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Citation: 26 Cardozo L. Rev. 35 2004-2005



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# CIVIL RIGHTS LIABILITY OF PRIVATE ENTITIES

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## INTRODUCTION

Section 1983 provides a remedy against a person acting under color of state law who violates an individual's constitutional rights. The under color of law requirement means that most § 1983 defendants are government employees, people who exercise State authority by virtue of their jobs.<sup>1</sup> In the typical § 1983 action, the plaintiff sues the jail guard or police officer who allegedly violated his constitutional rights and, frequently, the entity that employed the offending officer. Government employees are not the only § 1983 defendants, however. Any person who acts under color of state law may be a defendant.<sup>2</sup> As government increasingly privatizes official functions,<sup>3</sup> plaintiffs increasingly sue

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<sup>1</sup> Individuals who work for the state are virtually always engaged in state action when performing their jobs. See *West v. Atkins*, 487 U.S. 42, 50 (1988) (stating that a public employee generally acts under color of state law when exercising his official responsibilities and noting that *Polk County v. Dodson*, 454 U.S. 312 (1981), which found that public defenders did not act under color of state law in representing their clients, was the only case in which the Court had created an exception to the rule). Official conduct that constitutes state action is "action under color of state law and will support a suit under § 1983." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 935 (1982).

<sup>2</sup> See *Lugar*, 457 U.S. at 935.

<sup>3</sup> See generally Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003) (stating that "[p]rivatization is now virtually a national obsession" and describing privatization of medical care, welfare, public education, and prisons); Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 179-85 (1997) (discussing the use of government contracts to privatize various services); Donald G. Featherstun, D. Whitney Thornton, II, & J. Gregory Correnti, *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 644-45 (2001) (stating that "[e]very facet of governmental function has been touched by privatization" and giving examples). A good deal of literature focuses on the narrower question of prison privatization. See generally James Austin & Garry Coventry, *Emerging Issues on Privatized Prisons*, available at <http://www.ncjrs.org/pdffiles1/bja/181249.pdf>; RICHARD W. HARDING, *PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY* (1997); Developments in the Law, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868 (2002); Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997); E.S. Savas,

private defendants under § 1983.<sup>4</sup>

The Supreme Court has decided numerous cases where a private actor engaged in state action in such a way as to become a proper § 1983 defendant.<sup>5</sup> The Supreme Court has, however, engaged in little discussion of the rules that govern liability once a court determines that the private party was properly sued. Certainly it appears that the constitutional requirements that govern liability do not change depending on whether the defendant is public or private. The case law nowhere suggests that the Eighth Amendment imposes different obligations on a state prison and on a prison that a private entity runs.<sup>6</sup> Showing a constitutional violation is only one hurdle that a plaintiff must surmount in order to obtain relief in a § 1983 action, however.

Once a plaintiff establishes a *prima facie* case, defenses and other limitations on liability come into play. A plaintiff suing an individual defendant must generally overcome the defense of qualified immunity.<sup>7</sup> Suits against entities raise different hurdles. A plaintiff cannot sue a state for damages.<sup>8</sup> A plaintiff suing a municipality must satisfy the Court's requirement that the injury be inflicted pursuant to a municipal policy or custom.<sup>9</sup> Municipalities may not raise qualified immunity as a defense<sup>10</sup> but they are immune from liability for punitive damages.<sup>11</sup>

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*Privatization and Prisons*, 40 VAND. L. REV. 889 (1987); The Sentencing Project, *Prison Privatization and the Use of Incarceration*, available at <http://sentencingproject.org/pdfs/1053.pdf>.

<sup>4</sup> Private corrections companies are the defendants in many § 1983 suits against private defendants. Computer searches reveal that Corrections Corporation of America (CCA), for instance, was a defendant in twenty-seven cases decided in the 1990s and sixty-four cases decided between January 1, 2000 and the end of January, 2004. Similarly, Correctional Medical Services (CMS) was a defendant in twenty-six cases in the 1990s and eighty-three cases decided between January 1, 2000 and January 31, 2004. The number of suits against CCA, CMS and the other most common private corrections companies (Wackenhut, Prison Health Services, Correctional Medical Systems, Correctional Services Corp., TransCor America, EMSA Correctional Care, Aramark Correctional Services, and Prison Realty Trust) are equally dramatic. There were twenty-five cases against the named defendants in the 1980s, 193 in the 1990s, and 229 between January 1, 2000 and January 31, 2004.

<sup>5</sup> See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001); *Lugar*, 457 U.S. 922 (1982); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

<sup>6</sup> See *West v. Atkins*, 487 U.S. 42, 54-57 (1988) (relying on *Estelle v. Gamble*, 429 U.S. 97 (1976), a suit against a state prison physician that established when failure to provide adequate medical care violates the Eighth Amendment, in a claim against a private doctor who provided services to inmates at a state prison hospital). But see David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987) (arguing that courts should be more willing to find constitutional violations when a private prison is acting).

<sup>7</sup> See *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982).

<sup>8</sup> *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that states and state officials sued in their official capacities for damages are not "persons" that may be sued under § 1983).

<sup>9</sup> *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

<sup>10</sup> *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

Whether these principles apply in claims against private defendants is largely an open question.

The Supreme Court has directly addressed the extent to which traditional rules governing § 1983 liability apply to suits against private individuals in only one context, that of individual immunities. In *Wyatt v. Cole*<sup>12</sup> and *Richardson v. McKnight*,<sup>13</sup> the Court held that private individual defendants did not enjoy the qualified immunity available to government defendants. The Court based its decision on two main factors: history and policy.<sup>14</sup> The Court found that there was no historical basis for providing immunity to private individuals who attached property or to private prison guards,<sup>15</sup> and then asked whether the policies that support official immunity applied when private persons were defendants.<sup>16</sup> The answer was no. Official immunity aimed to encourage "principled and fearless" decision-making and to prevent the threat of suit from chilling the exercise of official discretion.<sup>17</sup> Immunities also prevented the fear of liability from inhibiting persons from working in the public sector.<sup>18</sup> These rationales, the Court said, did not apply to private individuals seeking to protect their own interests or to employees of private firms that competed with others to provide government services.<sup>19</sup>

While *Wyatt* and *Richardson* did not resolve all issues concerning the immunity of private defendants,<sup>20</sup> the Court did provide the lower courts with a framework for analyzing the question. The Supreme Court has not addressed the question of which rules govern in a case where the plaintiff sues not only the private employee, but also the private employing entity. The defendant prison guards in *Richardson* worked for Corrections Corporation of America (CCA).<sup>21</sup> The question is what analysis would govern CCA's liability if the *Richardson* plaintiff had sued CCA in addition to, or instead of, the guards.

The rules regarding liability would have been clear if the *Richardson* plaintiff had sued a government-operated prison. If the prison were a state prison, the plaintiff could not sue the entity for

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<sup>11</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

<sup>12</sup> 504 U.S. 158 (1992).

<sup>13</sup> 521 U.S. 399 (1997).

<sup>14</sup> See *id.* at 404-12; *Wyatt*, 504 U.S. at 163-68.

<sup>15</sup> *Richardson*, 521 U.S. at 407; *Wyatt*, 504 U.S. at 163-67.

<sup>16</sup> *Richardson*, 521 U.S. at 407-12; *Wyatt*, 504 U.S. at 167-68.

<sup>17</sup> *Richardson*, 521 U.S. at 408.

<sup>18</sup> *Id.* at 407-08; *Wyatt*, 504 U.S. at 167.

<sup>19</sup> *Richardson*, 521 U.S. at 409-11; *Wyatt*, 504 U.S. at 168. The Court emphasized that its cases did not establish a blanket rule eliminating immunity for private actors, but said that there was no immunity in attachment cases and in those in which the employees worked for a major firm that competed with others to provide government services on an ongoing basis. *Richardson*, 521 U.S. at 413-14 (prison guard); *Wyatt*, 504 U.S. at 169 (attachment).

<sup>20</sup> See *supra* note 19.

<sup>21</sup> *Richardson*, 521 U.S. at 409.

damages,<sup>22</sup> but could obtain injunctive relief by suing a state official in his official capacity.<sup>23</sup> If the prison were run by a city or county, damages would be available from the entity if its policies or customs were responsible for the challenged harm.<sup>24</sup> The defendant municipality would not be able to claim qualified immunity to avoid paying compensatory damages,<sup>25</sup> but it would be immune from punitive damages.<sup>26</sup> The Supreme Court has not determined whether private entities are "persons," whether they are only liable if the plaintiff satisfies the policy or custom requirement, whether private entities may claim qualified immunity, or whether private entities share public entities' immunity from punitive damages.

The lower courts have addressed these questions on numerous occasions.<sup>27</sup> They consider private entities suable "persons," and they largely agree that private entities are only liable if the plaintiff satisfies the policy or custom requirement, but they offer very little justification for that determination.<sup>28</sup> On the other hand, they do not agree on whether private entities may claim immunity. Some courts extend *Owen's* rule precluding municipal immunity to private entities, while others find that the *Richardson* Court's analysis governing individual immunity cases applies.<sup>29</sup> There are virtually no lower court cases discussing whether private entities may be held liable for punitive damages, but plaintiffs have succeeded in obtaining such damages.<sup>30</sup>

The lower courts generally reach their conclusions by analogy to prevailing law under § 1983. They do not, however, draw consistent analogies. Some lower courts focus on corporate status and analogize private entities to municipal corporations. Other lower courts focus on whether the defendant is public or private, and analogize private entities to private individuals. The lower courts rarely follow the approach that the Supreme Court has taken in analyzing the liability of private individuals, an approach that looks to history and policy.

This Article analyzes the cases that discuss the liability of private entities under § 1983. After reviewing the rules that govern the liability of government defendants and offering a model for analyzing questions of liability, it discusses the lower court decisions. It concludes that the lower court cases that attempt to apply prevailing § 1983 law to private

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<sup>22</sup> See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

<sup>23</sup> *Hafer v. Melo*, 502 U.S. 21, 27 (1991); *Will*, 491 U.S. at 71 n.10.

<sup>24</sup> *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

<sup>25</sup> *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

<sup>26</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

<sup>27</sup> See *supra* note 4 (providing figures).

<sup>28</sup> See *infra* text accompanying notes 134-49.

<sup>29</sup> See *infra* text accompanying notes 185 and 226-32.

<sup>30</sup> See *infra* text accompanying notes 233-41.

defendants reflect several failings. Lower courts do not use the correct analysis. They generally analogize private and government entities for purposes of determining the scope of entity liability, but compare private entities and private individuals for immunity analysis. While the second approach is preferable because the Supreme Court has designed municipal liability law with the notion of government liability specifically in mind, reasoning by analogy is not the approach the Supreme Court has used to determine the liability of private actors. Lower courts should follow Supreme Court precedent and approach liability by looking to statutory language, legislative history, and policy.

The lower courts' struggle to apply Supreme Court doctrine by analogy leads to fundamentally unsound results. The Supreme Court's municipal liability jurisprudence cannot comfortably apply to private entities. The lower courts' attempts to apply municipal liability law lead to both confusing and fundamentally unsound results. Some lower courts use the Supreme Court's policy or custom analysis to conclude that the private entity cannot be sued, and that only the employing entity can be liable.<sup>31</sup> The employing entity, however, can often escape liability.<sup>32</sup> This approach not only leaves wronged individuals without realistic redress, but renders private entities virtually unaccountable for constitutional harms that they cause.

Privatization is now accepted, but acceptance did not come without opposition. When the practice first became common, commentators argued that privatizing government functions such as corrections could constitute an unconstitutional delegation of government power.<sup>33</sup> The predominant fears that these commentators expressed concerned accountability and control, and the fear that the private actor would be free to act to pursue its own economic interests—interests that would prevail over the public's.<sup>34</sup> An approach to § 1983 private entity liability that focuses on private corporations' historical liability and the policies underlying § 1983 will help to ensure accountability. A proper

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<sup>31</sup> See *infra* text accompanying notes 170-76.

<sup>32</sup> See *infra* text accompanying notes 177-82.

<sup>33</sup> See generally John G. Dipiano, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. CRIM. & CIV. CONFINEMENT 171 (1995); Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813 (1987) [hereinafter Robbins, *Privatization of Corrections*]; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988) [hereinafter Robbins, *Delegation Doctrine*]. See also Ratliff, *supra* note 3, at 381-403 (dismissing the delegation doctrine as a guide to the constitutionality of privatization but arguing that due process requires limiting contractors' power); Charles W. Thomas, *Prisoner's Rights and Correctional Privatization*, 10 BUS. & PROF. ETHICS J. 3 (1991) (discussing the issues).

<sup>34</sup> See Ratliff, *supra* note 3, at 381 (arguing that privatization "poses the danger that private parties will misuse public power to serve their own ends"); Robbins, *Delegation Doctrine*, *supra* note 33, at 913, 951 (discussing private correctional firms' profit motive and arguing that privatization must take into account the danger that the delegatee's interests will prevail over the public's).

analysis of liability questions can help to counteract the dangers of privatization and allow victims of constitutional harm to obtain compensation.

## I. BACKGROUND

The Supreme Court's method of analyzing government liability under § 1983, while difficult to apply, follows clearly-defined steps. The first question is whether the entity is a "person," and thus subject to suit under § 1983.<sup>35</sup> The Court has tied the question of whether an entity is a person to whether the entity is a municipality or an "arm of the state" under Eleventh Amendment law.<sup>36</sup> Municipalities and other "local government units" are persons that are amenable to suit under the statute.<sup>37</sup> States, and state officials sued in their official capacities for damages, are not.<sup>38</sup> A court may require an arm of the state to obey the Constitution by issuing an injunction against a state employee in her official capacity.<sup>39</sup>

Municipalities are "persons" that may be sued for damages, but their liability is limited. Municipal liability law is built around three basic principles. First, municipalities cannot be held vicariously liable for the acts of their employees. Rather, they are only liable for constitutional violations that their policies or customs cause.<sup>40</sup> Second, municipalities are not entitled to qualified immunity.<sup>41</sup> Third, municipalities are immune from punitive damages.<sup>42</sup> The Supreme Court relied on both history and policy in establishing each of these principles.

The Court first recognized municipal liability in *Monell v. Department of Social Services*.<sup>43</sup> The *Monell* Court, reversing its earlier

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<sup>35</sup> Section 1983 liability lies against any "person," acting under color of state law, who deprives another of federal statutory or constitutional rights. 42 U.S.C. § 1983 (2000).

<sup>36</sup> *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (explaining that its holding that states are not "persons" under § 1983 "applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes"); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 689, 690 & n.54 (1978) (limiting its holding that municipalities are "persons" to "local government units which are not considered part of the State for Eleventh Amendment purposes").

<sup>37</sup> *Monell*, 436 U.S. at 689.

<sup>38</sup> *Will*, 491 U.S. at 71. The Court has also held that neither the Territory of Guam nor its officials acting in their official capacities are persons under § 1983. *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990) (considering § 1983's language, purpose, and the fact that Congress has defined "person" to exclude Territories).

<sup>39</sup> *Will*, 491 U.S. at 71 n. 10.

<sup>40</sup> See *infra* text accompanying notes 44-71.

<sup>41</sup> See *infra* text accompanying notes 72-89.

<sup>42</sup> See *infra* text accompanying notes 90-97.

<sup>43</sup> 436 U.S. 658 (1978).

decision to the contrary in *Monroe v. Pape*,<sup>44</sup> held that municipalities were “persons” subject to suit under § 1983.<sup>45</sup> In so holding, the Court reconsidered the *Monroe* Court’s analysis of the statute’s legislative history, particularly the significance of Congress’ rejection of the Sherman Amendment, a proposal that would have held municipalities liable for private acts of violence.<sup>46</sup> The Court said that opponents of the Sherman Amendment feared that it presented municipalities with a Hobson’s choice between keeping the peace or paying damages; that choice imposed by indirection an obligation to keep the peace that Congress could not have constitutionally imposed directly.<sup>47</sup> The *Monell* Court explained that a theory of municipal liability that only held municipalities liable for their own violations of the Fourteenth Amendment did not lead to the same problems.<sup>48</sup> Local governing bodies could be sued for unconstitutional actions implementing or executing official municipal policies that the body’s officers adopted and promulgated.<sup>49</sup>

The *Monell* Court found that the legislative history that showed Congress was afraid of imposing an obligation to keep the peace “compel[led] the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort.”<sup>50</sup> Creation of a federal law of respondeat superior would have led to the constitutional problems associated with imposition of a duty to keep the peace that doomed the Sherman Amendment.<sup>51</sup> The Court recognized that policies of deterrence and loss-spreading supported respondeat superior liability, but said that those policies could not sustain the Sherman Amendment and could not now justify imposing vicarious liability.<sup>52</sup> Government

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<sup>44</sup> 365 U.S. 167 (1961).

<sup>45</sup> *Monell*, 436 U.S. at 690.

