

The University of Chicago Law Review

Volume 76

Fall 2009

Number 4

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ARTICLES

Regulating Privatized Government through § 1983

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As governments increasingly delegate traditional public functions to private, for-profit entities, the federal civil rights statute, 42 USC § 1983, has the potential to play an important role in encouraging private entities to respect constitutional rights when they take on public duties. That potential is undermined, however, by the prevailing view that private entities subject to § 1983 should be exempt from the traditional tort principle of respondeat superior liability simply because the Supreme Court already has held that municipal entities are exempt. Exempting private entities carries significant implications, not only because of the growing privatization of government functions, but also because respondeat superior liability often is critical for fulfilling tort law objectives of deterrence and compensation.

This Article examines differences regarding how private entities and governmental entities behave and contends that those differences justify imposing respondeat superior liability on private § 1983 defendants even if public § 1983 defendants remain exempt. Initially, the Supreme Court's rationale for exempting municipalities from respondeat superior liability was particular to public entities and does not justify exempting private parties from respondeat superior liability. Additionally, as a policy matter, the fact that profit-motivated, private entities may be both more responsive than electorally accountable public entities to tort liability incentives and less responsive to other nonfinancial constraints on behavior suggests that respondeat superior may be better suited for deterring private misconduct than public misconduct. Imposing respondeat superior liability on

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I would like to thank Steven Goldblatt, Jane Aiken, Amanda Leiter, Kathryn Sabbeth, Erin Aslan, Eliza Platts-Mills, Tabatha Abu El-Haj, Rebecca Lee, and Marcy Karin for their assistance back when this Article was just an idea. I also would like to thank Dan Filler, Alex Geisinger, David Cohen, Lawrence Rosenthal, Jack Beermann, Daryl Levinson, Margo Schlanger, David Achtenberg, and Alan Chen for their thoughtful and detailed feedback. Additionally, I would like to thank the faculties at the University of Denver Sturm College of Law, Quinnipiac University School of Law, Case Western Reserve University School of Law, and the Earle Mack School of Law at Drexel University for their helpful ideas and suggestions.

private parties therefore can help ensure that when private parties agree to perform important public functions, they will not diminish important constitutional values.

INTRODUCTION

Traffic was at a crawl in Baghdad's Nisour Square on the afternoon of September 16, 2007 when several American guards in the area noticed one car moving slowly in their direction.¹ Although the car was still far away from the guards' convoy, one guard opened fire, shooting the driver, Ahmed Heithem Ahmed, in the head.² Mr. Ahmed's body slumped forward onto the accelerator, causing the car to continue to approach the guards.³ The guards responded not just by firing on the car, but by opening fire in all directions across the crowded square.⁴ Iraqi civilians, none of whom appeared to present a threat and many of whom were running for safety away from the guards, were shot and killed.⁵ All told, the guards' "barrage of gunfire" killed seventeen Iraqi civilians, including children, and wounded as many as twenty-seven more.⁶ The incident sparked widespread public outcry and prompted an FBI investigation.⁷ The FBI concluded that the overwhelming majority of the shootings were unjustified and violated US rules on the use of deadly force in Iraq.⁸

One might wonder how members of the United States Armed Forces, who undergo rigorous training regarding deadly force and rules of engagement, could commit this kind of violence. The answer is that they did not. Rather, the shooters were employees of Blackwater USA, a private company that contracted with the federal government to provide security and military support services for the State Department.⁹

¹ David Johnston and John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis without Cause*, NY Times A1 (Nov 14, 2007); James Glanz and Alissa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NY Times A1 (Oct 3, 2007).

² Glanz and Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NY Times at A1 (cited in note 1).

³ *Id.*

⁴ *Id.*

⁵ Johnson and Broder, *F.B.I. Says Guards Killed 14 Iraqis without Cause*, NY Times at A1 (cited in note 1); Glanz and Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NY Times at A1 (cited in note 1).

⁶ Glanz and Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, NY Times at A1 (cited in note 1). See James Glanz, *New Evidence that Blackwater Guards Took No Fire*, NY Times A1 (Oct 13, 2007).

⁷ See Frank Rich, *The "Good Germans" among Us*, NY Times A13 (Oct 14, 2007).

⁸ See Johnson and Broder, *F.B.I. Says Guards Killed 14 Iraqis without Cause*, NY Times at A1 (cited in note 1).

⁹ See John M. Broder and David Rohde, *State Dept. Use of Contractors Leaps in 4 Years*, NY Times A1 (Oct 24, 2007).

Blackwater is just a single example of the growing trend of privatization of traditional and sensitive public functions. Although the Blackwater incident occurred overseas and involved privatization by the federal government,¹⁰ the same type of privatization—which is defined generally as “government use of private entities to implement government programs or to provide services to others on the government’s behalf”¹¹—also is occurring with increasing frequency domestically, particularly at the state and local levels.¹² State and local governments have contracted with private parties to perform a wide array of core government services—often very sensitive services—including operating prisons,¹³ providing medical care to prisoners,¹⁴ administering welfare and public benefits programs,¹⁵ processing

¹⁰ This Article, which focuses on 42 USC § 1983, concerns constitutional responsibilities arising out of the privatization of state and local government functions. Constitutional claims against the federal government are governed by *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971), and its progeny.

¹¹ Gillian E. Metzger, *Privatization as Delegation*, 103 Colum L Rev 1367, 1370 (2003).

¹² See id at 1379 (“Privatization seems likely only to expand in the near future, fueled by increasing belief in market-based solutions to public problems.”); Jody Freeman, *Extending Public Law Norms through Privatization*, 116 Harv L Rev 1285, 1289 (2003) (observing “a discernable trend toward ‘privatization,’ which in the American context consists largely of contracting out”); Paul Howard Morris, Note, *The Impact of Constitutional Liability on the Privatization Movement after Richardson v. McKnight*, 52 Vand L Rev 489, 493 (1999). At the federal level, for example, government contracting to private parties increased by 50 percent from 2002 to 2005. See Kerry Korpi, Panel Discussion, *Outsourcing Government? The Privatization of Public Responsibilities* (American Constitution Society Annual Convention June 13, 2008), online at <http://www.acslaw.org/node/6787> (visited Aug 9, 2009).

¹³ As of June 30, 2007, 7.4 percent of all US prisoners were housed in private facilities. 30,379 federal prisoners and 87,860 state prisoners were in private facilities. William J. Sabol and Heather Couture, Bureau of Justice Statistics Bulletin, *Prison Inmates at Midyear 2007* 5 (DOJ June 2008), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (visited Aug 9, 2009). Additionally, private prisons hold alien detainees facing deportation or other immigration-related charges. See Margaret Talbot, *The Lost Children*, New Yorker 58 (Mar 3, 2008). By the mid-1980s, private facilities held nearly 30 percent of detained aliens. See James Austin and Garry Coventry, Bureau of Justice Assistance, *Emerging Issues on Privatized Prisons* 12 (DOJ 2001), online at <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf> (visited Aug 9, 2009).

¹⁴ Correctional Medical Services (CMS), one of the larger prison healthcare companies, provides health services to over 200,000 inmates. See Correctional Medical Services, *About Us*, online at <http://www.cmsstl.com/about-us/index.asp> (visited Aug 9, 2009). Another company, Prison Health Services (PHS), provides health care for an additional 270,000 prisoners. 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, 302 (2007). CMS estimates that 42 percent of all prison health services are provided by private companies. See Correctional Medical Services, *About Us*.

¹⁵ As many as forty states have privatized aspects of their welfare and public benefits administration and delivery programs and have spent billions on contracts with private welfare providers. See Metzger, 103 Colum L Rev at 1383–88 (cited in note 11); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 Ariz L Rev 83, 87–88 (2003);

parking tickets,¹⁶ providing private security services,¹⁷ collecting government debts,¹⁸ fighting fires,¹⁹ and overseeing foster care and child placement programs.²⁰ With billions of dollars in federal aid from the recently enacted economic stimulus package going to state and local governments,²¹ privatization opportunities should only increase.²²

As governments continue to delegate public functions to private companies, it is critically important to determine the appropriate set of background rules against which privatization takes place in order to ensure that private companies give proper respect to public values and constitutional rights. The federal civil rights statute, 42 USC § 1983—which is the primary vehicle for protecting individuals from violations of their constitutional and federal statutory rights by state actors and which applies to private entities that perform traditional public functions—is a potentially potent tool for holding private entities constitutionally accountable. Currently, however, that statute encourages private entities to give constitutional rights short shrift because it does not expose private entities that perform public functions to the traditional tort principle of respondeat superior liability—that is, holding an employer liable for the torts of its employees committed

Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government*, 75 NYU L Rev 1121, 1180 (2000).

¹⁶ See, for example, *Ace Beverage Co v Lockheed Information Management Services*, 144 F3d 1218, 1219 (9th Cir 1997) (finding that a private company that processed parking tickets for the city of Los Angeles acted under color of state law for purposes of § 1983).

¹⁷ See, for example, *Powell v Shopco*, 678 F2d 504, 505 (4th Cir 1982) (finding that a private security guard could be sued under §1983); *Groom v Safeway*, 973 F Supp 987, 991–92 (WD Wash 1997) (holding that a grocery store acted under color of state law when it hired an off-duty police officer to work as a private security guard). See also *Flagg Bros v Brooks*, 436 US 149, 163–64 (1978) (identifying police protection as a traditional public function).

¹⁸ See, for example, *Del Campo v Kennedy*, 517 F3d 1070, 1072–73 (9th Cir 2008) (describing how a private company sought to collect debts owed to the state of California).

¹⁹ See Jesse McKinley, *On the Fire Lines, a Shift to Private Contractors*, NY Times A11 (Aug 18, 2008). See also *Flagg Bros*, 436 US at 163–64 (identifying fire protection as a traditional public function).

²⁰ See, for example, *Donlan v Ridge*, 58 F Supp 2d 604, 610–11 (ED Pa 1999) (holding that a private foster care provider acted under color of state law); *Bartell v Lohiser*, 12 F Supp 2d 640, 649–50 (ED Mich 1998) (finding that a private contractor who provided foster care acted under color of state law and could receive qualified immunity).

²¹ The economic stimulus package was enacted as the American Recovery and Reinvestment Act of 2009, Pub L No 111-5, 123 Stat 115. Billions of dollars in that package are dedicated to state and local government projects. See, for example, *Governors v. Congress*, Wall St J A14 (Feb 23, 2009) (noting that the stimulus bill provides \$150 billion to the states).

²² At the same time, recent evidence suggests that the economic downturn is hampering certain forms of privatization, such as the sale of public assets to private buyers. See Leslie Wayne, *Politics and the Financial Crisis Slow the Drive to Privatize*, NY Times B3 (June 5, 2009).

within the scope of employment.²³ Even though Blackwater itself would not be subject to § 1983 because it contracted with the federal government rather than with a state or local government,²⁴ the Blackwater incident exemplifies the risks that accompany any attempt to privatize core government services, whether at the federal level or at the state and local levels. This Article contends that private parties that perform public functions, and are therefore covered by § 1983, should be subject to respondeat superior liability.

Section 1983 provides a private right of action against anyone who violates federal constitutional or statutory rights while acting “under color” of state law.²⁵ Although § 1983 primarily applies to state and local governments, courts also have found—through the evolution of the state action doctrine—that private entities act “under color of law” for purposes of the statute when they perform traditional public functions or act jointly with the government.²⁶

²³ See Dan B. Dobbs, *The Law of Torts* 905 (West 2000) (defining respondeat superior liability). See also Part III.A.

²⁴ Because Blackwater contracted with the federal government rather than with a state or local government, § 1983 could not be used to hold Blackwater accountable. In fact, the Supreme Court has held that there is no private cause of action for constitutional violations committed by a private company performing services for the federal government. See *Correctional Services Corp v Malesko*, 534 US 61, 66 (2001) (refusing to “confer a right of action for damages against private entities acting under color of federal law”).

²⁵ 42 USC § 1983 (making liable to private suit any person who deprives another of the “rights, privileges, or immunities secured by the Constitution and laws” when acting under color of state law). See also *Maine v Thiboutot*, 448 US 1, 3–4 (1980). Because the bulk of § 1983 actions allege constitutional violations, for ease of reference, this Article will refer to § 1983 as protecting “constitutional” rights.

²⁶ There is no firm rule for determining what constitutes state action, though the Supreme Court has articulated several different tests. Generally, state action exists only if there is a sufficiently “close nexus” between the private action and the state such that “seemingly private behavior may be fairly treated as that of the state itself.” *Brentwood Academy v Tennessee Secondary School Athletic Association*, 531 US 288, 295 (2001), quoting *Jackson v Metropolitan Edison Co*, 419 US 345, 351 (1974) (quotation marks omitted). Under the “public function” test, a private party qualifies as a state actor when it performs a function that was traditionally and exclusively governmental. See *Lee v Katz*, 276 F3d 550, 554–55 (9th Cir 2002). State action also occurs when a private party is a “willful participant in joint activity with the State or its agents.” *Brentwood*, 531 US at 296 (quotation marks and citation omitted). Satisfaction of a single test may be sufficient to find state action. See *id* at 303 (suggesting that when the facts show that one state action test is satisfied, “the implication of state action is not affected by pointing out that the facts might not loom large under a different test”). For ease of reference, this Article uses the term “traditional public function” or the equivalent to refer to instances where private parties may perform state action.

Although merely contracting with the government to perform a service does not give rise to state action, see generally *Rendell-Baker v Kohn*, 457 US 830 (1982) (finding that private school teachers acting under a state contract were not state actors), courts have relied on the public function and joint action tests to subject private parties performing traditional public functions to § 1983. See, for example, *West v Atkins*, 487 US 42, 52–54 (1988) (finding that a doctor who

When individuals have sued private entities and their employees under § 1983, those entities understandably have attempted to cloak themselves in the same protections from liability afforded to government defendants under § 1983. In particular, private entities have sought (successfully) to shield themselves from respondeat superior liability for § 1983 violations. The source of this protection comes from the Supreme Court's 1978 decision in *Monell v Department of Social Services*²⁷ regarding the scope of municipal liability. The *Monell* Court held that although municipal entities can be sued for damages, they cannot be sued on a respondeat superior theory.²⁸ Instead, a municipality is liable for damages only if the plaintiff can show that some action directly attributable to the municipality itself—a municipal “custom or policy”—caused the violation.²⁹ The gap between showing an underlying violation and showing a municipal custom or policy, however, is a vast one, and in practice the “custom or policy” standard has proven very difficult to satisfy.³⁰

provided medical care to prisoners under a contract with the state acted under color of law for purposes of § 1983); *Flagg Bros*, 436 US at 163–64 (identifying police and fire protection as traditional public functions); *Tool Box v Ogden City Corp*, 316 F3d 1167, 1176 (10th Cir 2003) (indicating that performing “necessary municipal functions” and running nursing facilities constitute state action); *Hicks v Frey*, 992 F2d 1450, 1458 (6th Cir 1993) (“It is clear that a private entity which contracts with the state to perform a traditional state function such as providing medical services to prison inmates may be sued under § 1983 as one acting ‘under color of state law.’”); *Donlan*, 58 F Supp 2d at 610–11 (finding that a private foster care provider acted under color of state law because foster care through the Department of Human Services is a traditionally governmental function analogous to incarceration); *Groom*, 973 F Supp at 991–92 & n 4 (holding that a private store acted under color of law by hiring an off-duty police officer to provide security services); *J.K. v Dillenberg*, 836 F Supp 694, 699 (D Ariz 1993) (finding that a private entity that contracted with the state to provide state-mandated health services through a government program was a state actor). See also *Lee*, 276 F3d at 555–57 (finding that a private party overseeing a state-owned public park was a state actor).

²⁷ 436 US 658 (1978).

²⁸ Id at 691 (“[W]e conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable on a respondeat superior theory.”).

²⁹ Id at 694. See also *Board of County Commissioners of Bryan County v Brown*, 520 US 397, 403 (1997) (stating that a plaintiff must “identify a municipal ‘policy’ or ‘custom’ that caused the plaintiff’s injury” in order to recover damages).

³⁰ See, for example, Harold S. Lewis, Jr, and Theodore Y. Blumoff, *Reshaping Section 1983’s Asymmetry*, 140 U Pa L Rev 755, 795–97 (1992) (noting that it will be the “rare case” where governmental misconduct rises to a level of custom or policy, and stating that a single act of government misconduct will almost never constitute a custom or policy). It even may be more difficult to establish municipal liability under § 1983 than to establish liability for punitive damages for a private employer. See David Jacks Achtenberg, *Taking History Seriously: Municipal Liability under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 Fordham L Rev 2183, 2193–94 (2005). Section 1983 makes municipalities liable only for the misconduct of those employees with “final policymaking authority” whereas a private actor may be liable for punitive

Although both scholars and the Supreme Court have devoted attention to whether other § 1983 liability protections, such as qualified immunity, should be extended to private parties,³¹ there has been comparatively little discussion of whether private entities should be subject to respondeat superior liability for the torts of their employees.³² For victims of constitutional injuries, however, the availability of respondeat superior liability may be as important as, or more important than, whether an individual employee is protected by qualified immunity. In most tort cases, recovery comes not from the individual tortfeasor but from the entity employing the tortfeasor, and that entity typically is sued under a respondeat superior theory.³³ Additionally, in many cases, recovery against the individual employee may not be a viable option because individual employees often are judgment proof, protected by common law immunity, difficult to identify, or less likely than companies to possess liability insurance.

Nor does employer indemnification solve this problem because employees often will be immune if they act in good faith—meaning there would be nothing to indemnify—and indemnification clauses often do not cover bad faith behavior.³⁴ Indemnification, unlike respondeat superior, does not provide recovery where the misbehaving employee can claim good faith immunity, which generally applies un-

damages for the misconduct of the broader category of “managerial agents.” See *id.*, citing Restatement (Second) of Torts § 909 (1977).

³¹ With respect to scholarship on private-party immunity, see, for example, Clayton P. Gillette and Paul B. Stephan, *Richardson v. McKnight and the Scope of Immunity after Privatization*, 8 S Ct Econ Rev 103, 139 (2000) (arguing that withholding qualified immunity from private employees may be justified in certain circumstances but not in others); Robert G. Schaffer, Note, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 Duke L J 1049, 1086–87 (1996) (arguing in favor of qualified immunity); Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 La L Rev 449, 491–93 (1992).

The Supreme Court has also addressed private-party immunity under § 1983. See *Richardson v. McKnight*, 521 US 399, 412 (1997).

³² Professor Barbara Kritchevsky has devoted some attention to this question as part of an article devoted more broadly to private parties and § 1983. See Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 Cardozo L Rev 35, 73–76 (2004). Kritchevsky’s discussion provides a useful starting point for a more comprehensive analysis of whether a private entity should be exempt from § 1983 respondeat superior liability.

³³ See Fowler V. Harper, Fleming James, Jr, and Oscar S. Gray, 5 *Harper, James and Gray on Torts* § 26.1 at 5 (Aspen 3d ed 2008) (“[I]n the vast majority of cases the plaintiff seeks satisfaction from the employer alone.”). One study of more than 1,500 negligence cases from 1875–1905 found that “[i]n less than four per cent of the cases in our sample was the defendant accused of actually being negligent. In all other cases the defendant was sued on the basis of the alleged negligence of employees or (in a few cases) children.” Richard A. Posner, *A Theory of Negligence*, 1 J Legal Stud 29, 32 (1972).

³⁴ This argument is developed more fully in Part IV.A.

less the employee acts with actual malice.³⁵ And although immunity is not available where an employee does act with malice, many indemnification clauses exclude intentional, reckless, or malicious conduct.³⁶ Moreover, respondeat superior is more effective than indemnification in the not uncommon situation where a victim cannot identify which employee committed the violation but can identify the employer. As a result, even with widespread indemnification, the absence of respondeat superior liability threatens to leave many victims of constitutional violations with an imperfect recovery or no recovery at all.³⁷

Similarly, the availability of state tort actions against private entities does not ensure adequate protection of constitutional rights. 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.³⁸ 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.³⁹

Moreover, although scholars have devoted significant attention to whether *municipalities* should be subject to respondeat superior liability,⁴⁰ the scope of damages liability for *private parties* arguably is just as important as it is for municipal entities. This is because municipalities are the only governmental institutions that can be sued for damages

³⁵ See *id.*

³⁶ *Id.*

³⁷ Although a plaintiff who lacks a viable claim against the municipality has the option of suing high-level municipal officials in their personal capacity for damages under a theory of supervisory liability, that claim may be just as difficult to win as a claim against a municipality. Not only must a plaintiff overcome a good faith immunity defense, but the standard for supervisory liability is high. Generally, a plaintiff must show that the supervisor was grossly negligent or deliberately indifferent in failing to prevent a subordinate from violating constitutional rights. See, for example, *Poe v Leonard*, 282 F3d 123, 140 (2d Cir 2002). Additionally, whether courts will continue to recognize supervisory liability is uncertain in light of the Supreme Court's recent decision in *Ashcroft v Iqbal*, 129 S Ct 1937, 1948–49 (2009). The *Iqbal* Court rejected the plaintiff's argument that a federal defendant in a *Bivens* action could be held liable on a supervisory liability theory and held that "each Government official, his or title notwithstanding, is only liable for his or her own misconduct." *Id.* at 1949. See also *id.* at 1957 (Souter dissenting) (stating that "the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely"). It is unclear whether courts will apply that reasoning to § 1983 actions.

³⁸ This argument is developed more fully in Part IV.B.

³⁹ See *id.*

⁴⁰ For a sample of some of the commentary questioning the wisdom of *Monell's* decision on municipal liability, see note 70.

under § 1983; state governments are not “persons” under § 1983 and are protected from damages by Eleventh Amendment immunity.⁴¹ By contrast, although private entities perform only a small (but increasing) percentage of traditional public functions, private 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.⁴²

The Supreme Court has not addressed whether private entities subject to § 1983 should be exempt from respondeat superior liability. The overwhelming majority of lower courts, however, have extended *Monell’s* respondeat superior exemption to private parties.⁴³ This outcome, at first blush, seems intuitively appealing. After all, if the only reason private parties are subject to § 1983 is because they perform state action, then it makes sense to grant them the same protections given to governmental defendants.

This intuition is flawed. As this Article explains, private entities that fall within § 1983 because they perform public functions should be subject to respondeat superior liability. Extending *Monell’s* municipal exemption from respondeat superior liability to private parties is misguided for both doctrinal and policy reasons. First, as a matter of statutory construction, the textual and legislative history justifications for creating a municipal exemption from respondeat superior liability were specific to public entities and do not apply to private entities, even private entities that perform governmental functions.⁴⁴ Second, from a policy perspective, government actors and private actors may respond differently to the incentives created by tort liability such that respondeat superior may be justified for private entities regardless of whether it is justified for public entities.⁴⁵ Specifically, the financial risk of a damages award may be more effective at deterring profit-maximizing private firms—including firms that perform public functions—than electorally motivated government actors. Conversely, oth-

⁴¹ See, for example, *Will v Michigan Department of State Police*, 491 US 58, 66–67 (1989) (holding that states are not “persons” within the meaning of § 1983 and are entitled to Eleventh Amendment immunity for damages actions). State officials, however, can be sued in their official capacities for injunctive relief. *Kentucky v Graham*, 473 US 159, 165–67, 167 n 14 (1985), citing *Ex Parte Young*, 209 US 123 (1908).

