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# Richardson v. McKnight: Barring Qualified Immunity from 42 U.S.C. § 1983 for Private Jailers

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# *Richardson v. McKnight*: Barring Qualified Immunity from 42 U.S.C. § 1983 for Private Jailers

## I. INTRODUCTION

In recent years, the dichotomy between the public and private sectors has blurred, or perhaps collapsed entirely.[1] Reflecting this trend, state governments frequently contract with private prison facilities to help absorb the alarming increases in prison populations.[2] In analyzing qualified immunity questions,[3] the Supreme Court has never strictly relied upon public or private status distinctions in determining whether to grant qualified immunity from 42 U.S.C. § 1983 ("§ 1983") actions;[4] the Court's functional approach demonstrates its hesitance to look

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1. Examples of the trend toward privatization of traditional government services include the use of private security as a means of providing law enforcement services and the use of alternative dispute resolution mechanisms as a way to supercede civil court proceedings. *See* E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 890-93 (1987) (discussing the privatization of traditional government services).

However, in the context of prisons, one criticism of privatization is that "'[t]he presence of a profit motive results in private prisons substituting the goal of the general welfare of society with the goal of profit maximization.'" *See* John G. DiPiano, *Private Prisons: Can They Work? Panopticon in the Twenty-First Century*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 198 (1995) (quoting Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 662 (1987)).

2. *See generally* DiPiano, *supra* note 1, at 198 (describing the recent explosion of the United States' prison population and the development of private prison facilities as an alternative to state incarceration).

3. Qualified immunity shields its beneficiaries from liability from suit under certain circumstances. *See generally* Charles T. Putnam & Charles T. Ferris, *Defending a Maligned Defense: The Policy Bases of the Qualified Immunity Defense in Actions Under 42 U.S.C. § 1983*, 12 BRIDGEPORT L. REV. 665 (1992) (discussing how qualified immunity protects individuals from liability). Immunity doctrines recognize that a government acts through its employees or agents and that, in order to ensure smooth operation of the government, "those who carry out governmental operations must . . . be immune [from civil suit under certain circumstances]." *See id.* at 680.

4. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

only upon an employee's status in analyzing immunity questions.[5] However, the modern explosion of privatized governmental services, particularly privatized prisons, complicates the Court's functional approach to qualified immunity.[6]

In light of these concerns, the Supreme Court recently adjudicated *Richardson v. McKnight*.[7] In *Richardson*, a prisoner brought suit against private prison guards under § 1983.[8] The prisoner alleged violation of his constitutional rights because the guards had placed him in excessively tight restraints.[9] However, the Court declined to extend qualified immunity to the private guards in light of historical precedent denying immunity to private jailers and marketplace pressures that distinguished private prison guards from their state counterparts.[10]

### *A. The Requirements of a § 1983 Action*

The aim of § 1983 is to prevent persons acting under the guise of state authority from depriving other individuals "'of their federally guaranteed rights.'"[11] Moreover, it provides a remedy when a person's constitutional rights have been violated.[12]

Section 1983 provides for two distinct groups of defendants: those exposed to personal liability and those organizations that "[employ] the accused agent."[13]

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rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (Supp. 1996). In practice, § 1983 is a civil rights statute which provides a remedy when officials, acting pursuant to legal authority, deprive persons of their constitutional rights. *See generally* John F. Wagner, Jr., J.D., Annotation, *Availability of Qualified Immunity Defense to Private Parties in Action Under 42 U.S.C.A. § 1983*, 95 A.L.R. FED. 82 (1989) (discussing the operational aspects of § 1983).

5. *See infra* notes 43-45, 56-57, 107, 123-25, 164-67 and accompanying text (discussing the Court's functional approach to immunity questions).

6. *See* Putnam & Ferris, *supra* note 3, at 672-73 ("[§ 1983's] original purpose was to allow for the redress of constitutional violations, either performed by or with the acquiescence of state and local governments . . . ."). However, modern qualified immunity analysis arguably "'rests on functional categories, not on the status of the defendant.'" Richardson v. McKnight, 117 S. Ct. 2100, 2109 (1997) (Scalia, J., dissenting) (quoting Briscoe v. LaHue, 460 U.S. 325, 342 (1983)).

7. 117 S. Ct. 2100.

8. *See id.* at 2102.

9. *See id.*

10. *See id.* at 2106-08.

11. *See id.* at 2103 (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)); *supra* note 4 and accompanying text (discussing § 1983).

12. *See Richardson*, 117 S. Ct. at 2103. However, a deprivation or violation of constitutional rights will not always rise to the level of actionable behavior under § 1983. *See* Putnam & Ferris, *supra* note 3, at 676. Torts which resemble § 1983 violations receive varying treatment depending upon a given jurisdiction; therefore, § 1983 litigation remains complicated in application. *See id.*

13. *See* Putnam & Ferris, *supra* note 3, at 674. When asserting either type of § 1983 action, plaintiffs must prove that the rights denied them are personal in nature; moreover, a corporation is ineligible to assert another's constitutional rights as personal in nature. *See id.* at 675. Furthermore, plaintiffs must also prove that the right denied to them was "a Federal right secured either to the federal

In order to state a valid § 1983 claim to impose personal liability, a potential plaintiff must establish the following: (1) the action at issue was committed under color of law, (2) a person acting under the badge of state authority perpetrated the action, and (3) a causal link between the actions and a deprivation of constitutionally or federally protected rights.[14] Likewise, to state a § 1983 claim against an entity employing the person allegedly violating § 1983, the plaintiff must prove the same three elements in addition to showing that "a policy or custom attributable to the entity must have been the moving force behind the deprivation."[15]

### *B. Qualified Immunity: Its Theoretical Basis*

Absolute immunity typically involves completely insulating a governmental employee's exposure to liability,[16] while qualified immunity typically involves limiting the same.[17] Specifically, qualified immunity protects governmental officials undertaking discretionary tasks to the extent that "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[18] Courts often extend qualified immunity to governmental employees "to provide [them] . . . with the ability [to] 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'"[19] However, it remains unclear whether qualified immunity protects private

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Constitution, federal statutory law, or federal regulatory law." *See id.* at 676.

