2015

Force and Fraud in Criminal Law

Logan Teisch

Logan Teisch

Force and Fraud in Criminal Law

Prof. Ristroph

12/3/14

Fairness, Equality, and Qualified Immunity in Prison Litigation

I. Introduction

The doctrine of qualified immunity, as it pertains to the prison litigation context, needs to change. In prison litigation, qualified immunity protects prison officials from liability when prisoners bring a § 1983 claim against them alleging that the officials violated one of their protected rights. However, public prisons and private prisons are treated differently under the law. As a result, qualified immunity only offers protection for some prison officials, and none at all for others. This differing treatment also greatly affects prisoners trying to bring valid claims against prison officials, as their chances of succeeding on their claims and recovering damages depend largely upon whether they are serving their sentences in a private prison or in a public prison.

Regardless of whether a prisoner is serving out his sentence in a private prison or in a public prison, he is nevertheless a "prisoner," with all of the legal ramifications that entails. In addition, regardless of where he is serving out his sentence, the same rights and liberties have been stripped away from him. However, not all rights have been lost. One important right that a prisoner retains is the Eighth Amendment's right to be free from the infliction of cruel and unusual punishments. Prisoners can bring claims of cruel and unusual punishment against the prison guards who watch over them.

There are two allegations prisoners can make when bringing Eighth Amendment lawsuits against prison officials: allegations of excessive force and allegations of inhumane conditions of confinement. While both allegations involve the prison context, they are subject to different legal standards. In all Eighth Amendment claims brought by prisoners alleging that prison officials used excessive force against them, the key determination will be "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[1] Under this standard, if prison officials used force in a malicious or sadistic manner, they will be held liable for their actions. In these cases, the extent of the injuries suffered by the prisoner is just one factor to consider, along with the need for application of force by the official, the relationship between the need for force and the actual force used, the reasonably-perceived threat in the view of the official, and any efforts by the official to minimize the amount of force exerted.[2]

In addition to having the right to be free from excessive force, prisoners also have the right to be free from inhumane prison conditions.[3] Prison officials must provide "adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'"[4] In Eighth Amendment claims alleging inhumane conditions of confinement, courts will examine the acts of the officials under a "deliberate indifference" standard. What this means is that prison officials will only be held liable if they knew that what they were doing subjected prisoners to a substantial risk of serious harm, and they knowingly disregarded that risk by failing to take any reasonable measures to abate it.[5]

---

[1] *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).
[2] *Id.*
[3] *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).
[4] *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).
[5] *Id.* at 847.

While all prisoners have the right to be free from excessive force and inhumane prison conditions, some are able to recover damages much more easily than others. The United States Supreme Court has made a crucial distinction between private prisons and public prisons. While courts have long recognized that public prison guards are entitled to a defense of qualified immunity from Eighth Amendment cruel and unusual punishment claims, the Court made it very clear in *Richardson v. McKnight* that this defense does not extend to *private* prison guards.[6] Therefore, private prison guards are subject to liability where their public counterparts are not. This means that it is easier for prisoners to successfully bring meritorious claims of cruel and unusual punishment against private guards than it is to do so against public guards.

The Court in *Richardson* determined that private prison officials did not need the protection of qualified immunity because "[t]he organizational structure [of private prisons] is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments."[7] This reasoning has resulted in an inequality among the prisoner population in this country. Prisoners should have just as much of a chance of succeeding on their claims against guards, regardless of whether they are serving time in a private prison or in a public prison. They have no say as to whether they are going to serve their time in a public or in a private facility. Since they have no say or control in the matter, it is unjust to simply let their placement dictate whether or not they will be able to recover damages for any harm inflicted upon them by a prison official. Prisoners in private and public prisons alike, who have suffered the same intrusion upon their rights, should have an equal opportunity in remedying that wrong.

[6] *Richardson v. McKnight*, 521 U.S. 399 (1997).
[7] *Id.* at 412.

