

CORPORATE VICIS AND CORPORATE VIRTUES:
DO PUBLIC/PRIVATE DISTINCTIONS MATTER?

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INTRODUCTION: "PUBLIC" AND "PRIVATE" IN THE
LIFE OF LEGAL SCHOLARSHIP

What is public, what is private, and who cares? These days, to present a Symposium on *The Public/Private Distinction* is a bit like staging a Tommy Dorsey revival. Most of legal scholarship is caught up in the new sounds—"fairness/utility," "Rawls/Nozick," "property rules/liability rules"—public/private having slipped into memory with the other old favorites. (Remember Durham/M'Naghten and Neutral Principles?)

Surely it isn't that public/private has gone from favor on the bench. Judges still give it an ear. Why, then, is it receiving so little play in the journals?

Part of the answer is that scholarship, like anything else, is subject to vogue. After a while, the variations one can delve from a popular theme become exhausted, and the results too familiar. But there is more to it than a fall from fashion. The substantive objection is not so much that the terms have worn, as that they have spread thin, extended into too many disparate contexts, in each of which something different hangs in the balance. In one situation, what we ultimately want to know is whether, in the circumstances, a distributor of leaflets can be ejected;¹ in another, whether property can be "taken" by condemnation;² in still another, whether the police need a warrant to arrest.³ In each context public and private enter our thinking. But in each, the real

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I wish to thank, for their comments, Allan Axelrod, Barbara Herman, Blair Levin, Martin Levine, Michael Moore, Judi Resnik, Larry Simon, David Slawson, Matt Spitzer, Jeff Strnad, Bob Thompson, and Norm Wegener.

¹ See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 362 U.S. 501 (1946).

² See *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 171 (1959) (public port enjoined from taking land by eminent domain because "public use" not shown).

³ See *United States v. Santana*, 427 U.S. 38 (1976) (front doorway of residence a "public place" for fourth amendment purposes, supporting warrantless probable cause arrest).

decisional force seems to be exercised by independent policies and principles strong enough to bend public and private to the shape they need.

Accordingly, there is not so much one "public/private" dichotomy, as several. Among them, there are family resemblances: some criteria of public that are relevant to, for example, free speech (what constitutes a public figure?) reappear relevant to searches and seizures (what constitutes a public place?). But as we shift to more remote contexts (what is a public purpose supporting a municipal bond issue?) the considerations that shape our decision are less recognizably similar. As a consequence, any scholar with a curiosity about public/private is tempted, perhaps well-advised, to carve out public and private *this* or public and private *that*, as the only way around the vaguest abstractions or the slyest tautologies.

If those are the substantive reservations that have warded recent scholarship from public/private (one finds their traces in most of the Symposium's other contributions), they are more or less valid. "More or less," because there are at least two legal languages in which public/private is enlisted; doubts about the terms' importance are more valid as to the one language and less as to the other.

First, there is the language that courts and agencies employ in the law's routine operating level: the language of rules and regulations, statutes and opinions. Transcending that is the legal "metalanguage" of policy statements and principles, the chat of academicians, many of whose terms never descend into the operating language, but which serve to assess, direct, and nurture it.⁴

Public and private belong to a set of terms that have currency in both languages. In the operating language, they claim a place alongside "last clear chance" and "malice"; in the metalanguage, alongside "fairness" and "utility." It is regarding the operating language that the reservations about public and private are strongest, there generally being more severe objections to vagueness and ambiguity when it comes to fashioning the workaday rules on the steadiness of whose meanings communities must depend. By contrast, the requirements we impose on a term's acceptability in the metalanguage are generally looser, and more pragmatic. A concept has a valid place, as long as it can germinate good coherent insights. Indeed, the very vagueness that is a vice in the operating level (for

⁴ I have maintained elsewhere that there may be as many as four law-related languages, often overlapping, with which law scholarship could be concerned. See Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1175 n.84 (1981).

example, in the definition of a crime)⁵ may prove in the metalaw to be a virtue, precisely because it leaves room for the play of meaning on which the evolution of society depends.

These distinctive requirements affect the way in which the two languages are connected. Securities law, for instance, is informed by the metalegal notion that some security issues that are broadly traded (public) ought to be regulated differently from those whose market is limited (private). But in implementing that policy—translating it into terminology workable on the operating level—precise quantitative standards, based on such factors as numbers of shareholders, serve as finely honed proxies for public and private, which do not themselves make an appearance in the statutes.⁶

All this warns, if warning were needed, how seamless and forbidding the public/private distinction can become. But it also suggests the value of a symposium that promises to restore it to scholarly respect and examination. With regard to the operating language, my sense is that any grand effort to collect and unify all the diverse functions public/private plays, context to context, would produce a large compendium, but little insight. In this area, scholars would better aim to identify the context-specific criteria for public and private, and even to encourage the development of more precise surrogates (open, governmental, secret) when other needs of the law, such as reckonability, require. But with regard to their more general, metalegal usages, I doubt that there are equivalent terms equally well freighted. A good society needs a commitment that public/private *matters*, even allowing that the terms are destined, over time, to matter in different ways in different areas.⁷

⁵ Notwithstanding their apparent openendedness, even the terms public and private may appear in the definition of some crimes. See, e.g., CAL. PENAL CODE § 314 (West Supp. 1982) (misdemeanor to expose one's "person, or the private parts thereof, in any public place . . .").

⁶ Similarly, Title VII's proscriptions against discriminatory hiring never invoke public and private as such. Instead the law speaks of employers (in commerce) with 15 or more employees. See 42 U.S.C. § 2000e(b) (1976) ("employer" covered by Act to include those employing fifteen or more persons). But what is that number, other than a compromise of the values that contend in the metalaw under color of public and private, including the proper limits of governmental power, and the sorts of "persons" whose claims to liberty deserve recognition?

⁷ See, e.g., the Supreme Court's recent pronouncement on the fundamental issues that revolve around public/private in the state action area:

Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the state, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own

The present paper does not, however, aspire to all that, to track public/private to its metalaw lair, and to examine it there in its fullest original. Mine is a distinctly less heady, less heroic chore. I have been asked to concentrate on the influence of public and private in shaping the laws affecting corporate conduct, where corporate is broadly understood to include the whole range of formal bureaucratic organizations, both those that are formally chartered—ordinary business corporations, incorporated charities, municipalities, nonprofits, and so on—as well as the host of unincorporated bureaucracies, ranging from associations to governmental units such as water districts and federal agencies. The task is to evaluate how public/private distinctions might rightly affect society's judgment both as to what is expected of these organizations, and as to the methods appropriate to make them behave accordingly.

Another paper, one which I have not written, might do well to start with some theory—of the state, of personal liberty, of socio-biology—and to derive such public/private distinctions in the corporate field as the theory required. My strategy has been the opposite tack: to begin with the public/private distinctions that present law relies on in fact, and to build upward, toward the theoretical abstractions and justifications.

In part I, I discuss how the growing effacement in traditional distinctions between public and private activities and actors is clouding analyses that purport to turn on that dichotomy. But despite this increasing ambiguity, the law appears determined to work with some distinction along those lines. The balance of the article examines the results of that determination in two broad regions of law. Part II canvasses what I call the region of public immunities and private liabilities. In this region the corporate body stands to win if it is characterized as public, but to lose, if private. Sovereign immunity is the paradigm example. In part III, I consider the converse, the region of public liabilities and private immunities. In this region, the corporate body bears liabilities if characterized as public, but emerges immune if private. In this region, state action cases provide the paradigm.

In dealing with each region, my aim is to summarize for the Symposium's consideration some of the influence public/private thinking has had on the law in the corporate area; to examine, in

power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.

light of the considerations that dominate each region, what rational warrant there may be for retaining distinctions based upon public and private characteristics of the organization; and to see whether we can derive from the rationales some guidelines for characterizing the hybrid actors and activities as one or the other—at least, in those circumstances in which some sort of public/private distinctions ought to continue to matter.

I. PUBLIC AND PRIVATE IN THE LIFE OF LEGAL FICTIONS: AN OVERVIEW

A. *The Complexity of Corporate Activity and Organization*

Restricting our scope to the functions of public and private in corporate law does not eliminate—it rather illustrates—the several reasons those labels have come to be viewed warily. For even when limited to public and private “corporations,” the difficulties of locating a single sense of public/private remain. One reason is that the world of bureaucratic actors and activities is so complex and shaded that it is difficult to distinguish the public from the private by reference to any single clear set of standards. Another is that as we move around this one field, we still find public and private playing roles which, although more familial, are nonetheless distinct.

Let me start with the first impediment to a single unifying conception, the hybrid character of social actors and activities. In the abstract, we may have notions of what is private and what public, but actual actors and activities rarely satisfy all our notions of what it takes to be one or the other.

Begin with the problem of typing actors. Suppose, for example, we offer a distinction along the lines of politics and markets as a first slice: ⁸ “private” are those bodies that are constrained and nourished through market exchanges; ⁹ “public,” through political act. A moment’s reflection will show, however, that political incentives and market incentives are too entangled for us unambiguously to sort out organizations subject to the one from organizations subject to the other. With the expenditures of federal, state, and local governments running at \$960 billion annually ¹⁰—over 1/3 of

⁸ The reference is, of course, to C. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS* (1977).

⁹ The nonprofits ordinarily receive their wealth through donations from the private sector, often supplemented with government support. See generally Hansmann, *Reforming Nonprofit Corporation Law* 129 U. PA. L. REV. 497 (1981).

¹⁰ U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES* 276, table 468 (102d ed. 1981) (lists expenditures by all levels of government as \$958.7 billion in 1980).

GNP¹¹—the extensive dependency of private companies on the political trough is evident. And even the private companies reliant on market exchanges, not politics, as the predominant source of wealth are responding to signals that are heavily doctored, in amplitude and even in kind, by public action: taxes, tariffs, patents, public subsidies, labor laws, antitrust statutes, and so on. Viewing it from the other side, the actors we think of as public are not detached from markets. The Port of Los Angeles and the Port of Long Beach—both public authorities¹²—are engaged in earnest competition for transport handling revenues. Even more striking, municipalities, public authorities, and other public agencies compete against the for-profits for funds in the bond market, and are increasingly conscious, not merely of their general financial condition but even of the relative ratings of their bonds.¹³

We can, of course, try to specify a list of organizational characteristics that would in general type a corporation as public or private, all other things being equal.¹⁴ But it seems impossible to eliminate a large class of hybrids not clearly on one side or the other. There are corporations that are market-oriented in their sales efforts, but whose life in fact depends, as more and more economic life depends, on government licenses and other privileges. There is an increasing number of corporations that are federally chartered, whose boards are appointed by the President with Senate approval, that are subject to “sunshine” regulation, but whose employees are specifically declared not to be government employees.¹⁵ For example, the Communications Satellite Corporation (Comsat), is federally chartered, three of its fifteen directors are presidentially appointed, and it is obligated to make certain special congressional reports. At the same time, it is a stock corporation (within special

¹¹ GNP for 1980 was \$2.6261 trillion. *Id.* 420, table 699.

¹² Public authorities are public bodies that generally enjoy a legal, administrative, and financial autonomy beyond that of ordinary government agencies and public corporations. See A. H. WALSH, *THE PUBLIC'S BUSINESS: THE POLITICS AND PRACTICES OF GOVERNMENT CORPORATIONS* 39-44 (1978).

¹³ See *Special Report: State and Local Government in Trouble*, *Bus. Wk.*, Oct. 26, 1981, at 135, 154-58.

¹⁴ By “organizational characteristics” (as opposed to “activities characteristics,” see *infra* text accompanying note 22) I include (1) the organization's formal legal status, e.g., whether a municipality, government agency, or business corporation; (2) its principal source of funding, e.g., whether through the public purse or through market exchanges/donations; and (3) the principal direction of its managerial accountability, e.g., whether accountable to the electorate or to investors/beneficiaries/donors, etc.

¹⁵ See, e.g., Public Broadcasting Act of 1967 § 201(a), 47 U.S.C. § 396(b) (1976) (creating the nonprofit Corporation for Public Broadcasting, “which will not be an agency or establishment of the United States Government.”).

constraints)¹⁶ and expressly denominated "for-profit."¹⁷ Another sort of hybrid is resulting from court-approved settlements, particularly under the securities laws, whereby the selection of officers and directors of otherwise private corporations has been subjected to the approval of public agencies.¹⁸ In other instances, the bureaucratic offices of private companies, and some of the tasks expected of those offices, have been shaped by public action, through judicial remedy,¹⁹ legislation,²⁰ and regulation.²¹

It is not only the hybrid organizational characteristics of the *actors*²² that so often blurs the public/private distinction; boundaries between public and private *activities* are also unclearly marked. Witness the distinct treatment that has been accorded common carriers, inns, and like enterprises "affected with a public interest,"²³ and the conceptual shambles that have resulted from trying to maintain the governmental-proprietary distinction in the sovereign immunity field.²⁴ Whatever lines may once have existed are closer than ever to obliteration. Governments are in many

¹⁶ See 47 U.S.C. § 734(b)(2) (1976) (ownership of voting Comsat shares by authorized communications common carriers not to exceed 50% of shares issued and outstanding).

¹⁷ See 47 U.S.C. § 731 (1976).

¹⁸ See Matthews, *Recent Trends in SEC Requested Ancillary Relief in SEC Level Injunctive Actions*, 31 Bus. LAW. 1323 (1976) (reviewing securities cases settled on terms that affect management and bureaucratic structure).

¹⁹ For example, a 1973 consent decree between AT&T and EEOC required each major subdivision of AT&T to establish certain employment opportunity officers with designated functions. See, e.g., *AT&T Discrimination Settlement*, 8 LAB. REL. REP. (BNA) (431 Fair Empl. Prac. Man.) 73, 87, 95-96. See generally, Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1, 37-38 (1980).

²⁰ An example is the ordinary corporations code requirement that there be a board of directors with certain powers, such as to declare dividends. See, e.g., MODEL BUSINESS CORP. ACT §§ 35, 45 (1979).

²¹ See, e.g., Current Good Manufacturing Practice for Finished Pharmaceuticals, 21 C.F.R. §§ 211.1-.208 (1981) (FDA regulations requiring pharmaceutical firms to establish internal procedures assuring quality control as prescribed by the FDA); 10 C.F.R. § 21.21(a) (1982) (Nuclear Regulatory Commission regulation requiring licensees to adopt procedures to inform responsible officers of hazard indications).

²² See *supra* note 14.

²³ See *Bell v. Maryland*, 378 U.S. 226, 296-300 (1964) (Goldberg, J., concurring) (discussion of common law obligations even of theatres, as well as of common carriers, hotels, etc.).

²⁴ See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 979 (4th ed. 1971) ("It has been said that the rules which courts have sought to establish in solving [the meaning of the governmental-proprietary functions distinction in municipal immunity doctrine] are as logical as those governing French irregular verbs.").

traditionally private lines of business, such as land development, railroading, insurance, and fuels production.²⁵ Meanwhile, traditional public services are increasingly available from the private sector. It isn't just private mails. In California you can even rent-a-judge.²⁶ Many municipalities contract with for-profits to supply local services such as refuse and even police and fire protection.²⁷ The federal government enlists private nonprofits to do its thinking (Rand, Mitre), and to serve as intermediaries for the implementation of welfare programs.²⁸

Even in the face of all this hybridization, some may wish to press the search for some general essence of public/private. But I doubt that the prospective rewards would warrant the effort. For what we need is not merely a line (if we could produce it) that clearly and intelligibly satisfies our intuitive notions about public and private in general. We need definitions that suit specific legal purposes, yielding whatever division is appropriate to the legal consequences that currently are, or should be, attached. And that brings us to the other half of the problem. Even within the limited domain of corporate conduct, we find the public/private distinction invoked for guidance in several distinguishable subcontexts, each with its independent, or semi-independent, senses.²⁹ In short, we are asking of the same terms distinct and even unclearly related functions.

²⁵ By 1953, the federal government was the largest electric power producer in the country, the largest insurer, the largest lender and the largest borrower, the largest landlord and the largest tenant, the largest holder of grazing land and timberland, the largest owner of grain, the largest warehouse operator, the largest ship owner, and the largest truck fleet operator.

A. H. WALSH, *supra* note 12, at 29. See *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 72, 646 P.2d 835, 843, 183 Cal. Rptr. 673, 681 (1982) (action by municipality to condemn franchise of National Football League team, court confirming that "acquisition and, indeed, the operation of a sports franchise may well be an appropriate municipal function.").

²⁶ See Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-you-Go Courts*, 94 HARV. L. REV. 1592 (1981).

²⁷ See S. SONENBLUM, J. KIRLIN & J. RIES, *HOW CITIES PROVIDE SERVICES* 6-7, 9-11 (1977).

²⁸ See Musolf & Seid, *The Blurred Boundaries of Public Administration*, 40 PUB. AD. REV. 124 (1980) (reviewing the ever-increasing use by government of "quasi-government" or "quasi-private" organizations, including nonprofit intermediaries utilized by the Department of Labor to handle key components of the 1977 Youth Employment and Demonstration Program).

²⁹ For example, a private (in the sense of investor-owned, for-profit) corporation can issue securities in either a public or private manner, e.g., to the public at large, or to a restricted universe of investors.

B. *The Public/Private Distinction in the Sorting of Immunities and Liabilities*

Of the corporate subcontexts in which the public/private dichotomy has a role to play, two have had a particularly significant history. The two contexts are best distinguished by assuming the position of counsel defending an organization that has hybrid characteristics (as all organizations have, in some degree). First, there is a region of law in which public bodies are immune from liabilities to which their private counterparts are exposed.³⁰ In this region, a defendant will seek to be characterized as public—for example, the government contractor or licensee that hopes, by pulling the covers of sovereign immunity its way, to avoid punitive damages in a tort suit.

Second, there is a region in which the advantages are reversed. Liabilities are attached to public bodies in circumstances in which their private counterparts would be immune.³¹ Hence, in the second region, defendants are likely to seek the benefits of a private characterization: the educational institution that discriminates as to race or dress code, or prohibits a campus club for homosexuals; the company-owned “town” or shopping center that wants to exclude pamphleteers; the landlord that wants an eviction, or a utility that wants to terminate service, unencumbered in either case by procedural due process.

Unfortunately, it is easier to characterize these two regions by reference to strategic advantages under current law than to identify the types of conduct or claims that have been sorted into each region. Generally, the conduct the law accords the treatment of the first region is of a sort that hazards life and limb—the subject, essentially, of common law delicts.³²

By contrast, in the second region, the conduct being questioned is typically not of a sort recognized by common law torts and crimes. The paradigmatic claim is for a constitutional right, the most visible and celebrated controversies pivoting around the Constitution’s state action requirements. I shall refer to the obligations in this region as “fairness obligations,” because at the bottom, what

³⁰ See *infra* notes 44-136 and accompanying text.

³¹ See *infra* notes 137-243 and accompanying text.

³² I am using “delicts” to include a whole range of unlawful conduct, excluding contract liabilities, but including behavior giving rise to money liabilities for ordinary tort damages, punitive damages, civil penalties, or criminal fines. I qualify with “common law” because (one of the complications of my regional division) there are fines and damages—and not merely injunctions—for highly disfavored, constitutionally based wrongs, as under the civil rights acts.

is wanted is that the organization show respect for persons, be even-handed, considerate, tolerant, understanding, and empathic. In effect, the claim is that we incline to characterize as public those organizations that ought to be, in a way I shall elaborate, a model of virtue.³³ This preference may explain, in part, our readiness to rely on structural injunctions as relief in the second region: we enjoin upon the organization bureaucratic and procedural rectitude.³⁴

It is difficult, however, to give any account of the divvying that results from this dichotomy which does not seem riddled with apparent, perhaps irredeemable anomalies. The tenant of a public housing project stands in a relatively good position vis-a-vis a rent increase,³⁵ but not so, should the building collapse on him.³⁶ A recipient of public welfare is entitled to a hearing before termination of benefits,³⁷ but cannot recover compensatory damages if the welfare agency defames him.³⁸ A state³⁹ can fix prices with relative impunity⁴⁰ but will have to explain itself if it wants to establish a dress code.⁴¹ The public sector employees emerge better protected than their private counterparts as to their jobs,⁴² but less so as to

³³ See *infra* notes 185-201 and accompanying text.

