

WITHHOLDING QUALIFIED IMMUNITY FROM PRIVATE PRISON GUARDS: A COSTLY MISTAKE

I. INTRODUCTION

During the last fifteen years, private prison companies have contracted with states to incarcerate their criminals.¹ The growth of the private prison industry has led the Supreme Court, lower federal courts, and various commentators to debate whether qualified immunity, which protects public prison officials, should extend to private prison officials. Last summer, the Supreme Court resolved this question concerning private prison guards in *Richardson v. McKnight*.² In *Richardson*, the Court elected to deny private prison guards who are sued by inmates under the Civil Rights Act of 1871³

1. Private prisons currently hold approximately 77,500 of the 1.8 million prisoners incarcerated nationwide. "Over the next five years, analysts expect the private share of the prison 'market' to more than double." Eric Bates, *Corporate Prisons Turn Public Money into Big Private Profits*, ANCHORAGE DAILY NEWS, Mar. 1, 1998, at F1. Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation (WCC) dominate the private prison industry with CCA controlling over 50% and WCC about 30% of the prison market. See Stacey Hartman, *CCA Starts California Dreamin'*, THE TENNESSEAN, Feb. 22, 1998, at E1.

2. 117 S. Ct. 2100 (1997).

3. 42 U.S.C. § 1983 (1994). The Civil Rights Act of 1871 provides that an individual may bring suit against "every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . ." *Id.* Section 1983 attempts to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights, and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citation omitted). Courts must be careful when "devising limitations to [this] remedial statute . . . which on its face does not provide for any immunities." *Id.* at 171 (Kennedy and Scalia, JJ., concurring) (citation omitted).

the privilege of qualified immunity.⁴ This Recent Development contends that *Richardson* was improperly decided and will likely cause unfortunate, unnecessary consequences for states, courts, and private prisons.

II. QUALIFIED IMMUNITY AND PUBLIC OFFICIALS

Qualified immunity insulates a select group of public and private actors from certain types of lawsuits brought under the Civil Rights Act of 1871, or 42 U.S.C. § 1983.⁵ The Court currently employs a two-prong analysis to determine whether an officer sued under § 1983 is entitled to receive qualified immunity.⁶ Under the first prong, the Court assesses the common law history of immunity and determines whether the official would have received immunity at common law prior to 1871.⁷ The Court has sometimes broadened the

4. See *Richardson*, 117 S. Ct. at 2107-08.

5. Qualified immunity protects an official from personal liability so long as she does not violate clearly established federal law. See *Harlow v. Fitzgerald*, 457 U.S. 800 at 818 (1992) (holding that qualified immunity protects "government officials performing discretionary functions . . . 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"). Only objectively reasonable actions of an official are protected by qualified immunity. See *Richardson v. McKnight*, Oral Arguments, available in 1997 WL 136255, Mar. 19, 1997. The qualified immunity standard was applied to the facts of *Richardson* at oral arguments by Justice Ginsburg: "how would it not be clearly established that it's a violation to take someone who was over 300 pounds and put them in these tight restraints that are bound to cause extreme pain? We are talking about qualified immunity and would a reasonable officer understand from the clearly established law that you don't do this. That is my problem with this case." *Id.* If qualified immunity is successfully invoked, it entitles a defendant sued under section 1983 to the dismissal of the plaintiff's case prior to discovery. See *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982).

Certain government officials involved in executive and administrative discretionary functions receive qualified immunity protection. These include FBI agents, see *Anderson v. Creighton*, 483 U.S. 635 (1987)), federal cabinet members, see *Butz v. Economou*, 438 U.S. 563 (1978), state prison officials, see *Procunier v. Navarette*, 434 U.S. 555 (1978), state hospital administrators, see *O'Connor v. Donaldson*, 422 U.S. 563 (1975), school board members, see *Wood v. Strickland*, 420 U.S. 308 (1975), and public police officials, see *Pierson v. Ray*, 386 U.S. 547 (1967).

