CHAPTER FIVE – THE PERTINENT

John Rohr tells us that “Supreme Court opinions are pertinent in the sense that they raise questions that are useful for reflection on fundamental values” (Rohr, 1989, p. 82). The focus of this final chapter is the pertinence of the Court’s actions in *West v. Atkins* (1988) for the public administration and healthcare communities. In this process, I will also examine issues at the nexus of the law, public administration and healthcare—issues such as privatization decisions and contracting processes. While *West* is concerned with prison health care services, its message is not limited to the corrections community. The case informs other communities involved in the theory and practice of public administration and state action.

As noted earlier, “state action” is an ambiguous term. Generally speaking it refers to the actions of states and their sub-divisions. The latter include, counties, cities, municipalities, special districts, and so forth. We also use the term “state” in the nation-state sense to refer to the actions of the federal government. However, citizens are protected from the actions of the federal government by the Bill of Rights, a document that traces its origin to the Anti-Federalists. Citizens’ protection from abusive state action is afforded through the Fourteenth Amendment. The Court has not applied the Bill of Rights to state actions across the board, but rather, on a case by case basis, has relied on the Fourteenth Amendment to protect specific rights from state actions and not others. This bifurcation of the Bill of Rights, as applied differently to the actions of the states and those of the federal government, has created a rich body of jurisprudence.

*West v. Atkins* (1988) has become part of the body of jurisprudence dealing with state action and the Court’s ongoing dialogue with itself. The essence of the Court’s nearly unanimous decision in *West* was a clarification of the line between public and private actions in relationship to constitutional responsibilities and liabilities. As mentioned in earlier chapters, that decision was that it was the function not the relationship that determined whether actions were taken “under color of state law.” This chapter will discuss the implications of that decision and offer prescriptions for the public administration practitioner and health care provider.
Pertinence of *West* in the History of State Action

*West v. Atkins* (1988) is one in a series of cases in which the Court refined its doctrine of state action. *West* was a warning in an era of privatization of government services and related efforts to avoid constitutional responsibilities through such privatization—a warning that the courts would look at the function in question rather than the relationship of private actors to the state. However, *West* did not stand alone, but built on the Court’s earlier 5-4 decision\(^1\) in *Lugar v. Edmondson Oil Co.* (1982). The *Lugar* Court provided a two-part test of state action:

> To constitute state action, “the deprivation must be caused by the exercise of some right or privilege created by the State ... or by a person for whom the State is responsible,” and “the party charged with the deprivation must be a person who may fairly be said to be a state actor” (West, 1988 at 49 citing Lugar, 1982 at 937).

The *Lugar* Court also held that conduct that satisfies the requirements of state action under the Fourteenth Amendment is “also action under color of state law and will support a suit under §1983” (*Lugar*, 1982 at 935). The latter point was reemphasized by the Court in *West* (*West*, 1988 at 49).

The Court’s nearly unanimous *West* (1988) decision, the breadth of that decision, and continuing citations of the case by the Supreme Court as well as by district and circuit courts suggest that *West* remains “good law,” that is, it most likely will not be overturned in the foreseeable future. It also reaffirmed the earlier 5-4 *Lugar* decision. The Supreme Court has used *West* to support four more recent decisions and, in one instance, a dissent.

In *West* we have learned that one need not be a state employee to be found to be a “state actor” and to be engaged in state action. In *Polk County* (1981)\(^2\) we learned that a government

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\(^1\) In *Luger*, Chief Justice Warren E. Burger filed a dissenting opinion, as did Justice Lewis F. Powell, Jr. Justices Rehnquist and O’Connor joined in the latter.

\(^2\) This case was discussed in Chapter Two, pp. 37-38.
employee (in the form of a public defender) need not be a state actor involved in state action ("actions taken under color of state law") when their job is to advance the interests of their client—even though that client’s interests may be adversarial to the state. As the West Court emphasized, it will be the function performed that determines the presence or absence of state action and whether one is or is not a “state actor” for the purposes of § 1983.

Progeny of West

In the same year that the Court heard West (1988), it used its nearly unanimous West decision to contrast the relationship between Dr. Atkins and the State of North Carolina to the relationship of the National Collegiate Athletic Association (NCAA), a voluntary multi-state athletic association whose membership includes both public and private institutions, to the State of Nevada and found that the relationship, in the latter instance, was not a controlling one (NCAA v. Tarkanian, 1988). Similarly, in American Manufacturers Mutual Insurance Co. et al. v. Sullivan (1999), the Court denied that the actions of a private insurer, although governed by state law, constituted state action.

