

## CHAPTER ONE - INTRODUCTION

### Overview

This dissertation explores the pragmatic implications of judicial rhetoric found in a 1988 Supreme Court decision, i.e., this is a dissertation about public administration using constitutional law to illuminate an administrative question. My viewpoint is a legal/constitutional one which uses the law as pedagogue to inform public administration and to offer a useful message for the public administration practitioner. That message deals with a legal/constitutional distinction between publicness and privateness and the implications of that distinction. I have stressed the legal/constitutional nature of the viewpoint because of the expanse of literature dealing with non-legal public-private distinctions. The latter will be acknowledged, but not examined. More closely examined will be the history of the distinctions drawn by the Court. These reflect the composition of the Court itself, its sensitivity to changing political perspectives and public sentiment, different understandings of the nature of judicial powers, as well as the inherent institutional tensions within our regime. The approach outlined also invites consideration of a parallel perspective—that of bioethics, a field well grounded in history, philosophy, and practice. A bioethical perspective will be compared and contrasted to the legal/constitutional viewpoint and will be used to provide an example of the complexity of the public administration practitioners' role.

The Court has a long history of distinguishing between publicness and privateness. In 1815 the Supreme Court distinguished between public and private corporations and noted the different degrees of governmental control to which each was subject (*Terrett v. Taylor*, 1815; Kelly, Harbison, & Belz, 1991; Rohr, 1976). The public-private dichotomy continues to capture the attention of scholars while newer approaches to governing, such as privatization and New Public Management, have blurred the line between public and private (Haque, 2001; Rosenbloom, Carroll, & Carroll, 2000). Indeed, hybrid organizations have been identified and created (Gore, 1993; Moe, 1994; Osborne & Plastrik, 1998; Powell & DiMaggio, 1991; Scott, 1995; Scott, 1998; Wilson, 1994). Privatization and the creation of hybrid organizations have tested and continue to place demands on the courts for clarification. Since 1815, the courts have had to

examine many public-private relationships and to clarify their public or private status and elements. In a recent term, the Supreme Court heard such a case involving a Tennessee not-for-profit athletic association that regulated interscholastic sports, among both public and private schools, by setting membership standards and rules related to student eligibility. The Court held that “the association’s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association” (*Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.*, 2001).<sup>1</sup>

“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 Anti-Federalist promoted Bill of Rights. Citizens’ protection from abusive state action is afforded through the Fourteenth Amendment. The Court has not applied the Bill of Rights against the states 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.

This jurisprudence includes *West v. Atkins*, the framework of this dissertation, a lawsuit filed by an inmate of a North Carolina prison in the 1980s. *West* was in the federal courts for several years. Defendants named in that suit were the state’s governor, the director of the North Carolina prison system and a contract physician. Quincy West, the inmate, initiated the suit in 1984, following a July 1983 Achilles tendon injury and his subsequent treatment by contract physician Dr. Samuel Atkins. West’s claim was premised on the Eighth Amendment as applied to the states via the Fourteenth Amendment. The question raised when *West* reached the Supreme Court was: “whether a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts ‘under color of state law,’ within the meaning of 42 U.S.C. § 1983, when he treats an inmate” (*West v. Atkins*,

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<sup>1</sup> This language is from a bench opinion and subject to formal revision before publication.

1988). The question of whether Atkins acted under color of state law was essential for West to prevail in his suit because that suit charged that a constitutional tort had taken place, i.e., that West's rights under the Eight and Fourteenth Amendments had been abridged. Inasmuch as the Bill of Rights, the first ten amendments to the U. S. Constitution, protects citizens from federal government actions and the Fourteenth Amendment extends that protection to actions of the states, it was necessary for West to show that Atkins was a state actor performing a state function—i.e., acting under color of state law. Answering the question of whether Atkins was acting under color of state law in the affirmative and making more explicit its doctrine of state action, the Court remanded the case to the lower courts to assess West's claim under the Eighth Amendment.