³⁴ See *infra* notes 229-33 and accompanying text.

³⁵ See Annot., 28 A.L.R. FED. 739 (1976).

³⁶ It is more difficult to obtain tort recovery, especially punitive damages, against the government than against a private party. See *infra* notes 52-61 and accompanying text.

³⁷ See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (procedural due process requires evidentiary hearing prior to termination of welfare benefits).

³⁸ Cf. *Paul v. Davis*, 424 U.S. 693 (1976) (injury to "reputation" caused by police distribution of respondent's name and photograph on "active shoplifters" list will not support federal claim for deprivation of civil rights).

³⁹ Perhaps, however, a city does not have the same leeway as does the state in which the city is located. See *Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982) ("home rule" municipality held not to enjoy state action exemption from liability under the Sherman Act); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (municipal utility liable to antitrust counterclaim, its operation not being deemed "pursuant to state policy to displace competition.").

⁴⁰ See *Parker v. Brown*, 317 U.S. 341, 352 (1943) (federal antitrust laws do not prohibit a state "as sovereign" from imposing certain anticompetitive restraints "as an act of government.").

⁴¹ See, e.g., *Bishop v. Colaw*, 450 F.2d 1069 (8th Cir. 1971) (public school dress code invalid absent showing that such regulation necessary to fulfill institutional mission).

⁴² For example, the public sector employee may have a constitutionally protected interest in his employment, mandating a due process hearing if discharge will create a defamatory impression. See *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (dictum). A municipal employer may not even raise a good faith defense to a 42 U.S.C. § 1983 action based on a procedureless firing in such circumstances. See *Owen v. City of Independence*, 445 U.S. 622 (1980). Consti-

their limbs.⁴³

On the other hand, despite the ambiguities and anomalies, the law seems committed to revolve its strategy for controlling corporate conduct around these two public/private axes. Taking this commitment, however inexact, as a given, the next two parts will attempt to refine the sorts of public/private differences that might justly play so influential a role. I will look first at the region of public immunities and private liabilities, and then at its converse.

II. THE REGION OF PUBLIC IMMUNITIES, PRIVATE LIABILITIES

In the first region, the conduct typically is what the common law commentators would have deemed a delict.⁴⁴ The predominant aim of the law is to restrict the wrongful conduct within the efficiency and fairness constraints commonly associated with deterrence objectives.⁴⁵ In this region, such influence as the public/private distinction has had can be traced to two fundamental deterrence strategies. I will call these the *liability* and the *interventionist* strategies, respectively.

A. *Two Fundamental Strategies for Controlling Corporate Misconduct*

The liability strategy is to threaten the organization with loss of a valued resource should it do the thing we do not want it to do. Most often, the threatened resource is a fixed sum of money, as in

tutionally protected rights aside, public employees are generally in a superior position by statute. See R. DWOSKIN, *RIGHTS OF THE PUBLIC EMPLOYEE* (1978); Note, *Federal Employment—The Civil Service Reform Act of 1978—Removing Incompetents and Protecting “Whistle Blowers,”* 26 WAYNE L. REV. 97 (1979). Nonetheless, the job rights of private sector employees are being increasingly protected by a growing body of law. See *infra* note 143.

⁴³ Governments are freer to hazard their workers because of both the unavailability of punitive damages as a deterrent, and the inapplicability of OSHA to units of government. See Occupational Safety and Health Act, 29 U.S.C. § 652(5) (1976) (exempting from OSHA's coverage “the United States or any State or political subdivision of a State.”). Any disadvantages public sector employees suffer regarding health and safety because of laxer requirements on their employers should be mitigated by competition in the labor market: over a period of time, the compensation of public sector employees should be expected to rise to account for the uncovered hazards.

⁴⁴ See *supra* note 32.

⁴⁵ With respect to some delicts, e.g., overweight trucks, our restrictive efforts are constrained by the direct and indirect, market-measured costs of the restriction and its enforcement. With respect to more culpable delicts, e.g., the willful hazarding of life and limb, our efforts are less constrained by market-measured costs and benefits, and freer to adjust to indignation. I am assuming that in either case, whatever ceiling on restrictive effort is collectively approved, delict by delict, common considerations of efficiency and fairness will govern.

the case of ordinary civil judgments, punitive damages, civil penalties, and criminal fines. For purposes of a more general discussion, however, we can group with this strategy other authoritative deprivations, such as ineligibility to receive public funds,⁴⁶ and the loss of accreditation,⁴⁷ license,⁴⁸ or charter.⁴⁹ What unifies these measures into a single strategy⁵⁰ is that in all these cases the society seeks to modify the organization's conduct indirectly, through the specter of after-the-fact repercussions. The managers are not told *how* to avoid the misconduct; they are told only what will happen if the misconduct occurs. It is up to the managers to devise what they judge to be the most cost-effective response to the prospect of legal penalties, just as they are left free to adapt to the prospective "penalties" of the market.

The interventionist strategies are employed *ex ante*. Rather than trust the managers to work out compliance and avoidance measures at the organization's (and in some circumstances, the managers' personal) jeopardy, the desired preventives are prescribed directly. Collective choice displaces managerial choice with regard to such matters as monitoring and disciplining agents, selecting factors of production, and adjusting output levels.⁵¹

The connection between the liability-interventionist distinction and the public/private debate is expressed in sovereign and inter-governmental immunity.⁵² These doctrines leave us free to employ

⁴⁶ See, e.g., 34 C.F.R. § 74.110-116 (1981) (provisions for close out, suspension, and termination of Department of Education grants to institutions); 47 Fed. Reg. 12,038, 12,042 (1982) (proposed March 19, 1982, to be codified at 10 C.F.R. § 600.27(b)). (Dept. of Energy may debar firms from receiving grants on various grounds including crimes indicating a lack of business integrity).

⁴⁷ See McQuiston, *A Hospital in L.I. Loses Accreditation*, N.Y. Times, Sept. 3, 1981, at B2, col. 1 (disaccreditation of psychiatric center due to staff, record-keeping, and fire safety inadequacies threatens loss of \$16.5 million in federal funds).

⁴⁸ See Atomic Energy Act of 1954, 42 U.S.C. § 2135 (1976 & Supp. IV 1980) (providing for suspension or revocation of license for violation of antitrust laws).

⁴⁹ The revocation of a charter for corporate wrongdoing has been preached more often than practiced, but does not die as an idea. See H.R. 7481, 94th Cong., 1st Sess. § 403 (1975) (provision of bill to establish a federal corporate chartering commission would empower commission to revoke the charter of corporations in event of certain violations).

⁵⁰ Although I lump these approaches together in text, there are, of course, significant distinctions. For example, it may be far preferable to modify the behavior of an entity through finely calibrated penalties than through blunter sanctions that may overdeter or punish unfairly, such as withholding the corporation's funds, ousting it from its charter, or debarring it from government contracting. See *infra* notes 73-77 and accompanying text.

⁵¹ With regard to the distinction between liabilities and interventions generally, see Stone, *supra* note 19, at 11-45.

⁵² In technical usage, sovereign immunity denotes the immunity of a sovereign from suit by one of its own citizens in its own courts; intergovernmental immunity

against a private actor the whole gamut of legal devices; the revealed preference traditionally has been to use liabilities rather than interventions, and thus to place the private bureaucracy, like the private bedroom, beyond public view and reach. But against the public actor, the portrait is more complicated. There is some evidence that, when judicial action against public entities is not blocked by the doctrines, the preference reverses: to favor interventions over liabilities, so that we incline to make, for example, a nonconforming prison or school system put its house in order by injunction rather than by threat of fine.⁵³ There are many other circumstances, however, in which relief against public actors is foreclosed by the immunity doctrines. So far as concerns conduct in which we do not want our public bodies to engage, we are thrown back upon the political process to ensure accountability, appointing, recalling, and defining the tasks of our public servants in the ordinary political ways, rather than through the courts.

Today, much of sovereign immunity, however far it may once have extended,⁵⁴ has been waived—at least for compensatory judgments stemming from ordinary torts.⁵⁵ That is not to say the distinction has been buried. The waivers are typically riddled with exceptions. The Federal Torts Claims Act,⁵⁶ for example, excludes claims arising from certain services,⁵⁷ those incurred by certain named agencies,⁵⁸ and those of a certain character including a host of intentional torts such as false arrest, false imprisonment, and defamation.⁵⁹ Moreover, more stringent rules of respondeat superior

denotes the immunity of one government to suit by another. The latter term may also cover restrictions on suits against one government (by any plaintiff) in another government's forum.

⁵³ See *infra* notes 120-36 and accompanying text.

⁵⁴ The original extent of sovereign immunity, at least as far as municipalities are concerned, has been subject to some recent revisionism. See *Owen v. City of Independence*, 445 U.S. 622 (1980) (suggesting that municipal immunity from tort suit in 19th century was not far-reaching). For a relatively contemporary account, see W. WILLIAMS, *THE LIABILITY OF MUNICIPAL CORPORATIONS FOR TORT* 1-23 (1901) (summarizing 19th century law.).

⁵⁵ See, e.g., *Mayle v. Pennsylvania Dept. of Highways*, 479 Pa. 384, 388 A.2d 709 (1978) (abrogating sovereign immunity against state of Pennsylvania for torts of its agents).

⁵⁶ 28 U.S.C. §§ 2671-80 (1976 & Supp. IV 1980).

⁵⁷ E.g., postal delivery, 28 U.S.C. § 2680(b), and tax collection, *id.* § 2680(c).

⁵⁸ E.g., Tennessee Valley Authority, *id.* § 2680(1); Panama Canal Co., *id.* § 2680(m); Federal land banks, Federal intermediate land banks, or banks for cooperatives, *id.* § 2680(n).

⁵⁹ See *id.* § 2680(h) (excluding "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights"). That section was amended to make the Federal Tort Claims Act applicable to acts or

typically prevail, so that governments probably bear narrower exposure for their agents' conduct than does the ordinary private corporation.⁶⁰ Perhaps most significantly, the fact that a sovereign has waived its immunity for ordinary civil awards does not, of itself, expose it to liability for judgments of a predominantly punitive and deterrent nature, such as exemplary judgments and fines, whose employment against public actors remains exceptional.⁶¹

The traditional distinctions in treatment are under strain elsewhere as well. In a few circumstances, the sorts of interventionist measures associated with public bodies are being tried out on private corporations.⁶² In one case, a federal court threatened an oil company, a recidivist polluter, with a partial receivership over its pollution abatement program⁶³—an obvious echo of the "structural relief" decrees in the public area. From the other side, the traditional immunities of public agencies show signs of weakening even

omissions of investigative or law enforcement officers of the U.S. Government. See Pub. L. No. 93-253, 88 Stat. 250 (codified as amended at 28 U.S.C. § 2680(n) (1976)).

⁶⁰ Note that 28 U.S.C. § 1346(b) (1976) provides that the United States shall be liable for negligent acts or omissions of any government employee "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." But this cannot be taken literally in light of the limitations on liability built into the Federal Tort Claims Act. For example, although an ordinary principal is liable for its agent's torts committed in the course of the principal's business, the plaintiff suing the government must also show that the agent's acts were not of a "discretionary" character. This results in immunity for the government in circumstances in which a private person would be liable. See 28 U.S.C. § 2680(a) (1976).

⁶¹ Compare *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (punitive or exemplary damages exceptional remedy, not recoverable from municipalities under 42 U.S.C. § 1983) with *Monell v. New York Dep't. of Social Serv.*, 436 U.S. 658 (1978) (municipalities held liable for ordinary civil damages for civil rights deprivations under the same section). See generally Annot., 1 A.L.R. 4th 448, 454-59 (1975).

By way of contrast, it is quite likely that charities liable for ordinary damages are liable also for punitive damages. See *Allard v. Church of Scientology of California*, 58 Cal. App. 3d 439, 129 Cal. Rptr. 797, cert. denied, 429 U.S. 1091 (1976) (punitive damage judgment of \$50,000 awarded against religious corporation for malicious prosecution of former member). California immunizes public entities from exemplary or punitive damages under any circumstances. See CAL. GOV'T CODE § 818 (West 1980); see also *Austin v. Regents of University of California*, 89 Cal. App. 3d 354, 358, 152 Cal. Rptr. 420, 422 (1979); A. VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 2.36 (1980).

⁶² See *supra* notes 18-21.

⁶³ The District Court was, however, overruled. *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972) (overruling as unduly onerous a district court's imposition of a probation order requiring a company to instate an oil spill containment program). See Comment, *The Application of the Federal Probation Act to the Corporate Entity*, 3 U. BALT. L. REV. 294 (1974) (discussing case in the context of corporate probation generally).

from punitive judgments.⁶⁴ In effect, we are witnessing some effacement of traditional public/private distinctions through a modest convergence: private entities are being treated more like public ones—their autonomy over “internal” decisions being displaced and hedged by societal choices—and the public ones more like the private—subject to penalties.

This trend may be proceeding only gingerly in the courts, but stands out more prominently if we include other sources of control, specifically, government contracting and licensing. Increasingly, societal preferences concerning how an organization should avoid liability-creating misconduct⁶⁵ are being expressed by conditioning the receipt of governmental benefits upon a corporation accepting specified internal controls, independent of whether the beneficiary is, in any respect other than the benefit, private or public. For example, the recombinant DNA safety guidelines affect procedures of any laboratory receiving National Institute of Health funds;⁶⁶ and the Department of Health and Human Services requires grantees doing human subjects research to establish an in-house

⁶⁴ See, e.g., *Hennigan v. Atlantic Ref. Co.*, 282 F. Supp. 667 (E.D. Pa. 1967) (punitive damages against municipality upheld; court interpreting city's waiver of tort immunity to extend to all actions against the city “in accordance with the same rules of law as applied by the Courts of this Commonwealth against any other party defendant.” *Id.* 683 (quoting Philadelphia Code, ch. 21-700 (1962))). Recently, the Federal District Court in Kansas held a school district liable for punitive damages under 42 U.S.C. § 1981, distinguishing *City of Newport v. Fact Concerts*, 453 U.S. 247 (1981), on the basis that *City of Newport* was a section 1983 action, in which distinct considerations governed. See *Boyd v. Shawnee Mission Public Schools*, 522 F. Supp. 1115 (D. Kan. 1981).

⁶⁵ I am referring here only to conduct which, if not corrected, would lead to ordinary civil or criminal litigation. For example, in regard to the Health and Human Services protections discussed in text accompanying note 67, presumably a human subject would have a cause of action against an abusive institution that injured him. The contractual term is intended to prevent the harm, notwithstanding the prospect of an after-the-fact remedy. In other situations, more characteristic of the conduct found in Region II, the misconduct being questioned, for example, racial or sexual discrimination, may not as readily lend itself to traditional damage remedies; injunctions may be better suited, particularly if, as I propose, it is not merely an individual's rights that are being secured, but a “public good.”

⁶⁶ See National Institute of Health Guidelines for Recombinant DNA Research, 45 Fed. Reg. 6,724 (1980), amended at 45 Fed. Reg. 25,366 (1980) and at 45 Fed. Reg. 50,524 (1980) (mandatory DNA experimentation guidelines for all institutions receiving federal support from NIH). The Food and Drug Administration previously published a Notice of Intent to Propose Regulations, 43 Fed. Reg. 60,134 (1978), which would effectively extend the 1976 NIH regulations to all manufacturers, by requiring guidelines to be followed as a condition of FDA approval when products prepared by recombinative technology are submitted. See generally, Korvek, *The NIH Guidelines for Recombinant DNA Research and the Authority of FDA to Require Compliance with the Guidelines*, 35 FOOD, DRUG, COSM. L.J. 633 (1980) (critical of rules and FDA's position).

Human Subjects Protection Committee.⁶⁷ Also, as a condition of license, the Nuclear Regulatory Commission (NRC) requires any nuclear facility to establish certain internal procedures, without regard to whether the facility is investor-owned or public.⁶⁸

B. *The Choice of Strategy*

But why should there be any distinctions at all? In the context of Region I, the prescriptive question might be put this way: in selecting strategies for deterrence—in particular, in choosing between monetary judgments and interventionist techniques—what significance should be attached to various generally public-making or private-making characteristics of the organization?⁶⁹

I. Prescriptive Considerations Other than the Public/Private Characteristics

Note that in focusing on the public and private characteristics of the organization, we are isolating only one group of the several factors that inform the selection of deterrence strategy. To appreciate the larger range of concerns—and to put the contribution of organizational characteristics in perspective—we begin with the premise that if a lawmaker were omniscient, there would be reason to prefer interventions to liabilities against any sort of organizational actor, public or private. That is, if the lawmaker knew (a) what conduct and outcomes were collectively disfavored, (b) the marginal social product that a marginal reduction in the undesired outcomes warranted, and (c) the costs and benefits of each of the various measures that could be applied to reduce those outcomes, it would be more efficient⁷⁰ to prescribe the avoidance measures

⁶⁷ See 42 U.S.C. § 289f-3(a) (1976); 45 C.F.R. § 46.112 (1981) (requiring entities applying for grants under the Public Health Service Act to establish review committees for research involving human subjects funded by HHS); DuVal, *The Human Subjects Protections Committee: An Experiment in Decentralized Federal Regulation*, 1979 AM. B. FOUND. RESEARCH J. 571.

⁶⁸ See 10 C.F.R. at 50 App. B, III (1981) (design control) (Nuclear Regulatory Commission licensees required to delegate verification and monitoring of design measures to individuals other than those who performed original designs); see also *id.* XVIII (audits) (requiring periodic audits to be performed by personnel independent of areas being audited).

⁶⁹ The question has significance not only in the formulation of rules, but also in guiding the exercise of official discretion, which often contemplates not just a range of penalties, but a substitution of techniques. Under the Water Pollution Control Act, for example, a court may either fine an entity or subject it to an injunctive order that is interventionist. See 33 U.S.C. § 1319(a) (1976 & Supp. IV 1980) (administrator empowered to order compliance with permit limitation or to bring civil action for penalty).

⁷⁰ Efficiency is not, of course, the sole constraint on the law.

directly, displacing managerial autonomy over factors of production, bureaucratic structure, and so on, with the solution that was socially ideal.⁷¹

In the real world, however, lawmakers are not omniscient. The more that interventionist regulations are fleshed with invasive detail, the greater the risks of imposing costs that exceed the benefits. If the corporations subject to the regulations comply, innovation is inevitably stultified. And the restrictions may prove illusory, anyway, in light of any organization's capacity, and inclination, to subvert and coopt externally imposed controls and their agents.⁷²

Hence, *in general* (that is, putting aside for a moment qualifications that may have to be introduced by virtue of significant public or private characteristics of the organization), there are reasons to hesitate using interventions. Moreover, there is much to be said in favor of monetized penalties, their rivals. First, penalties can be finely calibrated to express the collective preference that some proscribed outcome not occur. This does not mean that penalties have been perfectly tailored in practice. The expected penalty⁷³ may be off in either direction, either underrestricting an objectionable outcome or overrestricting beneficial behavior that is associated with it. Indeed, under conditions of "bounded rationality,"⁷⁴ there are several reasons, including whimsical application, why the prospect of penalties, particularly jury-awarded punitive damages, may be lost sight of in the flood of other data competing for the organization's attention.⁷⁵ But at least in the instance of

⁷¹ This, the "political" interventionist resolution, will be particularly favored the more society prefers prevention to after-the-fact compensation and punishment. This preference may be strengthened by, for example, the anticipation of high litigation costs (exacerbated by after-the-fact proof), the uneasiness about monetizing certain injuries, and the possibility of bars to satisfaction of judgment.

⁷² See Stone, *supra* note 19, at 38-39.