<sup>46</sup> *Id.* at 664-83. The *Monell* Court explained that the Sherman Amendment did not attempt to amend § 1 of the 1871 Civil Rights Act, which became § 1983. *Id.* at 665-66. Furthermore, it said that objections to that Amendment were based on a fear that it unconstitutionally obligated municipalities to keep the peace, not on a fear that municipal liability itself was unconstitutional. *Id.* at 666-83. The meaning of the Sherman Amendment and Congress’s rejection of it is discussed in detail in Robert J. Kaczorowski, *Reflections on Monell’s Analysis of the Legislative History of § 1983*, 31 URB. LAW. 407 (1999).

<sup>47</sup> *Monell*, 436 U.S. at 679.

<sup>48</sup> *Id.* at 679-83.

<sup>49</sup> *Id.* at 690.

<sup>50</sup> *Id.* at 691.

<sup>51</sup> *Id.* at 693.

<sup>52</sup> *Id.* 693-94. For criticisms of this aspect of the Court’s opinion, see PETER SCHUCK, *SUING GOVERNMENT: CIVIL REMEDIES FOR OFFICIAL WRONGS* 119-21 (1983); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 516 (1982); Susanah M. Mead, 42 U.S.C. § 1983 *Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 N.C. L. REV. 517, 536-37 (1987); Eric Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 215 (1979).

The Court also said that its decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), foreclosed an



entities were only responsible when execution of a government's policy or custom inflicted the injury.<sup>53</sup>

Later cases teach that *Monell's* policy or custom standard can be met in two ways. The first is when an individual who makes municipal policy—a policymaker—takes or mandates an unconstitutional act.<sup>54</sup> Policymakers are “those officials or government bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.”<sup>55</sup>

The Court has found that state law determines who makes municipal policy. In *City of St. Louis v. Praprotnik*,<sup>56</sup> the plurality emphasized that the policymaker inquiry was one of state law and expressed confidence that state law “will always direct a court to some official or body that has the responsibility for making law or setting policy in any given area of a local government's business.”<sup>57</sup> A majority of the Court adopted the *Praprotnik* approach in *Jett v. Dallas Independent School District*.<sup>58</sup> The *Jett* court said that the policymaker question was a legal question that required the trial judge, “[r]eviewing the relevant legal materials, including state and local positive law” and “‘custom or usage’ having the force of law,” to decide who had “final policymaking authority for the local governmental actor concerning the action alleged to have caused” the violation at issue.<sup>59</sup>

Courts face difficult problems in applying the Supreme Court's policymaker analysis. One problem involves questions of delegation. The plurality opinions in both *Pembaur* and *Praprotnik* recognized that

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argument that respondeat superior should follow from an employer's right to control an employee's actions. *Monell*, 436 U.S. at 694 n.58. The *Rizzo* decision held that Philadelphia residents could not enjoin the Mayor and police supervisors to establish procedures to counter police brutality. The case's relevance to municipal liability is questionable because it did not discuss Philadelphia's liability but that of individual supervisors. Different concerns arise in the two situations. Municipalities can spread losses in a way that individual supervisors cannot and individual supervisors may not be able to hire and fire the individuals for whose conduct they would be held responsible. See SCHUCK, *supra*, at 120; Charles A. Rothfeld, Note, *Section 1983 Municipal Liability, and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 947-48 (1979); *infra* text accompanying note 279-82.

<sup>53</sup> *Monell*, 436 U.S. at 694.

<sup>54</sup> See *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

<sup>55</sup> *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

<sup>56</sup> 485 U.S. 112 (1988).

<sup>57</sup> *Id.* at 125. The plurality recognized that policymaking authority could be shared, and explained that it appeared that both the Mayor and Aldermen made personnel policy in Saint Louis. *Id.* at 126.

<sup>58</sup> 491 U.S. 701 (1989). *Jett* was a suit seeking recovery from a municipal defendant for a violation of 42 U.S.C. § 1981, prohibiting racial discrimination in contracting. The Court held that municipalities could only be liable under § 1981 if the plaintiff met the standards for imposing municipal liability under § 1983. *Id.* at 731.

<sup>59</sup> *Id.* at 737.

a policymaker might delegate his policymaking authority to a subordinate.<sup>60</sup> The *Praprotnik* plurality, however, cautioned that this possibility should not lead courts to impose liability for a subordinate's exercise of delegated discretion.<sup>61</sup> It said that the recognition that municipalities could be liable for unconstitutional customs would preclude municipalities' "egregious attempts to insulate themselves from liability for unconstitutional policies"<sup>62</sup> and rejected arguments that its construction left a "gaping hole" in § 1983.<sup>63</sup> The plurality's analysis and the *Jett* court's focus on positive law and custom and usage strongly suggest that the Court will not impose liability for the actions of a person with de facto policymaking authority.<sup>64</sup>

State law may also show that an official who appears to be a municipal officer makes policy on behalf of the State. In *McMillian v. Monroe County*,<sup>65</sup> the Court held that Alabama sheriffs make state policy, meaning that counties cannot be held liable for their actions.<sup>66</sup> The Court said that Alabama law, chiefly its 1901 Constitution's provisions regarding sheriffs, established that sheriffs represent the state when acting in a law enforcement capacity.<sup>67</sup>

The other approach to imposing municipal liability looks to the nature of the policy and its causal link to the harm. A municipality can be held liable when a facially constitutional policy that "amounts to deliberate indifference" to individual rights causes a constitutional violation.<sup>68</sup> The deliberate indifference standard is met if the municipality failed to train officers when the inadequacy was very "likely to result in the violation of constitutional rights" or when officers exercising their discretion violated the Constitution so often that "the need for further training must have been plainly obvious."<sup>69</sup> The

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<sup>60</sup> *Praprotnik*, 485 U.S. at 126 (plurality opinion); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion).

<sup>61</sup> 485 U.S. at 126-27 (plurality opinion). The plurality said that "[i]f the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability." *Id.* at 126.

<sup>62</sup> *Id.* at 127 (relying on *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). The opinion also explained that when official policies not of an official's making constrain the person's actions, "those policies, rather than the subordinate's departures from them, are the act of municipality." *Id.*

<sup>63</sup> *Id.* at 131. Justice Brennan's concurring opinion had charged the plurality with leaving a "gaping hole" in the statute by not recognizing de facto delegations of policymaking authority. *Id.* at 144 (Brennan, J., concurring).

<sup>64</sup> See Barbara Kritchevsky, *Reexamining Monell: Basing Section 1983 Municipal Liability Doctrine on the Statutory Language*, 31 URB. LAW. 437, 462-63 (1999) (discussing problems with the Court's delegation analysis) [hereinafter *Reexamining Monell*].

<sup>65</sup> 520 U.S. 781 (1997).

<sup>66</sup> *Id.* at 789. The State of Alabama is not liable for damages because it is not a "person" under § 1983. See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

<sup>67</sup> 520 U.S. at 788.

<sup>68</sup> See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

<sup>69</sup> *Id.* at 390.

municipal liability deliberate indifference standard is an objective standard.<sup>70</sup> "Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied."<sup>71</sup>

The *Monell* opinion made it clear that municipalities were not absolutely immune from liability, but left open the question of whether a qualified or good faith immunity might be available. The Court answered that question in *Owen v. City of Independence*.<sup>72</sup> The Court found the City of Independence liable for violating its police chief's procedural due process rights when it fired him without a hearing, even though the city officials acted in good faith<sup>73</sup> and the law giving the right to a name-clearing hearing was not clearly established at the time of the incident.<sup>74</sup>

In ruling that the municipality could not claim qualified or "good faith" immunity,<sup>75</sup> the Court first turned to § 1983's language and legislative history. The Court explained that the statute used expansive language and did not expressly provide for immunities.<sup>76</sup> The Court noted that it had, nonetheless, found individual immunities so well established at common-law that it inferred that Congress intended them to apply under § 1983.<sup>77</sup> It concluded, however, that "there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983" that would grant municipalities immunity.<sup>78</sup>

The Court explained that in 1871, municipalities, like private corporations, were treated like natural persons and routinely sued for

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<sup>70</sup> See *Farmer v. Brennan*, 511 U.S. 825, 841 (1994); *Canton*, 489 U.S. at 389-90.

<sup>71</sup> *Canton*, 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part) (agreeing with the "obviousness" standard and observing that liability is proper when policymakers are "on actual or constructive notice" of the need to train).

<sup>72</sup> 445 U.S. 622 (1980). *Owen* was a § 1983 suit brought by Owen, the City of Independence's former police chief. The City Manager summarily fired Owen after the City Council voted to release various reports of his alleged misfeasance to the news media. Owen's lawsuit alleged that his dismissal and concurrent stigmatization violated his procedural due process rights. The Supreme Court held that the municipality was liable, and was not entitled to immunity from liability because its agents acted in "good faith." *Id.* at 638.

<sup>73</sup> See *id.* at 632-33, 638. At the time *Owen* was decided, the Court still used a subjective immunity inquiry. See *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). The court adopted an objective inquiry in 1982. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982).

<sup>74</sup> The Court said that the City was liable, even though the circuit court had held that the officials were immune from liability because the Supreme Court had not clearly established that Owen had a right to a hearing at the time he was fired. The City was not entitled to immunity because its agents acted in "good faith." *Owen*, 445 U.S. at 634, 638.

<sup>75</sup> See *supra* note 73.

<sup>76</sup> *Owen*, 445 U.S. at 635-36.

<sup>77</sup> *Id.* at 637.

<sup>78</sup> *Id.* at 638.

damages.<sup>79</sup> The cases imposing damages did not suggest that municipalities might claim immunity. While two doctrines protected municipal corporations from tort liability, one distinguishing between “governmental” and “proprietary functions,” and the other granting immunity for “discretionary” activities, the Court found that Congress could not have intended either to limit § 1983 liability.<sup>80</sup> Immunity for governmental functions was rooted in the principle of sovereign immunity, which Congress abrogated when it made municipalities amenable to suit under § 1983.<sup>81</sup> The discretionary function doctrine did not help because a local government has no discretion to violate the Constitution.<sup>82</sup>

The Court then turned to policy, saying that Congress’s purpose in enacting § 1983 and “considerations of public policy” compelled the denial of immunity.<sup>83</sup> Imposing municipal liability was necessary to ensure that plaintiffs could obtain redress for constitutional violations. Given the immunity that government officials can claim, “many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense.”<sup>84</sup>

The Court explained that damages would serve not only to compensate victims but to deter future constitutional violations.<sup>85</sup> The knowledge that a municipality could be liable for violations inflicted in good faith would provide an incentive for officials to protect constitutional rights and to institute rules to prevent constitutional violations.<sup>86</sup> “Such procedures are particularly beneficial in preventing those ‘systemic’ injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.”<sup>87</sup>

The Court also emphasized that imposing municipal liability for municipal officials’ good faith behavior supported a proper allocation of the costs of a constitutional violation between the victim, the officer who inflicted the injury, and the municipality.<sup>88</sup> The Court explained that the innocent individual who suffers a constitutional violation would be assured of compensation, the offending official would not be liable for damages “so long as he conducts himself in good faith,” and the public would only be forced to pay for injuries “inflicted by the

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<sup>79</sup> *Id.* at 638-39.

<sup>80</sup> *Id.* at 644.

<sup>81</sup> *Id.* at 647-48.

<sup>82</sup> *Id.* at 649.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 650-51.

<sup>85</sup> *Id.* at 651-52.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 652.

<sup>88</sup> *Id.* at 657.

'execution of a government's policy or custom . . . .'"<sup>89</sup>

The Court followed the same analytical approach in *City of Newport v. Fact Concerts, Inc.*,<sup>90</sup> finding municipalities immune from punitive damages. The Court approached the issue largely as one of immunities, finding that when "Congress enacted what is now § 1983, the immunity of a municipal corporation from punitive damages was not open to serious question."<sup>91</sup> The Court thought that, given the common-law immunity, Congress would have explicitly stated if it wished to abolish the doctrine.<sup>92</sup>

The debate on the Sherman Amendment also suggested opposition to such awards. "We see no reason to believe that Congress' opposition to punishing innocent taxpayers and bankrupting local governments would have been less applicable with regard to the novel specter of punitive damages against municipalities."<sup>93</sup>

The Court then turned to a discussion of public policy, examining the objectives of punitive damages and their relationship to the goals of § 1983. Explaining that punitive damages aim to punish, not to compensate, the Court said that an award of punitive damages against a municipality would punish the taxpayers, "who took no part in the commission of the tort."<sup>94</sup> Punitive damages would be a windfall to a fully-compensated plaintiff and would likely be "accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill."<sup>95</sup> A municipality was not a proper target of punitive damages because it "[could] have no malice independent of the malice of its officials."<sup>96</sup> It was also not clear that punitive damage awards would deter wrongdoing. The specter of punitive damages against the individual offender would be more likely to deter violations than would

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<sup>89</sup> *Id.* (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). While *Owen* provides that municipalities cannot raise a qualified immunity defense, the policy or custom inquiry can give municipalities a similar level of protection. Municipalities are deliberately indifferent only when the need to train is "obvious," meaning that they can escape liability when the constitutional right at issue is novel or unclear. See *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). *Board of Commissioners v. Brown*, 520 U.S. 397 (1997), takes this limitation further by requiring that the plaintiff show that a municipal decision demonstrated deliberate indifference to a risk of violating "a particular constitutional . . . right." *Id.* at 411. This standard, which looks to the clarity of the constitutional right, gives municipalities much of the protection of qualified immunity. See *Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (en banc) (finding that the fact that defendant police officers were qualifiedly immune precluded municipal liability because the city could not have been deliberately indifferent in failing to train officers regarding an unsettled right).

<sup>90</sup> 453 U.S. 247 (1981).

<sup>91</sup> *Id.* at 259.

<sup>92</sup> *Id.* at 263.

<sup>93</sup> *Id.* at 266.

<sup>94</sup> *Id.* at 267.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

“the threat of damages against a government employer.”<sup>97</sup>

## II. APPLYING MUNICIPAL LIABILITY PRINCIPLES TO PRIVATE DEFENDANTS

### A. *The Supreme Court's Cases*

The Supreme Court has devoted considerable attention to determining when private defendants are amenable to suit under § 1983,<sup>98</sup> but has said very little about the contours of private defendants' liability. In the one area in which the Court has analyzed matters in some depth, determining whether private individuals sued under § 1983 are entitled to immunity, the Court has looked to history and policy.

The Court first addressed the question in *Wyatt v. Cole*, finding that a private individual who acted under color of state law in attaching private property was not entitled to qualified immunity.<sup>99</sup> The Court explained that it determined who was entitled to immunity by reference to the common law. “If the parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871,” the Court would infer that Congress intended to incorporate those immunities unless policy dictated to the contrary.<sup>100</sup> The Court then determined that analysis of liability for common-law torts that were analogous to wrongful attachment did not support a grant of qualified immunity.<sup>101</sup>

Turning to policy, the Court found that the rationales supporting immunity for government agents did not apply. “Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions.”<sup>102</sup> Immunities struck this balance by providing protection to government officials who were attempting to serve the public good and by preventing the threat of damages from deterring individuals from entering government service.<sup>103</sup> Those rationales were not applicable to private defendants because private entities did not hold office requiring them to exercise discretion and because the public good

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<sup>97</sup> *Id.* at 270; see Sabatino, *supra* note 3, at 213-20 (discussing *Fact Concerts* and why public entities are generally immune from liability for punitive damages).

<sup>98</sup> See *supra* note 5.

<sup>99</sup> 504 U.S. 158, 168-69 (1992).

<sup>100</sup> *Id.* at 164.

<sup>101</sup> See *id.* at 164-65. The Court explained that a good-faith defense was still possible. *Id.* at 169.

<sup>102</sup> *Id.* at 167.

<sup>103</sup> *Id.*

was not at stake when private parties acted.<sup>104</sup>

The Court used much the same analysis in *Richardson v. McKnight*, finding that private prison guards were not entitled to immunity.<sup>105</sup> The Court first found no history of immunity for private corrections officials.<sup>106</sup> Emphasizing that corrections had never been exclusively public, the Court found evidence that the common law provided prisoners with remedies against mistreatment at the hands of private imprisoners.<sup>107</sup> The Court also found that policy considerations did not justify immunity. Officials were unlikely to be unduly timid "when a private company subject to competitive market pressures operate[d] a prison."<sup>108</sup> Privatization also helped to ensure that the threat of liability would not deter prospective employees from entering the field. Companies were required to insure themselves, increasing the likelihood that they would indemnify employees.<sup>109</sup> Private firms acted in response to marketplace pressures, which gave them incentives to encourage sound decision-making and to overcome excessive timidity.<sup>110</sup> Private firms also had more freedom to regulate their employees' conduct than state employers did, allowing them to reward proper, and discipline improper, acts.<sup>111</sup>

Unlike its careful analysis of individual immunity, the Court has made only passing statements regarding the liability of private entities. Its earliest decisions in § 1983 actions against entity defendants, however, never suggested that corporate and municipal liability were analytically similar. In *Adickes v. S.H. Kress & Co.*,<sup>112</sup> a pre-*Monell* decision, the Court suggested that the private defendant was not only amenable to suit, but that it could be held vicariously liable.