There is a category of cases referred to as “landmark.” These are cases with immediately broad impact, e.g., *Immigration and Naturalization Service v. Chadha* (1983), in which the legislative veto was found unconstitutional. *West* is not such a case. There was no notation whatsoever in the *Raleigh News and Observer* regarding the Supreme Court's *West* decision during the week that the decision was announced. However, there were two articles about another decision of the same date related to civil rights and private clubs. Quincy West's final effort in the federal court system was in February of 1990 and appears to have been a very brief affirmation by the Fourth Circuit Court of Appeals *en banc*<sup>2</sup> of the district court's findings in favor of defendant Atkins. Nevertheless, the Supreme Court has cited its *West* decision five times (and district courts an additional 66 times) since the 1988 decision—most recently in *Brentwood Academy v. Tennessee Secondary School Athletic Association, et al.* (2001) (FindLaw, 2000).

Although *West* has not received broad attention, it may serve as a benchmark for the Court's future interpretations of state action and its approach to cases involving the privatization of state services. At a time in which there is a focus on privatization of services previously considered inherently governmental, *West* deserves the attention of the public administration community.

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<sup>2</sup> The full panel of judges is present when a court sits “*en banc*”. Circuit courts of appeal usually sit in panels comprised of assigned judges. However, when a case is considered to be particularly interesting or important it may be heard by the full court sitting *en banc*.

Jethro Lieberman states that, “State action is the rule that constitutional restraints and limitations may be applied only to things that the government does, not to actions of private individuals” (Lieberman, 1999). Maimon Schwarzschild, in an effort to encapsulate the concept, wrote,

The state action doctrine . . . is the principle that the laws and policies of government must respect due process, equal protection, and free speech, but that there is no constitutional obligation on the private citizen or private organization to do likewise (Schwarzschild, 1989).

State action applies to regulations and administrative practices; the official acts of state officials; referendum votes by communities; courts; and the selection of jury members. While the Lieberman and Schwarzschild definitions of state action seem straightforward, the concept becomes considerably less clear when state functions and otherwise private activities or private individuals are coupled. For example, criminal defendants may be involved in state action when exercising peremptory challenges to jury selection (*Georgia v. McCollum*, 1992). Similarly, in a case involving freedom of speech, the Supreme Court was faced with the decision whether Amtrak was an agency or instrumentality of the United States government and thus engaged in state action when it regulated advertising at New York’s Penn Station (*Lebron v. National R.R. Passenger Corp.*, 1995; Lieberman, 1999; Rosenbloom et al., 2000). Obviously, the topic of state action is very broad. In order to narrow the focus of this dissertation, I will use the Supreme Court’s decision in *West* and the potential implications of that decision to frame the discussion. That is, *West* is not the subject of the dissertation for its own sake, but rather is being used as an instrument to enable the public administration reader to better understand the public-private distinction. Therefore, this is a dissertation about public administration using constitutional law to illuminate an administrative question.

A number of possible approaches may be used to identify and examine the issues raised by *West*. While the approach selected includes a comparison of alternative perspectives, the initial lens used for this dissertation will be a constitutional one. This approach will provide an entrée to a discussion of salient issues that the case raises for the public administrator, the healthcare community, and government healthcare services contractors.

Why start with a constitutional lens? Nearly a century ago Frank Goodnow, an early public administration scholar, contrasted constitutional government with “personal government.”

By constitutional government is meant, in the first place, a form of government which, as opposed to what may be called personal government, is based not on the temporary caprice and whim of those who possess political power, but which on the contrary, is carried on in accordance with rules so clearly defined and so generally accepted as effectively to control the actions of public officers. Constitutional government is then, in the first place, a government of laws and not a government of men (Goodnow, 1916).