⁷³ The expected penalty is the product of (1) the probability of the actor being not only caught but convicted and penalized, and (2) the magnitude of the penalty, discounted to present value. Hence, it can be varied either by taking measures to increase detection and conviction or by increasing the penalty level.

⁷⁴ The "bounded rationality" concept provides that because information-gathering and processing represents a cost, managers, in lieu of seeking the unique optimal solution to a problem, will accept a solution that meets certain minimal aspirations within constraints determined by the marginal information costs. See Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 495, 501 (1979).

⁷⁵ [T]he law and its contingent liabilities constitute only a small range of the threats that the corporation faces in dealing with the outside world. . . . Thus, there are any number of areas from which profits may be enhanced or threatened. . . . And of these, the law is not likely to occupy the foreground of the businessman's attention.

C. STONE, *WHERE THE LAW ENDS* 39-40 (1975); see also Stone, *supra* note 19, at 22 n.87.

legislated penalties (as distinct from punitive damages), the authorized maximum constitutes a clear ceiling subject to collective discussion. By contrast, the costs that complying with interventions entail—for example, forcing companies to establish internal audit controls⁷⁶—are difficult to calculate, difficult to contain, and may well entail expenditures that exceed the penalties the legislature would choose for the consummated wrong the interventions were enacted to avert.⁷⁷

The second general advantage of monetized penalties is flexibility. The threat of a penalty is inducement for the managers to comply, but it leaves them free to devise—and, when prudent, to revise in the course of experience—the most cost-effective method. By contrast, interventions, by displacing managerial judgment with the long and relatively uninformed arm of the lawmaker, exacerbate the risks of error.

Elsewhere I have examined how these conflicting advantages and disadvantages of the two techniques might be weighed in particular circumstances, depending upon, among other things, the correlation between the constraint and the hazard it seeks to avoid, the character of the risk, and the adequacy of after-the-fact remedies.⁷⁸ From those considerations, one can determine, for example, that in safeguarding against the theft of nuclear fuel, some dose of interventionist measures, such as government-promulgated standards as to how fuel is to be monitored and safeguarded within fuel processing facilities, will be preferred to (or a necessary supplement to) the specter of after-the-fact penalties should some of the fuel be spirited off.⁷⁹

But the question I am putting here is narrower: whatever balance between monetized penalties and interventions is indicated in any particular circumstance by the character of the hazard, etc., *is there any independent reason to shift our relative reliance from one strategy to the other, based upon the organization's mix of public or private characteristics?* In the terms of the nuclear fuel processor, is there any reason to alter the balance between inter-

⁷⁶ E.g., Foreign Corrupt Practices Act of 1977 (FCPA) § 102, 15 U.S.C. § 78m(b)(2)(A), § 78m(b)(2)(B) (Supp. V 1981); see *supra* note 68.

⁷⁷ 15 U.S.C. § 78ff(c)(1) (Supp. V 1981) provides for a fine not to exceed \$1,000,000 for violations of FCPA when the offender is a corporation. One company estimated that it would cost three million dollars to develop the mandated management report. See Note, *The Accounting Provisions of the Foreign Corrupt Practices Act: An Alternative Perspective on SEC Intervention in Corporate Governance*, 89 YALE L.J. 1573, 1592 n.95 (1980).

⁷⁸ See Stone, *supra* note 19, at 39-40.

⁷⁹ See *id.* 13-16, 19-28.

ventionist and penalty strategies depending upon whether the utility handling nuclear fuel is investor-owned or municipal?

2. Prescriptive Considerations Derivable From Public or Private Organizational Characteristics

As the survey of existing law indicates, liabilities, particularly penalties, have been disfavored when public units are concerned. To organize the analysis that follows, I will examine six bases that might be advanced for considering liabilities relatively inappropriate when the target of the law is a public rather than a private organization.

a. Differences in the Organizational Motive

Whether or not we have done so consciously, some disparity in treatment almost certainly arises from different assumptions that are commonly made about public and private actors regarding motive or attitude. Suppose, for illustration, two cases in which public health is jeopardized, the one by a private pharmaceutical house engaged in cancer research, and the other by a publicly funded and operated laboratory involved in the same projects. A different quality or depth of indignation might be aroused by the company that hazards health "for profit" than by the public laboratory that does so in the pursuit of science, and whose successes would be more ratably shared among the whole population, rather than a group of investors. If so, we would expect less readiness to employ punitive damages against the public entity.

Whether that sentiment is defensible is another question. If the aim of the law is to sensitize the callous, it is not easy to say on whom we need be harder. Private industry has its bad record on brown lung and asbestosis. On the other hand, the United States Public Health Service "studied" syphilis among hundreds of black males, when it ought to have been curing them.⁸⁰ To satisfy national defense needs, and curiosity, the U. S. Army, paraded its employees onto the perimeter of a nuclear weapons test—and into

⁸⁰ *E.g.*, G. ANNAS, L. GLANTS & B. KATZ, INFORMED CONSENT TO HUMAN EXPERIMENTATION 259-61 (1977); N. HERSHEY & R. MILLER, HUMAN EXPERIMENTATION AND THE LAW 8-10 (1976) (beginning in the 1930's, the U.S.P.H.S. chartered the course of untreated syphilis in approximately 400 black males, providing them no treatment, and indeed taking measures to prevent the participants from receiving syphilis treatment elsewhere, even though, by the early 1950's, penicillin had been widely recognized as a safe and effective cure. Of the 400 subjects, an estimated 107 died from the effect of syphilis).

a high risk of leukemia.⁸¹ In fact, those in quest of profit may be more circumspect about the risks they are posing than those who can more glibly rationalize their every action as taken in the "public interest."

In the last analysis, it seems to me that any case for distinct treatment that has to appeal to general presumptions about which group has the superior motives or attitudes will be inconclusive. I will therefore assume that, to deter unwanted conduct, the price we should be willing to pay (in direct enforcement costs and foregone social resources) is independent of the organizational character of the actor subjected to controls. In the terms of our pharmaceutical illustration, this comes down to saying that to avoid contamination, we should expend as much to protect ourselves from public laboratories as from private. Observe, however, that this assumption leaves open our principal question: whether we should prefer to expend whatever amounts are justified through monetized penalties, with their associated costs, or through interventions, with theirs.

b. *Differences in Independent Legal Rules*

The answer to this question—what balance to strike between money judgments and interventions—depends on how other variables in the law are resolved. It is fruitless to debate whether a particular organization should be liable to or immune from various money judgments, without accounting for the whole matrix of rules that form the legal background in which public and private institutions operate—rules that spell out distinct treatment regarding limited liability, indemnification, respondeat superior, liability of individual agents, and so on.

In some cases, a discrimination in the treatment the liability-immunity rules accord public and private actors may even serve to correct for distinct treatment produced by the corollary rules. For example, assume a proprietary hospital faces the prospect of punitive damages which its competitor, a municipal hospital, does not. This seems to advantage the public over the private. But then consider that the proprietary hospital owners enjoy limited liability. By contrast, if the municipal hospital should face so heavy a judgment that to satisfy it would break the municipality bank, the municipality, lacking an analogue to limited liability, might face a

⁸¹ See Berreby, *Nuclear Time Bomb*, Nat'l. L.J., Dec. 28, 1981, at 1, col. 1 (reviewing attempts by veterans of Army nuclear tests to receive compensation for alleged radiation caused defects).

mandamus to compel it to raise the wherewithal.⁸² As a consequence, the apparent disparity in public/private treatment that one infers from the sovereign immunity rules is misleading: although the private corporation may be treated more sternly in liability theory, those who stand behind it may yet come off better in judgment-satisfying fact.

There are important implications, too, in the different rules for agency. In general, public entities are less likely than private ones to suffer judgments arising from their agents' misdeeds,⁸³ either directly or through indemnification.⁸⁴ And of course public officials generally enjoy greater personal immunity from suit than their private sector counterparts.⁸⁵ The result is to forego (at least, to limit) one of the potentially most effective controls over the misconduct of public organizations—sanctions that operate directly on their officers.

Ideally, all of these variables should be dragged into the light and examined together. They all constitute, together with the liability rules, a single tapestry. But to undo woof and warp at once, and then to restore the filaments into some new pattern, lies well beyond my current design. Instead, I will regard the rules of matrix as independently fixed beyond review, and treat the liability or immunity from monetary judgment as the dependent variable within the purview of revision.

⁸² That is, mandamus may lie to compel municipalities to exercise their taxing power if that should be required to satisfy judgments against them. See *Merrivether v. Garrett*, 102 U.S. 472, 515 (1880) (court may by mandamus compel city to raise, through taxation, funds required to satisfy holders of overdue, unpaid bonds); cf. Federal Water Pollution Control Act, 33 U.S.C. § 1319(e) (1976) (regarding penalties for municipal polluters, compulsory joinder of the state with the municipality is available when the municipality has been sued, the state to be liable for judgment and expenses entered against the municipality when state law prohibits the municipality from raising the revenues to comply with the judgment). See generally, McQUILLIN, 17 MUNICIPAL CORPORATIONS § 51.46 (rev. vol. 1967).

⁸³ See *supra* note 60. The rationale may derive from the general notion of sovereign immunity, that because the sovereign can do no wrong, it cannot authorize a wrong to be done for it. Ergo, any tort committed by an employee of a municipality is *ultra vires*. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 29.3 (1956).

⁸⁴ Compare MODEL BUSINESS CORP. ACT § 5(a)-(b) (1979) (agent indemnifiable by business corporation if actions giving rise to liability were "in good faith," were undertaken in the interest of, or at least not opposed to the interest of, the corporation, and, when a crime was involved, the agent had no reason to believe his conduct was unlawful) with CAL. GOV'T CODE § 825 (West 1980) (no authorization for public entity to indemnify "such part of a claim or judgment as is for punitive or exemplary damages.").

⁸⁵ See generally, Mashaw, *Civil Liability of Government Officers: Property Rights and Official Accountability*, LAW & CONTEMP. PROB. 8 (Winter 1978); Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

The point is that each of the corollary rules that we are thereby committed to regard as given has strong implications for the liability-immunity rules. For example, the prevalence of limited liability among the private for-profits implies a shift toward more liberal employment of interventionary techniques in the private sector than we presently have.⁸⁶ With regard to entities not possessing limited liability—generally, public bodies—there is the opposite problem: the specter (perhaps more theoretical than practical) of unacceptably far-reaching vicarious liability. When we impose a murderously high penalty on an entity lacking limited liability, someone may really have to pay it. Curiously, this prospect seems to imply that we should be employing interventionist techniques more liberally against public, as well as private, entities.⁸⁷ Perhaps most important, if we are committed to hold constant, for our analysis, the broader immunity of civil servants from personal liability, the implication is to raise severer threats against their principals, the public entities, than against their private counterparts.⁸⁸

Note, however, that even when an examination of the independent variables suggests a case for employing severer measures against one form of entity than another, we cannot conclude that this added control should take the form of more intense penalties (the more traditional private treatment), or of more invasive interventions (the more traditional public response). The exercise of that choice will turn on some of the other factors discussed below.

⁸⁶ See Stone, *supra* note 19, at 65-76 (advocating shift toward interventionist techniques in response to limited liability in the private sector).

⁸⁷ This is not to ignore the costs entailed by interventionist techniques, which, in principle, could exceed the costs of a given fine. See *supra* text accompanying notes 76-77. But the expenses imposed by interventions are regularly incurred, and thus become incorporated in the entity's financial statements and captured in share prices without the same uncertainty element.

⁸⁸ That is because, in the private sector, a penalty that falls on the employee in the first instance is more likely to be passed on, ultimately, to the enterprise because of the wider availability of employee indemnification. See *supra* note 84. This is not true of public entities. For example, California public entities are, with few exceptions, immune from liability for injury to an inpatient of a mental institution. See CAL. GOV'T CODE § 854.8(a)(2) (West 1980). Public employees, however, do not enjoy this immunity, so that if a patient suffers an injury, the plaintiff must recover against the employee; the employer has discretionary authority, but ordinarily no duty to indemnify the employee. See VAN ALSTYNE, *supra* note 61, § 4.42, at 391.

Holding the indemnification rules constant, the private enterprise will bear the burden of liabilities (through indemnification) that will not be borne by their public sector counterparts, except insofar as would be accounted for in compensation agreements, assuming that the public sector employees, exposed to non-indemnifiable liabilities, will demand and acquire some additional compensation for the added risks, either *ex ante*, or through some *ex post* substitute. See generally Stone, *supra* note 19, at 52-54.

c. *Differences in Managerial Incentives*

How effectively money judgments that fall on the entity will modify an organization's behavior depends on how it affects those with the most influence over its direction. From organization to organization, that power is divided among managers, directors, taxpayers, budget committees, shareholders, and so on.

One can devise from these considerations several justifications for relying upon interventions, rather than penalties, to control the conduct of public entities. All are based on the supposition that public sector managers are personally less intimidated than their private counterparts by the specter of a judgment against their employer.

One form this argument takes is not, strictly speaking, that public sector managers derive no utility from their organization's wealth, but that their access to it is unlimited—which results in much the same thing. Specifically, the immunity of municipalities from punitive damages has been rested on the view that, because the purpose of punitive damages is to deter, and because municipalities are graced, by virtue of the taxing power, with essentially bottomless purses, there is no purpose in penalizing them.⁸⁹ This bit of legal wisdom, which must appear to today's hard-pressed city managers as a bad joke, would probably not warrant an appearance in text, had the United States Supreme Court not recently resurrected it in *City of Newport v. Fact Concerts, Inc.*⁹⁰

⁸⁹ See *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885 (1975) (disallowing punitive damages against municipality because burden would then fall upon municipality's unlimited taxing power and because the power to elect different municipal officers is appropriate deterrence).

⁹⁰ 453 U.S. 247 (1981).

Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial impact on the jury, in effect encouraging it to impose a sizable award. The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large. Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.

Id. 270-71 (footnotes omitted). Formally, the Court relied on legislative intent, *viz.*, that at the time of passage of the civil rights acts, punitive damages were unavailable against municipalities. See *id.* 260.

As I indicate elsewhere, the argument for more lenient judicial treatment of municipalities might be based more persuasively on other grounds, by appeal to limited liability, see *supra* text accompanying notes 82-88, or the existence of political alternatives, see *infra* notes 100-13 and accompanying text.

There may be a limiting case of a public agency whose output is so firmly determined by political varieties that judgments would have no impact. For example, imagine misconduct by the division of the Pentagon responsible for fueling

A second form this argument takes is that the managers of private for-profits are maximizing profit, while the managers of government units, as of other nonprofits, are maximizing something else, ranging from the provision of public services to the aggrandizement of their personal empires. Ergo, although money judgments appear appropriate to discipline the for-profits, they are not well calculated to affect the nonprofits, and thus some substitution of interventionary techniques for monetary-based techniques is indicated against the latter.

But this argument, too, is premised on generalized distinctions between public and private that are unacceptably sweeping. The managers of most government units—financially strapped municipalities for example—would likely be at least as chary of money judgments as the managers of investor-owned utilities or other business corporations that enjoy a margin of monopoly power. Indeed, even managers who pursue some nonprofit goal (managers of a sort we will find in both sectors), must recognize that all that empire-building, leisure creating, or whatever, *also takes money*. Hence, a legal threat to the organization's wealth cannot be disregarded, whatever is being maximized.⁹¹

What the argument requires is a somewhat moderated, and somewhat more plausible claim: that although the personal welfare of the managers is in almost all circumstances a function of the organization's "wealth,"⁹² among the for-profits, the connection is generally more direct. The compensation of a for-profit manager is often tied directly to firm profits through such devices as profit-sharing and stock ownership. These arrangements contribute to a congruity of interest between the private sector manager and his

nuclear missiles. It is barely conceivable that the government would fail to restore whatever law-imposed penalties the division suffered. Even in that case, however, the government might secure assurances from responsible officials that, through improved monitoring, etc., the misconduct would not be repeated.

⁹¹ For an excellent analysis of the ordinary tort liability rules in the public sector as a function of different models of bureaucratic behavior, see Professor M. Spitzer's student work, Note, *An Economic Analysis of Sovereign Immunity in Tort*, 50 S. CAL. L. REV. 515 (1977).

⁹² As we move from one organizational type to another, what counts as wealth will vary. In the case of the for-profit corporation, we can speak of retained earnings; of the donative nonprofit, the endowment; of the government agency, and of some charities, the annual budget, and so on. The differences are not as pronounced as one might be tempted to suppose. See Young, *'Nonprofits' Need Surplus, Too*, 60 HARV. BUS. REV. 124 (1982). William Niskanen suggests that, of the several variables that enter the public sector bureaucrat's utility function, salary and perquisites of the office are among those that are a direct function of the total budget of the bureau. See W. A. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* 28 (1971).

enterprise that potentially extends beyond the period of his employment. Assuming he plans to hold his stock, he has an incentive to steer the organization clear even of liabilities that may not be discovered until after his departure. There is no exactly analogous device to tie the public sector manager to his enterprise through time.

Managerial reputations are, of course, a factor in both sectors. Nonetheless, monetary penalties imposed on the organization are likely to provide more direct and effective discipline in areas in which private characteristics dominate. In the private sector, the market for managers may more heavily value a performer according to indices of his or her firm's financial success.⁹³ And a case might be made that the mechanisms the private sector employs to displace top-level managers (shareholder uprisings and take-over bids) are, in general, more readily triggered by financial setbacks than are the displacement mechanisms operating in the public sector (by-and-large, electoral politics).⁹⁴ These factors would all give the managers of for-profits more personal incentive to avoid law-driven financial losses to their organization.⁹⁵ Furthermore, even if the managerial incentives to avoid law-driven losses were the same in both sectors, the managers of public entities, at least where civil service rules prevail, may face more institutional resistance in carrying out the responses the law contemplates: identifying, then disciplining or firing the responsible underlings, or changing bureaucratic rules.⁹⁶

⁹³ There are, of course, exceptions to this generalization. One can well imagine a university president being valued in proportion to the endowment raised, and the manager of a charity being valued by reference to growth in annual donations. Conversely, it is quite possible that, in the private sector, considering the prevalence of mixed inputs and consequences outside any individual manager's control, a manager might be valued for having appeared to solve important production or distribution problems, not reflected in the firm's financial statements.

⁹⁴ To make a definitive judgment, one would want to know more about the relative costs of the takeover mechanisms to the insurgents, e.g., of a proxy fight in the private corporate sector versus an election campaign in the public. In doing so, we would have to account for the possibility that the victors, after a successful proxy fight, might reward themselves some of their expenses from the corporate till. See *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291 (1955) (dismissing suit challenging the reimbursement of election expenses of both new and defeated directors; in a contest over corporate policy, reasonable expenses are reimbursable).

⁹⁵ It is not self-evident how one would measure managerial sensitivity to law-driven losses for purposes of evaluating strategies. One approach might be to plot the elasticity of supply of company resources dedicated to legal compliance, as a function of increments in level of expected penalty. The more sensitive organization would be the one with the higher elasticity.

⁹⁶ See generally C. STONE, *supra* note 75, at 45-46.

This analysis suggests that at least some set of public entities (presumably those that most heavily rely on nonmarket transactions for capital and operating funds and those subject to civil service) are less responsive than for-profits to the prospect of money judgments. But even if we so suppose, what is implied for the choice of strategy? By itself, an entity's relative insensitivity to wealth-threats would not warrant abandoning the liability approaches. As long as an organization's resources are of positive value to those who steer it, there must be *some* level of prospective judgment capable of daunting them into compliance. To deal with the relatively insensitive entities, we have the option to raise the expected value of the penalty. And note that a true penalty can be raised to whatever level deterrence requires (as opposed to a civil judgment, which is constrained by the actual damages plaintiff suffered).

The implication appears to be that higher penalties should be employed against public than against private entities in comparable circumstances. For example, if public units are less sensitive to money-threats than for-profits are, ordinary compensatory tort judgments, deemed adequate to modify behavior of the latter, may be inadequate as against the former. Hence, even in circumstances in which we are presently satisfied to let ordinary civil judgments "straighten out" a commercial enterprise, we might wish to deploy against a public agency the extra "kicker" of punitive damages and penalties—not, as present law generally has it, the other way around.