14. *See id.* at 674.

15. *See id.*

16. Courts will often extend absolute immunity where subjecting a governmental official to liability would detract from that individual performing his duties and expose such official to "'unlimited harassment and embarrassment.'" *See* Imbler v. Pachtman, 424 U.S. 409, 423 (1976) (holding that the District Attorney acted within the scope of his duties in prosecuting a criminal case and thus was entitled to absolute immunity) (quoting Pearson v. Reed, 44 P.2d 592, 597 (1935)). Although the theoretical underpinnings of absolute and qualified immunity are nearly identical, absolute immunity often encompasses distinct and narrow classes of persons acting in an official capacity. *See, e.g., id.* (listing judges and jurors as classes of persons acting in an official capacity which usually receive absolute immunity); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (holding that state legislators are entitled to immunity while acting in the sphere of legitimate legislative activities).

17. In determining what type of immunity to apply, courts have determined that immunity will be extended "no further than its justification would warrant." *See* Harlow v. Fitzgerald, 457 U.S. 800, 811 (1982) (holding that presidential aides are usually only entitled to qualified immunity). Also, a defendant must plead qualified immunity as an affirmative defense. *See id.* at 815.

18. *See id.* at 818 (establishing the criteria for granting qualified immunity) (citations omitted).

19. *See* Anderson v. Creighton, 483 U.S. 635, 646 (1987) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)).

defendants.[20] In *Richardson*, the Court turned to historical precedent and public policy to determine that qualified immunity did not extend to private prison guards.[21]

### C. *Public Prisons Versus Private Prisons*

Prison privatization advocates cite cost savings as one of the primary benefits of privatizing the public prison system.[22] However, a recent study suggests that private prisons also have a lower recidivism rate than do their public counterparts.[23] Regardless of the pros and cons of private prison facilities, private industry has a certain degree of flexibility which enables it to create innovative solutions to operating prisons.

Private prison companies build prison complexes from scratch, which enables them to construct state of the art facilities.[24] These prisons greatly eliminate the security problems inherent in the outdated designs of many public facilities, while allowing fewer private prison guards to effectively and efficiently maintain order among the prison population.[25] Because private prison companies are able to shop around for construction companies, they are able to construct prison facilities more rapidly than states.[26] Operation as a whole is much cheaper in a private prison than in a public one because union rules and civil service constraints simply do not

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20. *See, e.g.*, Wyatt v. Cole, 504 U.S. 158, 162 (1992) (holding that rationales mandating qualified immunity for public officials do not extend to cover private individuals). Under a purely functional approach, qualified immunity should extend to private parties performing analogous duties to their public counterparts where such counterparts receive qualified immunity. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2109-10 (1997) (Scalia, J., dissenting). Conversely, opponents of extending qualified immunity to private parties argue, in part, that competitive market pressures and a profit motive face private parties; these nullify qualified immunity's rationale in the private context. *See id.* at 2106-07.

21. *See Richardson*, 117 S. Ct. at 2104-07.

22. *See* Betsy Z. Russell, *The Handle*, SPOKESMAN REV., Jan. 11, 1997, at B1. For example, Idaho Governor Phil Batt will look to private prison facilities to accommodate a growing prison population because of cost considerations. *See id.* The Governor also favors private prisons because building state prisons is a lengthy process which cannot meet the needs of a state with a ballooning prison population. *See id.*

23. *See* John D. McKinnon, *Private Jails Seen Cutting Recidivism*, WALL ST. J., Jan. 14, 1998, at F1. A recent study of Florida's inmate population indicated that those incarcerated in private prison systems have fewer subsequent run-ins with the law than do those incarcerated in public jails; 10 percent of inmates released from private prisons were arrested again, while 19 percent of inmates from the public prisons were arrested again. *See id.* Yet critics of this study argue that the private-prison industry heavily funded this research and that the private prisons incarcerated only the best-behaved inmates from the public prison system. *See id.*

24. *See* Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 382 (1996).

25. *See id.* The preferred design for modern prisons is "[o]ne or two story structures with security control in the center, straight hallways extending out from the security control, and modern electronic surveillance systems." *See id.*

26. *See id.* at 383. In fact, the typical amount of time spent constructing a public jail is anywhere from two to five years, while a private construction company can construct a jail in one and a half to two years. *See id.*

apply in the private context.[27] Furthermore, private prisons can obtain supplies from the sources with whom they negotiate the best price.[28] Thus, private prison companies have all of the freedoms of private industry and few of the constraints facing public prison operators.

### D. Richardson v. McKnight: *The Public or Private Dichotomy Is Alive and Well*

By denying private prison guards qualified immunity from § 1983 actions, *Richardson*, albeit a limited holding, reaffirmed the importance of a public/private dichotomy in analyzing immunity questions. In addition to the theoretical ramifications of *Richardson*, this Note will analyze how *Richardson* will affect the private prison system and prisoners' constitutional rights. Part II examines the Supreme Court's historical interpretations of qualified immunity in the context of § 1983 actions as well as the history of prison privatization.[29] Part III discusses *Richardson's* factual and procedural background.[30] Next, Part IV examines the Court's majority and minority opinions.[31] Part V addresses the decision's practical, political, and constitutional significance.[32] Part VI concludes by suggesting that *Richardson* will not open the floodgates to prisoners bringing lawsuits, but will rather improve prisoners' civil rights.[33]

## II. HISTORICAL BACKGROUND

### A. *The Evolution of Qualified Immunity in a § 1983 Context*

#### 1. Immunity from § 1983 and Its Common Law Antecedents

*Tenney v. Brandhove*[34] is the seminal case establishing that certain defendants

27. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2107 (1997).
28. *See* Gold, *supra* note 24, at 383-84.
29. *See infra* notes 34-86 and accompanying text.
30. *See infra* notes 87-93 and accompanying text.
31. *See infra* notes 94-134 and accompanying text.
32. *See infra* notes 135-167 and accompanying text.
33. *See infra* note 168 and accompanying text.
34. 341 U.S. 367 (1951).