Clearly, certain changes need to be made to the current state of the law to help ensure equality and fairness among all prisoners in bringing Eighth Amendment claims. I propose that instead of abolishing the doctrine of qualified immunity altogether, a few simple changes to the existing doctrine can lead to the desired results. In Eighth Amendment lawsuits alleging excessive use of force, public prison officials will still be entitled to qualified immunity while private officials will not, but the ultimate decision as to whether qualified immunity may be asserted will be made by the judge. First, instead of the jury making the final determination as to whether or not the Eighth Amendment has been violated, as is the case today, the judge will be the one to examine the totality of the circumstances and determine whether or not the prison official acted "maliciously and sadistically to cause harm." If the judge finds that the official did act with such intent, the *private* prisoner will then be entitled to recover damages. In a case brought by a *public* prisoner, though, the judge will have to make an additional finding as to whether or not it would still be appropriate under the circumstances for the official to assert a qualified immunity defense and to not be subject to liability.

Keeping qualified immunity intact and shifting the decision-making authority to the judge will help put prisoners on equal footing with one another. Private prisoners already have an easier time recovering damages than public prisoners do, but now it will be easier for public prisoners as well because officials will not be able to simply assert qualified immunity at the outset of the case. Public prisoners will get the facts and circumstances of their cases heard before a judge first, and *then* the judge will decide whether qualified immunity would be appropriate. With these changes to the existing law regarding qualified immunity, fairness and equality for all prisoners can be achieved.

II. History and Purposes of Qualified Immunity

Before discussing any reforms to improve the current state of the law, though, it is important to understand the history and purposes behind the doctrine of qualified immunity. First of all, prisoners can bring claims of cruel and unusual punishment against prison guards through 42 U.S.C. § 1983. This statute provides a federal cause of action for someone who has been deprived of a federally protected right by another who was acting under the color of state law.[8] Congress first passed the statute within the Civil Rights Act of 1871, which was enacted after the Civil War to help ensure that the individual rights of former slaves were enforced equally along with everyone else's individual rights.[9] Its main purposes were 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."[10] For prisoners, and for anyone else for that matter, to bring a claim under § 1983, the deprivation of a constitutionally-protected right, or a right protected under any federal law, must first be shown.[11] The other part of the claim requires the plaintiff to show that the alleged deprivation occurred while the defendant acted with either the actual or apparent power of the state behind him, meaning the defendant acted under color of law.[12]

Within its plain language, § 1983 makes no mention of any immunity from legal action.[13] However, the Supreme Court has permitted immunity from suit for certain government actors, if such immunity existed under the common law. Immunity from liability existed under the common law prior to the passage of § 1983 for "'those governmental functions that

---

[8] 42 U.S.C.A. § 1983 (Westlaw current through 09/26/2014).
[9] *See Monroe v. Pape*, 365 U.S. 167, 183 (1961).
[10] *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).
[11] 42 U.S.C.A. § 1983.
[12] *Id.* (*See United States v. Price*, 383 U.S. 787, 794 n.7 (1966)).
[13] *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

were…viewed as so important and vulnerable to interference by means of litigation that some form of…immunity from civil liability was needed to ensure that they are performed' with independence and without fear of consequences."[14] Another basis for immunity was the idea that officials will make mistakes and they must be protected in some way, otherwise they will be afraid to act.[15] Public officials needed to be shielded '"from undue interference with their duties and from potentially disabling threats of liability.'"[16]

The Court's rationale for providing immunity under § 1983 was that the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'"[17] There are, thus, two prongs that courts use to determine whether immunity should be afforded to certain officials sued under § 1983: (1) whether there is history of the immunity at common law such that the official would have received immunity prior to the passage of § 1983 in 1871,[18] and (2) whether the purposes that underlie immunity for officials support extending the immunity to the defendant at bar.[19] Under the first prong, the history of immunity must be "firmly rooted" in the common law.[20] Under the second prong, the Supreme Court has stated that the two primary purposes are to promote effective performance by officers who might otherwise be inhibited by the threat of lawsuits[21] and to prevent qualified candidates from being deterred from public service by threats of liability.[22]

---

[14] 2 Rodney A. Smolla, Federal Civil Rights Acts §14:28 (3d ed. 2014).
[15] *See Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974).
[16] *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).
[17] *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (quoting *Pierson v. Ray*, 386 U.S. 547, 555 (1967)).
[18] *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986).
[19] *See Wyatt*, 504 U.S. at 164.
[20] 14A Glenda K. Harnad et al., C.J.S. Civil Rights §450 (2014).
[21] *See Forrester v. White*, 484 U.S. 219, 223 (1988).
[22] *See Wyatt*, 504 U.S. at 167.

