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The Supreme Court has decided several § 1983 cases involving businesses and private prison employees. In those cases, the Court refused to grant businesses the more favorable Monell *liability, and it denied private prison employees the immunities that government employees receive in civil rights lawsuits. Every one of the defendants in those cases faced trial for their constitutional torts.*

Nearly all circuit courts, on the other hand, have extended Monell *liability to businesses, private prisons, and the medical companies operating within the walls of private prisons. The federal district courts are torn between following the Supreme Court's precedent and circuit court precedent. This split in authority has created a range of decisions.*

This Article addresses the Supreme Court's precedent and cases from the lower federal courts. It explains why the circuit courts were wrong to extend Monell *liability to these entities. It discusses the history and the pattern of civil rights violations in the industry and provides a roadmap for courts to change course. The authors hope to encourage courts to align their precedent with the Supreme Court's legal analysis and focus on the deterrence and compensation goals of the Civil Rights Act.*

INTRODUCTION

Private prisons and privatized health care in carceral facilities generate billions in industry profits each year.[1] Contracts cost governments and taxpayers hundreds of millions of dollars.[2] The industry has become a political behemoth, amassing more power by lobbying for self-serving laws, donating to political campaigns, and cultivating relationships with officials who reward companies with contracts.[3]

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* B.A. Baylor University, J.D. South Texas College of Law Houston. Judicial law clerk, Western District of Texas. This Article reflects only my individual views. I would like to thank my co-author, Professor Amanda Peters, for her invaluable contributions, expertise, and collaborative spirit. Special thanks to Robert Topham for his comments, feedback, and encouragement. Most importantly, I would like to thank my family and loved ones for their everlasting belief, love, and support.

** Associate Dean and Professor of Law, South Texas College of Law Houston. B.A. and J.D., Texas Tech University. I would like to thank my colleagues, my employer, and my family for supporting my scholarship. Special thanks go to my co-author Grecia Sarda and to Roger Topham and Frank Fagan for their comments and suggestions on earlier drafts of this Article.

1. Demarquin Johnson, *Why the Congressional Black Caucus Must Reject Private Prison Money*, 35 HARV. BLACKLETTER L.J. 65, 66 (2019); *see* Rebekah M. Cochran, Note, *Privatized Justice: Ankle Monitors Are the New Private Prison*, 47 J. CORP. L. 797, 801–02 (2022); Beth Healy & Christine Willmsen, *Pain and Profits: Sheriffs Hand Off Inmate Care to Private Health Companies*, WBUR (Mar. 24, 2020), https://www.wbur.org/news/2020/03/24/jail-health-companies-profit-sheriffs-watch [https://perma.cc/8W7J-DB43] (noting that Wellpath generated $1.6 billion in profits each year).

2. *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS, at i (2016) [hereinafter REVIEW OF CONTRACT PRISONS], https://oig.justice.gov/reports/2016/e1606.pdf [https://perma.cc/BED6-T8PA].

3. Mike Tartaglia, *Private Prisons, Private Records*, 94 B.U. L. REV. 1689, 1707 (2014); *see also* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 528 (2005) (explaining that prison companies "pay[] thousands of dollars in annual membership dues for a seat at the drafting table with influential legislators"); 2021 A.B.A. REPORT TO THE HOUSE OF DELEGATES, at 5–6 (2021) [hereinafter ABA REPORT],

The industry is financially motivated to lobby for laws that harm prisoners and society.[4] Larger prison populations produce greater profits.[5] When legislatures enact more three-strikes laws and create more offenses with life sentences, they grow long-term inmate populations that require a lifetime of housing, services, and medical care.[6] There are financial incentives to deny parole and revoke good-time credit; private facility inmates serve a greater percentage of their sentence than public prisoners do.[7] Harsher sentences and more penal laws are good for business, whereas decriminalization is not.[8] So these companies have a vested interest in mass incarceration and increasing society's reliance on their facilities.[9]

Private prisons have thin profit margins.[10] They must house, feed, protect, and provide medical care for inmates, yet generate profit for shareholders.[11] Cutting costs requires facilities to skimp on smaller expenses like food and toiletries, as well as bigger expenses like staff and medical care.[12] Some companies end educational and anti-recidivism programs because they are

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https://www.americanbar.org/content/dam/aba/directories/policy/annual-2021/507-annual-2021.pdf [https://perma.cc/CZ9S-MA4V] (highlighting that the industry has paid millions to lobby for beneficial laws).

4. *See* Gregmar I. Galinato & Ryne Rohla, *Do Privately-Owned Prisons Increase Incarceration Rates?*, LAB. ECON. Sept. 2020, at 1, 1 (citing several instances of lobbying efforts to increase prison-sentence length and increase bed quotas in private prisons).

5. John F. Pfaff, *The Incentives of Private Prisons*, 52 ARIZ. ST. L.J. 991, 995–96 (2020); *see* Stephen Raher, *The Business of Punishing: Impediments to Accountability in the Private Corrections Industry*, 13 RICH. J.L. & PUB. INT. 209, 247 (2010) ("Twentieth century private prisons can be viewed as a reform movement, but the motivations were not benevolent. Rather, the primary objective underlying the modern private prison industry was rapid expansion of the nation's prison system.").

6. Jordan Andrews, *The Current State of Public and Private Healthcare*, WHARTON U. PA. PUB. POL'Y INITIATIVE (Feb. 24, 2017) [https://perma.cc/EBC3-TUQF#_edn1]; *see also* Galinato & Rohla, *supra* note 4, at 1 (noting that the private prison industry lobbied for longer sentences and harsher penalties).

7. Dolovich, *supra* note 3, at 522–23; *see* Ryan Miller, *The False Promise of Prison Privatization in America*, 37 LOY. L.A. INT'L & COMPAR. L. REV. 377, 407 (2016) (highlighting that one company stated it could be "adversely affected by . . . leniency in conviction or parole standards"); MEGAN MUMFORD ET AL., HAMILTON PROJECT, THE ECONOMICS OF PRIVATE PRISONS 5 (2016), https://www.hamiltonproject.org/papers/the_economics_of_private_prisons [https://perma.cc/3MFU-HWLZ] ("[T]hose serving in private facilities tended to receive more penalties and stay for a longer portion of their sentence length."); *see also* Galinato & Rohla, *supra* note 4, at 14 (observing that privately imprisoned inmates in Mississippi served longer sentences than publicly imprisoned inmates convicted of the same crimes).

8. *See* ABA REPORT, *supra* note 3, at 5–6; Joseph Margulies, *This Is the Real Reason Private Prisons Should Be Outlawed*, TIME (Aug. 24, 2016, 12:37 PM), https://time.com/4461791/private-prisons-department-of-justice [https://perma.cc/9QCK-SH75].

9. Margulies, *supra* note 8.

10. Case Comment, *Qualified Immunity – Privatized Governmental Functions:* Richardson v. McKnight, 111 HARV. L. REV. 390, 398 (1997).

11. *Id.* ("Private prison providers work within extremely narrow profit margins.").

12. Dolovich, *supra* note 3, at 460–62; *see* Emily Le Coz, *Inmates Allege Malnourishment, Substandard Food*, CLARION-LEDGER (Jan. 1, 2015, 10:51 PM), https://www.clarionledger.com/story/news/2015/01/01/inmates-allege-malnourishment-substandard-food/21176007 [https://perma.cc/YM8P-7J6E] (reporting that inmates alleged that a private prison fed them pet-food equivalent meat and a diet so low in calories that it resulted in weight loss).

expensive, despite their benefits.[13] These reductions and practices tend to increase civil rights violations in facilities and endanger public safety.[14]

Despite the industry's power, it faces several modern challenges. First, the industry and its government contracts are in decline.[15] Though twenty-six states still operate some private prisons and jails, California, Colorado, Michigan, Minnesota, Nevada, Oklahoma, and Utah have decided to end or limit contracts moving forward.[16] Arizona, Idaho, New Mexico, New York, Ohio, and Vermont have encountered serious contractual deficiencies with for-profit prisons and medical providers.[17] Covid-related inmate-release programs decreased inmate populations nationwide by 16%.[18] A path of decriminalization is now preferred to mass incarceration, which suggests these numbers may continue to trend downward.[19]

Second, these companies are facing political and financial pressures from outsiders. In 2018, some of the largest banks in the U.S. quit financing the

13. *See* ABA REPORT, *supra* note 3, at 7–8; *see also* MUMFORD ET AL., *supra* note 7, at 5 (explaining that private prisons may falsely report greater numbers of participants); Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), https://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html [https://perma.cc/FKG3-BF5T].

14. *See* David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 825–29 (1987) (noting that financial self-interest, "absence of standards," and a lack of accountability take precedence over the protection of fundamental rights and liberty interests); Miller, *supra* note 7, at 408–09 (explaining that when private prisons release inmates due to their minimum- or medium-security status, recidivism numbers are higher than normal, and their communities suffer).

15. Press Release, Fed. Bureau of Prisons, BOP Ends Use of Privately Owned Prisons (Dec. 1, 2022), https://www.bop.gov/resources/news/20221201_ends_use_of_privately_owned_prisons.jsp [https://perma.cc/K9SY-C9XN] (reporting that the federal prison population in 2013 topped 219,000 inmates but maintained 159,500 inmates in 2022); KRISTEN M. BUDD, SENT'G PROJECT, PRIVATE PRISONS IN THE UNITED STATES, at fig. 2 (2024), https://www.sentencingproject.org/reports/private-prisons-in-the-united-states/ [https://perma.cc/AM85-K69N].

16. *See* Steve Lewis, *Oklahoma's Move Away from Private Prisons*, OKLA. POL'Y INST. (Sept. 8, 2020), https://okpolicy.org/oklahomas-move-away-from-private-prisons-capitol-update [https://perma.cc/GG56-Z2DD]; Assemb. B. No. 32, 2019–2020 Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB32 [https://perma.cc/U5RK-JEWE]; Saja Hindi, *Colorado Poised to Restrict County Jail Contracts with ICE, Prohibit New Private Immigration Detention Centers*, DENV. POST (Apr. 20, 2023, 7:04 PM), https://www.denverpost.com/2023/04/20/colorado-immigration-detention-bill-ice-contracts-detention-centers/ [https://perma.cc/7DVS-2CRS]; Timothy Williams, *Inside a Private Prison: Blood, Suicide and Poorly Paid Guards*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html [https://perma.cc/HY7K-RS44]; Press Release, Minn. House of Representatives, Minnesota House Approves Legislation Banning Private Prisons (Mar. 23, 2023), https://www.house.mn.gov/members/profile/news/15499/36772 [https://perma.cc/8MTB-S8Q7]; Assemb. B. No. 183, 80th Reg. Sess. (Nev. 2019), https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6286/Overview [https://perma.cc/42PK-ABSU].

17. *See* Tartaglia, *supra* note 3, at 1702–08; Gleeson v. County of Nassau, No. 15-CV-6487, 2019 WL 4754326, at *8 (E.D.N.Y. Sept. 30, 2019).

18. E. ANN CARSON ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., IMPACT OF COVID-19 ON STATE AND FEDERAL PRISONS, MARCH 2020–FEBRUARY 2021, at 1 (2022), https://bjs.ojp.gov/library/publications/impact-covid-19-state-and-federal-prisons-march-2020-february-2021 [https://perma.cc/4KX7-CB8V].

19. Margulies, *supra* note 8.

industry.[20] In 2021, President Biden issued an executive order that closed federal for-profit prisons (private immigration detention centers remain open).[21] Also in 2021, the American Bar Association passed a resolution opposing the use of private prisons and juvenile detention centers.[22]

Third, legal challenges continue to surface. Inmates and next of kin routinely sue facilities for medical neglect and civil rights violations.[23] Two companies alone faced 1,200 lawsuits in just five years.[24] Litigation arising from civil rights abuses and prison conditions has led to government-imposed consent decrees—orders that a jail or prison must comply with government-imposed conditions or risk closure.[25]

These lawsuits are expensive to settle.[26] Employees in these facilities are performing a government function, which means they can be sued for civil rights violations under 42 U.S.C. § 1983.[27] And unlike public prison employees, private employees have no immunities to suit.[28] While the Supreme Court has never limited the liability of private parties in civil rights lawsuits, almost all circuit courts have.[29]

This limited liability is attributed to *Monell v. Department of Social Services*, a § 1983 case that created a level of protection for cities, not businesses or

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20. Morgan Simon, *Is This the Beginning of the End for Private Prisons? The Market Seems to Think So*, FORBES (Aug. 20, 2020, 3:20 PM), https://www.forbes.com/sites/morgansimon/2020/08/20/is-this-the-beginning-of-the-end-for-private-prisons-the-market-seems-to-think-so/?sh=265100e45b91 [https://perma.cc/RBZ2-ES22].

21. *See* Exec. Order No. 14,006, 86 Fed. Reg. 7483 (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities [https://perma.cc/N8CZ-F5D5].

22. Matt Reynolds, *Private Prisons Are a Failed Experiment with 'Perverse and Immoral Incentives,' ABA House Says in Calling for Their End*, ABA J. (Aug. 10, 2021, 11:55 AM), https://www.abajournal.com/news/article/resolution-507-aba-house-of-delegates-calls-for-an-end-to-private-prison-contracts [https://perma.cc/8VG7-V3TV].

23. *See* Healy & Willmsen, *supra* note 1; *see also* Timothy Williams & Richard A. Oppel Jr., *Escapes, Riots and Beatings. But States Can't Seem to Ditch Private Prisons*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/private-prisons-escapes-riots.html [https://perma.cc/7XQJ-YXCZ].

24. Healy & Willmsen, *supra* note 1.

25. JAMES AUSTIN & GARRY COVENTRY, U.S. DEP'T OF JUST., BUREAU OF JUST. ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 17–18 (2001), https://www.ojp.gov/pdffiles1/bja/181249.pdf [https://perma.cc/MG8P-ZUVL].

26. *See* Healy & Willmsen, *supra* note 1.

27. *See* West v. Atkins, 487 U.S. 42, 54 (1988) (holding that a private doctor contracted to provide medical services to a prison population was acting under color of law); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (concluding that "private prison guards . . . do not enjoy immunity from" § 1983 lawsuits); Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir. 2003) (agreeing with the Sixth Circuit that "private prison-management corporations and their employees may be sued under § 1983 by a prisoner who has suffered a constitutional injury").

28. *Richardson*, 521 U.S. at 412.