⁴² See, for example, *Del Campo*, 517 F3d at 1072 (holding that a private debt collector that was collecting government debts pursuant to a contract with a state was not entitled to Eleventh Amendment immunity from damages).

⁴³ See note 78 and accompanying text.

⁴⁴ See Part II.

⁴⁵ See Part III.

er public accountability mechanisms, such as negative publicity and electoral considerations, may be more effective in keeping government actors in check than private actors.⁴⁶ Consequently, exempting private parties from respondeat superior liability for violating federally protected rights threatens to inadequately deter constitutional violations and to leave victims with insufficient remedies, thereby undermining § 1983's twin purposes of deterrence and compensation.

This Article proceeds in four parts. Part I describes the Supreme Court's § 1983 jurisprudence regarding municipal liability and explains the Court's rationale for creating an exemption from respondeat superior liability. Part II addresses whether *Monell's* interpretation of § 1983's text and legislative history to exempt municipalities from respondeat superior liability applies to private parties. Part III considers whether, as a matter of policy, there are differences in how tort liability and other constraints affect public and private entities that justify imposing respondeat superior on private entities even if municipalities remain exempt. Finally, Part IV examines whether employee indemnification and state tort law already create adequate incentives for private entities to protect constitutional rights and explores the implications of a rule of private § 1983 respondeat superior liability on the privatization movement.

I. *MONELL* AND THE MUNICIPAL RESPONDEAT SUPERIOR EXEMPTION

The Supreme Court's consideration of municipal liability under § 1983 began with its 1961 decision in *Monroe v Pape*.⁴⁷ *Monroe* involved allegations that Chicago police officers broke into and ransacked the plaintiffs' home in violation of the Fourth Amendment.⁴⁸ Although the Court held that the individual police officers could be sued under § 1983, it determined that the City of Chicago could not because it was not a "person" within the meaning of the statute.⁴⁹ In concluding that § 1983 did not apply to municipalities, the Court relied heavily on the legislative debate concerning the statute and specifically on Congress's rejection of an amendment to the statute known as the Sherman Amendment. The Sherman Amendment would have made municipalities vicariously liable not just for the misconduct of their employees (respondeat superior), but

⁴⁶ See Part III.A–B.

⁴⁷ 365 US 167 (1961).

⁴⁸ *Id.* at 169.

⁴⁹ See *id.* at 187 (concluding that "Congress did not undertake to bring municipal corporations within the ambit" of § 1983).

also for the misconduct of private citizens anytime those citizens breached the peace.⁵⁰ The Court concluded that Congress rejected the amendment because it believed that the Constitution prohibited it from imposing obligations on municipalities, which were instrumentalities of the state and therefore subject to state regulation.⁵¹

Monroe's exclusion of municipalities from § 1983 lasted just seventeen years before the Court overruled that portion of the decision in *Monell v Department of Social Services*. *Monell* held that municipalities were “persons” that could be sued for damages under § 1983 but that they could not be sued on a respondeat superior theory.⁵² In *Monell*, a group of female municipal employees challenged a policy of the City of New York requiring pregnant employees to take unpaid leaves of absences before those leaves became medically necessary.⁵³ In holding that municipalities were “persons” for purposes of § 1983, the Court reexamined the legislative history of the Sherman Amendment.

This time, the Court concluded that Congress did not perceive a constitutional problem with imposing liability on municipalities in general, but instead that Congress believed that it could not constitutionally impose liability on municipalities in a way that interfered with the ability of states to regulate their municipalities.⁵⁴ Municipalities were considered to be creatures of the state,⁵⁵ and under the nineteenth-century doctrine of dual sovereignty, Congress believed that the Constitution prohibited it from imposing obligations on municipalities that would conflict with state-created duties or impair a municipality's ability to carry out state policies.⁵⁶ According to the Court, Congress saw no dual sovereignty problem with requiring municipali-

⁵⁰ Id at 188–92.

⁵¹ See, for example, *Monroe*, 365 US at 190, quoting Cong Globe, 42d Cong, 1st Sess 804 (Apr 19, 1871).

⁵² 436 US at 691.

⁵³ Id at 660–61.

⁵⁴ See id at 678–82.

⁵⁵ *Monell* identifies several examples of key congressional representatives characterizing municipalities and counties as state instruments. Representative Samuel Shellabarger referred to a county as “an integer or part of the state.” Id at 672–73, quoting Cong Globe, 42d Cong, 1st Sess 751 (Apr 18, 1871). Representative Blair, a strong opponent of the Sherman Amendment whose statements the Court relied upon heavily, called municipalities “creations of the state alone.” Id at 674, quoting Cong Globe, 42d Cong, 1st Sess 795 (Apr 18, 1871).

⁵⁶ For example, Representative Blair emphasized that states “say what [municipalities’] powers shall be and what their obligations shall be,” and argued that the federal government is not permitted to add to those obligations. *Monell*, 436 US at 675, citing Cong Globe, 42d Cong, 1st Sess 795 (Apr 18, 1871). See also *Monell*, 436 US at 678. For additional discussion of the dual sovereignty doctrine and its relevance to § 1983, see Achtenberg, 73 Fordham L Rev at 2210 (cited in note 30).

ties to enforce the Constitution, and therefore the Court had no problem concluding that municipalities were subject to § 1983.⁵⁷ With respect to forcing municipalities to keep the peace by imposing liability for the riotous acts of its citizens as the Sherman Amendment would have done, the Court concluded that Congress feared that creating these new obligations could impede states from setting municipal priorities and could require municipalities to assume obligations—such as creating their own police forces in order to quell riots—that conflicted with those priorities.⁵⁸ The foundation of Congress’s constitutional concern was federalism—namely that Congress could not usurp a state’s authority to determine how to regulate its own municipalities.

Although the Court found that the legislative history supported including municipalities within the reach of § 1983, it held that this same history foreclosed making municipalities liable for the torts of its employees under a respondeat superior theory. Here, the Court analyzed § 1983’s statutory text “against the backdrop” of the Sherman Amendment’s legislative history.⁵⁹ With respect to the text, the Court noted that the statute imposed liability on any person who “subjects, or causes to be subjected, any person . . . to the deprivation of any” federal right.⁶⁰ The Court appeared to assume that the phrase “subjects, or causes to be subjected” meant “directly causes,” stating that this language “cannot be easily read to impose liability vicariously on government bodies.”⁶¹ The Court, however, did not rely solely on the text, perhaps recognizing that the text is at best ambiguous. After all, there is no inherent inconsistency between the concept of causation and vicarious liability. As other scholars have pointed out in criticizing *Monell*, causation is an essential element of negligence, yet respondeat superior applies routinely to negligence actions.⁶²

Instead, the Court interpreted the text in light of the legislative history. Although it acknowledged that Congress’s rejection of the extreme form of vicarious liability proposed in the Sherman Amendment did not compel rejection of lesser forms of vicarious liability,

⁵⁷ *Monell*, 436 US at 680–82.

⁵⁸ *Id.* at 673.

⁵⁹ *Id.* at 691.

⁶⁰ *Id.*, quoting 42 USC § 1983.

⁶¹ *Monell*, 436 US at 692.

⁶² See, for example, Lewis and Blumoff, 140 U Pa L Rev at 787–88 (cited in note 30) (attacking *Monell*’s reasoning by noting that “causation is an invariable prerequisite of liability for civil harms”); Susanah M. Mead, 42 U.S.C. § 1983 *Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 NC L Rev 517, 533 (1987) (“Actual causation is an element that the plaintiff must prove in any tort case regardless of the legal theory of liability.”).

such as respondeat superior, it nonetheless concluded that a respondeat superior rule “would have raised all the constitutional problems associated with the obligation to keep the peace” that Congress refused to impose in the Sherman Amendment.⁶³ The Court then put the text and the legislative history together and held that “Congress’ rejection of the only form of vicarious liability presented to it [when] combined with the absence of any language in § 1983 which can be easily construed to create respondeat superior liability” supported the conclusion that Congress did not intend to subject municipalities to respondeat superior liability.⁶⁴ In other words, the phrase “subjects, or causes to be subjected” did not automatically foreclose vicarious liability, but instead was too ambiguous to provide a basis for imposing it over Congress’s constitutional concerns. The Court did not hold, however, that municipalities were completely immune from damages. It concluded that a municipality can be liable for damages if a municipal policy or custom is the driving force behind the violation.⁶⁵

The consequences of *Monell*’s policy or custom requirement for plaintiffs are significant. Even though the policy or custom requirement has expanded to situations beyond explicit, written policies, courts still have fashioned the standard into a much higher bar than traditional respondeat superior liability. For example, a plaintiff can establish municipal liability by showing either (1) that the unconstitutional conduct of a municipal employee was known to and tolerated by municipal policymakers or (2) that the municipality should have known of the risk that the employee would violate constitutional rights when it made its hiring decision. The Supreme Court, however, has held that the first avenue requires showing that the municipality was “deliberately indifferent” in failing to address the risk that the employee would violate constitutional rights,⁶⁶ and that the second avenue requires showing that the constitutional violation was the “plainly obvious consequence” of the hiring decision.⁶⁷ Moreover,

⁶³ *Monell*, 436 US at 692–93. The Court also considered several policy rationales for respondeat superior, specifically that employers are better risk bearers than employees and that accident costs should be spread to the community as a whole in the form of municipal liability rather than falling solely on the employee. See *id.* at 693–94. The Court did not question the merits of either rationale, but concluded that Congress would have found them insufficient to overcome the *constitutional* objections to the Sherman Amendment. See *id.* at 694.

⁶⁴ *Id.* at 692 & n 57 (stating that its interpretation of the phrase “subjects, or causes to be subjected” was supported by the legislative history of the Sherman Amendment).

⁶⁵ *Id.* at 694.

⁶⁶ See *City of Canton v Harris*, 489 US 378, 388–89 (1989).

⁶⁷ See *Board of County Commissioners of Bryan County v Brown*, 520 US 397, 411 (1997). Even gross negligence will not satisfy this standard. *Id.* at 407.

rarely will a municipality be liable for a single constitutional violation of an employee, as establishing a custom or policy generally requires showing a pattern or practice of misconduct.⁶⁸ And if that were not enough, a plaintiff cannot establish municipal liability simply by showing that the misconduct was endorsed by any supervisory or managerial employee; the plaintiff must show that a municipal official clothed with “final policymaking authority”—a much narrower group—knew of and tolerated the unconstitutional actions.⁶⁹ These hurdles, none of which are part of ordinary tort law, make it very difficult to hold municipalities accountable under § 1983.

Virtually from the time it was decided, scholars have criticized *Monell's* rationale for exempting municipalities from respondeat superior liability.⁷⁰ In particular, several scholars have pointed out that municipalities were subject to respondeat superior liability when § 1983 was enacted and have argued that Congress likely intended to incorporate preexisting common law liability rules.⁷¹ Additionally, scholars have pointed out that Congress's rejection of an extreme and unprecedented liability rule that would have made municipalities liable for the torts of private citizens hardly compels the conclusion that Congress also would have rejected the more conventional rule of making municipalities liable for their employees' torts.⁷² By contrast, few have jumped to *Mo-*

⁶⁸ In *Brown*, the Court distinguished between a constitutionally “deficient training ‘program’ necessarily intended to apply over time to multiple employees” and a single instance of unconstitutional behavior by a municipal employee, which would not suffice to make a municipality liable. *Id.* at 407–08, quoting *Harris*, 489 US at 390–91. See also, for example, *Burge v. St. Tammany Parish*, 336 F3d 363, 369–73 (5th Cir 2003) (stating that deliberate indifference by a municipal policymaker “generally requires a showing of more than a single instance of the lack of training or supervision causing a violation of constitutional rights”). But see *Pembaur v. City of Cincinnati*, 475 US 469, 480 (1986) (holding that “municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances”).

⁶⁹ See *Pembaur*, 475 US at 481–83. See also Lewis and Blumoff, 140 U Pa L Rev at 794–95 (cited in note 30) (explaining the difficulty of meeting the “final policymaking authority” standard).

⁷⁰ See, for example, Steven Stein Cushman, *Municipal Liability under Section 1983: Toward a New Definition of Municipal Policymaker*, 34 BC L Rev 693, 728–29 (1993); Lewis and Blumoff, 140 U Pa L Rev 755 (cited in note 30); Jack M. Beerermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 Stan L Rev 51, 76–77 (1989); Peter H. Schuck, *Municipal Liability under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 Georgetown L J 1753, 1789–91 (1989); Larry Kramer and Alan O. Sykes, *Municipal Liability under Section 1983: A Legal and Economic Analysis*, 1987 S Ct Rev 249, 300–01 (1987); Mead, 65 NC L Rev 517 (cited in note 62); Karen M. Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 Temple L Q 409, 444–45 (1978).

⁷¹ See, for example, Mead, 65 NC L Rev at 526–27 (cited in note 62); Blum, 51 Temple L Q at 413 n 15 (cited in note 70).

⁷² See, for example, Achtenberg, 73 Fordham L Rev at 2210 (cited in note 30); Jack M. Beerermann, *Municipal Responsibility for Constitutional Torts*, 48 DePaul L Rev 627, 642–43 (1999) (“Expecting a municipality to prevent its employees from violating federal rights is quite

nell's defense, and many of those who do support *Monell* do not defend the Supreme Court's reasoning but instead suggest that limiting municipal § 1983 liability may be wise for pragmatic reasons.⁷³

The question that scholars have not analyzed is the one that *Monell* left open: whether private entities that fall within § 1983 because they perform public functions should be exempt from respondeat superior liability. While some critics of *Monell* may argue that the best solution is simply to overrule it and to subject all entities, both public and private, to respondeat superior liability, it is important to address the distinct question of whether *Monell* should apply to private parties. First, despite thirty years of attacks on *Monell*, the Supreme Court repeatedly has reaffirmed it⁷⁴ and does not seem likely to overrule it in the near future.⁷⁵ For better or for worse, *Monell* is the law of the land, and therefore it is important to determine how far that decision should extend. Second, not everyone believes that *Monell* created a bad result. Some believe that limitations on § 1983 liability like those established in *Monell* are important because judicial interpretation of § 1983 has expanded the statute's reach too far.⁷⁶ This Article also aims

different from placing upon a municipality the obligation to prevent private citizens from engaging in riotous conduct.”).

⁷³ For a defense of *Monell*'s reading of the legislative history, see Terrence S. Welch and Kent S. Hofmeister, *Prapotnik, Municipal Policy and Policymakers: The Supreme Court's Constriction of Municipal Liability*, 13 SIU L J 857, 881 (1989). Some scholars who question *Monell*'s doctrinal underpinnings also suggest that the decision may be defensible for pragmatic reasons. See, for example, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga L Rev 845, 861–65 (2001) (proposing that *Monell*'s custom or policy requirement strikes an acceptable balance in deterring government misconduct); Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983*, 62 S Cal L Rev 539, 542–43 (1989) (asserting that *Monell* balances competing interests of maintaining municipal accountability and preserving principles of federalism).

⁷⁴ See *McMillian v Monroe County*, 520 US 781, 783 (1997); *Brown*, 520 US at 415 (“As we recognized in *Monell* and have repeatedly reaffirmed, Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights.”); *Jett v Dallas Independent School District*, 491 US 701, 735–36 (1989); *Harris*, 489 US at 399–400; *City of St Louis v Prapotnik*, 485 US 112, 127–31 (1988); *Pembaur*, 475 US 469, 480–81; *City of Oklahoma City v Tuttle*, 471 US 808, 821–24 (1985).

⁷⁵ To be sure, Justices John Paul Stevens, Stephen Breyer, and Ruth Bader Ginsburg, have called for a “re-examination” of *Monell*. See *Brown*, 520 US at 431 (Breyer dissenting, joined by Stevens and Ginsburg). That call, however, occurred more than ten years ago, and the Court has not taken any steps toward limiting, let alone overruling, *Monell*. Nor is there any indication that the Court's newest justices, John Roberts, Samuel Alito, and Sonia Sotomayor believe that *Monell* should be overruled.

⁷⁶ See, for example, Sheldon H. Nahmod, 1 *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 1.7–1.8 (West 4th ed 2008) (describing common criticisms of § 1983). See also *Crawford-El v Britton*, 523 US 574, 611 (1998) (Scalia dissenting) (decrying the broadening of § 1983 and lamenting the “tens of thousands” of § 1983 suits that are filed each year).

to convince those *Monell* defenders that the decision should not be extended to private parties performing traditional public functions.

Although the Supreme Court has not addressed this issue since *Monell*,⁷⁷ the overwhelming majority of lower courts have extended *Monell*'s respondeat superior exemption to private entities.⁷⁸ Typically, however, those courts have engaged in little analysis, but instead seem to have concluded that private entities should be treated identically to municipalities without saying why that is the case.⁷⁹ The lower court

⁷⁷ Prior to *Monell*, however, the Court hinted that private parties that jointly conspire with state actors to violate constitutional rights could be held liable via respondeat superior. In *Adickes v. S.H. Kress & Co.*, 398 US 144 (1970), the Court found that a plaintiff could sue a department store under § 1983 if the store's employees engaged in a joint conspiracy with the state. *Id.* at 152. Although the department store was the defendant, there was no contention that the store had to act pursuant to an unconstitutional custom or policy to be held liable based on the acts of its employees. Rather, the Court held that the lower court erred in granting summary judgment to Kress because there was an issue of fact as to whether a state policeman "reached an understanding with some Kress employee" to refuse to serve the plaintiff because she was in the company of African-Americans. *Id.* at 157. Since *Monell*, however, lower courts have not applied *Adickes* when considering private-entity vicarious liability under § 1983. It is interesting to note that even though at that time a plaintiff could not directly sue either a state or a municipality under § 1983, the Court apparently saw little concern with holding a private entity (as opposed to a private employee) liable.

⁷⁸ See, for example, *Rodriguez v. Smithfield Packing Co.*, 338 F3d 348, 355 (4th Cir 2003); *Dubbs v. Head Start, Inc.*, 336 F3d 1194, 1216 (10th Cir 2003); *Natale v. Camden County Correctional Facility*, 318 F3d 575, 583 (3d Cir 2002); *Jackson v. Medi-Car, Inc.*, 300 F3d 760, 766 (7th Cir 2002); *Johnson v. Correctional Corp of America*, 26 Fed Appx 386, 388 (6th Cir 2001); *Sena v. Wackenhut*, 3 Fed Appx 858, 861 (10th Cir 2001); *Street v. Correctional Corp of America*, 102 F3d 810, 818 (6th Cir 1996); *Austin v. Paramount Parks, Inc.*, 195 F3d 715, 727–28 (4th Cir 1999); *Sanders v. Sears, Roebuck & Co.*, 984 F2d 972, 975 (8th Cir 1993); *Harvey v. Harvey*, 949 F2d 1127, 1129–30 (11th Cir 1992); *Rojas v. Alexander's Department Store, Inc.*, 924 F2d 406, 408 (2d Cir 1990); *Taylor v. List*, 880 F2d 1040, 1046–47 (9th Cir 1989); *Goodnow v. Palm*, 264 F Supp 2d 125, 130 (D Vt 2003); *Mejia v. City of New York*, 228 F Supp 2d 234, 243 (EDNY 2002); *Goode v. Correctional Medical Services*, 168 F Supp 2d 289, 292 (D Del 2001); *Thomas v. Zinkel*, 155 F Supp 2d 408, 412 (ED Pa 2001); *Parent v. Roth*, 2001 WL 1243563, *3 (ED Pa); *Kruger v. Jenne*, 164 F Supp 2d 1330, 1333–34 (SD Fla 2000); *Andrews v. Camden County*, 95 F Supp 2d 217, 228 (D NJ 2000); *Edwards v. Alabama Department of Corrections*, 81 F Supp 2d 1242, 1255 (MD Ala 2000); *Smith v. Ostrum*, 2000 WL 988012, *3 (D Del); *Donlan v. Ridge*, 58 F Supp 2d 604, 611 (ED Pa 1999); *Jones v. Sabis Educational System, Inc.*, 52 F Supp 2d 868, 878 (ND Ill 1999); *Allen v. Columbia Mall*, 47 F Supp 2d 605, 613 n 12 (D Md 1999); *Otani v. City & County of Hawaii*, 126 F Supp 2d 1299, 1305–06 (D Hawaii 1998); *Raby v. Baptist Medical Center*, 21 F Supp 2d 1341, 1357 (MD Ala 1998); *Robinson v. City of San Bernardino Police Department*, 992 F Supp 1198, 1204 (CD Cal 1998).

A few district courts, however, have asserted that *Monell* should not apply to private entities. See, for example, *Hutchison v. Brookshire Brothers, Ltd.*, 284 F Supp 2d 459, 473 (ED Tex 2003); *Segler v. Clark County*, 142 F Supp 2d 1264, 1268–69 (D Nev 2001); *Taylor v. Plousis*, 101 F Supp 2d 255, 263 n 4 (D NJ 2000); *Groom v. Safeway, Inc.*, 973 F Supp 2d 987, 991 n 4 (WD Wash 1997); *Moore v. Wyoming Medical Center*, 825 F Supp 1531, 1549 (D Wyo 1993).

⁷⁹ One of the more detailed federal appellate decision on this issue may be *Powell v. Shopco*, 678 F2d 504 (4th Cir 1982), which appears to be the primary source for subsequent circuit decisions extending *Monell* to private parties. Even there, however, the court's discussion was limited to one paragraph. The court briefly summarized *Monell* and then simply concluded,

approach raises two questions. One is whether principles of statutory interpretation support reading § 1983 and *Monell* to exempt private entities from respondeat superior liability. The second is whether, as a policy matter, public entities and private entities should be treated identically with respect to respondeat superior liability. The next two Parts explore each of these questions.

