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Publicly Funded Private Security: A Critical Examination of Georgia Law Pertaining to the Private Employment of Off-Duty Police Officers

Ryan L. Giles
University of Georgia School of Law

NOTES

PUBLICLY FUNDED PRIVATE SECURITY: A CRITICAL EXAMINATION OF GEORGIA LAW PERTAINING TO THE PRIVATE EMPLOYMENT OF OFF-DUTY POLICE OFFICERS

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I. INTRODUCTION

Employing private security services—especially armed guards—is an important business decision. While employing armed guards provides a business with security and peace of mind, the presence of armed guards is accompanied by an increase in risk.[1] The following illustrations demonstrate just a few of the tragedies that have resulted in Georgia from the employment of armed security.

In 2009, a guest visiting City Views Apartments was shot in the face by an armed security guard.[2] Although the security officer alleged that he saw drugs, and shot because he thought the guest was reaching for a gun, no drugs or weapons were found near the scene.[3] Similarly, an Overlook Gardens Properties security officer entered an apartment in 2013 and placed an eight-year-old in handcuffs to "teach [him] a lesson" about throwing pine straw at dogs in the complex.[4] Demonstrating that such tragedies are not limited to the recent past, an unarmed passenger on a train was fatally shot in 1911 by a negligent security guard employed by Central of Georgia Railroad Company.[5]

In each of these tragedies, the doctrine of *respondeat superior* intuitively comes to mind.[6] The principle that an employer should be held liable for injuries caused by his servant is well established in Georgia law.[7] Despite these seemingly clear examples of appropriate vicarious liability, the relief sought by the plaintiff in each case was either significantly obstructed[8] or denied

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[1] *See infra* notes 2, 4–5 (illustrating examples of the risks associated with armed security).

[2] Ambling Mgmt. Co. v. Miller, 764 S.E.2d 127, 128–30 (Ga. 2014).

[3] *Id.* at 130.

[4] Martin v. Macon-Bibb Cty., No. 5:15-CV-6 (MTT), 2016 WL 2745830, at *1 (M.D. Ga. May 11, 2016).

[5] Pounds v. Cent. of Ga. R.R., 83 S.E. 96 (Ga. 1914).

[6] O.C.G.A. § 51-2-2 (2016). The doctrine of *respondeat superior* states that a master is liable for the torts committed by his servants when in the prosecution of the master's business.

[7] Georgia codified the common law doctrine of *respondeat superior* in 1863. *Id.*

[8] *See, e.g.*, *Miller*, 764 S.E.2d at 133 (remanding for a jury determination after five years of litigation in three different state courts).

altogether.[9] The reason for this denial: the private security officers were off-duty police officers.[10]

Every day, thousands of police officers throughout Georgia don their uniforms and strap on their duty belts as they prepare for work. While most officers head to the local sheriff's office or municipal police department, a large number head to a private place of business where they work an "extra-duty" job as a security guard.[11] In theory, an off-duty police officer is synonymous with a private citizen.[12] When it comes to private security jobs however, the reality is quite different.

Current Georgia law treats torts committed by police officers, including off-duty officers, vastly different than torts committed by a non-police security guard.[13] In Georgia, private employers of police officers can escape all liability under *respondeat superior* by showing that the officer's tortious act was in furtherance of a police function.[14] This is true even where the act was for the private employer's benefit, such as when an officer working as a bar doorman removes a disorderly patron.[15] The simple fact is, when police officers are hired by a private business, they are hired precisely to provide "police services," and to protect commercial interests.[16] This Note will consider how a private employer's ability to escape *respondeat superior* liability under the current law ultimately allocates the risk of its security operations to the

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[9] *See, e.g.*, *Martin*, 2016 WL 2745830, at *7 (granting defendant's motion for summary judgment).

[10] *Id.* ("Plaintiffs have wholly failed to address whether sovereign immunity bars these claims. . . . Accordingly, [Defendants are] entitled to summary judgment on these claims.").

[11] Some departments even have official mechanisms in place to connect officers to off-duty employment. *See, e.g.*, Peachtree City, *Extra Duty Employment of Police Officers*, http://www.peachtree-city.org/index.aspx?nid=892 (last visited Dec. 26, 2016) (showing a formal process by which off-duty officers can be hired directly through the department).

[12] *See* 26B C.J.S. *Detectives* § 3 (2016) ("It has been held that when an off-duty officer accepts private employment . . . the officer changes his or her identity . . . to a private citizen . . . .").

[13] Pounds v. Cent. of Ga. R.R., 83 S.E. 96, 97 (Ga. 1914) ("The mere fact that a railroad company pays for the services of a certain police officer, who does nothing but perform the duties of a police officer proper, does not make the company liable.").

[14] *Id.*

[15] Putnam v. City of Atlanta, No. 1:10-CV-03243-RWS, 2012 WL 3582607, at *1 (N.D. Ga. Aug. 16, 2012).

[16] *See id.* at *13, *16 (ejecting and arresting intoxicated patron when working as bar doorman constituted police duties); Page v. CFJ Props., 578 S.E.2d 522, 524 (Ga. Ct. App. 2003) (arresting shoplifter as private store security constituted police duties).

taxpayer.[17] Additionally, this Note will consider how the current law is difficult to apply consistently, provides a strong disincentive for employers to reduce risks and control employees, and poses a steep barrier for victim recovery.[18]

Several jurisdictions have considered the consequences arising from the externalization of private liability and have enacted legislation to remedy the problem. One common legislative solution has been a statute requiring private employers of off-duty police officers to indemnify the government for actions taken within the scope of their private duties.[19] The Eleventh Circuit Court of Appeals recently considered one such statute in the March 2016 decision *Blue Martini Kendall, LLC v. Miami Dade County*.[20] In upholding the constitutionality of Florida's private indemnification statute,[21] the court concluded that the state had a legitimate interest in preventing the public from bearing the costs of privately contracted police services.[22]

This Note will conduct a critical analysis of the existing Georgia law, identify current problems with its application, and propose a potential solution. Part II of this Note will illustrate and apply current Georgia law in the context of a hypothetical scenario. Part II.A will illustrate how Georgia tort law applies to the employment of civilian private security, while Part II.B considers these principles in the context of off-duty employment of law enforcement officers. Part III of this Note outlines the problems arising from the current state of the law, including the consequences for the government, for tort victims, and for society in general. Finally, Part IV evaluates the Florida statutory indemnification approach recently upheld by the Eleventh Circuit and proposes a potential solution to the identified problems.

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[17] *See infra* Part III.

[18] *See infra* Part III.

[19] At least eight other states have adopted legislation requiring private employers of off-duty police officers to indemnify the government for acts done for their benefit. For a full list of relevant statutes, see APPENDIX A.

[20] 816 F.3d 1343, 1346 (11th Cir. 2016) (evaluating a Florida private employer indemnification statute).

[21] *Id.* at 1352. *See also* FLA. STAT. § 30.2905 (1991). In relevant part, subsection (2)(a) provides: "Any such public or private employer of a deputy sheriff shall be responsible for the acts or omissions of the deputy sheriff while performing services *for that employer* while off-duty, including workers' compensation benefits." *Id.* (emphasis added).

[22] *Blue Martini Kendall*, 816 F.3d at 1351.

II. ILLUSTRATION AND APPLICATION OF THE CURRENT GEORGIA LAW

Tort liability comes in many forms. A single injurious act by an employee may impose liability on multiple distinct parties.[23] Part II.A of this Note will illustrate the most likely claims arising under Georgia law from a private security guard's tortious act. In contrast, Part II.B will consider how the liability for the same act shifts when committed by an off-duty police officer and the Georgia "police functions" approach is applied.

A. HYPOTHETICAL 1: APPLICATION OF GEORGIA LAW TO A CIVILIAN SECURITY GUARD

To illustrate the potential causes of action arising out of the acts of a private security guard, imagine this hypothetical. Suppose that Grocer Gary's shop, located in the city of Glitzy, Georgia, is plagued with shoplifters. Gary decides that he needs additional security for his shop and hires Bully Bob, a private citizen and well-known tough guy, to patrol the store and prevent shoplifting. Gary provides Bob with a uniform, assigns him shifts, and instructs him to "keep the place safe." While on patrol on his first shift, Bob sees Victimized Vinnie put what he suspects to be store merchandise under his coat and walk towards the door. Believing that he is a shoplifter, Bob charges Vinnie and tackles him onto the concrete. He puts Vinnie into a chokehold and strikes him over and over, even after Vinnie is handcuffed. As a result of the incident, Vinnie is severely injured and requires hospitalization. Additionally, what Bob saw Vinnie put under his coat was actually his cell phone, making Vinnie completely innocent of any wrongdoing. Vinnie suffered a $100,000 total loss as a result of his injuries, which includes his medical bills, lost wages, pain, suffering, and all other non-pecuniary damage.