III. Qualified Immunity in the Prison Litigation Context

Courts have recognized two types of immunity: absolute immunity and qualified immunity. Absolute immunity has been reserved for legislators, judges, and prosecutors,[23] while qualified immunity has generally been afforded to officials who exercise significant discretion in carrying out their duties.[24] The Supreme Court afforded qualified immunity to public prison officials for the first time in *Procunier v. Navarette*.[25] Since prison guards are only afforded *qualified* immunity, rather than *absolute* immunity, that necessarily means there are times when they are not going to be protected from civil liability. In the prison litigation context, the defendant official has the initial burden of proving that he was acting within the scope of his discretionary authority at the time of the incident.[26] If the defendant satisfies this first step, then the burden shifts to the plaintiff to show that immunity is inappropriate.[27]

The standard that courts have used to determine if plaintiffs have satisfied their burden has been modified over the years. The first test was explained by the Supreme Court in *Scheuer v. Rhodes*, which was the first case in which the Court formally adopted the defense of qualified immunity.[28] *Scheuer* established that a police officer was entitled to immunity where the official had a reasonable belief that the action taken was appropriate based on the circumstances as they appeared at the time, coupled with a good faith belief.[29] The Court in *Scheuer* determined that the amount of immunity granted to an official would be based on the amount of discretion he

---

[23] *See Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (recognizing absolute immunity for legislators); *Forrester*, 484 U.S. at 227 (recognizing absolute immunity for judges); *Burns v. Reed*, 500 U.S. 478, 493 (1991) (recognizing absolute immunity for prosecutors).

[24] Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting From Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 Notre Dame L. Rev. 929, 937 (2009).

[25] *Procunier v. Navarette*, 434 U.S. 555 (1978).

[26] *Valdes v. Crosby*, 450 F.3d 1231, 1236 (11th Cir. 2006).

[27] *Id.*

[28] *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

[29] *Id.* at 247-48.

was afforded in carrying out the duties of his office.[30] The following year, the Court altered its analysis of the qualified immunity defense. In *Wood v. Strickland*, the Court explained the objective and subjective portions of the defense. The objective portion of the analysis required that the official not disregard any "settled, indisputable law," and any "basic, unquestioned constitutional rights."[31] Regarding the subjective portion of the analysis, the Court held that the official also must have been acting with the sincere belief that what he was doing was right.[32]

In *Procunier*, the Court explained that the *Strickland* standard was a two-part inquiry in which the defendant official would be held liable only if he knew or should have known that his conduct violated a clearly established constitutional right, or if he acted with malicious intent to deprive the plaintiff of a constitutional right.[33] Since the Court's decision in *Strickland*, though, the subjective portion of the analysis has been eliminated. The Court in *Harlow v. Fitzgerald* announced the new standard, which is still the standard used by courts today: "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."[34] Therefore, the subjective intent of the official is irrelevant to the determination of whether qualified immunity may be asserted. Courts will only undergo an objective analysis. Under this standard, a defendant who acts in good faith is not afforded any immunity when he acts contrary to clearly established law, while a defendant

[30] *Id.* at 246-47.
[31] *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).
[32] *Id.* at 321.
[33] *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (quoting *Strickland*, 420 U.S. at 322).
[34] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added).

who acts with intentional malice may be afforded protection because a reasonable person would not have known that he was violating a clearly established right.[35]

Much debate has taken place since *Harlow* regarding the definition of "clearly established." The Supreme Court has held that in order for a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful…but it is to say that in the light of pre-existing law the unlawfulness must be apparent."[36] Put another way, the Court will look to see whether the state of the law at the time the incident took place gave the defendant fair warning that his actions were unlawful.[37] Some of the various Circuits have devised their own definitions of "clearly established," as well. For example, the Second Circuit has held that courts should consider "(1) whether the right in question was defined with 'reasonable specificity;' (2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful."[38] Regardless of which definition courts use, it appears that the general inquiry is an objective one, examining whether a reasonable person should have known about the legality of his or her actions.

