominican Coll. of Blauvelt*, 672 F. Supp. 2d 477, 489-91 (S.D.N.Y. 2009) (Dominican College state actor). This Article also omits discussion of cases in which the complained of action is student action. *See, e.g., Yeo v. Town of Lexington*, 131 F.3d 241, 251-55 (1st Cir. 1997) (finding action of student editors running school yearbook and newspaper not state action).

the merits of a constitutional claim without any discussion of state action whatsoever.¹⁸²

The vast majority of cases filed are individual in nature and seek retrospective relief, i.e., they are brought on behalf of one plaintiff (as opposed to a class) and seek damages for a particular injury that happened in the past (as opposed to prospective injunctive relief). Examination of these cases, combined with the few that have been filed for prospective injunctive relief reveals that although the courts differ widely in their approach to the state action issue, two factors weigh heavily in their analysis: whether attendance at the educational facility in question was voluntary or involuntary, and how shocking the underlying facts of the alleged injury are. Although neither of these factors is an official part of any of the Supreme Court's oft-cited "tests" to divine the presence of state action, they both nevertheless appear to be excellent predictors of whether such action will be detected.

1. *Involuntary Attendance*. Irrespective of other tests indicating state action, the factor of involuntary attendance is outcome-determinative for many lower courts. In other words, courts may find in favor of state action should there be *involuntary* attendance (perhaps in conjunction with other indicators of state action) but few courts are willing to find state action if attendance is *voluntary* (even in conjunction with other indicators of state action).

a. No State Action—Voluntary Attendance. The Third Circuit's decision in *Robert S. v. Stetson School, Inc.*,¹⁸³ underscores the importance of voluntary attendance—and the potential narrowness of the definition of "voluntary."¹⁸⁴

182. See, e.g., *Daugherty v. Vanguard Charter Sch. Acad.*, 116 F. Supp. 2d 897, 906 (W.D. Mich. 2000) (addressing whether complained-of actions by private company operating charter school were pursuant to official policy or established custom under § 1983 without discussion of state action); *Jones v. SABIS Educ. Sys., Inc.*, 52 F. Supp. 2d 868, 878 (N.D. Ill. 1999) (same).

183. 256 F.3d 159 (3d Cir. 2001).

184. Interestingly, plaintiff in this case initially survived summary judgment at the district court level. *Kathryn P. v. City of Philadelphia*, No. Civ.A. 97-6710, 1999 WL 391492, at *4 (E.D. Pa. May 27, 1999). That court noted that the plaintiff was a ward of the state and that "a school can be both a state actor when its students are assigned by the state and a private actor when its students are assigned by their parents." *Id.* at *4 & n.3. The district court ultimately ruled against plaintiff after an evidentiary hearing. *Robert S. v. City*

Because the plaintiff was in the temporary custody of the Philadelphia Department of Human Services and that agency placed him at the school in question in its capacity as his legal guardian, the court—in an opinion written by then-Judge Alito—found:

Whether or not Robert, a minor at the time in question, personally wanted to attend the [school], his legal custodian, DHS, wanted him placed there, and his mother consented. Thus, his enrollment at [the school] was not “involuntary” in the sense relevant here, i.e., he was not deprived of his liberty in contravention of his legal custodian’s (or his mother’s) wishes.¹⁸⁵

Just as attendance at a school would not be considered involuntary if the minor resisted but the parent insisted, here the Third Circuit determined that the student had functionally been enrolled at the school by his parent, i.e., his legal guardian, the Department of Human Services.¹⁸⁶ As other commentators have pointed out, this approach means that wards of the state forfeit their ability to raise any civil rights claims against private institutions in which the state places them.¹⁸⁷

of Philadelphia, No. 97-6710, 2000 WL 288111, at *6 (E.D. Pa. Mar. 17, 2000). It determined the school was “not a prison or a juvenile detention facility, and the students are not locked down [Plaintiff] was never adjudicated a juvenile delinquent, or ordered to attend [the school] by any court.” *Id.* at *5.

185. *Robert S.*, 256 F.3d at 166-67. The egregiousness of the complained of behavior, or lack thereof, may also have played a role in the court’s decision:

[S]tudents were not placed in solitary confinement, discouraged from seeing visitors, required to take lie detector tests, or subjected to censorship of their mail. On the contrary, it is undisputed that Robert was allowed to leave campus with an instructor, had regular contact with his family (including frequent visits with his mother and stepfather), was allowed to leave campus with his family, and was even allowed to go home for vacations.

Id. at 168.

186. This finding would not preclude liability against the state agency for its state action—the act of referring the plaintiff to the school in the first place. See *Doe v. Westlake Acad.*, No. 97-2187, 2000 WL 35499064, at *1, *12-14 (Mass. Super. Ct. Nov. 20, 2000) (finding no state action where plaintiff was a ward of the state civilly committed to a secure residential treatment).

187. Sacha M. Coupet, *The Subtlety of State Action in Privatized Child Welfare Services*, 11 CHAP. L. REV. 85, 115 (2007).

In *S.G. v. Care Academy, Inc.*,¹⁸⁸ the Western District of Kentucky notes that the Academy is a private school, that state law did not mandate the strip searches of which plaintiff complained,¹⁸⁹ and that the plaintiff “was not forced to enroll by court order or other adjudicative process, and indeed freely withdrew after the incident in question.”¹⁹⁰ Similarly, in *Robertson v. Red Rock Canyon School, LLC*,¹⁹¹ the District of Utah concluded that there was no state action in a case involving the voluntary placement of a student at a specialized boarding school for “at-risk youth[s].”¹⁹²

b. State Action—Involuntary Attendance. In *Milonas v. Williams*,¹⁹³ the Tenth Circuit found a private school to which many students had been involuntarily referred for special education services was a state actor.¹⁹⁴ The school was privately owned and operated, but received public monies and also operated as a correctional and detention facility, and as a mental health facility.¹⁹⁵ The plaintiff was involuntarily committed to the school by his mother, but the commitment was a condition of probation imposed by a juvenile court.¹⁹⁶ The court concluded that the state had so insinuated itself with the school as to be considered a joint participant and distinguished *Rendell-Baker*: “The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state

188. No. 3:09-CV-422-S, 2010 WL 1416717 (W.D. Ky. Mar. 31, 2010).

189. *Id.* at *3. The court is, of course, incorrect as a matter of law that state law must mandate the complained-of actions. *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961) (holding that city police officers who conducted an illegal search and seizure were state actors).

190. *Care Academy*, 2010 WL 1416717, at *3.

191. No. 2:05-CV-758 TC, 2006 WL 3041469 (D. Utah Oct. 24, 2006).

192. *Id.* at *1, *3. The court noted that “Plaintiffs do not allege that [the school’s] decision to house [plaintiff] in another unit with unsupervised sexual predators was in any way directed, controlled, or influenced by a governmental entity.” *Id.* at *5.

193. 691 F.2d 931 (10th Cir. 1982).

194. *Id.* at 939.

195. *Id.* at 935-36.

196. *Id.* at 936.

officials who were aware of, and approved of, certain of the practices which the district court has now enjoined.”¹⁹⁷

A series of § 1983 cases in the late 1990s and into 2000 that challenged conditions at a number of juvenile detention facilities in Louisiana, which also provided educational services, are instructive as well.¹⁹⁸ The daily operation of the facilities had been outsourced to a series of private corporations and the facilities were intended to provide, among other services, education and rehabilitation for the youths held therein.¹⁹⁹ Attendance at the facilities was involuntary.²⁰⁰ The various cases were consolidated in *Williams v. McKeithen*, and although the parties reached a settlement agreement that bound both the relevant state agencies and private corporations, there was no apparent discussion of state action.²⁰¹

2. *Injury Shocking to the Conscience.*²⁰² In *Logiodice v. Trustees of Maine Central Institute*, the First Circuit

197. *Id.* at 940.

198. *Williams v. McKeithen*, 121 F. Supp. 2d 943 (M.D. La. 2000) (consolidation of ten § 1983 cases).

199. *See, e.g.*, Amended Complaint, *Brian B.*, *supra* note 87, ¶ 34 (naming private corporation under contract with state as defendant); Complaint, *A.A.*, *supra* note 118, ¶ 21 (same).

200. The complaints alleged various violations of plaintiffs’ First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, including the use of excessive force, summary discipline practices, and inadequate care. *See, e.g.*, Amended Complaint, *Brian B.*, *supra* note 87; Complaint, *A.A.*, *supra* note 118.

201. *Williams*, 121 F. Supp. 2d at 945-48 (“The term ‘State’ shall refer to . . . employees, agents, contractors, and successors . . . who are wholly or partially responsible for the care of juveniles confined in the juvenile facilities . . .”). At least two similar cases were filed in 2010, also with no mention of the state action requirement. Amended Complaint, *D.L.*, *supra* note 87, ¶¶ 8, 16-18 (suing private company under contract with the state with no mention of state action requirement); Complaint ¶¶ 1, 22-28, *C.B. v. Walnut Grove Corr. Auth.*, No. 3:10CV663 DPS-FKB (S.D. Miss. Nov. 16, 2010) (same). Another case, *D.W. v. Harrison County*, named only the state entity but resulted in a settlement agreement that bound both the state and “the MSP [Mississippi Security Police, a private security company], as a contractor of the Defendant.” Memorandum of Agreement at 2, *D.W. v. Harrison Cnty.*, No. 1:09-cv-267-LG-RHN (S.D. Miss. Apr. 20, 2009).

202. This terminology draws upon the formulation used by the Court in *Rochin v. California*, 342 U.S. 165, 172 (1952) to denote behavior that is so egregious it constitutes a substantive due process violation even in the absence of a fundamental right. It is used informally here to signal those types of

declined to find the trustees of the Maine Central Institute state actors.²⁰³ The school in question was a privately-run facility under contract with several Maine school districts to educate all children in those districts.²⁰⁴ The court noted that the trustees served as private citizens; that the complained-of action involved student discipline, which the school contract left wholly to the discretion of the trustees; and that the plaintiff was not required to attend that particular school.²⁰⁵

The underlying claim in *Logiodice* was over a de facto seventeen-day suspension the plaintiff received for cursing at a teacher.²⁰⁶ Thus, although the plaintiff arguably satisfied the involuntary attendance factor, the facts of his claim might have been insufficiently shocking to motivate the court to find state action, as evidenced by the court's referral to the "small arguable unfairnesses that are part of life."²⁰⁷

Conversely, some allegations can be so shocking that even the fact of voluntary attendance will not dissuade a court from finding state action. In *Scaggs v. New York Department of Education*, the Eastern District of New York found a charter school to be a state actor even though attendance at the school was voluntary.²⁰⁸ Plaintiffs alleged the school utterly failed to meet any of the requirements to which it was subject under the Individuals with Disabilities in Education Act; that the school was lacking in essentials such as books, pens, pencils, and paper; and that the school

injuries to which the lower courts have been more sympathetic, without judgment as to whether "bad facts have made bad law."