29. *See* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 794 (7th Cir. 2014); Alfred C. Aman Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 IOWA L. REV. 883, 901 (2017); Barbara Kritchevsky, *Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 71 (2004) ("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."); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70–72 (2001).

individuals.[30] In that case, the Supreme Court held that municipal governments cannot be held liable for the constitutional torts of their employees unless the employer's policy or custom was the moving force behind the violation.[31] *Monell* denies plaintiffs a path to victory based on a theory of respondeat superior liability when the defendant is a local government.[32]

Four years later, the Fourth Circuit extended *Monell* to private corporations in a poorly reasoned, terse opinion that misapplied *Monell*.[33] Since then, nearly all circuit courts and some district courts have followed suit,[34] though some have done so reluctantly.[35] This has happened despite the Supreme Court's belief that private parties are not interested in advancing what is good for the public and should thus proceed to trial when they are sued.[36] The disconnect between what the Supreme Court has never authorized and what the circuit courts have authorized places federal district courts in a difficult position.[37] Should they follow the Supreme Court's precedent? Or are they bound to follow their circuit's precedent, even though it conflicts with Supreme Court cases?

This Article attempts to demonstrate why applying *Monell* to private prisons and privatized carceral health-care facilities is a mistake. It bridges a gap in scholarship. It provides a roadmap for federal courts to align themselves with Supreme Court authority. Part II of the Article briefly examines the history of the private prison industry and the civil rights claims and lawsuits it generates. Part III discusses relevant Supreme Court authority on civil rights claims and non-governmental entity liability. In Part IV, this Article identifies the origin of the error and examines varying paths federal district courts have taken. Part V

30. *See* 436 U.S. 658, 694–95 (1978); Powell v. Shopco Laurel Co., 678 F.2d 504, 505–06 (4th Cir. 1982).

31. *Monell*, 436 U.S. at 694–95.

32. *See, e.g.*, Crowson v. Washington County, 983 F.3d 1166, 1191 (10th Cir. 2020) ("A core principle of *Monell* liability is that municipal entities are liable for only their own actions and not vicariously liable for the actions of their employees." (citing Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 770 (10th Cir. 2013)).

33. *See Powell*, 678 F.2d at 506.

34. *See, e.g.*, Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246 (1st Cir. 1994); Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406, 408–09 (2d Cir. 1990); Defreitas v. Montgomery Cnty. Corr. Facility, 525 F. App'x 170, 176 (3d Cir. 2013); Street v. Corr. Corp. of Am., 102 F.3d 810, 818 (6th Cir. 1996); Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982); Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012); DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714, 723 (10th Cir. 1988); Harvey v. Harvey, 949 F.2d 1127, 1129–30 (11th Cir. 1992).

35. *See, e.g*, Shields v. Ill. Dep't of Corr., 746 F.3d 782, 795 (7th Cir. 2014); Thomas v. Lincoln County, No. 6:16-CV-00562, 2017 WL 3218071, at *3 (D. Or. July 27, 2017) (acknowledging that the circuit's precedent stood in the way of holding the company liable out of fairness); Zimmerman v. Berdanier, No. 4:07-CV-0818, 2008 WL 11503563, at *4 & n.3 (M.D. Pa. Oct. 22, 2008) (acknowledging the soundness of holding companies liable, while being bound by precedent); Revilla v. Glanz, 8 F. Supp. 3d 1336, 1340–41 (N.D. Okla. 2014) (calling the *Shields* analysis "potent" and "thorough" but acknowledging it is bound to follow Tenth Circuit precedent).

36. *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992).

37. *See, e.g.*, *Thomas*, 2017 WL 3218071, at *3; *Zimmerman*, 2008 WL 11503563, at *4.

considers failures and fixes before concluding. The authors hope that more courts find a way to hold private prisons and private medical providers operating within jails and prisons accountable for their civil rights violations using traditional respondeat superior liability.

I. THE INDUSTRY AND ITS CIVIL RIGHTS LAWSUITS

The Supreme Court, circuit court judges, and scholars alike acknowledge that America's prison industry has frequently included some form of privatization.[38] San Quentin was the first privately constructed and operated American prison.[39] It began operating in the mid-1800s.[40]

Private prisoner contracts in America began when entrepreneurs shipped prisoners from England to the colonies to work for businesses.[41] By 1885, thirteen states contracted with businesses to provide cheap labor through imprisoned people.[42] In 1905, President Theodore Roosevelt banned federal prison-labor contracts; state legislatures followed suit during the Great Depression.[43] After these bans, prisons returned to exclusive government control.[44] This would continue through the 1960s; this period from the Great Depression to the 1960s became an era defined by a strong public sector.[45]

This public-prison-and-jail era ended in the 1970s and 1980s, when private companies began building and operating juvenile facilities.[46] In 1984, the federal government contracted with private prison operators for the first time to detain immigrants.[47] Around the same time, Tennessee and Kentucky hired companies to build and manage state facilities.[48] In the 1990s, three things grew the emerging private industry: sentencing policies changed, judges ordered

38. *See* Richardson v. McKnight, 521 U.S. 399, 405–07 (1997) (finding that prison privatization existed in different ways from the 18th century until modern times); Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspectiv*e, 38 AM. CRIM. L. REV. 111, 112, 134 (2001) (referring to America's history as "semi-privatization" except from 1940 to 1970, when it was exclusively public); Moore v. LaSalle Mgmt. Co., 41 F.4th 493, 499 (5th Cir. 2022) ("Many cities privatize their prisons."); Jason Szep et al., *Public Jails, Private Care: U.S. Jails Are Outsourcing Medical Care – and the Death Toll Is Rising*, REUTERS (Oct. 26, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-privatization [https://perma.cc/G4BA-BJH2] (reporting that by 2018, 62% of U.S. jails relied on privatized health care).

39. *San Quentin Rehabilitation Center*, CALI. DEP'T OF CORR. AND REHAB, https://www.cdcr.ca.gov/facility-locator/sq/ [https://perma.cc/VK5X-MVJ2].

40. AUSTIN & COVENTRY, *supra* note 25, at 10. Its operators argued that they could run it more affordably and efficiently than the government could. *Id.* But after a series of scandals and mismanagement, the prison reverted to state control, which proved to be equally corrupt. *Id.*

41. *Id.* at 9.

42. *Id.* at 10.

43. *Id.* at 11.

44. *Id.*

45. Dan Weiss, Comment, *Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care*, 86 U. COLO. L. REV. 725, 741 (2015).

46. AUSTIN & COVENTRY, *supra* note 25, at 12.

47. *Id.*

48. *Id.*

governments to ease prison overcrowding, and fiscal conservatism became more popular.[49]

Currently, between 7%–8% of inmates in the U.S. are housed in private prisons and jails.[50] Many more, however, are treated by for-profit health-care companies that operate in public facilities.[51] Twenty state prisons and an estimated 50%–62% of state jails contract with this industry to medically treat their populations.[52]

The primary attraction to the privatized industry is the alleged cost savings.[53] The industry filled facility gaps when voters rejected expensive bonds needed to build new state prisons.[54] While some cost-saving measures have worked, others have not.[55] Facility design and construction, when privatized, is cheaper, but the savings on labor and management are debatable.[56] Companies promised governments they could lower costs by 20%, but the U.S. Justice Department has estimated that actual savings average around 1%.[57]

Some private facilities are more expensive. For instance, Vermont paid millions more than it would have had facilities remained public.[58] A New Jersey county opposed private prisons because the prisons carried increased liability risks without proof of savings.[59] Indeed, "savings" are offset by costs.[60] Civil rights lawsuits are one example. Inmates have sued private prisons for

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49. Raher, *supra* note 5, at 215; Galinato & Rohla, *supra* note 4, at 2 (noting that the Reagan Administration's goals of smaller government, free markets, trade, and deregulation were contributing factors to the growth of private prisons in the 1980s).

50. BUDD, *supra* note 15; WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2023 (2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/5T97-U2N4].

51. *See* Blake Ellis & Melanie Hicken, *A CNN Investigation Exposes Preventable Deaths and Dangerous Care that Government Agencies Have Failed to Stop*, CNN (June 25, 2019) https://www.cnn.com/interactive/2019/06/us/jail-health-care-ccs-invs/#:~:text=A%20CNN%20investigation%20exposes%20preventable,agencies%20have%20failed%20to%20stop.&text=The%20pleas%20for%20help%20describe,locked%20up%20across%20the%20country [https://perma.cc/7KRM-FXHA].

52. *See* Micaela Gelman, Note, *Mismanaged Care: Exploring the Costs and Benefits of Private vs. Public Healthcare in Correctional Facilities*, 95 N.Y.U. L. REV. 1386, 1389 (2020); Szep et al., *supra* note 38; Andrews, *supra* note 6.

53. Amy Pratt, *Private Prison Companies and Sentencing* 5 (The Ohio State Univ. Moritz Coll. of L., Student Paper Series No. 39, 2022), https://www.privateprisonnews.org/media/publications/Drug_Enforcement_and_Policy_Center-Private_Prison_Companies_and_Sentencing_Jan_2022.pdf [https://perma.cc/CU3T-H28D].

54. MUMFORD ET AL., *supra* note 7, at 2.

55. *See* AUSTIN & COVENTRY, *supra* note 25, at 22–29.

56. *Id.* at 15–17, 23–29.

57. *Id.* at 16, 59.

58. Tartaglia, *supra* note 3, at 1704.

59. DAVID SHAPIRO, AM. CIV. LIBERTIES UNION, BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION 19 (2011) (citing Memorandum from the Legal Review Comm. to the Corr. Facility Evaluation Task Force (Nov. 3, 2010) (on file with author)), https://www.aclu.org/sites/default/files/field_document/bankingonbondage_20111102.pdf [https://perma.cc/M2XF-F7LM].

60. *See* Galinato & Rohla, *supra* note 4, at 2 (highlighting that lower operating and construction costs are financial benefits whereas "moral hazard," bargaining power asymmetry, and contracting issues are problems).

deliberately indifferent medical care, assaults, excessive force, and other civil rights violations.[61] The following Subsections will examine the role private prison policies and practices play in increasing these violations, along with the laws related to these common types of civil rights claims.

A. Medical Violations

The government is obligated to provide medical care for incarcerated people.[62] Inmates must rely on in-house medical providers because they remain ineligible for Medicaid while incarcerated.[63] Medical staff and prison guards who deny or delay access to medical care can be liable for deliberate indifference.[64] The Supreme Court, in *Estelle v. Gamble*, created the legal standard for a § 1983 claim based upon medical civil rights violations.[65]

In *Estelle*, an inmate injured his back while performing a work assignment; prison officials, who doubted his pain, punished him.[66] The Court found that this deliberate indifference to the serious medical needs of inmates amounted to "unnecessary and wanton infliction of pain," which serves no penological goal and is thus prohibited by the Eighth Amendment.[67] The Amendment embodies civilized treatment and human dignity, not cruelty caused by medical neglect and indifference.[68] To establish an *Estelle* claim, the plaintiff must prove that the deprivation was objectively serious and the official acted with deliberate indifference to the person's health or safety.[69] The *Estelle* court recognized that the public must be required "to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself."[70]

"Although government-run prisons are hardly plush," the health care provided by private prisons more frequently fails to meet the minimum standard of care than health care provided by public prisons.[71] The quality of health-care services provided by private companies, who focus heavily on "cost

61. *See* Laura I. Appleman, *Cashing in on Convicts: Privatization, Punishment, and the People*, 2018 UTAH L. REV. 579, 585 (2018); Bernard J. Farber, *Civil Liability for Inadequate Prisoner Medical Care – An Introduction*, AELE MO. L.J., Sept. 2007, at 301, 303–07 [hereinafter *Inadequate Prisoner Medical Care*].

62. Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

63. Abaki Beck, *Medicaid Enrollment Programs Offer Hope to Formerly Incarcerated Individuals and Savings for States*, HEALTH AFFS. (Feb. 20, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200218.910350/full [https://perma.cc/T9ZV-BV7C]; *Inadequate Prisoner Medical Care*, *supra* note 61, at 301.

64. *Estelle*, 429 U.S. at 104–05.

65. *See id.* at 101–05.

66. *Id.* at 98–100.

67. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Pretrial detainees in jails are treated differently than those who have been convicted of crimes and are being held in a jail to serve their sentence. *See* Kingsley v. Hendrickson, 576 U.S. 389, 400–01 (2015). Pretrial detainees fall under the Fourteenth Amendment's protections, not the Eighth Amendment's. *Id.*

68. *See Estelle*, 429 U.S. at 102.

69. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

70. *Estelle*, 429 U.S. at 104 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

71. Appleman, *supra* note 61, at 588.

containment," has been investigated by human-rights groups and federal judges.[72] Nevertheless, sheriffs, who run jails and oversee their budgets, find a company's sales pitch attractive when it promises to cheaply manage health care.[73]

Making health care profitable is not easy, especially considering America's aging prison population and the fact that many prisoners suffer from serious health conditions.[74] The first day behind bars is the first day many prisoners receive any health care.[75] Inmates disproportionately have chronic health complications like diabetes, high blood pressure, heart disease, HIV/AIDS, and medical issues arising from prolonged substance abuse.[76] Their conditions are expensive to treat.[77] As a result, companies may decline to treat chronic illnesses or resist costly off-site medical transfers.[78]

Poor medical care begins with poor contracts. Some are facially inadequate.[79] Contracts may not require enough staff to serve inmates[80] or may not even require an on-site doctor.[81] They sometimes allow a health-care professional with adequate licensing to transfer patient-treatment responsibility to a person who lacks the appropriate licensing or education.[82] These facilities hire licensed vocation nurses, who require supervision, but fail to hire supervisors, leaving the nurses to make decisions alone.[83] In this way, the local government saves money, as does the company, through poorly drafted and short-sighted contracts.[84]

These agreements also discourage outside medical treatment at facilities that would treat the inmate with appropriate, yet more expensive care.[85] In these agreements, governments require companies to pay a lump sum for hospital-transfer expenses, which incentivizes them to choose between outside medical care and greater profits.[86] Companies choose the latter.[87] One company,

72. Andrews, *supra* note 6; *see* Szep et al., *supra* note 38.

73. *See* Szep et al., *supra* note 38.

74. *See* Weiss, *supra* note 45, at 744–46, 745 n.127 (explaining that longer sentences created older incarcerated populations with greater health-care needs and costs); Gelman, *supra* note 52, at 1395; Alan Greenblatt, *America Has a Health-Care Crisis – in Prisons*, GOVERNING (July 29, 2019), https://www.governing.com/archive/gov-prison-health care.html [https://perma.cc/4FJT-GNSN].