II. WHETHER *MONELL* EXTENDS TO PRIVATE ENTITIES

Before considering whether policy concerns support distinguishing private entities from municipalities for purposes of § 1983 respondeat superior liability, there is the threshold question of whether *Monell*'s interpretation of the phrase "subjects, or causes to be subjected"—to eliminate municipal vicarious liability—requires a similar interpretation for private entities. Two background principles of § 1983 and tort law can assist in answering that question. First, in interpreting § 1983, the Supreme Court has emphasized that the members of the Congress enacting § 1983 were familiar with the common law of torts and that "they likely intended these common law principles to obtain, absent specific provisions to the contrary."⁸⁰ Second, when Congress enacted § 1983 in 1871, just as now, respondeat superior liability was a well-accepted and standard principle of tort law.⁸¹

Assessing *Monell* against these background principles suggests three reasons why, as a matter of statutory interpretation, it should not be extended to private entities. First, Congress's concern that vicarious liability would unconstitutionally interfere with state prerogatives is inapplicable to private parties. Second, although both municipalities and private parties were subject to respondeat superior liability for ordinary torts at the time § 1983 was enacted, municipalities had other liability protections that roughly approximated § 1983's current custom or policy requirement whereas private parties had no such protections. Thus, reading the ambiguous phrase "subjects, or causes to be subjected" against the backdrop of 1871 common law supports imposing respondeat superior liability on private entities even if municipalities remain exempt. Third, although the Congress enacting § 1983

without any explanation, that "[n]o element of the Court's *ratio decidendi* lends support for distinguishing the case of a private corporation [from a municipality]." *Id.* at 506.

⁸⁰ *City of Newport v Fact Concerts, Inc.*, 453 US 247, 258 (1981).

⁸¹ The principle of respondeat superior liability for private entities was well accepted in 1871. See, for example, Joseph Story, *Commentaries on the Law of Agency* 536–600 (Little, Brown 5th ed 1857); Oliver W. Holmes, *Agency*, 4 Harv L Rev 345, 356 (1891) ("The maxim of *respondeat superior* has been applied to the torts of inferior officers from the time of Edward I to the present day."). See also Beermann, 48 DePaul L Rev at 645 (cited in note 72).

probably did not anticipate that private parties would fall within the statute, several factors suggest that in the absence of any constitutional objection, Congress likely would not have intended to exempt private parties from respondeat superior liability.

A. Reinterpreting the Statutory Text

First, *Monell's* explanation for Congress's refusal to impose respondeat superior liability on municipalities rests on a rationale specific to government actors. According to the *Monell* Court, Congress's main concern was that imposing such liability on municipalities would be unconstitutional.⁸² That constitutional concern was grounded in federalism; Congress believed that it could not impose obligations on municipalities—considered instrumentalities of state government—that would interfere with the state's ability to regulate municipalities. The Court then concluded that Congress would have perceived municipal vicarious liability as placing an unconstitutional burden on municipalities. But that constitutional concern is inapplicable to private entities, which are not creatures of the state (even when they contract with the state) and which therefore can be regulated without creating any corresponding constitutional difficulty.⁸³

Simply showing the lack of a constitutional impediment to imposing private respondeat superior liability, however, is not determinative because there remains *Monell's* interpretation of the phrase “subjects, or causes to be subjected”—at least with respect to a municipality—to mean “directly causes” and therefore to prohibit respondeat superior liability. Here is where the phrase's ambiguity with respect to vicarious liability comes into play. It appears that the *Monell* Court did not conclude that the text was sufficiently clear on its face to eliminate vicarious liability, but instead concluded that in light of Congress's constitutional objections to the Sherman Amendment, the phrase was too ambiguous to support a respondeat superior rule for municipalities.

⁸² See notes 54–58 and accompanying text.

⁸³ The inapplicability of Congress's constitutional concern to private parties was a strong justification for one of the few federal district court decisions holding that private parties should be subject to respondeat superior liability under § 1983. See *Hutchinson v Brookshire Brothers, Ltd.*, 284 F Supp 2d 459, 472–73 (ED Tex 2003).

Professor Barbara Kritchevsky makes a similar point in arguing that private entities should be subject to respondeat superior liability under § 1983. She asserts that “[t]here are no constitutional impediments to imposing liability on private parties that act under color of state law.” Kritchevsky, 26 Cardozo L Rev at 74 (cited in note 32). Her rationale differs slightly in that she asserts that imposing liability on a private party “does not subject the taxpayers to liability” in the same way that it would through municipal liability. *Id.*

Whereas the ambiguous nature of the phrase may have supported exempting municipalities from respondeat superior liability, that ambiguity works in the opposite direction for private parties because the constitutional concern is not at issue. Put another way, just as *Monell* found that “subjects, or causes to be subjected” was too ambiguous to express a clear intent to read municipal respondeat superior liability into § 1983 over Congress’s constitutional objection, the phrase similarly is too ambiguous to *read out* the preexisting common law rule of private respondeat superior liability in the absence of any constitutional or similar objection.⁸⁴ The text therefore should be read to support private respondeat superior liability even if it simultaneously eliminates municipal respondeat superior liability. The absence of any federalism concern with imposing liability on private parties, combined with an existing default rule of private party respondeat superior liability of which Congress was likely aware, supports the conclusion that § 1983’s text does not compel exempting private parties from vicarious liability.

Second, interpreting “subjects, or causes to be subjected” to impose respondeat superior liability on private parties while exempting municipalities finds additional support in the background rules of nineteenth-century tort law. To be sure, there is a general consensus that at the time of § 1983’s enactment, both private entities and municipalities were vicariously liable for the torts of their employees.⁸⁵ In the nineteenth century, however, municipalities (but not private parties) possessed other forms of common law immunity that, with some differences, roughly approximated *Monell*’s custom or policy require-

⁸⁴ Kritchevsky offers a different textual argument, which although persuasive, proves too much because it would apply to municipalities as equally as it would to private entities. She asserts that the text encompasses respondeat superior because entities have no independent identity and act only through their employees and agents. Kritchevsky, 26 *Cardozo L Rev* at 74 (cited in note 32). This argument, however, is equally applicable to municipalities, which also cannot act separately from their employees and agents, and therefore casts doubt on *Monell* itself. Thus, to the extent that *Monell* remains good law, it would appear to foreclose this argument.

⁸⁵ The weight of authority appears to support the conclusion that when § 1983 was enacted respondeat superior applied to municipalities as well as to private parties. See, for example, *Weightman v Washington*, 66 US (1 Black) 39, 50 (1861) (stating that municipalities “are liable for the negligent and unskillful acts of their servants and agents”); Mead, 65 *NC L Rev* at 527 (cited in note 62); Eugene McQuillin, 6 *The Law of Municipal Corporations* § 2823 at 1135 (Callaghan 2d ed 1937). See generally *City of Oklahoma City v Tuttle*, 471 US 808, 836–37 & nn 8–10 (1985) (Stevens dissenting) (citing cases applying respondeat superior principles to municipalities). The same is true today. Eugene McQuillin, 18 *The Law of Municipal Corporations* § 53.69 (West 3d ed 2008).

ment.⁸⁶ Relevant here is the then-popular but now-abandoned “government-proprietary” distinction, which reflected the fact that municipalities performed both public and private functions.⁸⁷ Under this doctrine, municipalities were liable for their employees’ torts when employees performed “proprietary” acts designed to advance the municipalities’ private interests.⁸⁸ At the same time, because municipalities were considered instruments of the states created to help further state objectives, they were treated as agents of the state entitled to state sovereign immunity when performing public or governmental duties.⁸⁹

Because many constitutional violations arise out of public rather than private behavior,⁹⁰ this distinction would appear to vastly reduce municipal liability under § 1983, even where the unconstitutional actions reflected a municipal custom or policy. As other scholars have pointed out, however, municipal officials were not immune from governmental acts where the official authorized, directed, or ratified the wrongful act,⁹¹ or where the official failed to properly supervise its employees’ behavior or screen them before hiring.⁹² Because municipalities were considered to be equivalent to public officials, these limi-

⁸⁶ See, for example, *Tuttle*, 471 US at 818 n 5 (stating that “certain rather complicated municipal tort immunities existed at the time § 1983 was enacted”); Kramer and Sykes, 1987 S Ct Rev at 262 (cited in note 70) (“[M]unicipal corporations were insulated from liability by various immunity doctrines not applicable to private corporations.”). See generally McQuillin, 18 *Municipal Corporations* at § 53.05 (cited in note 85) (summarizing various traditional forms of municipal immunity).

⁸⁷ See *Owen v City of Independence*, 445 US 622, 644–45 (1980) (explaining that the municipal corporation was a “corporate body . . . capable of performing the same ‘proprietary’ functions as any private corporation”). See also McQuillin, 18 *Municipal Corporations* at § 53.02.10 (cited in note 85) (explaining that the governmental-proprietary distinction generally “has been abandoned”). For a more thorough discussion of the governmental-proprietary distinction and its relevance for municipal § 1983 liability, see Achtenberg, 73 *Fordham L Rev* at 2222–37 (cited in note 30).

⁸⁸ See *Owen*, 445 US at 645; McQuillin, 18 *Municipal Corporations* at § 53.23 (cited in note 85); Achtenberg, 73 *Fordham L Rev* at 2223 (cited in note 30).

⁸⁹ See *Owen*, 445 US at 645 (“On the other hand, the municipality was an arm of the State, and when acting in that ‘governmental’ or ‘public’ capacity, it shared the immunity traditionally accorded the sovereign.”); McQuillin, 18 *Municipal Corporations* at § 53.24 (cited in note 85) (stating that a municipality is immune when it “is performing a duty imposed upon it as the agent of the state in the exercise of strictly governmental functions.”); Achtenberg, 73 *Fordham L Rev* at 2233 (cited in note 30); Kramer and Sykes, 1987 S Ct Rev at 262 (cited in note 70).

⁹⁰ See, for example, Ronald M. Levin, *The Section 1983 Municipal Liability Doctrine*, 65 *Georgetown L J* 1483, 1521 n 156 (1977) (noting that “cities and city officers are rarely in a position to infringe constitutional rights except when engaged in functions traditionally viewed as governmental”). See also Kramer and Sykes, 1987 S Ct Rev at 262–63 (cited in note 70).

⁹¹ Achtenberg, 73 *Fordham L Rev* at 2233 (cited in note 30); Kramer and Sykes, 1987 S Ct Rev at 263 & n 52 (cited in note 70).

⁹² Achtenberg, 73 *Fordham L Rev* at 2233–36 (cited in note 30).

tations applied to municipalities as well.⁹³ These exceptions roughly approximate the avenues for establishing a municipal custom or policy under § 1983, which permits municipal liability where municipal officials know of and tolerate unconstitutional behavior, or where they are deliberately indifferent to the risks of constitutional violations stemming from their hiring and training decisions. Although the threshold for invoking the exemption to the governmental immunity doctrine appears to be lower than the custom or policy threshold, particularly with respect to claims of improper hiring or supervision,⁹⁴ the nineteenth-century tort regime at least suggests that private-entity defendants received fewer liability protections than municipal defendants.⁹⁵ Private parties were subject to a traditional respondeat superior regime while municipal entities were liable for their employees' acts only in more limited circumstances. Thus, reading the ambiguous phrase "subjects, or causes to be subjected" against the backdrop of different common law rules for public and private entities supports interpreting the phrase to impose respondeat superior on private entities even if it is also interpreted to exempt public entities.

One potential problem with this interpretation is that it would imbue a single phrase of statutory text—"subjects, or causes to be subjected"—with different meanings for different parties. For municipalities, that language would eliminate vicarious liability, while for private parties it would permit vicarious liability. Although reading the same text differently for different parties may seem problematic, it is neither unprecedented nor inconsistent with statutory interpretation principles. For example, in *United States v United States Gypsum Co.*,⁹⁶

⁹³ See id at 2233.

⁹⁴ See id at 2235–36 (noting that under nineteenth-century tort law, municipal officers could be held liable for negligent hiring decisions). Negligence, even gross negligence, is insufficient to establish a custom or policy. See, for example, *Board of County Commissioners of Bryan County v Brown*, 520 US 397, 407 (1997).

⁹⁵ To be sure, the reasoning behind the governmental-proprietary distinction raises the question whether private parties that act "under color of law" because they perform public services should be considered arms of the state and therefore entitled to the same immunities bestowed on municipalities. I believe this view is unpersuasive. First, municipalities are state creations and extensions of the state government. Private parties, even ones that perform public functions, have an identity distinct from the state itself. Second, private entities, even when engaged in public activities, work for private profit, and therefore their activities could be classified as proprietary and not subject to immunity. Third, it appears that private entities that performed traditional public functions, such as operating private prisons, historically did not receive municipal or sovereign immunity. See, for example, *Richardson v McKnight*, 521 US 399, 404–06 (1997) (detailing that in the nineteenth century, private prison contractors were not immune from liability for their employees' torts).

⁹⁶ 438 US 422 (1978).

the Supreme Court held that § 1 of the Sherman Antitrust Act, which imposes both civil and criminal liability for antitrust violations, contains an intent requirement for criminal liability but not for civil liability.⁹⁷ Importantly, the Court rested its conclusion in part on background common law principles, emphasizing that intent is an “indispensable element of a criminal offense.”⁹⁸ Given that the Court has cautioned in a different context that § 1983’s text “is not to be taken literally” but must be read in light of the common law,⁹⁹ reading “subjects, or causes to be subjected” differently for private and municipal entities is sensible and consistent with § 1983’s purposes.¹⁰⁰

Additionally, the interpretive canon of “constitutional avoidance”—which cautions courts to interpret a statute narrowly when necessary to avoid a constitutional problem¹⁰¹—supports reading § 1983 differently for private entities than for municipalities. While the constitutional concerns associated with imposing vicarious obligations on municipalities may support a narrow and crabbed reading of the statute with respect to municipal defendants, the absence of any such concern for private defendants counsels against a similarly narrow

⁹⁷ Id at 435–36 & n 13 (holding that “a defendant’s state of mind or intent is an element of a criminal antitrust offense” but cautioning that its holding “leaves unchanged the general rule that a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect”).

⁹⁸ Id at 437. See also *Mobil Oil Corp v EPA*, 871 F2d 149, 153 (DC Cir 1989) (finding that the EPA did not err by interpreting the term “facility” in the Resource Conservation and Recovery Act “to mean different things in different contexts”). Similarly, statutes containing both remedial and penal provisions may be construed narrowly in the penal context but broadly in the remedial context. See Norman J. Singer and J.D. Shambie Singer, 3 *Sutherland, Statutory Construction* § 60:4 at 304–05 (West 7th ed 2008).

⁹⁹ *Briscoe v LaHue*, 460 US 325, 330 (1983) (holding that the phrase “every person” acting under color of state law did not include police officers testifying in a judicial proceeding).

¹⁰⁰ Similarly, the Court has had little problem interpreting § 1983 differently for different parties in the immunity context. Although the immunity defense does not arise from § 1983’s text in the same way as does *Monell*’s conclusion about respondeat superior liability, see *Wyatt v Cole*, 504 US 158, 163 (1992) (“Section 1983 creates a species of tort liability that on its face admits of no immunities.”) (quotation marks omitted), the Court has interpreted a single unitary statute to incorporate different forms of immunity for different parties. See generally, for example, *Richardson*, 521 US 399 (finding no qualified immunity for privately employed correctional officers); *Briscoe*, 460 US 325 (providing absolute immunity for in-court witnesses); *Harlow v Fitzgerald*, 457 US 800 (1982) (allowing qualified immunity for government employees); *Owen*, 445 US at 622 (finding no immunity for a municipality); *Pierson v Ray*, 386 US 547 (1967) (allowing absolute immunity from damages for judges); *Tenney v Brandhove*, 341 US 367 (1951) (providing absolute immunity for legislators).

¹⁰¹ See *Edward J. DeBartolo Corp v Florida Gulf Coast Building & Construction Trade Council*, 485 US 568, 575 (1988). See also Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 Case W Res L Rev 1031, 1037 (2006) (“The canon is a tool used by courts to interpret statutes narrowly when they raise ‘serious constitutional questions.’”) (citation omitted).

reading and in favor of an interpretation consistent with the default common law principle of respondeat superior liability.¹⁰² In other words, perhaps *Monell's* interpretation of § 1983 should not be perceived as the natural or general reading of the statute that as a default should be extended to other contexts, but instead as a specific interpretation designed to address a specific constitutional difficulty and which therefore should be treated as an exception to the general rule that defendants should be vicariously liable under § 1983 just as they are for all other torts.

B. Reexamining Congressional Intent Regarding Private Entities

Since the legislative history of the Sherman Amendment reveals that Congress's concerns about vicarious liability were specific to public entities, there is a question as to what Congress intended with respect to private parties. This may be an unfair question, since it is not clear that Congress anticipated that private parties would be covered by § 1983.¹⁰³ But courts often must try to determine rules that are consistent with congressional goals when faced with questions that Congress never explicitly contemplated.¹⁰⁴ Here, some clues exist that support interpreting § 1983 to encompass private-entity respondeat superior liability.

First, as previously explained, Congress intended to incorporate existing common law tort rules into § 1983 absent clear evidence to the contrary. Therefore, the default assumption should be that Congress would have included respondeat superior liability for private parties.

Second, the legislative debates make clear that Congress believed that § 1983 should be construed liberally in order to vindicate the sta-

¹⁰² Furthermore, given the general scholarly consensus that *Monell's* analysis of respondeat superior liability is substantially flawed, it makes little sense to *extend* that faulty reasoning to contexts where it does not necessarily control. Instead, it would be wiser to limit the reach of that decision to its facts, which the Supreme Court often does with questionable decisions that it is reluctant to overturn. See, for example, *Hein v Freedom from Religion Foundation Inc.*, 127 S Ct 2553, 2568–69 (2007) (confining the scope of *Flast v Cohen*, 392 US 83 (1968), regarding taxpayer standing); *United States v Verdugo-Urquidez*, 494 US 259, 291 (1990) (Brennan dissenting) (providing examples of cases that were subsequently confined to their facts).

¹⁰³ Whether the legislative history of the 1871 Civil Rights Act evinces any congressional intent to subject private entities performing public functions to § 1983 is beyond the scope of this Article. Other parts of the 1871 Act, however, explicitly apply to private parties. See 42 USC § 1985 (making it illegal for two or more persons to conspire to deprive an individual of his or her civil rights or of equal protection of the laws).

¹⁰⁴ See *Vermilya-Brown Co v Connell*, 335 US 377, 388 (1948) (stating that the Court's role is to determine what Congress "would have done had they acted at the time of the legislation with the present situation in mind").

tute's broad remedial purposes.¹⁰⁵ A broad construction of the statute would support incorporating, rather than eliminating, the doctrine of respondeat superior.

Third, the fact that §§ 1981 and 1982—which were enacted just a few years before § 1983 and which have been interpreted to cover private parties¹⁰⁶—subject private defendants to respondeat superior liability supports the conclusion that private entities also should be subject to respondeat superior liability under § 1983. Sections 1981 and 1982 were enacted as part of the Civil Rights Act of 1866,¹⁰⁷ which, like the Civil Rights Act of 1871¹⁰⁸ (the Act containing § 1983), was adopted to protect the rights of slaves newly freed after the Civil War. Section 1981 prohibits discrimination in the making and enforcement of contracts, and § 1982 prohibits discrimination in real estate transactions.¹⁰⁹ Private parties face respondeat superior liability under those two statutes.¹¹⁰ Furthermore, although the question has been rarely addressed, some courts have held that § 1985, which was part of the 1871 Act and which explicitly applies to private parties, incorporates traditional rules of respondeat superior liability.¹¹¹

¹⁰⁵ See, for example, Cong Globe App, 42d Cong, 1st Sess 68 (Mar 28, 1871) (statement of Rep Shellabarger) (stating § 1983 should be “liberally and beneficently construed” because it is “remedial and in aid of the preservation of human liberty and human rights”); id at 217 (Apr 13, 1871) (statement of Sen Thurman) (stating that § 1983’s language is without limit and “as broad as can be used”). See also *Monell*, 436 US at 686.

¹⁰⁶ See generally *Runyon v McCrary*, 427 US 160 (1976) (holding that § 1981 applies to private parties); *Jones v Mayer*, 392 US 409 (1968) (holding that § 1982 applies to private parties).

¹⁰⁷ Civil Rights Act of 1866, 14 Stat 27 (1866), codified as amended at 42 USC §§ 1981–82.

¹⁰⁸ Civil Rights Act of 1871, 17 Stat 13 (1871), codified as amended at 42 USC § 1983.

¹⁰⁹ 42 USC §§ 1981–1982.

¹¹⁰ See, for example, *Arguello v Conoco, Inc*, 207 F3d 803, 809–12 (5th Cir 2000); *Fitzgerald v Mountain States Telephone & Telegraph Co*, 68 F3d 1257, 1263 (10th Cir 1995); *City of Chicago v Matchmaker Real Estate Sales Center*, 982 F2d 1086, 1096 (7th Cir 1992); *Vance v Southern Bell Telephone & Telegraph Co*, 863 F2d 1503, 1512 (11th Cir 1989); *Hunter v Allis-Chalmers Corp*, 797 F2d 1417, 1422 (7th Cir 1986); *Mitchell v Keith*, 752 F2d 385, 388–89 (9th Cir 1985). See also Harold S. Lewis, Jr, and Elizabeth J. Norman, *Civil Rights Law & Practice* § 1.2 at 8–9 & n 36 (West 2d ed 2004) (“When a customer complains of racial discrimination by an employee of a retailer [under § 1981], the employer can be held vicariously liable for the acts of the employee if the employee was acting within the scope of the employment.”). Consider *General Building Contractors Association, Inc v Pennsylvania*, 458 US 375, 395 (1982) (assuming without deciding that “*respondeat superior* applies to suits based on § 1981”). Municipalities, by contrast, are exempt from respondeat superior liability under § 1981. See *Jett v Dallas Independent School District*, 491 US 701, 738 (1989).

¹¹¹ See, for example, *Scott v Ross*, 140 F3d 1275, 1283–84 (9th Cir 1998) (finding that private § 1985 defendant could be held liable under “traditional principles of respondeat superior”). See also *Bowen v Rubin*, 385 F Supp 2d 168, 176–77 n 2 (EDNY 2005) (questioning whether *Monell* should extend to private § 1985 defendants). In cases where courts have refused to impose respondeat superior liability under § 1985, the defendants have been government actors rather than private actors. See, for example, *Swint v City of Wadley*, 5 F3d 1435, 1451 (11th Cir 1993).

Although §§ 1981 and 1982 were part of a different statute and use different statutory language than § 1983, the 1866 Act was passed just five years before the enactment of § 1983, and it is generally understood that the collection of post–Civil War civil rights statutes “were all products of the same milieu and were directed against the same evils.”¹¹² The fact that § 1983 was expressly modeled on § 2 of the 1866 Act and was designed to carry out the 1866 Act’s purposes further bolsters the notion that §§ 1981 and 1982 can inform the meaning of § 1983.¹¹³ To be sure, §§ 1981 and 1982 apply only to very limited torts whereas § 1983 creates a remedy that covers all federally protected rights. But it is hard to believe, especially given § 1983’s broad remedial purpose, that Congress would have wanted to impose a more restrictive remedy for *constitutional* torts, arguably the most egregious type of tort, than for §§ 1981 and 1982.¹¹⁴ Thus, Congress’s willingness to impose respondeat superior liability on private parties in the other contemporaneous post–Civil War Acts suggests that it likely would have intended the same result under § 1983.¹¹⁵

¹¹² *General Building Contractors*, 458 US at 391.