When Dr. Atkins’ relationship to the state was compared to the actions of civil litigants using peremptory challenges based on race to discriminate against potential jurors, the Court held that, while there was no contractual relationship to the state and the conduct of private parties generally lies outside of the scope of the Constitution, state action existed because—“governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government” (Edmonson v. Leesville Concrete Co., 1991, at 620). Subsequently in the following year, hearing Georgia v. McCollum (1992), the Court declined to distinguish criminal defendants from the civil defendants in Edmonson and extended the Edmonson reasoning regarding racially discriminatory jury selection to criminal cases (McCollum, 1992).

In Morse v. Republican Party of Virginia (1996), West was cited, along with Lugar (1982), Tarkanian (1988), and Rendell-Baker (1982) by Justice Kennedy who was joined by the Chief
Justice in a dissent. Kennedy emphasized in his argument that “under color of state law” has been used by the Court as equivalent to “state action.”

**Pertinence of West to Issues of Liability and Immunity**

The Court’s decision in *West* (1988) that the determination of state action should be based upon the function performed by the private contractor rather than that contractor’s relationship to the state has profound implications for contractors and their employees. The principal implication is that the contractor may be held personally liable for constitutional torts and associated punitive damages.

Issues related to the distinction between sovereign immunity and official immunity have been examined by the courts during the past two centuries. Decisions related to both have evolved along with the evolution of the determination of state action. Sovereign immunity is based on the common law notion that “the king can do no wrong” and it was traditionally held that “the sovereign could not be taken before a court without its permission” (Cooper, 2000 p. 527-528). While immunity from suit is not the focus of this dissertation, it is important that the reader understand the type of immunity afforded most government employees when performing discretionary functions. It is called *qualified immunity*. Prior to 1970, the courts had afforded public administrators a type of immunity called *absolute immunity*. Absolute immunity is closer to sovereign immunity and means total “immunity from being sued personally for compensatory or punitive damages for violating individuals’ constitutional rights in the course of their official actions” (Rosenbloom, Carroll, & Carroll, 2000 p. 46). Absolute immunity is still applied to certain governmental functions such as legislative and judicial functions and it protects officials *while involved in those functions*. Executive functions are rarely similarly protected, with the exceptions of “prosecutors and similar officials, … executive officers engaged in adjudicative functions … and the President of the United States” (*Harlow v. Fitzgerald*, 1982 at 807).

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3 As pointed out in Chapter Two, the term “under color of state law” is derived from the Civil Rights Act of 1871, Rev. Stat. 1979, 42 U.S.C. 1983, while the term “state action” refers to the requirements of the Fourteenth Amendment. The Court emphasized in *Lugar* (1982) and in *West* (1988) that the requirements are the same.

4 *Harlow v. Fitzgerald* (1982) was a suit in which petitioners Bryce Harlow and Alexander Butterfield, two senior White House aides to President Richard M. Nixon, filed for civil damages against respondent A. Earnest Fitzgerald,
In general, public employees performing discretionary functions have been extended qualified immunity by the courts. The Court’s holdings in *Harlow v. Fitzgerald* (1982) clearly outlined the scope of qualified immunity and its limitations:

…[B]are allegations of malice should not suffice to subject government officials either to the cost of trial or to the burdens of broad-reaching discovery. … [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known….

… Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken “with independence and without fear of consequences,” … (*Harlow v. Fitzgerald*, 1982 at 817-818, 819).

The issue of immunity for contractors and their employees was raised when the Court heard *Richardson v. McKnight* (1997). Ronnie Lee McKnight sued guards Darryll Richardson and John Walker at Tennessee’s South Central Correctional Center (SCCC) saying that they had injured him by placing him in excessively tight restraints. Richardson and Walker claimed qualified immunity from § 1983 suits. The district court denied a petition to dismiss from Richardson and Walker on the grounds that they were employees of a private firm and hence not entitled to qualified immunity. The Sixth Circuit Court of Appeals affirmed. The issue before the Supreme Court was “whether prison guards who are employees of a private prison management firm are entitled to qualified immunity from suit by prisoners charging a violation

who had been dismissed from the Financial Management Office of the Air Force (at 804, footnote 5). The issue addressed by the Court was “the scope of the immunity available to the senior aides and advisers of the President of the United states in a suit for damages based upon their official acts” (*Harlow v. Fitzgerald*, 1982, at 802).
of 42 U.S.C. § 1983” (Richardson, 1997, at 399). The Court upheld the Court of Appeals’ decision that the private guards were not entitled to the immunity provided to their governmental counterparts. However, the Court expressed three caveats: (1) they had focused on § 1983 alone and had not addressed the issue of defendants’ liability in other areas such as for injuries sustained by the inmate, leaving the latter for the district court to decide based on Luger (1982) criteria; (2) they had answered the immunity questions narrowly and within context of a profit motivated private firm assuming a large administrative task with limited governmental supervision; and, (3) they had not foreclosed the possibility of the use of a “good faith” defense.5