203. 296 F.3d 22, 31 (1st Cir. 2002).

204. *Id.* at 24-25.

205. *Id.* at 28-29.

206. *Id.* at 25.

207. *Id.* at 29-30. Interestingly, the court did note that the school in question was in fact the "school of last resort" for plaintiff, as it was "for those in the community the only regular education available for which the state will pay." *Id.* at 27, 29.

208. *Scaggs v. N.Y. Dep't. of Educ.*, No. 06-cv-0799 (JFB)(VVP), 2007 WL 1456221 at * 1, *13 (E.D.N.Y. 2007).

was a chaotic and violent environment that was insect and rodent infested to boot.²⁰⁹

Finally, even a shocking injury will not suffice for a finding of state action if there are so many “intervening causes” that the court finds the injury too attenuated from the state—unless, perhaps, the injury is particularly shocking.²¹⁰

3. *Strict Liability for Outsourcing.* A handful of courts have followed the approach the Court took in *West v. Atkins*, which held that a private doctor under contract with a prison system to provide medical services to inmates acted under color of state law and was liable under § 1983 for deliberate indifference.²¹¹ The Court in *Atkins* reasoned that contracting out a state responsibility could not relieve the state of its constitutional duties or deprive those in the state’s care of a means to vindicate their constitutional rights:

[I]f this were the basis for delimiting § 1983 liability, the state will be free to contract out all services which it is constitutionally obligated to provide and leave its citizens with no means for

209. *Id.* at *8. The court distinguished *Rendell-Baker* on the grounds that plaintiffs’ claims “relate to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school.” *Id.* at *13.

210. Compare *Hamlin v. City of Peekskill Bd. of Educ.*, 377 F. Supp. 2d 379, 385-90 (S.D.N.Y. 2005), with *Susavage v. Bucks Cnty. Sch. Intermediate Unit No. 22*, No. Civ.A. 00-6217, 2002 WL 109615, at *10-11 (E.D. Pa. Jan. 22, 2002). In *Hamlin*, the court declined to find state action where a special needs student whose education was publicly funded was placed on a privately operated school bus and coerced into committing a sexual act by another student on the bus. *Hamlin*, 377 F. Supp. 2d at 381-85. The injury was committed by a fellow student and there was no evidence the state itself “had any control over what happened to the children while [at the school], and specifically over how they were put on the school bus.” *Id.* at 390. Interestingly, the court notes that the case did not present a “problem of a State encouraging the formation and function of ‘private’ schools in order to evade constitutional requirements with respect to public ones.” *Id.* at 387 n.4. In contrast, in *Susavage*, the court permitted recovery where plaintiff was also a special needs student whose education was publicly funded and who was placed on a privately operated school bus. *Susavage*, 2002 WL 109615 at *1. The plaintiff in *Susavage*, however, was strangled to death by an improper harness restraint on the bus. *Id.* at *2.

211. *West v. Atkins*, 487 U.S. 42, 57-58 (1988).

vindication of those rights, whose protection has been delegated to private actors, when they have been denied.²¹²

Much as the *Rendell-Baker* court sought to avoid a world in which all government contractors are liable as state actors in all of their actions, courts following the strict liability approach seek to avoid a world in which government and its contractors can evade liability altogether. The extent of the complainant's injuries or the degree to which the state was involved in the particular decision to treat become irrelevant; as soon as the state contracts out a particular type of service, state action is implicated.

For example, in *Magagna v. Salisbury Township School District*,²¹³ the Eastern District of Pennsylvania found that a school employee under contract with a non-profit corporation that in turn contracted with a public school district to provide alternative instruction for special needs students was a state actor.²¹⁴ The court distinguished *Rendell-Baker* on the grounds that the suit was brought by a student, as opposed to a school employee, and that the school in question was public, not private.²¹⁵ Thus, although the actions at issue were committed by an individual employed by a private corporation rather than the school district, "it is the nature of one's actions rather than the titular status of one's employer which determines whether § 1983 applies."²¹⁶ The court noted that finding otherwise would mean "a public entity could avoid § 1983 liability simply by using private surrogates to do the job for which the public actor is chartered."²¹⁷

212. *Id.* at 56 n.14 (quoting *West v. Atkins*, 815 F.2d 993, 998 (4th Cir. 1987) (Winter, J., dissenting)) (internal quotation marks omitted).

213. No. Civ.A. 98-1033, 1998 WL 961906 (E.D. Pa. Dec. 29, 1998).

214. *Id.* at *1-2.

215. *Id.* at *2 n.2.

216. *Id.* at *2.

217. *Id.*; see also *J.K. v. Dillenberg*, 836 F. Supp. 694, 699 (D. Ariz. 1993) ("The public policy implications of Defendants' position, if accepted, would be devastating. It is patently unreasonable to presume that Congress would permit a state to disclaim federal responsibilities by contracting away its obligations to a private entity.").

4. *Making Sense of the Lower Court Split.* The diversity in analysis and outcome reflected in these lower court opinions reflects the confusion sown by the Supreme Court's decisions on state action to date. The courts appear to have settled (for the most part) on two elements of a complainant's claim as being dispositive of the presence of state action: the voluntariness with which the complainant attended the institution in question, and the seriousness of her injuries. Neither of these factors is an "official" element of any test for state action articulated by the Court and the use of the latter factor is often not even explicit.

Neither factor, moreover, is a particularly good indicator of state action. Injury shocking to the conscience is highly subjective, which is one of the reasons the *Rochin* test²¹⁸ has fallen into disuse. It also places a critical constitutional determination at the mercy of judges' empathetic feelings.

The fact of involuntary attendance may reflect the presence of state action, as we shall see below, but lower courts relying upon this factor typically point to it for the wrong reasons. The point of involuntary attendance is not that the act of referral to the school itself constitutes the requisite state action, because the referring entity is invariably a state agency or official, e.g., a judge or local school board. Private individuals do not (yet) have the authority to involuntarily commit juveniles to particular institutions, so the act of referral itself as state action fails to present a meaningful question of state action.

The much harder issue presents itself *after* a student has been involuntarily committed to a particular school: whether the ostensibly private party in whose custody that student has been placed constitutes a state actor. This Article contends that the answer should be yes, in part because referral was involuntary—but only because the involuntary referral makes the student a captive audience, subject to the authority of the private entity only by virtue of the state's power, and where the private entity has authority only by virtue of power granted to it by the state.

218. See *supra* note 202 and accompanying text.

IV. THE SIGNIFICANCE OF STATE ACTION

Litigation under § 1983 has a venerable history dating back to the post-Civil War era, reflecting the statute's original purpose: to help African Americans vindicate their right not to be discriminated against during Reconstruction and its aftermath.²¹⁹ At the core of § 1983 is the recognition that governments are fallible, that mistakes will be made, rights will be violated, and that redress must be had.²²⁰ Redress is necessary not just for the benefit of the wronged party, but also to deter future wrongs, as “an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens’ constitutional rights.”²²¹ Section 1983 further serves to enforce public norms of conduct,²²² and to ensure the continued accountability of government to its people, for there can be no greater breach of trust than a constitutional

219. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.2 (2d ed. 1994).

220. As the Court has noted:

The absence of any damages remedy for violations of all but the most “clearly established” constitutional rights . . . could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined.

Owen v. City of Independence, 445 U.S. 622, 651 n.33 (1980) (citation omitted).

221. *Id.* at 652. In *Owen*, the Court denied a good faith defense to municipalities under § 1983. *Id.* at 624-25; see also *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 211 (1989) (Brennan, J., dissenting) (noting the desirability of having a “state actor stop and think before she acts in a way that may lead to a loss of liberty”).

222. See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1787 (1991) (“Constitutional remedies serve two basic functions in the constitutional scheme. The first is to redress individual violations. The slogan ‘for every right, a remedy’ reflects this purpose. The second function is related but distinct: to reinforce structural values, including those underlying the separation of powers and the rule of law.”); cf. Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 CARDOZO L. REV. 9, 11 (2004) (“[The] 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.”).

injury committed by the very government officials to whom we entrust ourselves.²²³

These powerful motivations have resulted in a powerful remedy. Although the Court has limited the scope of parties to whom § 1983 applies, particularly in the post-Warren Court era and in cases not involving racial discrimination,²²⁴ litigants seeking redress would be ill-advised to be persuaded of the premature death of the doctrine altogether. Some scholars have contended that although the doctrine “may succeed in extraordinary cases, . . . it cannot discipline the excesses—or facilitate the proper functioning—of the vast majority of arrangements in which private parties play a significant role.”²²⁵ Where the doctrine *does* apply, however—as this Article contends it does where attendance at an outsourced institution is compelled by the state—it is a doctrine that provides unique relief, unavailable under any other type of legal claim.

There are, at the outset, a number of practical advantages § 1983 offers litigants over claims in tort or other common law claims:

[T]he 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. . . . [S]ome litigants, such as state prisoners, may feel more comfortable bringing federal claims against their state antagonists. . . . The most fundamental substantive reason for seeking remedies under section 1983 is

223. See Fallon & Meltzer, *supra* note 222, at 1789 (“There historically always have been, and predictably will continue to be, cases in which effective individual redress is unavailable. This is regrettable, but tolerable. What would be intolerable is a regime of public administration that was systematically unanswerable to the restraints of law, as identified from a relatively detached and independent judicial perspective.”).

224. Cf. LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 251 (1985) (“*Burton [v. Wilmington Parking Authority]*’s symbiosis analysis remains the high-water mark in a tide of state action doctrine that has since been almost constantly at ebb.”).

225. Freeman, *supra* note 138, at 579.

that there may be no liability under state law for much of the conduct that gives rise to section 1983 claims.²²⁶

Some of these reasons undoubtedly apply in the context of publicly-funded privately-run disciplinary alternative schools; others may not, depending upon the facts of the particular case.

To this list, we may add the following, more compelling reasons—more compelling because they relate to the underlying structural purposes of vindicating one’s constitutional rights, rather than to advantages conveyed in litigation posture.

