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The Subtlety of State Action in Privatized Child Welfare Services

*Sacha M. Coupet**

[H]e [who] acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition [against deprivation of property, life or liberty] has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

Ex parte Commonwealth of Virginia, 100 U.S. 339, 347 (1879).

INTRODUCTION

In ever increasing numbers, public agencies are contracting with the private sector to provide services and benefits—once assumed to be governmental “duties”—that had long been delivered primarily through public channels. Examples include, among others, privatized nursing home care, privatized prisons, and private military forces. Despite some adverse outcomes, broad shifts in service delivery continue unabated, and, according to some, “seem to be occurring especially around collective commitments to provide for the basic human needs for food, shelter, education, medical care, and justice.”¹ It is therefore not surprising that we are witnessing a significant increase in the rate of private participation in child welfare services,² defined here as privately delivered out-of-home care for children formally placed by the state in the child welfare system and in the custody of the state.³

Far from a recent phenomenon, public-private partnerships have a

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¹ MARTHA MINOW, PARTNERS, NOT RIVAL: PRIVATIZATION AND THE PUBLIC GOOD 22 (2002). See also Robin A. Johnson, *States Expand Privatization of Social Services*, 10 INTELL. AMMUNITION 10 (2001) (“[a] 1997 Council of State Governments survey found that social service agencies were the state departments most likely to report increasing their use of privatization over time. More than 85 percent of the responding agencies reported they had increased privatization in the five years prior to the survey. Seventy-five percent of respondents indicated they planned to increase privatization in the next five years.”).

² Marguerite G. Rosenthal, *Public or Private Children's Services?: Privatization in Retrospect*, 74 SOC. SERV. REV. 281 (2000).

³ For the purposes of this article, the term child welfare system is used to mean the entire spectrum of services available for minors involved in the dependency, but not the juvenile delinquency systems.

long history in child welfare practice, beginning with the period immediately following the Revolutionary War. From the inception of the union, the care of destitute and needy children has been characterized by a unique blend of private agency support coupled with public funding, regulation, and oversight.⁴ However, the contemporary trend toward privatization appears anomalous in both its impetus and in the potentially deleterious consequences for recipients. Although recent privatization initiatives may be similarly “built on a [simple] model of using federal funds . . . to purchase services or care from private providers,”⁵ they differ in, among other attributes, their attraction for a market approach and an orientation toward profit. Indeed, the proliferation of privatization and its embrace of a market approach has been both heralded as an exemplary and innovative social service strategy and lamented as a harbinger of the feared commodification of our most intimate and cherished investments—our children and families.⁶

Despite acknowledged risks inherent in the shift from public to private human services, especially as it relates to child welfare, “there is scant public debate about whether [public-private partnerships] jeopardize public commitments to equality, due process, [civil rights,] and democracy.”⁷ Included among the less explored aspects of privatization is the shift in risk assessment that occurs within public-private contracting and all the attendant consequences of risk assessment for state agencies and service recipients. For all the potential benefits that may come to fruition through continued privatization efforts, there are problems encountered with the delegation of authority and responsibility from public to private providers, particularly when the civil rights of recipients are curtailed by virtue of the ostensibly private garb in which service delivery is cloaked. Indeed, while the drive to privatize the delivery of public services continues unabated—too little attention is focused on the impact of privatization on the diminu-

4 HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN* 13 (1902).

5 Rosenthal, *supra* note 2, at 294.

6 Use of the term “commodification” is meant to suggest that service and support of families, particularly poor families of color, continues to grow into a marketable enterprise. I am referring more so to the broader conception of commodification noted in Margaret Radin’s seminal work. According to Radin,

Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions. Universal commodification embraces this broad construction in its most expansive form, limiting actual buying and selling only by the dictates of market methodology, and solving problems of contested commodification by making everything in principle a commodity.

Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859 (1987). For a critique of the commodification of vulnerable children and families, see Barbara Bennett Woodhouse, *Making Poor Mothers Fungible: The Privatization of Foster Care*, in *CHILD CARE AND INEQUALITY: RETHINKING CAREWORK FOR CHILDREN AND YOUTH* 83 (Francesca M. Canican, et al. eds., 2002).

7 MINOW, *supra* note 1, at 2.

tion of constitutional protections for service recipients.⁸ Although “[r]ecent expansions in privatization of government programs mean that the constitutional paradigm of a sharp separation between public and private is increasingly at odds with the blurred public-private character of modern governance[,] . . . little effort has been made to address [the] disconnect between constitutional law and new administrative realit[ies].”⁹ There is, indeed, substantial evidence that “the growth of government contracting, coupled with an unrealistic and narrow understanding of state action, has created jurisprudence . . . significantly underprotective of constitutional rights.”¹⁰

The thesis of this article is that in failing to sufficiently key the current state action doctrine to the present reality of privatization, courts do not adequately protect the rights of children and families caught in the swell of the child welfare privatization initiative. All too often, a private party dressed in state clothes is permitted to escape civil rights liability owing to an anachronistic state action doctrine that fails to reflect the unique dimensions of child welfare service delivery. Although traditional tort remedies remain, they fail to appropriately reflect the abuse of state authority and are less likely to affect systemic social norms that constitutional tort claims might. This article highlights the unique role of the state in this particular public-private partnership, the appropriateness of extending the analogy between foster children to other incapacitated or restrained individuals, and the role of § 1983 as a mechanism of redress.¹¹ It also explores the rationale for holding private providers of child welfare services liable as state actors for constitutional deprivations.¹² A rich discussion pertaining to the

⁸ Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461, 461–67 (1987).

⁹ Gillian E. Metzger, *Privatization as Delegation*, 103 COLUMBIA L. REV. 1367, 1367 (2003).

¹⁰ Sheila S. Kennedy, *When is Private Public?: State Action in the Era of Privatization and Public-Private Partnerships*, 11 GEO. MASON U. CIV. RTS. L.J. 203, 204 (2001).

¹¹ 42 U.S.C. § 1983 is a federal statute which permits plaintiffs to challenge deprivation of constitutional rights. It provides in pertinent part that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

42 U.S.C. § 1983 (2000). Although it provides no substantive rights, the statute “provides a mechanism for seeking redress for an alleged deprivation of a litigant’s federal constitutional and federal statutory rights by persons acting under color of state law.” KAREN M. BLUM & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION (1998) available at [http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/\\$file/sect1983.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sect1983.pdf/$file/sect1983.pdf). “The constitutional standard for finding state action is closely related, if not identical, to the statutory standard for determining ‘color of state law.’” Ira P. Robbins, *Privatization of Prisons: An Analysis of the State Action Requirement of the Fourteenth Amendment and 42 U.S.C. § 1983*, 20 CONN. L. REV. 835, 836 n.2 (1988). Professor Steven L. Winter provides a cogent and brilliant examination of the contours of the metaphor “under color of law,” exploring the inherent challenges posed by relying on this metaphor “to mediate the application of legal restrictions on the exercise of state power.” Steven L. Winter, *The Meaning of “Under Color of” Law*, 91 MICH. L. REV. 323, 331 (1992).

¹² This article does not address privatization of adoption services which, according to some, represents “the most successful and the least controversial component of child-welfare privatization.”

mixed public-private identity of ostensibly private providers of child welfare services is long overdue, especially given that privatization's increasing role in service delivery appears all but unstoppable.

Specifically, in Part I, I explore aspects of privatization, defining privatization to include a myriad of public-private partnerships and the wholesale privatization of formerly public services. For purposes of elaboration, I discuss the history of privatization in the U.S. prison system, which illustrates the danger of minimized constitutional accountability in an era of privatization. In Part II, I provide a brief history of public-private partnerships in child welfare. Part III offers a critique of privatization, exploring the traditional justifications offered for increased reliance on the private market and the ways in which this altered service delivery may compromise public values as well as civil rights. This critique is contextualized within an understanding of the liability of the state for constitutional violations under § 1983, which is presented in Parts IV, outlining the contours of the Court's state action jurisprudence, and Part V, examining the accountability of the state and of private providers for constitutional deprivations under § 1983. In Part VI, I provide a few of the compelling justifications for framing harms suffered by children in care as constitutional deprivations over pure torts. Finally, Part VII presents a recalibration of the traditional state action test keyed to the new realities of public-private partnerships, as well as wholesale privatization in child welfare.

I. PRIVATIZATION OF PUBLIC SERVICES

A. Defining Privatization

Privatization is a rather amorphous and ill-defined term, as there are a variety of ways in which public-private partnerships have developed and expanded to deliver public services. While most "investigators generally acknowledge that public agencies have long purchased services from voluntary social service agencies, most have been impressed by the accelerated pace of 'privatization,' a term that has replaced the formerly used 'public/private partnership.'"¹³

B. Privatization in the Prison System

Although privatization of formerly public services has been widespread over the last century, I offer one example in which privatization has been harshly criticized as advancing too quickly without sufficient accountability—private prisons.

LISA SNELL, REASON FOUNDATION, POLICY STUDY NO. 271: CHILD-WELFARE REFORM AND THE ROLE OF PRIVATIZATION (2000), <http://www.reason.org/ps271.html>. Moreover, for the purposes of this article, the scope of privatization includes foster parents. Many of the same arguments underpinning the rationale for holding private non-profit and for-profit agencies liable as state actors apply with equal measure to foster parents.

¹³ Rosenthal, *supra* note 2, at 282.

Prison overcrowding is often regarded as the primary catalyst for the continuing growth of the private prison industry. For at least the last two decades, “private prisons and jails were seen as part of the solution to meet the increasing pressure for prison bed space at a time when taxpayers were reluctant to pay for correctional services” and did not support divesting resources “from other areas of state responsibilities and services.”¹⁴ Although there is a long history of contracting with private entities for medical, mental health, educational, and food services, in which “the correctional agency remains the financier and continues to manage and maintain policy control over the type and quality of services provided,” more recent prison privatization initiatives have left governments with a limited or nonexistent role in the financial support, management, and oversight of prisons.¹⁵ Rather than a partnership or subcontractor model, “[p]rivate companies, some of them publicly traded, now hold contracts to operate secure adult facilities and juvenile facilities around the country, and in some instances, private companies own the facilities as well as operate them.”¹⁶

Corrections, like child welfare, has a rich history of extensive public-private partnerships,¹⁷ but it was not until 1976 that a wholly privately owned, high-security institution began operating under contract to the state. The Weaversville Intensive Treatment Unit, located in North Hampton, Pennsylvania, and designed to handle male juvenile delinquents, “was the first modern institution for serious offenders to be completely operated in what has become an increasingly lengthy line of [private] institutions in the American correctional system.”¹⁸ The worldwide growth since then has been nothing short of dramatic, with 3100 inmates in privately operated facilities in 1987 and 132,000 just twelve years later.¹⁹ Two corporations, Corrections Corporation of America and Wackenhut Corrections Corporation, account for more than three-quarters of the entire worldwide market.²⁰

Privately operated prison facilities have often been plagued by problems associated with the quest for higher earnings. Indeed, “one of the central concerns raised by critics of correctional privatization is that firms motivated by financial gain might make decisions that enhance profits at the expense of the rights and well-being of inmates.”²¹ In some instances of private prison management, “[t]he profit motive produced such abominable conditions and exploitation of the inmates that public agencies were forced

14 JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 1–2 (2001) available at <http://www.ncjrs.gov/pdffiles1/bja/181249.pdf>.

15 *Id.* at 2–3.

16 MINOW, *supra* note 1, at 20.

17 See *West v. Atkins*, 487 U.S. 42 (1988) (noting the history of private participation in prisons and prison management without challenging the state actor designation of private providers).

18 AUSTIN & COVENTRY, *supra* note 14, at 12 (citations omitted).

19 *Id.* at 3.

20 *Id.* at 3–4.

21 *Id.* at 17. (citations omitted).

to assume responsibility.”²² Frighteningly, the current movement towards privatization is based on an assumption that “modern entrepreneurs are somehow more benevolent and humanistic so that the exploitations of the past will not reoccur [sic].”²³ Critics disagree, however, and “contend that privately managed facilities will bring new opportunities for corruption.”²⁴ These opponents “question the professionalism and commitment that privatized staff will bring to the job,” given that private prison agencies often rely on “poorly paid, undereducated, and inadequately trained staff.”²⁵

C. Private Military Forces

The twin dangers of profit motive and minimal, or nonexistent, oversight or accountability have nowhere surfaced in a more controversial manner in the last few years than in the context of private military forces—a polite term for what was once referred to as “mercenaries”—who now serve in all areas of war, from construction to security, cooking food to conducting interrogations, and almost everything in between. “Mercenaries no more, the successors to the dogs of war . . . now call themselves private military companies and focus on [among other things] postwar reconstruction, mine clearance and humanitarian aid.”²⁶ These private military firms (PMFs) “trade in professional services intricately linked to” various critical aspects of warfare—including “tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military technical assistance.”²⁷ Unlike American soldiers, sworn to uphold the Constitution and governed by the Uniform Code of Military Justice, PMFs are private agents, principally motivated by profit.²⁸ Subject neither to the military chain of command nor the restrictions of the Geneva Convention, they are, essentially, a law unto themselves, governed only by language in the contracts through which their services are retained.²⁹

Given their broad involvement in many “traditional” aspects of warfare, PMFs have not surprisingly been linked to several incidents of abuse

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jeremy Lovell, *Privatized Military Wave of the Future, Firms Say*, REUTERS, May 14, 2003 available at <http://www.commondreams.org/headlines03/0514-04.htm> (last visited August 17, 2006).

²⁷ Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and its Ramifications for International Security*, 26 INT’L SECURITY 186, 186 (2002).

²⁸ Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1019–20 (2004).