Vinnie has two proper parties against whom he may bring a cause of action: Bully Bob and his employer. Vinnie will first

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[23] *See* 147 AM. JUR. PROOF OF FACTS 3d 247 *Proof of Liability of Private Employer for Torts Committed by Off-Shift Police Officer Employed as Private Security Guard* § 3 (2015) (illustrating a list of potential claims against individual, state, and private entities for torts arising out of the off-duty employment of a police officer by a private business).

assert the state tort claims of battery[24] and false imprisonment[25] directly against Bully Bob for actually committing the act. Additionally, Vinnie will bring a claim against Gary's Grocery under *respondeat superior*[26] and negligent hiring[27] theories.

1. Individual Tort Claims Against the Security Guard. Vinnie will almost certainly prevail on his individual claims of false imprisonment and battery against Bob.[28] Against the false imprisonment claim, Bob might invoke the "Merchant's Privilege" defense. This doctrine allows a shopkeeper or his agent to detain a suspected shoplifter in a reasonable manner for a reasonable time to investigate the shoplifting.[29] This defense will almost certainly fail, however, because no reasonable jury could conclude that the manner of Vinnie's detention was reasonable.[30] Based on the clearly egregious facts of this hypothetical, Vinnie will likely receive a judgment against Bob on both counts.

2. Respondeat Superior *Claim Against the Private Employer.* Vinnie will also likely prevail on his vicarious liability claim against Gary's Grocery for Bob's acts. *Respondeat superior*, is the Georgia doctrine which holds employers liable for the torts committed by their employees in conducting the employer's business.[31] In *Chorey, Taylor & Feil, P.C. v. Clark*, the Supreme Court of Georgia explained that vicarious liability extends to the employer when: (1) the injury was caused by an employee "acting

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[24] O.C.G.A. § 51-1-13 (West 2016) (codifying Georgia's battery cause of action).

[25] O.C.G.A. § 51-7-20 (West 2016) (codifying Georgia's false imprisonment cause of action).

[26] O.C.G.A. § 51-2-2 (West 2016) (codifying Georgia's *respondeat superior* cause of action).

[27] O.C.G.A. § 34-7-20 (West 2016) (codifying Georgia's negligent hiring cause of action).

[28] The Georgia battery statute gives Vinnie a right of action against Bob regardless of Bob's intention. O.C.G.A. § 51-1-13 (West 2016). Additionally, a deprivation of personal liberty for any amount of time constitutes a false imprisonment. O.C.G.A. § 51-7-20 (West 2016).

[29] The common law Merchant's Privilege doctrine has been codified in Georgia under O.C.G.A. § 51-7-60 (2016).

[30] *See* Brown v. Super Disc. Mkts., Inc., 477 S.E.2d 839, 840 (Ga. Ct. App. 1996) (explaining that the reasonableness of the length and manner of detention are generally questions for the jury).

[31] The Georgia statute defining *respondeat superior* is codified at O.C.G.A. § 51-2-2 (West 2016). The doctrine is imported from the English common law. *See* Bosh v. Cherokee Cty. Bldg. Auth., 305 P.3d 994, 998 n.13 (Okla. 2013) (noting that *respondeat superior* is a common law doctrine). The rationales for this doctrine include: (1) incentivizing employers to conduct their business in such a way as to reduce injury to others, (2) increasing the likelihood that a judgment would be satisfied, and (3) encouraging employers to insure against liability. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 CMT. B (2006) (outlining the rationales of the *respondeat superior* doctrine).

within the scope of [his or her] employment," and (2) the employee was "on the business of the employer at the time of the injury."[32] This liability has been imputed to private security guards, even when the guard has an independent contractor relationship with the employer.[33] Because Bob was on-duty as a security guard for the grocery store at the time of the injury, and because the act of stopping a suspected shoplifter falls squarely within the scope of his employment, the two prongs of the *Clark* test are met. Gary's Grocery will almost certainly be vicariously liable for Bob's actions under the *respondeat superior* doctrine.

3. Negligent Hiring Claim Against the Private Employer. Finally Vinnie will likely bring a negligent hiring claim against Gary's Grocery. Unlike the first two causes of action, the success of this claim will largely depend on facts beyond this hypothetical. A business is liable in Georgia under a negligent hiring theory if it does not use ordinary care in selecting its employees.[34] To prevail, Vinnie will have to show that Gary "knew *or should have known* the employee was not suited for the particular employment."[35]

4. Apportionment of Liability: Who Pays for the Injury? Assuming that Vinnie proves liability on all three counts, he will be able to recover the full amount of his injury against Gary's Grocery. Because Georgia abolished joint-and-several liability by statute in 2005, liability is apportioned among defendants according to percentage of fault assigned by the jury.[36] Under the *respondeat superior* cause of action, Gary's Grocery will be fully liable for whatever percentage of fault is assigned to Bob in addition to the percentage of fault assigned to it under the negligent hiring claim.[37]

To illustrate, assume that the jury determined that: (1) Bob was 90% at fault for the injury for committing the battery and false

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[32] 539 S.E.2d 139, 140 (Ga. 2000).

[33] *See* Howard v. J.H. Harvey Co., 521 S.E.2d 691, 695 (Ga. Ct. App. 1999) (holding that employers can be liable under the doctrine of *respondeat superior* for the intentional acts of independent contractor security guards against business invitees).

[34] O.C.G.A. § 34-7-20 (West 2016).

[35] W. Indus., Inc. v. Poole, 634 S.E.2d 118, 121 (Ga. Ct. App. 2006).

[36] O.C.G.A. § 51-12-33 (West 2016).

[37] *See* Little v. McClure, No. 5:12-CV-147(MTT), 2014 WL 4276118, at *3 (M.D. Ga. Aug. 29, 2014) (stating that under Georgia's apportionment of fault regime, an employer is liable under *respondeat superior* for the percentage of fault assigned to his employee).

imprisonment; (2) Gary's Grocery was 10% at fault for negligently hiring Bob, and (3) *respondeat superior* was applicable because Bob acted within the scope of his employment at Gary's Grocery. With this jury determination, Vinnie can recover for his $100,000 injury in two ways. First, he could execute the judgment against Bob for $90,000 and against the grocery store for $10,000. Vinnie is not likely to pursue this option because an individual security guard will probably not have the assets to satisfy a $90,000 judgment, and Vinnie will go uncompensated. Vinnie's second option, however, is much more likely to lead to recovery. Vinnie may also execute the judgment against the grocery store for the full $100,000 injury, as the business is liable for the 90% fault assigned to Bob under *respondeat superior*.[38]

In this scenario, liability is correctly apportioned and the outcome benefits society. Because he can pursue his judgment against a business, Vinnie is much more likely to recover his judgment in full. Because of the liability imputed, Gary's Grocery will be strongly incentivized to ensure that its security operations do not harm the public, that it is insured against potential tort judgments, and that it carefully screens, trains, and hires employees. Because of the liability he imposed upon his employer, Bob will likely be fired and un-hirable as a security guard, keeping him from being in a position where he can harm others.

B. HYPOTHETICAL 2: APPLICATION OF GEORGIA LAW TO AN OFF-DUTY POLICE OFFICER EMPLOYED AS A SECURITY GUARD

The previous hypothetical provides a basic outline of the tort liability for the acts of a private, civilian security guard. Now compare the assignment of liability in the previous scenario with the results reached when instead of a civilian security guard, an off-duty police officer is hired to provide private security services.

First, assume all of the facts of the previous hypothetical are exactly the same. The only change: instead of hiring civilian Bully Bob, Gary instead hires off-duty police officer Oliver to protect his store. Officer Oliver is a full-time employee of the Glitzy Police Department but agrees to provide security services for Gary during his off-duty hours. Oliver is paid in cash, directly from the

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[38] *Id.*

grocery store, and the city receives no payments for his service. Officer Oliver wears his police uniform and carries his department-issued weapons while working for Gary. As in the previous scenario, Victimized Vinnie suffers the exact same fate at the hands of Officer Oliver. He is mistaken for a shoplifter, tackled, and suffers a serious injury requiring hospitalization. His total injury is valued at $100,000.

Intuitively, the apportionment of liability under this second hypothetical should be the same as the first. In both scenarios, Vinnie was battered and imprisoned by an employee of the grocery store and suffered an identical injury. In spite of the nearly identical facts however, Oliver's status as an off-duty police officer will have a drastic effect on how liability is allocated.

Unlike the first scenario, Vinnie will actually have three proper parties against whom he may seek to recover for his injury. Vinnie may bring claims against Officer Oliver, Gary's Grocery, and the City of Glitzy. First, Vinnie will bring the same battery[39] and false imprisonment[40] claims against Officer Oliver personally that he brought against Bully Bob. Vinnie may also bring a claim under 42 U.S.C. § 1983 against Oliver for violating his constitutional rights.[41] Second, Vinnie will bring the same negligent hiring[42] and *respondeat superior*[43] claims against Gary's Grocery that he brought in the first hypothetical. Finally, Vinnie also will bring an action under § 1983 against the city of Glitzy for the violation of his constitutional rights.[44] The application of these doctrines to an off-duty police officer contrasts significantly with their application against the private security guard described above.