On the other hand, whatever the theory, penalties cannot be raised indefinitely in practice. And the escalation is likely to be constrained earlier in the case of penalties aimed at public entities. The explanation includes the commonly-held beliefs that public motives are more benign,⁹⁷ that electoral accountability in the public sphere provides a satisfactory control alternative,⁹⁸ and that the unfairness to taxpayers is more poignant than that to shareholders.⁹⁹ Assuming that these popular attitudes are hardened (notwithstanding, as I indicate, the difficulty of sustaining them under analysis) then it is even less likely that the judicial system will invoke the theoretically optimal penalty against public entities than it will against private organizations. This constraint exacerbates the deterrence problem if public units are, overall, slightly less sensitive to money-threats.

⁹⁷ See *supra* text preceding note 80.

⁹⁸ See *infra* notes 100-113 and accompanying text.

⁹⁹ See *infra* notes 114-119 and accompanying text.

In summary, a brief survey of managerial incentives suggests that we are justified to employ interventions against public sector entities more freely than we do against their private counterparts, particularly if civil servants continue to enjoy greater freedom from personal liability and discipline.

d. *Differences in Control through Electoral Accountability*

Thus far I have only alluded to the fact that public units are more directly accountable to the electorate than private units are. It seems evident that we should be able to derive from this fact some distinctions in the treatment of public and private bodies at the hands of the law. But why, exactly, should the more direct political accountability make a difference in whether we rely on interventions or liability rules? The answer is to be found by analyzing governments as agents.

Start this way: suppose that we hire one member of our community, Harry, to clean the streets, collar thugs, and keep an eye on our nuclear fuel. Harry tends to all these chores personally. His actions (and inactions) are highly visible. As Harry's principal, we can specify his performance by contract. He being our agent, his employment is terminable at our will. Considering this basis of control, we would almost certainly deal with Harry's misconduct in a different way than that of other actors, who are not as directly our agents. With the others, we would be more inclined to use liabilities; with Harry, we would be more inclined to use our agency (we would call it "political") control, scoping his conduct by contract, and removing him if he gave us cause.

We might choose to supplement our political control over Harry by holding him liable to judgments in some circumstances. If we made that a part of the arrangement, however, we would have to pay Harry more to take the job. The greater his liability exposure, the more we would have to pay him. Whether it would be worth it to us to negotiate his assumption of various liabilities would depend on a number of factors, including Harry's ability to avoid the outcomes for which we intended to hold him liable, his and our attitudes toward risk, and how strongly we feel about compensating the injured.¹⁰⁰ The optimal solution is difficult to determine. It might be ideal to hold Harry liable only for compensatory judgments; only for punitive judgments; for both; or for neither.

¹⁰⁰ See generally Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

We can specify, however, one additional feature of the situation that will make the ideal outcome somewhat more determinable. Suppose now that Harry is in a certain sense *us*. Unlike the ordinary agent, who comes to his agency with some independent source of wealth, Harry has nothing but what we provide him. Any judgment we levy on him comes straight from our own pockets. In these circumstances, to control Harry, we will almost certainly rely on political mechanisms in preference to liability mechanisms regardless of the devices we choose for those who sweep our streets, collar thugs, and handle nuclear fuel under the hire of other principals.

Observe, however, that this analysis does not imply a strong preference for political control over sovereign misconduct in all circumstances. First, the implications are sound only insofar as Harry's acts affect none but his principal. Our sovereign immunity contract with Harry is of no consequence to those outside our community who are bearing the burdens of Harry's venality or oafishness, while we are reaping the benefits. Consider the case in which Harry, on our behalf and in our name, dupes people across the country to buy our worthless bonds, or attracts chemical companies to build factories on our lots by exempting them from sewage treatment, to the detriment of those who live downstream.¹⁰¹

Moreover, the more we flesh Harry into something resembling modern government, the less confidence we can have in the effectiveness of political control. The electoral solution may be too blunt: we may be generally satisfied with the job our servants are doing but want them to make specific alterations in certain practices, a message that elections cannot readily transmit. And in any event, as the population increases, efforts to monitor through the political system confront the familiar problems of large numbers. The monitors are ordinarily other agents, control over whom is itself a problem. Gradually, as the government thickens with dense layers of bureaucrats, there emerge the various problems that plague any large bureaucracy, those that the organization literature treats under such headings as opportunism, information impactedness, and subgoal identification.¹⁰² In the case of for-profit enterprises, the market provides a measure of discipline that the political process may find difficult to match.

¹⁰¹ See *infra* note 116.

¹⁰² See generally R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 26-38 (1963); C. STONE, *supra* note 75, at 43-46; Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1136-41 (1977).

There are at least two ways to counter these tendencies. One way is epitomized by public authorities and public corporations, in which there has been a deliberate effort to shift some of the burden of managerial accountability from electorate to markets. Their hired officers, for example, are typically not, like true agents, terminable at our will. The second, contrasting response is to try to improve accountability through perfecting oversight and budget procedures. This solution, too, is far from perfect. An oversight committee may incline to award resources by reference to how well the applicant is achieving its primary mission (dams built, cases won), with little devaluation for the side effects, such as covering up environmental hazards, or illegal wiretaps and mail covers. The designated committee may well regard these foibles as the principal concern of someone else.

Because monitoring and controlling by the political process thus have their own limitations, at some point it makes sense to shift toward judicially imposed liabilities, even for deterring one's own sovereign. Let me illustrate with what appears on the surface to be an almost paradoxical application of sovereign liability: a situation in which one branch of a sovereign criminally prosecutes another. For example, the Department of Justice might bring a criminal civil rights violation against the Public Health Service based on PHS's syphilis experiments on southern black males.¹⁰³ From one perspective, such a suit seems to be a meaningless exercise in federal bookkeeping, particularly if we disregard the possibility of remedies other than a fine.¹⁰⁴ Should the prosecution "win," someone in the Treasury would write the Treasury a check.

And yet, even acknowledging the juggling of accounts involved, such a proceeding would not be an empty gesture. For the society at large, the suit would serve one of the principal functions of the criminal law—to denounce, formally and ceremoniously, what is deemed unacceptable conduct. With regard to the responsible officials, the stamp of an indictment against their bureau¹⁰⁵ is "bad

¹⁰³ See *supra* note 80. But cf. *Defense Supplies Corp. v. United States Lines Co.*, 148 F.2d 311 (2d Cir.) (civil suit by one federally-owned corporation held an action by the United States against the United States, and not contemplated by admiralty statute), *cert. denied*, 326 U.S. 746 (1945).

¹⁰⁴ Criminal prosecutions can, however, result in a remedy other than a fine. For example, probation could be employed to fashion structural relief, as in *United States v. Atlantic Richfield Co.*, 465 F.2d 58 (7th Cir. 1972), discussed *supra* note 63.

¹⁰⁵ Note that a bureau, unlike a federal corporation or a public authority, ordinarily enjoys no legal existence independent of government, and thus is not ordinarily suable in its own name. Agencies may be sued in their own name, and indeed, there is eminent support for the proposition that "suability rather than

press"—a sanction in itself. By underscoring the seriousness of the conduct, the suit would make the managers' appearances before their oversight committee that much less pleasant. Even if the fine does not come out of the bureau's resources, which is problematical, budgetary approval might at least be conditioned upon the bureau's adopting more appropriate internal controls for the future. These and similar benefits of the prosecution may be worth the costs of staging it, depending on the circumstances.¹⁰⁶

Let us shift focus to punitive damages, which presents the more frequently litigated problem. Does it make sense to empower one of the sovereign's own subjects to recover a judgment in excess of his actual damages? In such a situation, a private plaintiff's victory is no mere account-juggling, for it represents an actual cost, a transfer of the community's funds to one of its members.¹⁰⁷ On the other hand, there are advantages that may be worth paying for. Empowering private citizens to sue not only shifts some of the administrative and litigation costs, it provides a liability-driving mechanism not as subject as the local prosecutor's office to political influence. This feature could be particularly significant when, in the nature of the complaint, government officers, possibly allied with the prosecutors, will be put on the defensive.

It is a matter of concern that the prospect of liability may induce excess caution. This prospect is ordinarily raised in support of civil servant immunity, most recently, and dramatically, in connection with the United States presidency.¹⁰⁸ If a government employee in the exercise of his discretion has to mull the prospects of a penalty for a "bad call," unbalanced by the prospect of a compensating bonus for a "good one," he may incline to be too con-

immunity should be the assumption when a federal agency, rather than the United States itself, is the defendant." H. HART & H. WECHSLER, *THE FEDERAL COURTS AND FEDERAL SYSTEM* 1351 (2d ed. 1973). The treatment is, in all events, uneven, and to bring about the result discussed in text would take some amendment of present law.

¹⁰⁶ For example, when wrongdoing is criminalized, the FBI and grand juries may be available to assist in the preparation of the case, whereas they otherwise would not be.

¹⁰⁷ The community will recoup some of its funds when the punitive damages are taxable. See *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955) (punitive damages for fraud and antitrust violations are taxable); Rev. Rul. 75-230, 1975-1 C.B. 93 (exemplary, but not compensatory damages for defamations taxable); Treas. Reg. § 1.61-14(a) (1965). *But see* Rev. Rul. 75-45, 1975-1 C.B. 47 (all damages, whether compensatory or punitive, received for personal injury or sickness excludable from income).

¹⁰⁸ The most recent reaffirmation is *Nixon v. Fitzgerald*, 102 S. Ct. 2690 (1982) (public's own interest in official's "bold and unhesitating action" might be jeopardized by prospect of civil liability of United States President).

servative. But the same consideration supports providing an entire agency with immunity for discretionary acts. For example, the Food and Drug Administration can anticipate various sanctions¹⁰⁹ for allowing a harmful drug like thalidomide to enter the market. But for the timely marketing of a beneficial drug, the agency cannot count on positive rewards, such as the market holds out for the pharmaceutical firm. As a consequence, the incentives operating on agencies today may already be skewed toward overdeterrence; more people may be dying from delayed access to "good" drugs than die from exposure to "bad" ones.¹¹⁰ From this perspective, one could argue that to add the prospect of a liability judgment that the agency might have to absorb in its own budget would only make matters worse.

On the other hand, the risk of overdeterrence—the inducement to exercise undue caution—is endemic to the controlling of misconduct generally, whether the target is public or private, and whether the strategy involves liabilities or interventions.¹¹¹ Obviously, when penalties are leveled against actors principally subject to market forces (which is as true of the Port of Los Angeles Authority as it is of the Chrysler Corporation) the tendency to engage in excess caution is tempered by countervailing rewards for beneficial performance. When dealing with organizations not as directly subject to market rewards, the better solution, although by no means a simple one, may be to design some equivalent mechanisms for providing positive incentives, before we resign ourselves to inadequate deterrence.

In sum, my point is not that political control is an illusory foundation for sovereign immunity. When the degree of political accountability is or could be made high, monitor and control costs considered, political control may provide a superior alternative to liability control. In many other situations, electoral control is inadequate: for example, when we are dealing with public institutions that are by design buffered from political winds¹¹² or when

¹⁰⁹ Sanctions would include bad publicity, which may make it more difficult for the agency to recruit and retain personnel, and even impede enforcement efforts as a consequence of lost credibility; those effects will make the work atmosphere less satisfying, even demoralizing, for those who stay on.

¹¹⁰ See PELTZMAN, *The Benefits and Costs of New Drug Regulation*, in REGULATING NEW DRUGS 113 (R. L. Landau ed. 1973).

¹¹¹ See *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 & n.17 (1978) (Supreme Court reluctant to interpret statute as authorizing strict criminal liability in order to avoid deterring salutary conduct).

¹¹² See A. H. WALSH, *supra* note 12, at 11. On the other hand, no public agency can be wholly buffered from shifts in political climate, as evidenced by the

the people who need protection have no voice over the sovereign whose actions threaten them.¹¹³ In still another important class of cases, increased use of liability judgments may serve as a valuable supplement to political mechanisms by oiling, even firing up, the electoral accountability process.

e. Differences in the Distributional Consequences

The choice of strategy is also determined by our desire that the brunt of our action fall on the right people in the right way. Sovereign immunity, for example, has been defended on the grounds that to impose a heavy judgment on a municipality will be either to make "innocent" taxpayers suffer,¹¹⁴ or else to restrict "vital services,"¹¹⁵ thereby concentrating the loss on a blameless subgroup of users. Even when such distributional considerations have not salvaged immunity as such, they often seem to temper judicial attitudes, so that in fixing judgment levels, courts may be more lenient with municipalities than with business corporations, even for offenses of essentially the same character.¹¹⁶ Such are among the various reasons that, for example, the Environmental Protection Agency has had less success cajoling municipal corporations into compliance with water pollution standards than it has the for-profits.¹¹⁷

On close examination, it is not easy to justify these discrepant sympathies. Certainly if a municipality is penalized for the misconduct of its police officers, the consequence, for all we know

recent history both of the Legal Services Corporation and the Corporation for Public Broadcasting.

¹¹³ See *supra* text accompanying note 101.

¹¹⁴ See *supra* notes 89-90. The "innocent taxpayers" argument is also put forward in Recommendation Relating to Sovereign Immunity, CALIFORNIA LAW REVISION COMMISSION, REPORTS 801, 817 (1963).

¹¹⁵ See *supra* note 90.

¹¹⁶ In the wake of the spilling of the highly toxic substance Kepone into the James River, the private firms charged, Allied Chemical Corporation and Life Sciences Corporation, were fined \$13.2 million and \$3.8 million, respectively; by contrast, the host city of Hopewell was fined only \$10,000, even though it had good reason to be aware that toxic spills were taking place, and was benefiting from being an attractive home site for chemical companies. (It advertised itself as the "Chemical capital of the South.") See generally Stone, *A Slap on the Wrist for The Kepone Mob*, 22 BUS. & SOC'Y REV. 4, 8-9 (Summer 1977), Goldfarb, *Kepone: A Case Study*, 8 INST'L L. 645, 656 (1978) ("Given the expenses of modern urban life, juries will not convict municipalities and judges will be lenient on sentencing them.").

¹¹⁷ See Miller, *Waste Woes: Municipalities Trail Industry in Cleanup of Water Pollution*, WALL ST. J., Oct. 13, 1976, at 1, col. 6 (reporting 1976 estimate by Environmental Protection Agency that 90 per cent of industrial polluters were moving into compliance, but only 50 per cent of cities and towns).

about the city's internal politics, might be a reduction in the public library's budget, thereby concentrating the loss on the library's staff and book-borrowers. But it is also true that when a large corporation is fined for the price-fixing of its paper carton division, the penalty may be paid at the cost of an expansion in baby foods.

Nor is the proclaimed innocence of the taxpayers so persuasive a basis for distinction.¹¹⁸ If a municipality has been systematically underpolicing sewage treatment as part of a program to attract chemical companies and thereby fatten its employment and tax base, the taxpayers are the beneficiaries of their agents' wrongs, just as the shareholders are of theirs.

In fact, just about everything that could be said on behalf of the purportedly "innocent" taxpayers of a fair-sized city could be said, with equal cogency, in favor of the shareholders in a fair-sized company.¹¹⁹ The fact is, vicarious liability is always hard cheese on someone (so is suffering the effects of toxic waste), but it is not therefore without warrant in the law. All we can say is, there comes a point at which a group's knowledge about, and control over, the actual wrongful conduct becomes so attenuated that it is practically pointless and morally wrong to hold them culpable as principals. But where this point lies is a function of numbers, of monitor and control costs, and many other factors that poorly correlate, even in a general way, with the characteristics that make a corporation public or private.

Finally, even if someone succeeds in devising a reason for accord- ing more sympathy, in general, to taxpayers than to shareholders (or to beneficiaries of foundations, who also suffer for the wrongful acts of their agents), it would still not settle the question of our principal concern: what substitution in strategies is indi-

¹¹⁸ Note that the standards for respondeat superior will ordinarily protect the principal from consequences of agent misconduct from which the principal stood no chance of benefit.

¹¹⁹ Not only *could* it be said, it has been—in two major decisions by our Symposium's introductory speaker, Judge Friendly. See *SEC v. Texas Gulf Sulfur Co.*, 401 F.2d 833, 866-67 (2d Cir. 1968) (Friendly, J., concurring) (consequences of holding corporation negligent for drafting a press release on which investors relied, to their detriment, "are frightening" if civil liability were to ensue; result would "lead to large judgments, payable in the last analysis by innocent investors . . ."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967) (punitive damages against pharmaceutical company for producing drug that caused cataract and other disabilities denied; Judge Friendly, observing that the possibilities of multiple punitive awards in suits brought on behalf of hundreds of plaintiffs are "staggering," stated, "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin.").

cated? Specifically, interventions, not only penalties, compel expenditure of an organization's resources in a way generally inimicable to its citizens, shareholders, or beneficiaries. There is no basis for concluding, in any sweeping, general way, whether penalties or interventions will impose the unfairest burden.

f. *Differences in Constitutional Ramifications*

Thus far, I have supposed the selection of strategies to be dominated by considerations of deterrence, within some loosely indicated fairness and efficiency constraints. But some disparity in treatment might be based on constitutional considerations, whose values, including separation of powers and pluralism, raise special pleas for intragovernmental and intergovernmental immunities. In any given case, those values can conflict with, and override, what appears to be the most efficient, distributionally acceptable deterrent.

To start with, some alternatives desirable as a matter of deterrence may be foreclosed constitutionally. The eleventh amendment bars federal courts from meting out damage awards against states, at least at the instance of another state's citizens, barring consent.¹²⁰ In other situations, the same underlying values may appear in non-constitutional guise, influencing statutory construction. For example, in *Parker v. Brown*,¹²¹ the Court was likely influenced by intergovernmental immunity values in ruling that Congress did not *intend* to apply the Sherman Act against a state.¹²²

Related considerations, derived from norms of good government, support sovereign immunity for discretionary acts. When the political branches weigh the social costs and benefits of proposed government action, they may be presumed to take into account the risks they are leaving uncovered and the costs of the alternatives that might avoid them. On this view, one can maintain that only the clearest mandate for judicial power would make it appropriate for the courts to second guess the other branches' balancing; the discretionary decision becomes, in effect, a "political question."

¹²⁰ *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) even suggests, in dictum never disavowed, that a federal court might be barred from entertaining suit by a citizen against his own nonconsenting state. See Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 29-32 (1972).

¹²¹ 317 U.S. 341 (1943).

¹²² See also *Quern v. Jordan*, 440 U.S. 332 (1979) (eleventh amendment bars retroactive award against state agency under 42 U.S.C. § 1983, because section 1983 did not abrogate the state's eleventh amendment immunity). There are also complex questions of the power of one government to tax the instrumentalities of another. See generally, ABEL, *The Public Corporation in the United States*, in *THE PUBLIC CORPORATION* 338-73 (W. Friedmann ed. 1954).

There is some appeal in this analysis. It has been well stated by Professor (presently Assistant Attorney General) Baxter¹²³ and my commentator, Professor Goodman, is understandably attracted to it.¹²⁴ Nonetheless, I think that the argument involves us in a regress common to many arguments that require reconstructing what was "taken into account" in some prior deliberation. It would be just as plausible for a court to assume that the other branches, when making their decisions, anticipated that the judiciary, with the benefit of judicial process and hindsight, would correct misjudgments, compensate the injured, and even rebuke and reform should that be appropriate.

At the least, the ambiguity reminds us that once we raise the constitutional and constitutional-like issues, we open a large and treacherous terrain, most of which I will gladly avoid. There is, however, one area too germane to the present inquiry to ignore. Consider some state or local government conduct that is either clearly subject to federal control or at least at the margin of being so, such that the legitimacy of federal influence presents a close constitutional question.¹²⁵ Our analysis squarely raises the question, is it constitutionally more acceptable for the federal government to exercise control over a state or local unit via a monetized judgment,¹²⁶ or via an interventionist route such as an autonomy-displacing statute or its judicial equivalent, a structural relief injunction?