¹¹³ The original § 2 of the 1866 Act, which is now codified at 18 USC § 242, was the forerunner of § 1983. *Jett*, 491 US at 724 (“[T]he first section of the 1871 Act was explicitly modeled on § 2 of the 1866 Act, and was seen by both opponents and proponents as amending and enhancing the protections of the 1866 Act by providing a new civil remedy for its enforcement against state actors.”). Section 1983 was characterized as “carrying out the principles of the [1866] civil rights bill.” Cong Globe, 42d Cong, 1st Sess 568 (Apr 11, 1871) (statement of Sen Edmunds). To be sure, § 2 of the 1866 Act differed from the portion of the 1866 Act that became § 1981. Section 2 imposed criminal liability on state actors who “willfully” violated federally protected rights on account of the victim’s race, color, or status as a former slave. Cong Globe App, 42d Cong, 1st Sess 68 (Mar 28, 1871) (statement of Rep Shellabarger). Given the criminal nature of § 2, vicarious damages liability would not have been an issue, though corporations generally can be held criminally liable for their employees’ misconduct. See *New York Central and Hudson River Railroad Co v United States*, 212 US 481, 492–96 (1909) (upholding liability against a corporation whose employee violated a law against providing rebates). However, Congress’s willingness to impose vicarious liability on private parties in other sections of the 1866 Act, combined with the fact that § 1983 was perceived as expanding the reach of federal civil remedies, see *Jett*, 491 US at 724–25, supports the conclusion that Congress would have intended to make private parties subject to respondeat superior liability under § 1983.

¹¹⁴ Several scholars have questioned whether Congress truly intended for §§ 1981 and 1982 to apply to private parties or whether that doctrine instead was a product of the Supreme Court’s views in the 1960s and 1970s on racial equality. See, for example, Charles Fairman, 6 *History of the Supreme Court of the United States: Reconstruction and Reunion, 1864–68* 1248–58 (Macmillan 1971); Gerhard Casper, *Jones v. Mayer: Clio, Bemused and Confused Maze*, 1968 S Ct Rev 89, 99–108 (1968). Even if that is the case, the fact that Congress may have wanted the civil rights statutes to be interpreted together suggests that if the Supreme Court decided to expose private parties to respondeat superior under §§ 1981 and 1982, then it should do the same for private parties subject to § 1983.

¹¹⁵ To be sure, §§ 1981 and 1982 were enacted to enforce the Thirteenth Amendment whereas § 1983 was enacted to enforce the Fourteenth Amendment. See *District of Columbia v*

The statutory and legislative history justifications for interpreting § 1983 to prohibit municipal respondeat superior liability do not apply to private entities. As a doctrinal matter, the prevailing view that private parties acting under color of state law should be exempt from respondeat superior liability is unfounded. The next Part examines whether policy reasons support imposing respondeat superior liability on private parties even if municipalities remain exempt.

III. PRIVATE ENTITIES VERSUS PUBLIC ENTITIES

If *Monell* does not support extending respondeat superior liability to private parties, the next question is whether private entities subject to § 1983 should be exposed to respondeat superior liability as a policy matter. This question is important not only because privatization is increasing, but also because many privatized functions involve services where employees are frequently interacting with individuals—such as operating prisons, administering welfare benefits, or providing health care, as opposed to digging ditches—in ways that give rise to numerous opportunities to violate constitutional rights.

Although lower courts have not been explicit, the primary policy justification for exempting private entities from respondeat superior liability appears to be one of symmetry. If private entities are subject to § 1983 only because they agree to take on governmental duties, then they should receive the same protections afforded to governments. Similarly, individuals who receive government services should not have different rights based solely on whether the service is provided by the government or by a private contractor.

While this may seem like an appealing justification, symmetry standing alone, is not the proper lens for analyzing whether private entities should be exempt from § 1983 respondeat superior liability. Initially, symmetry concerns traditionally have not been given disposi-

Carter, 409 US 418, 423 (1973). Thus, the provisions are not always treated the same way. See, for example, *Briscoe*, 460 US at 341 n 26; *Carter*, 409 US at 421–24. But see *Briscoe*, 460 US at 356–63 (Marshall dissenting) (arguing that the 1866 Civil Rights Act should guide interpretation of § 1983). In other instances, however, the Court has looked at one statute when interpreting the other. See, for example, *Quern v Jordan*, 440 US 332, 341 n 11 (1979) (refusing to look to the Dictionary Act to interpret § 1983, even though the Dictionary Act was enacted prior to § 1983, on the ground that the Dictionary Act “came more than five years after passage of § 2 of the Civil Rights Act of 1866, 14 Stat. 27, which served as the model for the language of § 1 of the 1871 Act”); Brief for International City Management Association, et al, as Amicus Curiae in Support of Respondent, *Jett v Dallas Independent School District*, Nos 87-2084, 88-214, *11 (filed Feb 3, 1989) (available on Westlaw at 1989 WL 1128162) (providing examples). Here, in the absence of any specific reason for interpreting §§ 1981 and 1982 differently, they should be considered relevant to whether § 1983 encompasses respondeat superior liability for private parties.

tive weight in devising liability rules under the statute. For example, in *Richardson v McKnight*,¹¹⁶ the Supreme Court held that private correctional officers, unlike state correctional officers, are not entitled to qualified immunity even though the two groups perform the same duties.¹¹⁷ Similarly, private contractors are treated asymmetrically based on whether they contract with state and local governments or with the federal government. An individual subjected to constitutional violations by a private entity contracting with the federal government cannot pursue a *Bivens* action¹¹⁸ against that entity, while an individual who suffers constitutional injury by an entity contracting with a state or local government can pursue a § 1983 action.¹¹⁹

Rather than reflexively applying a single rule to all parties, the Supreme Court has looked to the policy rationale underlying the particular liability rule and decided whether that rationale supported extending the rule to different defendants.¹²⁰ In *Richardson*, for example, the Court emphasized that marketplace incentives applicable to private parties reduced the need for qualified immunity.¹²¹ Whereas qualified immunity for public employees is seen as necessary to prevent employees from being unduly timid and to not deter qualified employees from entering public service, the Court stated that private employees have adequate incentives to be vigilant on the job because (1) those who are too timid risk being replaced by more effective employees, and (2) private employers can offer insurance and other market-based incentive programs that will encourage individuals to apply for jobs.¹²²

More importantly, symmetry is an inherently malleable concept. How one perceives symmetry really just depends on one's starting point. If the starting point is *Monell*, then imposing respondeat superior liability creates an asymmetry between public and private § 1983 defendants. But if the starting point is tort law in general, then impos-

¹¹⁶ 521 US 399 (1997).

¹¹⁷ *Id.* at 412. In fact, the Supreme Court repeatedly has been willing to impose different immunity protections on different types of § 1983 defendants. See note 100.

¹¹⁸ Section 1983 provides a cause of action against individuals acting under color of state law. In *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971), the Supreme Court established a similar cause of action for constitutional violations by federal officers. See *id.* at 397.

¹¹⁹ See *Correctional Services Corp v Malesko*, 534 US 61, 74 (2001) (refusing to permit a *Bivens* cause of action against a private contractor with the federal government).

¹²⁰ See, for example, *Richardson*, 521 US at 407–13 (focusing on the differences between public and private employees in deciding not to extend qualified immunity to private employees acting under color of state law).

¹²¹ *Id.* at 409–11.

¹²² See *id.*

ing respondeat superior liability resolves an asymmetry. Currently, private entities are subject to respondeat superior liability in all spheres of tort law except one—constitutional torts.¹²³ From that perspective, the current rule is anomalous because it imposes more restrictive remedies for constitutional torts than for ordinary torts.¹²⁴

Instead of focusing on symmetry standing alone, a better framework would be to attempt to determine whether symmetrical treatment best furthers § 1983's purposes of deterring constitutional violations and compensating the victims of constitutional injury.¹²⁵ If imposing respondeat superior liability will be more effective in deterring private entities from violating constitutional rights than it will in deterring public entities, then society may prefer to treat private and public entities differently, even when they perform the same function. This Part attempts to discern whether differences exist in how the risk of tort damages liability as well as other noneconomic factors, such as the risk of negative publicity, influence private and public entities, and whether, if such differences exist, they favor subjecting private § 1983 defendants to respondeat superior liability.

Against this backdrop, this Article suggests three reasons why private party respondeat superior liability is more likely than municipal respondeat superior liability to further § 1983's purposes. First, damages remedies provided through the tort system, including respondeat superior remedies, are more likely to deter wealth-maximizing private firms than less financially driven governmental entities from violating rights.¹²⁶ Second, damages remedies, such as respondeat superior, may be less necessary for deterring government misconduct because governmental entities are subject to other noneconomic forms of accountability—such as elections and open records laws—that do not apply as strongly to private parties.¹²⁷ Third, governments may be more likely than private parties to respond to damages liability not by reforming the agencies causing the misconduct,

¹²³ Consider Dobbs, *The Law of Torts* at 905 & n 1 (cited in note 23).

¹²⁴ See *Taylor v Plousis*, 101 F Supp 2d 255, 263–64 n 4 (D NJ 2000) (“It seems odd that the more serious conduct necessary to prove a constitutional violation would not impose corporate liability when a lesser misconduct under state law would impose corporate liability.”). See also *Smith v Wade*, 461 US 30, 48–49 (1983) (“As a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action.”).

¹²⁵ See, for example, *Owen v City of Independence, Missouri*, 445 US 622, 651 (1980) (“Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations as well.”).

¹²⁶ See Part III.A.

¹²⁷ See Part III.B.

but instead by cutting other programs that may provide important and useful services.¹²⁸ In other words, an asymmetrical starting point—different respondeat superior rules for private and public entities—may actually increase symmetry at the end point of protecting constitutional rights.

This is not to suggest that private entities respond to only one set of incentives and that governmental entities respond to an entirely distinct set of incentives. Municipal entities to some degree will be concerned with the financial impact of damages awards, and private entities will be concerned about negative public opinion. What this Article does suggest, however, is that the degree to which these factors affect public and private behavior differs, and that at the very least, courts should account for those differences in evaluating whether *Monell* should apply to private entities rather than reflexively extending *Monell* as they typically have done.

A. Respondeat Superior Liability and Deterrence

1. Private entity response to respondeat superior liability.

One basic and longstanding assumption of modern tort law is that employers should be liable for the torts of their employees committed within the scope of employment and that holding employers liable will promote deterrence objectives. Conventional economic theory treats private firms as rational profit-maximizers.¹²⁹ Private firms aim to minimize marginal costs, and one such cost is tort liability. Therefore, if private firms are subject to liability for certain actions, they likely will attempt to minimize those actions, or at least the parts giving rise to liability.¹³⁰ Although tort liability does not operate as a perfect deter-

¹²⁸ See Part III.C.

¹²⁹ See, for example, Michael J. Trebilcock and Edward M. Iacobucci, *Privatization and Accountability*, 116 Harv L Rev 1422, 1424 (2003) (“Private firms organize themselves to maximize profits.”).

¹³⁰ See, for example, Kritchevsky, 26 Cardozo L Rev at 79 (cited in note 32) (“Private actors, however, are likely to react to financial incentives and to avoid actions that will lead to liability.”); Metzger, 103 Colum L Rev at 1394 (cited in note 11) (noting that damages liability helps keep private companies accountable for their actions); Kramer and Sykes, 1987 S Ct Rev at 267 (cited in note 70) (“[L]iability rules create incentives to take precautions against accidental injuries and stand as a deterrent to intentional harms.”). Additionally, tort liability can affect a company’s stock price, which provides further incentive to take measures to avoid liability. See Note, *Developments in the Law: The Law of Prison*, 115 Harv L Rev 1838, 1884 (2002). In previous § 1983 decisions, the Supreme Court has relied on the proposition that private parties respond to tort liability incentives. See, for example, *Richardson*, 521 US at 412 (concluding that marketplace pressures “help private firms adjust their behavior in response to the incentives that

rent and although some scholars have questioned how effectively tort liability deters misbehavior, tort liability generally is regarded as an important mechanism for promoting accountability and encouraging private entities to abide by the law.¹³¹

In a Coasean world with zero transaction costs, a respondeat superior rule would have no effect on efficiency because the employer and employee would efficiently allocate risk between them regardless of the default legal rule.¹³² Essentially, if respondeat superior is an efficient rule, then employers would privately agree to indemnify their employees for violations committed within the scope of employment. However, because of some important differences between entities and employees, conventional tort theory nonetheless recognizes that respondeat superior liability can promote deterrence in ways that simply placing liability on the individual tortfeasor cannot.¹³³

First, respondeat superior can promote more efficient deterrence where, as is the case in many § 1983 actions, the individual employee lacks the resources to pay a damages award. As Professor Alan Sykes has demonstrated, employee insolvency encourages both the employer and the employee to underinvest in deterrence measures because it is cheaper for the employer and employee to engage in collusive side-payments that would cover the fraction of the damages award that the

tort suits provide"); *Correctional Services Corp.*, 534 US at 71 (acknowledging that it "may be" that "requiring payment [by private entities] for the constitutional harms they commit is the best way to discourage future harms" but refusing, on other grounds, to find that private parties are subject to *Bivens* actions).

¹³¹ See generally Steven Shavell, *Economic Analysis of Accident Law* (Harvard 1987) (discussing, through an economic analysis, how liability alters behavior); Guido Calabresi, *The Cost of Accidents* (Yale 1970). Not everyone agrees that tort liability is an effective deterrent in the private sector. See, for example, Richard L. Abel, *A Critique of Torts*, 37 UCLA L Rev 785, 817–19 (1990) (arguing that tort law individualizes victims while collectivizing tortfeasors, distributing the impact of lawsuits while simultaneously encouraging paying off individuals who are harmed rather than engaging in collective actions to change the practices of tortfeasors); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 Cal L Rev 555, 564–73 (1985) (describing how tort law can be an ineffective deterrent). See also generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L Rev 377 (1994) (questioning whether tort liability serves as a "strong" deterrent but concluding that liability still performs a deterrence function).

¹³² See Jennifer H. Arlen and William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U Ill L Rev 691, 706 (applying Coasean principles in the context of respondeat superior liability). See generally R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

¹³³ A number of scholars have provided a theoretical basis for the doctrine of respondeat superior liability. See, for example, Shavell, *Economic Analysis of Accident Law* at 170–75 (cited in note 131); William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* 120–21 (Harvard 1987); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L J 1231, 1961–79 (1984); Lewis A. Kornhauser, *An Economic Analysis of the Choice between Enterprise and Personal Liability for Accidents*, 70 Cal L Rev 1345, 1351–52 (1982).

employee can afford to pay.¹³⁴ Respondeat superior can correct that problem by placing liability on the employer, who is more likely to possess sufficient resources to satisfy the judgment.¹³⁵

Similarly, respondeat superior liability promotes efficiency where employees have certain defenses to liability, such as immunity, that entity-defendants do not have. In the § 1983 context, private individual defendants, but not private entities, often can claim immunity if they acted in good faith.¹³⁶ Immunity creates the same incentive for the employer and employee to engage in side payments rather than to contract for respondeat superior liability.

Second, even without such direct incentives, aligning the employer's profit with respect for constitutional rights may indirectly affect employee behavior. In many cases, employers are better equipped than courts to monitor their employees' behavior, meaning that employees will be more responsive to the risk of an employer sanction than to the risk of a tort judgment.¹³⁷ Similarly, employees naturally may want to help a firm maximize profits in order to assure job security and the employee's place within the firm.¹³⁸ Because employees may be more immediately concerned with pleasing their bosses than with the abstract risk of a tort lawsuit at some future point, making employers accountable for the violations of their employees may be a better inducement for employees to respect constitutional rights than placing tort liability on the employee alone.

Third, the employing entity is best able to put liability avoidance measures in place that will encourage all employees to try to minimize tortious conduct.¹³⁹ Entity liability creates incentives for employers to hire more qualified employees who are less prone to commit misconduct and to invest in employee training to reduce the risk of on-the-job misconduct.¹⁴⁰ Employers also can offer incentives, such as bonuses or

¹³⁴ See Sykes, 93 Yale L J at 1241–52 (cited in note 133).

¹³⁵ See *id.*

¹³⁶ See Part IV.A.

¹³⁷ Consider Kornhauser, 70 Cal L Rev at 1377 (cited in note 133).

¹³⁸ Consider Trebilcock and Iacobucci, 116 Harv L Rev at 1435 (cited in note 129) (“Private organizations are generally more effective than governments in motivating agents to act in ways that maximize a firm’s profits and value.”).

¹³⁹ See Dobbs, *The Law of Torts* § 334 at 908 (cited in note 23); Harper, James, and Gray, 5 Harper, James and Gray on Torts § 26.1 at 9 (cited in note 33).

¹⁴⁰ Shavell, *Economic Analysis of Accident Law* at 173 (cited in note 131); Posner, 1 J Legal Stud at 43 (cited in note 33); Sykes, 93 Yale L J at 1251 (cited in note 133) (“Alternatively, vicarious liability may lead to the employment of more financially responsible agents with an attendant increase in loss-avoidance effort.”).

stock option plans for employees who respect constitutional rights, as well as penalties for those whose behavior puts those rights at risk.¹⁴¹

Nondeterrence grounds also provide justification for respondeat superior liability. One longstanding rationale is fairness: a business that enjoys the profits of its employees' labor also should accept the burdens of its employees' job-related misconduct.¹⁴² Additionally, firms generally are better risk-bearers than their employees because they can purchase insurance more efficiently than employees (who would each have to purchase insurance separately)¹⁴³ and can spread the costs of liability across the entire firm (as well as its customers) rather than concentrating all of the risk on a single employee.¹⁴⁴ Also, shifting liability to the employer increases the likelihood that injured plaintiffs will receive full compensation, as there will be some cases in which an employee will be immune or will be judgment proof and not indemnified by the employer.¹⁴⁵

Even if employers and employees do bargain for the employer to assume the employee's liability risk through indemnification, indemnification is unlikely to deter misconduct as effectively as respondeat superior liability because employees can claim immunity for good faith actions and because bad faith actions often fall outside the scope of indemnification provisions.¹⁴⁶

To be sure, the deterrent effect of respondeat superior liability is limited, as the employer will invest in liability prevention measures only up to the point that the cost of prevention exceeds the expected cost of liability.¹⁴⁷ But the rule still provides for greater deterrence than

¹⁴¹ Sykes, 93 Yale L J at 1237 (cited in note 133).

¹⁴² See Restatement (Second) Agency § 219, comment a at 483 (ALI 1958) (“[I]t would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment, and the frailties of those working under his direction and for his benefit.”); Achtenberg, 73 Fordham L Rev at 2202 (cited in note 30) (stating that a “prominent nineteenth-century justification for respondeat superior was the concept that . . . those who hope to profit from an activity also must bear its costs”); Beermann, 48 DePaul L Rev at 646 (cited in note 72) (noting that it is “fair to hold employers liable” for the torts of employees because employers are the beneficiaries of their employees work).

¹⁴³ See Sykes, 93 Yale L J at 1236 (cited in note 133); Kramer and Sykes, 1987 S Ct Rev at 268 (cited in note 70).

¹⁴⁴ See Harper, James, and Gray, 5 *Harper, James and Gray on Torts* § 26.1 at 8 & n 17 (cited in note 33); Mead, 65 NC L Rev at 539–40 (cited in note 62); George D. Brown, *Municipal Liability under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati—The “Official Policy” Cases*, 27 BC L Rev 883, 893–94 (1986).

¹⁴⁵ See Beermann, 48 DePaul L Rev at 646 (cited in note 72); Kramer and Sykes, 1987 S Ct Rev at 277–78 (cited in note 70).

¹⁴⁶ See Part IV.A.

¹⁴⁷ See Posner, 1 J Legal Stud at 42–43 (cited in note 33).

placing liability on the individual alone.¹⁴⁸ And although a small number of scholars question how strongly respondeat superior liability deters future torts,¹⁴⁹ many scholarly criticisms of vicarious liability do not question the underlying doctrine, but instead question its application to discrete areas of law.¹⁵⁰

Thus, conventional tort theory provides several reasons for imposing respondeat superior liability on private § 1983 defendants. The fact that private entities may perform public functions does not change this analysis. Even when performing public functions or acting in concert with the government, private entities are still profit motivated and still sensitive to tort liability risks. In fact, respondeat superior may be an especially effective deterrent in the arena of public functions because poor employee training and retention can be a particular problem for certain privatized government services. Private prisons provide a good example. Labor accounts for as much as

¹⁴⁸ The fact that employers may not pay liability judgments directly but instead may obtain liability insurance does not undermine the efficiency benefits of respondeat superior liability. Initially, many governmental and private entities—including private entities that perform core public functions—self-insure. See Corrections Corporation of America, *Corrections Corporation of America 2004 Annual Report* 74 (stating that CCA is “subject to substantial self-insurance risk” for ongoing litigation); Susan A. MacManus and Patricia A. Turner, *Litigation as a Budgetary Constraint: Problem Areas and Costs*, 53 Pub Admin Rev 462, 468 (1993) (indicating that many cities and counties have shifted to self-insurance as insurance costs have risen); Gary T. Schwartz, *The Ethics and Economics of Tort Liability Insurance*, 75 Cornell L Rev 313, 315 (1990) (noting that many defendants are “self-insured”). If insurance is thought to promote effective deterrence, insurance likely will still underdeter in the absence of respondeat superior liability. To the extent that insurance premiums are tied to behavior that exposes an employer to liability, those premiums will not encourage employers to take action to reduce the risk of employee misconduct if the employers are not on the hook for their employees’ actions. If the concern is that insurance will have the opposite effect—that is, that it will make entities non-responsive to liability risk because the insurance company is the one that pays out the judgment—that concern also seems unfounded. Unless a company’s insurance premiums are flat, premiums would likely rise in relation to the number of adverse judgments. See, for example, Schwartz, 75 Cornell L Rev at 326–33 (comparing flat and responsive insurance). Additionally, insurance may actually improve deterrence because insurance premiums rise and fall based on how an entity behaves in order to minimize risk whereas legal liability only deters in cases where a plaintiff files suit and prevails either through judgment or settlement.

¹⁴⁹ Consider Gary T. Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S Cal L Rev 1739, 1755–64 (1996) (critiquing various deterrence rationales for vicarious liability but nonetheless concluding that vicarious liability can further deterrence objectives in certain circumstances). For an attack on vicarious liability as nothing more than an effort to reach “deep pocket[s],” see T. Baty, *Vicarious Liability* 146–54 (Oxford 1916).