²⁹ In 2005, there were approximately 100,000 civilian contractors supporting a range of U.S. efforts, including 20,000 private security forces. *Frontline: Private Warriors* (PBS television broadcast June 21, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/view/>. According to Peter W. Singer, a private military expert, “[w]hat you’ve done is privatize the fog of war.” Jay Price, *Hired Guns Unaccountable*, NEWS & OBSERVER, Mar. 23, 2006, at 1A (detailing the underreporting of incidents with private contractors in Iraq that resulted in the death or injury of hundreds of Iraqi citizens and the lack of accountability for the conduct of private contractors); see also P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 228 (2003).

both in the current war in Iraq and elsewhere abroad. Notably, what distinguishes the atrocities committed by PMFs on civilians throughout the world from those occurring at the hands of the U.S. military is that the former, given the private status of the offenders, typically leave victims with no meaningful form of redress.³⁰ This is almost entirely due to the fact that although PMFs are equipped to kill, their actions are not governed by long-standing rules of engagement and since “they aren’t legally considered [official] combatants,” there are virtually no rules governing their use of force.³¹

Responding to these concerns, “[i]n 2000, Congress passed [the Military Extraterritorial Jurisdiction Act] allowing criminal prosecutions against Defense Department (“DOD”) contractors working abroad.”³² The drafting of this legislation was prompted in part by “civilian contractors with El Segundo-based DynCorp [having] escaped prosecution on accusations in 2000 of running a prostitution ring in Bosnia.”³³ While theoretically the law allows for prosecution in U.S. courts of contractors working alongside the military overseas, it has drawn criticism for being too narrow in scope.³⁴ For example, since the Military Extraterritorial Jurisdiction Act (“MEJA”) covers only American citizens working for American forces, if they are “technically” employed by the sovereign host nation, they are exempt, as would be those contracted to work for the United Nations.³⁵ While some amendments have been made, including an extension of MEJA’s jurisdiction to cover employees and contractors of other federal agencies in addition to the DOD, the law continues to pose problems in its interpretation of what kind of work falls under its scope and who exactly is covered—a 21st century iteration of the age old dilemma of defining the

³⁰ Peter Singer reports:

In Colombia, for example, [a PMF] Airscan has been implicated in coordinating the bombing of a village in which eighteen civilians (including nine children) were killed. And in Peru, employees of [another PMF] Aviation Development Corporation who were working on aerial surveillance operations for the U.S. Central Intelligence Agency mistakenly directed the shoot[ing] down of a private passenger plane that was later found to be carrying a family of missionaries. An American mother and her seven-month-old daughter were killed in the attack.

Singer, *supra* note 27, at 218.

According to media reports, the United States has paid an undisclosed sum to the family of Veronica and Charity Bowers, who were killed in the incident, and to the Baptist missionary group they belonged to, but stopped short of admitting culpability. Aviation Development has never publicly accepted responsibility, and the U.S. government has never publicly accused the company of wrongdoing.

Robert Capps, *Crime without Punishment*, SALON.COM, June 27, 2002, <http://dir.salon.com/story/news/feature/2002/06/27/military/index.html>.

³¹ Ann Scott Tyson, *Private Security Workers Living on Edge in Iraq*, WASH. POST, Apr. 23, 2005, at A1.

³² Pratap Chatterjee & A.C. Thompson, *Private Contractors and Torture at Abu Ghraib, Iraq*, CORPWATCH, May 7, 2004, <http://www.corpwatch.org/article.php?id=10828> (last visited Sept. 14, 2007).

³³ *Id.*

³⁴ Capps, *supra* note 30.

³⁵ *Id.*

boundary between what is public and what is private.³⁶ Even with MEJA in place, as it now stands, “[t]hanks to a combination of factors—the jurisdictional conflicts of American law, the immunity provided to these contractors by international treaties, and the underdeveloped police agencies in host countries—many crimes committed by private military personnel while based overseas will likely go unpunished”³⁷

There is a continuing and reasonable fear that unlike state military and police forces, private military forces—operating outside of the realm of legal accountability, legal constraints, and public oversight—are subject only to the market driven law of supply and demand. History has taught us, however, that the law of the marketplace has proven to be an ineffective regulator against abuse and a disturbingly impotent arbiter of justice. While critics of private military forces—including Gay McDougall, executive director of Global Rights, a D.C.-based human rights organization—argue that “people who are ‘civilians and often outside of any given chain of command should be liable to prosecution for war crimes,’”³⁸ the mechanisms by which such accountability would take shape are currently lacking.³⁹ Opponents of this kind of private sector empowerment are, there-

³⁶ Glenn R. Schmitt, *Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole*, ARMY LAW. 43 (June 2005).

³⁷ Capps, *supra* note 30.

³⁸ Jonathan Groner, *Untested Law Key in Iraqi Abuse Scandal*, LEGAL TIMES, May 11, 2004, at 1, 12.

³⁹ At the time of this writing, David Passaro, a CIA contractor who was the first civilian to face criminal charges related to U.S. treatment of prisoners in Afghanistan and Iraq, was found guilty by a jury in North Carolina of two charges of assault and assault with a deadly weapon in the death of Abdul Wali, an Afghan detainee on a remote U.S. military base. Andrea Weigl, *Jury Finds Passaro Guilty of Assault*, NEWS & OBSERVER Aug. 17, 2006, <http://www.newsobserver.com/497/story/476098.html> (last visited Oct. 16, 2007). Ironically, Passaro’s prosecution was not pursuant to provisions of the MEJA, but under the U.S. Patriot Act, which prosecutors argued allowed the U.S. government to charge U.S. nationals with crimes committed on land or facilities designated for use by the U.S. government. Estes Thompson, *Ex-CIA Contractor David Passaro to Stand Trial in Afghan Beating*, NEWS & OBSERVER, Aug. 5, 2006, http://dwb.newsobserver.com/news/ncwire_news/story/2987127p-9415445c.html (last visited Sept. 26, 2007). In a statement that both suggests growing support for increased accountability of private military forces, while also promoting a vague and ambiguous “quasi-state action” test, U.S. Attorney General George Holding stated:

Today, a North Carolina jury sitting in Raleigh delivered a message to the world—nobody is above or beneath the law of the United States of America. The assault took place 8,000 miles away from here. The person assaulted was an Afghan farmer. The person who assaulted him was a U.S. citizen working for the CIA as a [private] contractor. But *because it was done at a U.S. base with an American flag flying over it, that victim found a little bit of justice.*

Weigl, *supra* (emphasis added). More recently, a September 16, 2007 shooting episode of 17 civilians in Iraq has cast the issue of oversight and accountability of private military forces once more into the spotlight. Blackwater, one of many private contractors in Iraq, supplies guards and training at many levels of war. Mounting frustration over numerous shooting incidents involving Iraqi civilians may lead to a shift in the response to private contractors whose conduct up to now has been generally insulated from prosecution by law and policies implemented by U.S. officials. Most notably, in 2004, the United States administration in Iraq wrote a provision into Iraqi law, Order 17, which granted immunity to private contractors by exempting them from Iraqi Law. “Since then, the number of security contractors has mushroomed and the question of their impunity has grown more pressing.” John M. Broder, *State Dept. Official Resigns; Oversaw Blackwater and Other Private Guards*, NYTIMES.COM, Oct. 25, 2007, http://www.nytimes.com/2007/10/25/washington/25griffin.html?_r=1&oref=slogin. As an ex-

fore, rightfully cautious of the encroachment into inherent governmental functions coupled with the diffused responsibility and diminished public oversight. Given the unanswered questions about who monitors, regulates and punishes employees of private military forces, and most importantly, who holds private military forces accountable for violations of our most cherished constitutional or human rights principles, they represent an extreme, but apt, analogy to the unchecked power of private child welfare service providers.

The central tenet running through both of the above broadly defined “public services” is that government power vested in the private market, in the absence of sufficient accountability and adequate mechanisms of redress, results in more than mere fiscal loss, but human loss. In examining whether harmful conduct arising in the context of these public services is deserving of constitutional protection, the question is not whether history reveals any public services to have ever been touched by private forces, but rather whether in its current administration, private market providers are cloaked in state clothes.

II. CONTEMPORARY PRIVATIZATION IN THE CONTEXT OF CHILD WELFARE

The history of privatization in child welfare services is a long and varied one. This article focuses only on the more recent history, since the 1960s.⁴⁰ As the federal government began to take a lead in enacting laws

ample of the existing lax standard of accountability, the *New York Times* reported that “[a]fter a drunken employee of Blackwater shot a man to death, . . . the employee was flown out of Iraq, docked pay and fired.” *Id.* Many lawmakers and legal scholars are in agreement that the recent shooting highlights an urgent need to clarify the law governing private military forces operating in a war zone. “Workers under contract to the Defense Department are subject to the Military Extraterritorial Jurisdiction Act, or MEJA, but many, included top State Department officials, contend that the law does not apply to companies like Blackwater that work under contract to other government agencies, including the State Department.” David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, NYTIMES.COM, Nov. 14, 2007, <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?pagewanted=1>. As Professor Tyler Cowen aptly observes “[e]xcessive use of private contractors erodes checks and balances, and it substitutes market transactions, controlled by the executive branch, for traditional political mechanisms of accountability.” Tyler Cowen, *To Know Contractors, Know Government*, NYTIMES.COM, Oct. 28, 2007, <http://www.nytimes.com/2007/10/28/business/28view.html>.

⁴⁰ Although beyond the scope of this article, the early history of child welfare service delivery demonstrates a mix of public-private partnerships. There remains, however, a prevailing misperception that the earliest forms of child welfare were entirely private philanthropic enterprises with minimal or nonexistent governmental involvement. In detailing the early history of child welfare, some scholars have overlooked the import of nascent public-private partnerships that took shape soon after the Revolutionary War, many of which resemble contemporary privatization efforts. Mangold, for example, writes that “[b]efore the last quarter of the nineteenth century, there were no public or private agencies dedicated to the care of abused and neglected children. It was private philanthropic agencies that first began this work, intervening into ‘private’ families in the name of protecting vulnerable children.” Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1301–02 (1999). This is only partially true. As evidenced in an account of the history of care of children in the city of New York, care to neglected children had a governmental or public nature to it when regarded, as it was, as a subset of general aid to the poor.

The common council [a body of elected city legislators] of [New York] whose minutes during the first three-quarters of the century afford many illustrations of aldermanic wisdom as

pertaining to child abuse and neglect in the 1960s, state child protective agencies were uniformly reformed to meet federal guidelines, to which critical operating funds were tied. Concurrently, for the first time states were permitted to subcontract with private, nonprofit companies, thus ushering in a new variant of public-private child welfare partnerships:

The first significant growth in the number of public-private arrangements for the delivery of child welfare and other social services occurred between 1962 and 1974, as a result of amendments to the Social Security Act that allowed federal funding to be used to fund social services provided by private, nonprofit agencies.⁴¹

A pervasive philosophical shift at the federal level prior to, and particularly throughout, the Reagan administration prompted movement away from “the public commitment at the heart of the Great Society programs of the 1960s and [early] 1970s and toward individual and private solutions to social problems.”⁴² No area of social service emerged unscathed, and the shift inevitably set the stage for a diminished governmental presence in child welfare service delivery.⁴³ Indeed, an ongoing trend in welfare delivery since the 1980s has been “the political[affinity] toward privatizing many functions the government assumed during the New Deal and Great Society eras . . . includ[ing] privatizing the government’s function of providing a safety net to preserve the poor families by increasingly using private agencies to provide services to children . . .”⁴⁴ Added to this list is the increasing emphasis on the provision of services to children by private agencies.⁴⁵

Most observers would agree that a lingering question is the degree to which “more recent trends to ‘privatize’ core child welfare functions” actually differ “from arrangements that have historically been in place.”⁴⁶ Depending on the forms they take, contemporary privatization initiatives will vary in the degree to which the public sector retains ownership, finan-

applied to child-saving, appointed January 7, 1805, a committee to consider and report upon the expediency of granting the application of the commissioners of the almshouse for the establishment at the almshouse of a school for the pauper children.

FOLKS, *supra* note 4, at 13. Moreover, in 1831, legislative action is seen in the form of a committee of aldermen reporting on the status of children in the newly formed Bellevue establishment, and a subsequent resolution adopted by the assistant aldermen concerning the education and employment of the children in the almshouse to “render them less burthensome to themselves . . .” *Id.* at 15–16. Similar legislative efforts to partially separate dependent children from the adult pauper population were seen in the other large cities of Philadelphia, Charleston, and Boston. *Id.* at 23–34.

41 MADELYN FREUNDLICH & SARAH GERSTENZANG, AN ASSESSMENT OF THE PRIVATIZATION OF CHILD WELFARE SERVICES: CHALLENGES AND SUCCESSES 13 (2003).

42 *Id.* at 14 (citation omitted).

43 *Id.*

44 Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL’Y. & L. 409, 411 (2005).

45 Woodhouse, *supra* note 6, at 84.

46 U. Ky Quality Improvement Ctr. on the Privatization of Child Welfare Servs., Status of Privatization, <http://www.uky.edu/SocialWork/qicpcw/status.htm> (last visited on Sept. 14, 2007) [hereinafter Quality Improvement Ctr.].

cial responsibility, and accountability.⁴⁷ “Specifically with regard to contracting out—the model most frequently used in the social services, in general, and in child welfare services in particular—government is likely to continue to finance services while private entities actually provide them.”⁴⁸ Contracting out has historically been used to provide foster care services, as “public family law allowed philanthropic [private] providers to receive public funds and work cooperatively with public agencies to provide placement services.”⁴⁹ A central feature of contemporary public-private contracting seems to be the extent to which the public agency “has transferred responsibility for day-to-day case management within the particular program to the private provider, and who maintains decision-making authority at critical junctures as the case progresses.”⁵⁰ In contemporary public-private agreements, private provider agencies participate by delivering services to families voluntarily and by court order. However, unless they are involved in an “ongoing way with a family when new allegations arise, [private providers] do not usually participate in the front end or ‘rescue’ aspect of cases,”⁵¹ as they once had and, instead, enter at the point of disposition, delivering services that are agreed on by the public agency and family and/or ordered by the court.

A second period of growth in private service participation occurred in the mid-1990s with amendments to the Social Security Act, which widened the channel of participation for private child welfare agencies. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 also ushered several amendments that permitted states to make Title IV-E foster care maintenance payments to for-profit and nonprofit private child care institutions.⁵² Under then existing law, IV-E foster care payments were limited to nonprofit private or public child care institutions. Experiments with privatization have not stopped with mere contracting of certain services or a percentage of child welfare cases and have come to include the privatization of entire state systems in a number of states, including, Kansas⁵³ and Florida.⁵⁴ Such initiatives, which represent the most dramatic evidence

47 FREUNDLICH & GERSTENZANG, *supra* note 41, at 15 (citing P. Starr, *The Meaning of Privatization*, 6 YALE L. & POL’Y REV. 6 (1988)).

48 *Id.* at 3.

49 Mangold, *supra* note 40, at 1309.

50 Quality Improvement Ctr., *supra* note 46.

51 Mangold, *supra* note 40, at 1313.

52 42 U.S.C. § 672(b)(1)–(2) (2000).