75. Szep et al., *supra* note 38.

76. *Public Health*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/health.html [https://perma.cc/R9E6-GSLG]; *Inadequate Prisoner Medical Care*, *supra* note 61, at 301.

77. Andrews, *supra* note 6.

78. *See* Ellis & Hicken, *supra* note 51.

79. Telephone Interview with Roger E. Topham, Attorney (Jan. 2, 2024).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See* Szep et al., *supra* note 38.

86. *See id.*

87. *See id.*

Corizon, saw its profit margins rise from 14.6% to 24.2% over three years by refusing to send inmates to the hospital, even when it was necessary.[88]

Vacancies, underqualified staff, and absent employees are another problem.[89] The industry has difficulty building and retaining medical staff.[90] Full-time doctor and dentist positions remain unfilled for months.[91] Companies may rely on inexperienced workers who lack credentials or on those with minimal training to perform and administer care.[92] Former medical personnel have stated that inmates in private facilities were denied specialized testing, necessary medication, and required treatments.[93] Oftentimes, understaffing results in medication-prescribing errors and ignored inmate medical requests.[94] The Department of Justice found private prison health-care "inadequacies create[d] a lack of appropriate intervention, treatment, and programs to promote a healthy, safe, and secure environment."[95]

Even when governments pay private facilities to deliver adequate medical care, management and profit still get in the way. In 2020, private companies in Massachusetts ran half the jails' medical facilities, billing the taxpayers $42 million annually.[96] The companies who won those bids incurred financial penalties for understaffing and were accused of failing to adequately treat prisoners with medical emergencies.[97] In Maryland alone, Wexford paid $15 million in liquidated damages for understaffing and patient-care penalties.[98]

Officials and coroners in Colorado, Georgia, Illinois, Nevada, New York, South Carolina, Texas, and Virginia have definitively linked inmate deaths in private prisons and jails to deliberately indifferent medical care or to dangerous customs and policies.[99] Mortality rates in prisons with private health care are 18%–58% higher than those in jails with public health care.[100] Moreover,

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88. *Id.*

89. Gelman, *supra* note 52, at 1414–16.

90. *See* Ellis & Hicken, *supra* note 51.

91. *See* REVIEW OF CONTRACT PRISONS, *supra* note 2, at 33.

92. Ellis & Hicken, *supra* note 51; Andrews, *supra* note 6; *see* Szep et al., *supra* note 38 (explaining that nursing directors failed to obtain the mandatory state licensure needed to supervise, and patients were not seen by nurses, as required, but by nursing assistants).

93. Ellis & Hicken, *supra* note 51.

94. *Id.*

95. REVIEW OF CONTRACT PRISONS, *supra* note 2, at 33.

96. Healy & Willmsen, *supra* note 1.

97. *Id.*; *see* Gelman, *supra* note 52, at 1416–17 (noting that Corizon, a private prison company, paid Kansas $2.82 million and New Mexico more than $3 million in penalties for understaffing).

98. Green v. Obsu, No. CV ELH-19-2068, 2021 WL 165135, at *5 (D. Md. Jan. 19, 2021).

99. *See, e.g.*, Ellis & Hicken, *supra* note 51; Yana Kunichoff, *Private Prison Health-Care Industry Grows as States Cut Costs, Bringing in Millions of Dollars*, PRISON LEGAL NEWS (May 15, 2012), https://www.prisonlegalnews.org/news/2012/may/15/private-prison-health-care-industry-grows-as-states-cut-costs-bringing-in-millions-of-dollars [https://perma.cc/9GHJ-CY3T].

100. Grant Smith, *Jail Deaths in America: Data and Key Findings of Dying Inside*, REUTERS (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-graphic [https://perma.cc/6P7A-3X8N].

employees in these facilities have sometimes released inmates just before the inmates' imminent deaths to lower on-site mortality rates, which boosts the company's reputation and ability to secure future contracts.[101]

Governments rarely monitor whether the company is performing as promised or is protecting civil rights nor do they hold violators accountable when problems arise.[102] The industry, on the other hand, insists that favorable profit clauses (e.g., bed quotas, minimum-occupancy guarantees, flat fees) are guaranteed.[103] When they are not, the industry is quick to insist that the government pay penalties, which is another form of private prison profit.[104] In this way, contracts are enforced in a lopsided manner, with the company on the winning end and the government on the losing end.

One recourse is to saddle these companies with financial penalties for breach of contract or to rescind the agreement altogether.[105] Governments that terminate private health-care contracts early risk being sued, but juries have ruled against companies who provide substandard medical care.[106] Even when governments know their contracts are being breached, they may choose not to enforce fines to avoid litigation.[107] If the private prison company builds, owns, and manages the facility, removing the bad contractor requires the government to purchase the facility at a profit or build new facilities, which is burdensome.[108] None of these options are ideal.

B. Violence, Abuse, and Excessive-Force Violations

Another common civil rights claim relates to the physical violence prisoners suffer at the hands of others. The Supreme Court addressed this issue in *Farmer v. Brennan*.[109] In that case, the plaintiff was sexually assaulted and beaten despite the facility's knowledge that the inmate was vulnerable to attacks

101. *See, e.g.*, Aimee Ortiz, *For-Profit Jail Is Accused of Abuse After Death of Woman with H.I.V.*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/us/lasalle-corrections-inmate-death.html [https://perma.cc/VQ3F-LPLL].

102. *See* Tartaglia, *supra* note 3, at 1701–02; Gelman, *supra* note 52, at 1406–07.

103. Tartaglia, *supra* note 3, at 1701; Aman & Dugan, *supra* note 29, at 902.

104. *See* Miller, *supra* note 7, at 403 (showing that Arizona had to pay a private prison $3 million in penalties for failing to meet bed quotas); *see* Green v. Obsu, No. CV ELH-19-2068, 2021 WL 165135, at *4 (D. Md. Jan. 19, 2021) (stating that the plaintiff alleged that a flat fee of $598 million paid upfront to the prison company incentivized it not to spend the money on health care, so it became profit).

105. *See* Ellis & Hicken, *supra* note 51 (noting that Texas penalized one provider $1.1 million).

106. *See, e.g.*, *id.* (observing that Pierce County, Washington received a jury verdict on its countersuit for nearly $2 million after refusing to pay a company $1.5 million for failing to abide by the terms of its health-care contract).

107. *See* Tartaglia, *supra* note 3, at 1703; Alex Friedmann, *Apples-to-Fish: Public and Private Prison Cost Comparisons*, 42 FORDHAM URB. L.J. 503, 537, 542, 550–51 (2014) (detailing several examples of counties not collecting what they were owed from private prison contractors despite contractual violations).

108. *See* Dolovich, *supra* note 3, at 496–97.

109. *See* 511 U.S. 825, 830 (1994).

and that the facility's general prison population was more violent.[110] In a *Bivens* action, which allows individuals to sue federal agents for violating civil rights,[111] the plaintiff alleged that prison employees violated the Eighth Amendment.[112]

The Court began its analysis by stating that the U.S. Constitution does not demand comfortable prisons, but it also does not require prison populations to suffer inhumane conditions.[113] Unsafe prison conditions, gratuitous violence, and excessive force fall under the Eighth Amendment's cruel-and-unusual-punishments prohibition.[114] "Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[115] However, not every injury violates the Eighth Amendment.[116]

To be liable for a civil rights violation, the prison employee must commit a serious constitutional deprivation with deliberate indifference.[117] The definition of "deliberate indifference" in this context differs from *Estelle*'s deliberate indifference standard. In this context, it amounts to an official disregarding a known risk to inmate health or safety.[118] Officials may escape liability if they respond to the harm, even when they cannot avert it.[119] The official's duty is only to ensure reasonable safety.[120]

People in private prisons experience assaults and use of force in higher numbers than those in public prisons do.[121] Prisoners in private facilities are found guilty and disciplined in greater numbers for "murder, assault, sexual assault, possession of weapons or drugs, [arson], . . . and participating in riots."[122] They experience more violence.[123] Private prison staff are also assaulted more frequently.[124] The industry pays lower wages and spends less on its employee training, which can lead to greater violence between prison populations and staff.[125]

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110. *Id.* at 830–31.

111. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

112. *Farmer*, 511 U.S. at 830–31.

113. *See id.* at 832.

114. *Id.* at 832–33.

115. *Id.* at 834 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

116. *Id.*

117. *Id.*

118. *Id.* at 837.

119. *Id.* at 844.

120. *Id.*

121. *See* REVIEW OF CONTRACT PRISONS, *supra* note 2, at 14.

122. *Id.* at 22; *see also* Alysia Santo & Joseph Neff, *No-Show Prison Workers Cost Mississippi Taxpayers Millions*, MARSHALL PROJECT (Dec. 9, 2020, 6:00 AM), https://www.themarshallproject.org/2020/12/09/no-show-prison-workers-cost-mississippi-taxpayers-millions [https://perma.cc/CM8Y-HKHE] (detailing several prison riots and escapes in private prisons due to understaffing).

123. *See* REVIEW OF CONTRACT PRISONS, *supra* note 2, at 14, 18.

124. *Id.* at 18.

125. Williams & Oppel, *supra* note 23; Margulies, *supra* note 8; ABA REPORT, *supra* note 3, at 8–9; *see also* Castillon v. Corr. Corp. of Am., No. 1:12-CV-00559, 2016 WL 3676116, at *7–8 (D. Idaho July 7, 2016) (explaining that staffing shortages can lead to increased violence).

Public prisons have their own share of abusive, unsanitary, and unsafe conditions,[126] but they do not compare to private prisons.[127] The Federal Bureau of Prisons reported prisoners in privatized facilities filed 24% more grievances related to safety, security, conditions, operations, sexual abuse and assault, solitary confinement, and staff complaints.[128] Weapons, cell phones, and other forms of contraband are found more frequently in these facilities—all are known to increase criminal activity within a prison.[129]

Carceral companies manipulate savings by taking healthier, less violent inmates who are cheaper to manage.[130] Despite selecting an easier inmate population, private facilities are more violent than public prisons, which speaks to the environments they create.[131] Again, many of these issues relate to staffing and training; guards and medical staff alike do not prevent, lessen, or properly treat injuries stemming from assaults.[132]

Staffing is a prison's biggest expense.[133] Private prisons are notorious for operating with significantly fewer employees than needed.[134] Some "employ" ghost staff.[135] In this scenario, the government pays the company to hire someone, but the company intentionally leaves the position vacant; the unpaid salary is converted to shareholder profit.[136] Chronic understaffing can lead to

126. *See, e.g.*, J.K.J. v. Polk County, 960 F.3d 367, 385–86 (7th Cir. 2020) (holding a public jail liable for acting indifferently when a correctional officer sexually assaulted two incarcerated females); Jan Ransom & William K. Rashbaum, *How Brutal Beatings on Rikers Island Were Hidden from Public View*, N.Y. TIMES (Mar. 2, 2022), https://www.nytimes.com/2022/03/02/nyregion/nyc-jail-beating-rikers.html [https://perma.cc/6VJM-PJRX] (outlining undocumented fights and abuse at Rikers Island that guards permitted and hid); Lisa Rathke, *Diary: Inmate Got Over-the-Counter Drugs Before Cancer Death*, AP NEWS (Nov. 21, 2017, 3:50 PM), https://apnews.com/article/c3dd02c61d664b1abee782bef1c334c5 [https://perma.cc/T7DB-3JB7] (discussing an inmate who suffered and died from cancer given only Tylenol and ibuprofen to manage pain); Editorial Board, *The Bureau of Prisons Is Beset by Dysfunction. Here's How to Address It.*, WASH. POST (June 10, 2023, 7:00 AM), https://www.washingtonpost.com/opinions/2023/06/10/bureau-of-prisons-reform-reports [https://perma.cc/R53K-5SYE].

127. *See* REVIEW OF CONTRACT PRISONS, *supra* note 2, at 14, 25–26 (explaining that public prisons had better safety records in all but two standard requirements, and in those two, the study found faulty reporting measures).

128. *Id.* at 22.

129. *Id.* at 15–17.

130. *See* Williams & Oppel, *supra* note 23; Tartaglia, *supra* note 3, at 1716; MUMFORD ET AL., *supra* note 7, at 1, 4.

131. *See* Dolovich, *supra* note 3, at 503–04.

132. *See* Williams, *supra* note 16.

133. *See* Santo & Neff, *supra* note 122.

134. Tartaglia, *supra* note 3, at 1702, 1710.

135. *See,* e.g., *id.* at 1702–03 (noting that an Idaho private prison withheld information from the state that contracted for positions that the prison left unfilled); Castillon v. Corr. Corp. of Am., No. 1:12-CV-00559, 2016 WL 3676116, at *11 (D. Idaho July 7, 2016); Kyle Dunphey, *3 Wrongful Death Lawsuits and Allegations of Pocketing State Funds Hit Utah-Based Private Prison Company*, DESERET NEWS (Sept. 21, 2023, 2:44 PM), https://www.deseret.com/utah/2023/9/21/23882984/utah-private-prison-company-mississippi-mtc-management-and-training [https://perma.cc/P94D-XVBU] (reporting that a Utah-based company was ordered to pay $5 million to Mississippi prison system for "ghost" employees it was contractually obligated to hire, but, to maximize profits, purposefully did not hire).

136. *See* Tartaglia, *supra* note 3, at 1702.

tired, unalert, and overwhelmed guards who fail to do necessary daily tasks; this increases civil rights violations.[137] When a private prison is understaffed, the company should pay a penalty to the government.[138] But unless the government is closely comparing staffing records to the contract,[139] the companies avoid fully staffing the facility and paying penalties.[140]

C. Housing Violations

Civil rights lawsuits are not limited to medical indifference claims or those stemming from physical violence. Plaintiffs sue prisons for failure to segregate violent and non-violent populations and those who act violently towards each other.[141] A prison with a custom of clustering gang members can be held liable for violence.[142] These claims rarely succeed, however, because there is no proven way to avoid violence in facilities nor is there an obvious § 1983 claim.[143]

A separate but related issue arises when private prisons violate civil rights in the *way* they house individual inmates. For instance, two private prison inspections by federal officials revealed that each facility placed around seventy new inmates in solitary confinement due to a lack of beds in the general population.[144] Once confined, the people were subjected to the same punishments and security protocols as those placed there for security reasons: restricted movement, limited access to educational or vocational programs, and limited phone calls.[145] Some of the federal prisons had negotiated language in contracts that allowed them to treat solitary beds like general-population beds, despite it being a violation of industry standards.[146] The federal monitors put an end to this contractual loophole and civil rights problem.[147]

All these civil rights violations, whether related to medical care, violence, or housing, are amplified when profit margins are the focus instead of prisoner welfare.[148] This is only made worse when courts consider the private industry

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137. *See Castillon*, 2016 WL 3676116, at *11–12.