¹⁵⁰ See generally Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 Ga L Rev 509 (1996) (addressing arguments for restricting vicarious liability in hostile work environment sexual harassment cases); Arlen and Carney, 1992 U Ill L Rev 691 (cited in note 132) (arguing against imposing vicarious liability in “fraud on the market” cases).

70 percent of the cost of operating a prison.¹⁵¹ Consequently, reducing labor costs is an easy way for a private prison to boost profits.¹⁵² Private prison companies have attempted to lower their costs by reducing both wages¹⁵³ and staffing levels.¹⁵⁴ The result of lower wages is greater employee turnover—one report stated that the average employment duration for Corrections Corporation of America employees was a scant three months¹⁵⁵—meaning that employees have less experience, receive less training, may feel less job satisfaction, and may invest less in their jobs or show less concern about performing well.¹⁵⁶ All of these factors increase the risk that employees will be less prepared to handle difficult situations from which constitutional violations are likely to arise.¹⁵⁷ One study concluded that private prisons

¹⁵¹ See Austin and Coventry, *Emerging Issues on Privatized Prisons* at 16 (cited in note 13); John Donohue, *Prisons for Profit: Public Justice, Private Interests* 14 & n 55 (Economic Policy Institute 1988), online at http://epi.3cdn.net/e6e28612a19ac589e8_ozm6ibbye.pdf (visited Aug 9, 2009); Sharon Dolovich, *State Punishment and Private Prisons*, 55 Duke L J 437, 475 & n 134 (2005) (citing sources indicating that two-thirds or more of a private prison's budget goes to labor costs).

¹⁵² See Dolovich, 55 Duke L J at 475–76 & n 138 (cited in note 151) (stating that private prison officials view cutting costs of employee staffing and training as essential for maintaining profitability); Note, 115 Harv L Rev at 1879 (cited in note 131) (stating that in general, private companies' "main savings come from reducing labor costs"); Austin and Coventry, *Emerging Issues on Privatized Prisons* at 16 (cited in note 151) (stating that private prisons claim to save 10 to 20 percent in expenses with "efficient handling of labor costs").

¹⁵³ See Judith Greene, *Bailing out Private Jails*, Am Prospect 23, 25 (Sept 10, 2001) (asserting that private prisons offer "wages and benefits [that are] substantially lower than those in government-run prisons"). Margaret Talbot, a reporter who investigated private detention facilities, cites one report concluding that private detention facilities "offer significantly lower salaries than public state correctional agencies," as well as an internal federal government memo detailing that the Corrections Corporation of America (CCA), the nation's largest private prison operator, pays new employees almost 30 percent less than county prison employees. See Talbot, *The Lost Children*, New Yorker at 64 (cited in note 13).

¹⁵⁴ See Austin and Coventry, *Emerging Issues on Privatized Prisons* at 52 (cited in note 13) ("[T]he number of staff assigned to private facilities is approximately 15 percent lower than the number of staff assigned to public facilities."); Talbot, *The Lost Children*, New Yorker at 66 (cited in note 13) (citing a study concluding that private facilities offer "significantly lower staffing levels" than public facilities); Aman, 14 Ind J Global Legal Stud at 310 (cited in note 14) (describing an investigation of a private prison healthcare company that showed frequent turnover and poor training of the company's physicians). See also Carla Crowder, *Sex Scandal Rattles Private Prison*, Rocky Mountain News A5 (Sept 26, 1999).

¹⁵⁵ See Talbot, *The Lost Children*, New Yorker at 64 (cited in note 13).

¹⁵⁶ For example, one provider of prison health care, Correctional Medical Services, has hired a number of medical personnel with suspended or revoked medical licenses. See Andrew Skolnick, *Prison Deaths Spotlight How Boards Handle Impaired, Disciplined Physicians*, 280 JAMA 1387, 1387 (1998).

¹⁵⁷ See, for example, Dolovich, 55 Duke L J at 461 & n 89 (cited in note 151) (providing examples of abuse and mistreatment of private prison inmates that may have resulted from the prison's focus on containing costs).

had a higher rate of assaults and major disturbances,¹⁵⁸ and a government report on misconduct at a privately run prison in Youngstown, Ohio attributed many of the prison's problems to inadequate training and experience.¹⁵⁹ Although the private prison industry is just one example, it suggests, consistent with the theoretical underpinnings for respondeat superior liability, that private employers can reduce the level of employee misconduct by investing in additional training and offering better wages. The lack of a respondeat superior rule, however, may reduce the employer's incentive to do so.

Of course, one could argue that respondeat superior is unnecessary to deter employer decisions to understaff and undertrain employees out of a desire to cut costs because those actions would satisfy *Monell's* custom or policy standard. That may not be the case, however, for several reasons. First, many cases of inadequate training or hiring of employees will not satisfy the custom or policy standard, which requires not just negligence, or even gross negligence, but a showing that the employer was deliberately indifferent to the risk of a constitutional violation and that the violation was a "plainly obvious" consequence of the employer's actions.¹⁶⁰ Second, even where the employee's misconduct might result from a custom or policy, actually proving the existence of the custom or policy often is very difficult, requiring significant additional discovery into the employer's knowledge, customs, and general practices. Documenting an illegal custom

¹⁵⁸ See Austin and Coventry, *Emerging Issues on Privatized Prisons* at 52 (cited in note 13). See also Talbot, *The Lost Children*, *New Yorker* at 66 (cited in note 13) (citing one study that found a significantly higher assault rate at private prisons than at public prisons); Dolovich, 55 *Duke L J* at 483 (cited in note 151) (suggesting that "guards who are insufficiently trained may well resort to force more readily than guards with adequate training and experience"). Although it is difficult to obtain data on private prisons, let alone to conduct an adequate comparison between public and private prisons, Talbot relays that the authors of the study which found higher assault rates stated that as a general matter, higher employee turnover rates correlate with higher violence. Talbot, *The Lost Children*, *New Yorker* at 66 (cited in note 13). See also Dolovich, 55 *Duke L J* at 502 (cited in note 151) ("[M]eaningful data do exist showing elevated levels of physical violence in private prisons."); Ken Kolker, *Critics Not Convinced Youth Prison is Fixed*, *Grand Rapids Press A1* (Aug 24, 2000) (reporting that a privately run juvenile prison, as a result of understaffing, experienced more violence than an adult maximum security prison in the same state).

¹⁵⁹ See John L. Clark, Office of the Corrections Trustee, *Report to the Attorney General: Inspection and Review of the Northeast Ohio Correctional Center* 7 (Nov 25, 1998) (noting "the lack of correctional experience on the part of all staff, especially supervisors" who were "not yet sufficiently experienced or trained for their duties"), online at <http://www.usdoj.gov/ag/youngstown/youngstown.htm> (visited Aug 9, 2009). See also Austin and Coventry, *Emerging Issues on Privatized Prisons* at 59 (cited in note 13) (noting that "inexperienced staff" and "inadequate training" of staff contributed to the problems at the Youngstown, Ohio prison); Dolovich, 55 *Duke L J* at 461 (cited in note 151) (describing inmate abuse at Youngstown).

¹⁶⁰ See notes 66–67 and accompanying text.

or policy is not easy, especially considering that in many cases the custom may take the form of informal, tacit “unwritten rules” rather than an easily identified, explicit policy. Third, even where there is an unlawful custom, the governmental entity, rather than the private entity, may be considered the final policymaker as long as it retains some oversight authority, which effectively lets the private entity off the hook.¹⁶¹ When privatization occurs at the state level, this means that the plaintiff cannot recover damages at all because the state has immunity from damages. Finally, the custom or policy standard itself has been criticized as ill-defined and expensive to litigate.¹⁶² The scope-of-employment standard, by contrast, provides better notice to employers about when they will be liable for employee misconduct.¹⁶³ Greater predictability leads to greater efficiency by enabling employers to order their behavior in advance.

At bottom, given both the general view that respondeat superior can promote deterrence and the fact that respondeat superior is a foundational part of the tort system, imposing respondeat superior liability on private parties subject to § 1983 likely would further the statute’s purposes by reducing constitutional violations.

2. Public entity response to respondeat superior liability.

Although respondeat superior may work well in the private sector, it is much less clear that it will effectively deter public entities from violating constitutional rights. How damages judgments affect government actors is not as well understood as how they affect private actors. This is because unlike a private firm, a government’s primary

¹⁶¹ See, for example, *Austin v Paramount Parks, Inc.*, 195 F3d 715, 729–30 (4th Cir 1999) (finding that a private defendant was not a final policymaker); *Howell v Evans*, 922 F2d 712, 725 (11th Cir 1991) (finding that prison healthcare provider was not a final policymaker because its decisions were subject to state review); *Hicks v Frey*, 992 F2d 1450, 1458 (6th Cir 1993) (same).

¹⁶² See Schuck, 77 Georgetown L J at 1781 (cited in note 70) (“[T]he indeterminacy of the existing ‘official policy’ limitation is surely a source of wasteful litigation.”). Consider Erwin Chemerinsky, *Rethinking State Action*, 80 Nw U L Rev 503, 548–49 (1985), citing Thomas G. Quinnt, *State Action: A Pathology and a Proposed Cure*, 64 Cal L Rev 146, 155–56 (1978) (suggesting that abolishing the state action doctrine could reduce litigation costs because the incoherence of the existing state action doctrine forces litigants to try and create finer and finer distinctions in the boundary between state action and private action).

¹⁶³ Courts have many more opportunities to define the scope of employment standard, which applies to virtually every private tort action involving a business defendant, than the custom or policy standard, which applies only in § 1983 actions and only to municipal defendants. Moreover, the custom or policy standard is only thirty years old, whereas courts have been defining scope of employment since the nineteenth century. See also Michael J. Gerhardt, *Institutional Analysis of Municipal Liability under Section 1983*, 48 DePaul L Rev 669, 682 (1999) (stating that the respondeat superior rule is a “test that judges can easily understand and administer”).

motivation is not to maximize profit, but to provide public services.¹⁶⁴ Because governments are not motivated primarily by profit, they may be less likely than private firms to respond to tort liability incentives.¹⁶⁵

Several theories attempt to explain what motivates government behavior in the absence of a strong profit motive. One common theory is that government officials, like anyone else, are rational actors that seek to maximize their self-interest. Elected officials, therefore, may be motivated to “respond[] primarily to political incentives, not financial incentives,” such as maximizing one’s chance of reelection.¹⁶⁶ One proponent of this theory is Professor Daryl Levinson, who has written a series of articles asserting that a government’s electoral incentives do not always align with its financial incentives and that as a result governments may not be responsive to damages awards.¹⁶⁷ For agency officials, self-interest may mean maximizing their own individual budgets or their jurisdictional authority.¹⁶⁸ Agency officials will take actions that demonstrate a need for more money and will avoid actions that tend to reduce the resources available for agency priorities.

¹⁶⁴ David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Private Sector* 198 (Addison-Wesley 1992); James O. Wilson, *Bureaucracy: What Public Agencies Do and Why They Do It* 115 (Basic Books 1989) (“To a much greater extent than is true of private bureaucracies, government agencies . . . cannot lawfully retain and devote to the benefit of their members the earnings of the organization.”); Kramer and Sykes, 1987 S Ct Rev at 278 (cited in note 70) (“With the possible exception of certain independent, proprietary governmental entities, however, municipal agencies are not usually motivated by the desire to maximize profits.”).

¹⁶⁵ See Daryl J. Levinson, *Empire-building Government in Constitutional Law*, 118 Harv L Rev 915, 965–66 (2005) (arguing that government bureaucracies, which do not seek to maximize profit, have little reason to be concerned with losing money to litigation judgments); Trebilcock and Iacobucci, 116 Harv L Rev at 1426–27 (cited in note 129) (noting that government will be less responsive than private enterprise to damage judgments due to differing incentive structures).

¹⁶⁶ Levinson, 118 Harv L Rev at 966 (cited in note 165) (explaining that government officials care about damage awards only to the extent that the awards drain funds that would otherwise go to preferred political constituencies). See also Edward L. Rubin and Malcom M. Feeley, *Judicial Policy Making and Litigation against the Government*, 5 U Pa J Const L 617, 621–22 (2003) (describing the public choice perspective, which holds that political actors are motivated primarily by their desire to maintain the benefits of their status as influential policy agents); David R. Mayhew, *Congress: The Electoral Connection* 13–17 (Yale 1975) (arguing that the primary goal of members of congress is to be reelected).

¹⁶⁷ See, for example, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U Chi L Rev 345, 347 (2000); Levinson, 118 Harv L Rev at 966 (cited in note 165). Levinson’s articles have spawned significant debate regarding damages and governmental deterrence. See notes 185–89 and accompanying text.

¹⁶⁸ See William A. Niskanen, Jr, *Bureaucracy and Representative Government* 36–42 (Aldine 1971) (“Bureaucrats maximize the total budget of their bureau during their tenure.”). See also Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U Pa J Const L 797, 844–47 (2007) (asserting that governmental entities seek to avoid actions that will expose them to significant financial liabilities).

Other models take a different approach. Some suggest that government actors seek to maximize public welfare, even at the expense of their own.¹⁶⁹ Finally, some believe that governments do not behave that much differently than private parties and that, like private parties, they have an incentive to minimize the amount of litigation damages they pay out.¹⁷⁰

Each of these models is consistent with the idea that damages liability can deter misconduct. For the budget maximizer, a damages judgment could exert a deterrent effect if the payout correspondingly reduced the amount of money that the offending agency can devote to other programs. For the electorally driven, damages could deter future misconduct if the award angered the government's constituents. Indeed, some scholars point to the fact that states have universally enacted tort immunity statutes as evidence that governments are sensitive to the risk of damages liability.¹⁷¹

What is important, however, is that whether or not governments respond to damages awards, they do not respond in the same manner as private parties. Unlike the clear economic incentive for private entities to maintain an efficient level of liability, the political incentives facing government actors are muddier. For governments, reducing damages awards is an instrumental concern designed to achieve some other goal—reelection, agency power, or social welfare. As explained below, because the relationship between reducing damages liability and those other goals can become attenuated, it is possible that government actors may not respond to tort liability as strongly as private actors.

First, although government agencies may want to maximize their budgets, a disconnect can exist between the part of the government bureaucracy responsible for the violation and the part that actually

¹⁶⁹ Gillette and Stephan, 8 S Ct Econ Rev at 111 (cited in note 31); Ronald A. Cass and Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 Va L Rev 257, 271 (1991). This model may sometimes lead to the same outcomes as the budget-maximizing model. “[G]overnmental officials generally believe that they are advancing the public good by increasing the authority and responsibility of their agency, with an increase in the budget and power of the agency as an accompanying consequence.” Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experimental Analysis*, 101 Nw U L Rev 861, 874 (2007).

¹⁷⁰ See, for example, Harold J. Krent, *Preserving Discretion without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L Rev 871, 872 (1991) (“If the theory of tort law is in part to compel private entities to become more efficient in light of potential tort liability, then there is no reason why potential liability should not similarly force the government to be more prudent in its operations.”).

¹⁷¹ See, for example, Rosenthal, 9 U Pa J Const L at 841 (cited in note 168) (“Evidence that tort liability exacts a political price by reducing political control over public resources is also reflected in the pattern of immunity legislation.”).

pays the judgment. For some governmental entities, litigation payments do not come from the budget of the offending employee's agency, but from a general litigation or judgment fund.¹⁷² In such situations, damages liability imposes no direct punishment on the agency whose employee committed the violation. Only if the government connects the budgetary cost of litigation to the agency employing the responsible party could there be any effect, but it is far from clear how strong that connection is.¹⁷³

Second, even if litigation judgments did come from the agency's budget, the longer the time horizon is between when a violation occurs and when damages are paid out, the less likely it is that a judgment will affect government behavior. Section 1983 litigation can take a long time from start to finish. Several years may pass before a lawsuit is even filed,¹⁷⁴ and the complex nature of § 1983 litigation can add several more years or even a decade to the life of a case.¹⁷⁵ By the conclusion of the lawsuit, the voting public may not associate the damages

¹⁷² See, for example, Daniel L. Low, *Nonprofit Private Prisons: The Next Generation of Prison Management*, 29 New Eng J on Crim & Civ Confinement 1, 41 (2003) (stating that lawsuits against federal prisons are paid out of a general judgment fund); Roderick M. Hills, Jr, *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 Stan L Rev 1225, 1228 (2001) (stating that some state governments, as well as the federal government, maintain separate judgment funds to pay litigation damages and concluding that "damages judgments do not affect an agency's bottom line"). Some municipalities also appear to have general liability funds for satisfying judgments. See Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 Geo Wash L Rev 453, 472–73 (2004) (noting that the city of Los Angeles paid out \$79.2 million in civil judgments from 1991–1995, that New York City paid out \$70 million from 1994–1996, and that the city of Chicago budgeted \$30 million per year for payment of civil liability judgments). Indemnification practices, however, may mitigate this effect, since indemnification payments come from the relevant agency's budget rather than from a general judgment fund. See Cass and Gillette, 77 Va L Rev at 323 (cited in note 169).

¹⁷³ See Hills, 53 Stan L Rev at 1246–47 (cited in note 172) (asserting that legislators do not ordinarily respond to litigation judgments by cutting the offending agency's budget). In fact, in some cases, litigation actually can result in *increased* budgets for particular agencies. See Armacost, 72 Geo Wash L Rev at 475 (cited in note 172) (describing how police departments have received budgetary increases in the face of lawsuits).

¹⁷⁴ Potential plaintiffs typically have several years before the statute of limitations runs to decide whether to file suit. Section 1983 borrows the statute of limitations from the law of the relevant state, which typically is two or three years. See generally Daniel E. Feld, *What Statute of Limitations Is Applicable to Civil Rights Action Brought under 42 U.S.C.A. § 1983*, 45 ALR Fed 548 (2008) (collecting statutes of limitations for different states).

¹⁷⁵ For example, the DC Circuit issued a § 1983 decision in early 2008 concerning allegations of misconduct occurring from 1991–1997. See *Brown v District of Columbia*, 514 F3d 1279, 1281 (DC Cir 2008). Moreover, the issue on appeal was the grant of the defendant's motion to dismiss, meaning that the case had not yet even proceeded to discovery, let alone summary judgment or trial. See *id.* In *Thompson v Connick*, 553 F3d 836 (5th Cir 2008), the underlying violation, a wrongful conviction based on prosecutorial misconduct, occurred in 1985 and the Fifth Circuit did not affirm the jury's damage award until 2008. *Id.* at 842–43.

paid out with the underlying violation, and so there may be little electoral or budgetary consequence for failing to take corrective action. At the time damages are actually paid, there may even be a different administration in place from when the violation occurred. The officials who have to respond to the judgment either by raising taxes, diverting spending from other programs, or reorganizing agency budgets to pay the judgment therefore may not be the ones whose employees committed the violations.¹⁷⁶ As a result, even assuming that voters do account for budgetary costs in their voting decisions, they would penalize the wrong administration. Tort liability likely will have less deterrent power if public officials know that there is a good chance that neither they nor their agencies will be the ones to pay the price for the actions of their employees.¹⁷⁷

Third, while politically accountable government entities may respond to litigation damages by addressing the conduct giving rise to liability, they also may respond by making symbolic or superficial changes designed to create the public appearance of addressing the underlying problem.¹⁷⁸ In other words, governments may find it more effective to perpetuate bad behavior while conveying to the voting public that it is correcting the problem.¹⁷⁹

Fourth, for financial penalties to translate into political accountability, voters must associate any pecuniary impact they feel with constitutional liability and choose to hold elected officials responsible as a result. Whether this actually happens in practice is uncertain. Paying civil liability damages affects voters either by leading to increased tax-

¹⁷⁶ Recently, a newly elected district attorney in New Orleans was saddled with a \$15 million jury award against the office for prosecutorial misconduct occurring more than twenty years earlier. See Michael Kunzelman, *D.A. Says \$15M Ruling May Bankrupt New Orleans*, Philadelphia Inquirer A9 (Jan 8, 2009). Consider Freeman, 116 Harv L Rev at 1326 (cited in note 12) (asserting that the greater the distance between the electorate and the elected, the less effective political accountability will be).

¹⁷⁷ At the same time, long time horizons between violations and judgments also may affect private entities. Publicly traded companies may act out of a short-term interest in boosting stock prices, and if actions leading to civil rights violations create a short-term benefit but a greater long-term harm, those companies might find it in their interest to tolerate the violations. To the degree that long time horizons undermine the efficacy of tort incentives, however, they may have less of an effect in the private sector than in the public sector. Even where private companies have an interest in boosting short-term stock prices, litigation risks will affect stock prices and a company that seeks short-term gain at the cost of elevating its risk of civil rights liability may find that investors account for that risk in the present by driving down the stock price. See Note, 115 Harv L Rev at 1884 (cited in note 130).

¹⁷⁸ Charles R. Epp, *Litigation Stories: Official Perception of Lawsuits against Local Governments* (unpublished presentation, 1998 Annual Meeting of the Law & Society Association).

¹⁷⁹ See *id.*

es or to reduced spending on other services. In many jurisdictions, the cost of paying judgments, while perhaps significant in absolute terms, may be marginal when spread across all taxpayers in the jurisdiction, especially if the judgment represents only a small percentage of the government's budget.¹⁸⁰ Consequently, voters may not connect marginally higher tax rates or marginally reduced spending with specific constitutional violations rather than with myriad other government decisions that affect taxes and spending.¹⁸¹ To the extent that the risk of damages awards exerts some pressure on public officials to encourage public employees to abide by the law, the attenuated relationship between damages payments and voter perceptions of elected officials blunts that deterrent effect.

Moreover, even if government actors desire to reduce damages liability, respondeat superior may do less than anticipated to help them achieve that goal because many governments lack the flexibility to take measures that reduce the risk of future employee misconduct. Because of rigid civil service laws, governments often are less able

¹⁸⁰ Damages awards against governmental entities can be significant in absolute terms. For example, between 1994 and 1996, the city of New York paid out \$70 million in awards in police misconduct cases alone. Rosenthal, 9 U Pa J Const L at 835 (cited in note 168); Armacost, 72 Geo Wash L Rev at 472–73 (cited in note 172). From a percentage perspective, however, evidence suggests that § 1983 judgments account for a tiny fraction of agency budgets. See Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L Rev 719, 736–39 (1988) (finding in a study of three federal districts that § 1983 damages payouts accounted for 0.02 percent of government expenditures and cost thirty-five cents per taxpayer). This may be less true at the municipality or county level, however, given that most municipalities and counties will have smaller budgets than states. Some local government entities have asserted that civil rights judgments exert a significant financial impact. See Kunzelman, *D.A. Says \$15M Ruling May Bankrupt New Orleans*, Philadelphia Inquirer at A9 (cited in note 176) (reporting statements from a New Orleans district attorney that a \$15 million verdict in a § 1983 wrongful prosecution action threatened to bankrupt the city). Consider Charles R. Epp, *Exploring the Costs of Administrative Legalization: City Expenditures on Legal Services, 1960–1995*, 34 L & Socy Rev 407, 426–27 (2000) (concluding that total municipal legal expenditures have risen over time, but have not risen dramatically); MacManus and Turner, 53 Pub Admin Rev at 470 (cited in note 148) (concluding that total litigation costs, as opposed to paying judgments, exerted a budgetary impact on municipalities).