John Rohr (1989), pointing out how “the Court is a contemporary institution in a dialogue with its past,” also provides assistance in answering this question. This dialogue constitutes an evolving constitutional narrative providing stability to our regime by solving new problems with creative interpretations of familiar principles (Rohr, 1989). I hope that this dissertation becomes an addition to the conversation of which Goodnow and Rohr are a part.

Within our regime one of the roles of the federal courts is to resolve disputes related to constitutional issues. One such dispute was clarified in *West* as the Supreme Court, dealing with the blurred line between public and private, refined its doctrine of state action. In the process, the Court’s decision highlighted the position of prison inmates requiring healthcare services—the position as possibly one of the very few groups for whom healthcare access has become a constitutional right.

Why am I interested in *West*? One of the purposes of pursuing the Ph.D. in public administration was explained in my application:

I am applying for the Ph.D. program in Public Administration at Virginia Tech because I believe that my twenty plus years of practical experience will add to my ability to synthesize the academic material; and at the same time, I hope that my

local government and healthcare professional experience will be an addition to seminar and class discussions. I believe that I have been in the crucible of change during these twenty years and that *it is time for intense reflection within the rigors of a formal academic setting* (emphasis added).

This dissertation is part of those reflections.

Decision-making for an administrator often involves his or her sense of appropriateness<sup>3</sup> and fairness. However, constitutional studies are not just studies of the law. The U.S. Constitution is the foundational document of our regime; and, as the previous Goodnow quotation noted,

. . . constitutional government . . . is based not on the temporary caprice and whim of those who possess political power, but . . . is carried on in accordance with rules so clearly defined and so generally accepted as effectively to control the actions of public officers (Goodnow, 1916).

For me, that means that it embodies regime values, broadly held symbols of the American people such as freedom, property, and equality, and therefore it must become a consideration for the public administrator wielding administrative discretion (Rohr, 1989). *West* resonates with me because it has added an essential dimension to my reflection on some of the thornier issues that I have faced as a public administrator.

Alternative views and competing values frequently compound the complexity of the public administrator's responsibilities as well as the courts' jurisprudence. This dissertation will include alternative perspectives to the Supreme Court's decision in *West*. For example, in a concurring opinion, based on the due process clause of the Fourteenth Amendment, Justice

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<sup>3</sup> Perceived appropriateness is essential to the actions of a public administrator and has implications related to the legitimacy of those actions. *Black's Law Dictionary* defines *appropriate* ". . . used in the sense of distribute. In this sense it may denote the act of an executor or administrator who distributes the estate of his decedent among the legatees, heirs, or other entitled, in pursuance of his duties and according to their respective rights." March & Olsen (1989), referring to MacIntyre and contrasting the concept with the utilitarian/consequentialist focus on outcome, related appropriateness to rules, social codes, justice and obligation. Wamsley links appropriateness with the pursuit of the public interest and finds it to be an attribute especially suited to the moral dimensions of governance.

Antonin Scalia offered an alternate rationale to that of the majority of the Court. Similarly, a bioethicist might choose to focus on a physician's professional duties of "nonmaleficence" (to do no harm)<sup>4</sup> and beneficence (to do good). These values are expressed in the Hippocratic Oath, statements of professional standards, and physicians' licensure by the states. The bioethicist might also examine the imbalance of power in the relationship between the physician and the patient. In *West*, that imbalance was heightened by West's role as prisoner and Atkins' position as the sole source of orthopaedic care available to West.