138. *See* Santo & Neff, *supra* note 122.

139. Gelman, *supra* note 52, at 1406–08; *see also* AUSTIN & COVENTRY, *supra* note 24,25, at 15–17.

140. Santo & Neff, *supra* note 122; MUMFORD ET AL., *supra* note 7, at 4 (explaining that private correctional salaries are approximately $7,000 lower than public correctional salaries). This happens in other privatized industries too. *See* Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 570–71 (2012).

141. *See, e.g.*, Street v. Corr. Corp. of Am., 102 F.3d 810, 815 (6th Cir. 1996); *Castillon*, 2016 WL 3676116, at *2, *14–16 (highlighting several lawsuits based on this claim).

142. *See Castillon*, 2016 WL 3676116, at *14–16.

143. *See, e.g.*, *id.* (detailing several incarcerated individuals' failed attempts to sue successfully on this theory).

144. REVIEW OF CONTRACT PRISONS, *supra* note 2, at 29.

145. *Id.* at 30.

146. *See id.*

147. *See id.* at 29–31.

148. *See* Appleman, *supra* note 61, at 585.

worthy of the same liability protections as municipalities and public jails and prisons.[149]

II. THE SUPREME COURT'S § 1983 CASES

Each of the above legal claims raises civil rights concerns governed by § 1983.[150] A civil rights plaintiff must allege a state government employee or official acting under color of state law violated his or her constitutional rights.[151] This is the route most inmates take to sue prisons for rights violations.[152] The Civil Rights Act assigns liability to governments and their agents when they violate constitutional rights.[153] The Act is supposed to deter state actors from using their power and position to commit constitutional violations and to compensate citizens when deterrence fails.[154] The landmark case plaintiffs use to sue local governments is *Monell*.[155]

The Supreme Court described *Monell* as "a case about responsibility," but the responsibility *Monell* created has limits.[156] In *Monell*, the Supreme Court held that municipalities and local government bodies may be liable under § 1983 when an "action pursuant to official municipal policy . . . caused a constitutional tort."[157] The *Monell* decision overturned the Court's *Monroe v. Pape* opinion, which held that cities were immune from § 1983 lawsuits.[158]

According to *Monell*, civil rights plaintiffs must do more than establish that a city employee violated their rights; employing a tortfeasor is not enough.[159] The city is liable only if its policies were the moving force behind the violation.[160] The *Monell* Court held that cities should be liable only for the torts they caused, based on the "subjects, or causes to be subjected" language in the

149. *See* Aman & Dugan, *supra* note 29, at 901.

150. *See* 42 U.S.C. § 1983.

151. West v. Atkins, 487 U.S. 42, 48 (1988).

152. *See* Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 WASH. U. L. REV. 1473, 1502 (2013) (calling section "1983[] the principal means of enforcing constitutional rights"); Weiss, *supra* note 45, at 732 (discussing the use of § 1983 to hold prisons and jails responsible for deficient medical care).

153. *See* 42 U.S.C. § 1983; Monroe v. Pape, 365 U.S. 167, 174–75, 191 (1961) (holding that the Civil Rights Act applies to law-enforcement officers); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

154. Wyatt v. Cole, 504 U.S. 158, 161 (1992).

155. *See* 436 U.S. at 690–91. *Monell* has frequently been criticized, but those criticisms are outside the scope of this Article. *See, e.g.*, Edward C. Dawson, *Replacing* Monell *Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 504 (2018) (citing several legal scholars and Supreme Court Justices who complained *Monell's* standard is too complicated and too unforgiving); Brian J. Serr, *Turning Section 1983's Protection of Civil Rights Into an Attractive Nuisance: Extra-Textual Barriers to Municipal Liability Under* Monell, 35 GA. L. REV. 881, 893 (2001) ("[N]othing in § 1983 . . . foreclose[es] *respondeat superior* liability . . . .").

156. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986).

157. *Monell*, 436 U.S. at 690–91.

158. *Id.* at 663; *see Monroe*, 365 U.S. at 187.

159. *See Monell*, 436 U.S. at 665–83, 691–94; Bd. of Cnty. Comm'rs, v. Brown, 520 U.S. 397, 406 (1997).

160. *Monell*, 436 U.S. at 694.

Act.[161] The custom-and-policy requirement was meant to distinguish municipal acts from employee acts.[162] A later case held cities could also be sued for an act caused by a person with final policymaking authority.[163]

Despite the focus on the Act's causation language, much of the Supreme Court's § 1983 jurisprudence has been driven by policy considerations, not the text of the Act.[164] Indeed, the *Monell* decision rests upon several policies. First, governments are motivated to reduce accidents if they must bear the cost.[165] This cost "should be spread to the community as a whole on an insurance theory."[166] Second, at least one Justice considered the kind of impact that lawsuits would have on municipal officers.[167] Judges and scholars have long suggested that the Court was concerned about city bankruptcies and taxpayer money funding lawsuit damage awards.[168] Third, the Court considered municipal autonomy and independence from federal oversight.[169] It sought to limit federal government interference with state and local government functions and officials.[170]

After *Monell*, the Supreme Court had the opportunity to address civil rights violations in the context of prisons and businesses. In *West v. Atkins*, an inmate sued a doctor the North Carolina's prison system contracted with to provide orthopedic medical services.[171] The issue before the Supreme Court was whether the doctor was acting under color of state law when he treated the plaintiff.[172]

The Court found that private professionals can be state actors and that their medical treatment of prisoners is state action.[173] The Court reasoned that

161. *See id.*; 42 U.S.C. § 1983.

162. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986).

163. *See id.* at 480–83.

164. *See e.g.*, Dawson, *supra* note 155, at 501; John M. Greabe, *A Better Path for Constitutional Tort Law*, 25 CONST. COMMENT. 189, 205 (2008) (arguing that the Court acknowledges "its willingness to rewrite the text of section 1983 to create a regime that 'better' balances competing policy considerations than does the actual law that Congress passed").

165. *Monell*, 436 U.S. at 693.

166. *Id.* at 693–94.

167. *See id.* at 664 n.9.

168. *See, e.g.*, Shields v. Ill. Dep't of Corr., 746 F.3d 782, 792 (7th Cir. 2014) ("*Monell* is probably best understood as simply having crafted a compromise rule that protected the budgets of local governments from automatic liability for their employees' wrongs, driven by a concern about public budgets and the potential extent of taxpayer liability."); Oklahoma City v. Tuttle, 471 U.S. 808, 844 (1985) (Stevens, J., dissenting) (outlining that the *Monell* Court could only justify its decision based on policy concerns about municipal bankruptcies); Serr, *supra* note 155, at 888 (noting that "the need to protect the municipal treasury" was the motivation behind *Monell*).

169. *See Monell*, 436 U.S. at 675, 679.

170. *Id.* at 675–79.

171. 487 U.S. 42, 43–45 (1988).

172. *Id.* at 49.

173. *See id.* at 51–54.

medical care within a prison is a joint effort between the facilities and the private providers.[174] The *West* Court stated:

> Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins[, who] voluntarily assumed that obligation by contract.[175]

The Court ruled that the plaintiff could sue the private doctor for deliberate medical indifference.[176] This decision removed a hedge of protection from private employees hired by the government to work in prisons when they violate civil rights, but it did not speak directly to their private employers.[177]

In *Wyatt v. Cole*, the Court addressed whether § 1983 common law defenses like qualified immunity were available to private actors.[178] Though the facts were unrelated to carceral companies, the Court attempted to reconcile a circuit split that applied to a variety of civil rights claims.[179] The Court looked to the common law traditions at the time the Act was created, policy concerns about suing government officials, and its own precedent.[180]

The *Wyatt* Court determined that qualified immunity, as a defense, exists to protect the public at large by safeguarding governments; it is not designed to benefit government agents.[181] Finding the defense nontransferable to private parties, the Court stated,

> Unlike school board members, . . . police officers, . . . or Presidential aides, . . . private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. . . . [T]he public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.[182]

The *Wyatt* Court found that any nexus between the historic justifications for qualified immunity and private parties was too attenuated to justify immunity from suit for private parties.[183]

In the next prison case, *Richardson v. McKnight*, the plaintiff sued private prison guards, who then raised qualified immunity.[184] The Court, relying heavily

174. *See id.* at 51.
175. *Id.* at 56 (footnote omitted).
176. *Id.* at 57.
177. *See id.*
178. *See* 504 U.S. 158, 159 (1992).
179. *See id.* at 159–61.
180. *See id.* at 162–68.
181. *See id.* at 167–68.
182. *Id.* at 168 (citations omitted).
183. *See id.*
184. 521 U.S. 399, 401–02 (1997).

on *Wyatt*, reiterated that § 1983's purpose is to deter *state actors* from violating rights and to provide civil rights plaintiffs relief when they do.[185] The Court was careful to look at the history and purposes for government-employee immunity to determine whether the private prison guards should be treated like government actors.[186]

The *Richardson* Court found that history did not support any "firmly rooted" immunities for private prison guards.[187] Looking to the history of private prisons, the Court stated that privatization existed in different ways throughout the eighteenth and nineteenth centuries.[188] The common law gave mistreated inmates remedies against private contractors in the nineteenth and twentieth centuries.[189] Dating back further, the Court found that England permitted privatized jails and prisons to operate from the Middle Ages until the eighteenth century, but the country outlawed abuse at the hands of private jailors.[190]

The Supreme Court highlighted critical marketplace differences between private and public prisons.[191] Market pressures ensure private prisons do not experience the kind of "unwarranted timidity" government employees confront when faced with potential civil rights lawsuits.[192] A sound private prison will use guards who are neither too timid nor overly aggressive lest the state hire a competitor with the right balance to guard inmates safely and effectively.[193] The business has far less ongoing state oversight.[194] It must buy insurance to compensate injured prisoners; insurance acts like immunity because it increases employee indemnification while discouraging fear of unwarranted liability.[195] The contract has an expiration date, so the company performs well or risks losing the next contract bid to a better performing competitor.[196] All these differences give the private prison incentives and penalties depending on how well its employees are trained and perform.[197] Moreover, the adjustments that companies can make to counter civil liability are nimbler than those governments can make.[198]

Given the government's supervision, the company's objective to make money, and marketplace competition, the Court held that the privately managed

185. *See id.* at 403.
186. *See id.* at 404.
187. *See id.* at 404–07.
188. *Id.* at 405.
189. *Id.* at 405–06.
190. *Id.* at 406–07.
191. *See id.* at 409–12.
192. *Id.* at 409.
193. *Id.*
194. *Id.*
195. *Id.* at 410. Tennessee requires contractors with the state to carry insurance to protect against civil rights claims. TENN. CODE ANN. § 41-24-107(a)(2) (West, Westlaw through 2024 Reg. Sess.).
196. *See Richardson*, 521 U.S. at 410.
197. *Id.*
198. *See id.* at 409–10, 412.

prison guards could not raise qualified immunity, unlike public prison guards.[199] *Richardson* stopped short of announcing a legal correlation to its holding: that private prison guards operate under color of state law.[200] The next case would clarify this point.

In *Correctional Services Corp. v. Malesko*, the Supreme Court addressed whether private prison employees could be sued in a *Bivens* action for Eighth Amendment violations.[201] The question of whether the *employer* could be sued was not raised by the facts or the claim.[202] The Court held that a *Bivens* action was designed to hold only government agents liable because holding the agency liable for employee torts carried "enormous financial burden[s]."[203] The Court declined to extend *Bivens* to cover anyone beyond individual officers or agents.[204]

In *Malesko*'s dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, expressed concern that prison corporations were incentivized to "adopt cost-saving policies that jeopardize the constitutional rights of . . . inmates in their custody" because the corporation's loyalty was to stockholders, not their populations or the public.[205] In response to the dissenters' concern, the majority noted that state prisoners could sue private correctional providers under § 1983.[206]

In *Minneci v. Pollard*, the Supreme Court again drew a hard line in *Bivens* actions between private actors who commit civil rights violations and government agents.[207] The Court again refused to extend *Bivens* to private actors, asserting that each state allowing private prisons to operate imposes statutory duties of care upon them.[208] In her dissent, Justice Ginsburg noted that if the main policy reason underlying *Bivens* was to deter federal agents from committing constitutional torts, it would have operated to do the same here against private prison guards.[209]

Even in Supreme Court cases that do not address private prisons or their employees, the Court has clarified that private parties should not be treated like governments under § 1983.[210] In *Newport v. Fact Concerts*, the Supreme Court explained that "§ 1983 cannot be understood in a historical vacuum" and then

199. *Id.* at 401; *see also* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

200. *See Richardson*, 521 U.S. at 409–12; Phillips v. Tiona, 508 F. App'x 737, 750 (10th Cir. 2013).

201. 534 U.S. 61, 63 (2001).

202. *See id.* at 71–72.

203. *Id.* at 69–70 (quoting FDIC v. Meyer, 510 U.S. 471, 486 (1994)).

204. *See id.* at 70.

205. *Id.* at 81 n.9 (Stevens, J., dissenting); *cf.* Manis v. Corr. Corp. of Am., 859 F. Supp. 302, 305 (M.D. Tenn. 1994) ("[C]orporate officers owe a fiduciary duty to advance stockholders' interests, but they owe no such fiduciary duty to the public at large.").

206. *See Malesko*, 534 U.S. at 71–72 & n.5.

207. *See* 565 U.S. 118, 120, 126 (2012).

208. *See id.* at 128–29.

209. *Id.* at 133 (Ginsburg, J., dissenting).

210. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981).

examined the laws, legislative intent, and policy considerations of that era.[211] After a careful analysis, the Court held that private parties were subject to punitive damages now, as they were in 1871, whereas municipalities were not.[212] It cited an 1877 decision from Missouri as support for its position that municipal officers were unlike corporations or their agents.[213] The Court held that respondeat superior applied to private actors, not to city governments.[214]

Other Supreme Court cases have addressed civil rights violations by private parties. In *Owen v. City of Independence, Missouri*, the Court noted that before the Civil Rights Act, cities were just as liable for tortious conduct as businesses and individuals.[215] It cited a treatise published two years before the Civil Rights Act as evidence.[216] The Court also recognized the importance of providing remedies to individuals whose rights had been transgressed, as well as a deterrent for institutions who engaged in systemic violations due to bad policymaking decisions.[217] While this case did not specifically address private prisons or inmates,[218] these principles—deterring systemic constitutional torts and providing remedies to individuals who have suffered them—apply in the private prison context.