can assert immunity from § 1983 actions.[35] In *Tenney*, Brandhove brought suit against several members of the California legislature alleging that their speech denied Brandhove his federally guaranteed rights.[36] The Supreme Court emphasized the tradition of legislative freedom in this country and determined that by enacting the Civil Rights Act of 1871,[37] Congress did not "mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here."[38] Thus, the Court implicitly found that Congress did not intend to reject all common law immunities.[39] Subsequent cases from the Court have limited immunity to the types of immunity existing at common law.[40]

To counterbalance concerns that immunity might thwart the civil rights policies underlying § 1983, specifically that government officials could abuse their powers to deny persons their clearly established constitutional rights, the Court added a policy prong to its historical analysis of immunity.[41] In doing this, the Court equally weighed the reasons for immunity, such as the efficient functioning of governmental operations, and the policies behind § 1983, such as concerns that governmental officials not be allowed to use their powers to deprive persons of constitutional entitlements.[42]

### 2. Examining Immunity with a Functional Approach

Although the determination of granting qualified immunity often empirically breaks down upon public or private lines, the Court usually employs a functional

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35. *See id.* at 379. In addressing legislative immunity, the Court reasoned that a legislator is the people's representative, and in order to represent the people fully and successfully, absolute immunity is appropriate to protect the legislator's liberty of speech. *See id.* at 373-77 (citing JAMES WILSON, II, WORKS OF JAMES WILSON 38 (Andrews ed. 1896)).

36. *See id.* at 369.

37. Section 1 of this statute has been modernly codified as § 1983. *See* Robert G. Schaffer, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1055 (1996).

38. *See Tenney*, 341 U.S. at 376.

39. *See id.*; *see also* Schaffer, *supra* note 37, at 1055 (arguing that *Tenney* "interpreted section 1983 to incorporate all immunities existing when Congress enacted section 1 of the Civil Rights Act of 1871").

40. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980); *see also* Schaffer, *supra* note 37, at 1055-56 (discussing the historical limits of immunity under § 1983).

41. *See* Wyatt v. Cole, 504 U.S. 158, 167 (1992) ("Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions") (citations omitted); *see also* Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (arguing that in determining questions of immunity under § 1983, courts should weigh the historical rationale for immunity against the policies underlying § 1983).

42. *See* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); *see also supra* notes 16-21 and accompanying text (discussing the Court's practices in determining whether to grant qualified immunity from § 1983).

analysis in examining immunity issues.[43] That is, the Court analyzes the function that the official charged with a § 1983 violation performs and looks to see if that function merits immunity.[44] The Court then uses a functional approach to determine whether absolute or qualified immunity should be applied to the official.[45]

### 3. The Modern Test

Early cases limited the application of qualified immunity.[46] This body of jurisprudence required that the totality of the circumstances suggests the persons allegedly violating § 1983 believe in the correctness of their actions.[47] However, the subjective nature of this test led to inconsistent application in the lower courts.[48] In *Harlow v. Fitzgerald*,[49] the Supreme Court adopted an entirely objective test by holding that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[50] Subsequently, in the context of a Fourth Amendment question, the Court determined that it was the responsibility of lower courts to define what constituted "clearly established law."[51]

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43. *See, e.g.*, Briscoe v. LaHue, 460 U.S. 325, 342 (1983) (stating that "our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant"); *Harlow*, 457 U.S. at 810-11 (holding that under a functional approach, immunity of governmental officials "extend[s] no further than its justification would warrant"); *see also* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (looking at a police officer's responsibilities rather than his status as an officer in determining whether he should receive immunity).

44. *See* Schaffer, *supra* note 37, at 1056.

45. Judges, legislators, prosecutors, and presidents traditionally receive absolute immunity for tasks performed within the scope of their duties. *See* Putnam & Ferris, *supra* note 3, at 690. Law enforcement officials and executive branch officials usually receive qualified immunity for discretionary tasks performed within the course of their employment. *See id.*

46. *See, e.g.*, Scheuer, 416 U.S. at 248 (applying a totality of the circumstances test to determine whether persons allegedly violating § 1983 believed in the correctness of their actions).

47. *See id.* Early on the Court established a two-prong test that denied immunity when the persons charged with a § 1983 violation knew or reasonably should have known their actions denied a person clearly established constitutional rights or if the alleged violators maliciously intended to deny a person such rights. *See* Wood v. Strickland, 420 U.S. 308, 321-22 (1975). Problematic in this line of reasoning, however, is that it called for courts to ascertain an official's subjective mind frame, which is an issue of fact appropriately within the jury's fact-finding duties. *See* Putnam & Ferris, *supra* note 3, at 690.

48. *See* Putnam & Ferris, *supra* note 3, at 690.

49. 457 U.S. 800 (1982).

50. *Id.* at 818.

51. *See* Anderson v. Creighton, 483 U.S. 635, 640-41 (1987).

### 4. *Procunier v. Navarette*: Qualified Immunity Extended to Public Prison Guards

In *Procunier v. Navarette*,[52] the Supreme Court extended qualified immunity to public prison guards.[53] In that case, a state prisoner brought a § 1983 action against state prison officials alleging manipulation of the prisoner's outgoing mail.[54] The Court reasoned that the prison officials did not deny the prisoner's constitutional rights because prisoners' mailing privileges had not yet been declared a constitutional right.[55]

Under a purely functional approach, *Procunier* seemingly suggests that qualified immunity should extend to private prison guards.[56] *Procunier*, however, did not address qualified immunity in a private context. This type of facial analysis ignores that functional analysis is used primarily to distinguish between absolute or qualified immunity, not to determine whether immunity itself is appropriate.[57] Thus, *Procunier*'s impact on immunity analysis is not helpful outside its own facts.

### 5. Does Qualified Immunity Extend to Private Parties?

The Supreme Court held early on that private defendants may be liable under § 1983 when acting under the color of law.[58] However, the Court initially left open the question of whether qualified immunity may apply to private defendants.[59] As a result, the circuits split as to whether qualified immunity extended to private

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52. 434 U.S. 555 (1978).

53. *See id.* at 565-66.

54. *See id.* at 556-57.