¹⁸¹ See Trebilcock and Iacobucci, 116 Harv L Rev at 1427 (cited in note 129) (noting that citizens have too small a financial stake in any particular set of government decisions to effectively hold public officials accountable). See also Freeman, 116 Harv L Rev at 1326 n 177 (cited in note 12) (questioning whether voters actually hold public officials accountable for poor performance decisions, and stating that “highly attenuated accountability of this kind rarely leads to disciplinary action by voters”); Hills, 53 Stan L Rev at 1235 (cited in note 172) (asserting that taxpayers have less incentive to “monitor” governments than do shareholders of private organizations, and that “[g]iven this lax monitoring, one cannot assume that government officials will internalize the costs that they impose on citizens simply because the government pays damages to those citizens derived from the government’s treasury”).

than private entities to reward or punish employees, change promotion and demotion practices, or create incentives for employees to respect constitutional rights.¹⁸²

Finally, the fairness rationale for respondeat superior, that the entity that enjoys the profits of its employees' labor also should bear the risk of their misconduct, carries less force in the public sector than in the private sector. Although in both cases the fairness rationale supports providing full compensation for an injured victim, public entities are not motivated by profit, and it is the general populace that ultimately benefits from the labor of government employees rather than a group of private investors or shareholders.¹⁸³ Indeed, the Supreme Court has relied upon the perceived unfairness of punishing innocent taxpayers for the wrongdoing of government employees to give governmental entities other § 1983 immunities.¹⁸⁴

The view that damages liability does not deter government misconduct is a controversial one. Professor Levinson's work, for example, has inspired numerous responses by commentators contending that civil liability risk can cause public institutions to change their behavior.¹⁸⁵ Although this Article does not attempt to resolve that debate,

¹⁸² In *Richardson*, the Supreme Court relied on the relative inflexibility of public civil service laws in denying qualified immunity for private prison guards. The Court concluded that private employees can use rewards and punishments to induce employees to act properly while public civil service laws "may limit the incentives or the ability of individual [governmental] departments or supervisors flexibly to reward, or to punish, individual employees." 521 US at 410–11. See also Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder*, 33 Pub Cont L J 263, 269 (2004) (noting that private employers have greater flexibility than governmental entities in devising employee incentive programs); Kornhauser, 70 Cal L Rev at 1351–52 (cited in note 133).

¹⁸³ At the same time, some courts have applied the fairness rationale to public defendants, reasoning that because a public entity performs a service that benefits the general populace, tort liability arising out of that service also should be spread across the population. See, for example, *Mary M. v City of Los Angeles*, 814 P2d 1341, 1349 (Cal 1991) (stating that "[t]he cost resulting from misuse of [police] power should be borne by the community, because of the substantial benefits that the community derives from the lawful exercise of police power," in holding that a city could be held vicariously liable for a rape committed by a municipal police officer).

¹⁸⁴ In *City of Newport v Fact Concerts, Inc*, 453 US 247 (1981), the Supreme Court held that municipalities are immune from punitive damages under § 1983, concluding that it would be unfair to impose punishment "on the shoulders of blameless or unknowing taxpayers" for the wrongs of municipal employees. *Id.* at 267.

¹⁸⁵ See, for example, Rosenthal, 9 U Pa J Const L at 799 (cited in note 168) (arguing that government officials have an interest in avoiding damages liability because they want to avoid tradeoffs between paying litigation judgments and spending on other policy initiatives); Margo Schlanger, *Inmate Litigation*, 116 Harv L Rev 1555, 1679–90 (2003) (arguing that public prison officials are concerned about the risk of damages awards and seek to reduce liability exposure); Gilles, 35 Ga L Rev at 848 (cited in note 73) ("There are a number of reasons to expect that the

several points are worth noting. First, several scholars who assert that tort liability deters governments also acknowledge that it is the nonfinancial effects of liability such as negative publicity that “more than anything else” induce governments “to take remedial actions.”¹⁸⁶ The effect of negative publicity is significant, as reducing negative publicity may also reduce the likelihood that lawsuits will be filed in the first place.¹⁸⁷ As Part III.B explains, the fact that governments may be more responsive than private entities to the risk of negative publicity underscores the importance of imposing respondeat superior liability on private entities under § 1983 even if municipalities remain exempt. Second, while several authors argue that a government’s concern about its own budget will induce it to avoid damages liability so that it can minimize the amount of the budget devoted to litigation payouts and maximize the amount that it can devote to other priorities,¹⁸⁸ that incentive, as explained above, is mitigated by both the existence of separate judgment funds that insulate agency budgets from the consequences of their employees’ actions and the long time horizon between constitutional violations and final payouts. Third, although several commentators conclude that tort liability influences government behavior, they appear to have some difficulty identifying the substantive source of that belief, relying instead in part on “common sense” and personal belief.¹⁸⁹

imposition of constitutional tort damage awards against individual officers or their municipal employers does have a deterrent effect on the behavior of these governmental actors and entities.”).

¹⁸⁶ Gilles, 35 Ga L Rev at 861 (cited in note 73) (acknowledging the role that information plays in inspiring policymakers’ actions). See also Schlanger, 116 Harv L Rev at 1681 (cited in note 185):

Moreover, anyone who reads the newspaper or watches television news knows that inmate litigation can trigger bad publicity about correctional institutions and officials. . . . [E]ven for an agency that doesn’t care about payouts (perhaps because those payouts come from some general fund rather than the agency’s own budget), media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses.

¹⁸⁷ See Charles R. Epp, *The Fear of Being Sued: Variations in Perceptions of Legal Threat among Managers in the United States* (unpublished presentation, 2001 Annual Meeting of the Law & Society Association) (asserting that media exposure of misconduct by the government leads to an increase in lawsuits filed against it).

¹⁸⁸ See, for example, Rosenthal, 9 U Pa J Const L at 844–47 (cited in note 168); Schlanger, 116 Harv L Rev at 1681 (cited in note 185).

¹⁸⁹ See Gilles, 35 Ga L Rev at 855 (cited in note 73) (“Common sense supports this view that constitutional damages deter police misconduct to some appreciable degree.”); *id.* at 858 (“I believe we can reasonably postulate that government, when exposed to constitutional tort damages, is induced to take affirmative remedial steps to eliminate socially undesirable activity.”); James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 Harv CR-CL L Rev 393, 402 (2003) (“I am inclined to believe that the costs of constitutional violations will outweigh the benefits in most cases.”).

But perhaps most importantly, even if the participants in this debate disagree about how strongly damages liability influences government behavior, they appear to agree that the incentives created by damages actions affect governments in a different manner and to a different degree than they affect private parties. My point is not that damages liability does not deter governments *at all*, but that it does not deter them in the same way as it deters private parties. It is that difference that courts should account for when deciding whether to extend *Monell* to private entities. Unfortunately, courts are not doing so, and as a result may be underdetering constitutional misconduct by private entities that perform state functions.¹⁹⁰

B. Nonfinancial Constraints on Entity Behavior

On the flipside, just as respondeat superior liability may be more effective in deterring private entities than public ones, it also may be less necessary for deterring public entities because there are other accountability mechanisms, such as concerns about the electoral consequences of negative publicity that can accompany constitutional violations, that are more likely to keep governments in check than private parties.

Assuming that government actors are motivated, at least in part, by the goal of ensuring reelection, electoral incentives can encourage public officials to take actions to protect constitutional rights. Public officials ultimately are answerable to their constituents, and those who tolerate constitutional violations risk being thrown out of office. Although the financial penalty of a tort judgment may not have significant electoral impact, government violations of civil and constitutional rights can have adverse political consequences that elected officials would rather avoid. As previously explained, what may cause the most harm from an electoral perspective is not a damages award, but the

¹⁹⁰ It does not follow from the argument that tort damages do not deter governments very effectively that governments should not be subject to damages liability at all. Even if damages do not deter governments as well as they deter private parties, they still promote deterrence to some degree. Moreover, deterrence is only one of § 1983's purposes. The other primary purpose is compensation, for which damages are necessary. Section 1983 liability also serves other non-deterrence goals, such as satisfying community concerns in making wrongdoers pay for their misdeeds, and giving meaning and content to constitutional rights. See Park, 38 Harv CR-CL L Rev at 396 (cited in note 189) (arguing that "the constitutional remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries"); Rosenthal, 9 U Pa J Const L at 823 (cited in note 168) (describing the corrective justice theory of tort liability).

negative publicity that can accompany unconstitutional conduct.¹⁹¹ Exposing civil rights abuses, public corruption, or police brutality may be more likely to galvanize the public into holding its elected leaders accountable than paying out a damages award.¹⁹² Consequently, government agencies “reportedly fear scandal more than the monetary liability that might accompany it.”¹⁹³ This accountability in turn may prompt government officials to protect constitutional rights, just as damages liability may prompt private entities to take liability-avoidance measures.¹⁹⁴

Private entities also care about publicity and therefore will have an incentive, even in the absence of tort liability, to safeguard constitutional rights if there is a risk that constitutional violations will sully their reputations and negatively affect their opportunities to obtain future government contracts.¹⁹⁵ Publicity concerns, however, are effective in promoting accountability only to the extent that misconduct is likely to come to public light.¹⁹⁶ As explained below, there are two important ways in which the reputations of private entities that perform public functions are better insulated from public scrutiny than the reputations of government actors. First, open records laws and sunshine laws are important tools for opening government behavior to public view, yet many of these laws do not cover private entities that contract

¹⁹¹ See note 186 and accompanying text.

¹⁹² See *id.*

¹⁹³ *Armacost*, 72 *Geo Wash L Rev* at 475 & n 123 (cited in note 172).

¹⁹⁴ Even assuming electoral accountability mechanisms and publicity concerns generally succeed in deterring public actors, they can create perverse incentives where the political benefits of violating civil rights outweigh the costs. An electorate that values safety, for example, may prefer that police officers act aggressively, even if that leads to increased instances of excessive force and increased governmental liability. In those cases, bringing misconduct to public light may merely increase the popularity of elected officials in voters' eyes by publicizing the administration's efforts to promote safety. Although perverse incentives are a real concern, they will manifest only in the subset of cases where the political benefits of constitutional violations outweigh the costs. In any event, the shortcomings of electoral incentives would justify, if anything, *imposing* additional damages liability on government entities, not *exempting* private entities from traditional tort rules of respondeat superior liability.

¹⁹⁵ A developing literature regarding the theory of “social norms” posits that private actors have an incentive, even in the absence of legal constraints, to follow social norms (such as the norm that society should protect constitutional rights) because of the reputational consequences of being labeled a bad or untrustworthy actor. For a more comprehensive discussion of social norm theory, see Eric Posner, *Law and Social Norms* 1–35 (Harvard 2000).

¹⁹⁶ Social norm theory acknowledges that parties may be more likely to adhere to social norms when “the cost of obtaining and exchanging information about a group member's reputation is low.” Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation*, 57 *Ala L Rev* 1, 5 (2005).

with the government.¹⁹⁷ Second, although government monitoring of private contractors should motivate private entities to respect constitutional rights because of the risk that the government will revoke or decline to renew the contracts of habitual rights violators, the government's inability to adequately monitor private behavior means that private parties generally do not have to worry that their misconduct either will be discovered or will lead to the loss of future contracts. For private entities on which these nonfinancial checks exert less force, respondeat superior liability becomes that much more important for ensuring that private entities have sufficient incentive to reduce the risk of constitutional violations.

1. Open records laws.

One important way “to hold the governors accountable to the governed”¹⁹⁸ is to use state freedom of information (FOI) and sunshine laws to make the public aware of what its government is doing. Specifically, state FOI laws allow the public access to information that may be relevant to holding public officials accountable, such as information regarding government abuse and employee misconduct.¹⁹⁹

Most state FOI and open meeting laws, however, apply by their express terms only to public agencies, and not to private entities that contract with those agencies to perform public services.²⁰⁰ Although

¹⁹⁷ Open records laws, also known as freedom of information laws, make certain government records available for public inspection. See *NLRB v Robbins Tire & Rubber Co.*, 437 US 214, 221 (1978) (stating that the federal Freedom of Information Act (FOIA) requires that materials in the hands of federal agencies, subject to certain exceptions, must be made publicly available). Sunshine laws, also known as open meeting laws, make certain government meetings and deliberations open to the public. See Patience A. Crowder, “Ain’t No Sunshine”: Examining Informality and State Open Meetings Acts as the Anti-public Norm in Inner-city Redevelopment Deal Making, 74 *Tenn L Rev* 623, 625 (2007) (defining sunshine laws).

¹⁹⁸ *Robbins Tire & Rubber Co.*, 437 US at 242 (referring to FOIA).

¹⁹⁹ See, for example, *Encore College Bookstores, Inc v Auxiliary Service Corp.*, 663 NE2d 302, 305 (NY 1995) (holding that the purpose of New York’s FOI statute “is to shed light on government decision making, which in turn both permits the electorate to make informed choices regarding governmental activities and facilitates exposure of waste, negligence and abuse”); 94 *Op Ky Atty Gen* 27, No 94-ORD-27, 3 (Mar 2, 1994) (“[T]he courts and this Office have long recognized that complaints against public officers and employees are not exempt from inspection” under Kentucky’s Public Records Act.).

²⁰⁰ See generally Craig D. Feiser, *Protecting the Public’s Right to Know: The Debate over Privatization and Access to Government Information under State Law*, 27 *Fla St U L Rev* 825 (2000) (surveying different state public records laws). Only a few states have laws that explicitly apply to private entities. Florida’s FOI law applies to private entities that act “on behalf of any public agency,” and Georgia’s Open Records Act applies to “[r]ecords received or maintained by a . . . private entity in the performance of a service or function for or on behalf of an agency.” *Fla Stat Ann* § 119.011(2) (West); *Ga Code Ann* § 50-18-70(a) (Lexis). For a discussion about the applicabil-

courts in many states have interpreted their FOI statutes to include private entities in certain circumstances, the tests that state courts use differ from the state action test used for subjecting a private party to § 1983.²⁰¹ Some states, for example, ignore whether the private entity performs a public function and instead look to whether the records at issue are held by a public agency, meaning that private entities can avoid exposure simply by holding important materials themselves.²⁰² Others limit the reach of their FOI laws to private entities that are publicly funded.²⁰³

Of those states that do consider whether a private entity performs a public function, many make clear that “[a] private business does not open its records to public scrutiny merely by performing services on behalf of the state or a municipal government.”²⁰⁴ Most states consider a private entity’s public purpose as just one of several factors. These states often focus on factors that typically would not cover private entities that contract with the government to perform public services. Some states, for example, have declined to subject private entities to FOI laws where those entities did not receive significant public fund-

ity of the federal Freedom of Information Act to private parties, see Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U Mich J L Ref 249, 268–91 (1995).

²⁰¹ See, for example, *Olelo v Office of Information Practices*, 173 P3d 484, 495 (Hawaii 2007) (concluding that “we do not believe that the federal courts’ ‘state actor’ analysis used to determine constitutional obligations is helpful in determining the scope” of Hawaii’s open records act).

²⁰² See, for example, *Harvard Crimson, Inc v President & Fellows of Harvard College*, 840 NE2d 518, 521 (Mass 2006) (holding that records of a university police department did not fall within the state’s public records statute because they were created and held by the university rather than by the police); *City of Dubuque v Dubuque Racing Association*, 420 NW2d 450, 453–54 (Iowa 1988) (holding that records must be held by a public agency to be subject to the state’s open records law).

²⁰³ See generally Feiser, 27 Fla St U L Rev at 853–57 (cited in note 200) (listing states that require public funding to subject a private party to state open records laws). See also, for example, *State Defenders Union Employees v Legal Aid & Defender Association of Detroit*, 584 NW2d 359, 362 (Mich App 1998); 02 Op Okla Atty Gen 37, No 02-37, 5 (Aug 21, 2002). By contrast, public funding does not convert private action into state action for purposes of § 1983. See *Rendell-Baker v Kohn*, 457 US 830, 840–41 (1982).

²⁰⁴ *Oriana House, Inc v Montgomery*, 854 NE2d 193, 201 (Ohio 2006). See also, for example, *State Defenders Union Employees*, 584 NW2d at 362 (construing “funded” to mean receipt of a government subsidy); *Domestic Violence Services of Greater New Haven, Inc v FOI Commission*, 704 A2d 827, 832 (Conn App 1998) (“Performing a government service pursuant to a contract does not make an entity a public agency subject to the act.”); *Indianapolis Convention & Visitors Association, Inc v Indianapolis Newspapers, Inc*, 577 NE2d 208, 214 (Ind 1991); 02 Op Okla Atty Gen 37 at 6 (holding that private organizations “which contract to provide goods or service to the public on behalf of a governmental agency . . . are not subject to the requirements of the Oklahoma Open Meeting Act”).

ing.²⁰⁵ Others look at whether the private entity was created and managed by the government, which is not the case in most government contracting contexts.²⁰⁶ Consequently, courts have declined to apply open records laws to private parties even in situations where they have found that the private parties performed public functions.²⁰⁷

That FOI laws may not apply to private entities does not mean that information about those companies is unavailable. Even if privately held documents are not disclosable, governments often audit their contracting partners and those audits, since they are government documents, would be open to the public. Additionally, publicly held companies must publicly disclose information to the Securities and Exchange Commission.²⁰⁸ But those avenues may not be adequate substitutes for FOI laws. With audits, private companies may be able to claim statutory exemptions—for example, that requested documents contain trade secrets or confidential business information—that would not be applicable if the government were performing those

²⁰⁵ See *Marks v McKenzie High School Fact-finding Team*, 878 P2d 417, 425 (Or 1994); *Connecticut Humane Society v FOI Commission*, 591 A2d 395, 398 (Conn 1991) (relying on the fact that the Humane Society had not received public funds in almost sixty years in finding that it was not covered by the state's open records law).

²⁰⁶ See, for example, *Olelo*, 173 P3d at 496 (finding that a private body had to be owned, operated, or managed by the state to fall within the state's open records law); *California State University v Superior Court*, 108 Cal Rptr 2d 870, 880–84 (Cal App 2001) (indicating that only bodies created or controlled by the state are subject to the state's Public Records Act). There are a few states, however, in which the private entity's public function would be sufficient to subject it to open records laws. See, for example, Ga Code Ann § 50-18-70(a) (Lexis) (covering private entities that perform services “on behalf of” a public agency); *Encore College Bookstores*, 663 NE2d at 305–06 (holding that a private company running a public university's campus bookstore fell within the state's FOI law because its records were created for the benefit of the state); 94 Op Ky Atty Gen 27 at 4 (cited in note 199) (suggesting that private companies that contract with the government may lose their private character).

²⁰⁷ See, for example, *Oriana House*, 854 NE2d at 201 (acknowledging that a nonprofit company that ran a local correctional facility performed what “has traditionally been a uniquely government function” but finding that it was not subject to the state's open records law because the company was neither created nor controlled by the government); *Marks*, 878 P2d at 424–26 (finding that a factfinding body, which investigated the actions of a high school administration, performed a traditional public function and was created at the state's behest, but was not subject to the open records law because the body had limited independent authority and was not publicly funded); *Connecticut Humane Society*, 591 A2d at 397–99 (finding that the Humane Society was not subject to an open records law, even though the court found that the society performed a public function by helping to detain, shelter, and euthanize animals, and that Humane Society employees were authorized by statute to engage in law enforcement activities including arresting, detaining, and fining individuals who committed animal cruelty or interfered with the prevention of animal cruelty).

²⁰⁸ See, for example, Jack M. Beermann, *Administrative-law-like Obligations on Private[ized] Entities*, 49 UCLA L Rev 1717, 1721 (2002) (describing how securities laws “place a great deal of information about private corporations in the public domain”).

services itself.²⁰⁹ For example, private prisons routinely refuse on trade secret grounds to disclose documents relating to the use of force against prisoners.²¹⁰ Moreover, not all companies that perform traditional public functions are publicly traded. Thus, because state FOI laws do not cover many private entities that are subject to § 1983 to the same extent that they cover public entities, those laws may not promote the same degree of accountability that they do in the public sphere.

2. Monitoring and private accountability.

In theory, any constraints that deter government actors from violating constitutional rights also should trickle down to the private entities with whom they contract. If public officials have an incentive to minimize their own constitutional violations, they likely have a similar incentive to minimize the constitutional violations committed by entities with whom they contract because those violations can reflect badly on the government. Governments can penalize contractors who violate constitutional rights by not renewing their contracts, and can choose to contract with companies that are more likely to respect constitutional principles. Competition for government contracts should create an incentive for private entities to protect constitutional rights, making respondeat superior liability less important.

The assumption underlying this view is that governments can adequately monitor the actions of the private parties with whom they contract.²¹¹ Without effective and thorough monitoring through which

²⁰⁹ See Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub Cont L J 321, 345 (2004) (stating that responses to FOI requests involving private contractors “exhibit redactions of data that routinely would be available if public officials had performed the work”). See also *Encore College Bookstores*, 663 NE2d at 306–08 (finding that an auxiliary service company that operated a bookstore for a public university was subject to the state’s open records laws, but that the requested documents did not have to be disclosed because they contained protected commercial information).

²¹⁰ See, for example, Talbot, *The Lost Children*, New Yorker at 61 (cited in note 13) (describing how Corrections Corporation of America refused to respond to a FOIA request regarding the legal authority to use force on inmates on the ground that compliance would require it to disclose business secrets); Nina Bernstein, *Few Details on Immigrants Who Died in U.S. Custody*, NY Times A1 (May 5, 2008) (noting that documents detailing how a CCA prisoner was “shackled and pinned to the floor of the medical unit as he moaned and vomited, then left in a disciplinary cell for more than 13 hours, despite repeated notations that he was unresponsive and intermittently foaming at the mouth” were labeled “proprietary information—not for distribution”); Karen Testa, *ACLU Sues to Get Wackenhut-run Prison’s Records*, Miami Herald B2 (June 6, 1999) (describing how Wackenhut refused to disclose records relating to several of its prisons).

²¹¹ See, for example, Jack M. Beermann, *Privatization and Political Accountability*, 28 Fordham Urban L J 1507, 1526 (2001) (noting that where governments contract public services to

governments can assess how well private entities respect constitutional rights, governments will struggle to hold private entities accountable.²¹² Assuredly, there are many examples where government monitoring effectively rooted out poor performance by a private contractor.²¹³ On the whole, however, there are many reasons to believe that monitoring is not a fully effective device for maintaining private accountability.