The dissenting justices pointed out that private individuals, such as grand jurors and witnesses who testify in court, have often been granted immunity and, quoting Alamango v. Board of Supervisors of Albany County (1981), that “[t]he duty of punishing criminals is inherent in the Sovereign power. …” (Alamango, 1981 at 552). Concluding the dissent, Justice Scalia, joined by the Chief Justice and Justices Kennedy and Clarence Thomas, stated that, “The only sure effect of today’s decision—and the only purpose, as far as I can tell—is that it will artificially raise the cost of privatizing prisons” (Richardson v. McKnight, 1997, at 422).

The divisions within the Court regarding its Richardson decision—and the nature of the caveats raised—suggest that the Court may have been extending an invitation to future reconsideration of the issue of qualified immunity for private contractors. While the circuit courts have reportedly cited Richardson 250 times in the six years since the Court’s decision, the Supreme Court, itself, has not cited this decision.6

I have attempted to emphasize that the distinction between public and private is not a bright line, but often an ambiguous and moving one. Lebron v. National Railroad Passenger Corporation

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5 The “good faith” defense evolves from the common-law and requires proof of subjective good faith. Its most frequent use is as an exception to the “exclusionary rule”—a rule, based upon 4th Amendment protections, that excludes illegally obtained evidence. The Court has addressed “good faith” in civil suit suits (U.S. v. Janis, 1976) as well as criminal cases (U.S. v. Leon, 1984; Segura v. U.S., 1984; and Illinois v. Krull (1987) (Fisher, 2001. pp. 813-816). Generally, the good faith exception to the exclusionary rule is applied in instances where there was an “honest mistake” resulting in an unconstitutional seizure of evidence by law enforcement officials (Hall, 1992).

(1995) is an excellent example of this ambiguity. Petitioner Michael A. Lebron, whose business was the display of commentary on public issues, rented space from the National Railroad Passenger Corporation (Amtrak) in Pennsylvania Station in New York. The petitioner’s display was rejected by Amtrak because of a policy, which it inherited from the former landlord of Penn Station, the Pennsylvania Railroad Company, disallowing political advertising. Lebron filed suit claiming violation of his First and Fifth Amendment rights.

The district court found that Amtrak was a governmental actor for First Amendment purposes because of its close relationship to the government. The Second Circuit Court of Appeals reversed. The Supreme Court granted certiorari to determine whether Amtrak was subject to constitutional constraints. Justice Scalia delivered the opinion of the Court, with Justice O’Connor dissenting. At issue for the Court was the relationship between Amtrak and the federal government.

Amtrak had been created in the public interest the by Rail Passenger Service Act of 1970 (RPSA). The legislation established goals for Amtrak, established that a majority of its board of directors would be appointed by the President, and detailed the structure and powers of the organization. The authorizing statute further specified that Amtrak was not to be “an agency or establishment of the United States government” (84 Stat., at 1330; 45 U.S.C. 541). However, the Court held that it was not for Congress to determine whether or not Amtrak was a governmental actor for purposes of decisions about the constitutional rights of those affected by its actions and that Amtrak was an instrumentality of the United States for the purposes of guaranteed constitutional rights. The Court held that:

It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, Plessy v. Ferguson … (1896), can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak (Lebron, 1995 at 397).
For the purpose of this dissertation, the messages of *Lebron* (1995) are: (1) that there are hybrid organizations that may be private for some purposes and public for others; and, (2) that the courts will make the determination of publicness or privateness, it will not be established by legislative enactment or executive proclamation.

The benefit of being a governmental actor is the protection offered by absolute or qualified immunity. The associated burden is the liability associated with constitutional rights and potential constitutional torts. The perceived benefit of being a private actor is the absence of responsibility for constitutionally protected rights and other governmental obligations such as rules and regulations regarding open meetings and public information. However, as I have attempted to demonstrate in this dissertation, these benefits may be illusory when the private actor is involved in a public function, or when that actor is entwined with government. When the latter is the case, it may be necessary for the courts to unravel the entwined relationship to determine publicness or privateness. And, that determination may be that the actor or organization is public for the purposes of constitutional liability, but private for the purposes of immunity, such as the prison guards in *Richardson* (1997).

**The Lessons of West (1988)**

How does the healthcare administrator avoid the circumstances such as those Quincy West experienced? Standards for prison healthcare are in place. The American Correctional Association (ACA) and the National Commission on Correctional Health Care (NCCHC) have both promulgated such standards. And, standards developed by the American Public Health Association (APHA) were important for the Court in *West* and other related cases.