The question in *Adickes* was whether Kress could be sued for conspiring with Hattiesburg police to arrest, on vagrancy charges, a Caucasian woman who attempted to eat at Kress's in the company of African-American youths.<sup>113</sup> The Court said that *Adickes* would have established a constitutional violation "and [would] be entitled to relief under § 1983 if she [could] prove that a Kress employee, in the course

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<sup>104</sup> *Id.* at 168.

<sup>105</sup> 521 U.S. 399, 412 (1997).

<sup>106</sup> *Id.* at 405.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 409.

<sup>109</sup> *Id.* at 411.

<sup>110</sup> *Id.* at 409-10.

<sup>111</sup> *Id.* at 410. The Court emphasized the limits of its holding. It addressed immunities in the context of a "private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government," which did so for profit and potentially in competition with other companies. *Id.* at 413. The case did "not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*

<sup>112</sup> 398 U.S. 144 (1970).

<sup>113</sup> *Id.* at 146-48.

of employment, and a Hattiesburg police officer” reached an understanding to violate her rights.<sup>114</sup> The Court decided *Adickes* before it decided *Monell*, but never suggested that a private entity was not a person that could be sued under § 1983 or that the entity could not be liable on a respondeat superior basis. The Court evidently assumed that Kress was a “person” even though, under the law of the time, Hattiesburg was not.<sup>115</sup>

The Supreme Court has also never suggested, post-*Monell*, that *Monell*’s policy or custom limitations applied to private entity defendants engaged in state action. The Court has decided cases against corporate defendants in the years after *Monell*.<sup>116</sup> In deciding these cases, the Court simply analyzed the state action question and determined that the corporate defendants were properly sued under § 1983. It never suggested that there were specific limits on liability.

The Supreme Court’s cases do not prove that the Court considered entity defendants persons that could be vicariously liable. It is possible that the Court assumed that private individuals would actually be held liable in these cases. The Court’s decision in *Lugar v. Edmonson Oil Co.*<sup>117</sup> suggests this possibility. A corporation was the defendant in the case, but the Court seemed to assume that individual liability was at stake when it discussed whether it was fair to hold that the defendant could be sued. The Court said that the fairness question should be dealt with by considering the availability of an affirmative defense, but it “did not need to reach the question of the availability of such a defense to private individuals at that juncture.”<sup>118</sup> The Supreme Court has never directly addressed the question of whether governmental liability rules apply to private actors.

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<sup>114</sup> *Id.* at 152. The *Adickes* Court also reserved the question of what relief would be available because the parties had not briefed remedial issues. *Adickes*, 398 U.S. at 174 n.44.

<sup>115</sup> See *supra* text accompanying notes 113-15 and *infra* notes 129-30, 256 (discussing *Adickes*’ relevance to corporate entity liability). Other pre-*Monell* § 1983 cases against private defendants also never considered the possibility that the corporate defendant was not a “person.” See *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978) (decided a month before *Monell*); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

<sup>116</sup> See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982).

<sup>117</sup> 457 U.S. 922 (1982).

<sup>118</sup> *Id.* at 942 n.23.



## B. *Can Private Entities Be Found Vicariously Liable?*

### 1. Lower Court Cases Before *Monell*

While the *Adickes* Court did not explicitly discuss the civil rights liability of private entities, it implicitly found that private entities were not to be treated the same as municipalities. The Court never suggested that Kress was not a "person" under § 1983, even though municipalities were not "persons" under the then-applicable holding in *Monroe v. Pape*.<sup>119</sup> *Monroe* itself contains language that can be read to support treating municipalities differently from private entities. The *Monroe* Court said that § 1983 liability "should be judged against the background of tort law."<sup>120</sup> If private entities were persons and their liabilities were "judged against the background of tort law," the entity could be sued and tort principles of vicarious liability would logically apply. The first court to address the question reached that conclusion in 1970.<sup>121</sup>

The question in *Hill v. Toll* was whether a private bail bond company, Southern, was liable because its agents beat and robbed Hill when they took him into custody. The court recognized that Southern could only be held liable if liability was based on the doctrine of respondeat superior.<sup>122</sup> Turning to *Monroe*, the court explained that § 1983 was to be read against the background of tort law, a background that did not preclude respondeat superior liability.<sup>123</sup> While tort liability looked to blame and vicarious responsibility did not, the principles "co-exist[ed] harmoniously at common law."<sup>124</sup> Relying on individual immunity cases, the court explained that § 1983 was not to be read in derogation of the common law unless the statute so mandated.<sup>125</sup> The statute did not clearly abolish the "wellsettled doctrine" of vicarious liability and the common law justification for vicarious liability—

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<sup>119</sup> 365 U.S. 167, 187 (1961); see *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997) (saying that *Adickes* "implicitly assume[s] that a private employer is liable for the actions of its employees by allowing the case to proceed against the employer without even discussing vicarious liability").

<sup>120</sup> 365 U.S. at 187.

<sup>121</sup> *Hill v. Toll*, 320 F. Supp. 185 (E.D. Pa. 1970). The *Hill* court said that "[n]o court has yet faced the issue of whether the doctrine of respondeat superior applies to § 1983." *Id.* at 188. The court said that *Adickes* was silent on the issue and cast "no illumination from which we can benefit." *Id.* at 188 n.2.

<sup>122</sup> *Id.* at 188.

<sup>123</sup> *Id.* The court also relied on the RESTATEMENT (SECOND) OF AGENCY (1958). See *Classon v. Shopko Stores*, 435 F. Supp. 1186, 1187 (E.D. Wis. 1977) (saying that agency principles can establish liability under § 1983, citing *Adickes*).

<sup>124</sup> *Hill*, 320 F. Supp. at 188.

<sup>125</sup> *Id.* (citing *Pierson v. Ray*, 386 U.S. 167 (1961)).

providing a deep pocket for recovery—applied to § 1983 suits.<sup>126</sup> The court concluded, “consistent with the traditional injunction that remedial statutes are to receive a liberal construction, that respondeat superior is impliedly a part of the Civil Rights Act.”<sup>127</sup>

Despite the *Hill* court’s careful analysis, later cases did not find *Hill* persuasive.<sup>128</sup> Some cases did find corporate defendants liable, relying either on respondeat superior<sup>129</sup> or a finding that the corporation was directly involved in a wrongful plan.<sup>130</sup> Other cases found that vicarious liability was improper, relying on lower court cases finding that individual government defendants, such as supervisory personnel, could not be held liable on a respondeat superior basis.<sup>131</sup> These cases

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 189.

<sup>128</sup> The court in *Thompson v. McCoy*, 425 F. Supp. 407 (D.S.C. 1976), declined to follow *Hill* in a case seeking to impose vicarious responsibility on a private defendant because, it said, later cases had found the doctrine inapplicable under § 1983. *Id.* at 410 (discussing cases finding that supervisory personnel could not be liable for the acts of their subordinates on a respondeat superior basis).

<sup>129</sup> *Croy v. Skinner*, 410 F. Supp. 117, 123 (N.D. Ga. 1976) (explaining that cases including *Adickes* established that corporations can be liable under civil rights laws and that “cases holding corporations potentially liable for violation of the civil rights laws indicate implicitly that concepts of vicarious liability for civil rights violations are equally applicable in the commercial context”).

<sup>130</sup> *Duriso v. K-Mart No. 4195*, 559 F.2d 1274, 1278 (5th Cir. 1977) (finding that a “customary plan” existed between the store and police regarding treatment of alleged shoplifters); *Smith v. Brookshire Bros.*, 519 F.2d 93, 94 (5th Cir. 1975) (saying that Brookshire and the police had a “customary plan” resulting in the challenged detention, citing *Adickes*); *Golden v. Biscayne Bay Yacht Club*, 370 F. Supp. 1038, 1043-44 (S.D. Fla. 1973) (finding private club liable under § 1983 for its discriminatory practices), *rev’d on other grounds*, 530 F.2d 16 (5th Cir. 1976) (en banc); see also *Classon v. Shopko Stores*, 435 F. Supp. 1186, 1187 (E.D. Wis. 1977) (explaining that liability can be found when the direct participant in a wrongful action acted on the superior’s orders or pursuant to a plan the superior instituted and stating, citing *Adickes*, that agency principles can establish liability under § 1983).

<sup>131</sup> See *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 145-46 (10th Cir. 1974); *Thompson v. McCoy*, 425 F. Supp. 407, 410-11 (D.S.C. 1976). These cases relied on a series of cases that found that individual supervisors could not be required to pay damages for the acts of their subordinates on a respondeat superior basis. See *Bursey v. Weatherford*, 528 F.2d 483 (4th Cir. 1975) (allowing recovery against division chief because he participated in the improper acts and indicating that liability would not lie on respondeat superior alone); *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973) (finding that claim did not lie against a police chief who was not present at the incident and who had no duty or opportunity to intervene).

These supervisory liability cases do not support a broader rejection of vicarious liability, however. The *Jennings* case, for example, rejected vicarious supervisory liability because the policies supporting respondeat superior—allocating risk to an enterprise as a cost of business because the enterprise is better able to bear and distribute the cost and as an incentive to careful supervision—only apply to the employing municipality. *Id.* at 1274-75. “It is the city who set the enterprise in motion, who ‘profits’ from the appellees’ labor and who, if held liable in such instances, can by its powers of taxation spread the resulting expenditures amongst the community at large.” *Id.* at 1275. At the time of the opinion, however, municipalities were not subject to suit under § 1983. See *id.* The courts’ reliance on *Jennings* to support refusals to hold entities liable on a respondeat superior basis is questionable. The *Jennings* court articulated policies distinguishing individual and entity liability and favoring holding entities vicariously liable.

found the same principle applicable in suits against private entities,<sup>132</sup> assuming that precedent involving individual liability governed corporate liability. They did not ask whether different rules should apply to private entities and they generally did not analyze the significance of *Adickes*, in which the Supreme Court considered the liability of a private entity.

## 2. Lower Court Cases After *Monell*

The Supreme Court's decision in *Monell* established that municipalities were "persons" subject to suit under § 1983 but that they could not be held vicariously liable for the acts of their agents. Rather, they were liable only for constitutional violations that their policies or customs caused.<sup>133</sup> *Monell* involved governmental defendants and said nothing about how its reasoning might affect suits against private entities. Some aspects of the Court's reasoning could apply to private defendants. *Monell* called the reasoning of lower court decisions such as *Hill v. Toll* into doubt to the extent that the Court's reliance on statutory language, its decision in *Rizzo v. Goode*, and the 1871 Congress' rejection of the Sherman Amendment interpreted the language of § 1983 to preclude vicarious liability. To the extent that the decision was based on the special status of municipalities as branches of government, however, *Monell* said nothing about private defendants. *Monell* did, however, speak in terms of respondeat superior liability, a concept traditionally used in determining corporate liability. That discussion appeared to lead courts to disregard the common law and a careful reading of *Monell*, and to assume that the Court's reasoning would apply to private defendants as a matter of § 1983 law.

Lower courts quickly found *Monell* applicable to private entities. The first clear discussion of the issue came in a Fourth Circuit case, *Powell v. Shopco Laurel Co.*<sup>134</sup> In finding that Shopco was not liable for the actions of a private security guard, the court stated that *Monell's* rejection of respondeat superior was "equally applicable to the liability

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<sup>132</sup> The Tenth Circuit reached this conclusion in *Draeger*, 504 F.2d at 145-46. That court also appeared to doubt that corporate defendants could be proper § 1983 defendants, discussing *Monroe's* non-person rule and saying that "a private entity does not have the requisite official character and thus cannot be reasonably concluded to be representing the state." *Id.* at 146. Later cases simply cited *Draeger* as support for the rule that corporate defendants could not be held vicariously liable. See *Thompson v. McCoy*, 425 F. Supp. 407, 411 (D.S.C. 1976); *Estate of Iodice v. Gimbels, Inc.*, 416 F. Supp. 1054, 1055 (E.D.N.Y. 1976); *Weiss v. J.C. Penney Co.*, 414 F. Supp. 52, 53-54 (N.D. Ill. 1976).

<sup>133</sup> See *supra* text accompanying notes 44-53.

<sup>134</sup> 678 F.2d 504 (4th Cir. 1982). An earlier case rejected holding a private company liable on respondeat superior grounds but did not cite *Monell*. See *Howell v. Tanner*, 650 F.2d 610, 615 n.8 (5th Cir. 1981).

of private corporations.”<sup>135</sup> The Fourth Circuit first said that *Monell* showed that Congress intended to exclude vicarious liability under § 1983. “For a third party to be liable the statute demands of the plaintiff proof that the former ‘caused’ the deprivation of his Federal rights.”<sup>136</sup> Second, *Monell* showed the Supreme Court’s determination that policy justifications for respondeat superior did not warrant its inclusion in § 1983.<sup>137</sup> “No element of the Court’s *ratio decidendi* lends support for distinguishing the case of a private corporation.”<sup>138</sup>

The *Powell* opinion proved very influential. Later cases seized on the court’s reasoning,<sup>139</sup> although some questioned the applicability of *Monell*’s policy discussions.<sup>140</sup> The courts’ refusal to hold corporations vicariously liable did not preclude entity liability in all situations. A few cases explicitly relied on *Monell* in assessing liability,<sup>141</sup> while others—without addressing *Monell*—appeared to assume that the plaintiff showed an actionable policy or custom.<sup>142</sup> A number of other

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<sup>135</sup> *Powell*, 678 F.2d at 506.

<sup>136</sup> *Id.* (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691-92 (1978)) (footnote omitted).

<sup>137</sup> *Id.* (citing *Monell*, 436 U.S. at 694).

<sup>138</sup> *Id.*

<sup>139</sup> *See, e.g.,* *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1433 (10th Cir. 1984) (citing *Powell*); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir. 1982) (citing *Powell* and pre-*Monell* lower court cases); *Rojas v. Alexander’s Dep’t Store, Inc.*, 654 F. Supp. 856, 858 (E.D.N.Y. 1986) (citing *Powell* and *Iskander*), *aff’d*, 924 F.2d 406, 408-09 (2d Cir. 1990) (relying on *Powell*); *Shepard v. Byrd*, 581 F. Supp. 1374, 1390 (N.D. Ga. 1984) (citing *Iskander*); *Ibarra v. Las Vegas Metro. Police Dep’t*, 572 F. Supp. 562, 564 (D. Nev. 1983) (citing *Iskander*); *see also* *Miami Int’l Realty Co. v. Town of Mt. Crested Butte*, 579 F. Supp. 68, 76 (D. Colo. 1984) (stating that respondeat superior is inapplicable under § 1983, but providing no support); *Alvarado v. Dodge City*, 702 P.2d 935, 944 (Kan. Ct. App. 1985) (explaining that a respondeat superior theory should not support the liability of either a private party or government entity because a “person must cause a deprivation of rights to be liable” under § 1983) (emphasis added); *Donna S. Spurlock, Liability of State Officials and Prison Corporations for Excessive Use of Force against Inmates of Private Prisons*, 40 VAND. L. REV. 983, 1016 (1987) (assuming that municipal liability law will govern the liability of private prisons).

<sup>140</sup> The *Ibarra* court explained that Congress rejected respondeat superior for municipalities because of perceived constitutional difficulties with imposing such liability. This reasoning did not support rejecting vicarious liability for private defendants “[i]n the absence of evidence that Congress had similar reservations as to the application of respondeat superior liability to private entities . . .” *Ibarra*, 572 F. Supp. at 564 n.1. The court found *Monell*’s analysis of Congressional intent to be controlling. *Id.* at 564.

<sup>141</sup> *See* *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1442 n.3 (11th Cir. 1987) (saying that it was unsettled whether corporations can be vicariously liable under § 1983, but that they would be liable for their policymakers’ acts under *Monell*); *Scutieri v. Revitz*, 683 F. Supp. 795 (S.D. Fla. 1988) (finding that corporations cannot be found vicariously liable but that corporations can be liable where there is a policymaking employee and there was “a policy which was the moving force of the constitutional violation”); *see also* *Passarella v. Prison Health Servs.*, No. CIV. A. No. 88-2175, 1988 WL 68075 (E.D. Pa. 1988) (appearing to find Prison Health Services a city “agency” that could only be liable under *Monell*’s guidelines).

<sup>142</sup> *See* *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1433 (10th Cir. 1984) (saying that the store and its managers acted in concert with police “according to a customary plan”); *Temple v. Albert*, 719 F. Supp. 265, 268 (S.D.N.Y. 1989) (finding that one basis for liability would be if it was the defendant’s policy to have its guards act coercively); *Miami Int’l Realty Co.*, 579 F. Supp. at 76 (saying that liability will not lie absent corporate ratification or wrongdoing by the corporation’s

cases appeared to assume that *Adickes* or principles of state action law supported holding private entities directly liable.<sup>143</sup>

As the Supreme Court elaborated on the *Monell* principle and it became an established part of § 1983 law, courts increasingly assumed that municipal liability law applied to corporate entities sued under the statute. Very few courts said that *Monell* did not govern private defendants.<sup>144</sup> A number of courts continued to use the *Adickes* Court's reasoning and, without suggesting that *Monell* was relevant, found that private entities could be held liable on a conspiracy or joint action theory.<sup>145</sup> Other courts said that private employers could be liable for their own actions, even if they could not be vicariously liable for what

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"high-ranking officers").