Pursuing the preliminary research for the dissertation, I presented the issues raised by *West* to Masters of Public Administration (MPA) student cohorts comprised of public administration practitioners in Greensboro, North Carolina; Roanoke, Virginia; and, Lynchburg, Virginia. In these presentations I outlined the *West* case and offered a brief description of the obligations, protections, and risks associated with state action. I then asked two questions: (1.) if they had previously been aware of the obligations and protections offered public or private actors involved in state action; and, (2.) if knowledge of these obligations and risks had significance for them in their professional capacities. In general, the practitioners responded in the negative to the first question. An exception was law enforcement officers who alone were aware of the constitutional rights of the individuals with whom they work, the protections afforded to them, and the risks associated with deviance from established policies and standards. Many of the individuals who had been unaware of the implications of state action found areas in their work where these implications were relevant. For example, a schoolteacher described the use of volunteers in the classroom before and after school. She said that her volunteers had received only a brief orientation and no information about their obligations in relationship to students' constitutional rights or the potential personal risk that they faced if charged with abrogation of such rights. Other concerns expressed were that the Court's decision in *West* could have a chilling effect on contracts for services; and, that contractor rates might have to be increased to cover the additional risk assumed by them.

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<sup>4</sup> Hippocrates directed physicians in the *Epidemics*, "As to diseases, make a habit of two things—to help, or at least to do no harm." Robert Levine, a historian of contemporary clinical science, points out that current authors in the field of bioethics separate the ethical obligations of beneficence (do good) and nonmaleficence (do no harm) although both are derived from the principle of beneficence. Robert Veatch adds the dimension of moral standing to his discussions of beneficence and nonmaleficence and those "to whom we owe some kind of duty (or)... (those) having a moral claim on us ..." (Jonsen, 1978; Levine, 1986; Veatch, 1981; Veatch, 2000).

Coming closer to the issues addressed in the *West* case, I interviewed a physician providing medical services in a Virginia prison. While aware of issues of medical ethics, the physician was being encouraged by the prison administration to withhold a community standard of care from his patients. He was totally unaware of his constitutional obligations and the risk of tort liability for himself and the prison. I believe that prison administrators had an obligation to fully inform this physician of his constitutional obligations and risks and that they had the requisite information to do so. My belief that they had, or should have had,<sup>5</sup> the requisite information is based on the 1994 publication of a report on the Virginia Department of Corrections written by the Virginia Joint Legislative Audit and Review Commission (JLARC). That report was forthright about inmates' constitutional rights to healthcare. Was the omission of this information by prison administration an oversight—or, an intentional effort to hold down healthcare costs?

While the questions raised at the end of the last paragraph may be interesting, they are peripheral. The primary purpose of this dissertation is to describe and prescribe efforts to expand our understanding of the distinction between public and private through an examination of the background and significance of the constitutional doctrine of state action in the Court's *West* decision. That purpose encompasses the contribution this dissertation will make to inform the healthcare community of issues raised by the *West* decision—issues that fall at the nexus of law, public administration, and healthcare. A secondary contribution will include the prescription of management mechanisms to inform government contractors of relevant issues raised by the *West* decision.

### **The Problem**

This dissertation is an effort to expand our understanding of publicness by studying the constitutional doctrine of state action in *West v. Atkins* (1988) using the law as pedagogue. In

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<sup>5</sup> Lack of knowledge of a critical issue such as this would not absolve the public administrator from liability in such an instance. (*Harlow v. Fitzgerald*, 1982)



*West* the Supreme Court attempted to make more explicit its position in relationship to the doctrine of state action: intrinsic governmental functions. The questions to be raised in this descriptive and prescriptive examination of *West* are: 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?

My approach to the questions will highlight normative differences between the public and private sectors and challenge the slogan, "We should be running the government like a business." On the surface, there is normative tension between an institutional mission to pursue the general welfare and an organizational mission to enrich owners or investors. This tension is perceived by some as mirroring tensions existing in the U.S. Constitution between the general welfare and individual rights. The questions I have posed above focus on the obligations of government, the associated protections provided to public actors, and the protections withheld by the courts from private actors performing public functions, i.e., state action.