Initially, regardless of how effectively governments monitor their contracting partners, respondeat superior liability can achieve the same goal of monitoring—that is, accountability—in a cheaper and more efficient way. A monitoring regime imposes an added layer of bureaucracy that is expensive and that further attenuates the link between the contracting party and the public officials ultimately accountable to the electorate. Instead of attempting to encourage private entities to respect constitutional rights by creating a cumbersome monitoring structure, it would be more efficient to force those entities to internalize the costs of their employees' misconduct through respondeat superior liability. Respondeat superior helps mitigate the need for, and can overcome the limitations of, government monitoring while still providing incentives for private entities to behave responsibly.²¹⁴ And because the private entity itself is probably in the best position to track its employees' behavior, placing responsibility on the private entity, rather than on the government, to ensure compliance with constitutional requirements will be more cost effective. In light of these advantages, the argument that government monitoring can hold private entities accountable, rather than removing a justification for respondeat superior liability, shows why respondeat superior liability is a good idea.

private parties, government agencies “will be responsible for monitoring the performance” of contracting parties).

²¹² Consider Metzger, 103 Colum L Rev at 1436–37 (cited in note 11) (“[C]lose government involvement is the best means for ensuring constitutional accountability.”); Jody Freeman, *The Private Role in Public Governance*, 75 NYU L Rev 543, 546–49 (2000) (emphasizing the importance of government monitoring for making private parties accountable).

²¹³ See, for example, Richard Lardner, *Contract for War Support Faulted; KBR Agreement Focus of Hearing*, Boston Globe 5 (May 5, 2009) (describing how a federal contractor responsible for supporting US troops in Iraq received a “withering review” after government audits exposed as much as \$4.7 billion in questionable costs); Dolovich, 55 Duke L J at 497 (cited in note 151) (noting that “states experimenting with privatization have rescinded a number of private prison contracts after contractor abuses came to light”).

²¹⁴ Of course, even with respondeat superior liability, governments will still have to monitor their contracts with private parties because governments need to track contract performance, not just a contractor's liability exposure. But respondeat superior liability can at least reduce the government's monitoring burden by allowing the government to devote its scarce resources to monitoring other aspects of the contracting process.

Additionally, monitoring itself is fraught with difficulties. In order to monitor effectively, a government has to know what information it is looking for and how to find it. Especially for traditional public services that have more abstract democratic goals than procurement or purchase contracts, it is difficult to develop a useful metric for evaluating private performance. Measuring whether a contractor provided the correct number of pencils is much easier than measuring, for example, how many assaults on prisoners took place at a private prison, which assaults were justified and which were not, and how those results compare against the cost of the contract and the overall quality of service.²¹⁵ Even where governments do create metrics, different contracts focus on different performance measures, making comparisons across providers difficult.²¹⁶

Consequently, monitoring often focuses instead on what governments can measure: costs. The amount of cost savings that a contract provides tends to be the most common method for evaluating private contractors.²¹⁷ Given that private entities are exempt from respondeat superior liability, focusing primarily on costs raises serious concerns. Employer measures to safeguard constitutional rights—including investing in employee training, paying higher wages to reduce turnover, creating employee incentive programs, and putting greater care into hiring decisions—are expensive. Where employers do not bear the costs of their employees' constitutional violations, focusing on costs threatens to create a "race to the bottom" in which the companies achieving the greatest cost savings are those that pay their employees

²¹⁵ See Aman, 14 Ind J Global Legal Stud at 320 (cited in note 14) (noting that one investigation of a private prison healthcare provider showed that monitoring focused much more on measuring whether the provider followed the contract's technical requirements than on the quality of the health care provided); Note, 115 Harv L Rev at 1873–74 (cited in note 130) (describing the difficulties of evaluating imprecise standards like quality); Jody Freeman, *The Contracting State*, 28 Fla St U L Rev 155, 171 (2000) (suggesting that the vaguer the final goal, the more difficult it will be to develop a metric for measuring success). See also Dolovich, 55 Duke L J at 478 (cited in note 151) (describing the difficulty of defining in a contract how to effectively provide for prison health care and inmate safety).

²¹⁶ See Note, 115 Harv L Rev at 1873–74 & n 38 (cited in note 130) (describing how, in the private prison context, different states evaluate completely different performance measures). See also Austin and Coventry, *Emerging Issues on Privatized Prisons* at 37 (cited in note 13) (noting the dearth of useful studies of private prisons and noting that many existing studies have significant methodological flaws).

²¹⁷ See Aman, 14 Ind J Global Legal Stud at 304 (cited in note 14) (asserting that governments' focus is "almost wholly in terms of cost and compliance" when choosing private contractors); Schooner, 33 Pub Cont L J at 274 (cited in note 182) (identifying cost savings as one of the most common measures that governments use to evaluate private contractors).

the least and that invest the least in employee training and support.²¹⁸ In other words, 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.

Even if governments could design effective metrics, financial concerns may discourage them from engaging in thorough monitoring. One main purpose of privatization is to achieve cost savings.²¹⁹ Effective monitoring, particularly of complex, multifaceted programs, is expensive, requiring significant amounts of data as well as a well-trained workforce to evaluate it.²²⁰ Monitoring can add 15 to 20 percent to the cost of a contract, which in many cases makes it more expensive for the government to contract out a service than to perform the service itself.²²¹

Governments also have other incentives to avoid intensive monitoring. Misconduct by a private contractor reflects badly on the government. Government actors may be hesitant to admit that they made a mistake in choosing a contracting partner, and therefore may have their own incentives to shield contractor misconduct from public view.²²² Decreased monitoring both reduces the chances of public exposure of contractor misconduct and also allows the government to deny knowledge of any wrongdoing if the misconduct is made public.

²¹⁸ See, for example, Dolovich, 55 *Duke L J* at 460–61 (cited in note 151) (asserting that private prisons “have prioritized economy above all else,” which may have contributed to mistreatment of inmates).

²¹⁹ See, for example, Freeman, 116 *Harv L Rev* at 1291–92 (cited in note 12); Metzger, 103 *Colum L Rev* at 1372 n 9 (cited in note 11). See generally E.S. Savas, *Privatization: The Key to Better Government* (Chatham 1987).

²²⁰ See Dolovich, 55 *Duke L J* at 492 (cited in note 151) (“Monitoring is necessarily labor intensive and therefore expensive, requiring an investment that states—which turned to privatization to save money—are not eager to make.”).

²²¹ See Korpi, *Panel Discussion, Outsourcing Government?* (cited in note 12). Because monitoring costs typically are not factored into the price of the contract, see *id.*; Austin and Coventry, *Emerging Issues on Privatized Prisons* at 16 (cited in note 13), thorough monitoring can cause the government to lose money through privatization, unless it chooses instead to try and monitor on the cheap.

²²² See Aman, 14 *Ind J Global Legal Stud* at 321 & n 88 (cited in note 14) (describing how New York officials began defending the behavior of its contractor, Prison Health Services (PHS), against charges of misconduct because of concerns that PHS’s problems “could negatively impact” the reputation of the city agency that contracted with PHS). Consider Freeman, 28 *Fla St U L Rev* at 179–80 (cited in note 215) (noting that an agency “may be more interested in maintaining smooth relationships with its contractual partners over the long term than in individual fairness or responsiveness to consumers in the short term”).

In this sense, government agencies may be prone to a contracting form of agency capture.²²³

Furthermore, the 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.²²⁴ Private contractors therefore face little risk that their employees' constitutional violations will result in revoked contracts or lost business. In fact, there appears to be little repercussion for private entities, even in cases where there is widespread public outrage and negative publicity. For example, even after the extensive public exposure of Blackwater's misconduct, the State Department nonetheless renewed its contract.²²⁵ A rule of respondeat superior liability, by con-

²²³ See, for example, James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 Yale L J 353, 360 (1986); Dolovich, 55 Duke L J at 494 (cited in note 151) (arguing that inspectors have ample opportunity to develop a rapport with prison administrators, creating the risk of capture). Several examples exist of this form of agency capture. A New York Times investigation of New York City's contract with PHS to provide health services to prisoners found that city officials excused contract violations by PHS at least nineteen different times so that PHS would receive a passing score rather than a failing one. Paul von Zielbauer, *Evaluation of Medical Care Provider in the City's Jails is Questioned*, NY Times B1 (Dec 26, 2005). At the federal level, when a US Army official responsible for managing a Defense Department contract with Kellogg, Brown & Root for services in Iraq refused to approve \$1 billion in undocumented spending based on the recommendation of internal army auditors, that official was taken off the contract and replaced with someone who approved most of the challenged charges. See James Risen, *Army Overseer Tells of Ouster over KBR Stir*, NY Times A1 (June 17, 2008).

²²⁴ In the welfare context, for example, "when the Arizona state legislature mandated the privatization of its state welfare system, only one company offered a bid; the state had no selection of alternatives. In Connecticut, Colonial Cooperative Care, Inc was the only bidder for its contract to determine eligibility for disability-based cash assistance." Stevenson, 45 Ariz L Rev at 92 & nn 37-38 (cited in note 15). Similarly, by the late 1990s two companies accounted for more than 75 percent of the global private-prison market. Austin and Coventry, *Emerging Issues on Privatized Prisons* at 3-4 (cited in note 13). See also Freeman, 28 Fla St U L Rev at 170 (cited in note 215) (identifying "absence of competition" as an impediment to effective privatization).

²²⁵ In May 2008, just six months after the Blackwater incident and while the guards were still under criminal investigation, the State Department renewed Blackwater's contract to provide security services in Iraq. See James Risen, *Iraq Contractor in Shooting Case Makes Comeback*, NY Times A1 (May 10, 2008). The State Department frankly admitted that Blackwater was its only choice, noting that only three companies met its requirements for providing security services in Iraq and that the other two were unable to fulfill the contract. See id. Although the State Department recently revised its decision and decided not to renew Blackwater's contract, it did not do so because it was dissatisfied with Blackwater but because it had little choice after the Iraqi government denied Blackwater a license to operate in Iraq. See *No Pact for Blackwater*, NY Times A12 (Jan 31, 2009). See also Kimberly Hefling, *KBR Wins Contract Despite Criminal Probe of Deaths*, Deseret Morning News (Feb 8, 2009), online at <http://www.deseretnews.com/article/705283640/KBR-wins-contract-despite-criminal-probe-of-deaths.html> (visited Nov 4, 2009) (describing how KBR re-

trast, avoids the problems created by oligopolies by creating an internal incentive to avoid liability that does not depend on competitive market pressures.

These same shortcomings also make it less likely that governments would, as a condition of contracting, require private parties to voluntarily assume respondeat superior liability for their employees' misconduct. The fact that governments want to demonstrate cost savings through the contracting process reduces their interest in imposing conditions that will raise the cost of contracting. The oligopoly position of certain private contractors also reduces the government's bargaining power. Finally, municipalities that undoubtedly want to preserve their own exemption from § 1983 vicarious liability may be understandably hesitant to take any action indicating that they believe entities that perform public functions should be subject to respondeat superior liability. Because of the various problems associated with government monitoring, it likely will not be as effective as respondeat superior liability in preventing constitutional violations by private entities.

C. The Risk of Spending Tradeoffs

Even assuming that governmental entities and private entities respond to liability incentives in relatively similar ways, there is one other reason to impose respondeat superior on private parties even if municipalities are exempt. Imposing additional damages liability on governments raises the risk that a government entity will respond to a damages judgment not by changing the behavior that resulted in liability, but instead by cutting spending from other valuable government services or programs.²²⁶ This concern, however, may be less pronounced for private entities. Consequently, imposing respondeat superior liability on governments may be more likely to create a risk of counterproductive and socially harmful spending tradeoffs than created by imposing similar

ceived a new \$35 million federal contract for services in Iraq after receiving repeated negative reviews and while it was the subject of a criminal investigation for the deaths of two US soldiers in Iraq).

Similarly, employees of the private company CACI International were involved in some of the worst abuses at Abu Ghraib. See Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* 22–23 (HarperCollins 2004). Nonetheless, just a year after the Abu Ghraib abuses surfaced publicly, the Defense Department gave CACI a new \$156 million contract, and later “placed CACI in an elite group of companies allowed to bid on \$35 billion worth of IT and logistical contracts over the next twenty years.” Tim Shorrock, *Spies for Hire: The Secret World of Intelligence Outsourcing* 5 (Simon & Schuster 2008).

²²⁶ Consider Rosenthal, 9 U Pa J Const L at 799–800 (cited in note 168).

liability on private parties. A few background principles help show why this is so.

Governments have an obligation to provide for the health, safety, and welfare of their constituents.²²⁷ Given the breadth of this mandate, governmental entities typically provide a wide array of different services and programs. Additionally, governmental entities cannot choose to opt out of this mission.²²⁸ Although they have some choice about how they provide those services, they cannot choose not to provide those services at all—it is not realistic to believe that a government will eliminate its police force, fire department, or school system because it is unprofitable without violating its obligations to its citizens.²²⁹

The fact that governments provide such a broad array of services means that they do not necessarily have to compensate for a liability judgment by reforming the agency employing the individual responsible for the violation. A government entity facing increased liability costs has three options: it can raise taxes; it can undertake reform efforts to reduce the likelihood of future liability; or it can compensate by cutting spending in other places. Political realities and the difficulties of initiating institutional reform may make spending cuts from other programs the path of least resistance in many circumstances.²³⁰ Raising taxes often is an undesirable and politically risky option, as is attempting to reform or cut the budget of a popular or bureaucratically powerful agency. An elected official in a district whose residents value public safety may not respond to a police brutality judgment by cutting the police department's budget. Instead, that official may be more likely to respond by cutting other services or programs, thereby penalizing innocent members of the community.²³¹ In fact, this is pre-

²²⁷ See *Taylor*, 101 F Supp 2d at 263–64 n 4 (“Governmental entities do not get to pick and choose the activities in which they will engage; these obligations are imposed by law.”); Rosenthal, 9 U Pa J Const L at 847 (cited in note 168) (“Government, however, has a politically enforceable obligation to protect the public from all threats to its safety and welfare.”).

²²⁸ See, for example, Mead, 64 NC L Rev at 541 (cited in note 62) (“Municipalities are unable, however, to withdraw from the kinds of activities that expose them to section 1983 liability.”).

²²⁹ See Rosenthal, 9 U Pa J Const L at 831 (cited in note 168) (claiming that “no politician would ever propose reducing police or fire protection in order to avoid tort liability”).

²³⁰ Although § 1983 damages awards may represent only a small percentage of a government's budget, see note 180, they can be significant enough to necessitate spending cuts. Recently, the District Attorney for New Orleans warned that his office may have to file for bankruptcy protection following a \$15 million judgment against the city in a § 1983 wrongful conviction lawsuit. See Kunzelman, *D.A. Says \$15M Ruling May Bankrupt New Orleans*, Philadelphia Inquirer at A9 (cited in note 176). Additionally, cutting a few million dollars out of government programs, even if small in percentage terms, may still exert a significant effect on those individuals who rely on those programs.

²³¹ See Rosenthal, 9 U Pa J Const L at 844–47, 870 (cited in note 168).

cisely the argument that municipal advocates made to Congress during hearings in the early 1980s concerning the possibility of amending § 1983 to overrule *Monell*.²³²

Moreover, assuming political concerns drive these decisions on spending tradeoffs, the programs that will be cut are those that affect the most disenfranchised and least politically powerful constituencies. Ironically, these may be precisely the groups—those that are unrepresented in the halls of government—that § 1983 is designed to protect the most.²³³ Thus, imposing additional § 1983 liability on governmental entities may be counterproductive. It may fail to deter if governments do not respond by correcting the problem that led to the violation, and it may instead undermine public welfare if governments respond by cutting other government services.

This concern about counterproductive spending tradeoffs also exists in the private sector, but it may be less salient for private entities. Private-entity liability naturally will have a lesser effect on the public fisc.²³⁴ Private entities also do not face the same obligations as governmental entities regarding the public welfare. Unlike the government, to the extent that private entities perform public functions, they do so voluntarily. If the cost of providing public services rises and becomes unprofitable, they can choose to exit the market and avoid the risk to their enterprise.²³⁵ Moreover, they can do so with the confidence that other private entities (assuming a competitive marketplace) or the government will step in to fill any void created by their exit. Even if the ultimate effect of respondeat superior liability is to reduce the level of privatized services, which may or may not be the case,²³⁶ this is not necessarily a bad result. If it is too expensive for a private company to perform public functions in a way that adequately safeguards federally pro-

²³² See generally *Municipal Liability under 42 U.S.C. 1983*, Hearings on SB 584, SB 585, and SB 980 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong, 1st Sess (1981). See also Brown, 27 BC L Rev at 891 (cited in note 144).

²³³ See Rosenthal, 9 U Pa J Const L at 844–47 (cited in note 168) (arguing that the budgetary effects of government tort liability are disproportionately felt by the society's most disadvantaged). Section 1983 provides a check against such majoritarian tendencies by giving a cause of action for violations of constitutional rights, rights designated as too important to trust to majority rule.

²³⁴ Presumably, expanded private-entity liability could affect the public fisc if private entities pass on the added costs of additional liability to the government through the contracting process. If those passed-on costs make the price of contracting too high, however, the government can simply decide not to contract and to perform those services itself.

²³⁵ See Kritchevsky, 26 Cardozo L Rev at 78 (cited in note 32) (arguing that private parties should be subject to heightened liability under § 1983 because they can pick and choose which services to provide); *Taylor*, 101 F Supp 2d at 263–64 n 4.

²³⁶ See Part IV.C.

tected rights, then perhaps those functions should be left to the government to perform.

Governments, however, do not have that same option. Their likely decision in the face of rising costs in one area, assuming a limited ability to raise taxes, is to cut costs in another area. This difference has been cited as a reason why private entities should not receive the same immunity from respondeat superior liability that governments receive.²³⁷ This risk of counterproductive spending tradeoffs provides an additional justification for refusing to extend *Monell's* exemption from respondeat superior liability to private parties that perform state action under § 1983.²³⁸

IV. OBJECTIONS AND IMPLICATIONS

Even assuming one accepts that both statutory interpretation principles and policy rationales support imposing respondeat superior on private parties subject to §1983, there remain several objections concerning both the necessity and wisdom of such a rule. With respect to necessity, one might argue that employee indemnification and the availability of state tort law remedies will ensure, with or without § 1983 respondeat superior liability, that private entities take measures to minimize the risk of constitutional violations. With respect to the wisdom of such a rule, there is an argument that respondeat superior liability will have an adverse effect by raising the cost of privatization, which in turn would reduce the number of services contracted to private companies and would undermine the efficiency gains that come from privatization.²³⁹ Although each criticism raises legitimate con-

²³⁷ See, for example, *Taylor*, 101 F Supp 2d at 263–64 n 4 (“Governmental entities do not get to pick and choose the activities in which they will engage Thus, various immunities and privileges given to governmental entities . . . reflect the notion that the taxpayers and public officials should not be exposed to the burdens of litigation when carrying out their mandated activities.”). Consider *Rosenthal*, 9 U Pa J Const L at 859–60 (cited in note 168) (arguing that municipal vicarious liability would force city governments to commit too many resources to preventing constitutional violations at the expense of other priorities).

²³⁸ Relying on concerns about the public fisc to treat private and public entities differently also appears consistent with the concerns of § 1983’s framers. The legislative debates surrounding § 1983 reveal that several members of Congress warned that exposing municipal budgets to significant liability would end up hurting the community rather than helping it. See *Cong Globe*, 42d Cong, 1st Sess 772 (Apr 18, 1871) (statement of Sen Thurman) (arguing that the money used to pay § 1983 judgments against municipalities would come at the expense of other municipal services); *Cong Globe*, 42d Cong, 1st Sess 772, 789 (Apr 19, 1871) (statement of Rep Kerr) (arguing that expanded liability would prevent municipalities from performing “their necessary and customary functions”).

²³⁹ The notion that private companies will provide superior services at cheaper prices is one of the primary justifications for privatizing traditional government services. See note 219 and accompanying text.

cerns, as explained below, none provides a sufficient reason to exempt private entities from respondeat superior liability.

A. Employee Indemnification

One argument against subjecting private § 1983 defendants to respondeat superior liability is that it is unnecessary because many employers indemnify their employees for legal wrongs they commit within the scope of their employment.²⁴⁰ In essence, indemnification is a private form of respondeat superior because the employer agrees to assume the liabilities and litigation costs incurred by its employees. If indemnification practices truly overlapped with the scope of respondeat superior liability, this argument might have greater force. But a number of gaps exist such that relying on indemnification will lead to suboptimal deterrence and will leave many victims of constitutional violations without an adequate remedy.

While many employers do indemnify their employees, not all employers do so.²⁴¹ Even for those that indemnify, however, the combina-

²⁴⁰ See, for example, Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 *Hastings L J* 499, 547 n 258 (1993) (noting that many state and local laws require indemnification of police officers); Lant B. Davis, et al, *Suing the Police in Federal Court*, 88 *Yale L J* 781, 810–11 (1979) (concluding from a sample of cases from Connecticut that police departments routinely foot the cost of lawsuits against individual officers).

²⁴¹ Professor Nina Pillard has studied indemnification of federal employees in *Bivens* actions and has concluded that indemnification “is a virtual certainty.” Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability under Bivens*, 88 *Georgetown L J* 65, 76–78 & n 51 (1999) (noting that the federal government represented 98 percent of *Bivens* defendants who requested counsel). However, in litigation, the United States has indicated that federal indemnification is not automatic. See Oral Argument of Jeffrey A. Lamken on Behalf of the United States, *Correctional Services Corp v Malekso*, No 00-860, *24 (Oct 1, 2001) (available on Westlaw at 2001 WL 1182728) (“*Lamken Argument*”) (“The Government, for example, does not routinely identify its employees before a judgment or even after judgment. On occasion we both decline to indemnify them.”). See also Brief of the United States as Amicus Curiae, *Richardson v McKnight*, No 96-318, *19 (filed Feb 7, 1997) (available on Westlaw at 1997 WL 63323) (noting that while private employers have “broad latitude” to offer to indemnify employees, “[t]he government has only a limited ability to indemnify its employees for constitutional tort liability and is unable to promise in advance to indemnify employees for judgments of unknown magnitude”).

While private employers do not face the same statutory constraints on indemnification as the federal government and while many companies performing public functions likely do indemnify their employees to some extent, see, for example, Oral Argument of Charles R. Ray on Behalf of Petitioners, *Richardson v McKnight*, No 96-318, *51 (Mar 19, 1997) (available on Westlaw at 1997 WL 136255) (acknowledging that private prison indemnified its employees), it is not clear that private entities universally indemnify their employees. See *Lamken Argument* at *24–25 (stating that a “corporation will not necessarily pick up the tab” for lawsuits against their employees and arguing that corporations should not indemnify automatically, but only where indemnification is “in the corporate interest”). Private employees are less likely than public employees to be

tion of common-law good-faith immunity for private § 1983 defendants along with limitations on indemnification for bad faith actions makes indemnification an inadequate substitute for respondeat superior liability.