Two cases hold particular relevance to the liability of private parties under § 1983. The first, *Adickes v. S.H. Kress & Co.*, decided before *Monell*, involved a restaurant employee acting at the bequest of police to violate the plaintiff's civil rights.[219] The Court held that when a state commands a private actor to violate constitutional rights, the act becomes state action.[220] The Court reasoned that even though "this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her . . . rights" if she proves her case.[221] *Adickes* is still good law; few recognize that the Court authorized a claim against the restaurant, based upon the employee's unlawful state action, which implicates respondeat superior liability.[222]

In the second case, *Lugar v. Edmonson Oil Co.*, the defendant oil company used state officials and state processes to harm a landowner.[223] The Supreme

211. *Id.* at 258.
212. *See id.* at 259–60.
213. *See id.* at 261–62.
214. *Id.* at 260–63.
215. 445 U.S. 622, 640 (1980).
216. *See id.*
217. *See id.* at 651–52.
218. *See id.*
219. 398 U.S. 144, 149 (1970).
220. *Id.* at 171.
221. *Id.* at 152.
222. *See* Shields v. Ill. Dep't of Corr., 746 F.3d at 782, 790, 793 (7th Cir. 2014); Kritchevsky, *supra* note 29, at 51–52.
223. *See* 457 U.S. 922, 924–25 (1982).

Court held that when a private party acts *jointly* with a government actor to deprive a person of his rights, the private party acts under color of law for purposes of § 1983.[224] If Lugar, like Adickes, could prove his claim that the private party misused state processes, his civil rights claim would be actionable.[225] Importantly, neither *Adickes* nor *Lugar* found that the private party was shielded from suit or entitled to defenses available to the government.[226]

The Supreme Court has never held that *Monell* applies to a private party, entity, or company.[227] Indeed, private parties in *all* of the above Supreme Court cases had to answer for their employees' torts under the theory of respondeat superior.[228] Thus, civil rights plaintiffs who sue private parties for constitutional torts are not required to prove that the tortious act stemmed from the employer's policy or custom under *Monell*.[229]

III. CIRCUIT COURT § 1983 CASES

While the Supreme Court has never extended *Monell* to private parties, most circuit courts have.[230] The extension began with a superficial and short-sighted decision from the Fourth Circuit.[231] In *Powell v. Shopco Laurel Co.*, the court ruled that a business was not liable when its security guard beat a man suspected of shoplifting.[232] In a single 130-word paragraph, the court concluded that *Monell*'s holding was "equally applicable to the liability of private corporations."[233] The court focused solely on the language of § 1983 rather than its legislative history, purpose, or Supreme Court precedent.[234]

The *Powell* court overlooked or ignored several critical aspects of *Monell* and Supreme Court precedent.[235] It likened "a municipal corporation" to a "private

224. *Id.* at 941.

225. *See id.*

226. *See Adickes*, 398 U.S. at 152; *Lugar*, 457 U.S. at 941.

227. *Shields*, 746 F.3d at 793; Kritchevsky, *supra* note 29, at 49.

228. *Shields*, 746 F.3d at 791–93; Kritchevsky, *supra* note 29, at 48–49.

229. *Shields*, 746 F.3d at 793; *see* Kritchevsky, *supra* note 29, at 48–49.

230. *See e.g.*, Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246–47 (1st Cir. 1994); Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406, 408–09 (2d Cir. 1990); Defreitas v. Montgomery Cnty. Corr. Facility, 525 F. App'x 170, 176 (3d Cir. 2013); Powell v. Shopco Laurel Co., 678 F.2d 504, 506 (4th Cir. 1982); Street v. Corr. Corp. of Am., 102 F.3d 810, 818 (6th Cir. 1996); Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982); Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012); DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714, 723 (10th Cir. 1988); Harvey v. Harvey, 949 F.2d 1127, 1129–30 (11th Cir. 1992). One commentator praised the Fifth Circuit for being the only one in alignment with Supreme Court precedent. Stephen J. Haedicke, *A Challenge to the Status Quo?* Shields v. Illinois Department of Corrections *and § 1983 Liability for Private Companies*, FED. LAW., May–June 2020, at 44, 48 (2020).

231. *See Powell*, 678 F.2d at 505–06.

232. *Id.*

233. *Id.* at 506.

234. *See id.*

235. *See id.*; Shields v. Ill. Dep't of Corr., 746 F.3d 782, 749–95 (7th Cir. 2014).

corporation" without explanation.[236] This contradicts Supreme Court precedent.[237] Admittedly, the Supreme Court decided *Wyatt* after the Fourth Circuit's *Powell* decision, but it considered three decades of precedent that predated *Powell* and was available for the *Powell* court to analyze.[238] Using that precedent, the Supreme Court determined that private actors do not have the same public-benefitting goals as the government and therefore are not immune from suit.[239] The Court did not see private corporations as worthy of § 1983 immunities, much less equal to municipal corporations.

The *Powell* court failed to rely on sources the Supreme Court routinely uses in its civil rights cases.[240] When interpreting civil rights law, the Supreme Court draws upon historical facts, tort common law traditions at the time the Civil Rights Act was enacted in 1871, defenses available at that time, and policy considerations.[241] The Fourth Circuit did none of that.[242] While the Supreme Court has examined the language of the Act itself, its decisions rest on the language only in part, not in whole.[243] This points to the Fourth Circuit's shallow analysis that fails to look outside the Act's language.

Since *Powell* was decided, the majority of circuit courts have ruled that *Monell*'s limited liability that municipalities enjoy also applies to private actors in civil rights lawsuits.[244] However, two circuits have not blindly followed *Powell*: the Fifth and Seventh Circuits.

The Fifth Circuit has never addressed the issue head-on, but its decisions have taken different approaches. In *Moore v. LaSalle Management Co.*, the Fifth Circuit refused to decide whether the plaintiffs could hold the corporate defendants vicariously liable for their employee's actions.[245] In *Olivas v. Correctional Corp. of America*, the court held that the defendant could not be held liable under respondeat superior.[246] The *Olivas* court required the plaintiff to

236. *See Powell*, 678 F.2d at 506.

237. *See Shields*, 746 F.3d at 790–91.

238. *See* 504 U.S. 158, 163–69 (1992).

239. *See id.* at 168.

240. *See Powell*, 678 F.2d at 506.

241. *See, e.g.*, *Wyatt*, 504 U.S. at 163–64; Richardson v. McKnight, 521 U.S. 399, 404 (1997); Adickes v. S.H. Kress & Co., 398 U.S. 144, 162–68 (1970); Owen v. City of Independence, 445 U.S. 622, 635–36; City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–66 (1981).

242. *See Powell*, 678 F.2d at 506.

243. *See, e.g.*, Bd. of Cnty. Comm'rs, v. Brown, 520 U.S. 397, 403 (1997).

244. *See, e.g.*, Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246–47 (1st Cir. 1994); Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406, 408–09 (2d Cir. 1990); Defreitas v. Montgomery Cnty. Corr. Facility, 525 F. App'x 170, 176 (3d Cir. 2013); *Powell*, 678 F.2d at 506; Street v. Corr. Corp. of Am., 102 F.3d 810, 818 (6th Cir. 1996); Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982); Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir. 2012); DeVargas v. Mason & Hanger–Silas Mason Co., 844 F.2d 714, 723 (10th Cir. 1988); Harvey v. Harvey, 949 F.2d 1127, 1129–30 (11th Cir. 1992).

245. *See* 41 F.4th 493, 512 (5th Cir. 2022).

246. *See* 215 F. App'x 332, 333 (5th Cir. 2007).

establish her injury stemmed from a policy or custom; it found she had not.[247] In *Rosborough v. Management & Training Corp.*, the Fifth Circuit held that private prison management companies and their employees can be liable under § 1983 for violating constitutional rights.[248] The court never mentioned or applied *Monell* in that decision.[249] While the Fifth Circuit decisions above are not fully aligned, the court has never cited, much less followed *Powell*.[250]

The Seventh Circuit has challenged *Powell* as an unwise model that other circuits have blindly followed.[251] In *Shields v. Illinois Department of Corrections*, the Seventh Circuit issued the most thorough and thoughtful decision addressing whether to apply *Monell* to a privatized health-care corporation working within Illinois jails and prisons.[252] Shields, a prisoner in an Illinois jail, required medical treatment for a ruptured tendon in his shoulder.[253] Due to a series of conflicting diagnoses and treatments among jail doctors, along with critical errors staff made, he did not get the surgery he needed, which left him permanently disabled.[254] He sued, claiming the health-care company, Wexford Health Sources, Inc., was deliberately indifferent to his medical needs.[255]

Judges Hamilton, Posner, and Tinder were sympathetic to Shields; they recognized "arbitrary gaps in the legal remedies" for § 1983 violations.[256] The court explained that part of the problem is that the legal focus is on individuals rather than corporations who employ those individuals.[257] The Seventh Circuit framed the issue as whether a private company should be able to claim the benefit of *Monell*.[258] The judges believed no other court had credibly explained a "yes" answer to this question.[259] The court wanted to hold Wexford liable for violating Shields's right to medical care; it believed applying *Monell* to the company was unwarranted.[260] However, because it could not overrule its own precedent without an *en banc* hearing, the panel set the stage to do so in the future.[261]

The *Shields* court expressed concern over the circuit court's blind and unwise following of *Powell*, a case that badly missed the mark.[262] It found several

247. *See id.*
248. 350 F.3d 459, 461 (5th Cir. 2003).
249. *See id.*
250. *See Moore*, 41 F.4th at 512; *Olivas*, 215 F. App'x at 333; *Rosborough*, 350 F.3d at 461.
251. *See* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 794–95 (7th Cir. 2014).
252. *See id.* at 793–96.
253. *Id.* at 785.
254. *Id.* at 786–88.
255. *Id.* at 788.
256. *See id.* at 785.
257. *See id.* at 785–86.
258. *Id.* at 786.
259. *See id.* at 786, 789.
260. *See id.* at 795.
261. *See id.* at 795–96.
262. *See id.* at 794–96.

legal reasons why extending *Monell* protections to companies was a dangerous idea.[263] The *Monell* Court never contemplated its rule applying to private corporations.[264] Private businesses faced respondeat superior liability when the Civil Rights Act was enacted, so there was a presumption that such liability would apply to them after *Monell*, just as it had before.[265] The text of the Act does not foreclose liability for corporations.[266] Supreme Court jurisprudence supports liability for private companies.[267] And the Supreme Court itself has never allowed a corporation to take advantage of *Monell's* limited liability.[268]

The *Shields* court also considered public policy in its decision.[269] It believed that employers who are judgment-proof have little incentive to change practices, especially when the better practice costs more.[270] The employer corporation is motivated by avoiding violations if it has to pay for the violations, and at the same time, it is in a better position than the employee to absorb costs.[271] Because companies can control their employees' acts, they should be liable for them.[272] The differences between the way governments and companies conduct business—the latter faces market pressures and incentives while the former has democratic pressures—support different treatment.[273]

After considering the law and public policy, the *Shields* court turned its attention to private prisons specifically.[274] It found that this industry has frequent opportunities to violate civil rights given the nature of the job; companies benefit from providing substandard medical care at the expense of inmate wellbeing; companies face market pressures; their actions harm the public at large.[275] In the end, the *Shields* court expressed a growing concern over private prison immunity given the expanded role privatized facilities play in our country.[276] Allowing prisoners to sue corporations would both protect constitutional rights and provide a remedy to injured inmates.[277] The court found that while employees lack qualified immunity, which motivates them to uphold inmate rights, a more effective motivator would be to remove the employer's limited liability.[278]

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263. *See id.* at 791–96.
264. *Id.* at 791.
265. *Id.* at 791–92.
266. *Id.* at 793.
267. *Id.* at 793–94.
268. *Id.*; Aman & Dugan, *supra* note 29, at 901.
269. *See Shields*, 746 F.3d at 792, 794.
270. *See id.* at 794.
271. *Id.* at 792.
272. *Id.*
273. *Id.* at 793–94.
274. *See id.*
275. *Id.* at 794.
276. *See id.* at 786, 795.
277. *Id.* at 795.
278. *See id.* at 794.

When it came to Wexford itself, the court believed that the company had structured medical decision-making in such a way as to protect plaintiffs from being able to blame any single policymaker or tortfeasor.[279] The Seventh Circuit found that Shields was a victim "of a system of medical care that diffused responsibility for his care to the point that no single individual was responsible for seeing that he received the care he needed in a timely way."[280] Shields was injured through institutional neglect.[281] Several employees and their mistakes led to his injury, but the real culprit was the sheer ineptitude of Wexford's medical-care system.[282]

Shields is the best-reasoned circuit court decision on this issue. In it, the court dismantled the faulty legal premise that *Powell* created and other circuits have followed.[283] *Shields* identified the legal and policy errors caused by applying *Monell* to private prisons.[284]

IV. THE DISTRICT COURTS' DILEMMA

The gap between what the Supreme Court has not authorized and what circuit courts authorize leaves district courts in a difficult position. Some have tracked the superficial path of *Powell*, some have indicated they would like to adhere to *Shields* but cannot, and some have followed the Supreme Court's lead rather than rely on their circuit's precedent.[285] This Part will parse these positions.

One approach district courts have taken is to sidestep circuit court decisions entirely by relying solely on Supreme Court precedent. A Nevada district court in *Segler v. Clark County* carefully analyzed Supreme Court cases, finding that a health-care company was not entitled to *Monell* immunity.[286] The court determined that because the company was not a city, the policy reasons for protecting cities and taxpayers from liability did not apply; thus, plaintiffs need not prove that a policy or custom led to the injury.[287] A federal district court in Texas emphasized that the Supreme Court has never applied *Monell* to private employers.[288] The court also found that the text of the Civil Rights Act

279. *See id.* at 795.

280. *Id.* at 799.

281. *See id.* at 785; Haedicke, *supra* note 230, at 46.

282. *See Shields*, 746 F.3d at 795; Haedicke, *supra* note 230, at 46.

283. *See Shields*, 746 F.3d at 790, 794–95.

284. *See* Haedicke, *supra* note 230, at 46–47.