The third edition of the APHA standards was released in early 2003. It points out, as has our analysis of *West*, that health care professionals in a prison setting may become “entangled in a conflict of identity that injures them, their prisoner patients, and the institution” (APHA Task Force, 2003, p. xviii). The organizing principles contained in that new manual note: (1) that jails are “part of the community at large” (Standard I.A); (2) that “medical care must meet the professional standards of the community” (Standard I.B); (3) that “[t]he ethical obligations of
health professionals in the correctional setting mirror those of health care professionals in the community” (Standard I.C.A); (4) that “[c]ommunity standards for consent … also apply to prison populations” (Standard I.C.C); and, (5) that prisoners should be treated as a “protected class in accordance with federal regulations and community standards” if participating in biomedical research (Standard I.C.E) (APHA Task Force, 2003, pp. 1-6).

In addition, two organizations provide accreditation for prison-based hospitals and clinics, the National Commission on Correctional Health Care and the Commission on Accreditation for Corrections (CAC). Private hospitals and free-standing clinics treating incarcerated individuals are subject to state licensing and accreditation standards. Some states such as California have established state licensing standards for such facilities. However, as noted in the Chapter Four section on “Community Attitudes,” California has not met its own licensing standards for prison-based healthcare facilities (Egelko, 2002). What is the role of the public healthcare administrator in such circumstances? How does the administrator balance his or her constitutional and bioethical responsibilities related to individuals in their charge when resources are inadequate and public attitudes are negative? It is much easier to postulate an answer to that question than to “walk in the administrator’s shoes.” However, the American Society for Public Administration (ASPA) Code of Ethics may offer some guidance (reprinted in Rosenbloom, 1998, pp. 555-556).

**Judicial Activism**

In 1976, Judge David L. Bazelon, a name often associated with judicial activism, called upon judges and administrators to collaborate to ensure fair public policies (Bazelon, 1976; O’Leary & Wise, 1991; Cooper, 2000). Starting around 1965, the judiciary chose to become involved in details of prison administration on many occasions. Feeley and Rubin (2000), in a discussion of judicial policy making, tell us that “[f]ar from limiting themselves to declaring prisons unconstitutional, the judges imposed or approved elaborate remedies whose features ranged from

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7 In some locales successful accreditation may serve as a proxy for meeting state licensure requirements.

8 The most common accreditation organization for hospitals and health centers is the Joint Commission for the Accreditation of Healthcare Organizations (JCAHO).
the highest policy to the lowliest details” (Feeley & Rubin, 2000, p. 297). Feeley and Rubin documented several instances in which correctional staff members willingly aided the courts and drew attention to prison problems. Charles Plummer, Sheriff of Alameda County, California, serves as an example.

When sued by inmates for the dilapidated conditions of the old Santa Rita Jail, Sheriff Plummer “helped write specifications into a consent decree that went well beyond anything that the court would have ordered” (Feeley & Rubin, 2000, p. 363). The result was the construction of a state of the art new jail that had been on the drawing board, but unfunded, for a number of years. It is my recollection that the members of the county board of supervisors were faced with funding the new jail or spending court ordered time in the old one. Funding was provided.

Reflections Regarding Privatization

Are there implications in the above for New Public Management and privatization initiatives? The message of West v. Atkins (1988) and cases such as Richardson (1997) and Lebron (1995) is one of caution. The Court’s message in West was unanimous and intended to be clear: that it was function not relationship that determined whether actions were taken “under color of state law” and that the state action requirements of the Fourteenth Amendment are functionally one and the same as actions taken “under color of state law.” This decision not only provided a warning to those involved in government contracts, it provided instructions to the lower courts, and suggests to us that the Court may use similar reasoning in future cases that it hears. Similarly, in Lebron (1995), the Court was firm in its position that privatization, undertaken with the intention of evading constitutional responsibilities, was not acceptable and such transfers of responsibilities would be scrutinized by the courts and likely be found to be taken “under color of state law.” In Richardson (1997), the Supreme Court and the court of appeals answered the question before them very narrowly, leaving issues such as the “good faith” defense for “another day.” However, the Court sounded the alarm that private individuals employed by private firms contracting with government should not expect to receive qualified immunity. The majority opinion, written by Justice Breyer, noted the purpose of immunity was to address a concern

about unwarranted timidity on behalf of government employees and market forces dealt with that issue in the case at hand. Breyer stated that Court has never held that “the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity ... especially for a private person who performs a job without government supervision or direction” (Richardson, 1997). In this statement Justice Breyer was alerting us to some of the subtleties that would be considered by the Court in such cases. In addition, the statement may be interpreted to alert us that the Court would be refining its Richardson decision when the right case presents.