55. *See id.* at 565. The Court also addressed subjective good faith as a factor in determining that qualified immunity should protect public prison guards. *See id.* at 565-66. However, the Court subsequently invalidated the subjective good- faith test in analyzing qualified immunity issues because it encouraged frivolous suits to proceed and usurped juries' fact finding responsibilities. *See Harlow*, 457 U.S. at 816-18.

56. Justice Scalia made this argument when advocating that private prison guards should receive qualified immunity. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2108-09 (1997) (Scalia, J., dissenting). However, this reasoning overlooks the fact that a functional analysis is relevant only to distinguish between a grant of absolute or qualified immunity. *See infra* notes 107, 123-25, 164-67 and accompanying text (discussing the Supreme Court's traditional means of employing a functional approach to determine whether to grant absolute or qualified immunity).

57. *See supra* note 56 (discussing the role of functional analysis in an immunity context).

58. *See* Dennis v. Sparks, 449 U.S. 24, 29 (1980).

59. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23 (1982).

parties. The Fifth,[60] Seventh,[61] Eighth,[62] Tenth,[63] and Eleventh[64] Circuits held that qualified immunity would extend to private parties, while the First,[65] Sixth,[66] and Ninth[67] Circuits held that it would not.[68] The other circuits have not yet addressed the issue.

In *Wyatt v. Cole*,[69] the Supreme Court held that qualified immunity did not extend to private parties "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute."[70] In *Wyatt*, Cole used a state replevin statute to gain possession of property from Wyatt, his estranged business partner.[71] In a hearing after the seizure, the trial court found the replevin invalid and ordered the property returned to Wyatt.[72] When Cole refused to return the property,[73] Wyatt filed a claim in federal court challenging the constitutionality of the state statute and petitioned for injunctive relief and damages.[74] The district court held, and the Fifth Circuit affirmed, that Cole's conduct was entitled to qualified immunity under § 1983.[75] The Supreme Court determined that qualified immunity should not extend to the respondents because immunity for private defendants was not strongly rooted in the common law and lacked sufficient public policy justifications.[76]

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60. *See* Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982).

61. *See* Sherman v. Four County Counseling Ctr., 987 F.2d 397, 403-06 (7th Cir. 1993).

62. *See* Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983).

63. *See* DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 716-17 (10th Cir. 1988).

64. *See* Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-25 (11th Cir. 1988) (en banc), *vacated on other grounds*, 489 U.S. 1002 (1989).

65. *See* Downs v. Sawtelle, 574 F.2d 1, 15-16 (1st Cir. 1978).

66. *See* Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988).

67. *See* Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983).

68. *See generally* Wagner, *supra* note 4, at 86-92 (discussing the split of the circuits over the question of whether qualified immunity would extend to private defendants).

69. 504 U.S. 158 (1992).

70. *See id.* at 168-69.

71. *See id.* at 159-60.

72. *See id.* at 160.

73. *See id.*

74. *See id.*

75. *See* Wyatt v. Cole, 710 F. Supp. 180, 183 (S.D. Miss. 1989), *aff'd*, 928 F.2d 718 (5th Cir. 1991).

76. *See Wyatt*, 504 U.S. at 167-68. The language in *Wyatt* suggested that its holding was limited to the particular facts of that case. *See id.* at 168-69. However, *Wyatt* also espoused broad language that indicated that qualified immunity is never appropriate in a private context. *See id.* As a result of the holding in *Wyatt*, it is unclear whether qualified immunity should extend to private defendants. *See id.*

### B. *The History of Prison Privatization in the United States*

Prison privatization has strong roots in the United States, beginning in the eighteenth and nineteenth centuries.[77] During those centuries, private jailers operated correctional facilities for a profit.[78] Inmates had to make a profit for their jailers, or at a minimum, pay their keep.[79] Early in the twentieth century, state contracts with private prison facilities dramatically decreased.[80] Nevertheless, the concept of prisoners working to benefit their jailers remained intact within the state prisons.[81]

Currently, the popularity of prison privatization has soared as the number of inmates has continued to dramatically increase.[82] In 1983, "[s]ixty-six correctional agencies in thirty-nine states plus the District of Columbia spent about 200 million dollars . . . on 3,215 contracts with private firms for thirty-two different services and programs."[83] Yet prison privatization runs the risk of sacrificing prisoners' civil rights in the name of budget cutting.[84] The current debate over prison privatization focuses on the crisis of state facilities coping with astronomical incarceration rates versus the concern that prisoners' constitutional rights will slip through the cracks during privatization.[85]

Questions concerning the scope of qualified immunity for private defendants charged with § 1983 violations and the debate over prison privatization converge in *Richardson*. The Supreme Court ultimately rejected a functional approach in the context of *Richardson* and denied private prison guards qualified immunity.[86] Thus, *Richardson* reaffirmed the public/private binary analysis in determining

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77. *See generally* David Yarden, *Prisons, Profits, and the Private Sector Solution*, 21 AM. J. CRIM. L. 325, 326 (1994) (reviewing PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowman et al. eds., 1993)) (discussing the history of private jailers in the United States).

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* The number of inmates in state and federal prisons rose from 240,211 to 710,054 between 1975 and 1990. *See id.* at 325; *see also* Savas, *supra* note 1, at 896-97 (discussing the growth of private-sector prison facilities).

83. Savas, *supra* note 1, at 897.

84. A potential danger exists in the private prison scenario because the presence of a profit motive may cause private prison officials to compromise measures used to guarantee prisoners' civil rights in exchange for higher profits. *See generally* Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867, 886-88 (1987) (critiquing prison privatization). Granting private prison guards qualified immunity would compound this danger because it would further insulate the private prison industry from accountability for a violation of an inmate's constitutional rights. *See id.* Regardless of the profit motive rationale, qualified immunity would undermine the legal accountability for guards who deprive inmates of constitutional entitlements. *See id.*

85. *See* Schaffer, *supra* note 37, at 1049-51.

86. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2107-08 (1997).

questions of qualified immunity for § 1983 violations.