---

[35] Stacey Haws Felkner, Article, *Proof of Qualified Immunity Defense in 42 U.S.C.A. § 1983 or Bivens Actions Against Law Enforcement Officers*, 59 Am. Jur. Proof of Facts 3d 291, § 2 (2000).
[36] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
[37] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).
[38] *Romaine v. Rawson*, 140 F. Supp. 2d 204, 213 (N.D.N.Y. 2001) (quoting *Jermosen v. Smith*, 945 F.2d 547, 550 (2d Cir. 1991)).

As previously mentioned, the Supreme Court granted qualified immunity to public prison officials for the first time in *Procunier v. Navarette*.[39] Using the *Strickland* test (*Harlow* had yet to be decided), the Court in *Procunier* found that because there was no established constitutional right protecting prisoners' mail privileges at the time the officials failed to send out the plaintiff's outgoing mail, and because the officials did not act with malice intent to deprive the plaintiff of any right or with intent to cause him injury, there was no basis for rejecting the defense of qualified immunity.[40] Just when it appeared that this issue regarding prison guards and whether or not they were afforded the protection of a qualified immunity defense was settled once and for all, a new system of prison operations began to take hold just a few years after *Procunier* was decided.

IV. Prison Privatization and *Richardson v. McKnight*

In 1983, Corrections Corporation of America (CCA) was officially incorporated.[41] The company was founded by three men who wanted to fix the problems with the public prison system and to "invent an approach that benefited many."[42] Prison populations were soaring in the mid-1980s as a result of lengthy mandated sentences under the war on drugs and the "tough-on-crime" approach.[43] CCA saw an opportunity to create private prisons operated by business, rather than by government.[44] These prisons would alleviate the prison populations in state prisons, which would in turn help the states save money.[45] CCA also proclaimed that its operations would be transparent and "in many ways just like the correctional facilities of

---

[39] *Procunier v. Navarette*, 434 U.S. 555, 566 (1978).
[40] *Id.* at 565-66.
[41] *The CCA Story: Our Company History*, CCA.com, http://www.cca.com/our-history (last visited Nov. 5, 2014).
[42] *Id.*
[43] J.M. Kirby, Note, *Graham, Miller, & the Right to Hope*, 15 CUNY L. Rev. 149, 155 (2011).
[44] CCA.com, *supra* note 41.
[45] *Id.*

government."[46] CCA currently operates 61 facilities in 20 states.[47] Today, CCA is just one of a number of private prison companies operating private prisons throughout the country, including GEO Group and LCS Corrections.[48] Since CCA opened the first private prison thirty years ago, the population of prisoners across the United States who are housed in privately-operated prison facilities has steadily grown. As of the end of 2013, there were 133,044 prisoners held in the custody of private prisons throughout the country.[49] This is 8.4% of the total United States prison population.[50] However, private prisons have an even greater impact on the federal level alone: 19.1% of all federal prisoners are serving their sentences in private prisons.[51]

With the rise of privately-operated prisons and the increasing number of prisoners in federal and state custody housed in these facilities, a very important question needed to be resolved: Are private prison officials entitled to a qualified immunity defense from § 1983 liability equal with their public counterparts? The Supreme Court provided a very clear, definitive answer to this question in *Richardson v. McKnight*, an answer that essentially provides the basis for the new proposal advocated for today.

The plaintiff in *Richardson* brought a § 1983 action against two prison guards, who he claimed deprived him of a right secured by the Constitution by placing upon him very tight physical restraints.[52] The Court then went through the two-pronged analysis set forth in *Wyatt* and reiterated above: it looked both to history and to policy considerations that underlie the grant

---

[46] *Id.*
[47] *Id.* at Locations.
[48] Scott Cohn, *Private Prison Industry Grows Despite Critics*, NBC News (Oct. 18, 2011, 10:44 AM), http://www.nbcnews.com/id/44936562/ns/business-cnbc_tv/t/private-prison-industry-grows-despite-critics#.VFqoZ_nF-g2.
[49] E. Ann Carson, *Prisoners in 2013*, Bureau of Just. Stat., at 14 (2014).
[50] *Id.*
[51] *Id.*
[52] *Richardson v. McKnight*, 521 U.S. 399, 401 (1997).

of immunity for government officials.[53] As to the first prong, the Court did not find a "firmly rooted" tradition of immunity that had been applied to privately employed prison guards.[54] Private contractors were heavily involved in prison management in the United States going as far back as the 19th century, but the Court found evidence that prisoners were indeed provided with remedies against harm committed upon them by the private prison operators.[55] The Court saw "no indication of any more general immunity that might have applied to private individuals working for profit."[56]