It is a difficult question. In some circumstances, the answer may depend on the basis of the action, or the character of the remedy that the wrong requires. For example, in the case of a student disciplinary action or employee discharge, the cause of action itself may be grounded in a constitutional claim; and what the law may require is some bureaucratic procedure: a hearing, or an ombudsman.¹²⁷ The law could, of course, leave it to the

¹²³ See Baxter, *Enterprise Liability, Public and Private* 42 LAW & CONTEMP. PROBS. 45, 49-51 (Winter 1978) ("discretionary acts" exception to governmental liability under Federal Torts Claims Act waiver traceable to the policy that courts are institutionally unsuited to second guess policy decisions of other branches).

¹²⁴ See transcript of Professor Frank Goodman's speech given at the University of Pennsylvania Law Review's Symposium on the Public/Private Distinction, January 23, 1982 (on file at the University of Pennsylvania Law Review).

¹²⁵ One might imagine, for example, Congress expressly subjecting all state activity to the federal antitrust laws, and providing for federally appointed masters to take over local antitrust compliance in cases of recidivism.

¹²⁶ Of course, there are special problems when the arrangement vests in a citizen the power to sue the state, *see supra* note 120, inasmuch as this raises the problems of the eleventh amendment and constructive waiver.

¹²⁷ Even an ombudsman appointed in aid of a court, ostensibly to aid in gathering information related to substantive charges can, in the course of interview-

organization to develop a response in the first instance, threatening the government or its officials with a fine, or empowering the injured to sue for punitive damages should the organization fail to reform itself fairly. But in these circumstances, we have to account for the vagueness of fairness, the difficulties of measuring damages, and, as I shall argue, the whole public's interest (not merely the plaintiff's) that the institution possess the correct organizational character. It may be more appropriate to spell out exactly what is required of the organization, enjoining it to reform itself,¹²⁸ than to require payment of punitive damages to those who are directly aggrieved. That discussion, however, can be deferred both because in the region of our present concern the plaintiff's action is not constitutionally grounded (it is the defense that may be) and the aim of the law, typically, is only that the actor achieve some measurable output, for the attainment of which any internal procedure the organization adopts is equally acceptable, and for the nonattainment of which the law's penalties can be independently attached.¹²⁹

Take pollution control as an example. Ordinarily it is the level of emission that the law seeks to regulate.¹³⁰ The emission is an output, an end accomplished by any number of means which, so far as the law is concerned, are equally acceptable. In these circumstances we have a choice of strategy: either interventions, mandating some means by which the pollution is to be abated, or monetized judgments, attaching penalties for failure to achieve the required output. Assuming that the two approaches could be fashioned equivalently to suit the ordinary constraints on enforce-

ing inmates, improve the institution's fairness, effectiveness and legitimacy. See *Miller v. Carson*, 401 F. Supp. 835, 841 (M.D. Fla. 1975).

¹²⁸ See *infra* text accompanying notes 229-33.

¹²⁹ For example, if we want a corporation to stop polluting there is in principle no reason we cannot attach a penalty to a coal-fired plant emitting, for instance, over one pound of sulfur dioxide per million BTUs produced. But if what we want is fairness, attaching penalties is more complicated, and less satisfactory. We could in theory call fairness a sort of output, demanding that the organization's managers achieve a satisfactory solution—the correct output of fairness—at the peril of a penalty for noncompliance. Among other problems, however, is that attaching penalties to vague standards runs into moral, even constitutional, constraints.

¹³⁰ That is, the predominant approach to air pollution under the Clean Air Act is to require existing plants to reduce their sulphur dioxide discharges per million BTUs produced, in varying amounts, depending upon the airshed. See Ackerman and Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 *YALE L.J.* 1466, 1477 (1980). Note, however, that technology—in the case of coal burning plants, scrubbers—may be compelled for new plants, an approach that is, in the terminology of this article, a substitution of an interventionist for a penalty strategy. See *id.* (generally critical of the scrubber requirements).

ment costs, fairness, and so on, our question concerns which one is preferable in terms of constitutional values.

To illustrate, let us take as given the federal government's power to constrict a municipality's air or water effluent. There is nothing inherent in the requirement of remedy that forecloses either the intervention or the monetized penalty. The federal government could tell the state or local unit how to go about its job, laying down an overall plan specifying which technology had to be adopted, what administrative structure was necessary to oversee pollution abatement, what reforms of local rules (such as driving speeds and hours of industrial operation) were needed, and so on.¹³¹ The alternative, penalty approach, would be to establish an acceptable rate of emission—X units of pollutant emitted per hour, or per ton of fuel consumed—backed by a penalty for noncompliance, either per diem, or proportionate to the deviation.

In the abstract, it is difficult to say which approach is more offensive to the integrity of local government or the values of community. Much obviously depends on the level of penalty contemplated: the power to fine, like the power to tax, can be the power to destroy. But if we restrict the fine's wound to less than mortal magnitude, and compare it with an intervention entailing roughly comparable costs, there is much to be said for preferring the fine. First, the burden the fine imposes is more visible to the polity. We can see exactly how much one government is demanding of the other, which is a good foundation for debating the demands' legitimacy. Second, the penalty leaves the local government free *not to comply*—at a price. If the penalty is reasonably related to the benefits, a decision by the local government to buy its way out should be respected—on many matters, at least—as a statement of its priorities even accounting for the interests the dominant sovereign represents. A defect of interventions (common to injunctions generally) is that they foreclose this accounting.¹³²

¹³¹ See *EPA v. Brown*, 431 U.S. 100 (1976) (refusing to review lower court judgment invalidating transportation control plan promulgated by EPA under Clean Air Act on grounds that the federal parties renounced their intent to seek review of certain invalidated regulations and conceded need to modify others). The judicial counterpart would be the imposition, by injunction, of a court-ordered plan, or even quasi-receivership, over the local government's air or water management program.

¹³² Cf. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 706-08 (1973) (favoring penalties over injunctions in the area of land use controls on the ground that monetized judgments retain market-sensitivity). There is, of course, social conduct that we may be less readily inclined to allow an actor to engage in in exchange for paying damages or even a fine. An example would be illegal racial discrimination, accounted for in Region II.

Third, if an intervention is selected and the local unit is recalcitrant, we may be committed to a physical solution, even calling in federal officers to implement the plan themselves. By contrast, if the local unit does not pay its fine, there are less confrontational alternatives. Quite likely, some of the federal funds on which local governments are dependent could be withheld, without offending *National League of Cities v. Usery*.¹³³

Fourth, if the local government does choose to comply with the mandated output standard, it is free to devise what it considers the most acceptable means of achieving the target, as determined by its own political processes, and according to its own political preferences. True, the output-penalty approach displaces the local government on a matter of substance: the target must be achieved. But if the aim is to protect the state and local governments from atrophy, and to preserve the values of community, the interventionist techniques, in displacing the *political processes* of the state or local government, strike me as the more intrusive and invidious threat, for they wither the very muscles on which democratic exercise depends.¹³⁴

As a conclusion for the constitutional considerations, we might urge the law to rotate from its present orientation. Presently, there is some evidence that injunctions are favored over money judgments when government units are before the bar,¹³⁵ and courts appear to fashion interventionist remedies more freely against

¹³³ 426 U.S. 833 (1976).

¹³⁴ There is an interesting parallel in the reluctance of the courts to affect the internal workings of religious organizations, even though they may impose punitive damages on them. See *People v. Worldwide Church of God, Inc.*, 127 Cal. App. 3d 547, 178 Cal. Rptr. 913 (1982) (dissolving provisional receivership imposed by lower court at attorney-general's behest in wake of allegations of financial misappropriation by church leaders. The receivership was said to conflict "with the constitutional prohibition against the governmental establishment or interference with the free exercise of religion. How the State . . . can control church property and the receipt and expenditure of church funds without necessarily becoming involved in the ecclesiastical functions of the church is difficult to conceive.") 127 Cal. App. 3d at 551, 178 Cal. Rptr. at 915; see *Allard v. Church of Scientology of California*, 58 Cal. App. 3d 439, 129 Cal. Rptr. 797, cert. denied, 429 U.S. 1091 (1976) (punitive damage judgment of \$50,000 awarded against religious corporation for malicious prosecution of former member).

¹³⁵ See, e.g., *Employees v. Dep't. of Pub. Health and Welfare*, 411 U.S. 279 (1973) (acknowledging congressional power to abrogate state immunity from citizens suit in federal court, but declining to construe Fair Labor Standards Act as having done so); *Edelman v. Jordan*, 415 U.S. 651 (1974) (similarly, refusing to find waiver). But see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (finding clear evidence of congressional intent to make Equal Employment Opportunity Act of 1972 applicable to states in displacement of eleventh amendment claims, and holding such action valid under the fourteenth amendment). See generally L. TUBE, *AMERICAN CONSTITUTIONAL LAW* 130-43 (1978).

government units than against for-profit corporations.¹³⁶ At least as far as the federalist/pluralist considerations are concerned—considerations which, admittedly, inform only a part of the decision—the attitude should be the opposite.

III. THE REGION OF PUBLIC LIABILITIES/PRIVATE IMMUNITIES

In Region I, as we have seen, a defendant's public character may serve to ensconce it beyond the court's reach. But as I indicated at the outset, there is another region in which the tables are roughly turned. In the first region, counsel for a hybrid—the government contractor, the licensee, the recipient of government dole—will emphasize the public character of its personality. In the second region, it does better to be characterized as private.

The two regions are not as much the mirror images that my subtitles, with their liabilities-immunities polarity, may suggest. An organization that is private in the first region, in the sense of being liable to an ordinary tort suit, is not necessarily private in the second. For example, a Region I private entity is not necessarily free, under Region II, from the fourteenth amendment's obligation not to discriminate racially.¹³⁷ Moreover, in the first

¹³⁶ See *supra* notes 62-64 and accompanying text. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (President unauthorized to direct Secretary of Commerce to assume management of most of nation's steel mills in order to avert strike which was likely to hamper Korean War efforts). The validity of the statement in the text diminishes, the more we construe traditional judicial actions such as corporate reorganizations to be tokens of interventionist judicial activity in the private sector. See Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980), which correctly emphasizes the long tradition of judicial oversight and visitation; but almost always, these interventions have the strong support of dominant corporate constituencies and do not conflict with the organization's traditional goals, such as maximizing profits and preserving assets. My suggestion, however, that courts intervene in the interests of, say, preserving the environment at some sacrifice of profits, has not the same tradition, and raises much more serious problems of successful implementation. See Stone, *Law and the Culture of the Corporation*, 15 BUS. & SOC'Y REV. 5 (Fall 1975).

The more frequent (perhaps more dramatic) structural relief in the public sector owes to the clash of constitutional principles, to doubts about the efficacy of monetized penalties applied to governments, and perhaps to the view that what the law requires in the public sector cases is more often a process than an output to which a penalty can be readily attached.

¹³⁷ Consider, for example, the private restaurant operating in premises leased from a public parking authority, held subject to fourteenth amendment obligations in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (discussed *infra* text accompanying notes 212-17). Suppose the day after that decision, Burton, enjoying his newly won right to eat on the premises, slipped and fell, and sued the restaurant in tort. I assume that the restaurant could not simply cite *Burton* as authority that it is public, and thus entitled to sovereign immunity.

The converse—an organization public for Region I (enjoying sovereign immunity) but private for Region II (not obliged to bear fairness obligations) is harder to find. The general rule is that a private actor that contracts with a public body

region, the rationale that supports immunity of public bodies from liability suits does not imply that they also should be immune from other devices of government. On the contrary, the arguments for restricting the exposure of public entities to liability judgments appears strongest when there exist viable political (nonjudicial) alternatives.¹³⁸ In the present region, however, the reasons for granting private actors immunity from judicial control are also reasons for placing the actor beyond the reach of legislative and executive action.

Hence, in the first region, in which the conduct we are trying to deter, such as jeopardizing life and limb, is not to be tolerated in any actor be it public or private, the law operates to strike a balance between judicial control and legislative or executive control. In the present region, in which the disfavored conduct—being arbitrary, unevenhanded, discriminatory, inconsiderate—is of a sort that may be tolerated among some actors, there is a more fundamental and starker alternative: between public control over the conduct, on the one hand, and no legal control, only moral dissuasion, on the other.

What has produced these two regions, with these rough differences they entail? One is tempted to appeal, at least for a formal explanation, to the fact that we are passing from the realm of the common law and ordinary legislation to the realm of the federal Constitution, much of which pivots on state action. But while the Constitution, through state action, is the dominant source for this region, the constitutional cases alone do not present the full impact that public/private thinking has had on the law.

A. *The Nonconstitutional Sources of the Second Region*

To start with, the Constitution is not the sole source of fairness obligations, even for government organizations clearly subject to

for performance of public work shares the public body's immunity, unless guilty of negligent or willful tort. See Annot., 9 A.L.R.3d 382, 389-90 (1966). The question here, though, is whether there are circumstances in which a private contractor, entitled to tort immunity, would be safe from fairness obligations. Taking first nonconstitutional fairness, it appears possible that a government contractor enjoying tort immunity might not enjoy immunity from the National Labor Relations Act; the standards are not coextensive. Compare Annot., 9 A.L.R.3d 382, *supra* with Annot., 54 A.L.R. FED. 619 (1981). As for state action, see *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219 (5th Cir. 1982) (for purposes of claims of former employees that their constitutional rights were violated by unauthorized searches and by discharges, company which was responsible for providing necessary personnel, materials, transportation, and various services required to support United States Sinai Field Mission, and whose employees were immunized from all local criminal, civil, tax, and custom laws was engaged in state action).

¹³⁸ See *supra* notes 100-13 and accompanying text.

its commands. Witness, for example, the Administrative Procedure Act,¹³⁹ or the fact that long before the Constitution was enacted, the law was imposing obligations on inns, common carriers, and other various occupations "affected with the public interest" not to discriminate, to be reasonable, and so on.¹⁴⁰ And along with the development of constitutional doctrine, there evolved a nonconstitutional body of law subjecting private corporations and associations to much the same sort (if not the same breadth and intensity) of fairness constraints that are imposed on governments by the Constitution.

Consider, for example, how the securities and corporations laws, including the common law based fiduciary duties, import fairness into the business corporation's dealings with its investors; how the labor laws do the same in regard to dealings with workers; and how the consumer laws affect dealings with consumers.¹⁴¹ In *Silver v. New York Stock Exchange*,¹⁴² the antitrust laws became the unlikely instrument for "constitutionalizing" the stock exchange, a private government. Moreover, in both common law and statute there are growing inroads into the private employer's freedom to terminate a worker vindictively, arbitrarily, or discriminatorily.¹⁴³ In fact, some of the Dealer's Day In Court Acts, which govern the relations between an automobile manufacturer and its

¹³⁹ 15 U.S.C. §§ 559-704 (1976 & Supp. IV 1980). See also *Berger v. United States*, 295 U.S. 78 (1935) (reversing conviction on basis of federal prosecutor's improper conduct, but not on express constitutional grounds):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. 88.

¹⁴⁰ See *supra* note 23.

¹⁴¹ Consider, for example, the advent of "procedural unconscionability" in commercial law. See generally Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053 (1977) (generally opposing invalidating contracts on basis of nonsubstantive unconscionability except in cases of certain market information failures).

¹⁴² 373 U.S. 341 (1963).

¹⁴³ See *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (tort action available for employee fired for refusal to participate in illegal price-fixing scheme); *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (terminating employee in order to eliminate his claim for commissions violated covenant of "good faith and fair dealing"); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (action available against employer for wrongful discharge if motivated by bad faith or malice or based on retaliation); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee cannot be discharged for refusing to follow employer's instructions not to volunteer for more than short-term jury duty; discharge wrongful if "for socially undesirable reason").

dealers, are striking examples of due process considerations being transported into private environments by statute.¹⁴⁴

In the area of private colleges and universities, even when courts have not found a state action nexus adequate to impose due process constraints as such, they have imposed many of the same obligations through judicial interpretation of tuition and employment contracts.¹⁴⁵ The courts leave the impression that, in determining what is reasonable and expected in the private college sector, they are drawing upon the public institution as a model, thereby bringing public and private more closely together. Similarly, as private membership associations have gained power, their traditional immunity from court review has been eroding.¹⁴⁶ And there is the ubiquitous government contract to be accounted for: private actors who accept federal monies often consent to terms that restrict their liberty to discriminate.¹⁴⁷

Thus, in this region, as in the first, if we survey the entire legal landscape we find throughout it the same response to the increasing hybridization: a narrowing of the gap between public and private.

¹⁴⁴ See, e.g., CAL. BUS. & PROF. CODE § 20020 (West 1982) (termination prior to franchise expiration for good cause only); *id.* § 20025 (written notice by franchiser required as prerequisite to franchise termination); 15 U.S.C. § 1222 (1976) ("good faith" required in automobile dealer franchise relations).

¹⁴⁵ See Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C. & U.L. 191, 198-202 (1981) (discussion of cases awarding due-process-like rights to private college students); Ray, *Toward Contractual Rights for College Students*, 10 J.L. & EDUC. 163 (1981) (same); Note, *The Importance of Being Private: Judicial Intervention into Dismissal Policies of Private Colleges and Universities*, 35 WASH. & LEE L. REV. 1027 (1978) (same); see also O'Brien, *Due Process for the Nontenured in Private Schools*, 3 J.L. & EDUC. 175, 188 (1974) (indicating that most private, as well as public, schools provide notice and hearing to tenured teachers in dismissal cases; author deriving right to same from "natural law").

¹⁴⁶ See *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).

¹⁴⁷ As early as 1951, fair employment practices were made mandatory for defense contractors, see Exec. Order No. 10210, 3 C.F.R. 390 (1951), apparently a practice that had origins in World War II policies, see N. DORSEN, P. BENDER, B. NEUBORNE, & S. LAW, 2 POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 994 (4th ed. 1979). Subsequent executive orders have prohibited discrimination on the basis of race, creed, color, national origin, sex, and age not based on a bonafide occupational qualification; generally, the nondiscrimination requirements apply to all government contracts involving more than \$10,000. *Id.* 995.

In regard to the tendency to "level" the differences among organizations, at least between public institutions and the nonprofits, consider also that in 1978 the Internal Revenue Service proposed guidelines to end the tax exempt status of private schools which had either been adjudicated racially discriminatory or which had rapidly expanded in the wake of desegregation orders. See 43 Fed. Reg. 37,296 (1978); Wilson, *An Overview of the IRS's Revised Proposed Revenue Procedure on Private Schools as Tax-Exempt Organizations*, 57 TAXES 515 (1979). The proposed regulations were subsequently withdrawn.

Private bodies of all sorts—business organizations, membership associations, charities—are being increasingly subjected to the obligations once largely associated with the hard core public sector.

B. *The State Action Sources of the Second Region*

Despite this gradual convergence in the treatment accorded “public” and “private” entities, in this region, as in the first, distinctions remain.¹⁴⁸ Because the law in this area draws from non-constitutional as well as constitutional sources, an analysis of the state action doctrine cannot provide a full account. Nevertheless, state action is the dominant factor to consider: first, because if the courts find state action, some constitutional standards of conduct become obligatory irrespective of the common law or of legislative or executive authorization; second, when state action exists, the courts, having a constitutional basis for their review, are likely to exercise more active scrutiny;¹⁴⁹ and third, much of the nonconstitutional activity can be construed as mimicking the constitutional developments, often, one supposes, with an eye to forestalling the extension of state action *per se*.

But it is easier to say that the influence of state action has been dominant than to define it. No one has come up with any unifying theory to reconcile, much less to justify, the outcomes of all the cases. And I scarcely suggest that by concentrating on our

¹⁴⁸ The gap is difficult to measure. Many of the apparent disparities in treatment accorded public and private entities probably stem less from a judgment that different obligations are appropriate depending on different organizational characteristics, than from differences in the services that are being provided, or in the groups that are being affected. For example, prisons have been one of the most active areas for judicially-imposed fairness obligations. But there being no private prisons, we have no exact public/private comparison to examine, and can raise only hypothetically the question whether less would be demanded of the one type of institution than of the other. Furthermore, there are often between sectors no exact counterparts to the protected interest or group. Private associations have members, private charities have donors and beneficiaries, and the business corporations have investors. The public constituency is analogous to none of these situations. Differences in treatment that appear on the surface to be because of public or private organizational characteristics may actually, therefore, derive from differences of other sorts.