## III. FACTS OF THE CASE

Ronnie Lee McKnight, a prisoner at Tennessee's South Central Correctional Center ("SCCC"), filed a § 1983 action against prison guards Darryl Richardson and John Walker.[87] SCCC was a private prison facility that employed the defendants as private prison guards.[88] McKnight claimed that the guards violated his constitutional rights when they allegedly bound him in excessively tight physical restraints.[89] The guards asserted a defense of qualified immunity, arguing that qualified immunity should apply to them in spite of their status as private, rather than state, prison guards.[90]

The district court denied the defendants qualified immunity because they worked for a private company instead of the government.[91] On interlocutory appeal, the United States Court of Appeals for the Sixth Circuit, citing various policy concerns, affirmed the district court's decision and refused to extend qualified immunity to private prison guards.[92] The United States Supreme Court granted certiorari to determine whether qualified immunity protects private prison guards.[93]

## IV. ANALYSIS OF THE COURT'S OPINION

### *A. The Majority Opinion*

Justice Breyer delivered the opinion of the Court.[94] Justice Breyer began the opinion by outlining the procedural background of the case.[95] According to Justice Breyer, the Court looked to *Wyatt* as guiding authority in determining how far qualified immunity extended when private defendants faced § 1983 allegations.[96]

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87. *See id.* at 2102.
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*
92. *See* McKnight v. Rees, 88 F.3d 417, 425 (6th Cir. 1996).
93. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2100 (1997).
94. *See id.* at 2103. Justices Stevens, O'Connor, Souter and Ginsburg joined the decision. *See id.*
95. *See id.* at 2102-03; *see also supra* notes 87-93 and accompanying text (discussing *Richardson*'s factual and procedural background).
96. *See Richardson,* 117 S. Ct. at 2103.

Among the factors raised in *Wyatt* and considered by the Court were the following: (1) whether § 1983 liability should be extended to private parties even though the primary policy underlying the statute was to prevent state actors from using their authority to deny persons "'federally guaranteed rights' and to provide related relief";[97] (2) the distinction between immunity and other legal defenses; (3) history and public policy determining whether immunity should apply to private defendants accused of § 1983 violations; and (4) whether qualified immunity should be limited to "'private persons . . . who conspire with state officials.'"[98]

Drawing heavily on *Wyatt*'s historical emphasis to determine the applicability of qualified immunity in various contexts, Justice Breyer examined the historical roots of qualified immunity as applied to private prison guards.[99] First, Justice Breyer analyzed the history of privatized prison facilities.[100] He recounted historical instances where entire state prison systems were leased to private individuals and companies and concluded that there was "evidence that the common law provided mistreated prisoners in prison leasing States with remedies against mistreatment by those private lessors."[101] Justice Breyer also cited historical documents indicating that England utilized private jailers and allowed prisoner lawsuits to recoup damages for any cruel and extreme punishment inflicted by their private jailers.[102] While the English system provided limited immunity for certain private defendants, Justice Breyer found no evidence that private persons working for profit were accorded any such immunity.[103]

Next, Justice Breyer examined whether the policies underlying immunity necessitated immunity for private prison guards.[104] Again citing *Wyatt*, Justice Breyer reasoned that immunity was traditionally granted to governmental officials

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97. *See id.* (quoting Wyatt v. Cole, 504 U.S. 158, 161 (1992)).

98. *See id.* at 2104 (quoting *Wyatt*, 504 U.S. at 168).

99. *See id.* There seems to be a consensus among those advocating a functional approach to immunity and those that do not necessarily adhere to such an approach that the existence of immunity at common law is paramount in determining whether a grant of immunity is presently appropriate. *Compare Wyatt*, 504 U.S. at 170, 173 (Kennedy, J., concurring) (advocating a historical analysis to determine whether immunity existed at common law for a particular class of defendants, while not adhering to a strict functional approach), *with id.* at 175-76 (Rehnquist, C.J., dissenting) (demonstrating a functional approach in determining whether a grant of immunity is appropriate where a similarly situated defendant would have enjoyed immunity at common law).

100. *See Richardson,* 117 S. Ct. at 2104-06. In noting the historical evidence that the United States has periodically delegated prison responsibilities to private parties, Justice Breyer observed that "[c]orrectional services in the United States have undergone various transformations." *See id.* at 2104.

101. *See id.*; *see, e.g.*, Dalheim v. Lemon, 45 F. 225, 228-30 (1891) (holding that a private contractor is liable for an inmate's injuries); Dade Coal Co. v. Haslett, 10 S.E. 435-36 (1889) (holding that an inmate can recover from injuries sustained while in the custody of private jailers).

102. *See Richardson*, 117 S. Ct. at 2105 (citing 2 C. ADDISON, A TREATISE ON THE LAW OF TORTS § 1016, 224-25 (1876)).

103. *See id.* However, Justice Breyer noted that English law did provide immunity for private parties "such as doctors or lawyers who performed services at the behest of the sovereign." *See id.* (citing Tower v. Glover, 467 U.S. 914, 921 (1984)).

104. *See id.* at 2105-07.

in order to allow them to perform their jobs aggressively and competently without fear of liability.[105] Justice Breyer rejected the prison guards' argument that their jobs were sufficiently analogous to state prison guards to merit immunity from suit.[106] Although the Court applied a functional analysis in determining whether to grant absolute or qualified immunity to public employees, Justice Breyer stated that the Court had never found that the mere performance of a governmental function entitled private individuals to either type of immunity.[107] Justice Breyer found that competitive market pressures faced by private companies who manage prison facilities nullify many of the policy rationales for extending qualified immunity to private prison guards.[108] Unlike state prison systems, private companies purchase mandatory insurance to compensate prisoners for civil rights torts,[109] are unburdened by excessive state supervision, and have a profit motive to employ guards that are neither too timid nor too aggressive.[110] Finally, Justice Breyer wrote that while the looming possibility of prisoner lawsuits distracted private prison guards, "'the risk of distraction' alone cannot be sufficient grounds for an immunity."[111]

After concluding that qualified immunity should not protect private prison guards from § 1983 suits, Justice Breyer closed with three provisos.[112] First, Justice Breyer warned that the Court had only adjudicated on the issue of immunity, and not liability in the present case.[113] Second, the Court determined the issue of immunity within the narrow factual context of the case at bar.[114] Finally, the Court had not ruled on whether the defendants in the present case could raise a good faith defense instead of qualified immunity.[115]

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105. *See id.* at 2105 (citing Wyatt v. Cole, 504 U.S. 158, 167 (1992)). Judge Hand has written that the fear of liability facing officials could "'dampen the ardour of all but the most resolute, or the most irresponsible'" public officials. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

106. *See Richardson*, 117 S. Ct. at 2106.