285. *See, e.g.*, Garafola v. Lackawanna County, No. 3:07cv2305, 2011 WL 1304861, at *9 (M.D. Pa. Mar. 31, 2011); Revilla v. Glanz, 8 F. Supp. 3d 1336, 1340–41 (N.D. Okla. 2014); Segler v. Clark County, 142 F. Supp. 2d at 1268–69 (D. Nev. 2001).

286. *See Segler*, 142 F. Supp. 2d at 1268–69.

287. *Id.* at 1269.

288. *See* Hutchison v. Brookshire Bros., Ltd., 284 F. Supp. 2d 459, 472 (E.D. Tex. 2003).

did not support such an application.[289] In this way, these courts looked closely to Supreme Court precedent and the text of § 1983 for guidance.

Another approach is to assume *Monell* applies to private companies based on circuit court decisions.[290] Many of the courts adopting this approach follow *Powell*'s lead and its conclusory legal analysis.[291]

It is possible for civil rights plaintiffs to successfully navigate *Monell's* application, but it is much harder. This is not required by the Supreme Court, as official policy and policymaking are "operative concept[s] of *municipal* liability," not private corporate liability.[292] Nevertheless, numerous federal courts have found that private prisons and privatized medical providers can be liable for § 1983 violations.[293] They have done so after finding that the plaintiff established a viable claim—at least in the motion-to-dismiss or motion-for-summary-judgment phase—that a company's custom or policy led to the injury.[294] Many of these customs and policies relate to cost-cutting measures, particularly in medical facilities within jails and prisons.[295]

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289. *See id.*

290. *See, e.g.*, Castillon v. Corr. Corp. of Am., No. 1:12-CV-00559, 2016 WL 3676116, at *4 (D. Idaho July 7, 2016) (citing Tsao v. Desert Place, Inc., 698 F.3d 1138, 1138–39 (9th Cir. 2012)); Haughie v. Wexford Health Sources, Inc., No. ELH-18-3963, 2020 WL 1158568, at *15 (D. Md. Mar. 9, 2020) ("Standards applicable to municipalities are applicable to private corporations acting under color of state law." (citing Rodriguez v. Smithfield Packing Co., 338 F.3d 348, 355 (4th Cir. 2003))).

291. *See, e.g.*, Garafola v. Lackawanna County, No. 3:07cv2305, 2011 WL 1304861, at *9 (M.D. Pa. Mar. 31, 2011) ("[W]e agree[] with the reasoning of the great weight of authority that extends *Monell* to private corporations that contract with municipalities."); Robinson v. Corizon Health, Inc., No. 12-1271, 2016 WL 7235314, at *9 n.7 (E.D. Pa. Dec. 13, 2016) (noting that a private company is like a municipality). One district court recognized the lack of analysis in these cases. *See* Taylor v. Plousis, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000) ("[T]he majority of courts to have reached this conclusion have done so with relatively little analysis, treating the proposition as if it were self-evident . . . .").

292. *See* George D. Brown, *Municipal Liability Under Section 1983 and the Ambiguities of Burger Court Federalism: A Comment on City of Oklahoma City v. Tuttle and Pembaur v. City of Cincinnati—the "Official Policy" Cases*, 27 B.C. L. REV. 883, 897–98 (1986) (emphasis added).

293. *See, e.g.*, *Garafola*, 2011 WL 1304861, at *9–10; *Robinson*, 2016 WL 7235314, at *13; Young v. Wexford Health Sources, No. 10 C 8220, 2012 WL 621358, at *6–7 (N.D. Ill. Feb. 14, 2012); McDonald v. Wexford Health Sources, No. 09 C 4196, 2010 WL 3034529, at *3 (N.D. Ill. July 30, 2010); Sanders v. Glanz, 138 F. Supp. 3d 1248, 1255–56 (N.D. Okla. 2015); Mikus v. Corr. Healthcare Mgmt. of Okla., Inc., No. 13-CV-120, 2019 WL 845416, at *8–9 (N.D. Okla. Feb. 20, 2019); Wright v. Glanz, No. 13-CV-315, 2020 WL 1663356, at *8 (N.D. Okla. Apr. 3, 2020); Birdwell v. Glanz, No. 15-CV-304, 2016 WL 2726929, at *6 (N.D. Okla. May 6, 2016); Natale v. Camden Cnty. Corr. Facility, 318 F.3d 583–85 (3d Cir. 2003).

294. *See, e.g.*, *Garafola*, 2011 WL 1304861 at *9–10; *Robinson*, 2016 WL 7235314, at *13; *Young*, 2012 WL 621358, at *6–7; *McDonald*, 2010 WL 3034529, at *3; *Sanders*, 138 F. Supp. 3d at 1255–56; *Mikus*, 2019 WL 845416, at *9; *Wright*, 2020 WL 1663356, at *8; Revilla v. Glanz, 8 F. Supp. 3d 1336, 1341–42 (N.D. Okla. 2014); *Natale*, 318 F.3d at 584–85.

295. *See, e.g.*, *Young,* 2012 WL 621358, at *6 ("Plaintiff's complaint also alleges facts to support a plausible claim against Wexford for a policy of denying medical care to inmates as a cost-saving device."); *McDonald*, 2010 WL 3034529, at *3 (finding that "Plaintiff's complaint more than adequately state[d] a policy that was the direct cause or moving force behind . . . allege[d] . . . constitutionally inadequate medical care" where plaintiff alleged a cost-cutting basis for jail not providing medicine); *Sanders*, 138 F. Supp. 3d at 1251 (finding that plaintiff's complaint established a plausible claim for relief where plaintiff alleged that the jail released him to avoid paying medical bills he would have incurred had he remained in custody).

Several district courts have held that plaintiffs alleged plausible claims—or offered evidence sufficient to defeat summary judgment—that a policy, custom, or policymaker's act led to the civil rights violation.[296] In one case, a Pennsylvania district court determined that the highest ranking medical corporate officer set the policy for the private medical provider in a jail.[297] The policy led an inmate to suffer from a broken hip bone with only Motrin and bed rest for months before his release.[298] While the doctor labeled this "conservative treatment," the court held that a reasonable jury could find that the plaintiff suffered cruel and unusual punishment in violation of the Eighth Amendment.[299]

In a similar case, an Idaho court found that a private prison consistently understaffed its facility in violation of its contract, which led to violent inmate attacks and demonstrated an overall indifference to the safety and wellbeing of its inmates.[300] The judge found that this amounted to a corporate policy that a reasonable jury could find violated constitutional rights.[301]

Sometimes private facility auditors push courts to side with the plaintiff. An Oklahoma district court judge in *Revilla v. Glanz* acknowledged that applying *Monell* to private entities is a circuit court practice, not a Supreme Court practice.[302] He cited to and agreed with *Shields*, but acknowledged that he was bound to follow the Tenth Circuit's precedent limiting the company's liability.[303] However, *Revilla* stands out because the plaintiff asserted that the facility was on notice from auditors who exposed risky policies in a report.[304] These alleged policies established a plausible claim, and thus the court denied the facility's motion to dismiss.[305] Two New York district court judges found a for-profit jail medical provider liable on the same basis: state auditors uncovered a system of woeful health-care deficiencies in the company's care for inmates.[306] And the Sixth Circuit recognized that a Department of Justice report detailing numerous civil rights abuses placed a jail on notice and, if admissible, could be used to bolster the plaintiff's claims of § 1983 violations on remand.[307]

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296. *See, e.g.*, *Garafola*, 2011 WL 1304861, at *9–10; *Robinson*, 2016 WL 7235314, at *13; *Young*, 2012 WL 621358, at *6–7; *McDonald*, 2010 WL 3034529, at *3.

297. *See Garafola*, 2011 WL 1304861, at *10.

298. *See id.* at *1–2.

299. *See id.* at *2, *6.

300. *See* Castillon v. Corr. Corp. of Am., No. 1:12-CV-00559, 2016 WL 3676116, at *12 (D. Idaho July 7, 2016).

301. *See id.*

302. *See* 8 F. Supp. 3d 1336, 1339 (N.D. Okla. 2014).

303. *See id.* at 1340–41.

304. *See id.* at 1341–42.

305. *See id.*

306. *See* Gazzola v. County of Nassau, No. 16-CV-0909, 2022 WL 2274710, at *12 (E.D.N.Y. June 23, 2022); Gleeson v. County of Nassau, No. 15-CV-6487, 2019 WL 4754326, at *15 (E.D.N.Y. Sept. 30, 2019).

307. *See* Simpkins v. Boyd Cnty. Fiscal Ct., No. 21-5477, 2022 WL 17748619, at *13–14 (6th Cir. Sept. 2, 2022).

A fact that often goes unnoticed is that the defendant facility operates in a community with a stationary judge. If numerous lawsuits are filed in the same court against the local private prison or jail, the judge may see a pattern of injurious behavior that could be viewed as a custom or policy leading to civil rights violations. This happened when one federal district court judge in Oklahoma heard numerous civil rights cases arising from a single Tulsa jail.[308] Patterns of medical indifference led to injuries and deaths. In a 2015 case, inmates severely beat an untreated mentally ill prisoner, damaging his brain; jail employees lied to avoid paying his medical bills.[309] In a 2016 case, a suicidal inmate broke his neck and died six days later without receiving any medical treatment.[310] In another 2016 case, a developmentally disabled man had seizures that left him in a coma because staff failed to give him his prescribed medicine.[311] In a 2019 case, the jail denied an inmate eye care for a month; he suffered permanent vision loss.[312] In a 2020 case, a woman with heart disease in cardiac distress endured severe pain for days before she died from lack of treatment.[313] In another 2020 case, an inmate's intra-abdominal injuries required off-site medical attention, but the doctor delayed it, and the man died as a result.[314]

In each of these cases, the federal judge found that jail personnel or private medical providers could be liable for policies that directly resulted in civil rights violations.[315] The Sheriff resigned, and the jail switched medical providers, but only after these deaths and injuries occurred and Tulsa taxpayers bore their costs.[316] It may have helped that the same judge heard all these cases. It must have been easier for him to identify that the same cost-saving policy led to these tragic violations. Nevertheless, plaintiffs who rely on the fact that a company

308. *See, e.g.*, Sanders v. Glanz, 138 F. Supp. 3d 1248 (N.D. Okla. 2015); Burke v. Glanz, No. 11-CV-720, 2016 WL 3951364, at *1 (N.D. Okla. July 20, 2016); Mikus v. Corr. Healthcare Mgmt. of Okla., Inc., No. 13-CV-120, 2019 WL 845416, at *1 (N.D. Okla. Feb. 20, 2019); Wright v. Glanz, No. 13-CV-315, 2020 WL 1663356, at *1 (N.D. Okla. Apr. 3, 2020); McCaffrey v. Glanz, No. 13-CV-315, 2020 WL 5834793, at *1 (N.D. Okla. Sept. 30, 2020); *see generally 4 Year Anniversary of the Resignation of Former Tulsa County Sheriff Stanley Glanz*, 2 NEWS OKLA. (Nov. 1, 2019, 5:26 PM) [hereinafter *4 Year Anniversary*], https://www.kjrh.com/news/local-news/4-year-anniversary-of-the-resignation-of-former-tulsa-county-sheriff-stanley-glanz [https://perma.cc/PG5L-D4ZC].

309. *See Sanders*, 138 F. Supp. 3d at 1250–51.

310. *See Burke*, 2016 WL 3951364, at *1–2.

311. *See* Fisher v. Glanz, No. 14-CV-678, 2016 WL 1175239, at *1–3 (N.D. Okla. Mar. 24, 2016).

312. *See Mikus*, 2019 WL 845416, at *7.

313. *See Wright*, 2020 WL 1663356, at *1–4.

314. *See* McCaffrey v. Glanz, No. 13-CV-315, 2020 WL 5834793, at *1–2, *5–6 (N.D. Okla. Sept. 30, 2020).

315. *See* Sanders v. Glanz, 138 F. Supp. 3d 1248, 1255–56 (N.D. Okla. 2015); *Burke*, 2016 WL 3951364, at *29; *Mikus*, 2019 WL 845416, at *9; *Wright*, 2020 WL 1663356, at *8; *McCaffrey*, 2020 WL 5834793, at *8; *Fisher*, 2016 WL 1175239, at *15.

316. *See 4 Year Anniversary*, *supra* note 308.

has faced numerous lawsuits as evidence of a civil rights violation custom or policy have failed to make their case in other federal courts.[317]

Each of the Oklahoma plaintiffs was able to prove much more than "the existence of an employer-employee relationship with a tortfeasor."[318] They were able to show, despite the company having been given limited liability, that the company was responsible for the rights violation.[319]

Several circuit courts have likewise found that plaintiffs alleged plausible claims—or offered evidence sufficient to defeat summary judgment—that a custom or policy led to an injury.[320] The Third Circuit applied *Monell* to a private health-care provider but found that its failure to give insulin shots, which resulted in death, was a custom or policy that a reasonable jury could find violated *Estelle*'s mandate.[321] The Seventh Circuit found that a medical company could be held liable under *Monell* when an inmate alleged he was refused treatment for a severed tendon and a gaping wound prior to and following an off-site medical visit.[322] The Sixth Circuit reversed a district court's entry of summary judgment for a defendant because the district court failed to consider a report offering evidence of a custom or policy that contributed to the plaintiff's injuries.[323] Another Sixth Circuit case found a privatized carceral medical company failed to train and supervise nurses, which a reasonable jury could find led to civil rights violations.[324]

The burden of overcoming *Monell* is heavy. "The gap between showing an underlying violation and showing a municipal custom or policy . . . is a vast one, and in practice the 'custom or policy' standard has proven very difficult to satisfy."[325] Because the Supreme Court never authorized this standard for non-municipal defendants, the standard should not apply to civil rights lawsuits involving non-municipal defendants.

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317. *See, e.g.*, Crone v. Ippel, No. 23-1387, 2023 WL 5276606, at *2 (7th Cir. Aug. 16, 2023).

318. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 692 (1978); Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986) (quoting *Monell*, 436 U.S. at 692).

319. *C.f. Pembaur*, 475 U.S. at 480 ("*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered.").

320. *See, e.g.*, Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 583–85 (3d Cir. 2003); Perez v. Fenoglio, 792 F.3d 768, 774–76, 780 (7th Cir. 2015); Shadrick v. Hopkins County, 805 F.3d 724, 737, 744 (6th Cir. 2015).

321. *Natale*, 318 F.3d at 582–85.

322. *See Perez*, 792 F.3d at 774–76, 780.