¹⁴⁹ For example, although the common law has provided some review for employees fired in the private sector, *see supra* the cases cited in note 143, they certainly lack the degree of protection required in the public sector by *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Owens v. City of Independence*, 445 U.S. 622 (1980).

One can imagine a legislative mandate saddling a public organization with more obligations than the courts, acting solely on the Constitution, would impose. For example, although the courts have been hesitant to make military forts “public forums” for purposes of political campaigning, *see Greer v. Spock*, 424 U.S. 828 (1976), Congress, presumably, could authorize them to do so.

one thread only, the actor's public and private organizational characteristics, we will put it all in focus. Certainly the related considerations of public and private *activities* exercise independent force. And everyone suspects, although judges rarely say,¹⁵⁰ that what is "public" expands and contracts depending upon the substance of the plaintiff's claim. Yet, recent decisions confirm my emphasis by treating the actor's public/private characteristics not only as independently significant, but even as the dominant element of judicial interest. In *Polk County v. Dodson*,¹⁵¹ a private attorney serving in a public defender capacity was found not to be a state actor although she was appointed and paid by the state, her service was in support of a uniquely public function (the criminal process), and the right involved, that to a fair trial, is certainly considered fundamental. More striking,¹⁵² in *Rendell-Baker v. Kohn*,¹⁵³ the Court refused to extend state action standards to a "private" school whose business consisted almost entirely of teaching maladjusted high school students under state contract; this, despite the facts that the activity being performed was primarily and traditionally a public function, and that the underlying liberty, that of a discharged school employee to her first amendment rights, sounded as calculated to overshadow fine distinctions in public/private organizational characteristics, as any. Moreover, in *Lugar v. Edmonson Oil Co.*,¹⁵⁴ the most recent word on attachment,¹⁵⁵ the Court, in finding state action, made it clear that attribution to the state depends upon finding a state actor involved at the level of the depriving conduct; the case cannot rest on a showing that the conduct was the exercise (by anyone) of a state-created right or privilege.¹⁵⁶

¹⁵⁰ In a sex discrimination case against the Little League, girl plaintiffs failed to get to first base by taking a poke at the League's federal charter. See *King v. Little League Baseball, Inc.*, 505 F.2d 264 (6th Cir. 1974). But the trial judge noted that, had the complaint been by Negro boys alleging racial discrimination, he would have found state action "more readily." *Id.* 266. The appellate court, however, expressly disaffiliated itself from the trial judge's reasoning. *Id.* 267.

¹⁵¹ 102 S. Ct. 445 (1981).

¹⁵² It did so, I shall maintain, quite erroneously. See *infra* text accompanying notes 238-42.

¹⁵³ 102 S. Ct. 2764 (1982).

¹⁵⁴ 102 S. Ct. 2744 (1982).

¹⁵⁵ See *infra* text accompanying notes 162-64.

¹⁵⁶ The whole state action area appears now, more than ever, a shambles. This confusion will strengthen the support, long abounding, to eliminate state action as an independent analysis entirely. Under such a view, all actions, by all actors, are subject to constitutional review for their impact on, for example, speech; the extent to which government is involved in the challenged conduct can be regarded as simply one of many factors to be somehow considered in determining whether the Constitution has been violated.

C. The "State Action" Implications for Public and Private Organizational Characteristics

Thus, to examine the actor's public/private organizational characteristics is to concentrate only on one element of a state action inquiry, albeit an element that the Supreme Court appears increasingly disposed to consider. Granted, concentrating on the actor's organizational characteristics distracts from the other elements that deserve judicial attention, such as the character of the right that is in issue. But there is a redeeming virtue, that the organizational characteristics provide a focus that is in several respects more manageable than if we were to take head on the entire army of state action issues.

First, in many, perhaps most, of the state action cases, there is no question that the actor whose conduct is challenged is private, at least in terms of its organizational characteristics: its formal legal status, the accountability orientation of its management, and the dominant source of its funding.¹⁵⁷ The case for state action is typically rested on allegations either that the actor, although generically private, was performing a public function (the company town,¹⁵⁸ or the shopping center that invites public entry¹⁵⁹) or that, in order to carry out the complained-of actions the private body acted in concert with the state's agents (the luncheon counter that invokes the sheriff to eject Negro trespassers¹⁶⁰). By contrast, our

I do not receive this view unsympathetically. But state action cannot be dismissed merely because a single unifying theory lies beyond our grasp, and because whatever policies it acts in motion are neither clear nor dispositive. That seems truer of principles, the more they are basic. And state action operates on so many basic choices it is practically inherent in our concept of law. See *Lugar v. Edmonson Oil Co.*, 102 S. Ct. 2744 (1982) (quoted *supra* note 7).

On this view, to retain state action as an independent inquiry is, more than anything else, a commitment to work within a broad and basic framework, without expectation of a sharp sense of direction. There is a loose but I think suggestive analogy in the role of causality in science. It is, more than anything else, a commitment that drives (rather than is justified within) science, a commitment to account for phenomena with reference to the consensual, if always shifting, framework on which science is built.

¹⁵⁷ For example, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971) (in which the Court held that issuance of a liquor license to a discriminating club was insufficient to trigger state action) the parties stipulated that the Lodge "is, in all respects, private in nature and does not appear to have any public characteristics." *Id.*, 179 n.1 (Douglas, J., dissenting).

¹⁵⁸ *E.g.*, *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁵⁹ *E.g.*, *Lloyd v. Tanner*, 407 U.S. 551 (1972); *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 303 (1968).

¹⁶⁰ *Cf.* *Bell v. Maryland*, 378 U.S. 226 (1964) (convictions of Negro "sit-in" demonstrators were reversed and remanded; subsequent law made refusal to serve on the basis of race illegal, casting doubt upon the validity of the convictions).

principal interest is to identify the obligations that may be triggered by the actor's *own* organizational characteristics¹⁶¹ rather than by the services it provides, or by the acts or acquiescences of other actors, indisputably governmental, from which it benefits in realizing its challenged objectives.

To illustrate, consider the challenge to a self-help repossession, for failure of the creditor to abide by constitutionally appropriate procedures. The plaintiff may base its state action claim on the adoption by the state of laws that legitimate such a repossession, such as the relevant portions of the Uniform Commercial Code, and the state's title registration mechanisms.¹⁶² That is the basis of the traditional challenge that, as we gather from *Flagg Brothers v. Brooks*,¹⁶³ seems destined to fail without the active participation of a party who may fairly be said to be a state actor (as was the case in *Lugar v. Edmonson Oil Co.*).¹⁶⁴ But imagine, by contrast, self-help repossession by an automobile company that is the beneficiary of large government contracts, or federal loan guarantees, or whose management structure has been subject to the sort of governmental review exercisable under the Emergency Loan Guarantee Act.¹⁶⁵ On those facts, the plaintiff could urge state action on the basis that the company's public characteristics had become so dominant as to transform its *own* character from private to public. It would not be a necessary condition of the plaintiff's case to trace its grievance back through the actor who is the immediate cause of its complaint to any "other" public body.

The second reason for the special narrowness of our own inquiry is that the actors whose obligations we are examining are all

¹⁶¹ It is not always easy to disentangle the private actor's own characteristics from the actions of a state actor, because the former can always be portrayed as deriving in some way from the latter. For example, one might say that merely by being chartered by the state, a private corporation's existence is entangled with the state from the start. And there are various arguments to make that it does whatever it does because the state allows it. But to go to those extremes would be tantamount to the elimination of state action as a viable concept, and thus the burying of fundamental distinctions, at considerable risk to our form of government. See *supra* note 156.

¹⁶² See, e.g., *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973) (defendant bank's use of state prejudgment self-help repossession statute does not constitute sufficient state involvement to support cause of action for deprivation of civil rights under color of law), *cert. denied*, 419 U.S. 1006 (1974).

¹⁶³ 436 U.S. 149 (1978) (warehouseman's proposed sale of goods entrusted to him for storage, as permitted by the U.C.C., is not state action). See generally *Brest, A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

¹⁶⁴ 102 S. Ct. 2744 (1982).

¹⁶⁵ See 15 U.S.C. § 1845(b) (1976).

organizations, as distinct from ordinary, natural persons. This consideration is significant because state action analysis commits us not only to determine which actors should bear the burdens to which we subject governments; it also requires us to determine which actors are entitled to the liberties of citizens. On this latter score one finds, running throughout the law and its literature, reservations about how fully constitutional liberties should, or even intelligibly could, apply to corporations—to for-profit corporations in particular.

Many of the reservations about according corporations full liberties have been expressed in terms of their large economic power.¹⁶⁶ Such objections I want to put to one side as not being claims about corporate liberties per se; they really raise questions about the rightful constraints on wealth generally.¹⁶⁷ Our concern is with reservations that are supposed to derive from the peculiarly *corporate* or *organizational* characteristics of organizations, as such, irrespective of their power. As early as *Bank of Augusta v. Earle*¹⁶⁸ and *Paul v. Virginia*,¹⁶⁹ a corporation (“[t]hat invisible, intangible, and artificial being,” Chief Justice Marshall had called it¹⁷⁰) was deemed not to be a “citizen” within the privileges-and-immunities-of-citizens clause of the Constitution.¹⁷¹ The fourth amendment is available to corporations, but not on the same basis as to natural persons.¹⁷² The fifth amendment’s self-incrimination provision

¹⁶⁶ See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952).

¹⁶⁷ Consider, for example, Hobhouse’s position that severer restrictions should be imposed on property-for-power than on property-for-use. See, L. T. HOBHOUSE, *The Historical Evolution of Property, In Fact and In Idea*, in PROPERTY: ITS DUTIES AND RIGHTS 22-24 (1922).

¹⁶⁸ 38 U.S. (13 Pet.) 519 (1839).

¹⁶⁹ 75 U.S. (8 Wall.) 168 (1868).

¹⁷⁰ *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

¹⁷¹ U.S. CONST. art. IV, § 2. Cf. *Pilgrim Real Estate v. Superintendent of Police*, 330 Mass. 250, 112 N.E.2d 796 (1953) (corporation not “citizen” qualified to sue to enforce ordinance).

¹⁷² In *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court opined that the fourth amendment, “if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be ‘particularly described.’” *Id.* 208 (emphasis added). The Court observed that “[h]istorically private corporations have been subject to broad visitatorial power, both in England and in this country,” from which had emerged a “settled [practice] that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.” *Id.* 204-05.

By 1949 it had been established that corporations were entitled to fourth amendment protection, but that they “can claim no equality with individuals in the enjoyment of a right to privacy.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1949). The Court explained only that:

cannot be claimed on their behalf at all.¹⁷³ And although corporations have been accorded free speech protection,¹⁷⁴ there is no clear consensus that they enjoy it in the same degree as ordinary persons.¹⁷⁵ As for the fourteenth amendment, corporations seem to have succeeded to the status of equal protection "persons" in a rather casual ruling from the bench.¹⁷⁶

They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation.

Id. See also *United States v. Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942) (motor carrier, regarded as a species of public utility, not to be accorded the same constitutional guarantees of privacy as an ordinary citizen in his private business).

¹⁷³ See *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906); see also *Rogers v. United States*, 340 U.S. 367 (1951) (U.S. Communist Party does not enjoy immunity with regard to its books and records).

¹⁷⁴ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (first amendment protection not lost "simply because its source is a corporation that cannot prove . . . a material effect on its business or property."); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (both upholding power companies' freedom of speech rights). See generally Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833 (1981).

¹⁷⁵ In *Bellotti*, the dissenting opinions of White (joined by Brennan and Marshall) and of Rehnquist reflected more readiness to distinguish between corporate and natural persons. See *Bellotti*, 435 U.S. at 802-28. See generally Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 Wis. L. Rev. 494.

¹⁷⁶ See *Bell v. Maryland*, 378 U.S. 226 (1964). In *Bell*, the Court noted that corporations are entitled to equal protection under the fourteenth amendment. Justice Douglas, in Appendix I to his separate opinion, observed the casualness of the first such ruling, in *Santa Clara County v. Southern Pacific R.R.*, 118 U.S. 394 (1886), the Court having disposed of the issue from the bench. See 378 U.S. at 262.

Justice Brandeis was unpersuaded about endowing corporations with full fourteenth amendment liberties (see *Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, J., dissenting)), as was Justice Black, see *Connecticut General Ins. Co. v. Johnson*, 303 U.S. 77, 85-90 (1938) (Black, J., dissenting) (fourteenth amendment not intended to apply to corporate persons). Justice Douglas's view was similar. In *Bell v. Maryland*, a case involving the right of a corporate food chain not to serve Negroes, he noted that the firm's president had expressly disavowed that the segregation was "my policy, my personal prejudice." Justice Douglas went on to ask:

So far as the corporate owner is concerned, what constitutional right is vindicated? It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The corporate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. What personal rights of theirs would be vindicated by affirmative? Why should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights personal to him are involved? Why should his interests—his associational rights—make it possible to send these Negroes to jail?

Presumably, the strength of the cases for and against deeming corporations constitutional "persons" varies from one doctrinal area to another. The corporation's claim would seem strongest in areas such as free speech, in which, as the Court recognized in *First National Bank v. Bellotti*¹⁷⁷ the corporation's political participation can advance the values of pluralism, and its voice can add to the public debate. Hence, there is an argument for endowing the corporation with speech-liberty that is fairly straightforwardly reducible to underlying human claims.

In other areas, however, claims on behalf of the corporation are not so transparently traceable to individuals, and there the situation gets cloudy.¹⁷⁸ Where an ordinary mortal is concerned, we can discern a value in preserving a sphere, free from state influence, in which he or she may be arbitrary, capricious, and prejudicial. Giving the individual this right-to-be-wrong, to make his or her own way, commands support because, among other things, it promotes the exercise and development of individual wills and personalities, personalities that may produce better citizens in the long run.¹⁷⁹

It is not as easy to find corresponding reasons to nurture virtues in a corporation's "personality." That is, even if it is intelligible to speak of a corporation, *as such*, being arbitrary, capricious or

Who, in this situation, is the corporation? Whose racial prejudices are reflected in "its" decision to refuse service to Negroes? The racial prejudices of the manager? Of the stockholders? Of the board of directors?

378 U.S. at 261-62.

¹⁷⁷ 478 U.S. 765, 786 (1978) (State would have to demonstrate compelling state interest to prevent corporation from informing electorate).

¹⁷⁸ Even concerning corporate free speech, some of the justices have their doubts as to whether the connection to humans is close enough.

Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not "an integral part of the development of ideas, of mental exploration and of the affirmation of self." They do not represent a manifestation of individual freedom or choice.

Id. 804-05 (White, J., dissenting) (quoting T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 5 (1966)).

¹⁷⁹ See *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969) (holding that requiring combat duty in the Vietnam War of a Selective Service registrant who was conscientiously opposed to American military activities in Vietnam, but who was not in a formal sense a religious conscientious objector, violated first and fifth amendments). In *Sisson*, Chief Judge Wyzanski emphasized defendant's sincere and conscientious consideration of the issues. "The true secret of legal might lies in the habits of conscientious men disciplining themselves to obey the law they respect without the necessity of judicial and administrative orders." *Id.* 911.

prejudicial (I think it is),¹⁸⁰ it is more difficult to defend a corporation's freedom to be so on the basis of values connected with the corporation's personality development. That is one reason it is easier to make a case for—and against¹⁸¹—endowing a corporation with legal rights by appealing to some mortal's derivative moral claims, than to argue for a corporation's legal right based on moral claims that are predominantly its own. No one doubts, for example, that associations provide the framework for developing personal relations prized on many theories of personality, liberty, and state.¹⁸² Indeed, many of the rights claimed by associations in

¹⁸⁰ We commonly pass moral judgments upon groups in ordinary language: "Germany was wrong to have invaded Poland." The speaker is understood to be characterizing the behavior of a nation on the plane of national behavior, a judgment that is obviously related to, but not straightforwardly deducible from, the blameworthy conduct of particular German leaders—of Hitler, of Goering, and so on.

It seems even more appropriate to ascribe various moral and morally relevant attributes to a corporation as such, rather than to its human agents, when the conduct supporting the judgment seems less grounded in the deliberate acts of the agents, as in the corporation's formal and informal information and authority systems. For example, one employee, a scientist, may know that a substance X at temperature Y poses danger, but not know that the conditions are being realized in one of the plants. Another employee, a plant engineer, identifies the conditions, but does not know that they are dangerous. Further, there is nothing in the company's internal operating procedures to bring the two agents together. Surely, if an explosion results, it is not clear we should blame either employee. Blaming others, such as the top managers or the stockholders (for their omissions) is possible, but may overextend the reach of the blaming terms, until they lose their significance. If we are to ascribe blame in the circumstances at all, it would not be unreasonable to blame (or in some circumstances, praise) the corporation.

Elsewhere, I have outlined the case for such attributions on the ground that moral language is part of a socializing process; "good" and "bad" behavior can in some circumstances be better taught by ascribing moral terms to the corporation, e.g., "the Z auto company was 'bad' to have produced such an unsafe car," rather than stretching "bad" to cover the behavior of employees none of whom, individually, was in a position to foresee the dangers. See Stone, *Corporation Accountability in Law and Morals*, in *THE JUDEO-CHRISTIAN VISION AND THE MODERN BUSINESS CORPORATION* (1982).

The case for distinct corporate praise and blame is probably strongest respecting acts which in their nature cannot be performed by a mortal, but only by a corporation, e.g., merging, declaring dividends, repurchasing stock.

¹⁸¹ For example, some of the arguments against corporate free speech are also instrumental, rooted in the notion that corporations possess so much power they might drown out other speakers. See *Bellotti*, 435 U.S. at 810 (White, J., dissenting). The drowning out considerations can be raised even more forcefully when the speaker is a government rather than a private corporation. See Shiffrin, *Government Speech*, 27 U.C.L.A. L. Rev. 565, 595-601 (1980).

¹⁸² Professor Hurst has called the freedom of private associations, including corporations, "a value built sturdily into our habits of life. . . . Exercising their freedom to enlist with others and using law positively to mobilize group power in behalf of individual states, people groped towards [a] policy expressly what they felt as a basic truth of civilized existence." J. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* 86 (1964).

their own name have been recognized on this basis.¹⁸³

Other situations exist, however, in which the liberty being claimed in the organization's name cannot as convincingly be traced to the normally recognized benefits of associated natural persons. The fifth amendment provides a good example. We cannot say that, if the corporation were allowed to plead the fifth amendment, no natural persons would benefit. In many circumstances, shareholders, officers, and employees would all stand to benefit if the protection shielded the corporation's accounts from legal liabilities. A satisfactory explanation must include the fact that it is (among other things) particularly *humiliating, frightening, and depersonalizing* to be compelled to testify against oneself. But when we compel the corporation's testimony, as when we search its records, the natural persons whom the action affects derivatively are not affected in the same way, not *humiliated*, as if their own testimony were being compelled, or their own papers searched. Hence, at least in some contexts, corporations can be denied liberties of natural persons without forcibly and directly colliding with personal autonomy values.¹⁸⁴

Certainly a lot more could be said on the subject of endowing corporations with independent rights and liabilities. The only point I want to raise here is that, until a firmer foundation can

¹⁸³ See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (State could not compel NAACP to disclose its membership lists because disclosure would be likely to restrain the freedom of association of its members). Note also that Justice Douglas, notwithstanding his sentiments in *Bell*, began his dissent in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1971) with the remark that the first amendment and the Bill of Rights

create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. . . . Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires.