107. *See id.*; *see also infra* notes 123-25, 164-67 and accompanying text (discussing the Court's use of a functional analysis to determine whether to grant absolute or qualified immunity).

108. *See Richardson*, 117 S. Ct. at 2106.

109. Particularly in the 1980s, when § 1983 actions generated the great bulk of constitutional tort liability cases, many criticized constitutional tort liability as contributing to an insurance premium crisis. *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 651 (1987).

110. *See Richardson*, 117 S. Ct. at 2106.

111. *See id.* at 2107.

112. *See id.* at 2108.

113. *See id.*

114. *See id.*

115. *See id.* The Court distinguished between the immunity defense and a good faith or probable cause affirmative defense. *See* Wyatt v. Cole, 504 U.S. 158, 169 (1992).

### B. *The Minority Opinion*

In a dissenting opinion,[116] Justice Scalia rejected the majority's approach because *Procunier* granted state prison guards qualified immunity against suits raised under § 1983 and private prison guards effectively perform the same function as their state counterparts.[117] Like the majority, Justice Scalia looked to history for guidance in disposing of the qualified immunity issue raised in the present case.[118] By contrast, Justice Scalia observed that the majority's historical gloss relied upon the absence of a case granting private prison guards immunity from lawsuits rather than any overt refusal by a common law court to grant such immunity.[119] Justice Scalia further noted that state jailers were sometimes sued at common law without immunity protection.[120] Yet this fact did not prevent the *Procunier* Court from granting immunity to public jailers.[121] Instead, Justice Scalia posited examining immunity in light of the following: "(1) immunity is determined by function, not status, and (2) even more specifically, private status is not disqualifying."[122]

In championing a functional approach, Justice Scalia asserted that it was appropriate to examine the nature of responsibilities delegated to an individual and the impact that an overarching threat of liability would have on the discharge of those responsibilities.[123] Justice Scalia argued that punishing criminals was a state function and individuals engaged in such responsibilities were performing a state function regardless of their own public or private status.[124] Justice Scalia reasoned that immunity should extend to private prison guards because private persons

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116. *See Richardson,* 117 S. Ct. at 2108 (Scalia, J., dissenting). Chief Justice Rehnquist and Justices Kennedy and Thomas joined the dissent. *See id.* (Scalia, J., dissenting).

117. *See id.* (Scalia, J., dissenting).

118. *See id.* at 2108-09 (Scalia, J., dissenting). Justice Scalia noted, "I agree with the Court . . . that we must look to history to resolve this case." *Id.* at 2109 (Scalia, J., dissenting).

119. *See id.* (Scalia, J., dissenting). Justice Scalia went on to write that *Procunier* never engaged in a historical analysis to determine whether public prison guards should receive qualified immunity, but instead extended immunity on the basis of public policy. *See id.* (Scalia, J., dissenting). Moreover, Justice Scalia criticized the majority's reliance on the absence of case law in limiting prison guard immunity considering that *Procunier*, the case defining such immunity, was unsupported by case law. *See id.* (Scalia, J., dissenting).

120. *See id.* (Scalia, J., dissenting).

121. *See id.* (Scalia, J., dissenting).

122. *See id.* (Scalia, J., dissenting).

123. *See id.* at 2109-10 (Scalia, J., dissenting). Justice Scalia emphasized that "[i]mmunity 'flows not from rank or title or "location within the Government," but from the nature of the responsibilities of the individual official.'" *See id.* at 2109 (Scalia, J., dissenting) (quoting Cleavinger v. Saxner, 474 U.S. 193, 201 (1985) (quoting Burtz v. Economou, 438 U.S. 478, 511 (1978))).

124. *See id.* at 2110 (Scalia, J., dissenting).

traditionally received qualified immunity when performing governmental tasks.[125]

Next, Justice Scalia rejected the majority's policy arguments for denying private jailers immunity.[126] Justice Scalia argued that the majority's reliance upon market pressures to ameliorate the impact of private prison guards' exposure to liability was misplaced.[127] In fact, Justice Scalia asserted that the decision as to which company will manage a state's prison facilities ultimately rests with a governmental official, not market pressures.[128] Justice Scalia reasoned that the decision whether to contract with a particular private company largely rests upon cost considerations, and therefore, exposure to liability can increase operating costs, resulting in a company losing its contract with the state.[129] Justice Scalia further attempted to discredit the majority's rationale by arguing that civil rights liability insurance is no less available to the state than to private companies and, without any type of immunity, the savings the government would achieve by contracting with private companies will shift "from the public to prisoner-plaintiffs and to lawyers."[130]

Finally, Justice Scalia argued against the rationale the Court of Appeals offered for denying immunity.[131] He suggested it was unlikely that private prison guards would be more prone to "violate prisoners' constitutional rights because they work for a profit motive"[132] in light of the fact that private prison managers would be subject to pay § 1983 damages "out of their own pockets."[133] Justice Scalia concluded by contending that neither history nor policy support a denial of

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125. *See id.* (Scalia, J., dissenting). However, Justice Scalia's analysis ignored that the Court, in an immunity context, utilized a functional approach to determine whether to grant absolute or qualified immunity. *See infra* notes 164-67 and accompanying text (discussing the Court's functional approach to immunity questions). Justice Scalia could not point to any of the Court's decisions that employ a functional analysis to determine generally whether to grant immunity. *See Richardson*, 117 S. Ct. at 2110 (Scalia, J., dissenting). Instead, he relied on state court authority to support his proposition that the Court should use a functional approach to determine whether granting immunity is appropriate. *See id.* (Scalia, J., dissenting).

126. *See id.* at 2110-12 (Scalia, J., dissenting).