53 “In 1996–97, Kansas became the first state in the nation to fully privatize its adoption, foster care, and family preservation services.” Privatization.org, Child Welfare Services, http://www.privatization.org/database/policyissues/childwelfare_state.html (last visited Nov. 29, 2007). With that, “Kansas’s Department of Social and Rehabilitation Services (SRS), previously the state’s largest provider of adoption and foster care services, [became] strictly a purchaser of services and contract monitor with respect to child welfare services.” *Id.* See also Kansas Dept. of Social and Rehab. Serv., Foster Care/Reintegration Services, <http://www.srskansas.org/services/fostercare.htm> (last visited Nov. 29, 2007) (noting that “[on] March 1, 1997, private contract agencies [in Kansas] assumed responsibility for foster care services including case planning, placement [and] service delivery.”).

54 Although current versions of the Florida statute, as amended by FLA. STAT. § 409.1671 (2001), replaced the term “privatization” with “outsourcing,” earlier versions of the bill made clear the intent to

of the rush toward privatization, have been marked by the dismantling of public systems of child welfare on a statewide level and largely disappointing results for beneficiaries.

III. DEBATE AND CRITIQUE

A. The Pros and Cons of Privatization

To better understand the debate over privatized child welfare service delivery, one must embed it within a broader discussion of privatized human services. An overly simplified assessment of this debate would read as follows: political conservatives, haunted by the specter of big government and the suppression of free market economics, favor increased diversion of government funds and authority to private for-profit and nonprofit entities. Our reliance on private support mechanisms for public purposes reflects a long-held belief that we as a nation have long expressed our “religious and moral conviction of responsibility for our fellow man” through our private social agencies.⁵⁵

The “marketplace allure” argument is rooted in an unwavering admiration for a free market, competitive, economic system—one that views the delivery of public benefits as analogous to the production, sale, and consumption of commodities. This appeal is amplified by the presumed efficiency and cost savings. Indeed, the rush toward privatization is driven in part by dissatisfaction with the quality of public services and the perception that privatization will improve the situation. Even without consistent data to support the assertion, many are guided by the “belief that the marketplace and competition will discipline organizations that provide low-quality goods or services by driving them out of business”⁵⁶

Free markets are themselves defined by the ability to engage in competitive exchanges of goods and services. Indeed, traditional “[e]conomic theory [would] suggest that social welfare rises as the level of competition

privatize Florida’s entire state child welfare system. *See* 57 FLA. JUR. 2D WELFARE § 114 (outlining Florida’s plan for privatization of foster care services by 2003). *See also* Johnson, *supra* note 1, at 10 (noting that “[i]n 1998, Florida passed legislation facilitating a major reorganization of the Department of Children and Families (DCF) and mandating that foster children be placed in private care by 2003.”).

⁵⁵ Rosenthal, *supra* note 2, at 291 (quoting then Executive Director of the Child Welfare League of America, Joseph Reid). Reid’s testimony before Congress was reflective of his broader policy work in promoting progressive child welfare practices and his call for “an expanded child welfare network that would require ever-increasing public expenditures to perform . . . traditional functions [pertaining to] child neglect and abuse, arranging for and supervising foster placement and adoption, and providing institutional care.” *Id.* at 288–91.

⁵⁶ PAMELA WINSTON ET AL., MATHEMATICA POLICY RESEARCH INC., PRIVATIZATION OF WELFARE SERVICES: A REVIEW OF THE LITERATURE 16 (2002), available at <http://www.mathematica-mpr.com/PDFs/privatization.pdf>. Not surprisingly, the absence of data might be attributable to our general distaste for the unappealing metrics involved in any cost-benefit analysis. Such a calculation would inevitably require weighing purely economic measures against the more nebulous ones around which human service delivery have long been oriented. In the case of child welfare, they include, among others, child well-being, family preservation, and permanency.

increases.”⁵⁷ However, in practice, while many public services can accommodate competition, or even flourish under it, others are unable to so seamlessly adapt to competitive market forces. In a marked departure from this key feature of economic free market theory, competition has been noticeably absent from many child welfare privatization initiatives. In fact, certain models of child welfare privatization, such as the managed care model, have drawn criticism for the “undesired and unnecessary monopolies” they have created.⁵⁸

In addition to the relatively objective rationales noted above, explanations for “[t]he acceleration of service contracting” of the more subjective ilk has included “ideological preferences for privately delivered services”; the perception of “greater professionalism” [in] private sector agencies; the presumption that privately provided services are more carefully “attuned to the needs of clients and communities”; and, finally, that such services are less stigmatized than are those delivered directly by public entities.⁵⁹ As Professor Martha Fineman observes, we “have an historic and highly romanticized affair with the ideals of the private and the individual, as contrasted with the public and the collective, as the appropriate units of focus in determining social good.”⁶⁰

An embrace of the private over public, however, is not universal. Political liberals, espousing many of the ideals of Progressive Era reformists, continue to “see volunteerism and civil society [as] harmed by the excesses of the market”⁶¹ and view public participation in the provision of social services as a critical dimension and responsibility of government. They caution against a “market methodology” with its tendency toward “evaluating human actions and social outcomes in terms of actual or hypothetical gains from trade measured in money” and the universal market rhetoric that increasingly influences the social service sector.⁶²

The National Association of Child Advocates, for example, takes issue with social service privatization due to the limited number of participants, noting that “[t]here tend to be only a few buyers and sellers, as opposed to

⁵⁷ Erwin Blackstone & Simon Hakim, *A Market Alternative to Child Adoption and Foster Care*, 22 CATO J. 485, 492 (2003) available at <http://www.cato.org/pubs/journal/cj22n3/cj22n3-6.pdf>.

⁵⁸ *Id.*

In 1996, Kansas drew national attention by adopting a managed-care system for its child welfare program statewide. Under this system, private-sector organizations were paid a set fee for each child referred, intended to cover the cost of all foster care, family preservation, or adoption services provided. However, the state’s Department of Social and Rehabilitative Services recently terminated the managed care approach after discovering that it created significant financial difficulties for contractors. Private providers continue to play an important role in the state’s child welfare system but are compensated with a per-child, per-month payment.

WINSTON ET AL., *supra* note 56, at 9 (citing, KANSAS ACTION FOR CHILDREN, *THE KANSAS CHILD WELFARE SYSTEM: WHERE ARE WE? WHERE SHOULD WE BE GOING?* (2001)).

⁵⁹ Rosenthal, *supra* note 2, at 282.

⁶⁰ MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY*, at xiv (2004).

⁶¹ MINOW, *supra* note 1, at 27.

⁶² Radin, *supra* note 6, at 1861.

the many buyers and sellers typically needed to support [genuine] competition. The buyer in human services is a single government agency, and the few sellers of human services often hold a virtual monopoly.”⁶³

As Judge Jean Shephard, a juvenile court judge for the Seventh District in Kansas, noted,⁶⁴

Privatization, . . . has led not to the healthy free competition one might expect, [but] instead . . . has created enormous service monopolies in this state. Before privatization we had four or five family preservation choices in our county [W]e no longer have the choices that we had before. . . . [I]n the past if we had questions as to abuse or neglect or quality of services in one placement or with one provider, we would attempt not to send our children to that entity until problems were resolved Our provider [today] operates the only show in town.⁶⁵

Despite the professed fiscal gains on which many privatization initiatives are based, there is surprisingly little empirical evidence that privatization of human services, and child welfare services in particular, saves dollars or meets any of the stated public aims of the program. “While a number of surveys have collected information on state and local governments’ use of privatization, few focus specifically on social services,” the area where its use is, arguably, most complicated.⁶⁶ According to a policy report of the Urban Institute:

The little empirical analysis comparing the effectiveness of public versus private service delivery shows no clear evidence that private service delivery is inherently more effective or less effective than public service delivery, although the public, private, and non-profit sectors each have their own relative strengths and weaknesses. There are examples of success and failure in both sectors.⁶⁷

There is a disturbing underlying contextual factor that lends further support to the arguments raised by privatization opponents—that of agency. The absence of agency for direct recipients of social services poses a particular risk of harm when less altruistic and charitable aims (i.e., profit) might influence agency decision making and drive the behavior of participants. Recipients of social services may have a limited capacity for choice and are typically not the actual decision makers. Young children, for example, are unable to make serious decisions. Instead, the person making critical decisions is likely to be someone other than the recipient—often the third-party beneficiary of a public-private partnership contract. Of course,

63 FREUNDLICH & GERSTENZANG, *supra* note 41, at 7 (citing NATIONAL ASSOCIATION OF CHILD ADVOCATES, FACT SHEET: PRIVATIZATION OF HUMAN SERVICES—IS IT THE BEST CHOICE FOR CHILDREN? (2000)).

64 The SRS Transition Oversight Committee before whom Judge Shephard testified was convened to review a number of programs undertaken by the Kansas Department of Social and Rehabilitative Services, including the agency’s privatization of adoption, family preservation and foster care programs. Roger Myers, *Judge Questions Program Benefits*, TOPEKA CAP. J., Nov. 5, 1997, at 1-A.

65 Luke Andrew & Steven Demaree, “*Tiny Little Shoes*”: *The Privatization of Child Welfare Services in Kansas*, 69 UMKC L. REV. 643, 646–47 (2001).

66 WINSTON ET AL., *supra* note 56, at 7.

67 DEMETRA SMITH NIGHTINGALE & NANCY M. PINDUS, PRIVATIZATION OF PUBLIC SERVICES: A BACKGROUND PAPER (1997) <http://www.urban.org/url.cfm?ID=407023>.

although the decision maker may have the best interests of the recipient in mind, it cannot be merely *assumed* that the best interests of the recipient will always win out, especially when the decision maker is under pressures wholly distinct from traditional social service aims. It is reasonable, therefore, to imagine instances in which the private market decisions “may not produce optimal outcomes for the recipient.”⁶⁸ Indeed, “the more vulnerable the client and the more involuntary the client’s participation (e.g., hospitals, prisons, child welfare), the higher the risk” that diminished recipient agency will operate to their detriment.⁶⁹

Particularly worrisome is the manner in which agency and accountability interact to the detriment of recipients. The lack of direct recipient agency has implications for the ability of states to hold private providers accountable for any wrongdoing, as “[n]either voter nor consumer sovereignty [which are the most typically reliant strategies] can secure accountability when public and private realms merge.”⁷⁰ As Professor Minow comments with respect to illusory market-style consumer choice, the assumption that consumers will “vote with their feet”—as private markets inherently assume—is so unlikely that meaningful accountability simply cannot be guaranteed.⁷¹ Moreover, although the newest trend in public services—performance-based contracting—may appear to take the views of service recipients into account, the degree and manner to which that input realistically influences actual service delivery is in no way the functional equivalent of agency.⁷²

B. Diminished Accountability in the Eyes of the Law

In addition, far less is known about the intangible costs and risks of privatization, some of which are fairly elusive and difficult to quantify in a straightforward cost-benefit analysis. Among the most troubling of these risks is that of diminished accountability, which in turn poses a greater risk of harm in the event that private providers fail to meet acceptable standards of service delivery. This diminished accountability is due largely to the limited remedial scheme that governs conduct between ostensibly private actors. It poses a particular risk in the context of human service delivery, where the inherently discretionary dimension places human service reci-

⁶⁸ Rebecca M. Blank, *When Can Public Policy Makers Rely on Private Markets?: The Effective Provision of Social Services*, 110 *ECON. J.* C34, C37 (2000). This issue is particularly problematic in the context of private prisons, as some opponents claim it is inappropriate to operate prisons based on a profit motive. “In many instances, private prison operators are paid according to the number of inmates housed. Arguably, it is in the operator’s financial interests to encourage lengthier sentences for inmates [or lobby to amend criminal law so that more offenses are punishable with incarceration] to keep bed spaces filled.” AUSTIN & COVENTRY, *supra* note 14, at 16. Moreover, “[c]ritics of prison privatization argue that firms will cut corners, from construction materials to hiring inexperienced personnel, forsaking security and quality of service in the process of making a profit.” *Id.*

⁶⁹ NIGHTINGALE & PINDUS, *supra* note 67.

⁷⁰ MINOW, *supra* note 1, at 29.

⁷¹ *Id.* at 34.

⁷² This query itself raises a critical question about whether constitutional rights ought to hinge on the drafting of contracts.

ipients at greater risk than beneficiaries of other traditionally public or governmental services. For this reason, “[i]t has been generally assumed that social services are more difficult to privatize than [any] other government function[,] because defining and measuring performance [and, therefore, ensuring accountability] is more challenging.”⁷³ As Johnson so aptly stated, “[p]icking up garbage is easier to oversee and monitor than ensuring foster children are properly placed.”⁷⁴

Despite these acknowledged risks, especially in child welfare, “there is scant public debate about whether [public-private partnerships] jeopardize public commitments to equality, due process, [civil rights,] and democracy.”⁷⁵ For all the potential benefits that may accrue to privatization, the delegation of authority and responsibility from public to private providers remains problematic, particularly when the civil rights of recipients are curtailed by virtue of the ostensibly private garb in which service delivery is cloaked. Indeed, too little attention is focused on the impact of privatization on the diminished constitutional protections for service recipients.⁷⁶ Although recently, the growth “in privatization of government programs mean[s] that the constitutional paradigm of a sharp separation between public and private is increasingly at odds with the blurred public-private character of modern governance [L]ittle effort has been made to address th[e] disconnect between constitutional law and new administrative realit[ies].”⁷⁷ As Professor Sheila Kennedy notes, “[t]here is significant

⁷³ Johnson, *supra* note 1, at 10.

⁷⁴ *Id.* Kennedy also notes that:

[E]ntrusting the most vulnerable citizens and the most delicate service tasks to private agencies is not simply a matter of choice between “making” or “buying” services. This might be the case when one considers contracting out for pencils, computer services, or strategic weapons. But when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life (through child protective activities) from private agencies, other values than efficiency are at stake.

Kennedy, *supra* note 10, at 206. Not surprisingly, the debate is far more nuanced than such a simplistic assessment could ever capture, and the subtleties beyond the more narrow focus of this article. Proponents of increased privatization wrap their support around a free market driven philosophy whose purported strengths include “efficiency, self-determination, consumer choice and cost effectiveness within an enterprise culture.” FREUNDLICH & GERSTENZANG, *supra* note 41, at 1 (quoting C. Sampson, *The Three Faces of Privatization*, 28 J. BRIT. SOC. ASS’N 79–90). At its core, “one of the most powerful [causal] factors [to which increased public-private partnerships can be attributed] may be ‘the persistence of value-laden preferences for private solutions to public problems in the American context.’” *Id.* (quoting Rosenthal, *supra* note 5, at 292). One might indeed be correct in concluding that, based on the widespread and increasing private market participation in social service delivery, there is no human service that could be better delivered through governmental rather than private channels. Moreover, in an era of tightening state budgets and ballooning government deficits, reliance on the private market is only likely to increase. Opponents of privatization, specifically in the area of child welfare, temper their enthusiasm for a free-market driven system by highlighting the dearth of empirical evidence that would definitively establish substantive benefits to the public, particularly as they concern efficiency and quality of services through competition. *Id.* at 5. Moreover, they express concerns that the outcomes associated with increased privatization do not outweigh the concerns about how reliance on privatized mechanisms effect children and families within the child welfare system. *Id.* at 16.