<sup>143</sup> See *Murray v. Wal-Mart, Inc.*, 874 F.2d 555, 558-59 (8th Cir. 1989) (stating, quoting *Adickes*, that a plaintiff is entitled to relief if the private defendant was "'a willful participant in joint activity with the State or its agents'"); *Temple*, 719 F. Supp. at 268 (stating that grounds for holding a private corporation liable are a conspiracy, citing *Adickes*, and a determination that the corporation's activities were state action); *Rojas*, 654 F. Supp. at 859 (explaining that a basis for liability exists if there is a conspiracy between police and the store's employees); *Shepard*, 581 F. Supp. at 1390 n.19 (saying that a corporation can be liable when it performs duties that have traditionally been the State's province).

<sup>144</sup> See *Hutchison v. Brookshire Bros., Ltd.*, 284 F. Supp. 2d 459, 473 (E.D. Tex. 2003) (saying that neither case law, the language of § 1983, nor policy supports shielding private employers from vicarious liability); *Segler v. Clark County*, 142 F. Supp. 2d 1264, 1268-69 (D. Nev. 2001) (finding that a private corporation that provided medical services to detainees was not a municipality and that the plaintiff could establish liability without showing a policy or custom); *Moore v. Wyoming Med. Ctr.*, 825 F. Supp. 1531, 1549 (D. Wyo. 1993) (stating that private defendant should not receive "*Monell*-type immunity, and the plaintiff need not prove that the defendants acted pursuant to a policy, custom or practice to prevail at trial"); *Gowan v. Bay County*, 744 So. 2d 1136, 1138 (Fla. Dist. Ct. App. 1999) (reversing dismissal of claim against Corrections Corporation of America, which argued that it could not be vicariously liable under § 1983, because plaintiff claimed that "CCA's correctional officer was acting within the scope of his employment and the scope of his authority, while serving the interests of CCA as his employer, when he caused appellant to suffer needless sun exposure and injury"). The cases do not cite direct authority for their conclusions. See, e.g., *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997) (saying that cases the parties cited in support of applying the *Monell* rule to private parties "provide no binding authority and little persuasive authority for the proposition that a private entity cannot be vicariously liable for the actions of its employees if those actions violate § 1983").

<sup>145</sup> *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 906 (6th Cir. 2004) (finding that plaintiff stated a claim against private companies that allegedly conspired with the City, without mentioning *Monell* or its requirements); *Ciambriello v. County of Nassau*, 292 F.3d 307, 324 (2d Cir. 2002) (acknowledging possibility of claim based on private party's conspiracy but finding that plaintiff did not state claim); *Spear v. Town of W. Hartford*, 954 F.2d 63, 68 (2d Cir. 1992) (discussing requirements of conspiracy claim against private actor without discussing *Monell*); *Hughes v. Patrolmen's Benevolent Ass'n*, 850 F.2d 876, 880-81 (2d Cir. 1988) (stating, relying on *Adickes*, that complaint alleging conspiracy alleged facts "sufficient to establish . . . a violation of § 1983"); *Small v. City of New York*, 274 F. Supp. 2d 271, 280 (E.D.N.Y. 2003) (finding that allegations that private party agreed with the City were sufficient to establish joint action and conspiracy "for the purpose of Section 1983 liability"); *Otani v. City & County of Hawaii*, 126 F. Supp. 2d 1299, 1305-06 (D. Haw. 1998) (suggesting that party could be liable for conspiracy even if there was no liability based on respondeat superior).

their employees did.<sup>146</sup> A few other courts explicitly debated *Monell's* applicability to private defendants and either found its reasoning applicable<sup>147</sup> or followed it because they declined to break from precedent.<sup>148</sup> The vast majority of lower court cases, however, accepted that private entities could not be vicariously liable under § 1983 and stated that principle without discussion.<sup>149</sup>

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<sup>146</sup> *Murphy v. Kearney*, No. Civ. 03-554-SLR, 2004 WL 878467, at \*4 (D. Del. Apr. 19, 2004) (saying that private entity can be liable for personal involvement in wrong but not on a respondeat superior theory); *Stewart v. Harrah's Ill. Corp.*, No. 98 C. 5550, 2000 WL 988193, at \*9 (N.D. Ill. July 18, 2000) (saying that plaintiff presumably argued that defendant was liable under respondeat superior because he "does not allege any direct action by Harrah's that purportedly violated his civil rights").

<sup>147</sup> See *Doby v. Decrescenzo*, No. CIV. A. 94-3991, 1996 WL 510095, at \*19-20 (E.D. Pa. Sept. 9, 1996) (explaining that the Supreme Court's holding in *Monell* applies with equal force to private entities because it did not rest on factors unique to municipalities but on general legislative history).

<sup>148</sup> The court in *Taylor v. Plousis*, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000), discussed at length why it was doubtful that the public policy concerns underlying *Monell* should apply to private defendants. Drawing a parallel to the Supreme Court's treatment of qualified immunity for private defendants in *Richardson v. McKnight*, 521 U.S. 399 (1997), the *Taylor* court explained that private corporations, unlike municipalities, could pick the activities in which they engaged. 101 F. Supp. 2d at 263 n.4. The immunities and privileges that governmental entities received reflected the view that "the taxpayers and public officials should not be exposed to the burdens of litigation when carrying out their mandated activities." *Id.* The court explained that it was arguable "that voluntarily contracting to perform a government service should not free a corporation from the ordinary respondeat superior liability." *Id.* Similarly, the availability of insurance coverage for private actors that was relevant to the immunity decision argued in favor of vicarious liability. *Id.* The court questioned why medical malpractice would impose respondeat superior liability when the more serious conduct showing an Eighth Amendment violation would not. "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." *Id.* See *Edwards v. Acadia Realty Trust, Inc.*, 141 F. Supp. 2d 1340, 1347 n.7 (M.D. Fla. 2001) (declining invitation to follow the *Taylor* court's reasoning and find private defendant vicariously liable; circuit precedent dictated otherwise); *Mulkern v. Cumberland County*, No. 00-382-P-C, 2001 WL 1519409, at \*21 (D. Me. Nov. 30, 2001) (believing that the First Circuit would adopt view that private entities cannot be vicariously liable despite *Taylor*); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997) (explaining, in case in which parties assumed that private employer could not be vicariously liable, that policies underlying *Monell* do not apply to private employer liability).

<sup>149</sup> See *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 355 (4th Cir. 2003); *Baker v. Simmons*, 65 Fed. Appx. 231, 234 (10th Cir. 2003); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003); *Natale v. Camden County Corr. Facility*, 318 F.3d 575, 583 (3rd Cir. 2002); *Jackson v. Medi-Car, Inc.*, 300 F.3d 760, 766 (7th Cir. 2002); *Johnson v. Corr. Corp. of Am.*, 26 Fed. Appx. 386, 388 (6th Cir. 2001); *Starcher v. Corr. Med. Sys.*, 7 Fed. Appx. 459, 465 (6th Cir. 2001); *Sena v. Wackenhut*, 3 Fed. Appx. 858, 861 (10th Cir. 2001); *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 818 (6th Cir. 1996); *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727-28 (4th Cir. 1999); *Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 975 (8th Cir. 1993); *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992); *Howell v. Evans*, 922 F.2d 712, 724 n.12 (11th Cir. 1991); *Goodnow v. Palm*, 264 F. Supp. 2d 125, 130 (D. Vt. 2003); *Mejia v. City of New York*, 228 F. Supp. 2d 234, 243 (E.D.N.Y. 2002); *Goode v. Corr. Med. Servs.*, 168 F. Supp. 2d 289, 292 (D. Del. 2001); *Thomas v. Zinkel*, 155 F. Supp. 2d 408, 412 (E.D. Pa. 2001); *Parent v. Roth*, No. 00-3773, 2001 WL 1243563, at \*3 (E.D. Pa. Oct. 17, 2001); *Kruger v. Jenne*, 164 F. Supp. 2d 1330, 1333-34 (S.D. Fla. 2000); *Andrews v. Camden County*, 95 F. Supp. 2d 217, 228 (D.N.J. 2000); *Edwards v. Alabama Dep't of Corr.*, 81 F. Supp. 2d 1242, 1255 (M.D. Ala. 2000);

As courts found that *Monell* governed the liability of private entities, they found it necessary to apply the Court's developing municipal liability law in cases involving private defendants. Applying *Monell* was not overly difficult in cases where courts only sought to determine whether a plaintiff proved the existence of a responsible policy or custom.<sup>150</sup> Some courts, however, found it necessary to analyze the uncertain contours of municipal liability law in assessing the liability of private defendants. The court in *Natale v. Camden*

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Smith v. Ostrum, No. 97-689-SLR, 2000 WL 988012, at \*3 (D. Del. June 29, 2000); Donlan v. Ridge, 58 F. Supp. 2d 604, 611 (E.D. Pa. 1999); Jones v. Sabis Educ. Sys., Inc., 52 F. Supp. 2d 868, 878 (N.D. Ill. 1999); Allen v. Columbia Mall, 47 F. Supp. 2d 605, 613 n.12 (D. Md. 1999); Szucs v. Comm. of Interns & Residents, 34 F. Supp. 2d 224, 229 (1999); Otari Otani v. City & County of Hawaii, 126 F. Supp. 2d 1299, 1305-06 (D. Haw. 1998); Raby v. Baptist Med. Ctr., 21 F. Supp. 2d 1341, 1357 (M.D. Ala. 1998); Robinson v. City of San Bernardino Police Dep't, 992 F. Supp. 1198, 1204 (C.D. Cal. 1998); Miller v. Hoffman, No. CIV. A. 97-7987, 1998 WL 404034, at \*5-6 (E.D. Pa. July 7, 1998); Rey v. Kmart Corp., No. 97-3912-CIV-GOLD, 1998 WL 656070, at \*4 (S.D. Fla. July 21, 1998); Nelson v. Prison Health Servs., Inc., 991 F. Supp. 1452, 1465 (M.D. Fla. 1997); Naguib v. Ill. Dep't of Prof'l Regulation, 986 F. Supp. 1082, 1094 (N.D. Ill. 1997); Burton v. Youth Servs. Int'l, 176 F.R.D. 517, 520 (D. Md. 1997); Forbes v. R.I. Bhd. of Corr. Officers, 923 F. Supp. 315, 324 (D.R.I. 1996); Little v. Lycoming County, 912 F. Supp. 809, 821 (M.D. Pa. 1996); Swan by Carello v. Daniels, 923 F. Supp. 626, 633 (D. Del. 1995); Hetzel v. Swartz, 909 F. Supp. 261, 264 (M.D. Pa. 1995); Fraser v. County of Maui, 855 F. Supp. 1167, 1182 (D. Haw. 1994); Trimble v. Androscoggin Valley Hosp., 847 F. Supp. 226, 227-28 (D. N.H. 1994); Jones v. Prison Health Servs., No. CIV. A. 93-5489, 1994 WL 197176, at \*4 (E.D. Pa. May 18, 1994); Lawson v. Burns, No. CIV. A. 94-0780, 1994 WL 583264, at \*2 (E.D. Pa. Oct. 24, 1994); Datil v. Prison Health Servs., Inc., No. CIV. A. 94-2704, 1994 WL 702626, at \*1 (E.D. Pa. Dec. 13, 1994); Marks v. Crawford, 882 F. Supp. 530, 532 (E.D. Va. 1993); Lassiter v. Kulp, No. CIV. A. 93-1176, 1993 WL 364694, at \*4 (E.D. Pa. Sept. 13, 1993); Miller v. Corr. Med. Sys., 802 F. Supp. 1126, 1131-32 (D. Del. 1992); Alber v. Ill. Dep't of Mental Health & Developmental Disabilities, 786 F. Supp. 1340, 1378 (1992); Unterberg v. Corr. Med. Sys., 799 F. Supp. 490, 497 (E.D. Pa. 1992); Islam v. Jackson, 782 F. Supp. 1111, 1116 (E.D. Va. 1992); Taliaferro v. Voth, 774 F. Supp. 1326, 1330 (D. Kan. 1991); McIlwain v. Prince William Hosp., 774 F. Supp. 986, 990 (E.D. Va. 1991); Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1520 (E.D. Pa. 1990); Chase v. Prison Health Servs., No. CIV. A. 90-1032, 1990 WL 42249, at \*1 (E.D. Pa. April 6, 1990); Priovolos v. Prison Health Servs., Inc., No. CIV. A. 90-2089, 1990 WL 82097, at \*1 (E.D. Pa. June 13, 1990); Katz v. Morgenthau, 709 F. Supp. 1219, 1229 (S.D.N.Y. 1989); Scutieri v. Revitz, 683 F. Supp. 795, 800 (S.D. Fla. 1988); Fraser v. Estate of Schultze, 663 F. Supp. 512, 514-15 (N.D. Ill. 1987); Shepard v. Byrd, 581 F. Supp. 1374, 1390 (N.D. Ga. 1984).

<sup>150</sup> See Nelson v. Prison Health Servs., 991 F. Supp. 1452, 1465 (M.D. Fla. 1997) (saying that the test for Prison Health Services' liability mirrors that for the county's liability and that the evidence of custom that sufficed to show municipal liability "also forms the basis for PHS's liability under § 1983"); see also Leidy v. Borough of Glenolden, 277 F. Supp. 2d 547, 569-70 (E.D. Pa. 2003) (finding that private prison did not deprive plaintiff of a constitutional right); Edwards v. Acadia Realty Trust, Inc., 141 F. Supp. 2d 1340, 1347-48 (M.D. Fla. 2001) (determining that plaintiff alleged a responsible policy or custom but did not present sufficient evidence to survive summary judgment); Mulkern v. Cumberland County, No. 00-382-P-C, 2001 WL 1519409, at \*21 (D. Me. Nov. 30, 2001) (finding that plaintiff did not show that Prison Health Services had a policy or custom of deliberate indifference to medical needs); Miller v. City of Philadelphia, No. CIV. A. 96-3578, 1996 WL 683827, at \*4 (E.D. Pa. Nov. 25, 1996) (finding that plaintiff's allegations that private hospital had policies or customs of subjecting persons to accusations of child abuse without justification and of failing adequately to train and discipline its staff stated a claim under § 1983); McIlwain v. Prince William Hosp., 774 F. Supp. 986, 990 (E.D. Va. 1991) (finding that hospital had no policy responsible for the alleged harm).

*County Correctional Facility*,<sup>151</sup> for instance, found that a private health services provider was responsible for injuries a diabetic detainee suffered from lack of medication. Following the law it distilled from the Court's municipal liability cases,<sup>152</sup> the Third Circuit found evidence that Prison Health Services could be liable because it "turned a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights" and failed to adopt a policy that was more responsive to medical needs.<sup>153</sup>

One important determination in many municipal liability cases is whether a municipal policymaker acted. This can be crucial if the plaintiff seeks to hold the entity liable for a policymaker's act or omission<sup>154</sup> or if the court finds it necessary to determine whether municipal policymakers ratified an alleged policy or custom.<sup>155</sup> The policymaker inquiry asks who, under state law, has final authority to make policy in the area in question.<sup>156</sup> Courts have found it very difficult to apply this analysis to private entity defendants in any rational manner, at least in part because state law does not regulate who makes corporate policy.

Some courts have responded to this dilemma by finding state law irrelevant to the determination of who makes policy for a private entity.

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<sup>151</sup> 318 F.3d 575 (3d Cir. 2002).

<sup>152</sup> *Id.* at 583-85 (citing *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404, 410-12, 417 (1997)); *City of Canton v. Harris*, 489 U.S. 378, 390 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (plurality opinion); *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 691-92 (1978).

<sup>153</sup> *Natale*, 318 F.3d at 584; *see also* *Andrews v. Camden County*, 95 F. Supp. 2d 217, 229 (D.N.J. 2000) (finding that the county's and Correctional Medical Services' policy of deliberate ignorance of the requirement that a Medical Director be on the prison staff was evidence of a custom or policy that created an unreasonable risk of an Eighth Amendment violation; Supreme Court and circuit cases have established that "a municipality may be held liable for *not* having in place a policy that is necessary to safeguard the rights of its citizens"); *Raby v. Baptist Med. Ctr.*, 21 F. Supp. 2d 1351, 1351-54 (M.D. Ala. 1998) (finding, after careful analysis of Supreme Court and circuit precedent, that claim that private entity was deliberately indifferent in hiring and retaining private police officer survived summary judgment).

<sup>154</sup> *See* *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736-38 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123-27 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83 (1986); *supra* text accompanying notes 55-64.