A substantial number of factors suggest that government may be contracting for an increasingly wider array of services than we have seen in the past. In addition to popular movements such as “Reinvention,” and New Public Management, efforts are underway to withdraw traditional civil service protections from a variety of public managers. Examples include: the privatization of public services such as the creation of hospital authorities, and reorganizations such as the Office of Homeland Security, the Defense Department’s plan to create a new personnel system for its 750,000 civilian employees, and so forth (Light 1999, 2003). In addition, there is a large number of civil servants approaching retirement age at the federal, state and local levels of government and offers of retirement incentives for public employees are becoming commonplace (Light, 2001).

Since the late 1980s, businesses have been required to report and book the contingent liability of future health care costs of employees and retirees. This requirement has resulted in the hiring of growing numbers of part-time or temporary employees by businesses to reduce their health care and retirement benefit costs. State and local governments have been faced with similar accounting requirements. One result of this accounting change is an effort to avoid this fiscal liability by hiring more contract employees in lieu of civil service employees with retirement and health care benefits. It is now common to find civil service protected employees working side by side with personal services contractors and employees of private contractors. The latter two may be dealing with the public, supervising employees, managing contracts, providing healthcare services to inmates, and so forth—all functions with potential constitutional liability—with no immunity for the private contractor.
Will the assumptions of private sector management superiority hold when private actors are faced with constitutional responsibilities? Heidi Koenig (1997) opines that, 

[i]t is possible that as the courts develop the law that governs government-independent contractor relationships and the extent to which independent contractors must remain under the management of government to avoid additional liability, a different set of answers will be developed to the question of who is to provide public services (Koenig, 1998, p. 9).

Let us examine the question of whether the a priori assumption of superior private management can be supported—even without the additional considerations that Koenig predicts.

The complexity of the responsibilities of the public manager to serve many competing demands far exceeds the complexity of the demands upon the private sector manager to serve a board of directors and achieve a satisfactory profit: the (readily quantifiable) “bottom line.” The “bottom line” for the public manager is one of legal, political, and moral obligations: serving the common good, supporting regime values, and upholding the United States Constitution. This difference is reflected in the approaches taken to education in business and education in public service. Wamsley’s comment referenced in the first chapter related to law setting the limits for business and dictating what actions should be undertaken by government and how those actions should be undertaken helps to underscore this difference. For example, the federal administrator’s actions are governed by the Administrative Procedures Act\(^\text{10}\) (Cooper, 2000, pp. 642-691) and state and local public administrators are similarly constrained by their jurisdictions. For the public administrator, unintended consequences of decisions which have a bearing on the public good may constrain actions, whereas, hard-headed business decisions may not be similarly constrained. Governments are also geographically constrained. They are unable to relocate when economic conditions grow unfavorable. Indeed, in such circumstances, the governmental entity may initiate job training programs and provide healthcare and economic benefits for employees left behind by a business employer seeking a more favorable economic climate or

\(^{10}\) 5 U.S.C. § 551 et seq.
downsizing to achieve economies of scale or to take advantage of opportunities offered by emerging technologies.

James Austin and Gary Coventry (2001) in their monograph prepared for the National Council on Crime and Delinquency challenge the use of private providers of prison services and, as mentioned earlier, question the propriety of the state’s delegation of its responsibilities to private contractors. Indeed, Austin and Coventry identify the central question as, “whether government has the authority to contract out what is now widely regarded as a public function” (Austin & Coventry, 2001, p. 18). This interesting question has not been carefully examined by the courts and is mentioned only because we may hear it raised in the courts as a challenge to privatization in the future.

Although quality of service provision is regarded by many as a key element in the privatization decision, cost is also a consideration, and is often used to support an argument of superiority of private services. Studies comparing costs of public and private provision of services do not support the assumption of private superiority (Austin & Coventry, 2001; Price & McCreary, 1991). All too frequently superficial cost comparison studies fail to acknowledge: (1) the private contractor’s ability to provide limited specific measurable amounts of service; (2) that cost formulas may not incorporate the additional government costs of administration and monitoring contracts; (3) that cost formulas may not include the additional government costs associated with indemnities provided to contract providers; (4) that cost formulas may not include trainings provided to the contractor; (5) that cost formulas may not comprehend the contractor’s additional liability for constitutional torts; and, (6) in some instances, costs associated with government provision of the facilities and or other services may be omitted. Overhead cost formulas, opportunistically intended to pick up a share of third party funding, may also disadvantage government operated programs in cost comparisons. Such comparisons may neglect to note that privatization of a program will not result in an overhead reduction—only in a redistribution of fixed overhead costs.
For a complete picture, qualitative issues, such as effectiveness of health care services, recidivism of inmates, and success of job placements, should be included. However, these factors are either difficult to quantify and or may require longitudinal analysis.