⁷⁵ MINOW, *supra* note 1, at 2.

⁷⁶ Sullivan, *supra* note 8, at 461.

⁷⁷ Metzger, *supra* note 9, at 1367.

evidence that the growth of government contracting, coupled with an unrealistic and narrow understanding of state action, has created a jurisprudence that . . . is significantly underprotective of constitutional rights.”⁷⁸ Opposition to privatization in the legal community is based on an underlying premise that there is a fundamental distinction between that which is public and that which is private, and this difference is to be found in law, not economic functions or other market-oriented justifications for privatization.⁷⁹

Even if distinctions between public and private child welfare service agencies have little measurable impact on actual service delivery, they emerge as paramount to the context and scope of rights granted to service recipients when they seek redress for harm inflicted by a private, rather than a public, provider. Because “[t]he requirement of state action is a necessary prerequisite to most civil rights actions . . . the state action inquiry serves as a threshold in the protection of individual civil liberties.”⁸⁰ Accordingly, the question to ask is, “[i]f we are altering traditional definitions of public and private by virtue of these new relationships, what is the effect of that alteration on a constitutional system that depends upon the distinction as a fundamental safeguard of private rights?”⁸¹ In an aptly cautionary tone, it is observed that “[b]ecause private institutions generally are not subject to constitutional restraints . . . debate over the merits of . . . [privatization] must be informed by a real understanding of the different legal positions of the public and private sectors.”⁸² Of course, the degree of “publicness” versus “privateness”⁸³ of the agency delivering services, therefore, matters insofar as “[r]ights secured by the U.S. Constitution are in every instance . . . protected from only government [public, and not private,] infringement.”⁸⁴ When the service is delivered through purely public means, rendering the service provider a state actor, a panoply of rights is made available that is simply nonexistent when the provider is regarded as a

⁷⁸ Kennedy, *supra* note 10, at 204.

⁷⁹ Ronald C. Moe, *Exploring the Limits of Privatization*, 47 PUB. ADMIN. REV. 453, 454 (Nov.–Dec. 1987). It is for this reason that in 1986 the American Bar Association issued a resolution cautioning that the privatization of prisons and jails should not proceed “until the complex constitutional, statutory, and contractual issues are satisfactorily developed and resolved.” *Id.* at 457. This opposition is applicable with arguably equal force to the privatization of child welfare as it is to the privatization of prisons and jails, and has compelled some in the legal profession to oppose privatization largely on constitutional and statutory grounds.

⁸⁰ David E. Lust, *What to do When Faced with a Novel State Action Question? Punt: The Eighth Circuit’s Decision in Reinhart v. City of Brookings*, 42 S.D. L. REV. 508, 508 (1997).

⁸¹ Kennedy, *supra* note 10, at 206.

⁸² Sullivan, *supra* note 8, at 461.

⁸³ I borrow the terms “publicness” and “privateness” from Prof. Ruth Hardie Shane, whose work focuses on the implications for public administrators of legal and constitutional distinctions of publicness and privateness in the delivery of public services and the import of this distinction in the Supreme Court’s state action jurisprudence. Ruth Hardie Shane, *Private Actions—Public Responsibilities: Reflections on West v. Atkins* (1988) (Nov. 19 2003) (unpublished dissertation, Virginia Polytechnic Institute) (quoting Interview with Gary Wamsley Professor, Center for Public Administration and Policy, Virginia Tech, in Blacksburg Virginia) (addressing the legal and constitutional distinctions between publicness and privateness and the implications of that distinction for public administrators).

⁸⁴ Sullivan, *supra* note 8, at 461.

purely private entity.

Under the Supreme Court's current interpretation of the state action doctrine and the varied corollary interpretations espoused by lower courts, lingering questions remain about which precise constellation of factors favors identifying public-private partnerships as purely private entities or as sufficiently aligned with the state as to have assumed its identity.⁸⁵ Especially as the state action doctrine is applied in the context of private child welfare service delivery, the lines between public and private easily blur, for as Professor Martha Minow notes, "The lines themselves are historical inventions."⁸⁶ Unfortunately, the accelerated pace toward privatization is occurring in the absence of necessary clarity regarding where the lines are, or should be, drawn. Although "[n]ew forms of governmental activities, developing within the growing scope of . . . privatization [have changed] the reality of state actions,"⁸⁷ the content of the legal doctrine of state action has not changed and ceases to serve its professed aims.⁸⁸

There remains, in each case, a feature unique to child welfare, with the exception of prisons—the overarching coercive presence of the state at the very core of the child welfare system. It is perhaps so self-evident as to be taken for granted, but the fact that children may only be legally removed and formally placed in the child welfare system through a court order renders this conduct arguably the least ambiguous form of state action. Its existence is itself grounded in the notion of the state as *parens patriae*, with state law serving as "the very foundation for what [a child welfare] agency is supposed to, or able to, do."⁸⁹ Indeed, it is the specter of the omnipotent state that provides a gloss of authority through which private agencies are empowered to do great good, and potentially great harm. Not only does the state enjoy a monopoly on the legitimate use of force, it also possesses the unique authority to break apart one of the most fundamental units of society: the family.⁹⁰ When, where, and how aspects of this awesome authority are delegated to private providers is the subject of continued debate. What is largely absent from the debate, however, is a full assessment of the consequences of extending the authority of the state to private providers gener-

85 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 18-1, at 1690 (2d ed. 1988) ("[T]he Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation.").

86 MINOW, *supra* note 1, at 22.

87 Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 *SYRACUSE L. REV.* 1169, 1191 (1995).

88 *Id.*

89 Shane, *supra* note 83, at 10 (citations omitted).

90 Daniel Bergner, *The Case of Marie and Her Sons*, *N.Y. TIMES*, July 23, 2006, (Magazine), at 28. Bergner's article "tells the story of a mother who wants to raise her five sons despite her struggles with drugs and violent men—and of the child-welfare worker who must decide whether to take away those children for good." *Id.* at 3. In describing the awesome responsibility which her job entails and explaining how it might contribute to the constant and quick turnover of her colleagues, the child-welfare worker offered the following: "It's almost hard to comprehend that we have [the prerogative to enter a family's home and split it apart] It's so huge." *Id.* at 31.

ally not constrained in the same manner as traditional state actors from unconstitutional conduct, and the corresponding need to tread more cautiously down the path toward privatization.

Contracts and monitoring are conceivably one source of accountability and protection. However, contract provisions provide only marginal and risky guarantees of accountability. Moreover, although comprehensive contracts might offer sufficient guarantees of service provision, what of accountability for constitutional deprivations that arise in the context of service delivery? Most would find it unacceptable that constitutional guarantees might rest on the details outlined in a contract, especially one to which the direct recipient, and potential victim of harm, is not even a party.

Contract monitors may serve a useful watchdog function; however, their role is limited to the terms of the contract itself. The City of Philadelphia Department of Human Services, a municipality that spends nearly 82% of its budget on contracted private services,⁹¹ defines the purpose of contract monitoring (the Division of Contract Administration and Program Evaluation) to include the translation of “the Department’s goals and objectives into service provision contracts”; centralization of “the process of evaluating what works”; and assurance that “all contracts contain performance standards that monitor achievement.”⁹² Although the aims may be laudable, they have not insulated the department from controversy stemming from private agency conduct.⁹³ Indeed, effective contract monitoring is quite often stymied by the “‘short supply’ of usable management information systems, auditing capability, and skilled contract managers,”⁹⁴ all of whose scarcity undermines meaningful accountability in the context of privatized social services.⁹⁵ Ideally, beyond merely contracting with private entities, state and local governments must assess their “capacity in terms of both resources and expertise, to appropriately design, implement, and over-

⁹¹ City of Phila. Dep’t. of Human Servs., Contract Administration Home Page, http://dhs.phila.gov/intranet/pgintrahome_pub.nsf/content/contractadminhomepage [hereinafter DHS Homepage] (last visited Sept. 15, 2007).

⁹² *Id.*

⁹³ The Philadelphia Department of Human Services has been the object of much scrutiny following 50 child deaths that have occurred since 2000 and a recent multi-million settlement in a civil rights claim against the agency. In November 2006, Philadelphia Mayor John Street appointed a Child Welfare Review Panel, consisting of child welfare experts from across the state and country to examine, among other issues, how the Department of Human Services hires and evaluates private contractors. John Sullivan, *City DHS Panel Looks at Hiring of Contractors*, PHILA. INQUIRER, Dec. 20, 2006, at B1. Cited as an example of egregious contract monitor failing is the case of a private child welfare agency, MultiEthnic Behavioral Health, Inc. which “won city contracts to watch over children at risk of abuse and neglect.” Nancy Phillips and Craig R. McCoy, *DHS Gave Psychologist a Contract Despite Personal, Career Problems*, PHILA. INQUIRER, Dec. 10, 2006, at A1. Although the private agency’s director lost his state certification due to an assault conviction, he was awarded a \$3.5 million contract with DHS until the death of a 14-year old client under the care of the private contractor. Nancy Phillips and Craig R. McCoy, *Mounting Failures Left Girl to Die*, PHILA. INQUIRER, Dec. 10, 2006, at A1.

⁹⁴ FREUNDLICH & GERSTENZANG, *supra* note 41, at 9 (quoting H.B. Milward, *Nonprofit Contracting and the Hollow State*, 54 PUB ADMIN. REV. 73, 78 (1994)).

⁹⁵ *Id.*

see privatization efforts.”⁹⁶ Even those in favor of increased privatization admit that, “[i]n the end, contract monitors simply make sure that the work promised will be delivered,” and nothing more.⁹⁷ For these reasons and more:

Critics are . . . [rightfully] skeptical about the actual degree of accountability that exists when social services are privatized. . . . Even when there are adequate systems to ensure accountability, the question often is “[a]ccountability for what outcomes?” Although the expectation is that private contractors will be held accountable for results, Bardach and Lesser argued that, at most, accountability is “for a better quality of effort directed toward the results being measured” as opposed to higher quality outcomes.”⁹⁸

In light of the implicit challenges to developing adequate accountability mechanisms, contract compliance alone may ring hollow as an adequate gauge. One of the challenges might be the elusive definition of the term accountability itself, which can be understood to encompass a broader scope than the mere performance standards outlined in contract terms. Accountability in this sense reflects the democratic accountability within a constitutional system in which elected persons in power are held accountable to the voting public. This is accomplished by levying an obligation that the party accountable report performance outcomes and be subject to sanctions. Neither of these markers is meaningful, however, unless the relevant parties base their actions on information about the actual performance of elected persons, governments, private enterprises, or other activities.⁹⁹ In a business context, “[c]onsumers and investors have power to hold others accountable because they can vote with their feet, but they cannot exercise this power if they do not know how or even whether to judge.”¹⁰⁰ Child welfare service recipients, unlike traditional consumer or investors, are generally powerless to exert any direct influence over the private agency. Service recipients are by and large¹⁰¹ not independent actors volitionally contracting for services, but individuals compelled by force of law to engage with private providers who are sometimes the proverbial “only game in town.”

As previously noted, the lack of service recipient agency looms even larger when this view of accountability is assessed, given that service recipients are increasingly restrained in their exercise of democratic powers as private systems of care eclipse public ones. Service recipients might then

⁹⁶ *Id.*

⁹⁷ CONNA CRAIG ET AL., REASON FOUND, POLICY STUDY NO. 248: BLUEPRINT FOR THE PRIVATIZATION OF CHILD WELFARE 13 (1998).

⁹⁸ FREUNDLICH & GERSTENZANG, *supra* note 41, at 9 (quoting E. Bardach & C. Lesser, *Accountability in Human Services Collaboratives: For What? And to Whom?*, 6 J. OF PUB. ADMIN. RESEARCH & THEORY 197, 201 (1996)).

⁹⁹ MINOW, *supra* note 1, at 153

¹⁰⁰ *Id.*

¹⁰¹ Note that the focus of this article is children who are in the legal custody of the state and whose families are compelled by the state to engage in private child welfare service delivery. I am not addressing the circumstance of families referred on a voluntary basis for services.

be said to at best enjoy only an attenuated measure of oversight, which can be exerted through pressure on the elected representatives who appoint key public officials, who in turn contract with private providers. In this chain of effects, it is indisputable that because “the use of private firms places ‘the influence over, and sometimes even control of, important decisions one step further away from the public and their elected representatives,’”¹⁰² service recipients are left with a diminished capacity to hold private firms directly accountable.¹⁰³ Moreover, even this minimal influence, moreover, is wholly dependent on the ability to access information regarding private providers and the contracts into which they enter. Access to such information is a critical component of accountability, since “[c]itizens [may] vote with ballots, petitions, and speeches, but they . . . cannot pursue these actions meaningfully if they do not know what is going on.”¹⁰⁴ Unlike the voting public, service recipients do not have access to private agency performance in a manner which would permit them meaningful review.¹⁰⁵

C. Civil Rights and Constitutional Protections

Although “[t]he concern over accountability of private actors performing public functions is a ripe debate in administrative law and in other substantive law areas,”¹⁰⁶ it is nowhere more important than in the constitutional rights of public service recipients.¹⁰⁷ At the heart of the American system of constitutional accountability is “the distinction between government and other realms,” which matters insofar as context “trigger[s]. . . constitutional protections guaranteeing due process and equal protection.”¹⁰⁸ Commitments to, for example, due process and equal protection operate only as a constitutional matter when the state, and not a private party, acts.¹⁰⁹ “The notoriously tricky question is how exactly to draw the line between state and private action, which polices the boundary between the application and nonapplication of the Constitution.”¹¹⁰ Application of constitutional duties to private providers of public services would be assured were the Constitution to give direct horizontal effect to such protections; however, such is not the traditional leaning of our constitutional jurispru-

¹⁰² Singer, *supra* note 27, at 218.

¹⁰³ *Id.*

¹⁰⁴ MINOW, *supra* note 1, at 153.

¹⁰⁵ Kelsi Brown Cokran describes this dynamic as a type of “information symmetry” in foster care contracting in which “the individualized nature of service goals and the absence of meaningful performances measures make it very difficult for the government as principal to determine the quality of foster care services provided by its agents—i.e., the nonprofit agencies with which it contracts.” Kelsi Brown Cokran, *Principal-Agent Obstacles to Foster Care Contracting*, 2 J.L. ECON. & POL’Y 29, 30 (2006). When, as in the case of private child welfare foster care contracting, the purchaser of the service (the government) is different from the consumer (the parent and child under the court’s jurisdiction), “the market institutions that address quality uncertainty work far less effectively.” *Id.* at 34.