As to the second prong, whether policy considerations dictate in favor or against the granting of immunity, the Court admitted that this was a closer question than the issue regarding a firmly rooted tradition under the common law.[57] The Court explained that the main purposes behind qualified immunity are to protect "'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.'"[58] Immunity should be granted in instances where it is necessary to help ensure that public officials will not be timid in carrying out their official duties.[59]

Using this general rule, the Court determined that there were other factors in place in a private prison system that already sufficiently safeguarded against timidity and aggressiveness. For instance, the Court noted that private prison companies are subject to competitive market

---

[53] *Id.* at 404.
[54] *Id.*
[55] *Id.* at 405.
[56] *Id.* at 407.
[57] *Id.*
[58] *Id.* at 408 (quoting *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).
[59] *Id.*

pressures.[60] The Court found that these competitive pressures meant that guards who are too aggressive will face damages that will raise costs, which could lead to the private company being replaced.[61] At the same time, the threat of replacement also hovers over a company whose guards are too timid.[62] Other companies who demonstrate an ability to do a safer, more effective job will be more appealing to the governments leasing out their prisons.[63] Therefore, "marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance."[64]

Aside from ensuring effective performance, the need to ensure that talented candidates are not deterred by the threat of damages suits is not applicable to the facts in *Richardson*, the Court stated, because private prison employees are covered by insurance and will likely be indemnified by the company for any damages a court may order them to pay.[65] There is no need for immunity because the guards' employer can operate just like other private companies, rather than operating like a government department.[66] The Court readily admitted that lawsuits may distract employees from their duties, but concluded that the risk of distraction alone is not sufficient grounds for immunity.[67]

With the failure to satisfy the history requirement of the *Wyatt* test, and with the absence of a need to grant immunity to meet any of the purposes of the defense, the Court emphatically refused to afford private prison guards the defense of qualified immunity.[68] However, without settling the matter, the Court left open the possibility that perhaps private prison guards, such as

---

[60] *Id.* at 409.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 410.
[65] *Id.* at 411.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 412.

the guards in *Richardson*, could assert an affirmative defense based on good faith, rather than an immunity defense.[69] This issue was not specifically before the Court in *Richardson*, though, and thus there was no ultimate decision regarding the possibility of raising such a defense.[70]

The disparate treatment that public and private prison guards now receive in terms of liability results in inequality among not just the guards themselves, but also among the prisoners. Denying qualified immunity to private guards means that prisoners in public and private prisons will receive unequal results when bringing an Eighth Amendment claim against prison officials. Prisoners in private prisons will at least be able to get their claims past summary judgment, for the most part, while those in public facilities will get their cases kicked out of court before any evidence is allowed to be presented. Justice Scalia made this injustice painfully clear at the end of his *Richardson* dissent when he wrote, "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 that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability."[71]

V. Public Prisons vs. Private Prisons

An examination of public and private prisons makes evident the need for reform regarding qualified immunity in the prison litigation context. To be sure, there are stark differences between government-run prisons and privately-run correctional facilities. The main purpose behind the rise of private prisons in the mid-1980s was to save the states money in

[69] *Id.* at 413-14.
[70] *Id.*
[71] *Id.* at 422.

operating their prison systems.[72] Private prisons were able to house and manage prisoners at much lower costs than the states could, so the states began contracting out their facilities to private firms.[73] While it was believed that competition for government contracts would provide the necessary incentives for private companies to manage prisoners more effectively and efficiently, this has proven to be far from the case.