In some instances, private providers of services have selected the clients or patients who are easier to work with, less difficult to serve, or healthier. For example, private health care providers, including health maintenance organizations (HMOs), may focus their marketing efforts on a younger population, such as children and young mothers rather than the elderly who generally have higher health care costs. Social services providers offering job placement and training may focus on assistance to the more highly educated and easily placed portion of the total client population. Similarly, private prison providers, through election to serve females and the less dangerous members of the inmate population may have lower per inmate day costs. For example, the proportion of female inmates in private prison facilities is 25 percent higher than the proportion in public facilities; and the proportion of maximum/close/high security inmates in private prison facilities to the rest of the private facility inmate population is less than one quarter of the proportion found in public correctional facilities (Austin & Coventry, 2001, p. 41).

Prescriptions Regarding Contract Mechanisms

In 1986 Ira Robbins, speaking about privatization of prisons, commented in the Federal Bar News & Journal that “the government does not have the power to delegate to private entities the authority for such traditional and important governmental functions” (Robbins, 1986, p. 195). As noted above, Austin and Coventry in their February 2001 monograph prepared for the Bureau of Justice Assistance (BJA) on “Emerging Issues on Privatized Prisons” framed the same statement in the form of a question when asking “whether government has the authority to

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11 A 2002 study by MDRC, a non-profit research group emphasizes the greater success of job placement programs which focus on the more advantaged welfare recipients rather than the most disadvantaged, i.e., those who had long-term welfare receipt, dropped out of high school, and had been unemployed long term (Hamilton, 2002).

12 The article was adapted from Robbins’ November 13, 1985 testimony before the House of Representatives Subcommittee on Courts, Civil Liberties and the Administration of Justice.
contract out what is now widely regarded as a public function." They also express concerns about punishment imposed upon inmates for the violation of institutional rules by private contractors—and the potential denial of due process if the punishment results in the lengthening of inmates’ imprisonment (Austin & Coventry, 2001, pp. 18-19).

Austin and Coventry point out that the U.S. Constitution protects inmates through the 5th, 14th, and 8th amendments against violations of due process and against cruel and unusual punishment. Noting that there has been a large volume of litigation concerning prison conditions and inmate rights, they ask, “whether private prisons can operate in such a manner that the exposure to litigation against government is reduced” (Austin & Coventry, 2001, p. 18). In response to this question, they recommend various approaches to protect the state and inmates from § 1983 liability associated with wrongful acts of contractors. The authors suggest that, “[t]he government can reduce, but not eliminate, its vulnerability to privatization-related lawsuits by specifying in law, and subsequently in the contract, that the government be indemnified against any damage award and for the cost of litigation” (Austin & Coventry, 2001, p. 71). The monograph also suggests that governments may wish to require the posting of a performance bond or the establishment of trust funds to indemnify themselves in the event of contractors’ financial or other problems (Austin & Coventry, 2001, p. 71).

In addition to concerns about governmental liability, contractors also face additional potential liability and may be unaware of the risks associated with government contracts. The government contract manager is in a position to inform private contractors of additional risks that they face when performing functions that may be deemed “governmental.” While current contracts often contain boilerplate nondiscrimination clauses, contractors need to be made aware that such “standard language” may be highlighting pitfalls that they have not seriously considered. Because of the contractors’ heightened risk associated with the Court’s recent denial of qualified immunity to private contractor employees when performing traditionally governmental functions (Richardson, 1997), I suggest going beyond public contract manager to private contract manager negotiations, monitoring and related communications to training in constitutional issues.

13 Clair A. Cripe (1997) explores this question somewhat differently and asks about the “propriety” of privatizing correctional facilities (Cripe, 1997, p. 394).
(constitutional competence) for contractors at all levels. In order to provide such training, the
public administrator must be cognizant of potential pitfalls and be attentive to the Court’s
“dialogue with itself.” In addition, Richardson (1997) is an excellent example of an issue that
the public administrator contracting for services and the private contractor should both be
watching closely. The Court’s split decision, its narrow answer to the immunity question, and its
raising the possibility of a “good faith” defense all invite challenges.

Government contracts often provide indemnification for contractors. However, there is risk
associated with such indemnification. In West it was noted that the State of North Carolina,
legislating that the state would protect physicians providing services in prisons from lawsuit (for
recruitment purposes), thereby weakened its own position when arguing that the physicians were
not involved in state action.