¹⁰⁶ Mangold, *supra* note 40, at 1318.

¹⁰⁷ *Id.*

¹⁰⁸ MINOW, *supra* note 1, at 31.

¹⁰⁹ Sullivan, *supra* note 8, at 461.

¹¹⁰ Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, 102 MICH. L. REV. 387, 412 (2003).

dence.¹¹¹ The constitutional regulation of third party, nominally “private,” conduct is referred to as the “third party effect.”¹¹² Only were this doctrine the norm would enforcement of constitutional rights easily apply to private parties and individuals with equal force as enforcement against the state.

The ability to hold private providers of public services accountable for constitutional deprivations rests on the outcome of this search, for it remains unclear as a normative matter the extent to which private agencies providing public services should or do have any constitutional duty to the clients they serve. As Professor Sullivan warns “privatization may undermine constitutional protections, because private entities, unlike public agencies, are not politically accountable nor are they bound by principles regarding the protection of citizens’ rights.”¹¹³ He concludes, in the end, that “privatization and protection of civil liberties [and constitutional rights] may prove to be mutually exclusive goals.”¹¹⁴

IV. A CLASH OF REALITIES: THE TRADITIONAL STATE ACTION DOCTRINE CONFRONTS THE 21ST CENTURY

A. Traditional State Action Doctrine

Because constitutional limitations and checks on constitutional accountability do not generally apply to acts of private parties, the basic query that courts aim to resolve in the context of state action claims is whether the private conduct complained of may fairly be attributed to the state. To say that determining which conduct is public and which private has been fraught with controversy and confusion is a considerable understatement. Although “[t]he Supreme Court has established a number of approaches to this general question, which it has recently said are essentially ‘facts that can bear on the fairness of such an attribution,’”¹¹⁵ the weight attached to certain facts and the manner in which they bear on the fairness

111 Stephen Gardbaum, *Where the (State) Action is*, 4 INT’L J. CONST. L. 760, 773 (2006). Gardbaum reviews a spectrum of conceptualizations of horizontal application of constitutional rights, which includes no horizontal effect, weak and strong indirect horizontality, and direct horizontality. *Id.* at 762–67. As Professor Gardbaum summarizes:

[T]here are three very general positions a constitutional system can take regarding the effect of constitutional rights on private actors These are: (1) no effect at all, direct or indirect, because constitutional rights only govern public law—regulating the relations between the individual and the state; (2) indirect effect, because although private actors are not bound by constitutional rights, such rights govern the laws that private actors invoke and rely on in their relations with each other; and (3) direct effect, because constitutional rights do bind the actions of private actors.

Id. at 778.

112 Mark Tushnet, *The Relationship Between Judicial Review of Legislation and the Interpretation of Non-Constitutional Law, with Reference to Third Party Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 167, 167 (2005).

113 FREUNDLICH & GERSTENZANG, *supra* note 41, at 10 (citing Sullivan, *supra* note 8, at 461–67).

114 *Id.* (citing Sullivan, *supra* note 8, at 466).

115 *Crissman v. Dover Downs Entm’t, Inc.*, 289 F.3d 231, 239 (3d Cir. 2002) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n.*, 531 U.S. 288, 296 (2001)).

of the attribution is a process better approximating divination than a systematic application of any clear rule of law.¹¹⁶ In the end, state action attribution has been far easier articulated in theory than realized in practice, as the Court “has applied [the view that private actions should be construed as those of the State] very narrowly, considering most actions as private despite clear traces of government involvement.”¹¹⁷

In lieu of establishing one uniform standard for determining state action, lower courts, guided by Supreme Court jurisprudence, have cited a varying range of factors and tests.¹¹⁸ Among the traditional approaches that assess whether the state requires, encourages, or is otherwise significantly involved in nominally private conduct are (1) the “compulsion” test, exploring the manner in which the state has exercised any affirmative conduct compelling the conduct complained of,¹¹⁹ (2) the “nexus” test, examining the degree of state involvement in private conduct,¹²⁰ and (3) the “public function” test, which looks substantively to the nature of the function performed to assess its public versus private identity.¹²¹ Any assessment of the Court’s state action jurisprudence reveals that, while useful as a guidepost, these tests remain rather loosely applied.¹²²

As the public function test is the most frequently used in the context of child welfare civil rights litigation, it is the only one that will be discussed here at length. It is a distinct approach to state action that focuses primarily on the “nature of the activity engaged in by the private person or entity”¹²³ and inquires whether the private person or entity exercises a traditional and exclusive state function.¹²⁴ In its original incarnation, the public function test operated to cut through the private façade of conduct fairly attributable to the state, making the state responsible for private actors carrying out a traditional function of the state.

The influence of the public function test can be said to have reached its apex in the 1968 case of *Amalgamated Food Employees Union v. Logan*

¹¹⁶ *See id.*

¹¹⁷ Barak-Erez, *supra* note 87, at 1172.

¹¹⁸ Michael Han, Note, *Civil Rights—Requirements for Fourteenth Amendment and § 1983 Protection—Attributing State Action to a Private Athletic Association*, 69 TENN. L. REV. 521, 524 (2002).

¹¹⁹ Barak-Erez, *supra* note 87, at 1173.

¹²⁰ *Id.* at 1174.

¹²¹ *Id.*

¹²² *See generally* Barak-Erez, *supra* note 87, at 1173–83. No doubt there is merit to the claim that there is a serious lack of consensus methodology in the area of the state action doctrine. The Court has unpredictably vacillated among and between variants of these tests, at times applying one distinctly, while elsewhere appearing to collapse both. The “entwinement” theory represents such an amalgam, in which the nexus and public function tests are combined to ostensibly form a new test. More recent jurisprudence has focused instead on the broad legal principles that unite all of the tests together. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n.*, 531 U.S. 288, 296 (2001). Daphne Barak-Erez examines Sec. 1983 claims through 4 tests, including the rarely relied upon “subsidies test.” In applying a subsidies test, the Court looks to whether the financial support granted by the government is substantively an official approval of the subsidized activity. *See* Barak-Erez, *supra* note 87, at 1173–83.

¹²³ 1 SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 2:10, 2-26 (4th ed. 2006).

¹²⁴ *Id.*

*Valley Plaza*¹²⁵, in which the Court held that a privately owned shopping mall could not avail itself of private trespass laws to restrict picketing by union employees. Relying heavily on its earlier holding in *Marsh v. Alabama*¹²⁶, in which the Court appeared to advance an argument not terribly dissimilar to “if it walks like a duck and quacks like a duck, it’s a duck,” the Court reasoned that the privately owned mall in question was “the functional equivalent of the business district” in the company town in *Marsh*, which, ostensibly public, was subject to First Amendment restrictions.¹²⁷ In so doing, the Court stretched the reach of the public function test in so incredulous a manner as to never again be repeated. Indeed, in subsequent cases leading up through the 1980s, the Court narrowed the definition of public function by requiring a duality of conduct such “that the questioned task be a traditional *and* exclusive function of the State.”¹²⁸ In the evolving iterations of the public function test, the Court would over time come to focus more narrowly on the challenged conduct than the identity of the actor. Two public function cases from what is collectively known as “the Blum trilogy” aptly depict the new narrower lens through which the public nature of private conduct would henceforth be assessed.¹²⁹ In *Blum v. Yaretsky*, the plaintiffs attempted unsuccessfully to characterize the challenged conduct of a private nursing home facility as that of the state, basing their arguments on the nursing home’s substantial receipt of state and federal Medicaid funds as well as heavy state regulation.¹³⁰ In reasoning that the private entity did not exercise powers “traditionally the exclusive prerogative of the State,”¹³¹ the Court declined to extend the constitutional protections the plaintiffs sought into the private realm. Similarly, in *Rendell-Baker v. Kohn*,¹³² a case which has been often analogized and heavily relied upon in cases exempting private providers of child welfare services from accountability for constitutional harms,¹³³ the Court found that the conduct of the private school employer was not attributable to the state under the public function test because, although education of students is indeed a public function, the provision of such is not “the exclusive prerogative of the State.”¹³⁴ Nor, under this reasoning, could the employment related decisions of the school be attributed to the State.

¹²⁵ 391 U.S. 308 (1968).

¹²⁶ 326 U.S. 501 (1946).

¹²⁷ *Amalgamated Food Employees Union*, 391 U.S. at 318. Harkening back to *Marsh*, the Court quoted from its earlier opinion, “[i]n short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.” *Id.* at 317 (quoting *Marsh*, 326 U.S. at 502–503).

¹²⁸ Han, *supra* note 118, at 525 (emphasis added).

¹²⁹ *Id.*

¹³⁰ 457 U.S. 991 (1982).

¹³¹ *Id.* at 1005.

¹³² 457 U.S. 830 (1982).

¹³³ See, e.g., *Robert S. v. Stetson*, 256 F.3d 159 (3d Cir. 2001); *Leshko v. Servis*, 423 F.3d 337 (3d Cir. 2005); *Willis v. Georgia Dept. of Juvenile Justice*, No. 7:05-cv-59 (HL), 2007 U.S. Dist. LEXIS 70012 (M.D. Ga. 2007).

¹³⁴ *Rendell-Baker*, 457 U.S. at 842.

The narrow focus on traditional exclusivity rendered the public function test relatively “impotent until the early 1990s,”¹³⁵ when the Court held in *Edmonson v. Leesville Concrete Co.*, that the use by a private litigant of peremptory challenges based on race was violative of the Due Process Clause of the Fifth Amendment.¹³⁶ Departing from the duality of conduct—exclusive and traditional—test that the public function inquiry had become after *Blum*, the Court instead stressed the traditional nature of the public function test, focusing on the attributes of the actor as well as the challenged conduct itself.¹³⁷ Although it can be argued that, per *Edmonson*, “the Court had reset the bar to a lower level,”¹³⁸ the view of some lower courts is that the public function test, particularly when conceived as still requiring conduct of a traditional and exclusive state nature, “imposes a ‘rigorous standard’ that is ‘rarely . . . satisfied.’”¹³⁹ As the logic goes, “[w]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’”¹⁴⁰ In his observation of the diminished influence and inherent “definitional weakness” of the public function test, noted scholar Paul Verkuil suggests that “the Court . . . seems to have abandoned the quest for an adequate definition of public function,”¹⁴¹ perhaps a harbinger of its recurring impotency.

V. ACCOUNTABILITY FOR CONSTITUTIONAL DEPRIVATIONS UNDER §1983

The first hurdle of a § 1983 claim is easily surmounted when the state agency alone is named as a defendant, as the agency is unquestionably a state actor for § 1983 purposes. Moreover, the issue of constitutional accountability was more narrowly circumscribed at a time when almost all child welfare services were administered by and delivered through the state. Every public provider in the system was conceivably a state actor by formal state designation. However, determining when and under what circumstances the thread of responsibility would be projected outwards to encompass private providers, in addition to or entirely apart from the state, remains controversial. Although the Court offers only minimal guidance in determining which precise constellation of factors supports the claim that “a private actor has acted ‘under color of state law,’” one directive emerges

¹³⁵ Han, *supra* note 118, at 526.

¹³⁶ 500 U.S. 614, 616 (1991).

¹³⁷ Han, *supra* note 118, at 526 (citing *Edmonson*, 500 U.S. at 624). It can, however, be argued that Justice Kennedy dispensed with the need for an analysis of the exclusivity prong of the public function test in *Edmonson* with an earlier discussion of the unique participation of the state in which he noted, “[i]t cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist.” *Edmonson*, 500 U.S. at 622.

¹³⁸ Han, *supra* note 118, at 526.

¹³⁹ Robert S. v. Stetson, 256 F.3d 159, 165 (3d Cir. 2001) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995)).

¹⁴⁰ *Id.* at 166 (quoting *Flagg Brothers Inc. v. Lefkowitz*, 436 U.S. 149, 158 (1978)).

¹⁴¹ Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, at 415 (2006).

clearly from the Supreme Court's jurisprudence: the facts are crucial."¹⁴² In the Court's "often-quoted words, '[o]nly by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance.'"¹⁴³

The facts, indeed, do matter. However, even in the face of sufficiently similar factual circumstances, courts have been inconsistent in whether cases involving foster children are analogous to the right to safety of incarcerated individuals or those involuntarily hospitalized, as the Court indicated in *DeShaney v. Winnebago*.¹⁴⁴ Evidence of this inconsistency includes the Supreme Court's limited review of right-to-safety cases only in the context of inmates and mental patients, counterpoised with the lower courts' acceptance that the doctrine applies to situations involving foster children injured while in care.¹⁴⁵

In 1989, the Court attempted to bring clarity to the complex and blurred lines between public and private by elaborating the circumstances under which the State would bear a duty to protect citizens from harms inflicted by private actors and the circumstances under which a § 1983 claim could proceed on the basis of private conduct. In the seminal case of *DeShaney*,² the Court recognized a limitation on state agency liability when children are harmed by private actors—in this case, the father of a child whose risk of harm was made known to the State child welfare agency.¹⁴⁶ As the Court made clear, the defining element in *DeShaney* was the custodial context and the duty, or lack thereof, that arose from any kind of custodial or special relationship between the child and the state.¹⁴⁷ The Court unequivocally limited a child's right to safety and the state's liability for constitutional deprivations to only those children who were in the custody of the State, not those whose circumstances were merely made known to state officials.¹⁴⁸ The majority opinion in *DeShaney* established that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."¹⁴⁹ Moreover, "[b]ecause there was no constitutional requirement that the government provide such protection, the Court reasoned the state could not be liable for injuries that resulted when protective services were not provided [to protect the child from privately-inflicted harm]."¹⁵⁰

¹⁴² *Crissman v. Dover Downs Entm't. Inc.* 289 F.3d 231, 233–34 (3d Cir. 2002).

¹⁴³ *Id.* at 234 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)) (alteration in original).

¹⁴⁴ *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 201 n.9 (1989).

¹⁴⁵ Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 947 (2005).

¹⁴⁶ *DeShaney*, 489 U.S. at 192–93.

¹⁴⁷ *Id.* at 200.

¹⁴⁸ *Id.* at 201–02.

¹⁴⁹ *Id.* at 195.

¹⁵⁰ Carolina D. Watts, Note, "Indifferent [Towards] Indifference": Post-*DeShaney* Accountability for Social Services Agencies When a Child is Injured or Killed Under Their Protective Watch, 30 PEPP. L. REV. 125, 137 (2002).