A. *Injunctive Relief*

For some plaintiffs, “it is damages or nothing” because they simply do not satisfy the requirements for injunctive relief.²²⁷ There are a host of harms for which purely retrospective relief—most often in the form of damages—are sufficient to make the injured party whole. For example, one-time injuries caused by the classic “bad apple,” or rogue employee, are easily resolved via individual cases seeking relief under a variety of tort and common law claims for which a finding of state action is wholly unnecessary.²²⁸ Conversely, for other plaintiffs, no amount of damages can make them whole, i.e., they have no “adequate remedy at law” and therefore qualify for equitable relief.²²⁹ The classic

226. Beermann, *supra* note 222, at 14; *see also* Frankel, *supra* note 11, at 1511-12 (“The lure of attorney’s fees makes it possible for aggrieved plaintiffs to bring § 1983 actions that perhaps might not be brought if the only remedy were under state common law, especially in cases where the level of damages is relatively low.”).

227. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *see also* *City of Los Angeles v. Lyons*, 461 U.S. 95, 110-11 (1983) (finding plaintiff lacked standing to seek injunctive relief barring city from using chokeholds because there was no serious risk that he would again be subjected to one, but noting the availability of damages).

228. *Cf. Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 407-08 (1997) (distinguishing between constitutionally “deficient training ‘program’ necessarily intended to apply over time to multiple employees” and single instance of unconstitutional behavior by municipal employee).

229. *O’Shea v. Littleton*, 414 U.S. 488, 492, 502 (1974) (“[Plaintiffs must] establish the basic requisites of the issuance of equitable relief in these

case of court-ordered injunctive relief is *Brown v. Board of Education*²³⁰: the idea that school segregation might be resolved via damages awards is simply impracticable.²³¹

Prospective injunctive relief is not only suitable, but arguably irreplaceable, in the context of a pattern and practice of rights abuses such that a critical mass of students at a school faces “the likelihood of substantial and immediate irreparable injury.”²³² It is only with prospective injunctive relief that plaintiffs may obtain, for example, a court order declaring that the school’s disciplinary policies and practices violate the Fourteenth Amendment due process requirement and an injunction mandating that the school change these policies and practices.²³³ Injunctive relief may also be preferable to punitive damages even where both are available when damages fail to impact the company in question (whether because of its financial situation or sheer intransigence) or when damages may put the school out of business altogether, leaving parents with no educational alternative for their children.²³⁴

Finally, it is worth noting that if only the actual state agency’s actions are subject to injunctive relief, e.g., the state agency’s act of referral, the injunctive relief available is insufficient to remedy the harm to which students attending the school are at imminent risk of suffering. First, it is unclear whether students already attending the school would have standing to bring a claim for injunctive relief seeking to stop referrals, and second, a court injunction barring or governing future referrals to the school does not provide relief for students already there.²³⁵ The theory of

circumstances—the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”).

230. 347 U.S. 483 (1954).

231. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 80 (1978).

232. *O’Shea*, 414 U.S. at 502.

233. *Cf.* FISS, *supra* note 231, at 91 (“[The choice of remedy] should . . . turn upon an appreciation of the technical advantages of each remedy and a judgment, made in light of the substantive claim, about the desirability of the allocation of power that is implicit in each remedial system.”).

234. See *infra* Part IV.C for additional discussion of the inadequacy of damages relief under tort and contract claims.

235. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that plaintiffs must allege “injury in fact” that is “concrete and particularized

state action must therefore be one of entwinement or joint action, such that injunctive relief may be procured against both the state and private actor for actions taken by school employees.²³⁶

B. *Public and Constitutional Accountability*

In addition to the availability of injunctive relief, § 1983 provides an important means of generating public and constitutional accountability. The Constitution and the public are done a disservice if both government and private entities are able to avoid constitutional liabilities to which they would otherwise be subject, the former by subcontracting to the latter, and the latter by virtue of being private.²³⁷ The question is not that which is posed by

and actual or imminent”; and that “it must be likely, as opposed to merely speculative, that the injury will be redressable by a favorable decision” (internal quotation marks and citation omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 110-11 (1983) (holding plaintiff who had been injured by police chokehold lacked standing to seek injunctive relief prohibiting use of chokeholds because he did not allege imminent risk that he would again be placed in chokehold by police); *O’Shea*, 414 U.S. at 495-96 (“Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.”).

236. Larry Tribe suggests otherwise, arguing in his book, *Constitutional Choices*, that a particularly useful avenue for circumventing the symbiosis analysis “almost constantly at ebb” with the Court is to sue only the “state officials who possess the power, by virtue of the state rules at issue, to put ‘private’ actors in a position to inflict injury—for example, by delegating governmental or monopoly power to private entities.” TRIBE, *supra* note 224, at 251, 255. Thus, rather than suing the private club who denied him a drink, the plaintiff in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), should have sued the members of the Pennsylvania liquor control board for “suborning racism and aggravating its impact by handing out the privilege of a scarce liquor license without regard to the licensee’s racist practices.” TRIBE, *supra* note 224, at 255. Tribe concedes that “[i]t is, of course, possible that the plaintiff would still have lost on the merits, given the difficulty of demonstrating a significant net impact on minority drinking opportunities and, more importantly, given the potential requirement of proving a discriminatory governmental purpose . . .” *Id.* at 425 n.82.

237. See *supra* text accompanying note 212 (quote from *West v. Atkins*, 487 U.S. 42, 56 n.14 (1988)); cf. *Flagg Bros. v. Brooks*, 436 U.S. 149, 163-64 (1978) (“We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection] and thereby avoid the strictures of the Fourteenth Amendment.”).

nondelegation doctrine, i.e., whether such delegations should be permissible, but rather, once we permit such delegations, whether and how government and the private parties with which it contracts should be held accountable.²³⁸

One scholar defines accountability as “being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.”²³⁹ Ensuring accountability for entities performing privatized government functions is a particularly pressing issue when the functions they perform become increasingly broad—and even more so when they involve vulnerable populations.²⁴⁰ Of course, as another scholar notes, accountability can itself “create perverse incentives where the political benefits of

238. Cf. Freeman, *supra* note 138, at 586 (“[T]he time has come to accept private delegations as a fact of life. This is not to deny that some delegations will be problematic—only that, as a general matter, we should focus on how to structure these arrangements effectively and milk their positive potential.”). This Article does not take a position on what types of immunities, if any, should be afforded to private actors once a finding of state action has been made. The Court has ruled that history and policy weigh against providing qualified immunity in the context of prison guards and attachment cases, e.g., *Richardson v. McKnight*, 521 U.S. 399, 412 (1997), but the prison context does not necessarily provide a template for the education context. For additional background on immunities in the post-state action context, see, for example, Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 78 (2004) (arguing private parties should not have access to qualified immunity); Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 82 (2004) (arguing private parties should have access to a good faith defense, as distinguished from qualified immunity).

239. Minow, *supra* note 12, at 1260; see also Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1509 (2001) (“Political accountability should be understood to include the democratic character of decision-making, the clarity of responsibility for an action or policy within the political system, and the ability of the body politic to obtain accurate information about a governmental policy or action.”).

240. See, e.g., Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 724 (2000) (“Because . . . the victims of ignorance, poverty, and prejudice generally have a hard time mobilizing themselves for effective political action . . . most politicians will usually maximize their reelection chances by giving greater weight to the interests of the rich and the educated.”); Minow, *supra* note 12, at 1259 (“The urgent question posed by a shifting mix of public and private providers of education, welfare, and prison services is how to ensure genuine and ongoing accountability to the public.”).

violating civil rights outweigh the costs.”²⁴¹ The question, then, becomes how to generate both public accountability and, perhaps more importantly, constitutional accountability. These questions are particularly pressing in the context of public education, and arguably even more so in the context of disciplinary alternative schools.²⁴²

1. *Common Approaches to Generating Accountability.* Commentators have differed in their approaches to the accountability problem, but tend to fall within one of three camps: Trust the Government; Trust the Contract, which may actually be a subset of Trust the Government; and Trust the Market, perhaps itself a variant on Trust the Contract.²⁴³ Unfortunately, none of these approaches satisfies the need to hold both government and private parties accountable at the back end of constitutional injury, i.e., once a harm has already occurred. There is plenty both governments and private party contractors could and should do to prevent such injuries by creating accountability at the front end, but the question this Article seeks to resolve is how we can best ensure fair redress for those injuries and accountability once they have taken place.

241. Frankel, *supra* note 11, at 1493 n.194. The electorate may believe, for example, that children in alternative schools are simply “bad” kids, who deserve to be treated harshly and to have more limited constitutional rights than other students.

242. As one commentator has noted:

If a local school board decides to hire a private company to operate the public schools under contract, questions arise concerning the ability of the school board, and through the board, the public, to control the operation of the schools. . . . Accountability can be reduced even if the school board maintains ultimate control over the schools through the choice of the contracting party, unless mechanisms are established to maintain control over and scrutiny of the details of school operation.

Beermann, *supra* note 239, at 1525-26.

243. Others have suggested different breakdowns. *See, e.g.*, Dolovich, *supra* note 14, at 481 (suggesting categories of relying upon the courts, accreditation, monitoring, and competition); Freeman, *supra* note 138, at 574-75 (suggesting categories of those who wish to treat private parties as state actors, those who wish to enforce nondelegation doctrine, those who would extend procedural controls to private actors, and those who would infuse private law with public law norms). With respect to these other paradigms, this Article is firmly in the camp of preferring to treat private parties as state actors (taking for granted the continued existence of delegation), i.e., looking to the courts for accountability.

a. Trust the Government. A number of scholars advocate reliance upon government itself to police private contractors, prevent injury to the intended beneficiaries of those contracts, and to redress injury once it has occurred. Proposals for citizen watchdog commissions, government administrative oversight and monitoring, and administrative or agency review, all fall under this rubric. As a general matter, others have noted the incentives many government entities have “to excuse, ignore, or cover up poor performance by the contractor” as “the contracting agency is the institution with the most direct responsibility, legally and politically, for the ultimate success or failure of the contractor’s performance.”²⁴⁴ In addition, each of these variations on trusting the government has its own flaws.

First, the idea of the watchdog commission, which monitors and reports on the activities of private contractors, perhaps by collecting data and relevant testimony, is an appealing one, perhaps particularly for those interested in promoting democratic values. Thus, Martha Minow suggests a democratically oriented framework for public accountability, one that relies upon the polity to police its government: “The polity must ensure that governments, as representatives of the public, retain the option to exit relationships with private entities, the means to express disagreements with the ways in which the private entities proceed, and the capacity to remain with the private entity as a vote of confidence.”²⁴⁵ She proposes these assurances may be made perhaps via “a public commission, ideally composed of representatives from both the public and private sectors” that would “periodically review the cumulative effects of privatization decisions. Alternatively, a legislative or administrative body could hold hearings on the effects of privatization and consider adopting guidelines for government contracting or other privatization measures.”²⁴⁶

Unfortunately, not only is it unlikely that the very government entities engaged in privatizing behavior will

244. Aman, *supra* note 138, at 322.

245. Minow, *supra* note 12, at 1266 (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970)).

246. *Id.* at 1269.

establish a watch-dog commission, but Minow's idealized "polity," as separate from "government" and to whom "government" is beholden, also bears little resemblance to most political communities in America today. It is no coincidence that those services most likely to be privatized are those serving the least powerful constituents.²⁴⁷ When it comes to the privatization of disciplinary alternative schools, we deal with a marginalized population within an already voteless (and thus voiceless) group. Not only must the government entity seeking to privatize these services be held accountable, but so too must the public at large that supports (expressly or tacitly) the privatization.