Meta-assumptions included in this study rely upon what has come to be known in public administration literature as the "Blacksburg perspective." My first meta-assumption is that normative issues are enduring and key to the role of the public administrator charged with upholding the Constitution and related legitimacy of the regime. This assumption was a theme throughout the seminal Blacksburg Manifesto and its supporting *Refounding of Public Administration* (Wamsley et al., 1989). The message of the Manifesto is that public administration is a significant and key actor in the governance process, and, in a government of shared powers, that actor in the governance process has discretion—a discretion that should be guided by a constitutional viewpoint. In discussing the need for a normative guide in public administration, Gary Wamsley noted the need for "systematic direction in governance; a direction oriented toward the common good rather than simply the vector-sum direction implied by interest group theory" and suggested that Leonard White (1926, 1955) in a preface to his seminal *Introduction to the Study of Public Administration* misdirected the new field when he assumed that "the study of administration should start from the base of management rather than the foundation of law" (White, 1926, 1955, p. xvi; Wamsley et al., 1989). It is quite possible that

White's embedding of public administration within management was a restatement and affirmation of the politics-administration dichotomy. Had he based the field on the foundation of law—an outgrowth of the political process, the dichotomy could not be sustained.

My viewpoint in this dissertation includes the normative view described above as the Blacksbury perspective. For the purposes of this dissertation, that viewpoint is most accurately described as a legal/constitutional one that uses the law as pedagogue to explore the pragmatic implications of judicial rhetoric.

A second meta-assumption is that an understanding of how the courts can inform public administration will enhance the effectiveness of individual public administrators and educators. Rohr has used Supreme Court decisions to encourage reflection on values—a reflection intended to guide the decision-making of those who govern by exercising administrative discretion. (Rohr, 1976; Rohr, 1989). The effort to embody regime values, such as equality, property and liberty, in policy and administrative decisions serves to lend legitimacy to those decisions and sustenance to our regime. In a recent conversation, Wamsley pointed out that “in the private sector the law sets the boundaries of what is permissible, and in the public sector the law is the very foundation for what an agency is supposed to, or able to, do.”

Framing the analysis of *West* are two preliminary considerations: first, that the Court's decision extended the “rights revolution” of the 1960s and 1970s, inspired by social climate, and influenced by the Court's composition; and second, that an attitude existed, and continues to exist, that allows the nature of a convict's crime to influence the treatment (or lack of treatment and palliative care) that he or she may receive for pain and suffering. The latter remains a current issue underlying questions such as: Should prisoners sentenced to die be considered as candidates for organ transplantation; or, should a death row inmate receive aggressive treatment for AIDS? (Gianelli, 1996; Manian, 1999)

The preliminary theories offered in the above paragraph are related to prisoners' rights and are not intended to be the primary focus of the dissertation. They are parallel themes to the principal theme of the dissertation and a body of literature that, while not examined in depth, will be

included to the extent that it informs the examination of publicness. These preliminary theories represent a reality that the public administrator and the healthcare provider grapple with in exercising administrative discretion. The Court's decisions provide the context for reflection on regime values.

### **Literature Contribution**

The third chapter of *Constitutional Competence for Public Managers* (Rosenbloom et al., 2000) inspired this dissertation. In that chapter, David Rosenbloom briefly outlined the implications for public administration of several recent court cases pertinent to New Public Management and privatization; and, he offered a summary of *West* and its implications (Rosenbloom et al., 2000). However, Rosenbloom, a constitutional scholar, did not offer public managers advice related to implementation of the Court's decisions in that volume. This dissertation will expand on the material Rosenbloom provided on *West* and on *West's* place in the doctrine of state action. In so doing, I shall provide an expanded view of the judicial considerations that highlight the nature of the state and state action.

In contrast to Rosenbloom, much of the public administration literature often focuses on other aspects of the public-private dichotomy, but gives short shrift to views articulated by the federal courts. For example, Stuart Gilman's (2001) column on ASPANET on "Inherent Government Functions" in which the cost of privatization and the eroding line between public and private functions are addressed makes no reference to criteria that the courts have mandated (Gilman, 2001).