1. Individual Tort Claims Against the Officer. Vinnie will bring the same false imprisonment and battery claims against Officer Oliver that he brought against Bully Bob in the first hypothetical. In addition, Vinnie might bring a § 1983 claim against Oliver for

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[39] O.C.G.A. § 51-1-13 (West 2016).

[40] O.C.G.A. § 51-7-20 (West 2016).

[41] 42 U.S.C. § 1983 (1996). Enacted as a part of the Civil Rights Act of 1871, this provision allows an individual to bring a cause of action against a defendant who deprives him or her of a constitutional right under the color of state law.

[42] O.C.G.A. § 34-7-20 (West 2016).

[43] O.C.G.A. § 51-2-2 (West 2016).

[44] *See supra* note 41. Section 1983 claims can also be brought against municipal defendants in certain circumstances. 74 U.S.C. § 1983 (1996).

the violation of his constitutional right to be free from unreasonable seizures.[45] Unlike the claims against Bob, in which Vinnie was almost certain to prevail, here Vinnie will have a much harder time recovering against Officer Oliver. Since Oliver is a police officer and still possesses his powers of arrest off duty, Oliver will claim that he was exercising his police power in effecting the arrest.[46] To prevail on a battery or false imprisonment claim against an officer exercising his power of arrest, Vinnie will have to prove that Oliver acted with "actual malice" to overcome his official immunity.[47] Actual malice is a difficult standard to meet in Georgia and requires proof of a deliberate intent to harm the plaintiff.[48] This fact alone poses a significant barrier to victim recovery for the torts of off-duty police officers, but in-depth analysis of this point is beyond the scope of this Note. Because of the egregious facts of this hypothetical, we will assume that Vinnie can overcome this high standard and prove that Officer Oliver did act with actual malice when he detained and struck the handcuffed Vinnie.

2. Respondeat Superior *Claim Against the Private Employer.* Assuming that Vinnie can establish liability against Officer Oliver personally, it seems logical that Gary's Grocery should also be liable under a *respondeat superior* theory. Here, Officer Oliver—an employee of Gary's Grocery—was conducting the business of his employer when he harmed Vinnie. As we saw in the first hypothetical, employers of security guards in Georgia are liable for the torts of their employees.[49] This is true even if the security guard has an independent contractor relationship with the

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[45] U.S. CONST. amend. IV. Unreasonable physical force used in effecting an arrest is properly analyzed as a violation of the Fourth Amendment. *See, e.g.*, Whitten v. Wooten, 671 S.E.2d 317, 320 (Ga. Ct. App. 2008) ("A claim based on the Fourth Amendment prohibition against unreasonable seizure of the person applies where alleged excessive force was used to seize a person during the process of arrest, prior to actual detention on the charges.").

[46] *See* Stryker v. State, 677 S.E.2d 680, 681 (Ga. Ct. App. 2009) (holding that a police officer possesses powers of arrest "twenty-four hours a day, on or off duty").

[47] GA. CONST. art. I, § 2, ¶ IX. This section of the Georgia Constitution shields officers from personal liability unless they act with: "actual malice or actual intent to cause injury in the performance of their official functions." *Id.*

[48] *See* Selvy v. Morrison, 665 S.E.2d 401, 405 (Ga. Ct. App. 2008) ("[T]he actual malice necessary to overcome official immunity must be the intent to cause the harm suffered by the plaintiffs.").

[49] *See supra* notes 31–32 and accompanying text.

employer.[50] If Oliver were a private citizen, this would be a straightforward application of the *respondeat superior* doctrine.[51]

The normal application of *respondeat superior* does not apply here, however. Oliver is an off-duty police officer, so, Gary's Grocery will probably escape all liability. In Georgia, a private employer of an off-duty officer escapes *respondeat superior* liability if it can show that the officer was engaged in a "police function" at the time the tort was committed.[52] The Supreme Court of Georgia recently reaffirmed this practice in 2014,[53] when it reiterated the principles set forth in the 1914 case of *Pounds v. Central of Georgia Railroad Co.*[54] In *Pounds,* the court held that a private employer that hires a police officer does not become liable for his torts if he is exercising police duties.[55] The relevant inquiry is whether the officer was acting in his capacity as a police officer, a servant, or both at the time the tort was committed.[56]

To escape liability, Gary's Grocery will only have to show that Oliver was acting in a police capacity that was not directed by Gary at the time the tort was committed. Looking at precedent, this should be a fairly simple task for Gary. Courts applying Georgia law have repeatedly found off-duty police employees to be engaged in "police duties," even when the tort arises out of an act that directly benefits the employer.[57] By arguing that the

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[50] *See supra* note 33 and accompanying text.

[51] *See, e.g.*, Howard v. J.H. Harvey Co., 521 S.E.2d 691, 695 (Ga. Ct. App. 1999) (holding that if the private security guard's act is performed on behalf of the employer, the employer is bound under *respondeat superior*).

[52] *See* Pounds v. Cent. of Ga. R.R., 83 S.E. 96, 97 (Ga. 1914) (holding that a railroad was not liable for the negligent shooting of a passenger by its off-duty police officer employee because the employee was exercising his police functions).

[53] Ambling Mgmt. Co. v. Miller, 764 S.E.2d 127, 130 (Ga. 2014).

[54] 83 S.E. 96 (Ga. 1914).

[55] *Id.* at 97.

[56] *Id.*

[57] *See, e.g.*, Martin v. Macon-Bibb Cty., 5:15-CV-6C(MTT), 2016 WL 2745830, at *1, *3 (M.D. Ga. May 11, 2016) (holding that an off-duty police officer employee was performing police duties that the private employer did not direct when he handcuffed an eight-year-old boy to "teach him a lesson" about throwing pine straw at a dog); Putnam v. City of Atlanta, No. 1:10-CV-03243-RWS, 2012 WL 3582607, at *13 (N.D. Ga. Aug. 16, 2012) (concluding that an off-duty police officer employed as a bar bouncer was engaged in a police function when he removed and fought with a disorderly patron); Hyatt Corp. v. Cook, 529 S.E.2d 633, 636 (Ga. Ct. App. 2000) (holding that an off-duty police officer employed as hotel security was exercising his police duties when he fought with a patron at the hotel bar); Wilson v. Waffle House, Inc., 510 S.E.2d 105, 107 (Ga. Ct. App. 1998) (concluding that an

attempted arrest of a shoplifter was within Oliver's duties as a police officer, Gary will likely win the *respondeat superior* claim on a summary judgment motion.

3. Negligent Hiring Claim Against the Private Employer. Vinnie will next bring a negligent hiring claim against Gary's Grocery—the same claim that he brought in the first scenario. Once again, his claim will likely fail because of Oliver's status as an off-duty police officer.

Normally, employers are liable if they do not use ordinary care when selecting employees.[58] This rule does not apply to independent contractors, and off-duty police officers hired as security guards are usually considered independent contractors.[59] While these laws apply regardless of Oliver's status as a police officer, courts in Georgia rarely hold a private employer liable for negligent hiring unless an off-duty police officer has committed a previous incident with the same employer.[60] Here, because Oliver has never worked for Gary before, Vinnie's negligent hiring claim is almost certain to fail.

4. Section 1983 Claim Against the City. Vinnie's final claim will be against the City of Glitzy. Vinnie's only recourse against the city will be a federal remedy authorized under 42 U.S.C. § 1983 because he will be unable to bring a state law claim against the City of Glitzy.[61] The doctrine of municipal sovereign immunity[62] precludes state law claims against the city absent a legislative waiver of immunity.[63]

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off-duty police officer employed by Waffle House was performing "police duties" when he removed and fought with a restaurant patron); Rembert v. Arthur Schneider Sales, Inc., 432 S.E.2d 809, 811 (Ga. Ct. App. 1993) (holding that an off-duty police officer employed as store security was exercising his police duties when he removed a disorderly patron).

[58] O.C.G.A. § 34-7-20 (West 2016).

[59] *See* Fortune v. Principal Fin. Grp., Inc., 465 S.E.2d 698, 703 (Ga. Ct. App. 1995) (holding that a principal cannot be held liable for negligently hiring an independent contractor).

[60] *Compare* Miller v. City Views at Rosa Burney Park GP, No. 2009CV08640C, 2012 WL 11936173, at *6 (Ga. Super. Ct. 2012), *rev'd on other grounds*, 746 S.E.2d 710 (Ga. Ct. App. 2013) (private employer had no duty to investigate background of off-duty police officer hired as security guard), *with* Am. Multi-Cinema, Inc. v. Walker, 605 S.E.2d 850, 855 (Ga. Ct. App. 2004) (negligent hiring theory supportable where off-duty police employee had been accused of using excessive force while working for employer in the past).

[61] *See supra* notes 41, 44 and accompanying text.

[62] GA. CONST. art. I, § 2, ¶ IX.