Second, others advocate government administrative oversight of private contractors. For example, another scholar argues in favor of "government supervision of private decisionmaking," contending that "government's regulatory and contractual powers, as well as its administrative resources and expertise, put it in the best position to control private delegates' behavior."²⁴⁸

This approach fails to take into account several practical realities. Effective monitoring can be expensive and time-consuming, and often requires expertise that state agencies are unable or unwilling to provide.²⁴⁹ As one commentator notes:

247. See, e.g., Metzger, *supra* note 15, at 1433 ("[G]overnment may be particularly inclined to delegate without oversight when programs are unpopular and participants lack the ability to defend their interests politically.").

248. *Id.* at 1471-72. Metzger correctly notes that current doctrine is deeply imperfect, in that it creates incentives "for government to grant its private partners broad discretion over government programs and minimize its involvement in their actions." *Id.* at 1375.

249. See, e.g., Frankel, *supra* note 11, at 1500 ("Effective monitoring, particularly of complex, multifaceted programs, is expensive, requiring significant amounts of data as well as a well-trained workforce to evaluate it."); Dolovich, *supra* note 14, at 492 ("[In the private prison context,] [m]onitoring is necessarily labor intensive and therefore expensive, requiring an investment that states—which turned to privatization to *save* money—are not eager to make."). Dolovich further notes the danger of agency capture, relevant in the private prison context, but also relevant here. Dolovich, *supra* note 14, at 493-94; see also Guttman, *supra* note 11, at 909 ("[T]he continued and increased reliance on third parties comes at the expense of official oversight capability [because] higher pay and more interesting work . . . drive the best officials into the contractor workforce.").

The assumption underlying this view [in favor of government oversight] is that governments can adequately monitor the actions of the private parties with whom they contract. . . . Additionally, monitoring itself is fraught with difficulties. . . . [A] government has to know what information it is looking for and how to find it. . . . Consequently, monitoring often focuses instead on what governments can measure: costs.²⁵⁰

State agencies with the resources and inclination to provide such monitoring—and to exercise the control over contracted entities necessary to make such monitoring meaningful—are also arguably less likely to outsource in the first place.

Finally, there are those who advocate some type of agency review for those who claim to be injured by these types of contracts. For example, Alfred Aman recommends increased use of administrative law, via broader application of the Administrative Procedures Act to certain private actors, to generate accountability.²⁵¹ Metzger proposes “providing administrative complaint systems through which individuals can obtain government review of private decisionmaking.”²⁵²

This approach again relies upon government “to do the right thing” by setting up administrative oversight

250. Frankel, *supra* note 11, at 1497, 1499. Frankel concludes that “the current monitoring system, rather than providing a check against private misconduct, may actually encourage it by rewarding those companies that operate on the cheap and devote fewer resources to civil rights protection.” *Id.* at 1500.

251. Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1712-13 (2002). (“A twenty-first century APA should apply to some private actors as well as the state, particularly when private actors have significant power over the constituents with whom they deal and they are engaged in public functions. . . . Contracts used to outsource social services to the poor . . . should be viewed as rules, subject to notice and comment . . .”). The APA applies only to federal agencies, but presumably this approach could be broadened to include its various state analogues.

252. Metzger, *supra* note 15, at 1376; *see also id.* at 1374 (“[D]irect application of constitutional limits to private actors is not necessary to achieve constitutional accountability. . . . [T]he appropriate judicial response is not subjecting private entities to direct constitutional scrutiny, but instead requiring that the government create such mechanisms as the constitutionally-imposed price of delegating government power to private hands.”).

procedures and structuring them fairly.²⁵³ It also results in a curious laundering of the accountability process through government. Metzger concludes that delegations absent these “mechanisms that adequately substitute for direct constitutional review” would be unconstitutional,²⁵⁴ but it is unclear why we would not prefer just to have direct constitutional review.²⁵⁵

State action doctrine is at its most meaningful when government operates imperfectly, when private actors are bad (or poorly trained) actors, when government colludes with private actors, and when all does not function as it should. The Congress that passed § 1983 recognized, quite simply, that government cannot always be trusted.

b. Trust the Contract. Contractors promote accountability via the contracting process itself. This may merely be a variant on Trust the Government, because the proposals boil down to getting the government to contract properly for services it wishes to outsource. The profit motive will often act to incentivize private parties to resist more stringent contracts, which leaves the promotion of those contracts to a benevolent government entity to pursue.

Pro-privatization advocates frequently point to the importance of proper contract structuring to ensure quality services are provided. The Reason Foundation, for example, states:

253. A similar inclination to trust the state can be found in the caselaw as well. For example, in *Matwijko v. Board of Trustees of Global Concepts Charter School*, No. 04-CV-663A, 2006 WL 2466868 (W.D.N.Y. Aug. 24, 2006), the court found the charter school in question to be a state actor because a statute defined charter schools as “independent and autonomous public school[s] performing essential, public purposes and governmental purposes of this state.” *Id.* at *5 (quoting N.Y. EDUC. LAW § 2853(c)-(d) (McKinney 2009) (internal quotation marks omitted)). This approach functionally removes from the judiciary the burden and right to determine state action and depends upon the good graces of the state to identify each private party to whom it has delegated responsibilities as a state actor.

254. Metzger, *supra* note 15, at 1374.

255. Another of Metzger’s proposals, that government simply limit the powers it delegates, is similarly predicated on trusting the government to do the right thing. *See id.* at 1477.

The most important key to successful privatization is an effective contract-monitoring system. School districts and other education agencies should recognize that they are not getting out of the business of education—they are merely shifting their role from provider to contract monitor. Doing so means clearly defining the evaluation criteria up front and sticking to those criteria. There should also be a clear enumeration of the desired objectives and a way to hold the [education management organization] contractually accountable for achieving those objectives.²⁵⁶

Freeman argues that “contracts themselves might do more work as enforceable agreements” and suggests that contracts “equip agencies with more effective enforcement tools: Greater specificity of terms, graduated penalties, and oversight”²⁵⁷ She further suggests that contracts could explicitly confer third party beneficiary status to those who receive the services in question²⁵⁸ and notes the benefits of mandatory disclosure provisions in contracts.²⁵⁹

The question that remains unanswered by proponents of accountability via contracting is: what incentive is there for the contracting parties to structure their contracts in this way? To the extent this is a cynical view, it is the same perspective that has animated the development and growth of § 1983 doctrine, which recognizes the real phenomenon of government collusion with private actors to cause constitutional injury.

In general, the private incentive for profit nearly always counsels against more stringent contracting practices because the protection of constitutional rights often costs money, is inconvenient, inefficient, or all of the above.²⁶⁰

256. HENTSCHKE ET AL., *supra* note 20, at 11; *see also* Metzger, *supra* note 15, at 1479 (“A final alternative is [for governments] to design the delegation in such a way that private entities’ exercise of their delegated authority necessarily comports with substantive constitutional requirements.”).

257. Freeman, *supra* note 138, at 608.

258. *Id.*

259. *Id.* at 635.

260. In fact, in her critique of those who would proceduralize private relationships, Freeman notes that forcing private actors to comply with bureaucratic requirements, such as “following detailed procedures, providing hearings, defending decisions to review boards and courts—could frustrate the benefits of private participation in governance by imposing significant burdens.” *Id.* at 587; *cf.* Guttman, *supra* note 11, at 863 (“[R]ules [created to govern these arrangements may] reflect the interests of the third parties that call for them,

Although the profit motive exists in almost any contracting situation involving at least one private party, the particular type of contracts at issue indicate a lower likelihood than usual that mechanisms contained within the contract itself will suffice for accountability.

First, these are service, as opposed to supply, contracts.²⁶¹ And, as Steven Schooner points out, “service contracts, in addition to being difficult to write well, have a tendency to require more contract management resources than supply contracts.”²⁶² Schooner notes that one way to contract effectively in the service context is for the government to use performance-based service contracting, in which the contracting entity focuses on “performance achieved rather than effort expended.”²⁶³ But this solution

but not necessarily the interest of the public at large. There is no assurance that the larger public interest will be represented.”).

261. See Ruth Hoogland DeHoog & Lester M. Salamon, *Purchase-of-Service Contracting*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE*, 319, 319-21 (Lester M. Salamon ed., 2002) (enumerating the defining features of service contracting, including the populations typically served, nature of services provided, difficulties encountered in evaluating performance, nature of competition for such contracts, and incentives of contractors).

262. Steven L. Schooner, *Competitive Sourcing Policy: More Sail than Rudder?*, 33 *PUB. CONT. L.J.* 263, 290 (2004); cf. Dolovich, *supra* note 14, at 478 (“[P]rivate prison contracts are necessarily ‘incomplete,’ meaning that the contractor’s obligations cannot be fully specified in the contract itself.”). Schooner also quotes the Office of Federal Procurement Policy, which states: “Contracting for services is especially complex and demands close collaboration between procurement personnel and the users of the service to ensure that contractor performance meets contract requirements and performance standards.” Policy Letter 93-1 ¶ 3, Office of Management and Budget (May 18, 1994). Schooner further distinguishes between personal services contracts, in which the government “retains the function, but contractor employees staff the effort” and nonpersonal services contracts, in which the government delegates a task or function entirely to the contractor. Schooner, *supra*, at 290-91. The staffing of a privatized disciplinary alternative school may take place in either context.

263. Schooner, *supra* note 262, at 292 (emphasis omitted); see also *id.* at 294 (“The alternative to the performance-based approach is . . . [c]ontracts [that] do not specifically describe tasks to be performed but instead merely state manpower requirements. . . . That’s not the way to achieve the type of objectives—increased quality, cost savings, efficiency, etc.—typically sought in a principled outsourcing regime.”). In contrast, Guttman contends that:

The promise of “performance” or “incentive” contracting . . . may be of least value where it is most needed—i.e., when, as with better weapons

requires us to trust the government to structure its contracts in a manner that, while more appropriate for the task at hand, will likely also cost more money.