An Expanded Understanding of Publicness

“Public” or “private” as legal concepts have become permeable and entwined to the extent that
the terms have become, according to some critics of the state action doctrine, “indeterminate”
(Kennedy, 1982). We have hybrid organizations: private for certain purposes and public for
other purposes. As part of its examination of West, this dissertation has attempted to explore the
ambiguity of such relationships and to provide some examples of their multiple manifestations.

We are fortunate that the Court has provided, as Robbins (1986) reminds us, three tests that
inform a decision of state action: “(1) the public-function test; (2) the close-nexus test; and (3)
the state-compulsion test” (Robbins, 1986, p. 196). The public function test was articulated in
West. The close-nexus test, a determination of “whether there is a sufficiently close nexus
between the State and the challenged action … so that the action of the latter may be fairly
treated as that of the State itself,” was articulated in Jackson v. Metropolitan Edison Co. (1974)
and also became a consideration in the Court’s West decision (Jackson, 1974 at 351). The state-
compulsion test asks “whether the state had a clear duty to provide the services in question”
(Robbins, 1986, pp. 196-197). In instances of contracted services, the question then becomes
whether the private entity acted “under color of state law” for the purposes of 42 U.S.C. 1983.
In West, the Court walked the reader through the reasoning of each of the above tests of state action before reaching its unanimous decision.

**Revisiting the Questions**

The questions raised in this dissertation were: How was the Supreme Court’s doctrine of state action reinterpreted in West; What is the import of West for public administration, healthcare, and government healthcare services contractors; and, How do or can the courts inform public administration? The foregoing chapters have explicitly focused on the first two of these three questions. The third question has been implicitly addressed throughout. However, it is important to address the third question, “How do or can the courts inform public administration,” more explicitly.

In order to do this I suggest that we look at the Constitution of the United States as a policy statement, as a statement of ideals and goals, and as an ambiguous statement of purpose which leaves much to interpretation and considerable latitude in implementation. For example, the Bill of Rights, the first ten amendments, protected citizens from the federal government. Prior to the Civil War and the subsequent adoption of the 14th Amendment, there were few barriers to protect citizens from coercive state actions. The 14th Amendment, adopted in 1868, was one of three amendments passed shortly after the Civil War to rectify certain abuses that had existed before the war. The language of the first section of that amendment appears to be clear:

> Section 1. … No State shall Make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

As noted in Chapter Two, the path of the 14th Amendment to extend the Bill of Rights to protect citizens from actions of the states and their subdivisions was a tortuous one. Five years after passage of the amendment, in 1873, the Supreme Court heard the *Slaughter-House Cases*. Filed after an 1869 Louisiana legislative act gave a single corporation the exclusive rights to slaughter
animals in New Orleans, the butchers disadvantaged by the granting of the monopoly initiated suit on the basis that the act deprived them of the right to pursue their trade and support their families. They contended that the monopoly granted by the legislature violated the Privileges and Immunities Clause of the new 14th Amendment. The Louisiana Supreme Court upheld the constitutionality of the Louisiana act and found that the law constituted a legitimate exercise of the police powers of the state. The U.S. Supreme Court, in a split decision, rejected the butcher’s argument, rejected the claim that the Louisiana act violated the Privileges and Immunities Clause, and rejected the claim that the amendment had anything to do with economic matters—beyond those related to the protection of individuals who had once been slaves. In that one decision, the Court effectively excluded almost all civil rights issues from the purview of the federal courts (Harvard Law Review, 1977).

As noted in that earlier chapter, ten years later in 1883 the Court addressed the Equal Protection Clause of the 14th Amendment and the prohibition of racial discrimination in public accommodations and conveyances protected by the Civil Rights Act of 1875 when it heard the Civil Rights Cases (1883). Thirteen years later the Court continued its narrow interpretation of the Equal Protections Clause of the 14th Amendment when it upheld a Louisiana Jim Crow law permitting “separate but equal” railroad accommodations (Plessy v. Ferguson (1896). Finally, in 1954, the Court overturned its Plessy v. Ferguson (1896) doctrine of separate but equal signaling a reconsideration of the 14th Amendment (Brown v. Board of Education, 1954).

In the 20th century, as well as speaking to liabilities and constitutional responsibilities, the courts have served as pedagogue in areas such as biomedical research and informed consent. For example, the Nuremburg tribunal established a set of biomedical research standards that have become the foundational document for all such research/experimentation subject rights statements (Marras, 1999). Similarly, early twentieth century court decisions in the area of informed consent preceded and informed patients’ rights documents, establishing a professional standard for medical practitioners; and, from 1965 forward, the courts have actively assumed both legislative and administrative roles in matters of social conscience such as school segregation and prison conditions (Faden, 1986; Feeley, 2000).
Currently, the Supreme Court’s examination of university efforts to create diverse student bodies and carefully articulate the line between actions promoting a legitimate university interest in a diverse student population and discriminatory practices provide a tutorial for the university administrator (Gratz v. Bollinger, 2003; Grutter v. Bollinger, 2003).