6. See *Richardson*, 117 S. Ct. at 2103-04 (citing *Wyatte v. Cole*, 504 U.S. 158, 167 (1992)).

7. See *id.*; *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts.").

Section 1983 does not grant immunity to any official. See *Imbler v. Pachtman*, 424 U.S.

first prong to include an inquiry into whether the defendant performs a function analogous to one that would have received immunity at common law.⁸ The second prong employed by the Court consists of an evaluation of the purposes that underlie official immunity and whether these purposes support extending immunity to the defendant.⁹ The Supreme Court advocates two primary policy considerations under this prong: (1) to promote effective performance by officers who might otherwise be inhibited by the threat of law suits;¹⁰ and (2) to prevent qualified candidates from being deterred from public service by threats of liability.¹¹

Notably, the Court utilized a different two-prong analysis in deciding *Procunier v. Navarette*,¹² a case that extended qualified immunity to public prison officials who are sued by inmates under § 1983.¹³ The Court's holding covered all levels of prison employees, from wardens to guards, but provided little rationale.¹⁴

409, 417 (1976) (Section 1983 of the Civil Rights Act of 1871 "creates a species of tort liability that on its face admits of no immunities").

8. See *Harlow v. Fitzgerald*, 457 U.S. at 812-13.

9. See *Richardson*, 117 S. Ct. at 2103; *Wyatt*, 504 U.S. at 164 ("Additionally, irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) ("because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983").

10. See *Forrester*, 484 U.S. at 223 ("the threat of liability can create perverse incentives that operate to inhibit officials in the proper performance of their duties. . . . When officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct.").

The Court has balanced the benefit of decisive action against the risk of violating inmates' rights should officers perform irresponsibly. See *Wyatt v. Cole*, 504 U.S. at 167 ("Qualified Immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions.").

11. See *Harlow v. Fitzgerald*, 457 U.S. at 814; *Wyatt v. Cole*, 504 U.S. at 167.

12. 434 U.S. 555 (1978).

13. See *id.*

14. See *id.*

III. QUALIFIED IMMUNITY AND PRIVATE PARTIES PURSUING PRIVATE CONCERNS

The Supreme Court applies the same two-part test to private parties that it applies to public parties.¹⁵ Under the first prong of the test, private parties must show either that the common law extended immunity to a private party performing their role or to their functional equivalent.¹⁶ Under the second prong, a private party must demonstrate that policy considerations of promoting unfettered public service, attracting qualified candidates to such service, and minimizing litigation are served by extending qualified immunity.¹⁷

Private parties who are sued under § 1983 for conduct involved in pursuing strictly private concerns are unlikely to be protected by qualified immunity. The Supreme Court addressed such a situation in *Wyatt v. Cole*.¹⁸ In *Wyatt* the Court held that a private party who invokes a presumptively valid attachment, garnishment, or replevin statute, which is later determined by the Court to be unconstitutional, does not receive qualified immunity protection from a § 1983 lawsuit.¹⁹ The Court made this determination based on an analysis of common law history and policy.²⁰ It first searched the common law for evidence of immunity for private parties involved in private undertakings and found no basis for such immunity.²¹ The Court then found policy concerns favoring immunity unavailing.²² It did not, however, explicitly exclude private parties from protection under all

15. See *Richardson*, 117 S. Ct. at 1203; *Wyatt*, 504 U.S. at 167-69.

16. See *Richardson*, 117 S. Ct. at 2104; *Wyatt*, 504 U.S. at 168. Note, however, that the functional equivalency test may no longer be applicable in this context. See *Richardson*, 117 S. Ct. at 2106.

17. See *Richardson*, 117 S. Ct. at 2105-08.

18. 504 U.S. 158 (1992).

19. See *id.* at 168-69. In *Wyatt*, A rancher brought a lawsuit under section 1983 against his partner for invoking an unconstitutional Mississippi replevin statute. See *id.*