This leads to the second observation about these types of contracts: they have to do with services for the traditionally disenfranchised and voiceless, e.g., students in need of disciplinary alternative educations, prisoners, and children in foster care. The government incentive in these situations to get the "problem" off its desk and the private incentive to turn a profit may be particularly strong in these situations.

In an ideal world, both government and private parties behave themselves, whether by respecting constitutional rights, structuring their contracts appropriately, and/or seeking enforcement of those contracts. Perhaps contracts would be drafted with explicit clauses providing third party beneficiary protection.²⁶⁴ In an ideal world, there would be no need for § 1983.

The question presented, however, is what happens when things go wrong; when actors, whether government or private, act in bad faith, or with deliberate indifference. Or, when we deal with governments and private actors who have simply neglected (whether because of indifference or oversight) to structure their contracts in this way. Or, when obeying the conventions of contract negotiation, private parties insist upon an indemnification agreement with state agencies to ensure protection against third party liability. Section 1983 provides a powerful tool in addition to injunctive relief: companies disinclined to risk their bottom line at the front end by entering into service contracts with onerous provisions may nevertheless be persuaded to

or better education, the products or services are not easy to define or attain, and the definition of performance may itself change in mid-contract with shifts in political or bureaucratic winds. Similarly, the promise of accountability through the required evaluation of past performance has proved illusory where past performance . . . is either not readily measurable or is just not measured.

Guttman, *supra* note 11, at 909.

264. Absent such explicit drafting, third party beneficiary status is exceedingly difficult to obtain. *See infra* Part IV.C.2.

change their ways via damages actions that can impact their profits at the back end.²⁶⁵

c. Trust the Market. A third group of scholars suggest that we place our trust in the market economy. For example, some suggest the use of private accreditation as a means of creating accountability,²⁶⁶ the use of voluntary self-regulation,²⁶⁷ or the use of multiple service providers to avoid monopolistic control.²⁶⁸

These suggestions have merit, but only where program participants have a choice of whether to participate at all and/or among institutions. When the targeted population is vulnerable, the services essential (or, as here, legally required), or the targeted population too limited to warrant multiple service providers, the proposition that we rely upon the market proves to be of limited value—and in many privatization situations, there is little to no competition whatsoever.²⁶⁹

In fact, what drives the outsourcing of some services—such as education for troubled or special needs students—is that local governments lack the resources to provide the service and/or a sufficient client population. They then turn

265. See Frankel, *supra* note 11, at 1456-57 (“[P]rivate entities can be sued for damages both when they contract with a municipality and when they contract with a state, since private entities are not entitled to Eleventh Amendment immunity.”).

266. Freeman, *supra* note 138, at 609.

267. *Id.* at 644.

268. Metzger, *supra* note 15, at 1376; *see also id.* at 1477 (“On some occasions, acting on the government’s behalf does not give private delegates enhanced power over others. One such situation is where there is a large pool of private delegates who compete with one another and wield the same authority on the government’s behalf, with the result that no delegate exercises monopoly or even quasi-monopoly control . . .”).

269. As Frankel notes:

[T]he argument that the risk of losing government contracts will keep private entities in check assumes an efficiently functioning marketplace in which governments can replace bad contractors with good ones. Many of the markets for traditional public services, however, are essentially oligopolies with few market participants. Private contractors therefore face little risk that their employees’ constitutional violations will result in revoked contracts or lost business.

Frankel, *supra* note 11, at 1501.

to private providers, who serve as consolidators of the market. The market, moreover, is largely a captive one, with little to no choice; in many areas of the country, one facility will have a functional monopoly on both the public and private markets because there simply are not enough students with such needs.²⁷⁰ As some have pointed out, market competition may indeed result in the rescission of contracts, but typically only where the noncompliance with the contract terms is so egregious that there is a “public outcry.”²⁷¹

The other problem with accountability measures that depend upon voluntary or private regulation is that the consequences for violating such regulations often do little to

270. Other scholars have commented on the false presumption of market competition in the prison health care context. Alfred Aman, for example, suggests that there are few competitors for the government contracts on offer in that context even though

the processes used are often based on the assumption that we are replacing a government monopoly with an open market consisting of many competitors, all vying for the government contract. This, in turn, suggests that the competition for the contract will yield the most highly efficient and skilled provider and, moreover, that these are not competing goals.

Aman, *supra* note 138, at 303-04. He concludes that:

Government service contracts . . . represent a kind of regulatory rulemaking, not just an agreement between a buyer and a seller. As such, they should involve various stakeholders and members of the community in addition to elected officials to assure that a fundamentally political process is not unduly narrowed to a simple low- or least-cost contracting approach.

Id. at 303. This position returns us to a “Trust the Government” perspective. Compare *Richardson v. McKnight*, 521 U.S. 399 (1997), in which Justice Scalia notes:

[I]t is fanciful to speak of the consequences of “market” pressures in a regime where public officials are the only purchaser, and other people’s money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some *political* official not to renew the contract. This is a government decision, not a market choice. If state officers turn out to be more strict in reviewing the cost and performance of privately managed prisons than of publicly managed ones, it will only be because they have *chosen* to be so.

Id. at 418-19 (Scalia, J., dissenting) (citation omitted).

271. See, e.g., Dolovich, *supra* note 14, at 497.

alleviate or address the underlying injury. That a private actor who violates industry regulations may be kicked out of the industry group and declared ineligible for future contracts provides little comfort to an injured party.

Finally, even if market competition for these types of educational services existed and worked, one questions whether such services should be commoditized in the same way as government contracts for roads and bridges.²⁷² The market, after all, is largely focused on extracting maximum value for minimum cost, and encourages low-bid contracts. It is unclear the extent to which denominations of value for these types of services can be done accurately and effectively; and, in the education context at least, the two goals of value maximization and cost minimization may be fundamentally incompatible.²⁷³

2. *Section 1983 Accountability for State and Contractor: Paying the Cost for Poor Contracting.* In contrast to the injury prevention only potentially offered by trusting in government, contract, and/or the market, § 1983 liability offers redress once injury has in fact occurred.

Both private party liability for actions committed by private employees, and state party liability for actions committed by its contractor, ensure that the full costs are borne for shoddy contracting practices—whether as a result of poorly drafted contracts or insufficient performance monitoring. If the risk of § 1983 liability results in fewer bids for such contracts, the service is perhaps ill-suited for outsourcing in the first place.²⁷⁴

272. Cf. Aman, *supra* note 138, at 305 (“Effectively hidden from public view, prisoner health is commoditized in a manner tantamount to roads, bridges, and other natural things—and this should worry all of us.”).

273. See, e.g., Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323, 328 (1999) (“Managers of the Education Companies must economize, sometimes at student expense, in order to yield, at some point, greater profit for shareholders. . . . Economizing to maximize profits, even when it compromises student interests, may be required under corporate law.”).

274. See, e.g., Frankel, *supra* note 11, at 1504-05 (“If it is too expensive for a private company to perform public functions in a way that adequately safeguards federally protected rights, then perhaps those functions should be left to the government to perform.”). Frankel’s position is that, assuming state action, private entities found to be state actors should be subject to respondeat superior liability. *Id.* at 1515.

C. *State Tort and Contract Relief as a (Non)Alternative*

The fact that some injuries may be remedied via state common law claims is irrelevant to whether plaintiffs may also have federal constitutional claims.²⁷⁵ Furthermore, as one commentator notes:

Putting aside whether constitutional rights have a special value and deserve their own remedy that does not depend on state tort law, many constitutional rights, including free speech, due process, and reproductive choice, do not have state common law analogues. Even if they did, the fact that state law, unlike § 1983, does not provide for attorneys' fees and in many cases has been limited through various tort reform measures makes state law an unrealistic option for many victims of constitutional injury.²⁷⁶

However, many, if not most, plaintiffs in cases seeking relief against privately-run disciplinary alternative schools include a variety of tort claims in their pleas for relief.²⁷⁷ State law claims such as false imprisonment, intentional infliction of emotional distress, and assault all dovetail many of the injuries underlying the spectrum of potential constitutional claims discussed in Part II. The question

Some commentators advocate a prohibition on such contracting at all, where the state agency is arguably "outsourcing the very duties the agency was created to undertake or fundamental responsibilities that flow from these duties," as opposed to "[c]ontracting for commercial services necessary to carry out agency duties." Aman, *supra* note 138, at 314. This Article does not take a position on whether such contracting should be permissible, but rather advocates that all parties to the contract bear the full costs for the contract via subjection to § 1983 liability.

275. As Justices Harlan and Stewart note in their concurrence in *Monroe v. Pape*, the legislative history of § 1983 indicates that Congress believed "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

276. Frankel, *supra* note 11, at 1456.

277. See, e.g., *S.G. v. Care Acad., Inc.*, No. 3:09-CV-422-S, 2010 WL 1416717, at *1 (W.D. Ky. Mar. 31, 2010) (false imprisonment, intentional infliction of emotional distress, assault); *Robertson v. Red Rock Canyon Sch., LLC*, No. 2:05-CV-758 TC, 2006 WL 3041469, at *1 (D. Utah Oct. 24, 2006) (negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and fraud).

remains whether the “private remedies and regimes” under which these claims require plaintiffs to seek relief are sufficient “to deal with the public aspects of the problems involved.”²⁷⁸

1. *Tort*. To the extent that fully analogous claims do exist in tort, it is worth noting that scholars have long commented on the failures of tort properly to allocate compensation, provide for any real deterrence of future harm, and to allocate moral blame.²⁷⁹ These failures may be further amplified where potential tortfeasors carry liability insurance; insurance provides far less insulation where the relief requested is an injunction governing future behavior.²⁸⁰

Some have argued that the failings of tort are amplified where those likely to be affected by a would-be tortfeasor’s actions are “those who are less likely to claim or who will recover lower damage awards—poor, unemployed, young, old, or inadequately educated individuals, racial minorities, noncitizens, and women.”²⁸¹ A notable number of these categories describe precisely the student (and corresponding parent) population at disciplinary alternative schools.²⁸²

278. Aman, *supra* note 251, at 1702.

279. See, e.g., Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 791 (1990) (“The purposes of tort law are to pass moral judgment on what has happened, respond to the victim’s need for compensation, and encourage future safety. It does a poor job of all three.”); see also Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule*, 4 J. TORT L. 1, 10-11 (2011) (arguing that compensatory damages fail to serve the public policy goal of injury prevention); Mark A. Geistfeld, *Punitive Damages, Retribution, and Due Process*, 81 S. CAL. L. REV. 263, 274-75 (2008) (arguing that compensatory damages are unable to truly make a plaintiff whole); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 565-80 (1985) (arguing that tort fails to serve as a deterrent).