What is the import of this historic story? First, it is intended to illustrate that there is no bright line between law and policy. *The Court’s dialogue with itself is not merely interpretation and development of the law—it is policy reformulation.* For this reason, a mere familiarity with the Constitution and its language is insufficient for the public administration practitioner. Inasmuch as the Court’s decisions have a direct bearing on administrative action, the conscientious administrator must monitor the Court’s ongoing dialogue with itself and listen attentively to its messages of import for our field and our practice.

Second, it is intended to alert the public administrator and government contractor that the contractor may be engaged in state action and found by the courts to be a state actor for purposes of § 1983. That latter determination may expose the contractor to risks associated with potential constitutional torts.

Third, it is intended to demonstrate that there may be competing ethical constraints upon the decisions and actions of the public administration practitioner. As Rohr has pointed out in speaking of our untidy moral universe, sound reasoning may often follow varied paths. In Court decisions these different paths are found in dissents and concurring opinions. In the instance of *West,* Justice Scalia reached the same conclusion as the majority of the Court, but by following different reasoning. I have attempted to illustrate that a bioethical view of Quincy West’s circumstances would raise different questions, be based on a different ethical rationale, and be founded on different legal and historical precedents.

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I realize that this statement opens up a historic argument regarding the role of the judiciary and the appropriateness of its involvement in policy related matters. While I have briefly mentioned judicial activism in this chapter, the historic debate in this area is not the topic of this dissertation. Nonetheless, I think that I am on safe ground when I imply, as in chapter one, that many administrative actions are driven by court decisions and that it behooves the conscientious public administrator to listen to what the courts have to say on administrative matters.
And, finally, my lengthy reflection is intended to illustrate that public opinion may reflect “a common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” as described on November 22, 1787 by James Madison in The Federalist No. 10 (Cooke, 1961, p. 57). I have used examples of public opinion related to health care services for prison inmates to illustrate this point. Such passions should not dictate the actions of the constitutionally trained public administrator, but be seen as pointing to a need for public education.

**Reflections on Values**

In his seminal work, *Ethics for Bureaucrats* (1989), John Rohr’s message is “how Supreme Court opinions can enrich ethical reflections” and he urges reflection on values as a component of bureaucratic decision making and the exercise of discretionary authority. Rohr presents “law as a symbol of values” and examines the regime values of equality, freedom, and property for us (Rohr, 1989, p. 5). While equality, freedom, and property are key regime values, they are examples and not an exhaustive list.

Rohr’s perspective stands in contrast to that of Oliver Wendell Holmes who has been credited by Albert W. Alschuler with sounding the “principal theme of twentieth century jurisprudence:” an iconoclastic theme in which truth and moral preferences are “more or less arbitrary” (Holmes to Lady Pollock, September 6, 1902, in Howe, 1961, p. 105; Alschuler, 2000, p. 1). For Rohr, values and faith are the adhesives that bind a regime of diverse ethnicities, cultures, and religious beliefs. Rohr gives his readers and his students the impression that, for him, values are not mutable and for use when it becomes situationally convenient, they are sturdy guides for conduct. Rohr’s view is an optimistic one—one of faith in others to make good choices, of belief in the capacity of bureaucrats to faithfully fulfill their oaths to uphold the Constitution of the United States of America, and of their capacity to reflect on values during the conduct of their responsibilities. It is his intention in *Ethics for Bureaucrats* to provide a framework for such reflection. It has been my intent in this dissertation to utilize that frame, the Institutional, the Dialectic, the Concrete, and the Pertinent, to examine *West v. Atkins*. 
Rohr also pointed out the untidiness of the moral universe. For the public administration practitioner there may be no right answers or equitable options available to resolve wicked problems. Too often actions and decisions have unintended consequences. When faced with these conundrums, the practice of reflection on our options, actions, and decisions in the light of fundamental values\textsuperscript{15} may keep us awake at night and be intensely painful. However, such reflection may, at the end of the day, provide the comfort that accompanies the knowledge that we did the best we could.

\textsuperscript{15} I use the term “fundamental values” in a general sense to include regime values, bioethical standards, and so forth. Frequently such values are express in more everyday terms, such as “fundamental fairness” rather than terms from the lexicon of ethics such as “equity,” “distributive justice,” and so forth.