20. See *id.* at 161.

21. See *id.* at 165.

22. See *id.* at 167-69. The court reasoned that private citizens do not require the same protection that public officials require because the public good is not affected by their actions in the same way. See *id.* at 169. While public officials need to exercise discretion in their offices in a forceful and decisive manner in the interest of the public, private parties do not. See *id.* In addition, one of the key features of immunity, encouraging qualified individuals to run for public positions, is moot with private parties. See *id.*

circumstances.²³

IV. QUALIFIED IMMUNITY AND PRIVATE CORRECTIONAL INSTITUTIONS

A. Richardson v. McKnight

A different circumstance was presented in *Richardson v. McKnight*,²⁴ a case involving private parties pursuing public concerns. The private party in *Richardson* was Corrections Corporation of America (CCA), a privately owned prison corporation that contracted with the state of Tennessee to pursue the public concern of incarcerating criminals.²⁵ In *Richardson*, Ronnie Lee McKnight, an inmate at South Central Correctional Center in Tennessee, sued two prison guards, Darryl Richardson and John Walker, under § 1983 for violating his Eighth Amendment right to be free from cruel and unusual punishment.²⁶ The Supreme Court held that private prison guards are not entitled to qualified immunity from lawsuits brought by prisoners under 42 U.S.C. § 1983.²⁷

In reaching its decision in *Richardson*, the Court declared that *Wyatt*, a case involving private actors pursuing private concerns,²⁸ established the standard for extending qualified immunity to private parties.²⁹ Accordingly, it applied the two-prong *Wyatt* analysis, requiring that it (1) look to the common law history of government employee immunity, and (2) look to the policy concerns that underlie government employee immunity.³⁰ The Court noted, however, that

23. See *id.* at 169. The Court left open “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 section 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.” *Id.* (citation omitted).

24. *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

25. See *id.* at 2102. CCA is the largest prison management firm in the United States and houses over half of the nation’s privately-held prisoners in its facilities. See *Bates, supra* note 1, at F1.

26. See *Richardson*, 117 S. Ct. at 2102. McKnight alleged that his rights were violated when guards placed excessively tight physical restraints on his large ankles.

27. See *id.* at 2107-08.

28. See *supra* note 19 and accompanying text.

29. See *Richardson*, 117 S. Ct. at 2103-04.

30. See *id.* at 2103.

the specific holding in *Wyatt* left unresolved the question of whether to extend immunity to privately employed prison guards.³¹

The Court in *Richardson* concluded that neither common law history nor the purposes of qualified immunity justified extending such immunity to private prison guards.³² It reasoned that although public prison guards benefited from immunity at common law,³³ there was no history of immunity for private prison companies at common law.³⁴ In addition, the Court de-emphasized,³⁵ and may have dismissed entirely,³⁶ the functional equivalency test as a means of determining whether to grant a private party immunity.³⁷

The Court acknowledged, however, that the second policy prong required a more difficult analysis.³⁸ It found that although decisive action on the part of prison officers is an important policy to promote, this concern is more relevant to the public sector than to the private sector where a competitive market operates.³⁹ If a private prison guard fails to react in a principled and fearless manner, the prison environment will deteriorate with violence.⁴⁰ Such an event would compel prison administrators to either employ guards who ensure prison security or jeopardize their contract with the state.⁴¹ In

31. *See id.* at 2104 (“*Wyatt*, then, did not answer the legal question before us, whether respondents—two employees of a private prison management firm—enjoy a qualified immunity from suit under § 1983. It does tell us, however, to look both to history and to the purposes that underlie government employee immunity in order to find the answer”).

32. *See id.* at 2107-08 (“Our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with a governmental immunity.”).

33. *See Procnier v. Navarette*, 434 U.S. at 561-62.

34. *See Richardson*, 117 S. Ct. at 2105. Although history shows that even before the 19th century, private contractors sometimes handled prison activities, there is no conclusive historical evidence of an immunity for them. *See id.*

35. *See id.* (“The Court has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity—absolute or qualified—a public officer should receive.”).

36. *See id.* at 2106 (“The Court . . . never has held that mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity, especially for a private person who performs a job without government supervision or direction.”).

37. *See id.*

38. *See id.* at 2105 (“Whether the immunity doctrine’s purposes warrant immunity for private prison guards presents a closer question.”).

39. *See id.* at 2106.