280. See Sugarman, *supra* note 279, at 573-80 (discussing impact of liability insurance on deterrent effect of tort).

281. Abel, *supra* note 279, at 809.

282. Cf. Wade, *supra* note 273, at 346 (“Students of privatized schools are vulnerable because the disparities in achievement between urban schoolchildren, who attend the schools most likely to be privatized, and suburban schoolchildren are stark. . . . [T]he parents of students in privatized schools often lack the political power that is generally exercised by more affluent citizens.”).

Finally, a regime that provides solely for damages relief has “distributional consequences” as well, whereby “[t]he liberty of the judgment-proof would be enhanced. So would the liberty of the very wealthy, assuming declining marginal utility of each dollar and an incapacity to introduce a principle of progressivity into the damage award.”²⁸³

2. *Contract*. State contract law is also unlikely to be of much use to would-be plaintiffs. Parents and students may seek to sue under the predicate government contracts, arguing that they are entitled to relief as third party beneficiaries.²⁸⁴ Such claims face a variety of doctrinal hurdles, however, and even where successful, provide only limited relief.

First, parties seeking third party beneficiary status must establish the existence of a valid and binding contract,²⁸⁵ and, more importantly, establish that there was an intent to benefit the third party.²⁸⁶ With regard to intent in government contracts in particular, would-be plaintiffs must demonstrate not only that the contractor intended to benefit the third party, but also that the contractor intended to confer a right to enforce the benefit on the third party.²⁸⁷ Although it is not commonly done in today’s contracts for disciplinary alternative schools, careful drafting by state agencies and the private companies with which they contract can easily foreclose third party beneficiary claims simply by stating in the terms of the contract that the

283. FISS, *supra* note 231, at 76.

284. See 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 37:1 (4th ed. 2000) (“[A] third party beneficiary contract arises when a promisor engages to the promisee to render a performance to a third person.”). If the third party is the intended beneficiary of the contract, it may sue to enforce the duty to perform the contract. RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981). A beneficiary is “intended” if the performance satisfies an obligation of the promisee to pay money [debtor] or if “the promisee intends to give the beneficiary the benefit of the promised performance.” *Id.* § 302.

285. WILLISTON & LORD, *supra* note 284, § 37:23.

286. See RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (1981).

287. *Id.* § 313.

government agency is the sole intended beneficiary of the contract.²⁸⁸

Second, even if plaintiffs prevail, they are bound by any inadequacies of the contract itself because they are entitled only to those rights contained in the contract.²⁸⁹ To the extent the contract is vague or provides only for substandard protections or services to students, plaintiffs are out of luck. Finally, the contract remedies themselves may also be unsatisfactory, because such remedies are limited to injunctive relief, specific performance of the contract, or compensatory damages.²⁹⁰ Punitive damages are generally unavailable for breach of contract.²⁹¹

D. *Transparency*

There is also the curious question of whether contracting entities running these types of schools would be subject to Freedom of Information Act (“FOIA”) requests under state laws in the absence of a finding of state action.²⁹² If the schools are publicly funded, it is likely that a substantial amount of information—e.g., student test scores, budget information, and the contract with the private entity—would be available via an information

288. Such terms may perhaps be challenged as being void for public policy. *See id.* § 178 (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”). But that doctrine is difficult to recover under as well. Not only is there a strong presumption favoring enforcement of contracts, but parties seeking to invalidate a contract must demonstrate the clear impropriety of the contract and that the impropriety outweighs the policy favoring enforcement. *See* 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 12:3 (4th ed. 2009); RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). In addition, “the mere fact that a contract under some circumstances may result in an act contrary to public policy will not invalidate it when that consequence will not necessarily result from performance of the contract, since it will be presumed that the parties will conform to the law.” WILLISTON & LORD, *supra*, § 12:3.

289. WILLISTON & LORD, *supra* note 284, § 37:23.

290. RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981).

291. *Id.* § 355.

292. *See generally* Frankel, *supra* note 11, at 1495-97 for a discussion of state freedom of information laws and the restrictions they may impose on requests directed at private entities.

request to the government agency that entered into the contract.

However, one can also imagine a wealth of information that might be unavailable (depending upon the structure of the government contract) should the entity not be considered a state actor, but which is nevertheless highly relevant to the public interest²⁹³: employee information such as teacher certifications, qualifications, and disciplinary history; teaching materials and methodologies used (sometimes considered proprietary by private education companies); and school disciplinary policies and practices, as well as data related to student discipline; staff training materials, etc.²⁹⁴

At least one commentator has suggested that liberal discovery rules may function as a serviceable substitute for requests made under the state equivalents to FOIA.²⁹⁵ Setting aside whether discovery rules today are as liberal as they once arguably were, the problem with this approach is twofold: first, would-be litigants often rely upon publicly available information gathered via FOIA and other methods to ascertain whether they have a case and its scope, and to draft a complaint; and second, in order to qualify for discovery, would-be litigants must first survive a motion to dismiss.

V. A WORKABLE DOCTRINAL TEST FOR STATE ACTION

The struggle at the center of this Article—who is liable when the party who has committed an injury reports to, was

293. As one commentator notes (in the federal context), “[government e]mployees, but not contractors, are covered by routine practices—such as the publication of agency phone books and organization charts—that inform the public of the name, title, and location of those who serve it. These practices do not, with small exception, cover contractors (or their employees).” Guttman, *supra* note 11, at 894.

294. One commentator argues that would-be contractors seeking to engage in this type of work for a state entity “should agree that if they are chosen, they will be subject to regular reporting requirements and a modified Freedom of Information Act.” Aman, *supra* note 138, at 327. While such voluntary cooperation during the contracting process would be nice, such an approach requires us to trust the contract. See *supra* Part IV.B.1.b.

295. Jack M. Beermann, *Administrative-Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717, 1723 (2002).

hired by, or is otherwise an agent of someone else—arises in doctrinal contexts other than state action, such as the common law governing tort and agency. The specific doctrinal tests that apply in these situations vary somewhat, but all seek to determine when and under what circumstances it is fair to hold one party responsible for an injury committed by another.

In the state action context, as set forth in Part III above, each of the various doctrinal tests seeks to ascertain the extent to which the state may properly be held accountable for injuries committed by a private party with whom it has some type of relationship, or the extent to which a private party can be treated as the state. Each test focuses on the scope and quality of that relationship, and the stronger it is, the more likely a finding a state action.

Unfortunately, as evidenced by the array of lower court decisions in the aftermath of the *Rendell-Baker* decision, existing state action doctrine is difficult to apply to privately-run publicly-funded disciplinary alternative schools. *Rendell-Baker* explicitly states that the provision of alternative educational services is not a public function and rejects the proposition that the state's statutory obligation to provide this type of education could indicate otherwise.²⁹⁶ This holding, coupled with *San Antonio Independent School District v. Rodriguez*,²⁹⁷ which holds that there is no fundamental right to education,²⁹⁸ would appear to foreclose entirely a finding of state action under the public function test.

As discussed above, the Court's increasingly narrow reading of the joint action test would appear similarly to foreclose a finding of state action under that test, and state compulsion is unlikely to present itself as an option in the factual settings in which this Article is interested.²⁹⁹

296. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982); *cf. id.* at 849 (Marshall, J., dissenting) (arguing in favor of state action because the school "provide[d] a service that the State [was] required to provide" under state statute).

297. 411 U.S. 1 (1973).

298. *Id.* at 37.

299. A finding of state action pursuant to state compulsion is of course possible, but cases in which there is evidence the state actually compelled private actors to violate student constitutional rights are rare and do not present a difficult doctrinal issue.

Similarly, although a case could be made for entwinement depending upon the particular factual circumstances of the school, this Article is interested in schools in which such a factual predicate does not exist. Not only would the *Rendell-Baker* school itself have seemed an appropriate candidate for such approach, but even if that approach were viable, private and public actors can easily restructure their arrangements to avoid such entwinement.³⁰⁰

A. *Doctrinal Tests Used in Other Areas of the Law*

1. *Agency and Tort Law.* Agency and tort law focuses largely on principal (or master, or employer) liability for injuries committed by their agents (or servants, or employees), in large part because the typical tort or agency plaintiff prefers the deep pockets of the principal to the often judgment-proof pockets of the agent.³⁰¹ There are some useful parallels in the agency and tort doctrine to the state action inquiry, however, as both deal with the scope of liability where one party answers to another, and some have suggested that the respondeat superior doctrine counsels in favor of state actor status for government contractors.³⁰²

In general, private companies under contract with the government are more likely to be treated as independent

300. As Gillian Metzger notes:

[C]urrent doctrine applies [state action] protections when they are often least needed—that is, when governments exercise close supervision and thus constitutional norms can be enforced by targeting government action directly. Worse still, focusing on government involvement creates perverse incentives for governments to forego close oversight of their private partners

Metzger, *supra* note 15, at 1371; *see also id.* at 1425 (“The inverse relationship between the extent of government involvement and private authority means that current doctrine has it nearly exactly backwards. Private actors given broader discretion in their exercise of government power are less likely to be subject to constitutional constraints than those who operate under close government supervision and whose potential for abusive action is thus more curtailed.”).

301. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958) (discussing doctrine of respondeat superior).

302. *See, e.g.,* Kennedy, *supra* note 135, at 221-22. Kennedy contends that an agency relationship and state action exists “[w]here government undertakes an activity, funds it, authorizes a contractor to act on its behalf, and effectively dictates the manner in which it is done” *Id.* at 222.

contractors than government employees, and under traditional agency and tort law, employers are not typically liable for injuries committed by independent contractors unless one of several exceptions applies.³⁰³ First, the common law recognizes that employers may still be liable for any role their own negligence plays in harms committed by independent contractors. Employers who fail to exercise reasonable care in the selection of a contractor, who fail to ensure that such contractors take proper safety precautions, and who fail to monitor or supervise their contractors face liability even if they were not physically involved in committing the underlying tort.³⁰⁴

Second, tort law acknowledges that some employer duties are non-delegable. Non-delegable duties arise when the duty performed is of enough significance to the community that an employer cannot avoid liability by delegating performance of that duty to another.³⁰⁵ Such duties may arise from a contractual obligation, from statute, or from common law.³⁰⁶

Third, tort law provides for employer liability for torts committed by a contractor when the work performed is inherently dangerous. This exception applies wherever a

303. In the context of these schools, private procurement of these contracts is often explicitly premised on company expertise in educating students with special needs that the contracting state agency does not have. Such independent contractors may or may not be agents:

An independent contractor is a person who contracts with another to do something for [the other] but who is not controlled by the other nor subject to the other's right to control with respect to [the] physical conduct in the performance of the undertaking. He may or may not be an agent.

RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958).

304. RESTATEMENT (SECOND) OF TORTS §§ 410-12 (1965).

305. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 71, at 512 (5th ed. 1984); *see, e.g.*, *Eli v. Murphy*, 248 P.2d 756, 757-58 (Cal. 1952) (common carrier duty to transport passengers safely); *Brown v. George Pepperdine Found.*, 143 P.2d 929, 930-31 (Cal. 1943) (duty of landlord to maintain common areas, like elevators); *Daly v. Bergstedt*, 126 N.W.2d 242, 248-49 (Minn. 1964) (duty to keep premises safe for business visitors and customers); *Saari v. State*, 119 N.Y.S.2d 507, 515 (Ct. Cl. 1953) (municipality's duty to keep streets in reasonably safe condition for travelers).

306. KEETON ET AL., *supra* note 305, §71, at 511.

clear danger is likely to arise in the normal course of the performance of the contracted-for work.³⁰⁷

Each of these exceptions is relevant to the quandary posed by harms committed by an independent contractor hired by the state to operate a disciplinary alternative school. The employer negligence exception is reflected at least partially in existing state action doctrine, which permits liability (for the contractor, as opposed to the employer) where there is joint action.³⁰⁸ Where the doctrines may diverge, however, is in the tort law recognition that *inaction* by employers—apart from collusion, encouragement, or participation in a joint enterprise—can also result in liability.³⁰⁹

The concept of non-delegable duties is also relevant to the inquiry when we consider the nature of the obligation being outsourced in the alternative school context. Although there is no federal constitutional right to a free public education, many state constitutions contain such a right and the duty of care owed by a state towards schoolchildren once it decides to take on such an obligation may properly be considered non-delegable.³¹⁰ It is one thing for private

307. RESTATEMENT (SECOND) OF TORTS §§ 413, 416, 427 A (1965).

308. *See supra* notes 140-42 and accompanying text.

309. *Cf. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201-02 (1989) ("It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger.").

310. *See* ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 2; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1(a); GA. CONST. art. VIII, § 1, para. 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST., art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1, cl. 3; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4, para. 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; WASH. CONST. art. IX, § 2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1; *see also* Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How*

schools to operate wholly independent of the state, but another when the state seeks to delegate its de facto and de jure obligations. Tort law properly acknowledges this distinction, by recognizing the difference between an accident that takes place when a homeowner decides to repair her roof herself, and where she hires an independent contractor.

The public safety and protection principles underlying the inherently dangerous activities exception are also arguably relevant. Although the operation of disciplinary alternative schools does not pose any inherent safety dangers to bystanders or passersby, the equivalent population of concern under tort law would be the students attending such schools. And this Article contends that the disciplinary nature of these schools and the targeted student population combine to create an inherent danger of constitutional injury.³¹¹

Finally, tort law recognizes that those who are required by law or who voluntarily take custody of others in such a way as to deprive them of their normal ability to protect themselves are obligated to protect them from foreseeable harms.³¹² This obligation includes a duty to exercise reasonable care to control the conduct of third persons.³¹³ Notably, the rule is traditionally applied to sheriffs or peace officers, jailers or wardens of penal institutions, officials in charge of a state asylum, and to teachers or other persons in charge of a public school.³¹⁴

Relevant Is the States' Experience to Shaping Governmental Obligations in Emerging Democracies?, 33 SYRACUSE J. INT'L L. & COM. 95, 98-100 (2005). In all states, moreover, school attendance is compulsory. 2 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 24:4 (2d ed. 2005 & Supp. 2010).

311. See *supra* Part II.

312. RESTATEMENT (SECOND) OF TORTS § 314 A (1965).

313. *Id.* § 320.

314. *Id.* cmt. a; see also, e.g., *Doe Parents No. 1 v. State, Dep't of Educ.*, 58 P.3d 545, 593-94 (Haw. 2002) (finding the State Department of Education liable for its negligent retention and supervision of an employee who sexually molested students at an elementary school); *Hansen v. Bath & Tennis Marina Corp.*, 900 N.Y.S.2d 365, 367 (App. Div. 2010) (finding that because a school's physical custody over students deprives the students the protection of their parents, the school may be held liable for foreseeable injuries).

2. *Section 1983.* The concept of state action is inextricably bound with § 1983 doctrine, which authorizes action only where the alleged injury was committed “under color of state law.”³¹⁵ The Court’s § 1983 jurisprudence is illuminating, particularly when we focus on several key aspects of that doctrine.

First, § 1983 doctrine consistently recognizes state actor liability even where (or particularly where) the party acts in violation of the law. Officers of the state act “under color of” the law for 1983 purposes even if they were not commanded by the state to undertake the action in question, and even if that action is actively prohibited by the state, as long as the action was “rendered possible or . . . efficiently aided by the statutory authority lodged in the wrongdoer.”³¹⁶

Second, § 1983 doctrine distinguishes between those situations in which the state has placed someone in an institution involuntarily and those in which attendance is voluntary. Thus, states have an affirmative duty of care to provide medical services to incarcerated prisoners because they have deprived them of the liberty to procure such services themselves,³¹⁷ to protect prisoners from violence inflicted by other inmates,³¹⁸ and to provide involuntarily committed mental patients with the services necessary to ensure their safety.³¹⁹ In contrast, the state is not constitutionally obligated to provide employees (who voluntarily accept offers of employment) with any minimum levels of safety or security.³²⁰

Third, in the context of municipal liability—relevant here because the state entities most likely to contract with private companies to provide educational services are local

315. 42 U.S.C. § 1983 (2006). As the Supreme Court has often noted, the state action and under-color-of-state-law requirements are identical. *See, e.g.*, *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (“In cases under § 1983, ‘under color’ of law has consistently been treated as the same thing as the ‘state action’ required under the Fourteenth Amendment.”).

316. *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913); *see also* discussion *infra* Part V.B.1.

317. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

318. *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (citing *Cortes-Quinones v. Jiminez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

319. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

320. *Collins v. City of Harker Heights*, 503 U.S. 115, 127-28 (1992).

and county entities, i.e., municipalities for the purposes of § 1983—the Court has held that plaintiffs must demonstrate that the alleged harm was the result of official custom or policy, and not merely the result of an employer-employee relationship.³²¹ The Court has also held that a failure to train employees may suffice for municipal liability where “the failure to train amounts to deliberate indifference to the rights of persons with whom the [officials] come in contact.”³²²

Taken together, these aspects of § 1983 doctrine indicate a strong cause of action for students who were involuntarily referred to a school and who can show a pattern of injuries caused by school employees who were improperly or inadequately trained.

B. *A Proposed Test for State Action*

Whereas other commentators have focused upon critiques of the state action requirement, or upon altering current doctrine to address cases they believe have been wrongly decided, this Article seeks to work within existing doctrine, highlighting what the Court has already found significant to point the way toward an appropriate analysis.³²³ It concludes that a two-pronged approach is appropriate for identifying at least a subset of state actions: (1) was the injury caused by someone cloaked in the authority of the state, and (2) was the injury made possible only because the state placed the complainant in the injurer’s care? In order to find state action, the answer to both questions must be affirmative; but affirmative answers are sufficient, not necessary, for a finding of state action.

1. *Was the Injury Caused by Someone Cloaked in the Authority of the State?* The first question to ask in the context of injuries committed by publicly-funded privately-run school employees or officials, is whether those

321. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

322. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

323. See, e.g., Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1192 (1995) (“[A] seemingly ‘private’ activity should be considered as a state action if . . . it is public in nature (according to present understanding of the responsibilities of the state); and . . . the state refrains from operating an equivalent service”); Krotoszynski, *supra* note 146 (arguing in favor of state action meta-analysis).

individuals were cloaked in the authority of the state when they committed the injuries. In other words, were those individuals capable of inflicting the harms alleged solely by virtue of the power granted them by the state, or were the harms more akin to private harms, like common law tort injuries?

Both state action and § 1983 doctrine are explicitly premised in recognition of the unique powers conveyed by state authority. The Court has insisted that relief only be granted where it is the state that has acted, and not a private party—even where the private party's action is arguably possible only because of state inaction, and even where only the state actor is sued.³²⁴ These doctrines recognize that once an individual has been vested with state authority, that authority carries “a far greater capacity for harm than an individual trespasser exercising no authority other than his own.”³²⁵ Even misuse of that power is considered state action (or action taken under color of state law) because that power was possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law³²⁶: “[P]ower, once granted, does not disappear like a magic gift when it is wrongfully used.”³²⁷

324. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197-200 (1989); *see also id.* at 196 (“[The Due Process Clause’s] purpose was to protect the people from the State, not to ensure that the State protected them from each other.”).

325. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392 (1971). Moreover, as some have noted:

[a]s a symbolic matter, the imprimatur of the state might matter to us. Discrimination at the hands of a government agency might sting more than discrimination at the hand of our neighbor. More concretely, the particular coercive power of the state—to impose financial penalties, withhold benefits, condemn our property, throw us in jail—is undeniable.

Freeman, *supra* note 138, at 551.

326. *United States v. Classic*, 313 U.S. 299, 326 (1941).

327. *Bivens*, 403 U.S. at 392; *see also Screws v. United States*, 325 U.S. 91, 92-93, 111 (1945) (upholding conviction under federal civil rights statute of police officers who beat a black man to death because the murder was committed while the officers were cloaked with the authority of the state); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) (“[W]here an officer or other representative of a State in the exercise of the authority with which he is

Thus, the police officer who punches a person in her custody is liable under § 1983, whereas one passerby who punches another is liable only for assault. The differing treatment for the same underlying physical actions reflects several understandings: first, that the officer may not have been in a position to inflict the injury but for her official position (it is easier to escape from your neighbor's headlock than an officer's handcuffs); second, that that difference may be reflected in the nature and seriousness of the injuries inflicted; and finally, that injuries inflicted by the state are qualitatively different from those inflicted by private parties (perhaps in part because you are more outraged by the malfeasance of those whom your tax dollars support). Whether the officer acted within the proper scope of her official authority is irrelevant for purposes of § 1983 liability.³²⁸

The question then becomes whether a search of a student's physical body without reasonable suspicion looks like an illegal search conducted by a police officer (or other officer of the state), or like a private individual patting down a kid from the neighborhood; whether the infliction of school discipline without notice and opportunity to be heard looks more like a state deprivation of liberty without due process, or a private individual confining a child without his parent's permission; and whether religious indoctrination at a school looks more like a state establishment of religion, or like private proselytizing.