<sup>155</sup> It is not clear whether identified municipal policymakers must be deliberately indifferent to a risk of harm to establish liability under *Canton*. The Court has sometimes said that the plaintiff must establish the policymakers' indifference. *See* *City of Canton*, 489 U.S. at 389. Other cases, however, look at municipal indifference more generally. *See* *Farmer v. Brennan*, 511 U.S. 825, 840-41 (1994) (explaining that the municipal liability deliberate indifference standard is objective); *Owen v. City of Independence, Missouri*, 445 U.S. 622, 622, 638 (1980) (distinguishing individual from municipal liability and holding that municipalities cannot claim immunity based on the "good faith" of its agents); *see also* Barbara Kritchevsky, *A Return to Owen: Depersonalizing Section 1983 Municipal Liability Litigation*, 41 VILL. L. REV. 1381, 1397-1404, 1415-26 (1996) (arguing that courts should not require a showing that identified policymakers were deliberately indifferent).

<sup>156</sup> *Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 123; *Pembaur*, 475 U.S. at 482; *supra* text accompanying notes 55-64.



The court in *Mejia v. City of New York*,<sup>157</sup> for instance, flatly stated: "Obviously, state law is irrelevant here as the claim involves the final policymaking authority within a private corporation."<sup>158</sup> The court then carefully followed the principles from Supreme Court cases regarding municipal policymaking in concluding that a freight company's regional security manager and cartage supervisor did not have final policymaking authority.<sup>159</sup> Other cases assessed corporate policymaking without considering the applicability of state law.<sup>160</sup>

Other courts considered corporate policy to be the equivalent of state law. The Eleventh Circuit, for instance, reasoned that, in determining whether a corporate employee is a policymaker, "the relevant 'state law' for policymaking determinations are . . . the contracts between [the corporation], the state, and [the corporation's] employees."<sup>161</sup> The court looked to Correctional Medical Services' contract with the state and to CMS's medical director's contract with CMS in finding that the medical director "was the policymaking authority for CMS" at the prison.<sup>162</sup>

Other courts struggled to take the Supreme Court's dictate to look to state law literally. In *Austin v. Paramount Parks, Inc.*,<sup>163</sup> for instance, the Fourth Circuit was faced with the question of whether the defendant's Manager of Loss Prevention, Hester, was its policymaker for law enforcement matters.<sup>164</sup> The court said that Supreme Court

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<sup>157</sup> 228 F. Supp. 2d 234 (E.D.N.Y. 2002).

<sup>158</sup> *Id.* at 249.

<sup>159</sup> *Id.* at 250-54. The court explained that corporate employees at that level "do not have the authority to make final policy for the corporation," *id.* at 249, and found that they had not been delegated final policymaking authority because their supervisors could have reviewed the decisions. *Id.* at 250-54. In a prior decision in the case, *Mejia v. City of New York*, 119 F. Supp. 2d 232 (E.D.N.Y. 2000), the court had relied on other decisions holding that "corporate employees in similar positions [to the regional security manager and cartage supervisor] are not final policymakers." *Id.* at 276. It cited: *Austin v. Paramount Parks*, 195 F.3d 715, 729-30 (4th Cir. 1999) (finding manager of loss prevention not a policymaker); *Smith v. United States*, 896 F. Supp. 1183 (M.D. Fla. 1995) (holding that manager of halfway house was not a policymaker); and *Miller v. Corr. Med. Sys.*, 802 F. Supp. 1126, 1132 (D. Del. 1992) (finding medical director of prison medical services corporation not a final policymaker).

<sup>160</sup> See *Raby v. Baptist Med. Ctr.*, 21 F. Supp. 2d 1341, 1353 n.6 (M.D. Ala. 1998) (noting that parties agreed on the identity of the person with authority to appoint and employ police officers and who was "the final repository of authority on personnel decisions"); *Blumel v. Mylander*, 954 F. Supp. 1547, 1555 (M.D. Fla. 1997) (finding that warden's statement that he made changes in jail policy supported the conclusion that he had "final policy making authority for CCA and, subsequently, the County"); *Unterberg v. Corr. Med. Sys., Inc.*, 799 F. Supp. 490, 498 (E.D. Pa. 1992) (noting that plaintiff presented no evidence that "policymakers of Lehigh County or CMS exhibited the requisite deliberate indifference").

<sup>161</sup> *Howell v. Evans*, 922 F.2d 712, 724 (11th Cir. 1991).

<sup>162</sup> *Id.* at 725; see also *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 729-30 (4th Cir. 1999) (looking to private entity's written policies in determining the policymaker); *infra* text accompanying notes 163-69.

<sup>163</sup> 195 F.3d 715 (4th Cir. 1999).

<sup>164</sup> The plaintiff sued the defendant park after she was arrested for allegedly passing bad checks at the amusement park. The court said that the defendant could not be liable on a

decisions holding that the policymaker inquiry was dependent on state law applied to private corporations.<sup>165</sup> The question became “whether Hester, as a matter of state and local positive law, or custom or usage having the force of law, . . . exercised final policymaking authority concerning arrests effected by the special police officers of the Park Police Department.”<sup>166</sup> In finding that Hester did not make policy, the court said that “nothing in the positive law of the Commonwealth of Virginia or of Hanover County granted Hester any policymaking authority concerning arrests effected by the special police officers.”<sup>167</sup> Nothing in the statute authorizing special officers gave private corporations authority over the officers’ law enforcement functions.<sup>168</sup> The court also looked to the defendant entity’s written policies on law enforcement, finding that the Manager of Loss Prevention was not in the relevant chain of command.<sup>169</sup>

The policymaker analysis has not always led courts to conclude that the government delegated policymaking authority to the private defendant. The Eleventh Circuit decision in *Howell v. Evans*,<sup>170</sup> for instance, concluded that Correctional Medical Systems’ (CMS) medical director did not make policy regarding equipment and staff. The court explained that the director “worked for CMS, which in turn worked for the state.”<sup>171</sup> The director reported to the prison superintendent and consulted with the Health Care Administrator to recommend improvements in services.<sup>172</sup> The director could not obtain necessary services on his own initiative; the Superintendent made the ultimate decision.<sup>173</sup> The director “was not the final authority on the matters of equipment and staff procurement at the prison” and CMS could not be held liable for his actions and policies.<sup>174</sup> Similarly, the Sixth Circuit found that “Kentucky law makes the fiscal court of each county the

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respondeat superior basis. *Id.* at 728. Recognizing that a municipality may be liable under § 1983 for a single decision by a policymaking official, the court turned to the question of whether the park’s Manager of Loss Prevention, who acquiesced in another employee’s decision to arrest plaintiff, was a policymaker. *Id.* at 728-29.

<sup>165</sup> *Id.* at 729.

<sup>166</sup> *Id.* (citation and footnote omitted).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* The court also said that no custom or usage having the force of law gave Hester policymaking authority. *Id.* at 729-730; see *Miller v. Corr. Med. Sys., Inc.*, 802 F. Supp. 1126, 1132-33 (D. Del. 1992) (holding that state medical director for private prison health care provider did not make policy under state law, even if his decisions were final in practice, because State officials supervised medical services and that plaintiff failed to show a culpable custom).

<sup>169</sup> *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 729-30 (4th Cir. 1999).

<sup>170</sup> 922 F.2d 712, 725 (11th Cir. 1991).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

final authority over medical services at the county jail.”<sup>175</sup> While the fiscal court contracted with CMS to provide medical services, it did not delegate “its final decision-making authority to CMS or its employees” and CMS could not be held liable.<sup>176</sup>

The possibility that the policymaker inquiry can lead to a conclusion that the employing government unit makes policy, and that the private entity does not, is enormously significant. The Supreme Court’s decisions make a clear distinction between officials who make municipal policy and those who make state policy. The plaintiff could not obtain damages from a state policymaker who contracted with a private entity because the state is not a person under § 1983.<sup>177</sup> Even municipal officers can be found to make state policy. In *McMillian v. Monroe County*<sup>178</sup> the Court said that Alabama sheriffs made policy for the State of Alabama, meaning that counties could not be held liable for their sheriffs’ unconstitutional decisions.<sup>179</sup> A court that found that government retained policymaking authority over a private entity could find, under the *McMillian* court’s rationale, that the state made policy. Doing so would preclude an award of damages from the private entity, because it did not make policy, and from the state, which is not a “person” under § 1983. This would, in effect, allow the private entity to share in the state’s sovereignty.

While no court appears to have taken this precise step, at least one court has relied on the state’s supervision of a private entity in concluding that the entity was an “arm of the state” entitled to Eleventh Amendment protection.<sup>180</sup> The *Citrano* court said that the Louisiana

<sup>175</sup> *Hicks v. Frey*, 992 F.2d 1450, 1458 (6th Cir. 1993).

<sup>176</sup> *Id.*; see also *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 & n.9 (11th Cir. 1985) (explaining that county’s duty to fund medical care does not disappear when the county contracts with a private entity and that, if Prison Health Services has responsibility to make final decisions about medical care, their “policies and customs become official policy”); *Blumel v. Mylander*, 954 F. Supp. 1547, 1556 (M.D. Fla. 1997) (stating that the County could only rely on CCA to formulate policy “[u]nless it chose to retain final policymaking authority” and that, because it did not, “CCA policy is the policy of the County”); *Miller v. Corr. Med. Sys.*, 802 F. Supp. 1126, 1132 (D. Del. 1992) (saying that state defendants were responsible for supervising the provision of medical services, removing the power to make final authority from prison officials).

<sup>177</sup> See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 68 (1989), discussed *supra* at text accompanying notes 35-39.

<sup>178</sup> 520 U.S. 781 (1997).

<sup>179</sup> *Id.* at 793; see *supra* text accompanying notes 65-67.

<sup>180</sup> *Citrano v. Allen Corr. Ctr.*, 891 F. Supp. 312 (W.D. La. 1995). The court did not discuss whether its conclusion also meant that the defendant was not a “person” under § 1983; cf. *Caraballo v. Del. Dep’t of Corr.*, No. C.A. 00C-06-100-JEB, 2001 WL 312453 (Del. Super. Mar. 22, 2001) (dismissing claim against the Delaware Department of Corrections and Prison Health Services because the state is not a person, but failing to explain whether that determination included Prison Health Services).

The Supreme Court has not addressed the question of whether a private entity can be an “arm of the state.” It has held that “States or governmental entities that are considered ‘arms of the State’ for Eleventh Amendment purposes” are not persons, *Will*, 491 U.S. at 70 (emphasis added). The *Monell* Court limited its definition of “persons” to “local government units which

Department of Corrections supervised the private correctional operator, Wackenhut, pursuant to legislative authorization which said that contracts with private correctional facilities were for the “safety and welfare of the people of the state.”<sup>181</sup> This led the court to conclude that Wackenhut operated the defendant facility as an arm of the state and was immune from suit by virtue of the Eleventh Amendment.<sup>182</sup>

This decision, however, appears to stand alone. The Sixth Circuit found that a private corporation that acted jointly with the state was not an arm of the state, emphasizing that the crucial Eleventh Amendment inquiry was “will a State pay if the defendant loses?”<sup>183</sup> Answering the question in the negative, the court concluded that the private corporation could be sued under § 1983.<sup>184</sup>

The lower court cases following *Monell* have, for the most part, uncritically drawn an analogy between governmental and private entities and assumed that municipal liability law governs private defendants. This analogy to *Monell* has led courts to find that private entities cannot be held liable on a respondeat superior basis in suits under § 1983, despite the doctrine’s general applicability in tort law. The attempt to transfer the Court’s municipal liability law to private entities has led to additional problems. Aspects of municipal liability law hinge on state law, but state law does not regulate the internal authority of corporate officers. And § 1983 law draws a sharp distinction between state and municipal liability that could immunize private entities from suit in some instances. The courts have not, however, considered whether these consequences should lead them to question their reliance on *Monell* and its progeny in analyzing corporate liability.

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are not considered part of the State for Eleventh Amendment purposes.” *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978)

<sup>181</sup> *Citrano*, 891 F. Supp. at 321 (quoting La. Stat. Ann. 39:1800).

<sup>182</sup> *Id.* The court explained that the company’s employees could be sued for damages but that they could raise a qualified immunity defense. *Id.*

<sup>183</sup> *Brotherton v. Cleveland*, 173 F.3d 552, 560 (6th Cir. 1999) (discussing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994)).

<sup>184</sup> *Brotherton*, 173 F.3d at 560-61 (concluding that an eye bank association was a proper defendant in a § 1983 suit alleging that it acted in conjunction with the county coroner in removing plaintiff’s dead husband’s corneas without her permission); see also *Proctor v. Wackenhut Corr. Corp.*, 232 F. Supp. 2d 709, 713 (N.D. Tex. 2002) (finding *Citrano* unpersuasive and finding that Wackenhut was not an Eleventh Amendment arm of the state in a suit under the Equal Pay Act, Title VII, and the Age Discrimination in Employment Act; Texas law provides that a private company operating a state prison may not claim sovereign immunity); *Teichgraeber v. Mem’l Union Corp.*, 946 F. Supp. 900, 905 (D. Kan. 1996) (finding that private corporation that operated student union at state university was not entitled to Eleventh Amendment immunity in an Age Discrimination in Employment Act suit); *Mullin v. P & R Educ. Servs.*, 942 F. Supp. 110, 114 (S.D.N.Y. 1996) (holding that private contractor that operated drinking and driving program in cooperation with the state Department of Motor Vehicles was not entitled to Eleventh Amendment immunity in § 1983 suit challenging requirement that motorist participate in the program).

### C. *Are Private Entities Entitled to Qualified Immunity?*

While most lower courts have assumed that *Monell's* policy or custom analysis applies to private entities, they have not similarly assumed that *Owen v. City of Independence's* preclusion of qualified immunity applies. The courts have generally failed to draw a simple analogy to municipal liability law.<sup>185</sup> They have, instead, analogized private entities to private individuals and have relied on the Supreme Court's decisions dealing with the immunity of private individuals.

The courts decided the earliest immunity cases against the backdrop of *Lugar v. Edmonson Oil*, in which the Supreme Court left open the question of whether a private defendant which followed state law in attaching goods was entitled to immunity.<sup>186</sup> The lower courts answered the question in the affirmative, finding the analogy to individual government defendants persuasive.

The courts may have drawn on *Lugar* because early corporate qualified immunity cases arose in situations analogous to that in *Lugar*; the cases involved defendants who followed presumptively valid state laws to obtain benefits.<sup>187</sup> *Jones v. Preuit & Mauldin*,<sup>188</sup> for instance, was a wrongful attachment case. Following the two-prong history and

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<sup>185</sup> An exception is *Blumel v. Mylander*, 954 F. Supp. 1547 (M.D. Fla. 1997), which denied CCA immunity. The court stated that "suing CCA is tantamount to suing a political subdivision of the state, not a government official in his or her individual capacity." *Id.* at 1560. The court relied on *Smith v. United States*, 850 F. Supp. 984 (M.D. Fla. 1994), a *Bivens* case that found that a private corporation under contract with the government "should be considered a governmental entity, and not an individual government actor." *Id.* (quoting *Smith v. United States*, 896 F. Supp. 1183, 1189 (M.D. Fla. 1995)). The *Blumel* court said that it was fair to require a company that "knowingly performed a public function for which it was compensated" to "bear the costs" associated with that activity. *Id.*; accord *Edwards v. Ala. Dep't of Corr.*, 81 F. Supp. 2d 1242, 1254 (M.D. Ala. 2000) (stating that Correctional Medical Services should be treated like a municipality for purposes of § 1983 litigation and "[a]s such, the private entity is not entitled to qualified immunity"); see also *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 621 (D. Md. 1998) (explaining that the fact that municipalities and state actors that are sued in their official capacities could not claim immunity supported its conclusion that the Supreme Court would not allow private corporations to claim immunity); *McDuffie v. Hopper*, 982 F. Supp. 817, 825 n.7 (M.D. Ala. 1997) (saying that it did not need to decide whether Correctional Medical Services should be denied qualified immunity because it should be treated like a municipality for both liability and immunity issues because the company would not be entitled to immunity under any analysis); *Moore v. Wyoming Med. Ctr.*, 825 F. Supp. 1531, 1543 n.8 (D. Wyo. 1993) (explaining that a private corporation that performs a public function is arguably not an individual "but is, in effect, the municipality itself raising the specter of *Monell*-type immunity, not qualified immunity").

<sup>186</sup> See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 942 n.23 (1982).

<sup>187</sup> The *Lugar* plaintiff stated a claim under § 1983 in alleging that the defendant had followed Virginia law in attaching his property. *Id.* at 940-42 (explaining that the defendant was only a state actor to the extent that he relied on a rule of conduct that the state established). The Court reserved the question of whether a defendant in such a case could claim immunity. *Id.* at 942 n.23. The *Lugar* Court treated the immunity question as one of individual immunities even though the defendant in the case was a corporation. See *id.*; *supra* notes 117-18.