40. *See id.*

41. *See id.*

addition, the Court determined that a second policy goal of attracting qualified employees by minimizing the risk of lawsuits was similarly of more concern in the public sector than the private context where private incentives and benefits are available for employees.⁴²

B. Problems with the Richardson Decision

In order for the Court's decision to treat private prison guards differently than public prison guards with regard to qualified immunity to make legal sense, the two-prong test should yield a different result in the private context than in the public context. If the test results are the same in both contexts, there can be no justification for providing qualified immunity in one but not the other. The Court's determination that private guards do not meet the first prong hinges on its unfortunate dilution of the functional equivalency test.⁴³ Had the Court recognized functional equivalency, its holding with regard to public guards in *Procunier* should have extended to private guards in *Richardson*.⁴⁴

Similarly, for the Court to reach different conclusions for private and public guards under the second prong of the two-prong test, the circumstances under which the guards work should be distinguishable. Without a true distinction between public and private prison work environments, the Court's policy balancing for public prison guards in *Procunier* should also apply equally to private guards.⁴⁵

42. See *id.* at 2107.

43. See *supra* note 8; see also *Richardson*, 117 S. Ct. at 2106, 2109 (Scalia, J., dissenting). In his dissenting opinion in *Richardson*, Justice Scalia took issue with the majority's dismissal of the Court's "settled practice of determining § 1983 immunity on the basis of the public function being performed." *Id.* at 2109. Commentators have deemed the majority's decision to minimize the functional equivalency test, in addition to disregarding precedent, illogical. See Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 LA. L. REV. 449, 487 (1992).

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

45. See *id.* Justice Scalia argues that the circumstances of private and public guards are equivalent: "Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers they possess over prisoners, and indistinguishable in the duties they owe towards prisoners, are to be treated quite differently in the matter of their financial liability." *Id.*

1. Competitive Market Pressures

The Court in *Richardson* mistakenly relied on competitive market pressures to distinguish the functioning of prison guards in the private versus public prisons. The Court's reasoning contains several problematic assumptions: (1) a state's supervision of private prisons is adequate to ensure that private prison operators deliver the quality of product for which a state bargained; (2) entry costs for the private prison market in a state allow prison corporations to competitively bid against a prison corporation that has an existing contract; and (3) politics are uninvolved in the contract bidding process.⁴⁶ These assumptions fail in the private prison context and undermine the Court's rationale in *Richardson*.

The first assumption fails because states are unlikely to monitor private prisons sufficiently to ensure that prisons are safe and effective and guards are not too timid.⁴⁷ When a consumer (the state and its citizens) is unable to determine the quantity and quality of a delivered good (prison services), the seller (private prisons) may provide fewer or inferior goods than were bargained for without the consumer's knowledge. This type of market failure is likely to occur in a private prison setting because the state's monitoring is inadequate due to the difficulty of supervision⁴⁸ and other impediments to monitoring.⁴⁹

The second assumption fails because the Court failed to account for the monopolistic features present in the prison industry.⁵⁰ After a

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

47. See *Richardson v. McKnight* Oral Arguments, *supra* note 5, at 33-35. Tennessee's monitoring of private prisons, which is limited to biennial supervision by certain committees of the Tennessee legislature, is an illustration of inadequate state supervision. See *id.*

48. See *Cleavinger v. Saxner*, 474 U.S. 193, 205 (1985) (discussing the general inaccessibility to prisons for any type of public observation); see also James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 356-57 (1986).

49. See *Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting). Justice Scalia noted that effective state supervision is dependent on the political process: "The process can come to resemble a market choice only to the extent that political actors will such resemblance—that is, to the extent that political actors . . . are willing to pay attention to the issue of prison services, among the many issues vying for their attention. . . ." *Id.*; see also *Qualified Immunity-Privatized Governmental Functions*, 111 HARV. L. REV. 390, 396 n.54.