127. *See id.* at 2111 (Scalia, J., dissenting).

128. *See id.* (Scalia, J., dissenting).

129. *See id.* (Scalia, J., dissenting).

130. *See id.* at 2111-12 (Scalia, J., dissenting); *see also* Eisenberg & Schwab, *supra* note 109, at 651 (discussing criticisms of civil rights insurance).

131. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting); *see also* McKnight v. Rees, 88 F.3d 417, 424 (6th Cir. 1996), *aff'd*, Richardson v. McKnight, 117 S. Ct. 2100 (1997) (holding that private prison guards, "as employees of a private corporation seeking to maximize profits . . . act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security").

132. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting).

133. *See id.* (Scalia, J., dissenting).

qualified immunity to private prison guards from prisoner lawsuits alleging § 1983 violations.[134]

## V. IMPACT OF THE COURT'S DECISION

### A. *Immediate Impact*

The Supreme Court in *Richardson* narrowly held that qualified immunity should not extend to private prison guards, but did not address whether the guards were "liable under § 1983 even though they are employed by a private prison firm."[135] Accordingly, the circuit court will determine the guards' liability on remand.[136]

Similarly, the Court did not adjudicate whether private defendants may assert a good faith defense.[137] Because *Wyatt* distinguished a good faith defense from immunity, and neither *Wyatt* nor *Richardson* addressed the issue, the constitutionality of such a defense is still unclear.[138] Therefore, on remand, the circuit court may allow the guards a good faith defense.

### B. *Marginal Impact on the Number of Future Prisoner Actions Against Private Prison Facilities*

Proponents of extending qualified immunity to private prison guards argue that *Richardson* will open the floodgates of prisoner litigation against private prison firms.[139] Indeed, Justice Scalia warned that denying private guards qualified immunity would shift the savings a state achieves by contracting with private companies for prisoner incarceration from taxpayers to prisoners and their lawyers.[140] Nevertheless, this massive onslaught of prisoner litigation is unlikely. *Richardson* specifically leaves open the possibility that private guards can invoke

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134. *See id.* at 2112-13 (Scalia, J., dissenting).

135. *See id.* at 2108.

136. *See id.*

137. *See id.*

138. In *Wyatt*, the Court provided:

> [W]e do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens. Because those issues are not fairly before us, however, we leave them for another day.

Wyatt v. Cole, 504 U.S. 158, 169 (1992).

139. *See, e.g.*, Schaffer, *supra* note 37, at 1052 ("Section 1983 suits by prisoners are common and are costly to litigate, even though they are seldom successful.").

140. *See Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting).

a good faith defense.[141] Unlike qualified immunity, a good faith defense would not bar suit based upon functional categories,[142] but would require a closer case by case analysis.[143] Whereas qualified immunity is an objective test, a good faith defense is a subjective test which gives district court judges the flexibility to evaluate the subjective motivations of private prison guards.[144] Thus, while a good faith defense is substantively different from qualified immunity, its net impact would be to prevent nonmeritorious § 1983 claims against private prison guards. In sum, any explosion in § 1983 lawsuits against private prison guards as a result of their inability to invoke a qualified immunity defense is unlikely.

### *C. Limited Impact on Prison Privatization*

Prison privatization is a growing and lucrative business.[145] The demand for prison space will continue to grow as states look for alternative methods to cope with astronomical incarceration rates.[146] Furthermore, privatization is slowly gaining approval as states begin to increasingly contract out services that were traditionally state functions.[147] Consequently, the dynamics of supply and demand

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141. *See id.* at 2108; *see also supra* note 115 and accompanying text (discussing *Richardson*'s treatment of the good faith defense). Although the precise contours of a good faith defense are not yet drawn, previous case law distinguished between a good faith defense and qualified immunity. *See, e.g., Wyatt*, 504 U.S. at 169 (discussing the possibility of a good faith defense). Commentators suggest that a good faith defense would consider subjective factors dependent upon the particular facts of any given case. *See* Wagner, *supra* note 4, at 85-86.

142. If the Court had taken a purely functional approach in *Richardson*, it would have extended qualified immunity to private prison guards because state prison guards are entitled to qualified immunity. *See* Procunier v. Navarette, 434 U.S. 555, 565-66 (1978).

143. *See, e.g., Wyatt*, 504 U.S. at 165-66 (characterizing qualified immunity as an objective, policy-based doctrine establishing immunity to suit, while characterizing a good faith defense as a defense which considers subjective motivations) (citing Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982)).

144. *See id.* (citing *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 815-16); see *also supra* notes 115 and 141 and accompanying text (discussing the distinctions between qualified immunity and the good faith defense).

145. *See supra* notes 82-85 and accompanying text (discussing the increase in private prisons).

146. *See generally* Yarden, *supra* note 77, at 325 (discussing the need for more prison space to accommodate the fast growing prison population). Between 1975 and 1990, prisoners incarcerated in state and federal prisons grew from 240,211 to 710,054. *See id.* A recent commentator noted that "[t]he rate of increase in our prison population during the year 1989 would require the construction of one 700-bed jail and one 1,600-bed prison during each and every week of the year just to keep up with the incarceration rate." *Id.*

147. *See* Savas, *supra* note 1, at 890. A 1982 survey revealed that, on average, one-quarter to one-half of the jurisdictions considered partially or wholly contracted with private companies to provide services, including the following: "emergency medical care, ambulance service, day-care facility operation, programs for children and the elderly, operation and management of hospitals and mental

suggest that private prison companies will thrive. Unlike state prisons, where qualified immunity exists so that guards may exercise their duties vigorously and without fear of liability,[148] private prisons have a financial incentive to hire guards that will competently discharge their duties.[149] Private prison companies who operate for profit face unique marketplace pressures that their state counterparts do not, and will thus simply factor potential prisoner lawsuits into their operating costs and methods. Furthermore, state prisons face stringent state supervision.[150] For example, Tennessee requires inspectors to examine publicly operated county jails at least once a month.[151] Tennessee law also mandates that the Tennessee Correctional Institute conduct inspections of state prisons and report its findings annually.[152] Conversely, private prison firms are relatively free of state supervision.[153] Although private prison companies ultimately answer to the state when it comes time for contract renewal,[154] the state conducts no copious day-to-day supervision. Hence, private prisons are free of excessive supervision and have wide latitude to develop ways to absorb the costs of prisoner lawsuits.