Paul Light has written extensively about the privatization of government services, without reference to actions taken by the courts that threaten the underpinnings of New Public Management and the current stampede to privatization (Light, 1995; Light, 1999). The National Performance Review, a touchstone of the Clinton administration, blatantly extolled the politically popular concept of privatization (Moe, 1994).

Wayne Moore in a private communication has suggested several versions of constitutionally relevant distinctions between “public” and “private.” Moore’s list includes: (1) “distinctions between public and private places -- e.g., as relevant to the 4<sup>th</sup> amendment;” (2) “distinctions between public and private decisions or choices, to track limits of collective/governmental authority in relation to personal/private/individual choice;” (3) “distinctions between public and private institutions, with the former conceived as formal institutions of governance and the latter as non-governmental (e.g., marriage, religious institutions, private enterprise);” (4) “distinctions between public and private functions – e.g., those typically performed by public or private institutions;” (5) public v. private ownership, with ‘public’ understood as governmental rather than non-governmental, as public/regulated corporations rather than private individuals, or otherwise;” (6) “public v. private funding, usually based on whether the funds are provided by public/governmental institutions or private/non-governmental sources;” (7) “public v. private employment—based on source of funds, types of functions, or the like;” and, (8) “distinctions between ‘public’/state/governmental actors/actions and ‘private’/actors/actions” (Moore, 2002) These approaches are represented in the literature.

While I am using a legal constitutional lens, much of the public administration literature related to the public-private dichotomy is approached from widely disparate perspectives—ranging from the feminism of Carole Pateman (1989) and Camilla Stivers (1993) to the political economy perspectives of Wamsley and Mayer Zald (1973), Hal Rainey (1978), and Rainey and Robert Backoff (1976). Pateman and Stivers identify “private” as the world of women within the home sphere and in contrast to the “public” world of men—a world that encompasses all that is not within the home sphere, i.e., the worlds of business, politics, etc. For Wamsley and Zald the distinction between public and private is a political one in which public organizations are “owned” by the state and private organizations are perceived as “owned” by groups or individuals who have been given a right to their use. Within this schema the sources of funding for organizations is a key element in the determination of publicness and privateness—with the latter subject to the market effect of a “price-utility relationship.” The Wamsley-Zald analysis is, by design, a non-normative structural functional approach. Rainey, and Rainey and Backoff, relying on Wamsley and Zald, identified an intermixing of the two sectors that made a clear determination of public or private particularly difficult. Discussing incentives, need for

achievement, and dominance and flexibility, the authors' language was that of sociology or psychology without focus on legal determinations and their related ramifications. While the approach may produce a helpful construct for the student, it does not guide the public administration practitioner in the scope of his or her responsibilities.

Larkin Dudley (1990), using Rosenbloom's (1989) categories of governance—political, managerial, and legal, examines multiple approaches to understanding publicness and privateness in the process of examining federal contracting processes and O.M.B. Circular A-76.<sup>6</sup> Her examination highlighted, among others, Lester Salamon's (1989) differentiation of the "tools" of government, Barry Bozeman's (1987) discussion of the routines of government, Peter Kettner and L. L. Martin's (1986) "focus on the resource allocation questions involved in the political dimension of contracting," examinations of efficiency by James Perry and T. T. Babitsky (1985), and Ronald Moe's (1987, 1988) discussions of the limits to privatization. Dudley points out value tensions between the public and private sectors and that "In bringing in private organizations a different set of values are brought into government, those emphasizing more autonomy and perhaps different rewards" (Dudley, 1990). These values are embodied in the New Public Management approach.