50. See Gentry, *supra* note 48, at 357-58.

private prison corporation survives the initial competitive bidding process and secures a contract with a state, it is unlikely that other prison corporations will be able to enter the prison market in the future due to market entry costs.⁵¹ Therefore, another corporation which hopes to compete for a state's prison contract will be at a major disadvantage in bidding for future contracts because it will have to figure into its bid capital costs that the existing firm can exclude.⁵² The "discount" offered by the existing firm is likely to influence a state to renew its contract.⁵³

The third assumption fails because politics heavily influence state decisions to award prison contracts.⁵⁴ In Tennessee, the role of politics in the prison industry is evidenced by the significant monetary contributions made by CCA to state public officials. As a result of market failure, monopolistic characteristics, and politics in the private prison industry, if guards perform indecisively and ineffectively it is unlikely that a state will detect their incompetence and, even if it does, that it will effectively pressure the prison to improve its performance.⁵⁵

2. Profit Motive

Another possible distinction between public and private prison environments that might justify withholding qualified immunity protection from private prison guards is the impact of a profit motive on the discretionary decisions of private prison management officials.⁵⁶ A profit motive is likely to influence the decisions made in private prisons by management officials who are responsive to

51. *See id.* This is primarily due to the existing prison firm's ownership of the only available prison facilities and employment of available prison workers.

52. *See id.* at 358.

53. *See id.*

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

55. *See id.* at 2111 ("[S]hort of mismanagement so severe as to provoke a prison riot, *price* (not discipline) will be the predominating factor in such a regime's selection of a contractor.").

56. *See McKnight v. Rees*, 88 F.3d 417, 424-25 (6th Cir. 1996). The Sixth Circuit's denial of qualified immunity to prison guards rested at least in part on what it perceived to be the tendency of a profit motive to encourage prison officials to violate the civil rights of prisoners. *See id.*

shareholders of the prison corporation.⁵⁷ Profits are likely to influence prison management to act in two conflicting ways, both aimed at lowering costs: first, managers and wardens may attempt to minimize services, staffing and training of employees; second, managers may try to minimize litigation costs and costly violent outbreaks by prisoners.⁵⁸ These interests may conflict with each other because reducing services, staffing, and guard training may trigger violations of prisoners' civil rights or create an unsafe prison environment. The resulting lawsuits or violence will raise costs and cut into a prison firm's profits. Due to this prospect, managers may provide adequate services, staffing, and training for guards in order to decrease the risk of lawsuits and violence. These measures, however, will raise costs and reduce profits. Due to a lack of empirical evidence, it is unclear whether one of these two interests will dominate the decisions of management.⁵⁹ This uncertainty is compounded by the existence of other cost-saving options available to prison firms that do not jeopardize prisoners' civil rights.⁶⁰ And,

57. Management officials seek to run a corporation as efficiently and cost-effectively as possible in order to maximize profits.

58. See *Richardson*, 117 S. Ct. at 2111-12 (Scalia, J., dissenting) ("A contractor's price must depend upon its costs; lawsuits increase costs; and 'fearless' maintenance of discipline increases lawsuits [. . .][T]he more cautious the prison guards, the fewer the lawsuits, the higher the profits."); see also Martin E. Gold, *The Privatization of Prisons*, 28 URB. LAW. 359, 380-81 (1996).

59. In addition to concern over litigation, private prison management firms may feel compelled to maintain adequate services, staffing, and training because their contracts with states specifically require certain standards of quality. See *Matters Relating to the Federal Bureau of Prisons: Hearing Before the Subcomm. on Crime of the Committee on the Judiciary House of Representatives*, 104th Cong. 100 (1995) [hereinafter *Hearing*] (Prepared statement of Charles W. Thomas) ("[S]tatutory and/or contract requirements so routinely oblige private firms to employ persons who meet or exceed all applicable experience, certification, and training requirements their public sector counterparts must meet"); see also Robert B. 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, 1084 n.237 (citing state statutes in Florida, New Mexico, Tennessee, and Texas that require strict standards for private prisons). Compliance with such contract specifications, however, may be lax due to a state's limited supervision and the monopolistic nature of the private prison industry.

60. Other cost-saving strategies by private firms may spare a reduction in services, training, and staffing. For example, modern prisons built by private firms have cost saving features that reduce the total staff needed without compromising the quality of service and security. See Gold, *supra* note 59, at 382-83. (discussing the advantages that a private prison can derive from design, construction, and operations).