Furthermore, under Tennessee law, private prison companies must buy insurance that is adequate to compensate victims of civil rights torts.[155] In *Richardson*, Justice Scalia argued that civil rights insurance was just as available to the states as to private prison firms.[156] While this is undoubtedly true, it overlooks the fact that mandating states to buy sufficient insurance to compensate prisoners who suffer constitutional violations would financially overtax an already burdened state-prison system.[157] Moreover, the purposes of prison operators in the public and private sector are fundamentally different in that the former operates as a state service while the latter operates for profit.[158] These differences justify

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health facilities, and operation of drug and alcohol programs . . . ." *See id.*

148. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (3d Cir. 1985) (citing Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982)).

149. *See* Richardson v. McKnight, 117 S. Ct. 2100, 2106-07 (1997).

150. *See id.*

151. *See id.* (citing TENN. CODE. ANN. § 41-4-116 (Supp. 1996)).

152. *See id.* (citing TENN. CODE. ANN. § 41-4-140(a) (Supp. 1996)).

153. *See, e.g.*, TENN. CODE. ANN. § 41-44-140(c)(5) (Supp. 1996) (excluding private prisons from certain types of state monitoring).

154. *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting).

155. *See* TENN. CODE. ANN. § 41-24-107 (Supp. 1996).

156. *See Richardson*, 117 S. Ct. at 2111-12 (Scalia, J., dissenting); *see also supra* note 109 and accompanying text (discussing criticisms of civil rights liability insurance).

157. *See, e.g.*, DiPiano, *supra* note 1, at 175-76 ("'State officials have discovered that tough crime laws and rigid sentencing requirements exact a price. After the law and order binge, many are suffering from a fiscal hangover.'" (quoting W. John Moore, *Paying for Punishment*, NAT'L. J., March 14, 1987, at 612).

158. *See Richardson*, 117 S. Ct. at 2106-07.

requiring insurance for private companies but not for state facilities.[159] The pre-existing insurance private companies must purchase will defray prisoner lawsuits and demonstrate that there likely will be little change in the trend toward privatization.

### *D. Constitutional and Judicial Ramifications*

#### 1. A Check Against Civil Rights Violations of Prisoners

Because states do not stringently supervise private prison firms, granting qualified immunity to private guards would mean that potential civil rights violations committed against prisoners would go unchecked and unremedied.[160] Although proponents of extending qualified immunity to private guards argue other measures could control civil rights violations,[161] none of these alternatives provide a remedy to the prisoner whose rights were violated. Moreover, proponents also contend that private firms have a financial incentive to adequately provide for prisoners' civil rights because a failure to do so could result in the private firm losing its contract with the state.[162] However, this overlooks the fact that states do not copiously supervise the private firms.[163] Hence, denying private guards immunity means that prisoner lawsuits will operate as a check against guards abusing prisoners' constitutional rights in the absence of rigid state supervision.

#### 2. The Diminished Role of the Functional Analysis

*Richardson* stands for the proposition that "mere performance of a governmental function" does not entitle a private individual to qualified immunity, "especially for a private person who performs a job without government supervision or

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159. *See id.* at 2111 (Scalia, J., dissenting). Justice Scalia is critical of using the presence of civil rights liability insurance as a justification for denying qualified immunity to private prison guards. *See id.* (Scalia, J., dissenting). Justice Scalia argued that where the law does not require a private prison firm to purchase liability insurance and the firm does not purchase it, but the firm's state counterpart possesses liability insurance, policy would dictate granting the private guards immunity but not the public ones. *See id.* (Scalia, J., dissenting).

160. *See, e.g., Kay, supra* note 84, at 887-88 (arguing that extending qualified immunity to private prison guards might encourage private prison firms "to cut corners to maximize profits").

161. *See, e.g.,* Schaffer, *supra* note 37, at 1084-86 (listing monitoring by state officials, public scrutiny, and requiring strict contractual provisions to be contained in contracts with private contractors as non-litigation means to guarantee that private prison guards will not violate prisoners' civil rights).

162. *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting).

163. *See supra* notes 153-54 and accompanying text (discussing the limited state supervision over private jail facilities).

direction."[164] In the past, the Supreme Court utilized a functional approach when analyzing immunity questions.[165] However, it is significant that the Court used the functional approach only to determine whether to grant absolute or qualified immunity, not whether a person was generally entitled to immunity.[166] Furthermore, a functional approach is particularly problematic because there is a growing overlap between functions in which the government and private industry engage.[167] Thus, a functional analysis may play a diminished role in determining qualified immunity questions in a § 1983 context.

## VI. CONCLUSION

Prison privatization is a logical and financially feasible solution to the explosive growth in prison populations in recent years.[168] Private prisons assume substantially similar tasks and responsibilities as their state counterparts, but they exist and operate solely for a profit. Although the profit motive may assure that private prisons conform to many of the standards to which state prison facilities must conform, there is no per se state enforcement of these requirements. Granting private guards qualified immunity from prisoners' § 1983 claims runs the risk of insulating private facilities from exposure to liability for prisoners' civil rights violations without any state regulations to check the practices of these facilities. Therefore, *Richardson* guarantees that prisoners' civil rights will not slip through the cracks of the profit motive foundation.

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164. *See Richardson*, 117 S. Ct. at 2106.

165. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993) (using a functional approach to determine whether to extend absolute or qualified immunity to prosecutors); Cleavinger v. Saxner, 474 U.S. 193, 201-02 (1985) (employing a functional approach in deciding whether to grant absolute or qualified immunity to members of a prison discipline committee).

166. *See Richardson*, 117 S. Ct. at 2106.

167. *See, e.g., id.* at 2106 (discussing the problems inherent in employing a functional analysis to immunity questions).

168. *See supra* note 82 and accompanying text (providing statistics as to the modern growth of incarceration rates).