Anticipating current critiques, Dudley pointed out in 1990 that Moe (1988) "contends that the inability of the privatization movement to come to grips with the need to integrate its economic theory with the complementary theories of public law and by extension public administration appears to be the Achilles heel of privatization (1987, 459)" (Dudley, 1990). In a recent article, "Public-Value Failure: When Efficient Markets May Not Do," Bozeman cites the Blackburg perspective, notes the "limited tools for analyzing public value and the execution of public authority," and points out that "The familiar market-failure model remains quite useful for issues of price efficiency and traditional utilitarianism, but it has many shortcomings as a standard for public-value aspects of public policy and management" (Bozeman, 2002).

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<sup>6</sup> The Office of Management and Budget (OMB) publishes circulars detailing requirements for a variety of federal financial/budget functions. Circular A-76 deals with federal contracting processes.

Rohr has contributed to the challenge to the principles of New Public Management in his most recent book, *Civil Servants and Their Constitutions*, in which he points out that “If the NPM is to be more than a passing fad, it must integrate constitutional principles” (Rohr, 2002).

*West* is mentioned briefly within the public administration and administrative law literature by Rosenbloom and Rosemary O’Leary (1996), and the case appears as a footnote in Phillip Cooper’s *Public Law and Public Administration* (2000) and similarly in Steven Cann’s *Administrative Law* (2001). As mentioned earlier, Rosenbloom, et al. (2000) highlights the case within the public administration literature. In addition, Rohr uses *West*, along with *Lebron v. National Railroad Passenger Corporation* (1995), *Board of County Commissioners, Wabuansee County, Kansas v. Umbehr* (1996), *O’Hare Truck Service v. City of Northlake* (1966), and *Richardson v. McKnight* (1997), to examine constitutional and ethical considerations related to contracting government services and privatization (Rohr, 2000).

Documents produced by agencies having oversight of various programs often make short reference to potential constitutional pitfalls; for example, the JLARC report referenced earlier (Joint Legislative Audit and Review Commission, 1994). *West* is cited in a 1995 report of the National Institute of Justice (NIS) on *Managing Prison Health Care and Costs*. Unfortunately, while the short section on “Liability” in the NIS report cites cases from the mid-1980s and notes that “governments retain legal liability for services rendered by contractors,” it neglects to mention the essential issues related to the risk that contractors assume in the performance of state action (McDonald, 1995).

The foregoing highlights a critical component of this undertaking: the attempt to tie the actions of the courts to management practices. Tentatively, I think that this should occur in the management arena labeled *risk management*. While the private sector may extol risk-taking, the critical nature of state responsibilities demands particular focus on potential and known risks, a more risk adverse administrative posture, and actions that are in harmony with constitutional restraints and regime values.

One body of work in which *West* is frequently cited is the prison healthcare literature. This literature may be useful when appropriate, but it is not a focus of the dissertation. However, literatures related to healthcare problems within correctional institutions or privatization of correctional facilities will be used to the extent that they advance the topic. That topic, and the purpose of this dissertation, is to expand our understanding of the public-private distinction by studying the constitutional doctrine of state action in *West* and its implications—i.e., to use the law as pedagogue to explore the pragmatic implications of judicial rhetoric.

### **Approach**

There is a story attached to each case that goes to the courts. Many of these stories inform public administration—for example, those offered by Cooper (2000), Barbara Craig (1988), Anthony Lewis (1964), and Alan Westin, (1950). The approaches taken by these authors bring the circumstances of the cases they discuss, the political environment, and the reasoning of the courts to the reader with clarity and contextual significance. I propose to attempt to follow in their footsteps by describing the progress of West’s efforts to seek redress in the courts, the judicial mechanisms used, the outcome of those efforts, the significance of the Court’s doctrine of state action, alternative perspectives, and how this information informs the public administration and healthcare communities. An underlying theme within this study will be the influence of regime values within this context and the extent and uses of administrative discretion.