323. *See* Simpkins v. Boyd Cnty. Fiscal Ct., No. 21-5477, 2022 WL 17748619, at *13–14 (6th Cir. Sept. 2, 2022).

324. *Shadrick*, 805 F.3d at 742–44 (relying on City of Canton v. Harris, 489 U.S. 378, 388 (1989)).

325. Richard Frankel, *Regulating Privatized Government Through § 1983*, 76 U. CHI. L. REV. 1449, 1454 (2009).

V. A ROADMAP TO END LIMITED LIABILITY FOR PRIVATE PRISONS AND HEALTH-CARE PROVIDERS

Examining the historical, political, and legal points the Supreme Court considers in civil rights cases could help reconcile the conflicts created by *Powell* and its progeny. When considering solutions, it is imperative to recognize the damage that the circuit courts have done to this area of law, to the rights of people living in jails and prisons, and to public policy. Even though the problem originated and has continued in the circuit courts, the Supreme Court has missed opportunities to provide a remedy. After recognizing some of the failed policies and practices, this Part will provide a roadmap to standardizing liability for private carceral companies.

A. Failures

1. Limited Liability Encourages Constitutional Violations

Offering a private prison immunities or defenses to civil rights violations is foolish. The Supreme Court acknowledged this much when it emphasized that public officials are principally interested in the public good, whereas private parties are governed by self-interest.[326] Other federal courts have recognized the same.[327] A Tennessee district court, in the state where modern public prisons began,[328] said the following a decade after private prisons emerged:

> [W]hen 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 . . . . 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.[329]

This district court's statement served as a prophecy of things to come. Whether the cost-cutting is for medical care, staffing, or when the company's policies are to blame, the industry repeatedly engages in practices that violate civil rights where it is shielded from liability.

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326. *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992).

327. *See, e.g.*, Manis v. Corr. Corp. of Am., 859 F. Supp. 302, 305–06 (M.D. Tenn. 1994); Duncan v. Peck, 844 F.2d 1261, 1264 (6th Cir. 1988).

328. Sydney Young, *Capital and the Carceral State: Prison Privatization in the United States and United Kingdom*, HARV. INT'L REV. (Sept. 23, 2020), https://hir.harvard.edu/us-uk-prison-privatization/ [https://perma.cc/6AH9-MDHZ] ("[I]n 1984, the company CoreCivic opened the first private prison, located in Tennessee.").

329. *Manis*, 859 F. Supp. at 305–06.

2. The Private Prison Market Is Not a Normal Market

Let's return to the market considerations discussed in *Richardson v. McKnight*. The Supreme Court noted numerous critical marketplace differences between private and public prisons.[330] It suggested that market pressures motivate private employers through sound business practices, insurance, and renewable, competitive contracts.[331] If good private prisons are sued less often and bad private prisons are sued more often, then it is in the company's best interest to use sound business practices.

To be clear, the *Richardson* Court denied the private prison guards qualified immunity and never addressed the guards' employer's potential liability.[332] But the marketplace discussion has not aged well. What if the market that the Court believed existed no longer exists? What if there are no incentives—at least not the kind that benefit the public—and no penalties? If these are faulty premises, then the argument that the market will punish bad actors fails.

One scholar noted that state and local legislatures simultaneously incentivize private prisons to spend as little money as possible and disincentivize local government monitoring.[333] Companies can and do repeatedly violate civil rights and renew and increase contracts in that same jurisdiction and elsewhere.[334] The private companies in the industry are few,[335] and disappointed states "cycle through repeat players and hop from one company to another."[336] For example, the three largest private prison companies housed 96% of all inmates nationwide,[337] and a single firm may run all private prisons within a state or within several of the most populous states.[338] Such market concentration means these companies do not face the kind of competition required to raise quality in care or prioritize rights-protection.[339] Free markets do not work well when the pool of competitors is this small.[340] A good market requires competition and is responsive to consumer preferences.[341] The industry does not operate in a competitive market nor does it pretend to care about the preferences of the people living in the facilities it operates, much less attempt to abide by its own contractual obligations.

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330. *See* Richardson v. McKnight, 521 U.S. 399, 409–12 (1997).

331. *See id.*

332. *See id.* at 412.

333. Weiss, *supra* note 45, at 730–31.

334. *See id.* at 731.

335. Gelman, *supra* note 52, at 1389; Miller, *supra* note 7, at 397.

336. Gelman, *supra* note 52, at 1397; *see also* Williams & Oppel, supra note 23 (highlighting the staying power of private prisons "despite large-scale failures").

337. MUMFORD ET AL., *supra* note 7, at 3.

338. *See id.*; *see also* Appleman, *supra* note 71, at 583–84 (stating that two private prison businesses control over seventy-five percent of the market).

339. *See* MUMFORD ET AL., *supra* note 7, at 3.

340. *See* Dolovich, *supra* note 3, at 495–96.

341. *See* Gelman, *supra* note 52, at 1398–99.

Proponents of privatized correction services have argued that the judiciary, through inmate-driven lawsuits, oversees carceral companies and deters abusive practices.[342] With a silent Supreme Court, a pro-business circuit court majority, and only a few district court rebels, this simply is not true. The judiciary should recognize that *Richardson*'s marketplace assertions are nothing more than assumptions that have not withstood the test of time.

3. Contracts Insulate Companies and Governments

Private prison companies seek to contractually limit government oversight and management.[343] Governments place expectations on private prisons through negotiated contracts, which govern how the prisons will run and how they will be held accountable when legal claims arise.[344] But the contract terms are fulfilled outside of government and public view.[345] Site visits are rare and ineffective at catching systems of errors.[346] Governments admit they fail to monitor active contracts.[347] When governments turn to privatization to save money, they do not want to spend money on monitoring.[348] Moreover, local governments sign contracts with companies known to offer woeful health care, to violate civil rights, and to breach negotiated provisions.[349] This process creates consistently bad outcomes.[350] The government is complicit.[351]

Certain types of private prison contracts could amount to a policy actionable under § 1983. For instance, any contract providing for fixed reimbursements, cost-sharing for care outside of the prison walls, and indemnification provisions could violate Eighth Amendment standards by creating unconscionable profit-making incentives over human care.[352]

Contracts are not meant to insulate the companies or the government from liability. The Supreme Court stated in *West* that even when a private company employee violates civil rights, this fact does not relieve the government from its obligation to the inmate.[353] Thus, in a civil rights suit, the plaintiff may still recover from the government based on *West*. The Eleventh Circuit held that a local government could be liable when it did not provide enough money to a

342. *See* AUSTIN & COVENTRY, *supra* note 25, at 17.

343. *See* Arielle M. Stephenson, *Private Prison Management Needs Reform: Shift Private Prisons to a True Public-Private Partnership*, 49 PUB. CONT. L.J. 477, 485–86 (2020).

344. *See id.* at 478.

345. Dolovich, *supra* note 3, at 490–91.

346. *See id.* at 492.

347. *See id.* at 491; *see also, e.g.*, Gelman, *supra* note 52, at 1406–08.

348. *See* Dolovich, *supra* note 3, at 492.

349. *See* Weiss, *supra* note 45, at 748.

350. *See id.*

351. *See, e.g.*, *id.* at 756–57 n.175.

352. *See id.* at 732, 749–56.

353. West v. Atkins, 487 U.S. 44, 56 (1988).

private health-care facility and a man with cancer died from lack of treatment.[354] The court found that the county's contract with the provider did not shield it from liability; the county's duty to pay damages for constitutional violations was nondelegable.[355]

If government functions are contracted out, accountability and transparency are critical.[356] An early American Bar Association committee tasked with reporting on the emerging private prison industry in the 1980s warned that the risks of a civil rights lawsuit could not be "privatized away" and "should be borne by the private [party]," not the government.[357] This is currently not the case. The private prison insulates local officials from management, performance, and contractual responsibility.[358] Not only that, but it prohibits state legislatures from interfering with its operations.[359] Private prison contracts also typically fail to address excessive use of force and inadequate quality and training of personnel, which consistently show up in civil rights claims.[360]

Courts should not allow businesses that provide substandard services and those that lack accountability to be treated like governments.[361] While the claims that allege civil rights violations are tortious—not contractual—in nature, courts provide an extra layer of insulation from liability when they give limited liability to private prisons and health-care companies. The Supreme Court never authorized insulation of any kind, much less double insulation.

B. Fixes

1. Begin at the Beginning—in 1871

Circuit courts should analyze limited liability, qualified immunity, and other protections that corporations seek as the Supreme Court has, rather than simply concluding that corporations are like governments.[362] Though the Supreme Court's analysis in these areas has been careful,[363] circuit court analysis has been

354. *See* Ancata v. Prison Health Servs., Inc., 769 F.2d 700, 702, 705 (11th Cir. 1985).

355. *Id.* at 705.

356. *See* Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 539 (1989).

357. *Id.* at 536–37, 653.

358. *See* White, *supra* note 38, at 139; Raher, *supra* note 5, at 229.

359. *See* Raher, *supra* note 5, at 231.

360. *See* MUMFORD ET AL., *supra* note 7, at 1.

361. *See* Stephenson, *supra* note 343, at 484–87.

362. *See* Kritchevsky, *supra* note 29, at 71.

363. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 161, 163–67 (1992); Richardson v. McKnight , 521 U.S. 399, 405–06 (1997); Adickes v. S.H. Kress & Co., 398 U.S. 144, 162–69 (1970); Owen v. City of Independence, 445 U.S. 662, 635–50 (1980); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258–66 (1981).

fast and loose. *Powell* and the courts that follow it have engaged in "incoherent analysis," creating "indefensible results."[364]

The Supreme Court frequently discusses at length the legislative history and tort law of the 1800s in its § 1983 decisions.[365] For thirty pages, the *Monell* Court exhaustively searched through history, examining the legislative history, committee hearings, unpassed laws, and events when the Act was created in 1871.[366] In another case, the Court carefully considered whether categories of defendants had immunities in 1871 before permitting the defendants to claim those immunities now.[367] And in *Richardson*, the Court acknowledged that the common law granted inmates remedies against private contractors at the time of the Act.[368]

While the circuit courts do not follow the Supreme Court's lead in carefully analyzing history and the law that existed in 1871 when it comes to respondeat superior liability,[369] they do so in other areas of civil rights law.[370] For example, in *Sanchez v. Oliver*, the Fifth Circuit held that a company that made more than a billion dollars annually from jail and prison contracts did not have qualified immunity.[371] Before reaching that decision, the court said it had a responsibility to conduct a thorough historical review of the law as it existed in 1871 to determine whether there was a firmly rooted tradition of granting private medical employees immunities.[372] The *Sanchez* court stated that all of its sister circuits had followed a similar analysis.[373] The court then engaged in a lengthy analysis of the policies that support qualified immunity and found there was no basis for granting it to private parties.[374] The court's analysis is impressive; it mimics the historical and policy analyses in Supreme Court cases.

Other courts follow the Supreme Court's lead in civil rights cases of a different stripe. Recall *Newport v. Fact Concerts, Inc.*, the Supreme Court case that

364. Kritchevsky, *supra* note 29, at 71.

365. *See, e.g.*, *Owen*, 445 U.S. at 635–50; *Newport*, 453 U.S. at 258–66.

366. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 666–95 (1978).

367. *See Owen*, 445 U.S. at 638–40.

368. *Richardson*, 521 U.S. at 404–07.

369. *See, e.g.*, Lyons v. Nat'l Car Rental Sys., Inc., 30 F.3d 240, 246–47 (1st Cir. 1994) (extending *Monell* to apply to suits against private employers under the Massachusetts Civil Rights Act without engaging in historic analysis); Rojas v. Alexander's Dep't Store, Inc., 924 F.2d 406, 408–09 (2d Cir. 1990) (applying *Monell* to suits against private employers under § 1983 without analyzing the history of the Act); Street v. Corr. Corp. of Am., 102 F.3d 810, 818 (6th Cir. 1996) (same); Iskander v. Village of Forest Park, 690 F.2d 126, 128 (7th Cir. 1982) (same); Lux *ex rel.* Lux v. Hansen, 886 F.2d 1064, 1067 (8th Cir. 1989) (same); Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1138–39 (9th Cir. 2012) (same); DeVargas v. Mason & Hanger Silas Mason Co., 844 F.2d 714, 723 (10th Cir. 1988) (same).

370. *See, e.g.*, Duncan v. Peck, 844 F.2d 1261, 1263–68 (6th Cir. 1988); Sanchez v. Oliver, 995 F.3d 461, 466–69 (5th Cir. 2021).

371. 995 F.3d at 469.

372. *See id.* at 467–68.

373. *See id.* at 469.

374. *Id.* at 469–72.

held municipalities could not be liable for punitive damages.[375] In *Newport*, the Court explained that to determine whether a form of immunity protects a party from a § 1983 action, courts must determine whether the immunity existed at common law and, if it did, whether Congress intended to abrogate it.[376] Accordingly, because private companies, unlike municipalities, were not immune from punitive damages at common law, they are not immune from punitive damages under § 1983.[377] The Fifth Circuit, Seventh Circuit, and numerous district courts did not engage in the kind of exhaustive historical and policy analysis that the Supreme Court did in that case, but they made it clear they were required to follow *Newport*.[378] Those courts considered the *Newport* decision to be the final word.

Clearly, some federal courts are engaging in a thorough analysis of history and policy and are following the Supreme Court's lead in other types of civil rights cases. It is puzzling, in comparison, that circuit courts have not adhered to that practice when it comes to limiting liability for companies. If they wanted to analyze the law correctly and carefully, they could look to the history and laws in existence in 1871.[379] At the time of the Civil Rights Act's enactment, private parties could be held liable for the torts of their employees.[380] Respondeat superior, by its very nature, has long been a source of business liability.[381] The same should be true today.

Companies should not receive special protections in a § 1983 lawsuit.[382] A New York district court reasoned that if a business can be held liable for a non-civil rights tort under respondeat superior, it should be no different for a civil rights tort.[383] A New Jersey district court shared that sentiment: "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."[384] As the Seventh Circuit found in *Shields*, *Monell* did not destroy the

375. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

376. *See id.* at 259; *see also* Moore v. LaSalle Mgmt. Co., 41 F.4th 493, 512 (5th Cir. 2022).

377. *Moore*, 41 F.4th at 512–13.