The Court rejected the special relationship doctrine¹⁵¹ that the Third Circuit had found persuasive in an earlier matter with similar facts and the notion that a constitutionally based special relationship can exist outside of a custodial context.¹⁵² According to Chief Justice Rehnquist's opinion, "the only kind of special relationship that [can] trigger[] affirmative duties [i]s one in which the State takes someone into 'custody,' thereby depriving him of liberty and the ability to protect himself, as was the case of the inmate in *Estelle*, and the developmentally disabled man in *Youngberg*."¹⁵³

Pursuant to *DeShaney* and subsequent case law, therefore, the state may be liable for constitutional wrongdoing visited on children in the custody of the state:

[I]n what has now become a famous footnote, on which many circuit courts have based a right to safety in foster care, the majority opinion [in *DeShaney*,] provided [but did not expressly endorse,] that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."¹⁵⁴

While post-*DeShaney* cases make clear that constitutional accountability by state agencies may follow for harms suffered by children in state custody, if, for example, the standards described below are met, it remains unclear and inconsistent as a matter of common law under what circumstances constitutional accountability will extend to the private providers with whom state agencies now increasingly contract for services. The Court's footnote in *DeShaney*, making reference to a plausible analogy between children in foster care and prisoners or involuntarily civilly committed individuals, provides strong support to the argument that private providers contracting with the state to carry out child welfare services are state actors for the purposes of § 1983, thus expanding the scope of constitutional accountability beyond the state itself.¹⁵⁵

Although divining state action has remained an unpredictable and frustrating exercise, Supreme Court state action jurisprudence has widened the

¹⁵¹ See Laura Oren, *Safari into the Snake Pit: The State-Created Danger Doctrine*, 13 WM. & MARY BILL RTS. J. 1165, 1169 (2005) (citing *DeShaney*, 489 U.S. at 197 n.4).

¹⁵² *Estate of Bailey v. County of York*, 768 F.2d 503 (3d Cir. 1985) (recognizing that a duty to protect a child from abuse is not limited to situations where the child is in state custody, since a special relationship between a child and agency gives rise to liability for agency's failure to act).

¹⁵³ Oren, *supra* note 151, at 1170 (citing *DeShaney*, 489 U.S. at 199–200). Oren notes that:

In *Estelle*, the Court acknowledged that state inaction through conscious indifference to the serious medical needs of an inmate, could violate the Eighth Amendment In *Youngberg*, the Court recognized a due process right of an involuntarily committed man, who had the intelligence of a very young child, to safety and protection from assaults by other patients and from his own self-destructive acts.

Id. at 1168 (citing *Estelle v. Gamble*, 429 U.S. 97, 97 (1976); *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

¹⁵⁴ Balmer, *supra* note 145, at 946–47 (quoting *DeShaney*, 489 U.S. at 201 n.9) (third alteration in original).

¹⁵⁵ *DeShaney*, 489 U.S. at 201 n.9.

path. Most noteworthy is the Court's reasoning in *West v. Atkins*,¹⁵⁶ which arguably opens the door to the extension of private provider liability, provided the analogy of foster children to prisoners is successfully made.¹⁵⁷ In *West*, a prisoner brought suit under § 1983 against his treating physician, Dr. Atkins, a private orthopedist under contract to provide services on a part-time basis to a North Carolina state prison hospital.¹⁵⁸ The question presented to the Court was whether the physician's treatment of the prisoner was fairly attributable to the state and, thus, whether he was acting under color of state law.¹⁵⁹ The Court agreed that "the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the prisoner] by incarceration and to deny him a venue independent of the State to obtain needed medical care."¹⁶⁰ The Court continued, explaining that "[t]he State bore an affirmative obligation to provide adequate medical care to [the prisoner]," which it delegated to the private provider.¹⁶¹ Because the private provider willingly assumed the delegated function through contract, the prisoner retained his right to pursue an Eighth Amendment claim against Dr. Atkins.¹⁶² The aim of this article is to extend *DeShaney* and *West* to assess the issue of constitutional accountability in the context of privatized child welfare services.

A. Suffering the Consequences in the Absence of Accountability

As the literature attests, the scope of the privatization debate is vast. This article is, however, particularly focused on the implications for children and families served by private child welfare service providers with respect to constitutional deprivations suffered while in the care of private, as distinguished from public, providers. The scope of private providers includes all nonprofit and for-profit providers of child welfare services, including those providing foster care, foster care case management, psychiatric treatment, and other related care delivered as a direct consequence of a child's placement by the state into the child welfare system and the corresponding custodial authority exercised by the state. Note that this cast of characters includes not only private foster care agencies, but also the staff and foster parents they employ.¹⁶³

An illustration of the degree to which constitutional accountability might be compromised by the participation of private versus traditional state actors is *Robert S. v. Stetson School, Inc.*¹⁶⁴ The case involved Ro-

¹⁵⁶ 487 U.S. 42 (1988).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 43–44.

¹⁵⁹ *Id.* at 43.

¹⁶⁰ *Id.* at 55.

¹⁶¹ *Id.* at 56.

¹⁶² *Id.* at 56–57.

¹⁶³ There is marked discrepancy as to whether foster parents are considered "volunteers" or "employees." Not only does the distinction have legal significance, it also carries a meaningful symbolic value with respect to whether foster parents constitute a core or fringe element of a private agency.

¹⁶⁴ 256 F.3d 159 (3d Cir. 2001).

bert, who had been placed in the custody of the state child welfare agency in Pennsylvania.¹⁶⁵ In this case, Judge Samuel Alito (now Justice Alito) affirmed a lower court ruling that a private treatment and educational facility specializing in the treatment and education of juvenile sex offenders was not a “state actor” as required for a § 1983 claim.¹⁶⁶ Although prior to his death, the initial district court judge denied the defendant’s summary judgment motion pertaining to the defendant’s designation as a state actor, the district court judge to whom the case was later transferred ruled that the defendants were not state actors for the purposes of plaintiff’s § 1983 claim.¹⁶⁷ In his complaint, the plaintiff, Robert S., “asserted [substantive due process] claims against the school and its staff members . . . for violating his federal constitutional rights by subjecting him to physical and psychological abuse.”¹⁶⁸ Owing to the controverted public versus private identity issues, however, Robert’s constitutional claims were quashed at the summary judgment phase, leaving him with only a state tort claim to take to the jury.¹⁶⁹

By way of background—and because, as in all state action inquiries, the facts are crucial—it is necessary to trace the plaintiff’s path from public to, ostensibly, private hands. At age 13, Robert, who himself had earlier been sexually abused and subsequently became abusive of his younger sibling, was found to be a “dependent child” under Pennsylvania statute and placed in the legal and physical custody of the Philadelphia Department of Human Services.¹⁷⁰ The statute defined dependency in a manner largely resembling that relied on in other child welfare jurisdictions across the nation: to be a child who is “without proper parental care or control.”¹⁷¹ Although the appellate opinion takes pain to note that Robert was placed in the custody of the state “with his mother’s consent,”¹⁷² it is clear that, under the statute, no parental consent is necessary for a finding of dependency. Not only is such consent unnecessary for the state to make a finding of dependency, but, in practice, such “consent” is either lacking entirely or illusory in light of the state’s omnipotent power to coerce “consent” from vulnerable parents. Upon removal from his mother’s custody, Robert was placed in a private residential institution, Stetson School, Inc., located in Massachusetts, which specialized in the treatment and education of juvenile sex offenders, where he alleged that he was physically abused by members of the Stetson staff.¹⁷³ Pursuant to the Child Protective Services Act,¹⁷⁴

¹⁶⁵ *Id.* at 161–62.

¹⁶⁶ *Id.* at 161.

¹⁶⁷ *Robert S. v. City of Philadelphia*, No. 97-6710, 2000 WL 288111, at *1, n.1 (E.D. Pa. Mar. 17, 2000).

¹⁶⁸ *Stetson*, 256 F.3d at 161.

¹⁶⁹ *Id.* at 161, 164. As will be discussed later in this article, although civil state tort claims often remain an option, it is my belief that such tort claims are an insufficient vehicle for justice.

¹⁷⁰ *Id.* at 161–62.

¹⁷¹ 42 PA. CONS. STAT. ANN. § 6302 (2007).

¹⁷² *Stetson*, 256 F.3d at 162.

¹⁷³ *Id.* at 162–63.

Stetson was one of many privately run institutions with which the Department of Human Services entered into a variety of financial and performance contracts. These contracts had the practical effect of transferring physical custody and direct care of dependent children to the private facilities.¹⁷⁵

In the opinion of the Third Circuit, Stetson School, Inc., was not a state actor although it provided specialized treatment and education to children declared dependent by the Commonwealth of Pennsylvania, ordered into the custody of the state and placed by an order of the state, in Stetson's care.¹⁷⁶ The Third Circuit's reasoning relies most heavily on the Court's application of the public function test in *Rendell-Baker v. Kohn*,¹⁷⁷ an employment discrimination case in which the Court failed to find the defendant school to be acting "under color of law" when it dismissed a school employee.¹⁷⁸ Although strongly analogizing Stetson to the school in *Rendell-Baker*, Judge Alito's opinion selectively omits certain facts and larger contextual matters that would have the effect of favoring Stetson's designation as a state actor. The Third Circuit notes that "[a]s was true of the New Perspectives School in *Rendell-Baker*, the record here does not show that the Stetson School performed a function that has been traditionally the exclusive province of the state."¹⁷⁹ However, what was absent from the Third Circuit's opinion was a crucial analysis from the appellate opinion in *Rendell-Baker v. Kohn*, wherein the court stated that:

The "public function" concept is strongest . . . when asserted by those for whose benefit the state has undertaken to perform a service, or when the state has lent its coercive powers to a private party. In this situation, for example, those *students* of the New Perspectives School who were placed there by [the state] particularly those who are compelled to attend under the state's compulsory education laws, would have a stronger argument than do plaintiffs that the school's action towards them is taken "under color of" state law, since the school derives its authority over them from the state. . . . The school's authority over its faculty derives from the contractual relationship of employment, not from "state law," [therefore, even though] [t]he school does not perform any public function toward [the employees], . . . it may (although we do not now decide the issue) perform such a function toward some or all of its students.¹⁸⁰

This reasoning is consistent in its theoretical underpinning with the Court's analogy in *Deshaney* between foster children and other individuals whose liberty is restrained by the state. Moreover, although understood to be merely dicta in *Rendell Baker*, this reasoning has yet to be explicitly disavowed in any later Supreme Court opinion.¹⁸¹

174 23 PA. CONS. STAT. ANN. § 6301 (2007).

175 *Stetson*, 256 F.3d at 162.

176 *Id.* at 165.

177 641 F.2d 14 (1st Cir. 1981).

178 *Id.* at 23.

179 *Stetson*, 256 F.3d at 166.

180 *Rendell-Baker*, 641 F.2d at 26 (emphasis added).

181 Barak-Erez, *supra* note 87, at 1189 (noting that in *Rendell-Baker* the Court avoided the ques-

Although it would be an example of unduly simplistic reasoning to suggest that the designation of the private party as a state actor could rest solely on the fact that Stetson performs a public function—the Third Circuit’s opinion appears to infer that this was the whole of plaintiff’s case.¹⁸² To the contrary, Robert S. argued that Stetson was a state actor because the children were ordered by the state into its care and their harm could not have occurred absent the state’s exercise of coercive control over the child and his parents.¹⁸³ Nonetheless, the Third Circuit refused to regard Robert’s placement as involuntary and instead appeared to reframe the relationship between the child, the state, and the private agency.¹⁸⁴ In a display of Kafkaesque reasoning, the Third Circuit’s opinion mischaracterizes Robert’s placement as “consensual” on the mere basis that his custodian, the state, consented to placing him in the confines of the private facility.¹⁸⁵ According to this logic, wherever the state would have placed Robert—be it in a locked, out-of-state residential facility, such as Stetson, or any other institution for that matter—his presence there would have been consensual, therefore forestalling any ability on his part to raise a civil rights claim against the facility on the basis of a deprivation of his liberty.¹⁸⁶

tion of the rights of the enrolled students who were there by the will of the state, because the petitioners in the case were, instead, employees of the institution).

¹⁸² *Stetson*, 256 F.3d at 165–66.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 166–67. In contrast to its lack of success at the appellate level, the analogy of foster children to other incarcerated or committed individuals was found to be persuasive in two Eastern District of Pennsylvania cases that preceded *Stetson* and *Leshko*. In *Estate of Earp v. Doud*, No. CIV. A. 96-7141, 1997 WL 255506 (E.D. Pa. May 7, 1997) and later in *Donlan v. Ridge*, 58 F. Supp. 2d 604 (E.D. Pa. 1999), the district court recognized that foster care agencies, private and public, perform a function that is the exclusive prerogative of the state, “namely the removal of children from their homes.” *Donlan*, 58 F. Supp. 2d at 609. As Judge Fullham held in *Earp*, “while the day-to-day care of a child is not the exclusive prerogative of the state, the forcible removal of children from their homes most certainly is,” thus rendering a foster care organization a state actor for the purpose of § 1983 liability. *Earp*, 1997 WL 2555606 at *2. Notably, despite the precedent set by *Stetson*, this reasoning found success yet again in *Harris ex rel. Litz v. Lehigh County Office of Children & Youth Serv.*, 418 F. Supp. 2d 643 (E.D. Pa. 2005) wherein the district court reinforced the view that the removal of children from the home is an exclusive public function of the state, thus conferring upon the foster care agency the designation of state actor.

¹⁸⁵ *Id.* (“There is, . . . no factual basis for analogizing Robert’s situation at the Stetson School to that of a prisoner or a person who has been involuntarily civilly committed. Whether or not Robert, a minor at the time in question, personally wanted to attend the Stetson School, his legal custodian, DHS, wanted him placed there, and his mother consented. Thus, his enrollment at Stetson was not ‘involuntary’ in the sense relevant here, i.e., he was not deprived of his liberty in contravention of his legal custodian’s (or his mother’s) wishes.”).