This Article contends that in each of these instances, the injuries inflicted are cloaked in state authority. Just as prisoners in custody find it difficult, if not impossible, to flee or otherwise avoid injury inflicted by prison guards, students at disciplinary alternative schools cannot avoid injuries inflicted by school officials and employees in the same way that they can run from the neighborhood bully. Flight is not only more difficult but may also be accompanied by additional injury or officially sanctioned punishment.

clothed misuses the power possessed to do a wrong forbidden by the [Fourteenth] Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant . . .").

328. *Monroe v. Pape*, 365 U.S. 167, 171-72 (1961).

The law provides police officers with the authority to conduct searches, recognizes the possibility that they will misuse that power, and further acknowledges that misuse of that power is categorically different from the use of private power. The average citizen does not feel free to decline a search by a police officer but would feel free to walk away from a stranger who asks to see inside their bag.

School officials and employees are in a position to search and discipline students solely by virtue of the authority granted to them by the state. And that authority further empowers them to punish students who refuse to comply with their directives. Misuse of this authority thus results in injuries that are qualitatively different from privately inflicted harms. Because these injuries could not have been inflicted but for the cloak of state authority, their infliction should be considered state action.

2. *Was the Injury Made Possible Only Because the State Placed the Complainant in the Injurer's Care?* The general rule that a state actor is not liable for inaction that results in harms inflicted by private actors appears initially to doom claims of state actor liability for failure to monitor properly the activities of a contractor. However, an exception to this rule exists where the state has confined a person and so made him unable to protect himself against the harms inflicted by a private actor.³²⁹

The second prong of the proposed test draws upon the “special custodial relationship” doctrine that creates an exception to the general rule that the state has no affirmative duty to protect its citizens from private harm.³³⁰ Under this doctrine, the state assumes such a duty when it takes physical custody of people or otherwise prevents them from helping themselves.³³¹ The duty arises from “the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty.”³³² Thus, “[t]he affirmative duty to protect arises not

329. *See supra* Part V.A.2.

330. *Cf. DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989) (finding in that case that state had no duty to protect plaintiff from his father’s violence).

331. *See id.* at 200.

332. *Id.*

from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."³³³ Unlike the situation in *DeShaney*, moreover, where the injuries were caused by a wholly private party, the injuries alleged by students at disciplinary alternative schools are caused by actors who would not have been in the position of authority to inflict the injury but for the intervention of the state (via referral to the school).³³⁴

There is, of course, no federal constitutional right to a free public education.³³⁵ And, as the Court underscored in *Rendell-Baker*, the provision of education is not a function traditionally reserved exclusively to the states.³³⁶ However, in the context of disciplinary alternative schools, the fact of involuntary referral should be critical. Although *Rendell-Baker* and other cases make clear that education has never been *exclusively* a public function, involuntary referral of students coupled with compulsory education laws makes their education at these schools functionally an exclusive function, i.e., they have no choice but to attend.³³⁷ This understanding is reflected in the lower court cases, and rightly so. In the alternative school context, the fact of involuntary referral to the schools in question, coupled with compulsory education, creates the equivalent of a non-delegable duty of care.

333. *Id.*

334. *Cf. id.* at 201 n.9 ("Had the State by the affirmative exercise of its power removed [plaintiff] from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.").

335. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

336. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

337. The forcible referral of students to disciplinary alternative schools may perhaps be analogized to the forcible removal of children from homes in the foster care context, which has been recognized as an exclusive prerogative of the state and thus an indicator of state action. CHEMERINSKY, *supra* note 219, § 8.9, at 505 ("The principle that appears to be emerging from the lower court decisions . . . is that the government has an affirmative duty to protect children in foster care when the government placed them there. But the government has no such obligation to provide protection when the children are voluntarily put in foster care without active government involvement."); *see also* Coupet, *supra* note 187, at 116 ("[T]he state, and *only* the State, may involuntarily remove children from the custody of their parents, exercise legal and physical custody over them, and deliver them legally into the hands of private agents.").

3. *The Critical Combination of Involuntary Referral with Actions Cloaked in the Authority of the State.* This Article contends that when the state (1) places an individual in an institution that is privately run and publicly funded (or where her care, at least is publicly funded), and (2) thereby subjects her to the authority of the parties running the institution, actions taken by those parties become cloaked in the authority of the state, regardless of whether the parties are private.

The source of state authority for the placement is irrelevant: sometimes the state acts as legal guardian, as is the case with placement of children in orphanages or foster care facilities; sometimes as an agent of the people empowered to inflict punishment, as is the case with referrals to prisons; and sometimes merely via exercise of its powers as the state, as is the case with referrals to alternative disciplinary schools. What matters is that persons placed in these institutions would not be there but for the intervention of the state.

The extent to which the placement is truly involuntary may vary somewhat, but this Article contends that a referral becomes doctrinally relevant when the individual is threatened with consequences from the state—as opposed to private parties—if she attempts to leave the institution in question. Criminal consequences, as for those breaking out of prison, are the clearest example. But in the context of disciplinary alternative schools, students may be charged with truancy or expelled from the state's school system if they fail to attend as directed. Students who are referred by the juvenile justice system may also face additional consequences if their attendance at a particular school was a judicially imposed condition.

The combination of state placement and state consequences for failure to comply creates the state imprimatur on the actions taken by the institution necessary for state action. It creates the “approval or enforcement” by the state that is demanded by the Court.³³⁸ This analysis is consistent with the Court's jurisprudence to date, even though it is not reflected explicitly in the canonical statements of state action doctrine.

338. *Blum v. Yaretsky*, 457 U.S. 991, 1010 (1982).

Thus, in *West v. Atkins*—in which the Court found state action in the context of publicly-funded but privately-provided care, in the form of a private doctor under contract with a public prison³³⁹—both prongs of the proposed test are met: admission to the institution in question was strictly involuntary and at the hands of the state, and the actions of the doctor were cloaked in the authority of the state because the prisoner had no other choice of medical care provider.

In *Blum v. Yaretsky*,³⁴⁰ another case involving a publicly-funded privately-run institution, the Court declined to find state action in the decisions of private nursing homes to transfer publicly-funded Medicaid patients to lower levels of care.³⁴¹ Neither prong of the proposed doctrinal test was met. First, attendance at the institution in question was voluntary: residence in a nursing home, much less a particular nursing home, is not state-mandated, and no one is subject to punishment for attempting to leave such a home.³⁴² Second, the actions of the nursing homes were not cloaked in the authority of the state.³⁴³ The plaintiffs in *Blum* alleged not that the decisions to shift patients from one level of care to another were imbued in any way with the authority of the state, but rather that the state *responded* to those concededly private decisions by reducing their Medicaid benefits.³⁴⁴

Although the Court's line of cases dealing with state action in the context of attachment and garnishment does not involve a publicly-funded privately-run institution, per se, it does deal with private parties seeking to exercise the power of the state. In these cases, the Court has drawn a strong line between those actions cloaked in the authority of

339. 487 U.S. 42 (1988); *see also* discussion *supra* Part III.B.2.

340. 457 U.S. 991 (1982).

341. *Id.* at 998.

342. *Id.* at 1011.

343. *Id.* at 1003 (“This case is obviously different from those cases in which the defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it ‘state’ action . . .”).

344. *Id.* at 1010 (“Adjustments in benefits levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. . . . [T]his degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself.”).

the state (and thus “involuntary” in the sense that non-compliance would be accompanied by adverse state consequences) and those undertaken by private parties. Thus, in *Sniadach v. Family Finance Corp.*,³⁴⁵ state action was found because officers of the state had acted jointly with the creditor to secure the property in dispute,³⁴⁶ but in *Flagg Brothers v. Brooks*,³⁴⁷ there was no state action where the creditor moved independently to sell the property pursuant to a self-help provision of a state statute.³⁴⁸ More recently, in *Lugar v. Edmondson Oil Co.*,³⁴⁹ the Court noted that joint action is found when a private party “invok[es] the aid of state officials to take advantage of state-created attachment procedures.”³⁵⁰

Finally, the Court’s relatively recent decision in *Brentwood* illustrates the proposed doctrinal test’s inapplicability to institutions that are not both publicly-funded and privately-run. In *Brentwood*, the Court found the institution in question—the Tennessee Secondary School Athletic Association—to be a state actor, even though membership in the institution was strictly voluntary.³⁵¹ Voluntariness of admission, however, is irrelevant where the institution itself is both publicly-funded and publicly-run.³⁵² The inquiry in *Brentwood* thus turns properly upon the public nature of the institution itself rather than voluntariness of admission or nature of the authority exercised over members.

CONCLUSION

Plaintiffs seeking to challenge constitutional rights violations by private actors in publicly funded school settings can and should request relief under § 1983 against

345. 395 U.S. 337 (1969).

346. *Id.* at 338-39.

347. 436 U.S. 149 (1978).

348. *Id.* at 151-53.

349. 457 U.S. 922 (1982).

350. *Id.* at 942.

351. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001).

352. *Id.* at 298. The Court emphasized that 84% of the Association’s voting membership consisted of public schools. *Id.* at 291.

such actors if the following circumstances are met: (1) students are involuntarily referred by the state (via, e.g., a local or state education agency or the state juvenile justice system); (2) the actions complained of are not peripheral to the government contract with the entity operating the school; and (3) the actions complained of are committed by employees cloaked in the authority of the state.

Although the Court's state action doctrine often appears opaque, the goal of this Article has been to look at it through the lens of one particular type of publicly-funded privately-run institution in the hopes of shedding light on how the doctrine might properly be understood as applied to other similar institutions. The proposed test is both consistent with the Court's jurisprudence and applicable to other traditionally government funded but privately-run institutions at which attendance or participation is compulsory and the population served a vulnerable one, such as foster care facilities.³⁵³

The test is not without its quirks. It applies only to publicly-funded privately-run institutions, and its application may result in a finding of state action for the purposes of one individual (who was involuntarily referred) but not for another (who attended voluntarily). It is nevertheless grounded in existing state action doctrine, other related areas of the law, and provides substantive guidance to those seeking to define the joint action and nexus tests.

Finally, the test also places proper emphasis on the critical role of state action, and by extension § 1983 liability, in generating constitutional accountability in our democratic system. Litigated solutions are often imperfect, but in the absence of a more perfect world in which government agencies and the private parties with whom they contract may be trusted to act with the public's interests at heart, they are often the best we have.

353. New federal regulations passed in 1996 permit the privatization of these services. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (relevant portion codified at 42 U.S.C. § 672(c) (2006)). This has resulted in the widespread use of state and federal dollars to fund the care of parentless children at for-profit institutions. Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1296 (1999); Nina Bernstein, *Deletion of Word in Welfare Bill Opens Foster Care to Big Business*, N.Y. TIMES, May 4, 1997, at 1.