<sup>188</sup> 851 F.2d 1321 (11th Cir. 1988) (en banc).

policy analysis from the Supreme Court's immunity cases,<sup>189</sup> the court asked whether a defendant's good faith reliance on existing law "was well established as a defense at common law" and whether "strong policy reasons support its application in section 1983 actions."<sup>190</sup> It answered both questions in the affirmative, concluding that "private defendants are entitled to qualified immunity in wrongful attachment suits."<sup>191</sup> The court then applied its immunity inquiry to defendant Preuit & Mauldin, without discussing the relevance of the fact that the defendant was a corporation, not an individual.<sup>192</sup>

The lower courts reached the same result in cases that arose in other contexts. The most extensive discussion of the issues was in a Tenth Circuit case, *DeVargas v. Mason & Hanger-Silas Mason Co.*<sup>193</sup> DeVargas sued a private company that provided security for the Los Alamos National Laboratory pursuant to a subcontract with the University of California Board of Regents.<sup>194</sup> Mason & Hanger refused to process DeVargas's employment application, relying on a Department of Energy directive that disqualified one-eyed individuals, such as DeVargas, from employment.<sup>195</sup> DeVargas sued, and the defendants responded that they were qualifiedly immune from suit.<sup>196</sup> The court explained that courts had denied private defendants immunity when they conspired with public officials to violate the Constitution,<sup>197</sup> but that private defendants were entitled to immunity in attachment and

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<sup>189</sup> *Id.* at 1324 (explaining that Supreme Court cases such as *Owen* and *Pierson v. Ray*, 386 U.S. 547 (1967) established that § 1983 incorporates immunities that were established at common law and are consistent with the purposes of the statute).

<sup>190</sup> *Jones*, 851 F.2d at 1324.

<sup>191</sup> *Id.* at 1325. The court discussed the common law tort of malicious prosecution in analyzing history and found that the existence of a good faith and probable cause defense in common law wrongful attachment actions supported a finding that qualified immunity was available in a suit under § 1983. *Id.* at 1324-25. Turning to policy, the court said that a citizen should be able to follow a procedure that the state legislature established without fearing liability as a result of the legislature's error. *Id.* at 1325. The court said that citizens should be encouraged to employ legal mechanisms to resolve disputes and should not be punished for doing so. *Id.* The court did, however, say that the immunity was subject to the qualification that the defendant have acted in good faith. *Id.*

<sup>192</sup> *Id.* at 1326-28; see also *Watertown Equip. Co. v. Norwest Bank Watertown*, 830 F.2d 1487, 1490 (8th Cir. 1987) (holding that individual and entity defendants could invoke the defense of qualified immunity in an attachment action).

<sup>193</sup> 844 F.2d 714 (10th Cir. 1988).

<sup>194</sup> *Id.* at 715-16.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* DeVargas sued under both § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which implied a cause of action against federal officials for damages under the Fourth Amendment. *DeVargas*, 844 F.2d at 716, 720. The court assumed that *Bivens* actions were available against private party defendants, *id.* at 720 n.5, and said that it treated the qualified immunity defenses to both claims identically. *Id.* at 720. The Supreme Court has since established that *Bivens* actions do not lie against entity defendants. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

<sup>197</sup> *DeVargas*, 844 F.2d at 721 (citing *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), and *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978)).

garnishment actions.<sup>198</sup> The *DeVargas* court found that the defendants in the case before it “reasonably thought that their contract with a government body *required* them to act” as they did, presenting “the strongest arguments for extending qualified immunity to private party defendants.”<sup>199</sup> Additionally, the private parties’ functions were ones that government employees would have otherwise performed.<sup>200</sup> The court concluded that qualified immunity was proper when private defendants performed a governmental function in accordance with contractually-imposed duties.<sup>201</sup>

The court then turned to the question of whether the private entity defendants should be able to claim the same immunity that was available to individual defendants. *DeVargas* argued that private entity defendants should be treated like municipal defendants. He claimed that because courts found *Monell’s* determination that government entities could not be held vicariously liable applicable to corporate defendants, *Owen’s* denial of qualified immunity should similarly apply to corporate defendants.<sup>202</sup>

The court rejected that premise, finding the question of whether parties should be vicariously liable “completely distinct” from the immunity issue.<sup>203</sup> The court said that *Monell* rested on Congress’s intent to preclude vicarious liability, a rationale that applied to corporate defendants.<sup>204</sup> In the immunity area, however, the crucial distinction was “between defendants that are governmental bodies and other defendants.”<sup>205</sup> Private parties performing governmental functions can generally claim immunity, and the fact that the defendant is a corporation “should not change this result.”<sup>206</sup> The court emphasized that the policy justifications for immunity, preventing over-deterrence and attracting individuals to government service, applied to private

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<sup>198</sup> *DeVargas*, 844 F.2d at 721. In addition to *Jones*, discussed *supra* at text accompanying notes 188-92, and *Watertown Equipment*, cited *supra* at note 192, the court relied on *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983), and *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982).

<sup>199</sup> 844 F.2d at 721.

<sup>200</sup> *Id.* at 722.

<sup>201</sup> *Id.* The court reserved the question of whether immunity would be proper when a private contractor performing a government function such as operating a prison performed acts that the contract did not require. *Id.* at 722 n.11.

<sup>202</sup> *Id.* at 722 (citing *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), and cited *supra* notes 139, 142).

<sup>203</sup> *DeVargas*, 844 F.2d at 722.

<sup>204</sup> *Id.* at 723.

<sup>205</sup> *Id.* The court quoted *Owen*, 445 U.S. 622, 653 n.37 (1980), which said that “[d]ifferent considerations come into play when governmental rather than personal liability is threatened.” See also *Carman v. City of Eden Prairie*, 622 F. Supp. 963, 966 (D. Minn. 1985) (finding that *Owen* did not preclude granting immunity to a private detoxification center to which police transported plaintiff because *Owen’s* rationale that strict municipal liability would equitably spread losses to the public did not apply to private entities).

<sup>206</sup> *DeVargas*, 844 F.2d at 723.

corporations.<sup>207</sup> Absent immunity, a contractor would be required to bear the cost of the plaintiff's injury "regardless of the objective reasonableness of its acts" and would be more timid in performing its duties and "less likely to undertake government service."<sup>208</sup>

When the Supreme Court addressed private defendant immunities in *Wyatt v. Cole*, it made it clear that the policies supporting government employees' immunity did not necessarily apply to private individuals.<sup>209</sup> This called the reasoning of cases such as *DeVargas* into question, insofar as they extended individual immunity analysis to entity defendants. The lower courts, however, read *Wyatt* narrowly and did not find that it precluded granting immunities to private corporations. The Seventh Circuit, for instance, granted immunity to a private psychiatric facility in *Sherman v. Four County Counseling Center*.<sup>210</sup> Finding no reason to distinguish private corporations from private individuals in analyzing immunities,<sup>211</sup> the court concluded that *Wyatt* did not preclude immunity when the defendant followed a state court's orders and did not act in bad faith or to "further its own pecuniary or other interests."<sup>212</sup> Policy justified immunity when a defendant was fulfilling a public duty and might otherwise be discouraged from public service.<sup>213</sup>

The court in *Manis v. Corrections Corp. of America*,<sup>214</sup> on the other hand, found that *Wyatt* meant CCA could not claim immunity.<sup>215</sup> The court said that "[a] private party that performs a government function for a fee" does not face the dilemma of a public officer who might run afoul of the Constitution in seeking to serve the public.<sup>216</sup>

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<sup>207</sup> *Id.* The court said that immunities existed because it would be unjust to hold defendants liable for performing their duties, because officials would otherwise be overly cautious, and because it would otherwise be difficult to attract qualified persons into public service. *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232 (1974)).

<sup>208</sup> *Id.*; see also *Carman*, 622 F. Supp. at 966 (arguing that denying immunity to private entities that the state required to exercise discretion would be unjust and could deter such organizations from providing necessary services to the public).

<sup>209</sup> 504 U.S. 158 (1992). The Court found that the policies justifying immunity did not apply to private individuals invoking state attachment or garnishment statutes because the defendants did not hold office requiring them to exercise discretion and were not chiefly concerned with the public good. *Id.* at 168. See *supra* notes 99-104 and accompanying text, which discuss *Wyatt*.

<sup>210</sup> 987 F.2d 397 (7th Cir. 1993).

<sup>211</sup> *Id.* at 403 n.4.

<sup>212</sup> *Id.* at 405.

<sup>213</sup> *Id.* at 405-06. But see *Moore v. Wyoming Med. Ctr.*, 825 F. Supp. 1531, 1543-45 (D. Wyo. 1993) (distinguishing *Sherman* and holding that private medical center was not entitled to qualified immunity under the *Wyatt* Court's reasoning).

<sup>214</sup> 859 F. Supp. 302 (M.D. Tenn. 1994).

<sup>215</sup> The court's decision did not discuss the differences between individual and corporate immunities. The court did say that the phrase "the defendants" applied to CCA and its defendant employee, *id.* at 303 n.2, and concluded that "the defendants in this case are not protected by qualified immunity." *Id.* at 306.

<sup>216</sup> *Id.* at 305. The court had first considered the availability of immunities at common law and concluded that private citizens did not have common law immunity. *Id.* at 304-05.



Corporate officers were hired to serve the corporation and its shareholders, who were chiefly interested in advancing their financial standing.<sup>217</sup> “Especially when a private corporation is hired to operate a prison, there is an obvious temptation to skimp on civil rights whenever it would help to maximize shareholders’ profits.”<sup>218</sup> Affording immunity would contradict the policy of promoting the public good and would free the corporation to sacrifice individual rights to make a profit.<sup>219</sup> “In such circumstances, the threat of incurring money damages might provide the *only* incentive for a private corporation and its employees to respect the Constitution.”<sup>220</sup>

The Supreme Court’s decision in *Richardson v. McKnight*<sup>221</sup> established that private individuals would not receive immunity in some cases in which they were not acting for their own benefit. The Court denied immunity to private prison guards, again emphasizing the differences between private and government employees. Guards working for a private company subject to competitive market pressures were less likely to be unduly timid.<sup>222</sup> Competitive pressures not only meant that a firm whose guards were overly aggressive would face damages that would raise costs, “but also that a firm whose guards [were] too timid [would] face threats of replacement by other firms . . . .”<sup>223</sup> Additionally, a private company had more freedom to reward or punish individual employees,<sup>224</sup> and privatization helped to ensure that the threat of liability for damages did not deter prospective employees from entering the field. The requirement that the company insure itself against civil rights liability, for instance, increased the likelihood that it would indemnify employees.<sup>225</sup>

Lower courts have continued to look to individual immunity cases after *Richardson*, and have had no trouble finding that the decision precludes granting private prisons immunity from suit.<sup>226</sup> The courts

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<sup>217</sup> *Id.* at 305.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 305-06.

<sup>220</sup> *Id.* at 306 (emphasis added); see also *Moore*, *supra* note 213. The *Manis* court refused to follow the unpublished opinion of another Tennessee district court, which granted immunity. See *Tinnen v. Corr. Corp. of Am.*, 91-2188-TUA, 1993 WL 738121 (W.D. Tenn. Sept. 20, 1993).

<sup>221</sup> 521 U.S. 399 (1997).

<sup>222</sup> *Id.* at 409.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 410.

<sup>225</sup> *Id.* at 411. The Court limited its holding to employees of a “private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government.” *Id.* at 413. It did not consider “a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.” *Id.*

<sup>226</sup> See *Horton v. Corr. Corp. of Am.*, 187 F.3d 635, 1999 WL 623769, at \*2 (6th Cir. Aug. 11, 1999); *Bowman v. Corr. Corp. of Am.*, 188 F. Supp. 2d 870, 881 n.4 (M.D. Tenn. 2000), *aff’d in part, rev’d in part*, 350 F.3d 537 (6th Cir. 2003).

have extended this reasoning to other private entities, such as private companies performing prison medical services<sup>227</sup> and a private detoxification center.<sup>228</sup> The Eleventh Circuit, for example, explained that a private medical service company, like a private prison, “was systematically organized to perform a major administrative task for profit” and acted “with limited direct supervision and control by the government.”<sup>229</sup>

The cases are not uniform, however. Courts have found private entities entitled to immunity after *Richardson*.<sup>230</sup> The District Court for the Eastern District of Michigan, for example, found that a nonprofit organization that acted to oversee foster homes using the services of state caseworkers was acting as an “adjunct” to the state foster care agency that hired it because it “operate[d] under close and continuous supervision, and consequently act[ed] as an arm of the State.”<sup>231</sup> Another district court applied *Richardson*’s two-prong history and policy inquiry and decided that “qualified immunity is available to private actors who are enlisted by law enforcement officials to assist in making an arrest.”<sup>232</sup>

The majority of lower courts take a strikingly different approach to analyzing immunity and liability questions. The immunity cases reveal more independent analysis than the municipal liability cases do. The courts often apply the Supreme Court’s history and policy analysis,

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<sup>227</sup> See *Hinson v. Edmond*, 192 F.3d 1342, 1345-46 (11th Cir. 1999); *Parreant v. Schotzko*, No. 00-2014 JRT/JGL, 2001 WL 1640137, at \*5 (D. Minn. Sept. 30, 2001); *Nelson v. Prison Health Servs.*, 991 F. Supp. 1452, 1462 (M.D. Fla. 1997); *McDuffie v. Hopper*, 982 F. Supp. 817, 825 (M.D. Ala. 1997).

<sup>228</sup> *Halvorsen v. Baird*, 146 F.3d 680, 685-86 (9th Cir. 1998) (noting that it was irrelevant that the defendant center was a nonprofit entity because “both profit and nonprofit firms compete for municipal contracts, and both have incentives to display effective performance”); see also *Ellis v. City of San Diego*, 176 F.3d 1183, 1191 (9th Cir. 1999) (stating that private ambulance company was not entitled to qualified immunity); *Ace Beverage Co. v. Lockheed Info. Mgmt. Servs.*, 144 F.3d 1218, 1220 (9th Cir. 1998) (finding that private company that processed parking tickets for the City of Los Angeles was in the position of the entity in *Richardson* and not entitled to qualified immunity); *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 621 (D. Md. 1998) (explaining that, in light of *Richardson*, *Wyatt*, and decisions finding that municipal corporations cannot claim qualified immunity, “it cannot be expected that the Supreme Court will allow a private business corporation, as distinct from its officers and employees, to claim the benefits of qualified immunity”).

<sup>229</sup> *Hinson*, 192 F.3d at 1346.

<sup>230</sup> See *Bartell v. Lohiser*, 12 F. Supp. 2d 640 (E.D. Mich. 1998) (holding that private foster care contractor and social workers were entitled to raise immunity defense), *aff’d*, 215 F.3d 550 (6th Cir. 1998); *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997) (finding that law firm acting as city’s outside counsel was entitled to immunity); *Mejia v. City of New York*, 119 F. Supp. 2d 232 (E.D.N.Y. 2000) (holding that private defendants that aid law enforcement officials in making an arrest are entitled to immunity). Courts have also found that private individuals acting as “adjuncts” to government were entitled to immunity. See, e.g., *Raby v. Baptist Med. Ctr.*, 21 F. Supp. 2d 1341 (M.D. Ala. 1998) (saying that private individuals given powers of police officers were entitled to immunity).

<sup>231</sup> *Bartell*, 12 F. Supp. 2d at 646.

<sup>232</sup> *Mejia*, 119 F. Supp. 2d at 268.

instead of unquestioningly following a line of Supreme Court decisions. In doing so, they generally do not analogize municipal and private corporations. Instead, most courts find cases governing the immunities of private individuals determinative. This approach suggests a recognition that the distinction between government and private defendants may be more important for § 1983 purposes than the distinction between individual and entity.

#### D. *Are Private Entities Subject to Punitive Damages?*

Whether a court focuses on the distinction between government and private defendants or between individual and entity defendants is crucial in determining whether private entities may be sued for punitive damages under § 1983. A court that simply analogizes private entities and government entity defendants would conclude that private entities, like municipalities, are immune from liability for punitive damages. A court that focuses on the distinction between public and private defendants would reach the opposite conclusion.<sup>233</sup> The latter court would recognize that the Supreme Court's decision in *Fact Concerts* rested on a determination that municipalities were immune from punitive damages, and could find it determinative that private corporations were historically subject to punitive damages.<sup>234</sup> Surprisingly, there is very little case law discussing the issue.

Courts have often assumed that private entities are subject to punitive damages in § 1983 actions.<sup>235</sup> However, there appears to be

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<sup>233</sup> Courts have assumed that punitive damages are available in § 1983 suits against private individual defendants. See *West v. Atkins*, 487 U.S. 42 (1988) (allowing suit to proceed against private doctor who contracted with a prison to provide medical care; the Court of Appeals decision in the case *West v. Atkins*, 815 F.2d 993, 994 (4th Cir. 1987) (en banc), notes that the plaintiff sought punitive damages); *Nieto v. Kapoor*, 268 F.3d 1208, 1222-23 (10th Cir. 2001) (upholding award of punitive damages against a private physician that the court found to be a state actor under *West v. Atkins*).

<sup>234</sup> See *supra* text accompanying notes 90-97 (discussing *Fact Concerts*) and *infra* text accompanying note 293 (explaining that private corporations were historically subject to punitive damages). It is also perhaps significant that the Supreme Court did not question the availability of punitive damages in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 925 (1982) (noting that plaintiff sought punitive damages). It is possible, however, that the Supreme Court thought that individual liability was really at stake in that case. See *supra* text accompanying notes 117-18 (discussing how the *Lugar* Court appears to have made this assumption in raising the immunity issue); see also *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 233-34 (1970) (Black, J., concurring) (discussing availability of punitive damages on remand).