[63] *See* Scott v. City of Valdosta, 634 S.E.2d 472, 477 (Ga. Ct. App. 2006) (holding that, "without a waiver of sovereign immunity, the City cannot be held liable for the actions of an

Establishing municipal liability under § 1983 is a heavy burden. In *Monell v. Department of Social Services*, the Supreme Court of the United States held that municipal liability under § 1983 is distinct from the doctrine of *respondeat superior*.[64] Liability can only be imputed to a municipality if the tortfeasor's act can be said to be the execution of a municipal policy or custom.[65] Even assuming such a policy or custom exists, liability will not attach under § 1983 unless it can also be proven that the *deliberate* conduct of the municipality was the "moving force" causing the injury.[66]

To recover here, Vinnie will have to show that Officer Oliver was either acting in furtherance of an express city policy, participating in a widespread practice of the city, or that the city failed to train Oliver such that it amounts to deliberate indifference to Vinnie's rights.[67] Once again, it will be difficult to determine the outcome of this claim because it would require a detailed examination of the practices of the City of Glitzy's police department and Officer Oliver's training. In the next section, we will consider the results if Vinnie wins on this claim, and the alternative if he does not.

5. Apportionment of Liability: Who Pays for the Injury? Now that we have considered the law as it applies to each of Vinnie's claims, the drastic effect that Oliver's status as a police officer will have on the apportionment of liability is apparent. In the first hypothetical, Vinnie was likely to prevail on his claims against both Gary's Grocery and Bully Bob. Furthermore, because Gary's Grocery was liable under *respondeat superior*, Vinnie would have

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arresting officer").

[64] 436 U.S. 658, 691 (1978).

[65] MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 99 (2d ed. 2008).

> Under Supreme Court decisional law, municipal liability may be based on (1) an express municipal policy, such as an ordinance, regulation, or policy statement; (2) a "widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a custom or usage' with the force of law"; or (3) the decision of a person with "final policymaking authority."

[66] Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

[67] *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

the option of recovering the full amount of his injury against a business with substantial assets. Here, by contrast, Vinnie's claims are far more tenuous.

First, we will assume that Vinnie can overcome the "qualified immunity" hurdle and prevail on his false imprisonment, battery, and § 1983 claims against Officer Oliver individually. Even this proposition is far from certain, but we will concede this claim because the implications of qualified police immunity in the context of private employment are beyond the scope of this Note. Second, both of Vinnie's claims against Gary's Grocery will almost certainly fail. Vinnie's negligent hiring claim will fail because courts are reluctant to impose liability on private employers who hire off-duty police officers absent special circumstances.[68] Vinnie's *respondeat superior* claim will also fail because Officer Oliver's arrest of a suspected shoplifter will protect Gary's Grocery from liability under the Georgia "police functions" approach.[69] Finally, Vinnie's claims against the City of Glitzy are uncertain at best. They would depend on extensive factual investigation into the practices, customs, and training of the City of Glitzy's police department. To account for this uncertainty, we will consider one apportionment of liability where Vinnie prevails on this claim (Alternative (A)), as well as another in which he does not (Alternative (B)).

In Alternative (A), Vinnie prevails on his § 1983 claim against the city. Presently, federal law is unsettled as to what role state law plays in the apportionment of § 1983 liability.[70] This uncertainty is largely immaterial to this hypothetical, however, because the common law principle that the plaintiff may only have one full recovery without regard to the number of defendants, still applies.[71] For example, the jury might first determine that Officer Oliver was liable for some of Vinnie's $100,000 injury for striking

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[68] *See supra* note 60.

[69] A security guard arresting a shoplifter on behalf of a store is similar to a bar bouncer removing a disorderly patron. Both are clearly done for the benefit of the private employer, but courts applying Georgia law treat them as "police functions" when performed by an off-duty police officer. *See supra* note 57 for other similar examples.

[70] *See* SHELDON H. NAHMOD ET AL., CONSTITUTIONAL TORTS 554 (4th ed. 2015) (noting the uncertainty surrounding the apportionment of § 1983 liability according to state statutes).

[71] *See id.* at 556 (explaining that lower federal courts apply the common law principle that a plaintiff may not recover more than the full amount of his injuries).

Vinnie while in handcuffs. They might further determine that the City of Glitzy was liable as well for being deliberately indifferent to a widespread department custom of striking handcuffed prisoners. Because Vinnie may only recover the full amount of his injury, the defendants to some degree will divide the resulting damages. Here, for example, the jury might award Vinnie $60,000 from Oliver and $40,000 from the City of Glitzy.

In Alternative (B), Vinnie does not prevail on his § 1983 claim against the city. Here, the entirety of the judgment will be against Officer Oliver personally. Gary's Grocery will not be liable under *respondeat superior*. Under the Georgia rule of several liability, Vinnie must attempt to collect the full $100,000 from Officer Oliver.

At first blush, the apportionment of liability looks very different depending on whether or not Vinnie prevails on his § 1983 claim against the city. In reality, however, it makes little difference. In 2014, an empirical, nationwide study strongly suggested that government agencies almost always assume financial responsibility for personal judgments against police officers.[72] The study included police departments in Georgia.[73] It also included judgments against off-duty police officers acting as private security guards at the time of the misconduct or tort.[74] The study concluded that, in practice, judgments against individual police officers are "functionally indistinguishable from *respondeat superior*" judgments against municipalities.[75]

With this understanding of police indemnification, the apportionment of liability under Alternative (A) and (B) is identical. Regardless of whether Vinnie wins his § 1983 suit, the City of Glitzy will be paying the judgment. While this is a better alternative for Vinnie, who is much more likely to collect his judgment from the government than from an individual, this more practically has the effect of making the Glitzy taxpayers responsible for subsidizing the security operations at Gary's Grocery.

As seen from this hypothetical, if Gary hires an off-duty police officer as a private security guard and the officer commits a tortious act, one of two things will happen. The first potential

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[72] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014).
[73] *Id.* at 905 n.90.
[74] *Id.* at 908 n.104.
[75] *Id.* at 890.

outcome will leave the victim with only the individual officer as a proper defendant. This poses a great barrier to victim recovery, as an individual police officer likely does not have sufficient assets to satisfy a judgment. Under the second, and much more likely outcome, the local municipality will be left holding the bag. The local taxpayers will necessarily satisfy the judgment for the tortious act of a private business's security operations.

In contrast to the correct apportionment of liability in the first hypothetical, risk is inefficiently allocated this time, leading to several negative outcomes. First, the city government and the taxpayers are required to assume the risk of Gary's Grocery's private security operations. Second, Vinnie may be unable to collect his judgment unless the city indemnifies Officer Oliver. Third, because he was not held liable, Gary has no incentive to change his behavior or to take steps to reduce the risk that his security operations pose to the public. Finally, because Officer Oliver has not imposed liability on his employer, Gary has no incentive to fire him or replace him with a more suitable guard. The taxpayers, the tort victim, and society are all worse off.

The current state of Georgia law simultaneously poses a barrier to victim recovery and externalizes the cost of private security to the taxpayer. In addition, the current law is difficult to apply consistently and provides little incentive for a private employer to reduce the risk that his security operations will harm the public. Part III of this Note will analyze these concerns in depth.

III. THE CONSEQUENCES OF THE CURRENT LAW

As the hypothetical scenarios described in Part II illustrate, a business decision to hire a police officer as private security greatly impacts the allocation of tort liability. Part III of this Note will consider three primary consequences arising from the current state of the law. Section A will demonstrate how the current approach to *respondeat superior* liability is difficult to apply consistently and often involves years of litigation to settle. Section B will consider how the current law externalizes the cost of private security to the taxpayers, and how this has the added effect of removing employer incentives to avoid harming the public. Finally, Section C will contemplate how the current law poses a

strong barrier to victim recovery in the event that a municipality refuses to indemnify a police officer.

A. THE CURRENT LAW IS DIFFICULT TO APPLY CONSISTENTLY

One of the most striking consequences of the current Georgia law is its difficulty in application and its inconsistency in results. The principle that the law should "treat like cases alike" is a core foundation of our legal system.[76] Even if one rejects the "independent moral force" of this principle, there are important instrumental goals of uniformity, such as the identification of wrongly decided cases and the economic benefits that come from having a predictable law.[77] The current Georgia law undermines this strong policy of uniformity and predictability in two distinct ways. The first problem, as the hypothetical in Part II illustrates, is that the acts of private security guards are treated completely differently than morally similar acts committed by a police officer. This undermines the principle of uniformity. The second problem is that Georgia courts cannot consistently define what constitutes a police function. This undermines the principle of predictability. This section will consider this second problem in depth.

The Supreme Court of Georgia has recently clarified the test for determining whether or not an officer's action was a "police function." The inquiry involves examining the officer's *conduct* as well as his *intent* at the time the tort arose.[78] This analysis is particularly prone to chaotic application because the conduct and intent of a private security guard is, in most cases, likely to be identical to the conduct and intent of a police officer under similar circumstances. It is difficult, if not impossible, to see how a court could consistently distinguish the conduct and intent of apprehending a shoplifter in a private security capacity to be different from that in an official police capacity.

Inconsistency in application has manifested itself in many Georgia cases over the years. In fact, even when courts consider

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[76] *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1975–76 (2008) (describing an egalitarian legal system as one that "treats morally like cases alike").