For the study of *West*, I propose the use of a framework outlined by Rohr in *Ethics for Bureaucrats* (1989). That framework, based on the four characteristics of Supreme Court decisions identified by Rohr, includes the following perspectives: (1) institutional, (2) dialectic, (3) concrete, and (4) pertinent (Rohr, 1989). (Dissertation chapter titles will follow this schema.) The institutional characteristic links the present with the past; or, as Rohr puts it, “the Court is a contemporary institution in dialogue with its past” (Rohr, 1989, p. 78). Therefore, the institutional approach will be a historical one with a focus on articulated values and social context. The dialectic component will include dissenting and concurring opinions with their conflicting approaches, values, and attitudes. In the instance of *West*, the healthcare perspective

offers divergent views in terms of community standard of care, bioethical considerations, public attitudes, and policy considerations. The pertinent component will speak to the relevance of the Court's actions for the public administration and healthcare communities; and, the concrete component will attempt to translate articulated values into prescriptions for management action. The following chapters follow this schema in a slightly different order to offer the concrete details before discussing the alternative perspectives included as dialectic.

Research will include: a review of the literature, public records, transcripts of court proceedings, participants' files, *amici curiae* briefs, and interviews—to the extent that parties to and participants in the case are available. North Carolina Prisoner Legal Services represented West in his pursuit of redress. That organization, in particular Senior Attorney Richard E. Giroux, has been particularly helpful in providing recollections and materials related to West's journey through the federal court and prison systems. Unfortunately, the prisoner, Quincy West, is now deceased and interviews to gain his personal perspective of the incidents that led to his suit will be replaced by the briefs that he wrote for the courts and other records.

As a preface to his description of a judicial view of the law, Dworkin has pointed out the multitude of other viewpoints of legal practice which could demand attention in an unrestricted examination—"legislators, policemen, district attorneys, welfare officers, school board chairmen, a great variety of other officials, and . . . people like bankers and managers and union officers, who are not called public officials but whose decisions also affect the legal rights of their fellow citizens"(Dworkin, 1986). In an examination of *West* there are a variety of potential perspectives. There are the perspectives of the prisoner, the judge, the "public" state actor, the physician, the corrections officer, the American Civil Liberties Union, the American Public Health Association, the attorneys for the plaintiff and for the state, and so forth. While many of these viewpoints will be discussed in the course of my discussion, most prominently in Chapter Four – The Dialectic, my viewpoint in this examination of *West* is that of the public administration practitioner seeking a message for my field: public administration. However, that viewpoint has not excluded my alter-ego of scholar. This duality of both public administration practitioner and scholar has resulted in tensions within the dissertation. Those tensions are manifested as the administrator within me seeks clarity and rational courses of action in contrast



to the scholar's efforts to analyze, synthesize, and interpret administrative, legislative and judicial actions at multiple levels of abstraction while accepting and reflecting on the ambiguities of the phenomenological journey which is part of—to borrow a well-worn phrase—the life of the mind.

Reference will be made to the controversies associated with Section 1983 of Title 42 of the United States Code (U.S.C.) (Blackmun, 1985; Turner, 1979). This section was part of the Civil Rights Act of 1871 (The Ku Klux Klan Act) which was designed to enforce the Fourteenth Amendment to the U. S. Constitution (Lieberman, 1999). However, most importantly for this dissertation, Section 1983 became the legal vehicle through which West was able to advance his Eighth Amendment claim.

In this chapter I have provided a brief overview of the substance of my dissertation: the use of a Supreme Court case to inform the public administration practitioner. I have provided a summary of the non-legal, non-constitutional literature within public administration and pointed out that much of that literature may not lend assistance to the practitioner in the completion of his or her day-to-day administrative tasks. However, there is a body of public administration literature to which I intend to provide an addition—that which represents a legal/constitutional viewpoint. My approach will use *West v. Atkins* (1988) as a framework to tell the story of one individual's attempt to find redress in the courts and his personal failure in finding the satisfaction he sought—while making historic constitutional impact. In telling this story I will describe in the following chapter the history of the constitutional doctrine of state action and the institutional setting, values and context in which West was granted certiorari and heard.