<sup>235</sup> See *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984) (allowing claim for punitive damages to go forward without question); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 993-95 (W.D. Wash. 1997) (reducing award of punitive damages against a private company but not questioning if an award of punitive damages was proper); *Unterberg v. Corr. Med. Sys.*, 799 F. Supp. 490, 498 n.6 (E.D. Pa. 1992) (stating that punitive damages claim against individual and private entity defendants must be dismissed because plaintiff did not state a claim under § 1983,

only one reported case that analyzes the issue.<sup>236</sup> Segler, an inmate at the Clark County Detention Center, filed a § 1983 suit against Emergency Medical Service Associates (EMSA)—which had contracted with Clark County to provide medical care to Detention Center inmates—alleging that it provided inadequate medical treatment. The court rejected EMSA's assertion that it should be considered a municipality.<sup>237</sup> After explaining the Supreme Court's policy reasons for refusing to hold municipalities liable for punitive damages, the court stated that "EMSA does not fit the requirements for a municipality" under the Court's *Fact Concerts* rationale.<sup>238</sup> An award of punitive damages against EMSA would not punish taxpayers; EMSA "would bear the burden of payment as a private corporation."<sup>239</sup> Similarly, the deterrent effect of a punitive damages award would affect EMSA as a private company, "influencing the possible future actions by EMSA or its employees."<sup>240</sup> The court concluded that EMSA could be found liable for punitive damages.<sup>241</sup>

The sparse law discussing private defendants' liability for punitive damages and the assumption that punitive damages are available reveals that courts recognize that municipalities and private corporations are not necessarily equivalent for § 1983. Rules governing municipal liability may rest on the municipality's status as an arm of government, not on

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but noting that the Supreme Court's decision in *Smith v. Wade*, 461 U.S. 30 (1982), establishes that punitive damages are available in cases of reckless disregard for a plaintiff's rights and stating that plaintiff could not show that "any defendant" acted with reckless disregard); *Pierce v. Corr. Corp. of Am.*, No. W2001-005950-COA-R3-CV, 2001 WL 1683792 (Tenn. Ct. App. Dec. 20, 2001)(mem.) (finding that complaint seeking compensatory and punitive damages from private entity defendants stated a claim on which relief could be granted); *Rex W. Huppke, \$1.75 Million Awarded in County Jail Suicide*, CHIC. TRIB., Feb. 25, 2003, at L1 (describing award of \$1.5 punitive damages against Correctional Medical Services); *Judith Greene, Bailing Out Private Jails*, AM. PROSPECT, Sept. 10, 2001, at 2327 (describing award of \$3 million punitive damages against Corrections Corporation of America for abusing a youthful inmate); *Mickie Anderson, Jury Blasts Prison Firm for Leaving Inmate's Jaw Wired*, MEMPHIS COM. APPEAL, Mar. 24, 2001, at B1 (describing award of punitive damages against Corrections Corporation of America).

<sup>236</sup> *Segler v. Clark County*, 142 F. Supp. 2d 1264 (D. Nev. 2001); see also *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 829-31 (3d Cir. 1991) (finding a regional transit authority immune from punitive damages under the Supreme Court's reasoning in *Fact Concerts*).

<sup>237</sup> *Segler*, 142 F. Supp. 2d at 1268.

<sup>238</sup> *Id.* at 1269. The court explained that the Supreme Court decision in *Fact Concerts* found that the purposes of awarding punitive damages would not be met by imposing damages on a municipality. *Id.* at 1268-69. Punitive damages would only punish the taxpayers, who did not commit the violation, and would not make the wrongdoer suffer for unlawful conduct. *Id.* at 1269. Punitive damages also would not deter unconstitutional municipal action or be a strong incentive to prevent municipal officers from acting unconstitutionally. *Id.*

<sup>239</sup> *Id.* at 1269.

<sup>240</sup> *Id.*; see also *Campbell v. City of Philadelphia*, CIV. A. No. 88-6976, 1990 WL 102945, at \*6 (E.D. Pa. July 18, 1990) (stating that, because the defendant was a private entity, "the policy behind prohibiting recovery of punitive damages against a municipality does not apply").

<sup>241</sup> *Segler*, 142 F. Supp. 2d at 1269.

its entity status. In such a case, law governing private individuals may be a more relevant source of guidance.

### III. HOW COURTS SHOULD ANALYZE PRIVATE ENTITY LIABILITY

#### A. *The Problem with the Current Approach*

The lower courts fail to take a coherent approach to determining the liability of private entity defendants under § 1983. The courts generally treat corporate and municipal entities the same in determining whether vicarious liability is available and assume that *Monell* governs the liability of corporate defendants.<sup>242</sup> The courts do not, however, draw the same equation when immunities or punitive damages are at stake. They rely on private individual immunity decisions in analyzing corporate immunity.<sup>243</sup> Courts also have not found the prohibition on punitive damages applicable to corporate defendants, appearing to treat corporate defendants in the same manner as individual defendants.<sup>244</sup>

The courts also offer little in the way of justification for their method of analysis. Most courts simply assume that *Monell* applies to private defendants without exploring whether the case's reasoning logically applies when government liability is not at stake.<sup>245</sup> Few courts explore whether *Owen's* rationale should apply to private entities,<sup>246</sup> and courts appear to assume that private entities may be liable for punitive damages, without questioning whether the fact that a claim lies under § 1983 might dictate a different result.<sup>247</sup>

This lack of analysis is problematic. First, while the majority of courts treat entity defendants in the same way, there are inconsistencies. A few courts, for instance, will hold private entities vicariously liable,<sup>248</sup> and a private entity may be immune in one jurisdiction but not in another.<sup>249</sup> Second, the courts' decisions generally lack a coherent

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<sup>242</sup> See *supra* text accompanying notes 144-49.

<sup>243</sup> See *supra* text accompanying notes 226-32.

<sup>244</sup> See *supra* text accompanying notes 235-41.

<sup>245</sup> See *supra* text accompanying note 149.

<sup>246</sup> See *supra* text accompanying note 185.

<sup>247</sup> See *supra* text accompanying notes 233-35.

<sup>248</sup> See *Hutchison v. Brookshire Bros., Ltd.*, 284 F. Supp. 2d 459, 473 (E.D. Tex. 2003) (saying that neither case law, the language of § 1983, nor policy supports shielding private employers from vicarious liability); *Segler v. Clark County*, 142 F. Supp. 2d 1264, 1268-69 (D. Nev. 2001) (finding that a private corporation that provided medical services to detainees was not a municipality and that the plaintiff could establish liability without showing a policy or custom); *supra* text accompanying and cases cited note 144.

<sup>249</sup> Courts that follow the *Richardson* analysis sometimes find that private corporations are entitled to qualified immunity, see *supra* text accompanying notes 230-32, while courts that find that *Owen* governs private entities would not find immunity a possibility, see *supra* text

rationale, depriving litigants of a clear focus for argument. Litigants do not know whether to argue in terms of municipal liability law, the law governing private individual defendants, or history and policy.

Blind allegiance to the predominant view also leads to decisions that attempt to apply municipal liability doctrine to private entities in a manner that requires incoherent analysis and reaches indefensible results. Courts, for instance, cannot logically determine which person in a private corporation's hierarchy possesses policymaking authority under state law.<sup>250</sup> A determination that a governing entity has not delegated policymaking authority can insulate the private entity from liability and potentially prevent the injured plaintiff from obtaining redress.<sup>251</sup> Courts should discard prevailing assumptions and consider the liability of private entities as an independent inquiry.

Supreme Court precedent, while scant, supports this approach. The Supreme Court, while it has said little about private entity liability, has certainly never suggested that private and governmental entities should be treated the same. The Court has long assumed that private entities could be liable even when municipalities could not.<sup>252</sup> It has also explained at length why the policies governing the liability of private and government defendants are not the same.<sup>253</sup>

The Court has analyzed history and policy when it has considered private defendants' liability.<sup>254</sup> Instead of drawing analogies to government liability, courts should base their analysis on common law principles governing corporate liability that Congress would logically

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accompanying note 185.

<sup>250</sup> See *supra* text accompanying notes 154-69. The court in *Groom v. Safeway, Inc.*, 973 F. Supp. 987 (W.D. Wash. 1997), identified another reason why municipal liability law should not govern private defendants. It said that the distinction between official and individual capacity suits that was important in municipal liability law "is yet another illustration of how case law from that context does not fit where the defendant is a private corporation." *Id.* at 992 n.5. The court explained that:

It would seem clear that Safeway, as a private employer, has no 'official'-capacity, or 'municipal,' liability, and yet the 'rule' against holding Safeway vicariously liable for its employee's actions is borrowed from the official-capacity/municipal liability context, in which a plaintiff seeks to hold a public entity liable for the actions of its employees.

*Id.* It appears that no court has actually used capacity analysis in determining the liability of a private corporation.

<sup>251</sup> See *supra* text accompanying notes 170-79.

<sup>252</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (assuming that the defendant corporation was a proper defendant at a time when municipalities were not subject to suit under § 1983); *Groom*, 973 F. Supp. at 991 n.4 (saying that *Adickes* "implicitly assume[s] that a private employer is liable for the actions of its employees"); *supra* text accompanying notes 112-15.

<sup>253</sup> See *Richardson v. McKnight*, 521 U.S. 399 (1997) (immunity of private prison guards); *Wyatt v. Cole*, 504 U.S. 158 (1992) (immunity of individual attaching property); *Groom*, 973 F. Supp. at 991 n.4 (relying on *Richardson* in saying that the reasons supporting *Monell* do not apply when the defendant is a private entity); *supra* text accompanying notes 99-111.

<sup>254</sup> See *supra* text accompanying notes 99-111.

have intended to apply under § 1983.<sup>255</sup> Following this analysis, courts should determine that private entities are “persons” subject to suit under § 1983, that they may be vicariously liable for their employees’ actions, that they are not entitled to qualified immunity, and that they may be liable for punitive damages.

### B. *The Proper Contours of Private Entity Liability*

The first step in assessing the scope of entity liability under § 1983 is determining whether private entities are persons. The Supreme Court has clearly assumed that they are, allowing cases against corporate entities to go forward, even at a time when municipalities could not be sued.<sup>256</sup> The reasoning the *Monell* Court used in determining that municipalities are “persons” supports this result.

The Court initially found that municipalities could not be sued because of fears that the 1871 Congress thought that it would be unconstitutional to impose liability on municipalities, which were instrumentalities for administering state law.<sup>257</sup> The Court rejected this reasoning in *Monell*, noting that imposing liability on a municipality that violated the Fourteenth Amendment was different from “imposing an obligation to keep the peace” and that “the doctrine of dual sovereignty apparently put no limit on the power of federal courts to enforce the Constitution against municipalities that violated it.”<sup>258</sup> Imposing liability on private corporations does not raise the questions of sovereignty that led the Court originally to assume that municipalities could not be sued.

Second, the *Monell* Court’s recognition that Congress intended the term “person” to include “legal as well as natural persons”<sup>259</sup> covers private corporations. The Dictionary Act, on which the *Monell* Court relied, states that “the word ‘person’ may extend and be applied to bodies politic and corporate.”<sup>260</sup> That definition explicitly includes corporate entities.

The rationales that the Supreme Court put forth in *Will v. Michigan*

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<sup>255</sup> However, this is not to suggest that the 1871 Congress specifically contemplated that private entities would be § 1983 defendants. Just as private individuals who act under color of state law fall under the statute, so should private entities. The Court looks to the law in effect in 1871 in determining the scope of private individuals’ liability and the defenses available, and should do the same when entity liability is at stake.

<sup>256</sup> See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *supra* text accompanying notes 112-15.

<sup>257</sup> See *Monroe v. Pape*, 365 U.S. 167, 190-91 (1961); *supra* text accompanying notes 46-49.

<sup>258</sup> *Monell v. Dep’t of Soc. Servs.* 436 U.S. 658, 679-80 (1978).

<sup>259</sup> *Id.* at 683.

<sup>260</sup> *Id.* at 688 (discussing Act of Feb. 25, 1871, § 2, 16 Stat. 431).

*Department of State Police*<sup>261</sup> for finding that states are not persons do not apply to private entities. The *Will* court relied on the premise that “the term ‘person’ does not include the sovereign” and on principles of statutory construction that come into play when state liability is in question.<sup>262</sup> Ultimately, the Court found that a determination that states were persons could not be squared with the fact that Congress intended a federal forum for § 1983 litigation but that states could not be sued in federal court because of the Eleventh Amendment.<sup>263</sup>

Private entities do not share in a state’s sovereign immunity. Courts should not find that private entities that contract with the state obtain Eleventh Amendment protection.<sup>264</sup> The crucial question in determining whether an entity is an arm of the state for Eleventh Amendment purposes is whether the state will pay if the entity loses the suit.<sup>265</sup> The state is not the real party in interest in a suit against a private corporation or legally obligated to pay when a private corporation loses. The fact that a state may choose to reimburse the corporation does not change the analysis. The Court looks to the party that is responsible for the judgment in determining if the entity receives Eleventh Amendment protection.<sup>266</sup> Just as an agreement providing that a private party will reimburse the state does not make the Eleventh Amendment inapplicable,<sup>267</sup> a state’s contractual choice to reimburse a private party should not bring the Amendment into play.<sup>268</sup>

If private entities are persons that can be sued under § 1983, the question becomes whether the limits that the Court imposes on municipal liability should also apply to private entities. The answer is no. The rationales that the Court gave in *Monell* for rejecting vicarious

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<sup>261</sup> 491 U.S. 58 (1989).

<sup>262</sup> *Id.* at 64.; see Thomas, *supra* note 33, at 25 (arguing that *Will* is irrelevant to private corrections firms).

<sup>263</sup> *Will*, 491 U.S. at 66.

<sup>264</sup> See Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. § 1983*, 40 VAND. L. REV. 867, 882-83 (1987) (asserting that the Eleventh Amendment does not protect private prison corporations, which could be held liable for both damages and injunctive relief and could be held liable on pendent state law claims); 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 the Eleventh Amendment does not shield private prisons); Spurlock, *supra* note 139, at 1016, 1020 (stating that private prison corporations are not the state for purposes of the Eleventh Amendment); Thomas, *supra* note 33, at 24 (saying that “the Eleventh Amendment stands as no barrier between a Section 1983 plaintiff and the treasury of corporation”); *supra* text accompanying notes 183-84.

<sup>265</sup> *Hess v. Port Auth.*, 513 U.S. 30 (1994); see *supra* text accompanying note 183.

<sup>266</sup> *Regents of the University of California v. Doe*, 519 U.S. 425, 430-31 (1997).

<sup>267</sup> *Id.* at 431.

<sup>268</sup> *Sales v. Grant*, 224 F.3d 293, 297-98 (4th Cir. 2000) (stating that state’s promise to indemnify individual sued in his individual capacity does not implicate the Eleventh Amendment); *Benning v. Bd. of Regents*, 928 F.2d 775, 778 (7th Cir. 1991) (noting that “[t]he state cannot manufacture immunity for its employees simply by volunteering to indemnify them”).



liability are not applicable to private defendants, and affirmative reasons support the imposition of respondeat superior liability.

The Court's first basis for finding that municipalities could not be vicariously liable lay in its fear that Congress could not force municipalities to keep the peace. Imposing liability would confront the municipality with a Hobson's choice between keeping the peace and facing liability.<sup>269</sup> Imposing liability on private entities does not raise similar constitutional concerns. There are no constitutional impediments to imposing liability on private entities that act under color of state law.<sup>270</sup> Private entities, unlike municipalities, pick the activities in which they wish to engage, and imposing liability does not subject taxpayers to liability for mandatory activities.<sup>271</sup>

Secondly, nothing in the statutory language supports a rejection of vicarious liability. Entities, like any other person, can "subject" a person to a constitutional deprivation.<sup>272</sup> To the extent that entities can only "cause" violations through their agents, respondeat superior liability has always been found a sufficient basis for responsibility.<sup>273</sup>

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<sup>269</sup> *Monell v. Dep't of Soc. Servs.* 436 U.S. 658, 679 (1978).

<sup>270</sup> See *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 991 n.4 (W.D. Wash. 1997) (asserting that reasons underlying *Monell* do not apply); *Ibarra v. Las Vegas Metro. Police Dep't*, 572 F. Supp. 562, 564 n.1 (D. Nev. 1983) (explaining that Congress rejected policy justifications for respondeat superior for municipalities because of perceived constitutional difficulties with imposing such liability, reasoning that did not support rejecting vicarious liability for private entities "[i]n the absence of evidence that Congress had similar reservations as to the application of respondeat superior liability to private entities"); *supra* note 140.

<sup>271</sup> *Taylor v. Plousis*, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000). The *Taylor* court said that the immunities and privileges that governmental entities received reflect the view that "the taxpayers and public officials should not be exposed to the burdens of litigation when carrying out their mandated activities." *Id.* The court explained that it was arguable "that voluntarily contracting to perform a government service should not free a corporation from the ordinary respondeat superior liability." *Id.*; see *supra* note 148.