¹⁸⁶ *Id.* The court in *Stetson* distinguishes Robert’s § 1983 claims from those successfully raised by students in *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982), by pointing to both the voluntary manner in which Robert was placed at Stetson and the degree of freedom Robert enjoyed while there compared to students at the Provo Canyon School. *Stetson*, 256 F.3d at 167. Although the court somehow interprets the facts differently, it is clear from the findings in the district court that, like many of the students in *Milonas*, Robert was there following his designation by the court as a dependent child and the custodial authority the state accordingly exercised over him. Moreover, like the students in *Milonas*, Robert had limited independence while at Stetson, where phone calls were monitored and no student was permitted to leave campus alone without the police being notified for the purposes of affecting the child’s return. *Id.* at 163. While Judge Alito was correct in noting that the district court had not found the limitations on Robert’s freedom to be identical to those of incarcerated prisoners, the court’s

Not only does the Third Circuit's opinion strain reality with respect to its characterization of the "voluntary" nature of Robert's designation as a dependent child and his placement in foster care, it also reveals a staggering insensitivity in its failure to appropriately regard public-private partnerships in the context of child welfare as distinct from most others. To assert that "the cooperation between the [state and the contractor] was only that appropriate to the execution of the subject matter of the contract and [that] the contractor's 'fiscal relationship with the State is not different from that of many contractors performing services for the state'"¹⁸⁷ fails to appropriately capture those features that make this kind of public-private partnership fundamentally different. Although it is largely absent from the court's reasoning in *Stetson*, the axiomatic and uncontroverted fact is that the state, and *only* the State, may involuntarily remove children from the custody of their parents, exercise legal and physical custody over them, and deliver them legally into the hands of private agents. This overarching contextual factor, which would have favored finding the private agent a state actor, was conveniently and curiously overlooked.

It is another Third Circuit case that highlights the risks faced by children in care whose private caregivers, paid foster parents, harm or abuse them. *Leshko v. Servis*¹⁸⁸ involved a case of a foster child who, alleging abuse by her foster parents, brought a civil rights claim against them. The plaintiff, Karen M. Leshko, was two-and-a-half years old when her foster mother, appellee Judy Servis, placed her in the kitchen sink of the Servis home to wash her.¹⁸⁹ There was a large pot of exceedingly hot water next to the sink and when Servis left the room, Leshko pulled it over on herself. She sustained severe burns across much of her abdomen, legs, and midsection. Both Servis and her husband failed to seek medical treatment for Karen for more than twelve hours.¹⁹⁰ When she reached the age of majority, Leshko brought suit against the county social services agency, various county officials, and her foster parents.¹⁹¹

As distinguished from the dependent child plaintiff in *Stetson*, Leshko's argument favoring classification of her foster parents as state actors was reasonably based on a 2002 Pennsylvania ruling holding that foster parents in Pennsylvania are considered county "employees" under Pennsylvania's Political Subdivision Tort Claims Act.¹⁹² "In Pennsylvania '[a]ny person who is acting or who has acted on behalf of governmental unit, whether on a permanent or temporary basis, whether compensated or

finding of "obviously significant limitations on the freedom of students enrolled at *Stetson*" strongly supports any analogy to the facts in *Milonas*. *Id.* at 169 n.11.

¹⁸⁷ *Stetson*, 256 F.3d at 166 (alteration in original).

¹⁸⁸ 423 F.3d 337 (3d Cir. 2005).

¹⁸⁹ *Id.* at 338.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² 42 PA. CON. STAT. ANN. § 8501 (2007). *Patterson v. Lycoming County*, 815 A.2d 659, 661 (Pa. Commw. Ct. 2002).

not' is an employee of that governmental unit."¹⁹³ Although it would appear that this classification should be to Leshko's benefit, it was not. Although the court "acknowledge[d] the force of [Leshko's] argument," in another example of uniquely flawed logic, it failed to find these same state employees to be state actors for the purposes of a civil rights claim.¹⁹⁴ Moreover, in a proverbial "state action" catch-22, "[t]he District Court dismissed Leshko's [state] tort claim against the Servises[,] . . . holding that the immunity provided by Pennsylvania's tort claims statute applied to the Servises as county employees."¹⁹⁵ Not surprisingly, neither the district court, nor, later, the Third Circuit Court of Appeals, in a panel that included Judge Alito, authoring judge of *Stetson*, found that the foster parents were state actors as required by § 1983. Karen Leshko has never received any compensation for the injuries she suffered while in care.

Relying on its unique interpretation of *West*, the court in *Leshko* concluded that state-hired private contractors are not automatically state actors under § 1983, even if the state is their only patron.¹⁹⁶ Although this may be true, as with *Stetson*, the court in *Leshko* omitted the contextual factors that add another layer of "publicness" to the state action landscape. Even if their designation by the state as official employees presents an insufficient basis on its own on which to ground a state actor attribution, this designation in addition to, and in the context of, the state's exercise of a uniquely coercive power should have been sufficient.

VI. WHY A § 1983 SUIT RATHER THAN A TRADITIONAL CIVIL TORT SUIT?

Section 1983 provides a remedy against persons acting under color of state law who violate an individual's constitutional rights. Although it does not provide any substantive rights, it is a vehicle for holding accountable officials acting under color of law. Claims raised under § 1983 may be regarded as constitutional torts, as the basis of the claim is civil, rather than criminal, in nature. In the typical suit against private providers of child welfare services, plaintiffs allege deprivations of substantive due process rights under the scope of "right to bodily integrity,"¹⁹⁷ most often arising from physical, psychological, or sexual abuse. Despite the Supreme Court's reluctance to expand recognition of a broader scope of harms as constitutional torts, there are several compelling justifications for framing the harms suffered by children in the custody of the state as constitutional torts rather than civil ones.

¹⁹³ *Leshko*, 423 F.3d at 342.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (limiting the protections afforded by the substantive component of the due process clause to "matters relating to marriage, family, procreation, and the right to bodily integrity.").

A. Federal Forum

The Fourteenth Amendment protects citizens from abusive state action.¹⁹⁸ The Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, was intended to grant litigants access to federal court for civil rights violations. After its enactment in 1871, § 1983 experienced a period of dormancy, until 1961 and the landmark Supreme Court case of *Monroe v. Pape*, in which the Court articulated the purpose of the state as granting private litigants a federal court remedy as a first resort rather than only in default of, or after exhaustion of, state action.¹⁹⁹ As Professors Blum and Urbonya explain, “the statute was intended to provide a *supplemental* [federal] remedy . . . necessary to vindicate federal rights because, according to Congress in 1871, state courts could not protect Fourteenth Amendment rights because of their ‘prejudice, passion, neglect, [and] intolerance.’”²⁰⁰ Framing such violations as constitutional torts goes to the very purpose of § 1983 as an antiviolence measure intended to extend protection from constitutional deprivations inflicted by private parties acting in complicity with the state. In the continuing debate over the superiority of a federal versus state forum for §1983 claims, many civil rights attorneys prefer litigating such claims in federal court, where it is believed that federal judges are more removed from local and state politics, and where litigants may be provided a more level playing field.²⁰¹

B. Recovery

In an era of increasing privatization, recovery can come from multiple sources in addition to the state agency itself. Although as noted earlier, immunities to constitutional torts might attach to the conduct of state officials and possibly those private actors “dressed” in state clothes, recovery is not affected by civil rights damages caps to the extent that it might be under tort caps. Some states have, for example, attempted to limit recovery from private providers of child welfare services through statutory tort reform. In 2005, a bill in Texas was introduced that “propose[d] privatization of substitute child care services statewide [at the same time capping] the liability of [private] agencies providing child welfare services on behalf of the state.”²⁰² The proposed damages cap would have amended Chapter 97 of the Texas Civil Practice and Remedies Code to limit the liability of private providers of child welfare services within the state and read in pertinent part as follows:

- (a) In an action on a liability claim in which a final judgment is rendered against a non-profit agency that provides child welfare services on behalf of the state to

¹⁹⁸ Shane, *supra* note 83, at 2.

¹⁹⁹ 365 U.S. 167, 183 (1961).

²⁰⁰ BLUM & URBONYA, *supra* note 11, at 2 (quoting *Monroe*, 365 U.S. at 180) (emphasis added) (second alteration in original).

²⁰¹ STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 192 (6th ed. 2004).

²⁰² Michael W. Shore & Judy Shore, *Personal Torts*, 58 SMU L. REV. 1045, at 1070–71 (2005) (citing Tex. H.B., 79th Leg., R.S. (2005)).

children in the conservatorship of the state, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply is a total amount, including prejudgment interest, not to exceed \$250,000 for each person and \$500,000 for each single occurrence of bodily injury or death.

(b) The limitation on civil liability does not apply to reckless conduct or intentional, wilful [sic], or wanton misconduct of a non-profit agency.²⁰³

Although the measure failed to pass, efforts are clearly underway to protect private providers from liability at the same time that they are increasingly occupying the spaces previously assumed by the government. In a cautionary note, the Shores observe that while, “[i]mproving child protective services should be a top priority of the Texas Legislature, . . . privatizing child welfare services [as a means of achieving this aim] is a risky proposition.”²⁰⁴ They argue that “[l]imiting liability of the child welfare service providers is particularly dangerous because the caps make it economically feasible for them to commit negligent acts. The service providers should know that if they fail to provide reasonable services, they will be held accountable for the fullest extent of their liability.”²⁰⁵

C. Immunities

The Court’s denial of qualified immunity to private prison guards in *Richardson v. McKnight* suggests that there might be limited expansion of immunities to private providers of all public services.²⁰⁶ In assessing whether two employees of a private prison management firm enjoyed a qualified immunity from suit under § 1983, the Court explained that because a private company subject to competitive market pressures when operating a prison is already restrained in its conduct by these same market factors, it did not require immunity from suit in order to perform its role.²⁰⁷ Although “lawsuits may well ‘distrac[t]’ these employees ‘from their . . . duties,’ the risk of ‘distraction’ alone cannot be sufficient grounds for an immunity.”²⁰⁸

²⁰³ *Id.* at 1071.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Richardson v. McKnight*, 521 U.S. 399, 412 (1997) (denying qualified immunity to private prison guards in § 1983 claim). Curiously, although the Court engaged in a thorough analysis of whether the private employees were entitled to qualified immunity from suit under § 1983, it passed on the issue of whether the private providers were even liable under § 1983. The Court instead noted that since the district court had assumed, but did not decide § 1983 liability, it was for the district court to determine whether “under this Court’s decision in *Lugar v. Edmondson Oil Co.*, defendants actually acted ‘under color of law.’” *Id.* at 413 (citation omitted).

²⁰⁷ *Id.* at 409. The Court noted that the most important concern with government immunity is unwarranted timidity. Such a concern is less likely present in a private prison because:

Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job.

Id.

²⁰⁸ *Id.* at 411 (citations omitted).

D. Artificial and Unnecessarily Forced Dichotomy

It is implausible that in litigating a claim by a plaintiff harmed in private care, a plaintiff would be forced to select remedies either exclusively through a civil tort or civil rights law. Skilled litigators acknowledge that although this is an “underutilized area of the law,” civil rights claims are effective in advancing the interests of children, particularly those whose harm is attributable to intervention by the state.²⁰⁹ To exclude a civil rights claim merely on the basis of the availability of tort remedies requires reliance on an artificial and unnecessarily forced dichotomy.

E. Expressive Theory of Constitutional Harm

One of the less obvious, yet equally important, justifications for framing these claims as constitutional rather than civil is the ancillary effects. Indeed, the focus on purely monetary remedies tends to obscure the ways in which the law can otherwise influence behavior for the public good. Framing harm to children in the care and custody of the state as a matter of constitutional law prompts us to consider the ways in which official designation communicates a particular standard of due care, both to those so designated, on whom the public relies, and to the public itself. In essence, it prompts us to inquire into the symbolic value of framing certain harms as violations of individual civil rights.

Assuming that human behavior is significantly shaped by the framework within which interactions occur, it is reasonable to assume that in a private, versus public, setting, the inculcation of public values is less likely to guide individual conduct. I posit that designating the wrongdoer as a public figure, thereby framing the harm as a constitutional violation, will assist in establishing “rules so clearly defined and so generally accepted as effectively to control the actions of [private providers as they do] public officers.”²¹⁰ Framing harms as constitutional in nature challenges the private agencies to comport themselves, and to order the conduct of their employees, in a way consistent with their designation as “agents of the state”—ideally placing public good above profit, and injecting public-oriented professionalism where an ethos of entrepreneurship may now dominate. In the most tangible example of the expressive ways in which a designation or label communicates a “public” persona, with all the atten-

²⁰⁹ Telephone Interview with Thomas F. Johnson, Esq., attorney in *V.M. v. City of Philadelphia*. (Jan. 16, 2007). Mr. Johnson was the plaintiff’s representative in a tragic case of systemic failure on the part of Philadelphia DHS, the private child welfare agency with whom it contracted, and the child’s own public guardian. In what is described as “one of the city government’s biggest civil-rights awards in memory,” the plaintiff was awarded a multi-million dollar settlement for harm she suffered while in the care of the Philadelphia Department of Human Services and the direct supervision of a private agency, Tabor Children’s Services, who was paid by DHS to help oversee the child’s foster care placement. Ken Dilanian, *A Tragedy that Money Can’t Fix*, PHILA. INQUIRER, Dec. 22, 2006, at A1. Interestingly, according to Mr. Johnson, the private provider, Tabor Children’s Services, did not challenge its designation as a state actor for the purposes of the suit and instead settled with the plaintiff for a sum of \$1 million. Telephone Interview with Thomas F. Johnson, *supra*.

²¹⁰ Shane, *supra* note 83, at 6.

dant public responsibilities, it would be unthinkable to not require some police officers, at least those who interact regularly with the public, to don uniforms that identify themselves as officers. The uniforms—the veritable “garb” of the state—represent and communicate something to the officer and to the public: that the officer and the State are one. My assertion is not merely speculative; we could easily measure the effect of state actor designation on ostensibly private actors. It is a question worthy of further empirical inquiry whether state actor attribution would translate into more “caring” or “responsible” providers or whether an official designation would provide private actors a greater incentive to adhere to a particular standard of care.