Another cost-saving mechanism utilized by private firms is replacing public employee

even if it could be shown that profit motives will lead prison managers to cut services, training, and staffing, it is far from clear that either profit motives or these decisions by management will effect the discretionary decisions of prison guards—the subject of *Richardson*—in a manner that jeopardizes the civil rights of prisoners.⁶¹

Furthermore, assuming that profit motives cause private prison managers to compromise services, staffing, and training, there is simply no basis for concluding that the quality of prison services, training, and staffing in public prisons is superior to those in private prisons.⁶² In fact, public prisons may be more likely than private prisons to compromise services, training, and staffing because (1) they are often politically unaccountable,⁶³ (2) public spending to

pension plans with stock ownership plans. Stock ownership plans are cheaper for the employer, although less reliable for employees than pension plans that are guaranteed. *See id.*

61. It is unlikely that prison guards are motivated by profits. *See Citrano v. Allen Correctional Center*, 891 F. Supp. 312, 319 (W.D. La. 1995) (discussing the various motivation of prison employees).

Although outside of the scope of *Richardson*, which dealt solely with qualified immunity for prison guards, an argument could be made that management officials or wardens who possess discretion over the provision of services should be denied qualified immunity in order to counter their incentive to reduce services such as food and health care in order to cut costs. Such an argument, however, presumes that an effective counter-balance is not already built into the profit motive in the form of reducing litigation costs.

In addition, it has been argued that prison management's decisions to reduce staffing and training have a direct bearing on prison guard conduct. *See Qualified Immunity—Privatized Governmental Functions*, November, 111 HARV. L. REV. 390, 398 (1997) (“[A] particularly formidable and distinctive pressure—the profit motive—arguably is able, when market forces are absent, to operate on private prison providers to curtail timidity among their employees in a way that renders qualified immunity unnecessary.”). However, the conclusion that understaffed, under-trained guards act more aggressively than trained guards seems speculative. *See id.* at 399.

62. *See Citrano v. Allen Correctional Center*, 891 F. Supp. at 319 (“Even if it is assumed that expenses can be reduced by “skimping” on civil rights, government is no doubt also motivated to cut costs. . . . There is no substantial basis to conclude that cost consciousness would be more apt to result in the deprivation of prisoners’ civil rights if a government contractor was involved as opposed to government employees.”).

63. *See Gold*, supra note 58, at 381. Gold notes that:

In comparing the accountability of publicly and privately operated facilities, it is often assumed that the public sector as a whole is fully and continually accountable. In reality, however, only elected officials are fully accountable. As we proceed down a governmental hierarchy, deeper and deeper into the bureaucracies of appointed officials and civil servants, accountability diminishes. Add to that the protection and rigidity of civil service rules

improve prison conditions is generally unpopular and must compete for funds with other government services,⁶⁴ and (3) prison resources are strained by the national rise in the number of inmates.⁶⁵ And although there are reports of poor services, training, staffing, and prisoner treatment in private prisons, there is similar evidence available concerning public prisons.⁶⁶ Furthermore, several studies conclude that the overall quality of private prisons exceeds that of public prisons.⁶⁷

Id.

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

65. See Natalie Phillips, *State Has Too Many Inmates, Too Few Beds*, ANCHORAGE DAILY NEWS, Mar. 1, 1998, at A1 (discussing the overcrowding of prisons as a result of President Clinton's "get tough on crime" agenda.).

66. See Editorial, *Who Guards the Prison Guards? More Reforms are Needed in State Operations*, THE ORANGE COUNTY REGISTER, Mar. 1, 1998, at G2 (reporting that state prison resources in California are overburdened due largely to the fact that the number of inmates has tripled in the last twenty years). According to the Prison Law Office, a prison reform group, the need for new officers leads to rapid advancement within the system. This results in less experienced people being promoted to supervisory positions. State prison officers in California receive only six weeks of training, compared to the six months required by municipal police departments. The Register also reported that eight public prison officials—guards and wardens—at the Corcoran state Prison in California received federal indictments for prisoner civil rights violations, "including one who was shot to death moments after a guard said it was about to be duck hunting season on an exercise yard." *Id.* Investigators for the Register uncovered that twenty-seven unarmed inmates had been killed by guards in the five years prior to October 1994. See *id.*; see also Natalie Phillips, *State Has Too Many Inmates, Too Few Beds*, Anchorage Daily News, Mar. 1, 1998, at A1 (discussing Alaska's overcrowding problems).