<sup>272</sup> A number of cases dealing with the liability of private entities find that the entity can be liable for its own acts, even if it cannot be vicariously liable for the acts of its agents. See *Stewart v. Harrah's Ill. Corp.*, No. 98 C 5550, 2000 WL 988193, at \*9 (N.D. Ill. July 18, 2000) (stating that corporation must be liable on respondeat superior because there was no allegation of liability for its own actions); *Groom*, 973 F. Supp. at 993 & n.6 (saying that jury instruction that spoke of when a corporation "subjects" another to a constitutional deprivation properly instructed it "on the separate basis of Safeway's liability"). Additionally, the cases that follow *Adickes* and impose liability for conspiring with government actors appear to impose liability for the entity's own actions. See cases cited *supra* note 145; see also *Kritchevsky, Reexamining Monell*, *supra* note 64, at 473-79 (explaining that § 1983 should be read to impose liability on municipal defendants that "subject" individuals to constitutional violations; the statute does not only impose liability on municipalities that "cause" others to subject individuals to violations).

<sup>273</sup> Nothing in *Rizzo v. Goode*, 423 U.S. 362 (1976), is to the contrary. The *Monell* Court said that *Rizzo* foreclosed an argument that respondeat superior should follow from an employer's right to control an employee's actions. *Monell*, 436 U.S. at 694 n.58 (discussing *Rizzo*, 423 U.S. at 370-71); see *supra* note 52. *Rizzo*, however, did not discuss entity liability and the decision was chiefly concerned with justiciability, 423 U.S. at 371-77, and federalism-related limits on governmental liability, *id.* at 377-80. Nothing in the decision calls into question the propriety of respondeat superior liability for private entities.

Section 1983 is to be read against the background of tort liability.<sup>274</sup> This background includes respondeat superior. The common law has recognized since 1871 that corporations are vicariously liable for their agents' acts.<sup>275</sup>

Sound policy supports vicarious liability. Indeed, the *Monell* Court recognized policy justifications for respondeat superior liability—that accidents might be reduced if even employers who appear blameless must bear the cost, that the costs of accidents should be spread to the community as a whole “on an insurance theory,” and that liability follows from the right to control a tortfeasor’s actions.<sup>276</sup> Policy arguments favoring vicarious liability were known when Congress enacted § 1983. Vicarious liability “will tend to insure greater care and caution in the selection of those who are to be entrusted with corporate affairs.”<sup>277</sup> Moreover, § 1983 is a remedial statute and, as such, should be read broadly.<sup>278</sup>

The courts that originally rejected the applicability of respondeat superior liability in § 1983 cases against private entity defendants did so in error. Those decisions relied on cases that held that individual supervisory employees were not vicariously liable for the acts of the employees they supervised.<sup>279</sup> While the rationales for vicarious liability may not support vicarious supervisory liability,<sup>280</sup> corporate entities stand on a different footing. They do have the ability to spread

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<sup>274</sup> *Monroe v. Pape*, 365 U.S. 167, 187 (1961); see *Hill v. Toll*, 320 F. Supp. 185, 188 (E.D. Pa. 1970) (arguing that § 1983 was not to be read in derogation of the common law unless the statute so mandated).

<sup>275</sup> *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 835 (1985) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*729-30 (1765)); see HENRY BALLENTINE, BALLENTINE ON CORPORATIONS § 87 (1927); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 119-20 (1879); see also W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984) (stating that “[t]he idea of vicarious liability was common enough in primitive law”); Kritchevsky, *Reexamining Monell*, *supra* note 64, at 476 (discussing support for vicarious liability in 1871).

<sup>276</sup> *Monell*, 436 U.S. at 693, 694 & n.58; see *Hill*, 320 F. Supp. at 188 (saying that the common law justification for vicarious liability, providing a deep pocket for recovery, applied to § 1983 suits). The *Monell* Court found the first two of these justifications insufficient to impose vicarious liability on municipalities because they had not been sufficient to sustain the Sherman Amendment. *Id.* at 694; see *supra* text accompanying notes 46-53 (discussing the Sherman Amendment). The Court found the last insufficient in light of its decision in *Rizzo v. Goode*, 423 U.S. 362 (1976). See *supra* note 273 (explaining why *Rizzo* should not control).

<sup>277</sup> COOLEY, *supra* note 275, at 120.

<sup>278</sup> *Hill*, 320 F. Supp. at 189 (concluding, “consistent with the traditional injunction that remedial statutes are to receive a liberal construction, that respondeat superior is impliedly a part of the Civil Rights Act”); *supra* text accompanying notes 122-27.

<sup>279</sup> See *Draeger v. Grand Central, Inc.*, 504 F.2d 142, 145-46 (10th Cir. 1974); *Thompson v. McCoy*, 425 F. Supp. 407, 410-11 (D.S.C. 1976); *supra* note 131 and accompanying text.

<sup>280</sup> See *Jennings v. Davis*, 476 F.2d 1271 (8th Cir. 1973) (finding that claim did not lie against a police chief who was not present at the incident and who had no duty or opportunity to intervene, and arguing that policies supporting corporate vicarious liability do not apply to supervisors); *supra* note 131 and accompanying text.

the loss and the incentive to supervise employees carefully. Indeed, the reasoning that courts used to justify their failure to impose vicarious liability on supervisory employees—that it is the entity that “set the entity in motion” that “profits from the appellees’ labor,” and that can spread the costs of liability<sup>281</sup>—supports holding entities liable on a respondeat superior basis.<sup>282</sup>

The failure to hold private entities vicariously liable in civil rights suits also creates anomalies when one remembers that the same entity would be vicariously liable if sued in tort. A company such as Correctional Medical Services, for instance, would be vicariously liable if sued in tort for medical malpractice but could escape civil rights liability for an Eighth Amendment violation. “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.”<sup>283</sup>

The same analysis dictates that private entities not be able to claim immunity from suit. The Court uses an established two-prong analysis, looking to history and policy, in analyzing both individual and entity immunity.<sup>284</sup> This same analysis governs questions of private party immunity.<sup>285</sup> As § 1983 “creates a species of tort liability that on its face admits of no immunities,”<sup>286</sup> any immunities enter through the common law.<sup>287</sup> Nothing suggests that corporations received any sort of immunities at common law.<sup>288</sup> The policies that support municipal liability also argue in favor of corporate liability.

While the *Owen* court’s reasoning does not apply to private

<sup>281</sup> *Jennings*, 476 F.2d at 1275.

<sup>282</sup> See *Taylor v. Plousis*, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000) (discussing policies supporting holding private entities liable on a respondeat superior basis, noting that private corporations picked the activities in which they engaged and could obtain insurance coverage); *supra* note 148.

<sup>283</sup> *Taylor*, 101 F. Supp. 2d at 263 n.4; see *Groom*, 973 F. Supp. at 991 n.4 (saying that “a policy of shielding private employers from liability or acts of their employees under § 1983 while subjecting them to liability for their employees’ state-law torts makes no sense”).

<sup>284</sup> *Tower v. Glover*, 467 U.S. 914 (1984) (individuals); *Owen v. City of Independence*, 445 U.S. 622 (1980) (entities).

<sup>285</sup> *Richardson v. McKnight*, 521 U.S. 399 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992).

<sup>286</sup> *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

<sup>287</sup> See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980); *Imbler*, 424 U.S. at 417-21.

<sup>288</sup> 5 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS Title 14 (1894) (containing a section on “Torts and Crimes of Corporations” that does not discuss immunities); see WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS §§ 41.90, 2876, 4234, 4925 (1992) (discussing immunities only in the context of the Foreign Sovereign Immunities Act, secondary franchises, government-owned corporations, and charitable corporations).

The debate in *Owen* centered on whether municipalities should receive an immunity that stemmed from sovereign immunity and that would allow municipalities to escape liability for “governmental” and “discretionary” activities. *Owen*, 445 U.S. at 644-50. Private entities could not avail themselves of sovereign immunity and were liable for their torts at common law. *Id.* at 644-45.

corporations by simple analogy between municipal and corporate liability, policies excluding immunity for municipal entities because of their corporate nature carry more weight in analyzing other types of entity liability than do policies governing individual immunity. Corporations, like municipalities, should be subject to the deterrent effect of damage awards and encouraged to institute procedures that will minimize the likelihood of "systemic injuries" that stem from interactive conduct.<sup>289</sup> As the court explained in *Manis v. Corrections Corp. of America*,<sup>290</sup> private entities face "an obvious temptation to skimp on civil rights whenever it would help to maximize shareholders' profits."<sup>291</sup> Affording immunity would free the corporation to sacrifice individual rights to profit.<sup>292</sup>

The same analysis should lead to a conclusion that private entity defendants are not immune from liability for punitive damages. Corporations were not immune from liability for punitive damages in 1871.<sup>293</sup> The policies that support holding private entities liable for exemplary damages apply with at least as much strength in civil rights litigation as in tort. Awarding punitive damages against private

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<sup>289</sup> *Owen*, 445 U.S. at 652. The Supreme Court's decision in *Richardson v. McKnight*, 521 U.S. 399 (1997), explaining the policy justifications for denying immunity to private individuals who work for private corrections firms, provides added support for denying immunity to the employing entity. See *supra* text accompanying notes 105-11 (explaining the *Richardson* Court's reasoning); *supra* notes 226-29 (discussing lower court cases that rely on *Richardson* in denying immunity to private entities). It is logical to assume, in light of *Richardson* and *Wyatt*, that the Supreme Court would not want to allow "a private business corporation, as distinct from its officers and employees, to claim the benefits of qualified immunity." *Sallie v. Tax Sale Investors, Inc.*, 998 F. Supp. 612, 621 (D. Md. 1998). The focus on entity liability and the lack of justification for holding private entities immune shows that the lower courts that find private entities that act as "adjuncts" to the state are entitled to immunity are in error. See *supra* text accompanying notes 230-32 (discussing cases that distinguish *Richardson* and allow private entities to claim immunity). While *Richardson* may justify extending immunity to the entities' employees, it does not support allowing the entities themselves to claim immunity.

<sup>290</sup> 859 F. Supp. 302 (M.D. Tenn. 1994); see *supra* text accompanying notes 214-20.

<sup>291</sup> *Manis*, 859 F. Supp. at 305.

<sup>292</sup> *Id.* at 305-06; see *Kay*, *supra* note 264, at 886-88 (discussing availability of immunity for private prison corporations and suggesting that they should not be immune under *Owen* and because they voluntarily enter the corrections field to make a profit); *Low*, *supra* note 264, at 41, 62 (stating that private prisons "do not have qualified immunity").

<sup>293</sup> See *Phila., Wilmington & Balt. R.R. Co. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858) (holding, in case in which plaintiff sought punitive damages from corporation, that "for acts done by the agents of a corporation . . . the corporation is responsible, as an individual is responsible under similar circumstances"); FRANCIS HILLIARD, *THE LAW OF REMEDIES FOR TORTS, OR PRIVATE WRONGS* 442-43 (1867) (discussing exemplary damages against common carriers); VICTOR MORAWETZ, *A TREATISE ON THE LAW OF CORPORATIONS* §§ 728-29 (2d ed. 1886) (saying that, despite policy arguments against holding corporations liable for punitive damages, "[t]he law has, however, been settled otherwise" and that courts impose punitive damages on corporations without finding that the shareholders were at fault); 5 THOMPSON, *supra* note 288, at § 6383 (saying that most courts "now agree that exemplary damages may be given against a corporation in any case where such damages might be awarded against an individual under like circumstances"); see BALLENTINE, *supra* note 275, at § 89 (discussing corporate liability for punitive damages in 1927).

corporations would not punish blameless taxpayers but rather the stakeholders who are charged with directing the company.<sup>294</sup> An award of punitive damages against a private company would force the company to “bear the burden of payment as a private corporation” and the deterrent effect of the award would influence the company’s future actions.<sup>295</sup>

## CONCLUSION

The cases analyzing the liability of private entity defendants lack a coherent rationale. Courts analogize corporate entities to municipalities in determining the rules governing liability, but to individuals in assessing immunity. Courts rarely, however, follow the Supreme Court’s analysis and consider the law in effect in 1871 and the policies underlying § 1983. Following that approach leads to the conclusion that private entity defendants are persons that can be sued under § 1983, that they can be held liable under the doctrine of respondeat superior, that they cannot assert qualified immunity, and that they are not immune from liability for punitive damages.

This analysis does not lead to a match between the liability of private corporate defendants and municipalities. While neither municipal nor private entity defendants would receive immunity, private entities would be subject to a greater degree of liability than public entities. They would be vicariously liable and subject to punitive damages. This is not an anomaly. There is no reason why rules governing the liability of government entities should govern suits against private defendants. Private entities have flexibility that governments lack; they can choose which fields to enter, can choose to leave the business, and have more control over how they structure their operations.<sup>296</sup> This flexibility can justify additional liability, as the *Richardson* Court suggested.<sup>297</sup>

A broad scope of liability is necessary to guarantee accountability in light of the lack of direct public control over private entities’ actions.

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<sup>294</sup> See *Segler v. Clark County*, 142 F. Supp. 2d 1264, 1269 (D. Nev. 2001) (explaining how the deterrent effect of a punitive damages award would influence the actions of a private company or its employees); *Sabatino*, *supra* note 3, at 220-28 (explaining that punitive damages aid accountability in an era of privatization and that the rationales underlying the Court’s decision in *Newport* do not apply when private entity liability is at stake); *Thomas*, *supra* note 33, at 28 (saying that “[t]here is no reason whatsoever to imagine that any court would hesitate to award punitive damages against a private firm” if the standards for awarding punitive damages against an individual were met); *supra* text accompanying notes 236-41.

<sup>295</sup> *Segler*, 142 F. Supp. 2d at 1269.

<sup>296</sup> See *supra* note 148 and text accompanying note 271.

<sup>297</sup> *Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997).

There are many arguments against broad delegation of government authority on constitutional and symbolic grounds.<sup>298</sup> One fear has been that the government will not be able adequately to supervise or control the actions of the private actor.<sup>299</sup> Private actors, however, are likely to react to financial incentives and to avoid actions that will lead to liability.<sup>300</sup> Interpreting § 1983 to hold private entities liable for the acts of their agents will increase accountability and, hopefully, lead the entity to police itself in a manner that the delegating government may not.<sup>301</sup>

Whatever the merits of the current law governing municipal liability under § 1983,<sup>302</sup> the same limitations on liability should not apply when the defendants are private parties. There is no warrant for applying those doctrines in history or policy. Those doctrines do not logically apply to private actors and can lead to incoherent results that can insulate private actors from liability. An approach to private entity liability that follows history and policy will increase the accountability of private actors and help to counteract the dangers of broad delegations of government power.

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<sup>298</sup> See *supra* notes 33-34 and accompanying text (discussing delegation and due process objections to privatization). Various commentators have also raised symbolic and ethical concerns concerning privatization of governmental functions such as corrections. See Robbins, *Privatization of Corrections*, *supra* note 33, at 826-27 (saying that the symbolic question of whether government weakens its authority by privatizing corrections may be the most difficult policy issue for privatization); Thomas, *supra* note 33, at 29-33 (discussing ethical arguments against privatization).

<sup>299</sup> See *Developments in the Law*, *supra* note 3, at 1880 (saying that, "[a] danger inherent in privatization is that public responsibilities will be performed by private individuals without effective oversight"); Dipiano, *supra* note 33, at 194-96 (discussing concerns regarding government oversight of private prisons); Robbins, *Privatization of Corrections*, *supra* note 33, at 817 (discussing how privatization can eliminate the public from the decision-making process and the problems of reducing accountability and regulation).

<sup>300</sup> See Low, *supra* note 264, at 41 (arguing that litigation incentives are weaker for public prisons than for private prisons because government litigation costs "come largely out of the budgets of other agencies," weakening the incentives to avoid law suits, and the private companies "have a greater and more direct exposure to lawsuits"). Commentators also suggest that juries are less sympathetic to private defendants. See *id.* at 42; *Developments in the Law*, *supra* note 3, at 1880.

<sup>301</sup> See *Developments in the Law*, *supra* note 3, at 1880 (arguing that legal developments such as denial of immunity to private prison guards "have sought to avoid [the] pitfall" of delegation without effective oversight); Low, *supra* note 264, at 42 (saying that "private prisons are more accountable because of more immediate economic incentives and greater legal liability")

<sup>302</sup> The four dissenting Justices in *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997), argued that the Court should reconsider municipal liability doctrine. Justice Breyer, writing for himself and Justices Ginsberg and Stevens, said that, rather than "spin ever finer distinctions as we try to apply *Monell*'s basic distinction between liability that rests upon policy and liability that is vicarious, . . . we should reexamine the legal soundness of that basic distinction itself." *Id.* at 430-31 (Breyer, J., dissenting). Justice Souter supported this call. *Id.* (Souter, J., dissenting). See generally Kritchevsky, *Reexamining Monell*, *supra* note 64 (arguing that the dissenting Justices are correct and explaining problems with the current approach to municipal liability law).