Id. 179-80 (footnote omitted). Certainly, that is the view espoused by the Court in such leading associational rights cases as *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963), and *NAACP v. Alabama ex rel. Patterson*: the Court views itself to be protecting the liberty claims of clearly identifiable individual members, not of the group as some sort of transcendental remainder.

¹⁸⁴ Meir Dan Cohen makes a thorough and thoughtful presentation of such a position in *M. D. COHEN, PERSONS AND ORGANIZATIONS: A LEGAL THEORY* (forthcoming, University of California Press, 1983).

Note that it is not inevitable that we should prefer the direct legal rights of natural persons over those that might intelligibly be established by some group, and that might, if recognized, benefit persons only in a derivative, even diluted way. One can imagine a society in which the preferences were reversed—where families, municipalities or other groups were so highly valued politically and communally that the unit, not the individual, was accorded a preferred position. Such an ideal is examined in *A. KOESTLER, DARKNESS AT NOON* (1941). See also *H. MAINE, ANCIENT LAW* 142-43 (1930) in which Henry Maine considered "families" in a corporate sense to be the primary units of primitive society.

be laid for defending corporations in their own rights, corporations might have to be recognized as a special subset of liberty holders, with the burden on them of proving their entitlement to some liberties, particularly when the connection is tenuous between corporate liberties and the moral claims of identifiable humans.

In sum, this subsection suggests that in determining what fairness obligations we may legitimately impose on an organization, two related but separable examinations of its public and private characteristics are required. The first is to determine the warrant for obliging the organization to act as though it were a government; the second, the warrant for protecting it as though it were a natural person.

D. A Case for the Public/Private Distinction: The Moral Exemplar Model

Is there any rational basis for altering the fairness obligations that we demand of an actor depending upon its organizational characteristics, either because those characteristics restrict the liberty claims to which it is entitled as a citizen, or enlarge the public obligations it needs to bear as a government?

I think the answer is yes. Let me use as the basis for illustration *Jackson v. Metropolitan Edison Co.*¹⁸⁵ In that case, respondent was a privately owned and operated electric utility. It held a certificate of public convenience and necessity from the public utility commission, which had the power to review certain managerial decisions, including proposed tariffs. Petitioner, a user, suffered one termination of service for nonpayment of her bills. She managed to reestablish the benefits of respondent's power, although she continued to avoid the ordinary financial burdens, by putting the account in the names of others with less sullied credit (including her twelve-year-old son),¹⁸⁶ and, allegedly, by a little meter-tampering for good measure.¹⁸⁷ When respondent's employees discovered that they had unwittingly extended her about a year's additional grace, they cut off her service without the ado to which petitioner believed herself entitled under the Constitution. She brought a section 1983 action, seeking damages for the termination, and an injunction requiring restoration of power services until she had been afforded notice, a hearing, and an opportunity to pay any amounts found owing.

¹⁸⁵ 419 U.S. 345 (1974).

¹⁸⁶ *Id.* 347.

¹⁸⁷ *Id.* 347.

The *Jackson* majority rejected petitioner's claim for failure to demonstrate sufficient connection between respondent's conduct and the actions of the state. The Court expressly reserved, however, the question "whether 'due process of law' would require a State taking similar action to accord petitioner the procedural rights for which she contends."¹⁸⁸ The answer to that reserved issue is our quest. Would there be any reason for a different outcome if the same conduct occurred, but the utility was not investor-owned but municipal?

The policy basis for making that distinction is surely not obvious, to put it mildly. Why, and to whom, should the actor's organizational character matter? Mrs. Jackson, it is safe to suppose, felt however badly she did without giving public/private much thought. Those who mull these fine lines might have discovered grounds for added indignity, had the defendant been a public utility, in the fact it would have been her own agents who did her wrong. But one can as forcefully point out that, because the agents of a public utility would have been more proximately under her electoral control, their actions could have been characterized, to that extent, as more legitimate.

In the final analysis, the basis for imposing separate obligations based on public/private characteristics is so obscure in such situations, that the courts, impelled by the Constitution to locate *some* dividing line, may be tempted to seize upon any that is distinct. Thus, we are left to suppose that for lack of any better boundary, a decision could turn on whether the utility in question was incorporated under the municipal code or under the general corporations code—even if that means little more than that in the one case it sells only bonds to the public, and in the other it sells both its bonds and its common stock. In either case, its securities are going to wind up, we may imagine, side by side in the same investment portfolios, anyway.

I propose to advance a case for distinct treatment on a basis that is not so arbitrary. The model on which it rests is not aimed at providing a general theory of state action, because it gives only a partial account of why actors indisputably governmental (Congress, the courts, a city council) have come to bear special obligations under the Constitution. But the part it does provide is the part for which theory matters most, to sort out the hybrid actors whose public/private status is most genuinely in doubt. The central idea

¹⁸⁸ *Id.* 359.

develops from the notion that the virtues we are seeking under the mantle of fairness are public goods.

Suppose first that in an ideal society people are considerate, temperate, nonarbitrary, and display the various other virtues with which "fairness" is associated. Being among people who deal with each other civilly is a benefit in itself; life is nicer that way. But there is an additional benefit. Ordering through law entails various costs. Thus, social practices that enable us to replace law with good manners as a way of organizing and coordinating behavior offer certain advantages.¹⁸⁹ For this reason, each person's exercise of virtue—and the very *expectation* of that exercise—provides a common benefit.¹⁹⁰

The practicers of virtue cannot, however, fully capture in exchanges the benefits their virtues are conferring on society.¹⁹¹ I derive benefits from your virtues, from which you cannot exclude me. We could respond by passing laws requiring such virtues of everyone. But that is hardly ideal. Even when enforcing virtue is *intelligible* (and it is not always so: consider mandatory altruism), the public enforcement of virtue probably rankles more than the public suppression of vice.¹⁹² In all events, the attempt to enforce virtue everywhere we found it flagging not only would be costly, it would, for most of us, unacceptably extend the power and reach of government.

There is appeal, therefore, in a solution that eschews the enforcement of all virtues universally, and instead appoints one sector—government—as a moral model or teacher, an exemplar of virtue. This is a notion that has cropped up from time to time, ordinarily in the field of criminal procedure. Consider Justice Brandeis's memorable dissent in *Olmstead v. United States*¹⁹³: "Our government is the potent, the omnipresent teacher. For good or

¹⁸⁹ See McKean, *Economics of Trust, Altruism, and Corporate Responsibility*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 29 (E. S. Phelps ed. 1975).

¹⁹⁰ For example, the gathering of taxes depends to a large measure on taxpayers feeling that to pay their share is the right and fair thing to do—and that people ought to be right and fair. Hence, even if I wanted to be wholly arbitrary, I would still (in the lingo of the literature) "bribe" others to be equitable, for the generally prevailing level of amenity is of some value to me.

¹⁹¹ The practice of some virtues, such as dealing with consumers or employees more fairly than law and contracts require, can produce a private benefit through the enhancement of the actor's good reputation. I am more interested, however, in the benefits conferred on society by the practicer that do not inure to its own economic benefit.

¹⁹² See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 670-72 (1958) (objections to legal coercion to virtue).

¹⁹³ 277 U.S. 438 (1928).

for ill, it teaches the whole people by its example.”¹⁹⁴ The same idea finds expression in one argument against the death penalty, not that the murderer does not deserve it, but that the government ought not to practice, and so to exemplify, the conduct that carrying it out involves. The intuition is that the government should comport itself fairly independent of a particular complainant’s rights; there are certain things government simply should not do—whether as prosecutor,¹⁹⁵ as landlord,¹⁹⁶ or as distributor of benefits and privileges.¹⁹⁷

The notion that certain virtues are public goods—that if the government flags in its moral leadership, it is the entire collective that suffers¹⁹⁸—is one way to flesh out these intuitions. Before il-

¹⁹⁴ *Id.* 485 (Brandeis, J., dissenting). Exemplar considerations may be more ubiquitous, even if not often identified as such. See, e.g., the contract clause, U.S. CONST., art. I, § 10, cl. 1; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21 n.17 (1977) (state legislation entailing “serious disruption of . . . bondholders’ expectations” under prior interstate covenant deemed violation of contract clause).

¹⁹⁵ See *Berger v. United States*, 295 U.S. 78 (1935) (discussed *supra* note 139).

Under the theory espoused in the text, one might argue that the government had a *duty*, and not just the power and privilege, to prosecute and punish those who did wrong.

¹⁹⁶ See *Knox Hill Tenant Council v. Washington*, 448 F.2d 1045 (D.C. Cir. 1971) (right of District of Columbia public housing tenants to sue for improper maintenance upheld as against claim of sovereign immunity). The court found the doctrine of sovereign immunity in “a considerable state of disrepair, at least in terms of intellectual respectability,” *id.* 251, and assumed the power “to declare [government’s] responsibility” as a landlord, *id.* 1053. Cf. *Powelton Civic Home Owners Ass’n v. Dep’t. of Hous. and Urban Dev.*, 284 F. Supp. 809, 831 (E.D. Pa. 1968) (Secretary of HUD “implicitly obliged by due process to make fair, non-arbitrary decisions” regarding urban renewal, with consequence that residents of area affected by proposed urban renewal project have opportunity to submit evidence prior to decision).

¹⁹⁷ See *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (enjoining Secretary of Agriculture from debaring plaintiffs from participating in dealings with Commodity Credit Corporation absent procedural regulations, without need to reach question whether debarment violated due process standards). Judge (now Chief Justice) Burger stated “to say that there is no ‘right’ to government contracts does not resolve the question of justiciability. Of course there is no such *right*; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person” *Id.* 574 (emphasis in original).

¹⁹⁸ The Model does not, however, stand or fall on the plausibility to construe virtue as a public good in a full technical sense. The reader who prefers to substitute a less pretentious vocabulary of public benefits and burdens will not miss much—and may, indeed, keep better sight of the moral underpinnings that economic (and pseudo-economic) analysis tends to obscure.

Nothing in this Model would modify the requirements for standing: to challenge the government’s action there still must be a complainant demonstrating an invasion of his or her protected interest. But it would empower a court, when passing on the claim, to impose greater burdens on the government than what appears to be owed the complainant under some theory of the complainant’s rights. The suggestion of the Model is that the burdens may appropriately rise to a level commensurate with the benefits to be collectively realized through the exemplary value of the government’s good comportment.

lustrating the Moral Exemplar Model, however, it is worth noting that the moral exemplar considerations—teaching by good example—are not the only reasons we might have special concern that the government, in particular, be fair. The alternative to self-control through fairness is social control through law. But in the case of the government itself, control through law presents special difficulties. For example, many of the things we find most vexing about government behavior, including the haphazard processing of applications, bureaucratic shirking, indifference, delays, inaction, and unevenhanded exercise of administrative discretion,¹⁹⁹ are difficult to influence through a system of liability rules or, indeed, any sort of legal procedure that fastens hope on traditional judicial review. (Consider the limits of review, each in its own way, of governmental impoliteness, covert intelligence operations, and the waging of war.) To keep government accountable, we need to encourage the public sector to habituate to desired patterns of behavior. The best way to do this, to alter the behavior of a bureaucracy, is to develop appropriate bureaucratic rules, and all the other factors that go into shaping an internal organizational ethos.²⁰⁰ Reforms of this sort, aimed at making institutions more *caring*, have been advocated by myself and others, under the rubric of corporate social responsibility, in regard to actors in the private sector.²⁰¹ But the case for assuring organizational responsibility, implemented through tangible institutional reform, is at least as critical among the public as among the private organizations. Thus, improvement of the government's own operations provides a strong basis for developing public agencies into paragons of virtue, aside from the educative value which that development would have on others, the thrust of the Moral Exemplar Model.

E. *The Moral Exemplar Model Illustrated*

To furnish reasons that the government in particular should be fair does not tell us all we need to know. The question remains, who, for these purposes of sorting hybrid actors *is* government? Let me illustrate how the Moral Exemplar Model may provide some satisfactory guidance.

¹⁹⁹ See Mashaw, *supra* note 85, at 10-12.

²⁰⁰ See J. MASHAW, BUREAUCRATIC JUSTICE: ADMINISTRATIVE LAW FROM AN INTERNAL PERSPECTIVE (forthcoming, Yale Univ. Press, 1983). (Effort to integrate the normative concerns of administrative law with positive concerns of organizational theory).

²⁰¹ See C. STONE, *supra* note 75, at 111-18.

First, the Moral Exemplar Model supports the intuition that special significance should be attached to the public reaction. If an actor or action is identified in the public mind with the government, we should be more demanding for that reason alone. (This proposition provides one of the Model's entres for the traditional public service criterion.)²⁰² For example, it is true that General Motors is big and powerful; nonetheless, its actions are not likely to be interpreted as the expression of the collective will. Similarly, when a private club is tolerated to discriminate against Negroes,²⁰³ it does not convey the message that racial discrimination is an accepted norm in the same way that message was conveyed, for example, when the United States Armed Services were segregated.

Granted, everyone knows that governments have extensive power to step into situations to prevent unfairness, either through conditioning necessary licenses, such as the liquor license in *Moose Lodge No. 107 v. Irvis*,²⁰⁴ or through general legislation. Failure to exercise that power can be pointed to as evidence that the actor's conduct is being politically condoned. The flaw in this reasoning is that there are reasons for government to stay its hand that do not imply approval—the most important being the recognition of liberty interests.²⁰⁵

On the same basis, I think we would be justified in demanding more from, for example, the Boy Scouts and the Little League, than from other incorporated nonprofits. Holding federal charters by special acts of Congress, such organizations' failings will be worse because what they imply will be worse: popular and authoritative sanction for whatever they are doing wrong.²⁰⁶ For another example, although Comsat's three Presidentially-appointed directors can always be outvoted, they give the corporation the *appearance*

²⁰² The Model also accounts for this criterion in another way. See *infra* text accompanying note 220.

²⁰³ See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Of course, the same reasoning will substantiate closely scrutinizing unfairness by firms and other organizations that, because of the services they provide, are identified with the government.

²⁰⁴ 407 U.S. 163 (1972).

²⁰⁵ The distinction I make in text is grounded in a dichotomy between acts of omission and acts of commission that is always difficult to sustain under close examination. Yet, the fact that the distinction appeals to common sense, and thereby influences ordinary moral discourse, is a significant credential under the present analysis.

²⁰⁶ *But see* *King v. Little League Baseball, Inc.*, 505 F.2d 264, 267 (6th Cir. 1974) (in sex discrimination suit by girls seeking to play in Little League, fact of congressional charter did not make corporation's actions "state" actions for section 1983 purposes).

that the government has its hand, at least symbolically, on the helm, which has special exemplary significance under the Model.

The second set of implications involves the relationships between the actor's finances and the public purse. To judge from the cases, the receipt of government financial support, such as a federally-insured mortgage, will not in itself subject the beneficiary to the full panoply of government fairness obligations.²⁰⁷ What compounding of the financial relationship should be required?

For the Moral Exemplar Model, the answer begins with the fact that, typically, fairness costs. It costs to provide procedural hearings; it costs to police and clean up after leaflet distributors; and it even costs more, let us assume, to teach in an atmosphere distracted by long hair and arm bands. But associated with these costs are benefits, benefits that flow not only to the suspended student or evicted leaflet distributor, but to the entire society. We are assuming, moreover, that the optimal situation is achieved by enforcing the desired conduct among some "public" actors only, encouraging others to comply by good example. If these assumptions are valid,²⁰⁸ and the justification is to advance the common benefit, it would therefore seem appropriate for the associated costs to be shouldered by the public at large. Hence, the Model implies that, at least when presented with these close choices, we should distinguish public from private in a way that most nearly assigns the burdens to general revenues.

To illustrate, suppose first a case in which the actor's principal financial connection with a government is a government license issued as part of a government regulatory scheme, as in *Moose Lodge*²⁰⁹ and in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.²¹⁰ In these cases, suits not to discriminate

²⁰⁷ See, e.g., *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) (Friendly, J.) (no trial-type hearing prior to rent increase required of landlord whose connection with government was limited to financial assistance under National Housing Act). But see *Ressler v. Landrieu*, 502 F. Supp. 324 (D. Alaska 1980) (owner of housing project benefiting from government-insured mortgage required to provide specific, uniform criteria and due process hearing in rejecting otherwise eligible applicants under § 8 of the Housing Assistance Program).

²⁰⁸ Their empirical validity is not, unfortunately, self-evident. The assumptions include: (1) that morality—at least of some sorts—is more effectively communicated when the teacher is identified with the public than with the private sector; (2) that the government acting rightly only under court order does not rob the good example of its educative force; and (3) that the conduct we want of nongovernments resembles what we want of governments closely enough—that the lesson is transportable from one sector to the other.

²⁰⁹ 407 U.S. 163 (1972). As Justice Brennan observed in his dissent, "[l]iquor licensing laws are only incidentally revenue measures . . ." *Id.* 184-85.

²¹⁰ 412 U.S. 94 (1973).

(which the Court rejected) would have concentrated losses on the licensees, who could not have passed them back throughout the entire benefitting public.²¹¹ Contrast that with the situation presented in *Burton v. Wilmington Parking Authority*.²¹² In that case, a state-created, publicly financed parking authority leased part of a parking facility to a private restaurant, which practiced racial discrimination. The Court found state action on the basis that the Authority had "so far insinuated itself into a position of interdependence with [the lessee restaurant owner] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."²¹³

There are several ways to interpret the contrasting results in *Burton* and *Moose Lodge*. One way is to contrast the symbolic elements of the situation: after all, the parking authority building flew, quite literally, the flags of government.²¹⁴ But another way, more in line with our present search for an economic basis for distinction, starts by accepting the defendant's testimony that a restaurant in that locale could make more money racially discriminating than not.²¹⁵ Because of the constitutional constraints obviously applicable to the public authority, it was not free to realize this highest economic use by operating the premises discriminatorily on its own account. However, if the government were allowed to lease the space to another party who was free to discriminate, at a rental that reflected the added value of that option, the government would share in the economic benefits of the misconduct.²¹⁶

This discussion suggests one perfectly plausible way to characterize the arrangement as state action: to deem the lessee an instrument of the public authority through which the government sought impermissibly to capture economic benefits of discrimination.²¹⁷ This argument, however, seems to prove too much. There

²¹¹ Of course, the licensee could choose not to reapply for a license, and go out of business.

²¹² 365 U.S. 715 (1961).

²¹³ *Id.* 725.

²¹⁴ *See id.* 720. (Both state and national flags flew from the parking authority building.)

²¹⁵ *See id.* 724.

²¹⁶ I am supposing some measure of monopoly advantage to inhere in a coffee shop that is located in the parking building itself.

²¹⁷ The Court seems to have favored some such construction. *See Burton*, 365 U.S. at 724. Since the delivery of this paper, however, the Court in *Rendell-Baker v. Kohn*, 102 S. Ct. 2764 (1982), distinguished *Burton* with the statement that "no symbiotic relationship such as existed in *Burton* exists here." *Id.* 2772. No explanation of "symbiotic relationship" was offered which might distinguish the

are many situations in which the government shares financial benefits of private parties doing what the government could not have done itself, in which we would not be so ready to imply state action. For example, in the many cases in which the government insures a housing project mortgage, or guarantees a loan, its financial position is also improved (through a reduced likelihood of default), whenever the borrower has the option to discriminate, or unburden itself of various due process-type obligations. Indeed, as long as the private actor is paying taxes, the government stands to benefit via increased tax revenues from any profits that unfairness produces.²¹⁸ Hence, if a benefit to the public purse were all that was necessary to constitute state action, the courts would be forced to review almost all social activity for unfairness, absent legislative direction.