[77] *See* David A. Strauss, *Must Like Cases Be Treated Alike?*, 14–15 (Univ. Chi. Pub. L. & Legal Theory, Working Paper No. 24, 2002) (discussing many of the instrumental goals of uniform adjudication, including predictability and accountability).

[78] Ambling Mgmt. Co. v. Miller, 764 S.E.2d 127, 130 (Ga. 2014).

identical facts, they often reach different results. A recent, striking, example is the 2014 *Ambling Management Co. v. Miller* case, discussed above.[79] In *Miller*, the trial court, the Georgia Court of Appeals, and the Supreme Court of Georgia each reached a different conclusion regarding whether an officer was engaged in a police function when he approached an unarmed apartment complex visitor and shot him in the face.[80] The trial court concluded, on a motion for summary judgment, that a police officer was engaged in the police duty of enforcing handicap-parking law immediately prior to the shooting.[81] The Court of Appeals reversed, concluding that the officer had a "blended purpose" of official and private motivation that was not purely related to his police duties when he approached the victim.[82] Finally, the Supreme Court of Georgia affirmed in part and reversed in part, concluding that the Court of Appeals incorrectly considered the blended motivation of the officer when approaching the victim. The Supreme Court of Georgia nevertheless concluded that the evidence left a question of fact regarding whether or not the officer's "conduct and intent" was within his police duties at the time of the shooting.[83]

The radically different interpretations of the same facts in the *Miller* case is just one of many examples demonstrating the difficulty in applying the "police functions" approach. It took five years and three courts reaching three different conclusions to ultimately remand the case for a jury determination of whether the officer's conduct was a police function. Sadly, this was actually one of the better outcomes that the victim's family in *Miller* could have hoped for under the current Georgia law.

As the spasmodic path of the *Miller* decision illustrates, case law in Georgia is highly unpredictable as to whether or not a court will grant summary judgment concerning an officer's conduct. Many Georgia courts have concluded that an officer's conduct, even when egregiously wrongful and performed in the scope of their private

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[79] *Id.*

[80] *Id.*

[81] Miller v. City Views at Rosa Burney Park GP, No. 2009CV08640C, 2012 WL 11936173, at *4 (Ga. State Ct. Apr. 17, 2012), *rev'd*, 746 S.E.2d 710 (Ga. Ct. App. 2013).

[82] Miller v. City Views at Rosa Burney Park GP, 746 S.E.2d 710, 713–14 (Ga. Ct. App. 2013).

[83] *Miller*, 764 S.E.2d at 130.

employment, was a "police function" on a summary judgment motion.[84] For example, in the 2016 *Martin v. Macon-Bibb County* case, the court determined that an off-duty police officer was engaged in police duties when he entered an apartment and handcuffed an eight-year-old boy for throwing pine straw at a dog.[85] Even though the officer was working for the apartment complex at the time, responding to a complaint from a resident, and identified himself as the complex "courtesy officer," the court determined that because the complex did not direct the officer's act, it escaped liability.[86] By way of contrast, in the 2015 *Agnes Scott College, Inc. v. Hartley* decision, the Georgia Court of Appeals affirmed a denial of summary judgment to a college seeking to avoid liability for the arrest of an alleged sexual offender by campus police officers.[87] Although the arrest of an alleged sexual offender intuitively seems to be more closely aligned with the scope of police duties than handcuffing a child for throwing pine straw, courts applying the same law reached opposite conclusions regarding the liability of the private employer.

The contrast between the result in *Martin* and *Hartley* is indicative of the larger problem with the current Georgia law.[88] Many benefits accompany a predictable, uniformly applied law in Georgia. Consistency in the law allows businesses to account for, and insure against, liability.[89] It allows for effective settlement of disputes, because adversaries can reliably forecast the strength of

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[84] *See, e.g.*, Martin v. Macon-Bibb Cty., No. 5:15-CV-6 (MTT), 2016 WL 2745830, at *1, *7 (M.D. Ga. May 11, 2016) (granting private employer summary judgment where an off-duty police employee placed an eight-year-old boy in handcuffs for throwing pine straw); Page v. CFJ Props., 578 S.E.2d 522, 523 (Ga. Ct. App. 2003) (arresting a trespassing patron at a department store was a police function); Hyatt Corp. v. Cook, 529 S.E.2d 633, 635 (Ga. Ct. App. 2000) (arresting an unruly customer by a bar bouncer was a police function); Wilson v. Waffle House, Inc., 510 S.E.2d 105, 107 (Ga. Ct. App. 1998) (fighting with a patron for going behind the restaurant counter was a police function).

[85] *Martin*, 2016 WL 2745830, at *1, *3.

[86] *Id.* at *1–3.

[87] 768 S.E.2d 767, 768 (Ga. Ct. App. 2015), *cert. denied* (May 11, 2015).

[88] *See* James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 525 (2006) ("The rule of law makes law-abiding possible. It requires that rules of law be clear and consistent and that their application be sure and predictable. When that is true, law-abiding people can know what the law is and can orient their conduct on what it requires.").

[89] *Id.*

their claims.[90] It allows policymakers to structure rules to achieve desirable public benefits.[91] It results in a more just society, because morally equivalent acts are treated similarly.[92] In spite of the many measurable benefits in favor of having a uniform and predictable law, the "police functions" approach currently employed undermines these principles and is rife with glaring inconsistencies. This problem, standing alone, warrants an examination of the law to correct the uncertainty it creates.

B. THE CURRENT LAW EXTERNALIZES THE COST OF PRIVATE SECURITY TO THE TAXPAYER

In addition to its inconsistent application, the current law also externalizes the cost of private security operations to the taxpayer. As illustrated in the Part II hypothetical, every time a private employer successfully invokes the "police functions" defense to a *respondeat superior* claim, they are immune from liability. As the private business is immune, the taxpayers will almost always cover the cost of the judgment.[93] This externalization has two primary negative consequences. First, allowing a private employer to assign the liability of its operations to the government inefficiently allocates resources from an economic standpoint. Second, externalizing the costs of an employer's operations to the government undermines the rationales of the *respondeat superior* doctrine and removes a strong employer incentive to protect the public. This section considers both consequences.

One of the preeminent goals of our legal system is to force actors to internalize costs they otherwise would unfairly impute to third parties.[94] Economists describe costs imposed on parties who did not

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[90] *Id.*

[91] *See* Stefan Wrbka, *Comments on Legal Certainty from the Perspective of European, Austrian and Japanese Private Law, in* LEGAL CERTAINTY IN A CONTEMPORARY CONTEXT 13 (Mark Fenwick & Stefan Wrobka eds., 2016) ("Lawmakers have to create rational legal fundaments and procedures to allow for a 'suitable' application of rules.").

[92] *See supra* note 76.

[93] *See supra* Part II.B.*5*; *see also* Schwartz, *supra* note 72, at 888. In light of Joanna Schwartz's research on municipal indemnification practices, whether through indemnification or through § 1983 liability, the municipality will almost always wind up paying the bill for off-duty police torts.

[94] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 167 (6th ed. 2016).

agree to bear them as externalities.[95] A famous example, posited by Arthur Pigou to illustrate the problems of external costs, is the case of a locomotive that emitted sparks and started crop-damaging fires along the railroad right-of-way.[96] Because the crop damage was not a cost to the railroad, it did not factor into the company's cost-benefit analysis and they had no incentive to modify their locomotive to reduce the risk of starting fires. The takeaway from this example is that if the law does not provide some means of forcing a private entity to internalize the costs it imposes on the public, the world becomes a far more dangerous place.[97]

Private security operations often impose external costs. When a guard uses excessive force against a shoplifter or shoots an apartment complex visitor, the victim incurs some of the cost of the employer's security operations. Just as the farmer in Pigou's example bore the costs of the railroad's business decision not to modify the locomotive, Vinnie bore the cost of Grocer Gary's business decision not to train or supervise his guard.[98] To reduce the likelihood that a business will make decisions that impose high risks on others, it is desirable for the law to require the business owner to include those costs when conducting the cost-benefit analysis.

When hiring a private citizen as a security guard, Georgia law, through tort principles, will correctly force the employer to internalize the costs incurred by non-consenting parties through the doctrine of *respondeat superior*.[99] If we assume that business decisions are made rationally, it follows that business owners conduct a cost-benefit analysis before employing private security. Because business owners in Georgia are generally liable under *respondeat superior* for the malfeasance or negligence of their employees, they have an incentive to carefully consider how a security guard will be trained, what actions they are authorized to take, and how to insure against potential judgments. This has the

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[95] *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 134 (4th ed. 1932) (distinguishing private costs from social costs [externalities] in the context of a locomotive hypothetical).

[96] *Id.*

[97] *Id.* at 192. Although Pigou argued that the locomotive should have been forced to internalize the cost by way of a tax, the principle that a private entity should be required to assume the cost it imposes on the public applies equally to tort law.

[98] *See supra* Part II.

[99] *See supra* note 31.

benefit of ensuring that the business owner will be motivated to reduce the risk of the harm to the public and to include the full measure of social costs in the cost-benefit analysis.