378. *See, e.g.*, *id.* at 512; Kolar v. Sangamon County, 756 F.2d 564, 567 (7th Cir. 1985); Revilla v. Glanz, 8 F. Supp. 3d 1336, 1342–43 (N.D. Okla. 2014); Lawes v. Las Vegas Metro. Police Dep't, No. 2:12-CV-01523, 2013 WL 3433150, at *2 (D. Nev. July 8, 2013); Est. of Gee *ex rel.* Beeman v. Bloomington Hosp., No. 1:06-CV-00094, 2012 WL 639517, at *12 (S.D. Ind. Feb. 27, 2012); Garafola v. Lackawanna County, No. 3:07CV2305, 2011 WL 1304861, at *10–11 (M.D. Pa. Mar. 31, 2011); Segler v. Clark County, 142 F. Supp. 2d 1264, 1268–69 (D. Nev. 2001).

379. *See* Serr, *supra* note 155, at 882–83; *see also* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 791-96 (7th Cir. 2014).

380. *See* Owen v. City of Independence, 445 U.S. 622, 640 (1980); Serr, *supra* note 155, at 893; Kritchevsky, *supra* note 29, at 77 n.293 (detailing cases, laws, and treatises that illustrate that companies were liable for punitive damages in 1871).

381. *See* Serr, *supra* note 155, at 902; Frankel, *supra* note 325, at 1455.

382. *See* Frankel, *supra* note 325, at 1457.

383. Brown v. Starrett City Assocs., No. 09-CV-3282, 2011 WL 2728468, at *2 (E.D.N.Y. July 13, 2011).

384. Taylor v. Plousis, 101 F. Supp. 2d 255, 263 n.4 (D.N.J. 2000).

presumption that respondeat superior liability would continue to apply to private parties.[385]

2. Focus on the Employer First, the Employee Second

The *Monell* Court envisioned individuals being responsible for civil rights violations, and to a lesser extent, governments. The Court never considered businesses in its decision. *Shields* identified this as a problem, stating that "the remedial system that has been built upon § 1983 by case law focuses primarily on individual responsibility," not employer responsibility.[386] Case law has wrongly focused on individual liability.

Every Supreme Court decision that addresses civil rights liability in a private prison setting focuses on the individual employee or the legal claim's applicability to those employees.[387] The individual in *West* was a doctor working at a private prison.[388] The individuals in *Richardson* were private prison guards.[389] The individuals sued in *Minneci* included "a security officer, a food-services supervisor, and several members of the medical staff."[390] *Malesko* was different. There, the plaintiff's suit against the private prison failed because a *Bivens* action only applies to individuals, and the statute of limitations had expired, barring the plaintiff's suit against employees.[391] Nevertheless, the Court recognized that a *Bivens* action is designed to deter *individuals* from violating civil rights.[392] All these Supreme Court cases have focused on private prison *employees*, not their corporate employers.[393]

Aside from *Malesko*'*s* observation that *Bivens* was not applicable to a private prison, the employer was notably absent from each Supreme Court opinion. Yet, the employer failed to provide proper training, adequately support and supervise its employees, spend money as needed to adequately run a prison and care for inmate health, and enact procedures to protect civil rights and to deter violations.[394] Few federal courts, aside from *Shields* and the district courts that

385. *See* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 791–92 (7th Cir. 2014).

386. *Id.* at 785.

387. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66 (2001) (recognizing "an implied private action for damages against federal officers" in a *Bivens* claim not against federal agencies or private companies contracted out by the federal government).

388. *See* West v. Atkins, 487 U.S. 42, 43 (1988).

389. Richardson v. McKnight, 521 U.S. 399, 401 (1997).

390. Minneci v. Pollard, 565 U.S. 118, 121 (2012).

391. *Malesko*, 534 U.S. at 65, 70–71.

392. *See id.* at 70.

393. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 161 (1992) (involving private defendants seeking qualified immunity, which is a personal, not a corporate immunity); *Richardson*, 521 U.S. at 401; *Malesko*, 534 U.S. at 64–66.

394. *See Malesko*, 534 U.S. at 71 (explaining that the inmate's argument implying liability upon private corporations "has no relevance to *Bivens*" because private companies typically respond best "to market pressures and make decisions without regard to constitutional obligations"); *Minneci*, 565 U.S. at 121–22; *Richardson*, 521 U.S. at 401; *West*, 487 U.S. at 44.

have found employers liable based on their policies and customs, seem to acknowledge the employer's role in the tortious conduct.

The Supreme Court should remedy the circuit courts' elevation of companies to government status. Given the level of civil rights abuses in private prisons, the objective should be to burden private prison and health-care providers with traditional civil liability to encourage proper care for inmates. Economic theory and efficiency support this approach. Consider Harvard economics professor Steven Shavell, who argued, "If liable firms must pay damages equal to harm, then, first, firms will in principle be led to take appropriate care to prevent harm; and, second, product prices will tend to reflect the full social cost of production, inducing consumers to make socially correct purchase decisions."[395] While Shavell's first point is clearly applicable, the second is trickier. Are the consumers of private prisons and privatized health-care companies governments or inmates? Governments contract these services and reap their benefits, whereas prisoners are consumers without any choice in the offered products. At best, one could argue both are indirect consumers of the services these companies offer. Regardless, *Shields* emphasized carceral companies are in the best position both to pay damages and supervise employees.

There is another problem with focusing on the private prison employee as a defendant. There is little to recover from these employees. Given that the private prison employee is often working in an understaffed facility, is more exposed to injury and death than public prison guards, is ill-qualified and ill-trained, and is pressured to save money at every turn, is it even appropriate to place the onus on the employee to pay for civil rights abuses? The burden should be placed on the party who is most responsible and most able to bear the cost, which, in these cases, is the company.

The Supreme Court has endorsed fault-spreading and cost-allocation both to the employee and the employer.[396] The *Shields* court stated that a corporation is motivated to change its practices if it must pay damages, and it is in a better position than the employee to absorb the costs of those damages.[397] Because companies can manage employee behavior, they can pay for their employees' torts.[398] Another idea proposed by Professor Shavell is that "[f]irms can partially remedy this problem by paying employees an above-market wage, because that will raise employees' desire to keep their jobs and thus to prevent accidents."[399] Of course, with profit margins as thin as they are, it is unlikely that privatized

395. Steven Shavell, *The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees*, 17 INT'L REV. L. & ECON. 203, 203 (1997), https://doi.org/10.1016/S0144-8188(97)00003-3 [https://perma.cc/XTR6-CNV3].

396. *See* Owen v. City of Independence, 445 U.S. 622, 657 (1980).

397. *See* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 792 (7th Cir. 2014).

398. *C.f. id.*

399. Shavell, *supra* note 395, at 203.

prison providers would take this route, which is all the more reason to hold these companies, rather than their employees, liable.

In standard tort cases, because of theories like respondeat superior and vicarious liability, recovery comes from the employer, not the employee.[400] Many companies have liability insurance.[401] Most employees, on the other hand, are not viable defendants, largely because they are judgment-proof.[402] For all of these reasons, circuit courts should focus their attention on the employer.

The Supreme Court explained in *Owen* that the "[e]lemental notions of fairness dictate that one who causes a loss should bear the loss."[403] More specifically, the Department of Justice has acknowledged that it is the carceral companies that "make decisions that enhance profits at the expense of the rights and well-being of inmates."[404] By focusing on employer liability first, most future civil rights violations in private prison and privatized health-care settings would cease. The one with the deeper pockets, power, money, and ability to change should be the one obligated to pay damages.

3. Remember the Act's Goal Is to Deter & Compensate

The Civil Rights Act is remedial in nature.[405] It is meant to right constitutional torts against citizens.[406] Respondeat superior liability fulfills two primary tort-law objectives: deterrence and compensation.[407] But even in § 1983 jurisprudence, the Supreme Court emphasizes the importance of compensation for official civil rights violations, as well as deterrence of future misconduct.[408]

The Supreme Court in *West* found that, even when local governments contract with private parties, the government owes a duty to protect inmate civil rights and to allow plaintiffs to vindicate their claims.[409] In *Richardson*, the Court relied on *Wyatt* when it explained that § 1983's purpose was to deter state actors from violating rights and to provide civil rights plaintiffs relief when they do.[410] The *Owen* Court recognized the importance of remedies and deterrence.[411] One of the chief policy reasons behind extending § 1983 to municipalities was to motivate governments to reduce civil rights violations by

400. Frankel, *supra* note 325, at 1455.

401. *Id.*

402. *See id.*; *see also Shields*, 746 F.3d at 792.

403. Owen v. City of Independence, 445 U.S. 622, 654 (1980).

404. *See* AUSTIN & COVENTRY, *supra* note 25, at 17.

405. *See* Preiser v. Rodriguez, 411 U.S. 475, 488 (1973); Brown, *supra* note 292, at 897 (redressing unlawful acts is one of the core principles of the Act).

406. *See* Brown, *supra* note 292, at 897.

407. Frankel, *supra* note 325, at 1449.

408. Brown, *supra* note 292, at 886.

409. *See* West v. Atkins, 487 U.S. 42, 56 (1988).

410. *See* Richardson v. McKnight, 521 U.S. 399, 402–03 (1997).

411. *See* Owen v. City of Independence, 445 U.S. 622, 650–51 (1980).

making them bear the cost when they are responsible.[412] Companies are no different.

Private prison and privatized health-care companies, which have deeper pockets than governments, should pay for civil rights violations.[413] One academic noted, "[T]he fact that profit-motivated, private entities may be both more responsive than electorally accountable public entities to tort liability incentives and less responsive to other nonfinancial constraints on behavior suggests that respondeat superior may be better suited for deterring private misconduct than public misconduct."[414] Judgments would both deter abuses by these companies and compensate those whose rights have been violated.

4. Prevent Companies from Hiding Policymakers to Avoid Suit

This Section identifies two related failures and a solution. First, some courts may adhere to *Powell*'s reasoning, and some companies may mimic what Wexford did in *Shields*. Each of these are failures. Courts should create a framework to designate a policymaker by default to prevent shielding companies that engage in practices like Wexford's.

One way to avoid a prison from structuring decision-making in such a way to prevent any single person from being deemed a policymaker is to deem a specific individual within a prison system and/or carceral corporation as the *de facto* policymaker.[415] There are several options that would work.

The Fifth Circuit declared a private prison warden the policymaker because the city delegated policymaking power to a private corporation, which in turn delegated it to the warden.[416] While the court did not decide whether the private prison could be vicariously liable, it did hold that the company was not immune from punitive damages.[417] Other courts have found the warden was the policymaker in similar circumstances.[418]

In an Illinois district court case, the judge ruled the defendant could sue the medical staff, the warden of the prison, and the CEO of the medical company because the prisoner alleged that he complained to all of the defendants about

412. *See id.* at 652; *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978).

413. *See* Brown v. Starrett City Assocs., No. 09-CV-3282, 2011 WL 2728468, at *4–5 (E.D.N.Y. July 13, 2011); Frankel, *supra* note 325, at 1449.

414. Frankel, *supra* note 325, at 1449.

415. *See generally Monell*, 436 U.S. at 694 (establishing the requirement that a municipality can only be liable for the acts of its employees when they are executing a policy or custom made by a policymaker); Shields v. Ill. Dep't of Corrs., 746 F.3d 782, 795 (7th Cir. 2014) (extending the *Monell* holding from municipalities to private corporations). *Contra* Coleman v. City of Wilmington, No. 23-425, 2023 U.S. Dist. LEXIS 230132, at *9 (D. Del. Dec. 28, 2023) ("Our Supreme Court instructs municipal liability cannot attach to the actions of "de facto" policymakers." (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 131 (1988)); *see also* Keeton v. Bd. of Educ. of Sussex Tech. Sch. Dist., No. 15-1036, 2016 WL 5938699, at *9 (D. Del. Oct. 12, 2016)).

416. Moore v. LaSalle Mgmt. Co., 41 F.4th 493, 510 (5th Cir. 2022).

417. *Id.* at 512–13.

418. *See, e.g.*, Blumel v. Mylander, 954 F. Supp. 1547, 1556 (M.D. Fla. 1997).

being denied necessary medical care for months.[419] The court premised liability on the notice these ignored grievances provided each party.[420] In a different case, the Eleventh Circuit designated a privatized health-care company's medical director the policymaker.[421]

The Supreme Court recognized in *Owen* that the threat of damages in a civil rights case "may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[422] While the *Owen* Court addressed governments, the same holds true for companies: attaching liability to policymakers encourages them to enact good policies rather than turn a blind eye to bad or inefficient ones.

Federal courts should hold specifically designated policymakers liable. As stated above, federal courts have designated individual persons—the CEO, the warden, the medical director—to be policymakers by default. If a company is purposefully trying to subvert liability by making the policymaker unclear or diffusing decision-making, as it appears Wexford did in the *Shields* case,[423] the court should create a legal standard to produce a default designee. That designee would likely take civil rights abuses more seriously if she were deemed personally liable in these suits.

CONCLUSION

The Supreme Court has never granted limited liability to companies in civil rights cases. The circuit courts were wrong to do so. Many courts now indicate that they are required to stick by their faulty precedent, but they are not. They should do as the Supreme Court does: look to the law and history of 1871 and to the policy of § 1983 for answers. If they did, it would become clear that companies then and companies now are liable for their own torts and the torts of their employees under the theory of respondeat superior.

Private prisons operate under a conflict of interest.[424] They cannot serve both the needs of the public and their populations, as public facilities do, *and* the financial interests of their shareholders. They cannot care for inmates when their business practices harm those inmates. Their employees should not carry the sole burden of paying for civil rights injuries because they are not

419. Young v. Wexford Health Sources, No. 10 C 8220, 2012 WL 621358, at *3–5, *7 (N.D. Ill. Feb. 14, 2012).

420. *See id.* at *5, *7.

421. Howell v. Evans, 922 F.2d 712, 725 (11th Cir. 1991), *vacated pursuant to settlement*, 931 F.2d 711 (11th Cir. 1991).

422. Owen v. City of Independence, 445 U.S. 622, 652 (1980).

423. *See* Shields v. Ill. Dep't of Corrs., 746 F.3d 782, 795 (7th Cir. 2014).

424. Robert G. Schaffer, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1074 (1996).

responsible for the customs and policies of the companies and because they are judgment-proof.

All federal courts should hold the carceral company responsible. This Article provides a path for the lower federal courts to align their decisions with Supreme Court precedent so the entity that creates and commits the civil rights violation pays for it. Only then will inmates in private facilities, and those who rely on privatized health care within them, be legally protected in the same way their public facility counterparts are protected from civil rights violations.