A virtue of the Moral Exemplar Model is that we may be able to extract from it a principled way to limit state action from such a fatal overbreadth. Observe that in *Burton*, the government stood to capture essentially all the economic benefits of the discrimination, assuming perfect competition among bidders for the lease. Hence, the Court's decision prohibiting the arrangement eliminated from public revenues essentially the full measure of the ill-gotten gains. To make up such loss, the parking authority will have to turn either to the state treasury, or to the public bond market. Whichever it does, the preponderant costs of setting a morally correct example will be borne by the public, which is exactly where they ought to lie. Note that the same consequence, the apportionment of essentially all "fairness" costs on general revenues, would not result from a plaintiff's victory when the government is insuring mortgages, or guaranteeing loans,²¹⁹ or is a regulatory licensor, as in *Moose Lodge*, or *CBS*. In those situations,

cases, and none, certainly, is implied by the Model. If anything, the strong gloss of traditional public function in *Rendell-Baker*, which involved providing secondary education under a state contract, thus binding the service provider to an extensive panoply of state regulations, would strengthen the public's perception of state responsibility; the apparent implication, that the state was allowed to contract out of fairness costs traditionally borne by the state (due process for teachers of students educated at public expense) makes the different outcomes even worse. See *infra* text accompanying note 242.

²¹⁸ Assume, for example, that the expenses of a due process-type hearing would qualify as a business expense for a private corporation, and thus as a deduction from taxable income.

²¹⁹ This assumes that the government is charging fees as part of a regulatory scheme—more or less to cover costs rather than enhancing its profits. If, for example, the government auctioned radio licenses the way it auctions outer continental shelf oil and gas leases, then, under my analysis, *CBS* would be less like *Moose Lodge* and more like *Burton*.

extending state action would concentrate costs on a distinct subgroup, a result that courts have been reluctant to decree.

The Moral Exemplar Model provides both a theory to substantiate this reluctance, and a functional rule of thumb for sorting public from private: *we should be readier to deem an actor "public" when the preponderant costs of doing so will be imposed on the benefitting public at-large.*²²⁰

There are two other significant implications of the Moral Exemplar Model which deserve comment, although they do not contribute to sort out public from private as much as to suggest what to do once something has been identified as one or the other. The first implication has to do with judicial review; the second, with remedies.

With regard to judicial review, the Model suggests some shift in the actions receiving closest scrutiny. The Model favors government's bearing the heaviest costs of exemplifying virtue. But a casual survey of actual legislation leaves the impression that in imposing expensive norms, lawmakers are inclined to go lighter on the public sector. OSHA is applicable to private employers, but units of government are expressly exempt,²²¹ as they are from the National Labor Relations Act.²²² Congress has long exempted itself from Title VII's restrictions against discriminatory hiring.²²³ The securities laws, at least until recently, have imposed less onerous restrictions on governmental issuers.²²⁴

The explanation for this self-favoring treatment may be as simple as that legislatures are more sympathetic to their own and

²²⁰ The concept of "benefiting public" is introduced to suggest that if the expected benefits were, for example, statewide, there would be a preference for making the state population bear them. Obviously, determining the boundaries of the benefiting community is a rough business.

Let me add by way of postscript that the theory in the text will not justify *Rendell-Baker v. Kohn*, 102 S. Ct. 2764 (1978), on this point either, *see supra* note 217, but then, I cannot think of any likeable theory that will. In that case, 90 to 99% of the "private" school's operating budget (the proportion varied from year to year) derived from state funds. *Id.* 4826. *Query*: can privately-supplied capital funds have been of significant magnitude?

²²¹ *See supra* note 43.

²²² *See* 29 U.S.C. § 152(2) (1976) ("employer" subject to National Labor Relations Act not to include United States and its instrumentalities, or state or subdivisions thereof).

²²³ *See* 42 U.S.C. § 2000e-16(a) (Supp. IV 1980) (Congress does not include itself as an "employer" subject to equal employment opportunities legislation unless hiring pursuant to competitive service). *But see* *Davis v. Passman*, 442 U.S. 228 (1979) (woman employee fired from congressional administrative position because "essential that understudy to my administrative assistant be a man," *id.* 230 n.3, allowed suit under fifth amendment).

²²⁴ *See* Steinberg, *Municipal Issuer Liability Under the Federal Securities Law*, 6 J. CORP. L. 277 (1981).

kindred bodies' budgets than they are to those of private entities. Or it may connect to broader, more general patterns of domestic politics, such as has led James Q. Wilson to observe that: "*In general, it is easier for a public agency to change the behavior of a private organization than of another public agency.*"²²⁵ But whatever the cause, the tendency suggests special reason for courts to consider suspect any legislation that concentrates the costs of exemplary behavior on subgroups, and away from government.²²⁶

The second implication of the Model concerns support for the present inclination of the law to disfavor punitive damages when the defendant is public. It is quite understandable that we allow, for example, a suspect or an inmate who has suffered a constitutional tort to sue a public entity for ordinary compensatory damages. But there is, I think, something intuitively unappealing about awarding punitive damages in these circumstances. Witness that although ordinary damages are allowed against a municipality under section 1983, punitive damages have been denied.²²⁷ Various reasons have been given for this reluctance to award punitive damages against governments, many of which are, as I pointed out, unpersuasive—for example, that the damages will simply be nullified by the taxing power.²²⁸

The better argument against punitive damages, at least as regards Region II relief, would seem to be as follows: if the constitutionally required character²²⁹ can be specified, and if a public in-

²²⁵ Wilson & Rachal, *Can the Government Regulate Itself?*, THE PUBLIC INTEREST 3-4, Winter 1977 (emphasis in original).

²²⁶ To carry this thesis through, however, one needs a theory of active judicial review that is hardly self-evident. We are not concerned here with legislative failure or disfavored minorities. The thesis requires active intervention despite, first, the tenuous constitutional status of some of the claims (health, for example). Second, the Model's rationale for review is based squarely on the assumption that the whole community stands to gain from the generalized moral benefits of the government's considerateness. Why should the court not be obliged to assume that, if the community were to be so benefited by the measure, the community would have voted for it? Personally, I think such a role for judicial review can be defended (even to the extent of authorizing interventions) based on the view that moral benefits are not automatically appreciated by the community, and that one of the functions we expect of courts is to exercise moral leadership. Exposition of this thesis is beyond the scope of the present paper.

²²⁷ See *supra* note 62. But see *Boyd v. Shawnee Mission Public Schools*, 522 F. Supp. 1115 (D. Kan. 1981) (punitive damages in section 1981 action allowable, distinguishing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981)).

²²⁸ See *supra* text accompanying notes 89-90.

²²⁹ There are arguments for fairness not directly linked to a constitutional source. See *supra* text accompanying notes 139-47. For example, in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the Court held that the Exchange had to deal fairly with a broker under antitrust principles. When an argument is so based, the case for interventions is presumably weakened.

stitution does not possess that character, then structural relief, which enjoins upon the institution the required properties, should dominate punitive damages, which rely only on the hope of cajoling them into existence. For example, to the extent that an ombudsman appears constitutionally compelled by the circumstances, then an ombudsman should be installed by decree;²³⁰ if hearings, hearings; if a police review board, then that.²³¹

For a court to take such an active hand would constitute judicial displacement of the ordinary political processes, which I myself depicted as constitutionally suspect in the analysis of Region I.²³² Even here in Region II, a court should have pause. But in Region II there are several differences. In Region I, the wrongs for which correction was demanded, (for example, a local government's failure to meet environmental discharge limits) were not constitutionally-based. By contrast, in most Region II cases, the values that are opposed to intervention, such as those of pluralism and federalism, are met with countervailing constitutional claims from the plaintiff's side.²³³ Second, what the law desires in Region I is ordinarily a satisfactory output that is achievable in various ways, among which the law is indifferent. Here, however, the institution's internal world is often the very thing under challenge.

I am not, let me remind, offering the Moral Exemplar Model as a unifying theory for all state action—supposing that such is possible, which I doubt.²³⁴ Not all state action cases are claims of unfairness, or can be satisfactorily translated into arguments about

²³⁰ I am referring to an ombudsman integrated into internal institutional functions as part of the substantive relief, and not reporting to the court merely as a fact-finding master.

²³¹ I presume that in weighing any decision, the courts will also balance the many contending reasons to exercise restraint in fashioning structural relief. See generally Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). But I agree with Mel Eisenberg and Stephen Yeazell that the supposedly alarming "novelty" of the structural relief cases has been overstated. See Eisenberg and Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

²³² See *supra* text accompanying notes 120-36.

²³³ See *Ruiz v. Estelle*, 503 F. Supp. 1265, 1386-87 (S.D. Tex. 1980) (ordering appointment of Master with broad power to secure institutional reform in Texas Department of Corrections; despite caution about judges "immersing themselves in the day-to-day management of prison systems . . . the federal courts cannot avoid the duty to protect constitutionally protected rights."). See generally Note, "Mastering" *Intervention in Prisons*, 88 YALE L.J. 1062 (1979) (analyzing use of court-appointed master in prisons to bring formal and informal systems up to constitutional requirements).

²³⁴ See *supra* note 156.

cost distributions: consider Congress restricting free speech.²³⁵ And of course the Model employs a social welfare analysis that would have been foreign, if congenial, to the founders. Nonetheless, the Model provides us with theory where theory is most needed: for the margin of active cases in which hybrid actors have to be sorted. Let me illustrate its value by returning to the question reserved in *Jackson v. Metropolitan Edison Co.*²³⁶

First, a private utility is commonly *perceived* to be something apart from government. Although its tariffs are publicly approved, its directors and managers are selected by private investors and are known to exercise a certain degree of independence from government. Hence, condoning the company's conduct does not pose the same risk of demoralizing society as do the acts of a publicly owned and operated utility.²³⁷ Second, when the actor is a private utility, government does not stand to capture the preponderance of the financial benefit from eliminating constitutional niceties. To put it another way, if the courts were to impose upon the private utility a standard of conduct fit for the state, the consequent costs would not be apportioned among the benefitting population as ratably as when the burden is placed on a public utility. Placing the incremental costs on the private utility will concentrate them on the equity holders, who will be residents of the service area only fortuitously.

Obviously, there are counter-arguments to be made. The knowledge that a private utility enjoys a publicly-protected franchise erodes the public perception point. And the possibility that

²³⁵ There are, as well, circumstances in which the state might delegate functions to a "private" association without capturing any notable economic benefit in return that should nonetheless be unconstitutional. *See, e.g.,* *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944) (racial segregation practiced by "private" political organizations in connection with primary elections held unconstitutional notwithstanding state decision "that the exclusion [of blacks] is produced by private or party action." 321 U.S. at 662).

²³⁶ 419 U.S. 345 (1974), discussed *supra* text accompanying notes 185-88.

²³⁷ Even though the corporate free speech cases evidence solicitude for a private utility's autonomy claims, *see supra* notes 177-78 and accompanying text, it is doubtful that the latitude would extend to allowing the private utility to segregate racially, and perhaps not even to discriminate against homosexuals, *cf. Gay Law Students Ass'n. v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (private corporation operating as public utility could not exclude homosexuals from employment "because of personal whims or prejudices or any other arbitrary reason" under equal protection guarantee of state constitution, the federal law not binding). Racial discrimination by a utility was disallowed at common law, *see supra* text accompanying notes 23 & 140. Observe that even if the utility is not deemed public in any particular circumstance, a plaintiff might yet establish the traditional "nexus" to state action, if officers of the state in fact exercised dominant control over the particular conduct in question.

the added costs will be passed through to customers, together with the capacity of the stock market to reflect in lower stock prices the costs not passed through, erodes the second.²³⁸ But to examine the fine discrimination intended in *Edison* is to start with just about the toughest test a state action theory has to meet. In a large class of cases of growing importance, the Model has a surer capacity to make discriminations—and to make them rightly, in my view. In *Flagg Brothers v. Brooks*,²³⁹ Justice Rehnquist, writing for the majority, expressly reserved judgment on

the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions [as education, fire and police protection, and tax collection] and thereby avoid the strictures of the Fourteenth Amendment.²⁴⁰

Surely, the Court was right that the possible permutations and combinations of government-private relationships are so complex as to caution against passing judgment on them prematurely.²⁴¹ But we can say that the Moral Exemplar Model puts whatever weight it has against allowing governments to contract out of constitutional burdens and reap the lion's share of the resulting financial benefits. Such an arrangement, which the Court—wrongly, I believe—recently refused to construe as state action in *Rendell-Baker v. Kohn*,²⁴² allows the public purse to benefit just where it should be burdened.

Although the Moral Exemplar Model thus provides some grounds for burdening the entities that are symbolically public and publicly-financed with heavier obligations than their private counterparts, still to be accounted for are the "liberty-claims." We can anticipate cases in which the considerations collide. For example,

²³⁸ That is, if the obligations become the accepted practice, share prices will duly discount to reflect the anticipated costs of being treated in *par materi* with a public utility.

²³⁹ 436 U.S. 149 (1978).

²⁴⁰ *Id.* 163-64.

²⁴¹ *See id.* 164.

²⁴² *Rendell-Baker v. Kohn*, 102 S. Ct. 2764 (1982); *see supra* note 222. *Blum v. Yaretsky*, 102 S. Ct. 2777 (1982), also decided while this Article was being edited, presents closer questions for the Model. In *Blum*, the challenged determinations by private doctors in private hospitals to transfer the plaintiff patients clearly had the consequence of saving money for the state (which was paying for their care). But there is not the evidence (as there was in *Rendell-Baker*) that the institutions involved were so heavily dependent upon state funds as to make plausible recharacterizing them as public under the Model. Therefore the Court was consistent with prior decisions to have demanded some showing of control over the particular action challenged.

even when the argument for burdening an ostensibly private corporation with the costs fit for government is persuasive, the company might have a strong conflicting argument for recognizing its liberty-claims qua citizen. Recognition is likely to vary both with the sort of liberty being claimed, and with the sort of organization (association, for-profit corporation, pension fund) asserting it. This is an area in which more work is needed.²⁴³

CONCLUSION

What is public, and what is private, and who cares? We are now in a better position, if not to give wholly satisfactory answers, at least to understand why that is so difficult to do.

To begin, the boundaries between public and private, never clearly marked, have grown, with time, more faint and less valuable. With regard to Region I, in which the concepts claim some role in determining the balance between political and judicial control over delictful misconduct, the significance of the actor's public or private characteristics may be overshadowed by the exact conduct in question. Are we trying to deter nuclear accidents or defamation? Similarly, in Region II, in which public and private are involved in determining fairness obligations, the substance of the claim may be as significant as the character of the actor. Are we considering the actor's obligation not to discriminate, not to disturb free speech, or not to deny a hearing?

Why should anyone persist in trying to draw the line, when both its original basis and its ultimate significance remain so obscure?

Part of the answer is that we are not persisting, that the weight once accorded public/private is in fact lessening. In both the contexts we have examined, that occupied with delicts and that occupied with fairness, the law is being applied with less regard for earmarks of public and private status, particularly when we consider the entire legal fabric, including not merely court-made and constitutional doctrine, but also legislation, government contracts, and licenses. In Region I, the traditional immunities of public bodies have been eroding. Like private business corporations, they are being exposed to the discipline of money judgments. Conversely, private business corporations are being treated increasingly like public bodies. Law and politics are displacing the market as the principal constraint on managerial discretion. Correspondingly, in

²⁴³ The most thorough-going contribution is M. D. COHEN, *supra* note 184.

Region II, the trend is for traditionally private bodies—private associations, private charities, private schools, even private business corporations—to bear the obligations once associated almost exclusively with governments.

Still, disparities between public and private treatment persist in the doctrines, no matter how difficult they may be to apply to the facts. Should not the lingering disparities be effaced altogether—a final merger of public and private?

In each region a different response to this question is required. In the first region, some distinct treatment along public/private lines seems destined to remain as long as other features of law and government are held constant. That is, as long as some actors (including an important subset of those generally deemed public) are endowed with unique powers, and subject to viable electoral accountability, there will be many circumstances favoring political mechanisms over liability mechanisms to control their misconduct. Moreover, the question of the appropriate liability-immunity rule is part of a whole matrix of rules, including those regarding agent liability, indemnification, respondeat superior, and limited liability. As long as these rules, deeply embedded in the law, continue to vary along a (roughly drawn) public/private line, some distinction in liabilities treatment seems ineradicable.

In the second region, the public/private distinction is not only embedded in basic doctrines, it seems inherent in every major issue of law. The objection to rooting it out is not, alone, that it would make government worse (which, beyond some point, it would),²⁴⁴ but that it would make government unrecognizable.²⁴⁵ Without apology, I have no full-blown theory of state action to offer. But for most of the cases actively litigated, we can find good guidance in my Moral Exemplar Model, which develops the notion that fairness is a sort of public good, and government an exemplar of virtue.

²⁴⁴ See H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 30 (1969) (reacting to Professor Elias Clark's proposal that all large charities be subject to fourteenth amendment antidiscrimination obligations, irrespective of their receipt of public financial aid):

Philanthropy is a delicate plant whose fruits are often better than its roots; desire to benefit one's own kind may not be the noblest of motives but it is not ignoble. It is the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law, which stimulates much private giving and interest. If the private agency must be a replica of the public one, why should private citizens give it their money and their time?

²⁴⁵ See *supra* note 7 and text accompanying notes 152-156.

For those who want to lobby for a more radical effacement or shift in the locus of the public/private boundary, there is opportunity for attack along the lines of unseating corporations from their entitlement to ordinary constitutional liberties. Some of the liberties that protect natural persons might not apply, or might apply less stringently, when corporations and other associations of various sorts are the claimants. The less heavily we weigh their liberty claims, the more we would be justified to encumber them with obligations.

Finally, it strikes me that the most complicated and perhaps most important questions do not involve whether to retain these two regions with their generally prevailing distinctions, but how we allocate between them. On what principles is some conduct shunted to one region, while other conduct goes to the other?

Consider price fixing by a state (for example, the marketing plan involved in *Parker v. Brown*²⁴⁶) and violations of worker health and safety (for example, the conduct covered by OSHA). Viewing the regulated conduct as delicts, the present posture of the law, to restrict the liability exposure of government units, can be interpreted consistently with my analysis of Region I. Although excusing governments from compensation is silly, excusing them from punitive judgments is not, whenever what is lost in judicial control is really compensated by stringent political accountability. Yet, by altering our description of price-fixing and worker-jeopardizing only slightly, we could recharacterize the underlying misconduct with strong implications for the region to which we assign them. Each can be viewed as involving not just a delict that affects a discrete group of aggrieved persons, but as a defect of the actor's character, the effects of which radiate throughout the entire society. In regard to price-fixing, we might say the government is exemplifying substandard business ethics; in regard to worker safety, an indifference to the well-being of persons. Under those constructions, the Moral Exemplar Model would seem to imply assigning the conduct to the second region, in which the courts would deal with the public actor more invasively and severely than the private actor—not, as at present, the other way around.

Perhaps this final quandary only illustrates once more the uncertain basis of my regional cartography. Yet, may these uncertainties not be testament, too, to a vital quality of the law? The divisions *are* unstable. Some of the most important developments in the law have consisted in migrations back and forth between

²⁴⁶ 317 U.S. 341 (1943).

my regions. Harms at one time relegated to torts (police brutality, invasions of privacy) have been elevated, by recharacterization, to constitutionally protected interests, first in such a way as to yield a favorable evidentiary rule or injunction, and later, as through section 1983, or *Bivens*,²⁴⁷ back to a yet more expansive action in tort. Conversely, we have examples of obligations originally demanded almost exclusively of governments, as a constitutional matter, being generalized to all actors, through a sort of mirroring; what is originally required of some actors constitutionally becomes the required norm throughout the society by a mimicry in nonconstitutional doctrines of torts, crimes, and contracts. Conversely, the obligations courts choose to impose on public actors through development of the Constitution may reflect (and magnify) the image of acceptable conduct that has come to prevail in the private world.

Indeed, some instability of population, some migration from one region to another, some imitative behavior, is not to be wondered at, when we consider how many fundamental factors are being played out along a public/private axis. The distinction is involved in the continuous defining and redefining of the most basic rights and remedies, liberties and liabilities, duties and disabilities, powers and privileges. Indeed, I do not doubt that if we could see to origins, we would find what is public, what is private, lying close to the heart of the human feelings that give rise to governments.

²⁴⁷ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (upholding action for damages against federal agents who violated plaintiff's fourth amendment liberties, notwithstanding absence of authorizing statute).