The desirable and necessary goal of requiring business owners to internalize social costs is completely undermined by the Georgia law pertaining to off-duty police officers. Under the current law, a business owner can contract with an off-duty police officer to provide private police services, and then escape liability by arguing that the officer, in fact, provided those services. This has the effect of removing external costs from the employer's calculations. If a business can receive all of the benefits of private security, with none of the attendant liability, the business has no incentive to ensure its behavior does not pose unnecessary risks to the public. Without liability, Pigou's railroad company had no incentive to modify its train to reduce the risk of fire. Similarly, without risk of liability, Gary's Grocery has no incentive to control the behavior of Officer Oliver or to develop a policy restricting when and how he should step in to prevent shoplifting.

The application of the "police functions" test not only passively removes an employer's incentive to control the behavior of its employee; it also actually provides a compelling reason to *affirmatively refuse* to provide any guidance to the off-duty officer at all. One of the most important factors considered by Georgia courts in determining if an off-duty officer was engaged in a police function was the amount of direction he received from the private employer.[100] In almost every case in which the private employer did not explicitly direct the officer to perform the act giving rise to the tort, it successfully escaped liability.[101] This has the effect of encouraging private employers to give as little direction as possible to their off-duty police security guards, because any attempt to

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[100] *See, e.g.*, Ambling Mgmt. Co. v. Miller, 764 S.E.2d 127, 132–33 (Ga. 2014) (holding that the amount of direction from the apartment complex was highly relevant as to whether the officer was engaged in police duties); Martin v. Macon-Bibb Cty., No. 5:15-CV-6 (MTT), 2016 WL 2745830, at *3 (M.D. Ga. May 11, 2016) (rejecting *respondeat superior* liability because apartment complex did not direct officer to place the child in handcuffs).

[101] *Compare* Touchton v. Bramble, 643 S.E.2d 541, 544 (Ga. Ct. App. 2007) (rejecting liability because amusement park did not direct officers to arrest patron), *with* Agnes Scott Coll. v. Hartley, 768 S.E.2d 767, 768 (Ga. Ct. App. 2015), *cert. denied* (May 11, 2015) (remanding because question of fact remained as to whether college directed officers to arrest plaintiff).

direct or control their behavior might lead to liability that otherwise would not have existed.

Removing levels of supervision from armed guards is inherently dangerous. Privately employed off-duty police officers do not have the echelons of government supervision in place that an on-duty officer has. The off-duty officer is likely to be the only person working the private security job and the patrol sergeant or shift commander, who normally would evaluate and oversee his or her work, is not present. Without the normal levels of government supervision in place, it becomes imperative that the private businesses assume this supervisory role.

Private businesses are in a better position to control their security employees and avoid harm to the public than the government. To answer the question of why it is more desirable for a private employer, rather than the government, to bear the liability, we can turn to one highly relevant principle outlined by Guido Calabresi in his famous article, *Toward A Test for Strict Liability in Torts*.[102] Calabresi posits that liability is most appropriately placed with the party best able "to make the cost-benefit analysis between accident costs and accident avoidance . . . ."[103] We live in a world where it is not economically efficient to prevent all conceivable harm; therefore, liability should rest with the person best able to determine, before the accident, if the cost of avoidance was worth the investment—the *cheapest cost avoider*.[104]

In the context of privately employed security officers, the private employer is in a far stronger position to evaluate the costs of avoiding harm to the public than is the government. Although the off-duty officer retains his or her weapons and powers of arrest, those powers are employed for the benefit of a private entity.[105] This can result in a dangerous condition where a private employer has an incentive to use the state monopoly on the use of force to enforce private business goals.[106]

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[102] Guido Calabresi & Jon T. Hirschoff, *Toward A Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972).

[103] *Id.* at 1060 (emphasis omitted).

[104] *Id.*

[105] *See* Stryker v. State, 677 S.E.2d 680, 681 (Ga. Ct. App. 2009) (holding that a police officer possess powers of arrest "twenty-four hours a day, on or off-duty").

[106] A good example of the potentially dangerous results that the use of police power to

In addition to this conflict of interest, there are three other reasons why private employers are in the best position to avoid the social costs of negligent or malicious acts by security guards. First, private employers have detailed knowledge on the specific needs of their business and know exactly which types of crimes they intend to prevent with the security services they retain. They are in the best position to know whether armed security is even necessary and for what purpose. Second, private employers have direct control over their hired security personnel through their internal supervisory structure and systems of accountability. A store manager is in a much better position to intervene if the security guard is exceeding the scope of his private employment than an absent government supervisor. Finally, private employers have the ability to define the scope of their employees' duties, and to make rules spelling out under what circumstances their employees should act. While a police department can make general policies about enforcing the law, only the private business can provide the specificity required to achieve the goals for which the officer was hired. For example, a police department policy concerning arrests for public intoxication is not equivalent to a bar's policy on when an intoxicated patron should be ejected.[107] In short, a private employer is in the best position to supervise and control its security personnel, and to identify and implement measures to avoid injuries before they occur. Additionally, because the private employer is in a position to benefit from an abuse of the police power to serve its private objectives, liability for the misuse of privately contracted police power must rest with it.

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enforce private rules may engender is seen in *Seibers v. Dixie Speedway, Inc.*, 470 S.E.2d 452, 454 (Ga. Ct. App. 1996). In *Seibers*, off-duty officers refused to allow the plaintiff to seek medical attention for two hours after a fight until he complied with the racetrack policy of shaking hands with his opponent. This ultimately led to a coma and brain damage. *Id.*

[107] Relevant to this example is *Putnam v. City of Atlanta*, No. 1:10-CV-03243-RWS, 2012 WL 3582607, at *1 (N.D. Ga. Aug. 16, 2012). In *Putnam*, a police officer working as a bar bouncer was alleged to have beaten a man for not leaving the bar, even though witnesses said the man was so intoxicated he could not respond. *Id.* at *2. The business escaped liability by arguing that it did not direct the actions of the officer and that the officer was engaged in a police duty. *Id.* at *13, *16. In this example, supervision, guidance, or intervention from the bar management concerning the removal of intoxicated patrons could have prevented the injury more easily than the general department policy concerning public intoxication arrests enforced by a non-present supervisor.

C. THE CURRENT LAW STANDS AS A BARRIER TO VICTIM RECOVERY

Although unpredictability and externalization of costs to the government are major problems with the current law, it also stands as a barrier to victim recovery. *Restitutio in integrum*—the principle that tort law should restore the plaintiff to the position he was in before the injury—is well established in the United States.[108] If a plaintiff is unable to recover for injuries inflicted negligently or maliciously, the purpose of our legal system as a mechanism for peacefully resolving disputes is wholly undermined. The goals of deterrence, corrective justice, and fairness require that a party who injures another through fault make the aggrieved party whole.[109] Current Georgia law undermines this foundational principle of tort law in two ways. First, victims must languish through years of legal battles (and the associated costs) to ultimately vindicate their rights because of the unpredictability and difficulty in applying the law. This problem was considered in Section A and is well illustrated in the case of *Ambling Mgmt. Co. v. Miller*.[110] Second, if the government refuses to indemnify the officer in his or her individual capacity, the victim will likely go uncompensated because the law effectively absolves the private employer of liability. This section considers this second barrier in more depth.

If a private business avoids liability for the tort of its off-duty police employee, the only remaining defendants are the government and the individual officer. In many circumstances, such as in the Part II hypothetical, the liability of the individual officer is not in question. The problem with limiting liability to just the individual officer, however, is that police officers will rarely have enough assets to satisfy even modest judgments. In 2015, the average police officer in Georgia earned $40,770,[111]

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[108] The Atlas, 93 U.S. 302, 307 (1876) (holding that *restitutio in integrum* is the "leading maxim" in tort cases).

[109] *See generally* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (2004) (discussing the goals of tort law in the context of noneconomic damages).

[110] 764 S.E.2d 127 (Ga. 2014). Recall that in *Miller*, after five years of litigation in three different state courts, the question of liability was still unanswered with respect to the apartment complex.

[111] BUREAU OF LABOR STATISTICS, *Occupational Employment and Wages: Police and Sheriff's Patrol Officers* (May 2016), https://www.bls.gov/oes/current/oes333051.htm#.

which is well below the annual mean wage of $46,540 for the state.[112] If we extrapolate from these numbers that most police officers have a below-average net worth,[113] even a combination of asset seizure and wage garnishment will be unlikely to satisfy even a modest judgment.[114] Because individual officers would be unlikely to satisfy a judgment against them, it is desirable to allow recovery against other, more solvent, at-fault parties.