Any attempt to differentiate the quality of guards in public and private prisons is further obscured by the fact that private prison firms hire many of their officials—both wardens and guards—from public prisons. The poor conduct of some private guards is merely a continuation of their conduct while serving as public employees: "The guards videotaped earlier this year assaulting prisoners with stun guns at a C.C.A. competitor in Texas had been hired despite records of similar abuse when they worked for the state." *Id.*

67. See *Hearing*, *supra* note 59, at 106; see also Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 601 (1992). Logan compared three prisons (one private, one state, and one federal) to assess their "quality of confinement" according to security, safety, order, justice, care, conditions, activity, and management. He used information from staff and inmate versions of the Prison Social Climate Survey developed by the Bureau of Prisons as well as official data "coming from such sources as grievance logs, significant incident and discipline logs, health clinic logs, inmate work and education records and staff personnel records." *Id.* at 593. Based on this information, he concluded that "[t]he private prison outperformed the state and federal prisons, often by quite substantial margins, across nearly all dimensions" and maintained lower costs. *Id.* at 601-02. Logan's report was identified by Thomas in his testimony before the subcommittee on crime as "the most sophisticated report regarding the quality of private prisons." See *Hearing*, *supra* note 59, at 106.

3. Conclusion

Neither competitive market pressures nor a profit motive differentiate the circumstances of private prison guards from their public counterparts. Without a change in the factors that led the Court to extend qualified immunity to public prison guards in *Procunier*, the same privilege should apply equally to private prison guards.⁶⁸ Furthermore, the costly consequences to states, private prisons, and courts of depriving guards of qualified immunity weighs heavily in favor of granting immunity to private prison guards.

V. THE CONSEQUENCES OF WITHHOLDING QUALIFIED IMMUNITY FROM PRIVATE PRISON GUARDS: *RICHARDSON'S* IMPACT

The Court's decision in *Richardson* to deny qualified immunity to private prison guards will: (1) burden the courts with a massive increase in frivolous prisoner lawsuits; (2) encourage "unwarranted timidity" from private prison guards, thereby compromising their job effectiveness and the security of prisons; and (3) artificially raise the costs to states of contracting prison services out to private prison management firms.

A massive increase in prisoner litigation will further burden courts that are already inundated with prisoner lawsuits, many of which lack merit.⁶⁹ The *Richardson* decision's facilitation of prisoner litigation contradicts the policy concerns enumerated in *Wyatt* and incorporated into *Richardson* against litigation concerns.⁷⁰ It also contradicts the

68. If the balancing in *Procunier* was mistaken in hindsight, then the Court should address the problem at its root by withholding immunity from all prison guards, not just private guards, as it did in *Richardson*.

69. See *Raine v. Carlson*, 826 F.2d 698, 702 (7th Cir. 1987) In *Raine*, Judge Posner wrote:

These courts are being flooded by prisoner litigation. . . Most of this litigation has very little merit. . . However, unless and until either Congress or the Supreme Court changes the ground rules that have evolved for this type of litigation, all judicial officers in this circuit must exert themselves to handle prisoner cases in conscientious compliance with these rules, complex as the rules have become.

Id. See also *Merritt v. Faulkner*, 823 F.2d 1150, 1157 (7th Cir. 1987); Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 23.

70. See *Richardson*, 117 S. Ct. at 2105-06.

intent of recent efforts by Congress to curb frivolous lawsuits.⁷¹ The Courts will be burdened on account of *Richardson* because an official's successful invocation of qualified immunity terminates a law suit before discovery.⁷² Without qualified immunity for prison guards, private prison firms and the courts will be forced to engage in expensive and time-consuming discovery.⁷³ This is likely to impose on courts an unnecessary and costly burden.