First, the judicial trend toward recognizing a defense of good faith immunity will result in many cases where indemnification does not ensure that an injured plaintiff obtains redress. Even though private employees do not receive qualified immunity under § 1983,²⁴² a number of courts have allowed private employees to claim common-law good-faith immunity that protects employees unless they acted with malice or its equivalent.²⁴³ A plaintiff suing under an indemnification regime will receive no recovery at all, from either the employer or the employee, if the employee is immune. By contrast, under respondeat superior principles, the employee's immunity does not bar a plaintiff from recovering from the employer.²⁴⁴

Second, in situations where an employee acts maliciously and does not receive immunity, a plaintiff still might not receive full compensation because many indemnification policies exclude coverage for intentional or reckless conduct.²⁴⁵ Some conduct that § 1983 makes

unionized and thus to reap the benefits of collective bargaining, and may not be sophisticated enough on their own to demand indemnification in their own negotiations. Moreover, the benefit of indemnification is not costless, as it likely comes at the expense of some other benefit foregone. Employee indemnification is not an automatic right, but something that employees must bargain for. By prioritizing indemnification, private employees may lose out on some other benefit that they have to give up in order to obtain indemnification.

²⁴² See *Richardson*, 521 US at 399.

²⁴³ See, for example, *Clement v City of Glendale*, 518 F3d 1090, 1096–97 (9th Cir 2008) (allowing a private towing company to assert a good faith immunity defense in a § 1983 action); *Pinsky v Duncan*, 79 F3d 306, 312–13 (2d Cir 1996); *Vector Research, Inc v Howard & Howard Attorneys, PC*, 76 F3d 692, 699 (6th Cir 1996); *Jordan v Fox, Rothschild, O'Brien & Frankel*, 20 F3d 1250, 1276–77 (3d Cir 1994); *Wyatt v Cole*, 994 F2d 1113, 1118 (5th Cir 1993). Even after the Supreme Court held in *Richardson* that private prison guards are not entitled to qualified immunity, some courts have granted qualified immunity to other private defendants. See, for example, *Bartell v Lohiser*, 12 F Supp 2d 640, 645–46 (ED Mich 1998) (finding that employees of a private contractor providing foster care services could receive qualified immunity under § 1983).

²⁴⁴ An employer cannot assert the employee's immunity as a defense in a claim seeking to hold the employer vicariously liable for the employee's misconduct. See Restatement (Second) of Agency § 217(b)(ii) (1958); id at comment b; Harper, James, and Gray, 5 *Harper, James and Gray on Torts* § 26.17 at 136–38 (cited in note 33).

²⁴⁵ See, for example, Martin A. Schwartz, *Should Juries Be Informed That Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 Iowa L Rev 1209, 1217 (2001); 1 Cal Gov Code § 996.4 (stating that a public employee is not entitled to indemnification if the employee acted out of fraud, corruption, or malice). See also Kramer and Sykes, 1987 S Ct Rev at 277 n 95 (cited in note 70); *City of Newport v Fact Concerts, Inc*, 453 US 247, 269 n 30 (1981). It is entirely possible that entities performing public functions will indemnify for bad faith actions given the possibility that employees will commit bad faith constitutional violations. But because private indemnification agreements, unlike public ones, are not governed by statute,

actionable, however, is intentional or reckless. Police misconduct, for example, including warrantless searches and excessive force, will involve intentional actions. Many prisoner § 1983 actions come under the Eighth Amendment's prohibition of cruel and unusual punishment, which requires the defendant to act with "deliberate indifference," a standard roughly equivalent to recklessness.²⁴⁶ Additionally, any case where the conduct in question gives rise to punitive damages will typically involve intentional or reckless behavior. By contrast, respondeat superior principles do not exclude intentional and reckless conduct.²⁴⁷ While some entities may indemnify their employees for bad faith conduct even if not contractually obligated,²⁴⁸ there is no guarantee that they will do so.

Several practical concerns also undermine the argument that indemnification and respondeat superior are functionally equivalent. First, the argument assumes that a victim can easily identify the individual employee responsible for the violation. Especially in actions involving a failure to act, identifying the responsible individuals may be extremely difficult.²⁴⁹ Moreover, pro se litigants, who constitute a substantial percentage of § 1983 plaintiffs,²⁵⁰ may not know which indi-

and because many employment agreements are not publicly available, it is unclear whether such employers do indemnify bad faith misconduct, and there are good reasons to think that they would not offer such extensive indemnification. See note 229.

²⁴⁶ See *Farmer v Brennan*, 511 US 825, 836 (1994) (finding that the deliberate indifference required to violate the Eighth Amendment is similar to recklessness).

²⁴⁷ Courts have applied respondeat superior to intentional torts if the tort arises out of the employment relationship rather than being motivated by personal ill will. See Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv L Rev 563, 589 (1988); Restatement (Second) Agency § 228 (stating that a principal is liable for an agent's intentional use of force when the use of force is foreseeable); *Fitzgerald v Mountain States Telephone & Telegraph Co.*, 68 F3d 1257, 1262 (10th Cir 1995) (applying respondeat superior to intentional discrimination under § 1981 for "those intentional wrongs . . . committed in furtherance of the employment") (quotation marks omitted).

²⁴⁸ See Richard Emery and Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 Fordham Urban L J 587, 587 (2000) (arguing that New York City "regularly indemnifies police officers regardless of whether they acted intentionally, recklessly, or brutally").

²⁴⁹ In *Brown v District of Columbia*, 514 F3d 1279 (DC Cir 2008), a prisoner alleged that his constitutional rights were violated when a doctor's order to have the plaintiff immediately transferred to the hospital for surgery were never carried out. Complaint, *Brown v District of Columbia*, No 04-2195, *8-9 (DDC filed Dec 20, 2004). The plaintiff had no way of knowing which employees were responsible for failing to carry out the doctor's order. Similarly, in *Malesko v Correctional Services Corp.*, 1999 WL 549003 (SDNY), the plaintiff originally filed his complaint against the private prison company because he could not identify the responsible employees. *Id.* at *2-3. By the time he sought to amend his complaint to add the individual employees, the statute of limitations had passed.

²⁵⁰ One DOJ study found that 96 percent of prisoner § 1983 cases were pro se. See Roger A. Hanson and Henry W.K. Daley, Bureau of Justice Statistics, *Challenging the Conditions of Pris-*

viduals to sue, or simply may assume that the employer is the ultimately responsible party and therefore the natural defendant. Even for those plaintiffs who eventually obtain counsel, it may be too late to amend the complaint to add new defendants without running afoul of the statute of limitations.²⁵¹

Finally, indemnity is not equivalent to respondeat superior because the identity of the named defendant matters in terms of the likely recovery for the plaintiff. There is a significant difference between suing an individual employee as a named defendant and suing a company as a named defendant, even if the ultimate payout will come from the same pocket in either case. Because juries in § 1983 cases generally are not informed that individual defendants are indemnified,²⁵² they are more inclined to absolve or give artificially low damage awards against individual defendants than against entity defendants, as they do not want to destroy an individual's finances.²⁵³ Thus, indemnification may end up underdetering by failing to create a sufficient incentive for employers to respect constitutional rights.

ons and Jails: A Report on Section 1983 Litigation 21 (DOJ Dec 1994), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf> (visited Aug 9, 2009).

²⁵¹ Most circuits hold that amending a complaint to add names of individual defendants does not "relate back" to the original complaint for purposes of tolling the statute of limitations. See Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 6A *Federal Practice and Procedure* § 1498 (West 4th ed 2008).

²⁵² See, for example, Schwartz, 86 Iowa L Rev at 1229–30 (cited in note 245) (stating that the majority of courts preclude juries in § 1983 cases from learning that an individual defendant will be indemnified).

²⁵³ See Beermann, 48 DePaul L Rev at 667 (cited in note 72) (arguing that indemnification "is a poor substitute for vicarious liability" because juries will think that damages will be paid by the employee directly). See also Schuck, 77 Georgetown L J at 1755 n 11 (cited in note 70) (noting that "jury sympathies" for individual defendants make it more difficult for aggrieved plaintiffs to recover from individual defendants).

Although it is possible that jurors will assume individual defendants are indemnified and will award damages as if the corporation was the defendant, if that were true, then one would expect no difference between jury awards against individual defendants and jury awards against corporate defendants. Available data, however, suggest that jurors issue higher awards against corporate defendants. See, for example, Audrey Chin and Mark A. Peterson, *Deep Pockets, Empty Pockets* vii, 43 (RAND 1985) (indicating that corporations typically pay "30 percent more than what an individual defendant would pay in the same case" and 4.4 times more where serious injury occurs); Valerie P. Hans and M. David Ermann, *Responses to Corporate versus Individual Wrongdoing*, 13 L & Human Beh 151, 162 (1989) (conducting experiments suggesting that juries treat individuals more favorably than corporations). It is not certain whether this difference is attributable to juries deflating awards against individual defendants, inflating awards against corporate defendants, or some combination of both.

B. State Tort Analogues

A related argument is that respondeat superior liability under § 1983 is unnecessary for promoting deterrence because private entities already are subject to respondeat superior under state common law and therefore will invest in deterrence regardless of § 1983's particular liability rules. Given the lower threshold for liability for certain state law torts—a state law medical malpractice action requires only negligence, for example, while a § 1983 claim for constitutionally inadequate medical care requires a showing of deliberate indifference—state tort law might provide superior deterrence than § 1983. Although state tort law may create some incentives for private employers to invest in deterrence, just as with indemnification, the lack of full overlap between state tort law and § 1983 makes state tort law an inadequate safeguard of constitutional protections.

Although certain § 1983 actions have a state tort analogue—for example a prisoner's claim for constitutionally inadequate medical care also can be brought as a medical malpractice claim—many others do not.²⁵⁴ A number of constitutional and federal rights protected by § 1983, including free speech and free exercise rights, privacy and reproductive rights, procedural due process rights including the notice and opportunity to be heard, substantive due process rights, voting rights protections, Fourteenth Amendment equal protection guarantees, and Fourth Amendment protections against warrantless searches may not be equivalently protected under state tort law.²⁵⁵ In fact, many of the § 1983 actions brought against private entities may involve constitutional rights for which there is no easy state tort analogue. Professor Gillian Metzger conducted an informal study of thirty-five constitutional actions implicating private parties and found that the majority raised substantive due process, procedural due process, First Amendment, and Fourth Amendment claims.²⁵⁶ Moreover, constitutional law generally evolves more rapidly than state common law, and so discrepancies between the

²⁵⁴ The perceived inadequacy of state law to deter constitutional violations was a major premise underlying the Court's decision in *Monroe v Pape*. Justice John Marshall Harlan stated in concurrence that "[i]t would indeed be the purest form of coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Monroe*, 365 US at 196 n 5 (Harlan concurring).

²⁵⁵ Some federal statutory and constitutional rights, however, may have analogues in state constitutions. In *Heck v Humphrey*, 512 US 477 (1994), the Supreme Court hinted that the elements of a § 1983 constitutional claim would be determined by the closest common law analogue. *Id.* at 483–84. Since then, however, the Court has never returned to that reasoning.

²⁵⁶ See Metzger, 103 Colum L Rev at 1455 & n 308 (cited in note 11).

two that do not exist today may develop in the future.²⁵⁷ State law claims also are subject to state common law and statutory defenses, some of which may be inapplicable or preempted in § 1983 actions.²⁵⁸ Thus, state law is unlikely to provide the same scope of protection as § 1983.

Even if state tort law were equivalent to § 1983 in theory, it likely is not in practice. One major difference between state common law and § 1983 is that the latter provides for attorneys' fees for prevailing plaintiffs.²⁵⁹ 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. Additionally, the federal *in forma pauperis* statute permits federal courts to appoint counsel for indigent prisoners, making it easier for prisoners to obtain counsel for federal § 1983 actions than for tort actions in state court.²⁶⁰

Third, a number of states have capped tort damages or adopted other tort reform measures that reduce the deterrent effect of state law and restrict the ability of aggrieved plaintiffs to be made whole.²⁶¹ Section 1983 damages, by contrast, are not capped other than by ordinary com-

²⁵⁷ See, for example, Chemerinsky, 80 Nw U L Rev at 518 (cited in note 162).

²⁵⁸ See, for example, *Thompson v Connick*, 553 F3d 836, 846 (5th Cir 2008) (noting, in an action where a wrongfully convicted plaintiff brought both a federal § 1983 claim and state law claims for malicious prosecution and intentional infliction of emotional distress, that the district court found the state law claims barred by absolute prosecutorial immunity but allowed the § 1983 claim to proceed).

²⁵⁹ See 42 USC § 1988(b) (authorizing the court, in its discretion, to award a "reasonable attorney's fee" to a prevailing party).

²⁶⁰ See 28 USC § 1915(e)(1). To be sure, the IFP statute is no panacea, as it is unclear how often courts appoint counsel and how often counsel accept those appointments, but the statute does not appear to be an empty letter. In fact, appellate courts have reversed district court decisions refusing to appoint counsel. See, for example, *Pruitt v Mote*, 503 F3d 647, 649 (7th Cir 2007) (en banc); *Hodge v Police Officers*, 802 F2d 58, 61–62 (2d Cir 1986). Even if counsel is not appointed particularly often, the opportunity for appointment may be valuable, given the high number of § 1983 lawsuits brought by prisoners and the high percentage of prisoners proceeding pro se. See Hanson and Daley, *Challenging the Conditions of Prisons and Jails* at 21 (cited in note 250) (noting that 96 percent of prisoner § 1983 lawsuits were pro se); Peter W. Low and John C. Jeffries, Jr, *Federal Courts and the Law of Federal-state Relations* 1080 (Foundation 5th ed 2004) (stating that in the early 1980s, prisoner lawsuits comprised as much as 50 percent of the federal courts' § 1983 docket).

²⁶¹ For example, a number of states, but not the federal government, have adopted statutes capping the noneconomic damages that plaintiffs can collect. See, for example, Michael P. Allen, *A Survey and Some Commentary on Federal "Tort Reform,"* 39 Akron L Rev 909, 913 n 11 (2006) (collecting state statutes). For a sample of the large number of enacted and proposed state-level tort reform statutes, see National Association of Mutual Insurance Companies, *Tort Reform: An Overview of State Legislative Efforts to Improve the Civil Justice System*, online at <http://www.namic.org/reports/tortreform> (visited Aug 9, 2009).

mon law principles.²⁶² That state tort law is constantly subject to change, either in terms of expanding or retracting liability, highlights the danger of making § 1983 liability turn on the whims of state legislatures. Section 1983 was meant to provide a uniform federal remedy for violations of federal rights, and that remedy should not rise and fall based on how state legislatures choose to regulate their tort regimes on any given day.²⁶³

Finally, using the availability of state law remedies to limit § 1983's reach is inconsistent with the statute's motivation and purpose. In *Monroe v Pape*, the Supreme Court found that Congress believed § 1983 was necessary because states would not enforce their own laws against groups like the Ku Klux Klan that were terrorizing African-Americans. The Court concluded that "[i]t was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind" § 1983.²⁶⁴ Section 1983 was intended to be "supplementary" to state law rather than just a gap-filler.²⁶⁵ Additionally, from a plaintiff's perspective, there may be an important qualitative difference between vindicating a constitutional right and pursuing a state common law right.²⁶⁶ The Constitution carries greater normative force than the common law, and a plaintiff may derive greater meaning, satisfaction, and feelings of justice from obtaining a ruling that an entity's action violated the constitution than a ruling that the entity's ac-

²⁶² See *Memphis Community School District v Stachura*, 477 US 299, 306 (1986) (refusing to allow a plaintiff to recover damages for the abstract injury associated with infringing a constitutional right, but stating that "when § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts").

²⁶³ Even with respect to *Bivens* actions against federal officials, an area in which the Supreme Court has been more restrictive than § 1983 in granting remedies to aggrieved victims, the Court has emphasized the importance of defining uniform federal remedies that do not turn on the scope of state law. See *Carlson v Green*, 446 US 14, 23 (1980) (deciding that the availability of a claim under the Federal Tort Claims Act, which can go forward only if the law of the relevant state would permit a tort action to proceed, did not eliminate the need for a *Bivens* remedy because *Bivens* actions should not depend on "the vagaries of the laws of the several States"). See also Metzger, 103 Colum L Rev at 1404-05 (cited in note 11) (noting that state law protections "do not substitute for constitutional constraints" because they can be repealed or amended at any time).

²⁶⁴ *Monroe*, 365 US at 174-75.

²⁶⁵ *Id.* at 183 ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

²⁶⁶ See *Briscoe v LaHue*, 460 US 325, 349 (1983) (Marshall dissenting) ("Different considerations surely apply when a suit is based on a federally guaranteed right—in this case the constitutional right to due process of law—rather than the common law.").

tions constituted an ordinary tort.²⁶⁷ Depriving victims of constitutional injuries of this avenue for redress threatens to minimize the emotional and legal magnitude of their harms. Therefore, the existence of state tort remedies does not justify exempting private entities from respondeat superior liability under § 1983.

C. Raising the Cost of Privatization

A final argument against subjecting private entities to respondeat superior liability under § 1983 is that it will raise the cost of privatization as private parties incorporate the added risk of liability into their contract prices, which in turn will lead to fewer privatization contracts.²⁶⁸ For opponents of privatization, this may be a welcome result. But even for proponents of privatization, the risk that private-party respondeat superior liability under § 1983 will undermine the purported benefits of privatization may not be significant. Initially, given respondeat superior's pervasiveness in the sphere of private tort law, the doctrine is fully consistent with privatization. The justification for privatization is that private entities, through the competitive pressures of the market, will provide services more cheaply and efficiently than the government. To the extent that respondeat superior is interwoven into the fabric of the private market and is considered to promote efficiency,²⁶⁹ it is a principle that underlies the functioning of a healthy marketplace rather than an antiprivatization concept.

But even if respondeat superior would raise the cost of privatization, that may not be a bad result. To the extent that respondeat superior increases costs, it exacts the greatest cost increase on those firms that are the biggest civil rights violators, and may help level the playing field for those firms that already take measures to protect constitutional rights. The difficulties of monitoring private contractors that have caused governments to focus on costs rather than on quality of service, by contrast, end up rewarding those companies that cut costs by opting not to invest in liability prevention—such as by paying high-

²⁶⁷ In his *Monroe* concurrence, Justice Harlan concluded that “the view that 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 a deprivation of a constitutional right” was “consistent with the flavor of the legislative history” of § 1983. 365 US at 196 (Harlan concurring).

²⁶⁸ See, for example, Metzger, 103 Colum L Rev at 1454 (cited in note 11) (noting that increasing regulation of private contractors “increases the costs of privatized programs, undermines the flexibility and efficiency that governments hope to gain through privatization, and deters private participation”).

²⁶⁹ See notes 133–50 and accompanying text.

er wages to reduce employee turnover or by investing in employee training programs.²⁷⁰ More reputable companies that do spend the extra money to reduce liability risk, on the other hand, can find themselves at a competitive disadvantage. Respondeat superior liability helps rectify that discrepancy by forcing companies to internalize the risk of their employees' misconduct. Of course, the less private competition there is, the more muted this leveling effect will be, but respondeat superior may still provide some check against a "race to the bottom."

Additionally, even if imposing respondeat superior liability would raise the cost of privatization, it is far from clear that it would have a significant adverse effect on privatization. There is little evidence that the current rule of respondeat superior liability for private torts has dramatically restricted economic growth or business development.²⁷¹ If respondeat superior liability results in greater deterrence and therefore fewer constitutional violations, private entities may even see reduced litigation expenses and lower liability insurance premiums. Moreover, the confusion and uncertainty surrounding the *Monell* custom or policy requirement "is surely a source of wasteful litigation"²⁷² that would become unnecessary if private entities were subject to vicarious liability. Finally, respondeat superior liability may seem cheap and relatively nonintrusive when compared to other proposed alternatives for making private contractors more accountable, such as making private entities that act under color of state law subject to the Administrative Procedure Act, or by allowing individuals to bring third-party beneficiary contract actions against private contractors that perform poorly.²⁷³

At bottom, the argument that respondeat superior should be rejected because it makes privatization more expensive proves too much. Taken to its logical conclusion, such an argument would justify eliminating all liability for private companies, as any liability rule that applies to private entities would increase expenses. Yet few privatization proponents argue that private entities should be unshackled from

²⁷⁰ See note 217 and accompanying text.

²⁷¹ See Harper, James, and Gray, 5 *Harper, James and Gray on Torts* § 26.5 at 22–23 (cited in note 33).

²⁷² Schuck, 77 *Georgetown L J* at 1781 (cited in note 70) (arguing that permitting claims against municipalities may be more efficient, as the "official policy" limitation produces wasteful litigation).

²⁷³ See Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable through Administrative Law*, 28 *Fordham Urban L J* 1477, 1498–1505 (2001) (arguing that the Administrative Procedure Act should apply to some private entities); Freeman, 28 *Fla St U L Rev* at 201–07 (cited in note 215) (proposing third-party-beneficiary actions as a way of promoting private accountability); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 *Cal L Rev* 569, 635–39 (2001) (same).

all forms of liability and should be regulated only by the market. Rather, the privatization debate seems to focus on identifying the proper default liability rules against which privatization should take place. When viewed through that lens, whether a particular liability rule should operate against private contractors depends on whether the benefits of increased privatization outweigh the downside of increased illegal conduct or vice versa. The judgment about how society should value privatization versus compliance with the Constitution is one that deserves further exploration, but considering that society generally believes that employers should be responsible for the torts of their employees, imposing § 1983 respondeat superior liability upon private parties performing public functions seems consistent with societal values.

CONCLUSION

In order to prevent incidents like the Blackwater shootings from occurring again, either domestically or internationally, in an age when privatization continues to increase and private companies take on ever more sensitive public duties, it is important to think seriously about the rules and values that should govern how privatization takes place. In particular, those background rules should focus not only on keeping private entities accountable, but also on making sure that private companies such as Blackwater display a healthy respect for public norms. Those values include not just encouraging efficient delivery of public services but also respect for constitutional rights. If private companies are going to compete for the opportunity to perform traditional public functions, then one of the axes of competition should be how well those private companies protect the rights of the citizens they serve. Imposing respondeat superior liability, in addition to promoting efficiency goals, will require private companies to compete on that basis by forcing them to internalize the costs of their employees' misconduct.

Although the possibility of municipal respondeat superior liability is foreclosed for the moment by *Monell*, that possibility remains open for private parties. Regardless of whether *Monell* may be a sensible rule for municipalities, extending *Monell* to private entities is misguided both because the statutory justification for exempting municipalities from respondeat superior liability does not apply to private parties, and because policy reasons may favor treating public entities and private entities differently. Consequently, private parties that perform public functions should be subject to respondeat superior liability under § 1983.