With individual officers unable to satisfy a judgment and the private employer absolved from liability, a plaintiff's only recourse will often be to attempt financial recovery from the government. As discussed in Part II, there are two ways the government might pay for the judgment. The first will be pursuant to finding of § 1983 liability.[115] Municipal liability is a heavy burden of proof for a plaintiff, however. As in the case of Vinnie, this option is often unsuccessful without strong evidence of a municipal policy or custom that contributed to the constitutional violation.[116] The second method by which plaintiff might recover against the government is through the voluntary indemnification of the individual officer by the government entity. While evidence suggests that, in practice, this almost always occurs, a refusal to indemnify an individual officer could leave a victim entirely uncompensated.[117]

Of all of the problems with the current law, the possibility of the government's refusal to compensate a tort victim is the least

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[112] BUREAU OF LABOR STATISTICS, *May 2016 State Occupational Employment and Wage Estimates: Georgia*, https://www.bls.gov/oes/current/oes_ga.htm#00-0000.

[113] According to Federal Reserve, the median net worth in the United States was $81,200. *See* FEDERAL RESERVE BOARD OF GOVERNORS, BULL. VOL. 100, NO. 4, *Changes in U.S. Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances* (Sept. 2014).

[114] Because the median net worth includes assets protected from seizure (such as some of the value of a residential home), these already meager assets are far too small to compensate a tort victim for any but the most minor judgments. Margaret Reiter, *Using Exemptions to Protect Property from Judgment Creditors*, NOLO, http://www.nolo.com/legal-encyclopedia/using-exemptions-protect-property-from-judgment-creditors.html. Further, while wage garnishment is an option in Georgia, the maximum garnishment is 25% of the debtors check after taxes. Patricia Dzikowski, *Georgia Wage Garnishment Law*, NOLO, http://www.nolo.com/legal-encyclopedia/Georgia-wage-garnishment-law.html. To illustrate the problem, consider that for Vinnie to collect his $100,000 judgment from Officer Oliver through wage garnishment (assuming Oliver makes the average police salary), it will require more than 163 months of continuous employment.

[115] *See supra* note 41 and accompanying text.

[116] *See supra* note 65 and accompanying text.

[117] Schwartz, *supra* note 72, at 888.

likely, but the most serious. While the externalization of private security costs to the government is problematic, even this is preferable to a complete denial of recourse for tort victims. Scholars debating the goals of tort law often disagree when discussing if compensation, deterrence, or some other end is the primary objective.[118] Most agree, however, that the peaceful resolution of disputes is the foundation not only of the tort system but also the legal system in general.[119] At a time when tensions between law enforcement and the public are particularly strained, a legal framework within which to equitably resolve disputes between the police and the public is not only morally necessary, but also socially necessary to maintain stability and peace.[120] An equitable tort framework also reassures citizens that egregious acts involving off-duty police officers will be fairly adjudicated. The current state of the law is problematic because the victim's recovery for the torts of an off-duty officer is often predicated entirely upon a voluntarily action of the local government.

In short, there are serious, recurring problems with the current law in Georgia. The lack of predictability and consistency, the economically inefficient allocation of liability, the barrier to victim recovery, and the unfair public subsidization of private businesses all suggest that a change in the law is needed. Part IV of this Note will consider a possible solution.

IV. A POSSIBLE SOLUTION

Other jurisdictions have considered the problems concerning off-duty police employment outlined in this Note. Nationwide, most states follow an approach similar to Georgia, in which courts look to the nature of the officer's act to determine private employer liability.[121] Some states, however, have begun to consider options

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[118] *See generally* Steven D. Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987) (discussing various theories, and their criticisms, concerning the goals of the tort system).

[119] *Id.* at 766 ("Tort law's primary function . . . is not to compensate, deter, or punish, but rather to resolve disputes arising from perceived breaches of important social norms . . . .").

[120] *See generally* Ronald Weitzer, *American Policing Under Fire: Misconduct and Reform*, 52 SOCIETY 475, 475 (2015) (discussing long term impact of police-community relations in light of recent high-profile instances of excessive force).

[121] *See* White v. Revco Disc. Drug Ctrs., Inc., 33 S.W.3d 713, 719 (Tenn. 2000) (noting that a majority of jurisdictions look at the nature of the officer's actions to determine if he was

to address the problems with these laws. For example, some state appellate courts have redefined the allocation of liability through judicial decisions.[122] Other states have enacted statutes requiring private employers to carry insurance,[123] to indemnify the officer,[124] or to indemnify the government for acts committed by off-duty officers.[125] Recently, the Eleventh Circuit Court of Appeals upheld one such approach adopted by the Florida legislature. In light of the Eleventh Circuit's decision, Part IV of this Note will consider a possible statutory solution in Georgia.

A. THE FLORIDA APPROACH

In 1991, the State of Florida passed a statute requiring private employers to assume responsibility for the acts of off-duty police employees and indemnify the government.[126] This statute is particularly relevant to Georgia legislators, because the Eleventh Circuit Court of Appeals recently upheld it against a constitutional challenge in March 2016.[127] In *Blue Martini Kendall*, the business defendant argued that the statute violated the Fourteenth Amendment's Due Process Clause because the law imposed liability "without regard for whether the off-duty officer's actions benefitted the public . . . ."[128] In rejecting this argument, the court reasoned that the statute easily survived rational basis scrutiny.[129] The court concluded that the government had a legitimate interest in preventing the public from bearing privately contracted costs, and that officers employed as private security guards were likely to find themselves in situations giving rise to liability.[130] The court ultimately reasoned that, without the statute, a business

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performing a public function for the purpose of *respondeat superior* liability).

[122] *See, e.g.*, *id.* at 726–27 (adopting agency law principles to determine private employer liability).

[123] ARIZ. REV. STAT. ANN. § 41-805(D) (West 2016).

[124] ALASKA STAT. § 6-5-338(c) (2016).

[125] MISS. CODE ANN. § 17-25-11(3) (West 2017); WASH. REV. CODE § 4.92.175(1) (2016).

[126] FLA. STAT. § 30.2905(2)(a). In relevant part, the statute reads: "Any such public or private employer of a deputy sheriff shall be responsible for the acts or omissions of the deputy sheriff while performing services for that employer while off duty . . . ."

[127] Blue Martini Kendall, LLC v. Miami Dade Cty., 816 F.3d 1343, 1351–52 (11th Cir. 2016).

[128] *Id.* at 1350.

[129] *Id.* at 1350–52.

[130] *Id.* at 1351.

could obtain the benefits of private police protection while forcing the public to bear the risks.[131]

B. A PROPOSED SOLUTION

In light of the Eleventh Circuit's recent ruling, the Georgia General Assembly should consider a statutory solution to the problems with the current law outlined in Part III. Although the Florida law is incomplete because it only addresses indemnification of the government by a private employer, the Eleventh Circuit's reasoning indicates that a statute imputing *respondeat superior* liability to private employers of police officers would be constitutional. This Note recommends enacting a statute consisting of two provisions, both of which would apply when an off-duty officer acts *for the benefit* of a private employer. The first provision, like the Florida statute, should require businesses to indemnify the government from liability for the torts of officers in their employ. This would have the effect of prohibiting businesses from externalizing the risks of their security operations to the taxpayer.[132] In addition, however, the law should also expressly authorize *respondeat superior* liability for acts that are done *for the benefit* of the employer. This would result in increasing predictability and consistency in the law, imputing liability to the "cheapest cost avoider," and reducing barriers for victim recovery.[133] Adopting the recommended legislation would eliminate or significantly diminish the impact of the three main problems with the current Georgia law outlined in Part III.[134]

1. The Proposed Solution Increases Predictability and Consistency in the Law. Adopting the recommended legislation

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[131] *Id.* at 1350–52.

[132] *See supra* Part III.B.

[133] *See supra* Part III.A–C.

[134] One example of the language that the recommended legislation might employ is as follows:

> Any private entity that hires an off-duty law enforcement officer of this State for the purpose of acting in a private security capacity shall, for any acts performed by the officer for the benefit of the private employer:
> (1) Indemnify any government entity from liability arising from the act, and;
> (2) Be subject to vicarious liability under O.C.G.A. § 51-2-2, notwithstanding the existence of an independent contractor relationship.

would largely eliminate the problems with predictability and consistency seen under the current Georgia law. Unlike the current inquiry, which asks whether or not the officer's act was a police function, the proposed statute requires courts to simply ask whether or not the officer was acting for the benefit of the private employer.[135] This change in focus would have a significant impact on the ease with which the law may be applied. It is far simpler for a court to determine whether or not an action was for the benefit of an employer than it is to determine if an act falls within the scope of "police duties" or if the act was explicitly directed by the business. The language of the Florida statute, like the recommended legislation, focuses on the benefit to the employer rather than the nature of the officer's act as the basis of liability.[136] The ease of applying this recommended legislation is obvious in the *Blue Martini Kendall* trial because of this similarity. At trial, the court was able to quickly and easily conclude that the officers were acting for the benefit of the business when they ejected and arrested bar patrons.[137] Another example of increased predictability in the law under the proposed legislation is illustrated by referring back to the Part II hypotheticals. While it is difficult to determine whether Officer Oliver was engaged in a police function or a purely private function when he detained and struck Vinnie, it is relatively straightforward to conclude that he was detaining shoplifters for the benefit of Gary's store.