Another result of *Richardson* may be to impair the performance of private prison guards and lessen the quality of private prison security. According to the policy objectives articulated in *Wyatt*, incorporated into *Richardson*, and balanced in *Procunier*, prison guards should benefit from qualified immunity in order to enable "fearless" maintenance of discipline undeterred by the threat of litigation. The appropriateness of qualified immunity for prison guards was determined by the Court in *Procunier*, a result of balancing the guards' and public's interest in fearless maintenance of discipline against the prisoners' interest in civil rights. Because this policy balance is indistinguishable in the public and private prison settings, the Court's inexplicable denial of qualified immunity for private prison guards in *Richardson* disrupts the balance reached in *Procunier* and may lead to timid conduct from private guards and violence in private prisons.⁷⁴

A final result of *Richardson* will be to drive up a state's costs of prison privatization in the long run. Studies indicate that the costs to

71. See Sandra J. Senn, *Stemming of the Tide: Reduction in Federal Pro Se Prisoner Lawsuits*, SOUTH CAROLINA LAWYER 24, 26-27 (Sept./Oct. 1997).

72. See *supra* note 5.

73. See *Harlow*, 457 U.S. at 816-18.

74. This conclusion holds true despite the impact of liability insurance coverage held by the private prisons in *Richardson*. See *Richardson*, 117 S. Ct. at 2111-12 (Scalia, J., dissenting). Justice Scalia explained the irrelevance of insurance:

Surely it is the *availability* of that protection rather than its actual presence in the case at hand, which decreases (if it does decrease, which I doubt) the *need* for immunity protection. (Otherwise, the Court would have to say that a private prison-management firm that is not required to purchase insurance, and does not do so, is more entitled to immunity; and that a government-run prison system that *does* purchase insurance is *less* entitled to immunity.) And of course civil-rights liability insurance is no less *available* to public entities than to private employers.

house prisoners in private prisons are high and the current savings made by states through privatization are low.⁷⁵ However, studies also show that private prison management firms have recently made substantial profits.⁷⁶ It is clear that the cost increases in the wake of *Richardson* from defending prisoners' lawsuits and paying for insurance will artificially raise costs for prisons.⁷⁷ It is unclear, however, whether this cost will be passed on to the states.⁷⁸ States enjoy only a slim margin of savings in their existing contracts with prison firms and, therefore, may be unable and unwilling to contract for a higher price. Prison firms, on the other hand, appear to maintain a large profit margin and, therefore, may still find it profitable to run prison even if that means absorbing these additional costs.

Despite the fact that state costs concerning private prisons may remain the same after *Richardson*, an increase in prisoner litigation will have negative impacts. First, it is unfair to increase costs artificially and unnecessarily for private prison firms despite the probable lack of short run impact on state budgets. Second, an increase in costs for private firms raises the already high cost of entry into the prison market even higher for competitors. This will have an anti-competitive effect by further entrenching firms with existing contracts with states. In the long run, this likely will raise the costs to states of prison privatization by inhibiting their ability to choose among competitive bidders.

75. See Bates, *supra* note 1, at F1. Bates' article relates that a 1996 report by the GAO based on cost comparisons between public and private prisons concluded that there was not "substantial evidence that savings have occurred." *Id.*

76. See Bates, *supra* note 1, at F1. Bates reports that "Corrections Corporation ranks among the top five performing companies on the New York Stock Exchange over the past three years. The value of its shares has soared from \$50 million when it went public in 1986 to more than \$3.5 billion at its peak last October." *Id.*; see also Carrington Nelson, *CCA Posts Record Performance*, NAHSVILLE BANNER, Feb. 19, 1998, at B2 ("For all of 1997, CCA earned \$53.9 million, or 61 cents a diluted share, up 75 percent from \$30.9 million, or 36 cents, in the prior year. Revenues for the year rose 58 percent to \$462 million from \$293 million.").

77. See *Richardson*, 117 S. Ct. at 2112-13 (Scalia, J., dissenting).

78. See *id.* Justice Scalia asserted that the majority's decision would lead to an "artificial" increase in private prison costs: "Whether this will cause privatization to be prohibitively expensive, or instead simply divert state funds that could have been saved or spent on additional prison services, it is likely that taxpayers and prisoners will suffer as a consequence." *Id.*

VI. CONCLUSION

The *Richardson* decision was unfortunate. The decision makes little sense legally or logically in that it deprives private prison guards of a privilege enjoyed by their public counterparts who perform analogous functions under analogous circumstances. Furthermore, the decision makes even less sense in light of its costly impact on states, private prisons, and courts.

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