This communicative or expressive justification for state actor designation rests on a subjective application of the state action test, not from the vantage of the alleged state actor, but from the vantage of children and families in the system who are the direct objects of the state’s actions. Applying the subjective expressivist theory advanced by Professor Godsil, this argument challenges the belief that “the meaning of government action should be determined from the perspective of an ‘objective observer,’ . . . [since] this objective observer standard [falsely] presumes that different . . . groups place the same meaning upon the expressive content of a government action that affects them differently.”²¹¹ In challenging this “universal” objective observer standard, Godsil acknowledges that “in charged contexts, the same actions or set of circumstances may be perceived very differently depending on the perspective of the observer [And that] the meaning assigned to such actions is inherently rooted in the perspective of the person interpreting them.”²¹² In “propos[ing] . . . that the meaning of a government action be determined from the perspective of a reasonable member of the allegedly affected community,”²¹³ Godsil’s argument supports relying on the perspective of those ordered into state care to assess whether they perceive the private providers in whose care they

²¹¹ Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 250 (2003). Although Professor Godsil does not use expressivist theory in the context of substantive due process rights, as I am attempting to do herein, I find her argument for a subjective assessment of harm in the context of governmental expression particularly useful. She attributes a restatement of expressivist theory to Elizabeth Anderson and Richard Pildes who she says “posit that the legality of an actors’ conduct is dependent upon whether that conduct ‘expresses appropriate attitudes toward various substantive values.’ Actions that convey attitudes that are contrary to accepted norms constitute ‘expressive harms.’” *Id.* at 274. As Godsil explains:

An expression is an action, statement, or any other expressive vehicle that manifests a state of mind. The state of mind can be cognitive—beliefs, ideas or theories—but can also include “moods, emotions, attitudes, desires, intentions, and personality traits.” Expression can also take place at the level of state action, where policies and deliberative principles can be interpreted as “expressing official state beliefs and attitudes.” The role of expression is to bring a state of mind into the open for others to recognize and interpret. A particular action, statement or other vehicle may be more or less successful in conveying the state of mind of the actor.

Id. at 274.

²¹² *Id.* at 250.

²¹³ *Id.* at 247.

have been delivered to be state actors or merely private persons.

F. Missing the Mark

Confusion in case law on the matter of liability of private providers arises from the focus on a number of arguably irrelevant factors that courts have nonetheless relied on when attempting to discern the degree of “publicness” or “privateness” of service delivery. I assert that these factors miss the mark with respect to the key underlying feature that bears the ultimate mark of “publicness”—exclusive state dominion.

Perhaps through a lack of understanding, experience, or empathy, courts that have failed to find private providers to be state actors have also rejected a more precise discernment of the role of the state in the tradition of child welfare, focusing instead on the mere participation of private parties in the provision of direct care. However, mere participation of private parties does not render the conduct itself wholly private, just as the mere participation of a state actor does not cloak the conduct under the garb of the state. The strongest example of this axiom would be in the area of privatized prisons. Although there is an extensive history in private enterprise of providing correctional services, most courts would be reluctant to regard incarceration as an historically wholly private affair.²¹⁴ There is something distinctly governmental about the deprivation of liberty that characterizes prisons, and something sufficiently parallel to the experience of children and families in foster care to warrant finding private providers to be state actors.

Both the *Stetson* and *Leshko* opinions take pains to note the presence or absence of parental consent to the placement of a child in state care. As noted earlier, such consent is either unnecessary or entirely illusory in the context of the authority wielded by the state against families in the child welfare system.²¹⁵ Although the Third Circuit did not explain at length in *Stetson*, it appears that the reluctance to analogize Robert’s plight to that facing prisoners and other involuntarily civilly committed individuals appears to be based on an assumption that because minors are perpetually deprived of their liberty, they have as such no independent constitutional claims that can be based on facts suggestive of deprived liberties.²¹⁶

VII. RECALIBRATING THE STATE ACTION TEST IN A NEW ERA OF PRIVATIZED CHILD WELFARE

Just what would an alternative test look like? The faulty application of the traditional state action doctrine and the failure to account for the myriad of services that fall within the category of inherent governmental func-

²¹⁴ AUSTIN & COVENTRY, *supra* note 14, at 9 (tracing the private sector involvement back to shortly after the first English colonists arrived in Virginia in 1607).

²¹⁵ *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 162, 167–68 (3d Cir. 2001); *Leshko v. Servis*, 423 F.3d 337, 338, 347 (3d Cir. 2005).

²¹⁶ *Stetson*, 256 F.3d at 169.

tions strengthens the call for a new state action test—one that assesses the intrinsic governmental nature of the function, and one that better reflects our current privatization realities.²¹⁷ Under an “intrinsic governmental function” test, rather than focus on the “traditional” and “exclusive” nature of the relationship, a new state action doctrine would regard the intrinsically public nature of the function and the corresponding actor delegated to carry it out as sufficiently indicative of state action.²¹⁸ Under such an analysis, the uniquely coercive character of the state intervention must form the backdrop against which any state actor designation is made. Although including factors related to the history of public-private partnerships, an “intrinsic governmental function” test would more appropriately recognize the exclusive kind of coercion that the state exercises when exploring the relationship between the private provider and the contracting public agency.

Although this is not a position advanced in this article, Professor Barak-Erez notes that “[a]nother way to criticize the constraints of the current doctrine is by revealing its unjustified differentiation between state contracting with individuals and state contracting with a [corporation].”²¹⁹ In an argument embedded with strains of the Court’s symbiotic relationship test, she observes that the contractual relationship that essentially binds the employee to the state might have equal force when exploring the liability of private agencies contracting with the state. According to Barak-Erez,

The Supreme Court never doubted that public sector employees are state actors However, looking more closely at the matter, public employees are identified with the state due to their contractual relations with it and, sometimes, the statutory powers given to them. Given this basis, close contractual relations, sometimes coupled with statutory status, should equally suffice with regard to corporations operating public institutions or public services.²²⁰

The key focus of a new state action test should involve an inquiry into whether the function “necessarily involve[s] the power properly reserved to the sovereign” or whether “the function is largely private in character, requiring none of the coercive powers of the sovereign” to be achieved.²²¹ Although the case for the continued use of the traditional state action doctrine is based, in part, on the interest of preserving freedom in the private domain from unnecessarily rigid restrictions, this argument proves to be rather misleading, especially in the case of those providing care to children removed from their homes, where such protections from harm are crucial.²²² The focus on the protection of private providers over that of vul-

²¹⁷ See Sullivan, *supra* note 8 (noting varieties of arrangements between governments and private service providers that immunize both government and private groups from constitutional restraints under the Supreme Court’s current state action jurisprudence). “Function” as used in the proposed “intrinsic governmental function test” is defined for these purposes as the care of children removed by the state.

²¹⁸ See Metzger, *supra* note 9, at 1369.

²¹⁹ Barak-Erez, *supra* note 87, at 1187.

²²⁰ *Id.*

²²¹ See Moe, *supra* note 79, at 457.

²²² Barak-Erez, *supra* note 87, at 1185–86.

nerable children is utterly misguided:

The [critical] question is not whether “pure” private enterprises should be free of constitutional limitations. The question is how to conceptualize the divisions between public and private—whether privatized enterprises are always “private,” or sometimes serve as new actors in the public domain. The question is really whether old tests should be applied to new realities.²²³

Ironically, it is the Third Circuit that again offers a relevant example in the attempt to discern a new state action test better, although imperfectly, reflective of the kind of line-drawing necessary in addressing the new public-private partnerships in child welfare. In a case, *C.K. v. Northwestern Human Services*,²²⁴ which followed *Stetson* but preceded *Leshko*, the district court looked not only to the identity of the defendants, but to the purpose of the child’s placement in finding that the private providers were state actors under § 1983. *C.K.* involved a child found to be delinquent and placed in the care of a private residential facility, Northwestern Academy,²²⁵ where she alleged that she was sexually abused.²²⁶ The district court found that the private facility and its employees, which had custody of the child pursuant to a state court order, were state actors acting under color of state law because they were performing a quintessentially governmental function.²²⁷ The court described the purpose of her commitment to Northwestern Academy as rehabilitation, which it considered to be “a power that is traditionally exclusively reserved to the State.”²²⁸ According to the court,

We see no basis to reach a different result than in *West* . . . simply because Northwestern Academy is a juvenile facility for delinquent children rather than a prison for adults. Both house persons involuntarily deprived of their liberty as a result of judicial process. Moreover, the court in *Stetson*, in finding no state action by a school for ‘dependent child[ren],’ was careful to distinguish it from an institution for ‘delinquent child[ren].’ The court’s opinion, as we read it, strongly suggests that it would have found state action had *Stetson* been an entity having custody of children in the latter category.²²⁹

²²³ *Id.*

²²⁴ 255 F. Supp. 2d 447 (E.D. Pa. 2003).

²²⁵ *Id.* at 448. Northwestern Academy is a subsidiary of a Pennsylvania non-profit corporation, Northwestern Human Services, Inc., “which provides a variety of services to children and adults in Pennsylvania.” *Id.*

²²⁶ *Id.* For the purposes of my argument, it is irrelevant to distinguish between findings of dependency and delinquency. The literature addressing children in state care supports the understanding that both systems operate for the purpose of treatment and rehabilitation of children and families. Moreover, many child welfare statutes, such as that in *Stetson* and *C.K.* have some overlapping distinctions of delinquency and dependency. For example, 42 PA. CONS. STAT. ANN. § 6302 (2007) defines a “delinquent” child as one who is “ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation” and defines a “dependent” child as one “under the age of ten [that] has committed a delinquent act.”

²²⁷ *C.K.*, 255 F. Supp. 2d at 451.

²²⁸ *Id.*

²²⁹ *Id.*

According to the district court, the only manner in which the *Stetson* court was willing to regard Robert as similarly situated to a prisoner were if he had been adjudicated delinquent rather than dependent. However, given that both designations—dependent and delinquent—fall within the scope of child welfare law, with the broadly defined aims of rehabilitation, treatment and substitute care, any distinction between the two, at least as it shapes the identity of the private provider, should be irrelevant. It is for this reason that I view the reasoning in *C.K.*, which reflects the same assumption, to be imperfect. Nonetheless, the court looked to the uniqueness of the role played by the state—to care for children deprived of their liberty—in attributing a public identity to the private providers. In a more sufficiently keyed application of the state action test, the court in *C.K.* explored not only the “links between the private person and the state, but also . . . the significance of each tie and the cumulative effect of the ties.”²³⁰

In a hypothetical application of the intrinsic governmental test, were a child injured by a foster parent or staff member of a residential facility, the child would retain a right to pursue a civil rights claim for deprivation of a constitutional right if the child’s placement in that setting were a direct result of the state’s unique, exclusive and intrinsic authority to remove children from their homes, thereafter delivering them to the care of others. In this sense, the intrinsic governmental test largely resembles the approach embraced by the court in *C.K.*

On a practical matter, even in the absence of a new state action test, state child welfare agencies should continue to be alarmed about minimal or flawed accountability under the current contracting scheme. As previously discussed, few state agencies have sufficient staff devoted to reviewing private agency compliance with contractual terms. Moreover, there will always be a lack of meaningful review if the criteria for review are simply target percentages of the number of parents who will be satisfied with services and the number of children who reach permanency within a prescribed time frame. The absence of a more robust accountability scheme provides further support for the thesis of this article, that given the unique nature of foster care placement—one that reasonably parallels the circumstance faced by prisoners and individuals involuntarily committed by the state—courts should be more willing to extend liability for constitutional deprivations to those who contract with public agencies for the provision of care.

VIII. CONCLUSION

Regardless of where one stands in the debate on privatized child welfare services, it is clear that these longstanding public-private partnerships will continue to exist in some form or another. That said, the rush to privatization must be tempered by measured concern for the level and effective-

²³⁰ BLUM & URBONYA, *supra* note 11, at 11.

ness of accountability, constitutional and otherwise, to all relevant parties.

As it is currently conceived and implemented—often with only vague outcome measures, minimal oversight, and lax accountability—privatized child welfare services fail to sufficiently safeguard child well-being. The failure to address overall well-being is, moreover, accentuated within the context of privatized service delivery as the concept is, in and of itself, a challenging one to operationalize, let alone accurately assess, as a function of performance-based contracting, the now accepted metric in public-private partnerships. Many existing privatization models currently rely on outcome criteria that are not designed for human service evaluation, but rather a managed care model for delivery of health care. Reasonable arguments have been raised that the matter of safeguarding against harm and building in accountability can only be appropriately addressed with properly drafted contracts.

It is clear that privatization works best in the context of limited, discrete and easily measurable outputs. Think of the privatization of trash collection where the output is clearly delineated and assessed—trash must be picked up regularly. There are many similar transactions in the marketplace, with each private trash collection agency competing to deliver better performance within a fairly narrow range of measurable output. Moreover, because government can contract out trash collection or even allow consumers to select from government and non-government providers, trash collection is not an intrinsic governmental function. Since “[p]rivatization becomes less successful as the number of outcomes increases and their quantification is on different measurement scales[.]”²³¹ the use of outcomes-based metrics is too complex and ill-suited to the human service work that is at the core of child welfare. At the provider level, as well as at the direct service level, the focus should be on precisely defined longitudinal and well-being based assessments with recognition that they might very well clash with the fiscal demands of private for-profit and nonprofit agencies and the timeframe of most public-private contract arrangements. As Professor Kennedy notes, when it comes to purchasing the care and control of drug addicts, the safety and nurturing of children, the relief of hunger and the regulation of family life through child welfare interventions from private agencies, core values other than economic efficiency are at stake.²³² We must recognize “that the impact of this transformation on the future of the American welfare state has not received adequate attention.”²³³

Even while acknowledging the importance of contract drafting, monitoring, and compliance, it is critical to admit that these interventions will do little to remedy actual harms caused to service recipients, and whose claims

²³¹ Blackstone & Hakim, *supra* note 57, at 489.

²³² Kennedy, *supra* note 10, at 207.

²³³ *Id.* at 206 (quoting STEVEN RATHGEB SMITH & MICHAEL LIPSKY, *NONPROFITS FOR HIRE* 11 (1993)).

can only be addressed in the course of litigation. Unlike the state agency that may cancel or decide not to renew contracts with private agencies on the basis of poor performance, the direct recipient of care has no remedy arising from contract compliance or performance monitoring, but only from suit brought against the state and/or private agencies that delivered his or her care. It is here where constitutional claims raised by plaintiffs have slipped through the cracks, as courts have clumsily attempted to graft an antiquated state action doctrine onto a new public-private reality.

The aim of this article has been to highlight this more particularly troubling aspect of the privatization transformation—that “[i]f the state action doctrine does not change to accommodate new realities, we are in danger of losing an important constitutional check on the exercise of administrative power.”²³⁴ It is evident that any workable state action doctrine will require flexible application, especially during a period in which we are “reinventing” government. That said, however, flexibility need not trump consistency and predictability. Certain characteristics of the relationship between government and private entities will always be relevant to the inquiry of whether an action can be fairly attributed to the state. Again using the trash collection analogy, it is easy to see how some public-private partnerships are more analogous to private exchanges of goods or services than others. Among the dispositive elements that must be considered are “the existence, nature and extent of government funding; the nature and extent of government control of the activity in question; the extent to which government has authorized a contractor to exercise government powers; and a functional (holistic) analysis.”²³⁵ It is my hope that this piece will add to the ongoing dialogue.

²³⁴ *Id.* at 207.

²³⁵ *Id.* at 219.