2. The Proposed Solution Requires Private Entities to Internalize Social Costs. In addition to increasing predictability, the recommended legislation will also require private businesses hiring off-duty police officers as security guards to internalize the social costs. The recommended statute essentially requires private employers who hire off-duty police officers to be liable to the same extent that they would be liable if the security guard was a private citizen. In addition to achieving a measure of fairness in the treatment of morally similar cases, this suggested change also

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[135] *See supra* note 134 and accompanying text.

[136] FLA. STAT. § 30.2905(2)(a) ("Any such public or private employer of a deputy sheriff shall be responsible for the acts or omissions of the deputy sheriff *while performing services for that employer* . . . ." (emphasis added)).

[137] Martinez v. Miami-Dade Cty., 32 F. Supp. 3d 1232, 1241 (S.D. Fla. 2014).

promotes economic efficiency.[138] By authorizing *respondeat superior* liability and requiring that employers indemnify the government from liability arising from the private service, employers will be required to conduct a cost-benefit analysis that includes social costs. Because businesses are in the best position to know what their security needs are, they can best weigh the costs of accident prevention against the costs of the accident. Placing liability with the business will thus further the "cheapest cost avoider" principle.[139]

In addition to furthering the "cheapest cost avoider" principle, the recommended legislation will incentivize private businesses to take measures to prevent harm to the public. By requiring private employers to assume the liability for the acts of their police employees, there will be a strong incentive for them to structure their operations such that they reduce risks to the public. This would represent a radical change from the present law, which encourages private employers to give as little guidance and supervision to police employees as possible to avoid liability for their torts.[140] These steps are reasonable because the business is in the best position to structure policies that minimize the risks to the public while still meeting their security needs. The private business is also in the best position to reduce the risk to the public by providing the level of oversight necessary to enforce the rules and intervene in the event a security employee oversteps his or her authority.

3. The Proposed Solution Does Not Act as a Barrier to Victim Recovery. Lastly, in stark contrast to the current law, the recommended legislation does not stand as a barrier to victim recovery. There are two ways in which the proposed solution facilitates improved compensation of tort victims relative to the current law. As discussed in Part IV.B.*1*, the proposed statute greatly enhances the predictability and consistency with which the law would be applied. It would encourage settlement and expedite the cases that do ultimately go to trial because parties would be

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[138] *See* PIGOU, *supra* note 95, at 134, 192 (arguing the benefits of a legal system which requires actors to internalize social costs); *see also supra* Part III.B.

[139] *See* Calabresi & Hirschoff, *supra* note 102, at 1060 (arguing that liability should rest with the party best able to determine if an investment in accident prevention is worth it).

[140] *See supra* note 101 and accompanying text.

able to reliably estimate the strength of their claim(s). This would reduce the instances of tort victims (or innocent defendants) languishing in litigation for years before finally vindicating their rights.[141] Secondly, because the doctrine of *respondeat superior* is authorized under the proposed legislation, tort victims would have access to a solvent defendant without having to overcome the steep barriers of sovereign immunity[142] or *Monnell* § 1983 liability to pursue a claim against the government.[143]

The proposed legislation is a relatively simple fix to the problems outlined in Part III of this Note. Rather than adopting a novel approach or experimental theory, the proposed law simply requires the proper application of centuries-old tort principles to businesses that hire police officers to perform private services.[144] The law will work because the rationales underlying the doctrine of *respondeat superior* are sound and the current "police functions" approach to liability is essentially a loophole through which businesses often escape liability for the acts of their servants.

C. COUNTERARGUMENTS

Despite the serious problems with the current law, there are several arguments for maintaining the status quo. Two predominant contentions favor maintaining a legal distinction between off-duty police officers and private citizens working private security jobs. The first argument is that having more police officers working in the community is socially beneficial and deters crime, suggesting we should therefore encourage private employers to hire them because of the secondary public safety benefits they provide. The second argument is that it is unfair to force a private employer to subsidize the public good of enforcing criminal laws. This section will consider these two arguments in favor of maintaining the current approach and articulate why the recommended legislation overcomes these objections.

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[141] *See, e.g.*, Ambling Mgmt. Co. v. Miller, 764 S.E.2d 127, 128, 132–33 (Ga. 2014) (remanding for a jury determination after five years of litigation in three different courts).

[142] *See supra* notes 62–63 and accompanying text.

[143] *See supra* notes 64–65 and accompanying text.

[144] O.C.G.A. § 51-2-2 codified the doctrine of *respondeat superior* in 1863. The doctrine is adopted from English common law.

The first argument suggests that since police officers deter crime, even when off-duty, it is socially beneficial to incentivize their employment by private businesses. This is the strongest argument in favor of the status quo, but it is founded in two faulty premises. The first reason this argument is untenable is because it assumes private employers will not hire officers in the absence of a public subsidy. This argument is incorrect because most of the benefits that accompany hiring an off-duty police officer remain unchanged by the proposed legislation. Police officers will still come more highly trained, experienced, and equipped than your average private citizen. Furthermore, officers are likely to have undergone psychological testing and a background check, and to have received training in interfacing with the public. Although the proposed legislation will require the employer to account for liability arising from the officer's conduct, those costs will be no higher than those an employer must consider for any private citizen security guard. The ancillary benefits accompanying an off-duty officer will still provide a strong incentive for a private employer to hire them, even if the business must now rightfully mitigate potential liability.

The second faulty premise of this argument assumes that a mere increase in police presence will have a deterrent effect on crime. Scholars have questioned this premise, with some concluding that a mere increase in the number of police has only minimal impact on crime rates.[145] Whether or not this assumption is true, the uncertain potential that a public subsidy for hiring off-duty police officers will increase crime deterrence is not enough to unseat the serious problems outlined in Part III.

The second contention in favor of retaining the current approach suggests that it is unfair to require private businesses to assume liability for the public good of enforcing the law. This argument has merit, but only applies if we ignore a key component of the recommended legislation. It is true that a private business should not incur liability for an officer enforcing a law completely separate from his or her role as a private security guard. Referring back to the hypotheticals, if an officer working at Gary's

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[145] Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766, 799 (2010) (noting that there is little credible evidence concerning the deterrent effect of increasing the number of police officers in a community).

shop witnesses a robbery next door, it would be unfair to impute liability for a negligent response to Gary. Under the proposed legislation however, *respondeat superior* liability only attaches for acts of the officer done *for the benefit* of the private employer.[146] In this example, responding to a robbery at an unrelated business would clearly not be "*for the benefit*" of Gary's Grocery, whereas detaining a shoplifter inside the store would. Requiring a business to assume liability when the enforcement is done for the benefit of the business, however, is completely fair. A business hiring an officer to provide private police services at their establishment should bear the costs arising from the services provided. The Eleventh Circuit acknowledged as much in *Blue Martini Kendall*, when it noted that hiring an off-duty officer is a business decision that contemplates placing that officer in situations where police action will be necessary.[147]

The arguments against changing the current law lose their force in light of the proposed legislation. Because the recommended statute addresses the three critical problems with the current law, while avoiding potential issues raised by the counterarguments, it merits strong consideration as a legislative solution.

V. CONCLUSION

Although the current law is problematic, it can be corrected through a relatively simple piece of legislation. Georgia must close the liability loophole that allows private business to subsidize their security operations with public funds, and which undermines employer accountability for the actions of their employees. The inconsistency, economic inefficiency, and unfairness created by the current law can be rectified through a simple application of the centuries-old tort principle of *respondeat superior*. By insisting that employers supervise both police and non-police employees and are held accountable for their actions, the State of Georgia would be taking a step towards increasing public safety, protecting the

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[146] *See supra* note 134 and accompanying text. The indemnification and vicarious liability provisions only apply "for any acts performed by the officer *for the benefit of the private employer*." (emphasis added).

[147] *See* Blue Martini Kendall, LLC v. Miami Dade Cty., 816 F.3d 1343, 1351 (11th Cir. 2016) (noting that a privately-hired, off-duty officer "is more likely to find himself in a situation where police action is necessary than an officer who is not working such a detail").

public treasury, and improving public perception of the justice system's fairness.

Ryan Lee Giles[*]

[*] J.D. expected, University of Georgia School of Law, 2018; B.A., University of Georgia, 2011. Prior to beginning his legal studies the author served as a police officer in Athens-Clarke County, Georgia. The author thanks Professor Mike Wells for his invaluable mentorship and Lee Giles for his unwavering support.

APPENDIX A

List of State Statutes Requiring Private Employers of Off-Duty Police Officers to Indemnify the Government in Some Capacity

Alabama: ALA. CODE § 6-5-338 (2017).

Arizona: ARIZ. REV. STAT. ANN. § 41-805 (West 2017).

California: CAL. PENAL CODE § 70 (2017).

Florida: FLA. STAT. § 30.2905 (2017).

Mississippi: MISS. CODE ANN. § 17-25-11 (West 2017).

South Carolina: S.C. CODE ANN. § 23-24-30 (West 2016).

Washington: WASH. REV. CODE § 4.92.175 (2017).

West Virginia: W. VA. CODE § 15-2-18 (2016).