Professor Mary Sigler has commented that "[t]he traditional market mechanisms for disciplining poor performance may not operate effectively in the private prison setting."[74] Typically in the case of other private services, dissatisfied consumers can demand change and improved service. However, the "consumers" in the private prison setting are the prisoners themselves, and by virtue of their status, cannot demand any sort of change whatsoever.[75] They are "virtually powerless to effect change in the face of unsatisfactory prison conditions."[76] Professor Sigler also notes that prisoners are not the only ones who are left powerless in a case of unsatisfactory conditions. Public officials, the ones who are contracting with the private firms to run their prison facilities, will not easily be able to cancel a contract with a firm that is not performing well, due to the difficulty in finding alternative facilities to house the prisoners.[77]

In addition, because the private prison market is dominated by a very small number of firms, these firms are the ones with the bargaining leverage when negotiating with governments who are under pressure to find a place to house prisoners as quickly as possible.[78] These inherent circumstances within the private prison system mean that even when there are instances of severe

---

[72] Mary Sigler, Article, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 Fla. St. U. L. Rev. 149, 158 (2010).
[73] *Id.*
[74] *Id.* at 160.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

prison guard force unduly exerted upon prisoners, there is very little governments can do to punish the private firms who are letting that happen under their watch. "When money is the state's primary concern, it will hesitate to rescind contracts even when evidence of abuse is considerable, fearing the costs such a move would entail."[79]

Another way private firms avoid accountability is by not providing specific contractual terms regarding the number of employees, the level of training those employees receive, as well as their salaries and benefits.[80] While governments can try to demand that these terms be specified, it is the private firms who hold the bargaining leverage in these negotiations due to the fact that there are only a limited number of private firms for governments to choose from. Therefore, government demands do not carry sufficient weight in these situations to cause private companies to change their ways. Professor Sharon Dolovich wrote that specifying any of these terms would increase the costs of contracting and greatly impede the private contractors' ability to cut labor costs, which in turn hurts their main objective of minimizing expenses.[81]

Without specifying those crucial contract terms, private prison officials have less training and less experience than those in the public sector. As one might guess, less training and less experience has led private prisons to become the scenes of more physical violence than public prisons.[82] Without obtaining adequate knowledge of due process and even of the law itself, these private guards are left to their own devices when making the most critical of decisions in the prison setting.[83] In addition, they receive lower wages than their counterparts in public prisons.[84] What these circumstances ensure is that private prison firms attract younger employees, with less

---

[79] Sharon Dolovich, Article, *State Punishment and Private Prisons*, 55 Duke L. J. 437, 505 (2005).
[80] *Id.*
[81] *Id.*
[82] *Id.* at 502.
[83] Mary Sigler, Article, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 Fla. St. U. L. Rev. 149, 162 (2010).
[84] *Id.*

experience and less training, all of which contributes to a higher turnover rate.[85] Professor Sigler writes that private prison employees "are less likely to develop the commitment to public values and shared norms of professionalism that contribute to rule compliance and promotion of the common good."[86] To sum up, "[T]he private sector is more interested in doing well than in doing good."[87]

Perhaps most concerning, though, is that the performances of the guards take place behind closed doors "in the service of beneficiaries who lack meaningful recourse in cases of poor performance."[88] In light of all of these obstacles to accountability, Professor Sigler writes that these are all "challenges to effective oversight in precisely those circumstances that call for special vigilance."[89]

Clearly there are significant differences between public and private prisons. However, these distinct prison systems share more similarities than one might think, indicating that perhaps they should share some more similarities in terms of the legal standards that apply to them, as well. As Professor Dolovich writes, "[T]he private prisons of today function very much like public prisons, only with a cheaper labor force."[90] Dolovich notes some of the most important similarities between public prisons and private prisons: the discretion and power the guards possess, the high pressure of the prison environment, and inmates' proclivity to violence.[91] Prison guard force against prisoners is a real concern in all prisons, no matter who is running the operation.

---

[85] *Id.*
[86] *Id.*
[87] *Id.* at 163.
[88] *Id.* at 161.
[89] *Id.*
[90] Sharon Dolovich, Article, *State Punishment and Private Prisons*, 55 Duke L. J. 437, 501 (2005).
[91] *Id.*

Adding further to the similarities, Professor Dolovich notes that public prisons are not even entirely publicly-run in each and every aspect of their organization. Governments are involved with the private sector for at least some of the services that public prisons provide.[92] The most common services for which almost all prison facilities across the country contract out to for-profit firms include food services, medical treatment, dental treatment, psychiatric treatment, and even garbage collection and educational programming.[93] It comes as no surprise that public prisons are doing this to help cut costs. As Dolovich notes, these services often directly affect a prisoner's well-being and helps contribute to violence in public and private prisons alike.[94]

To conclude her argument, Professor Dolovich sums it up best when she writes, "[P]ublic prisons, too, contract with for-profit providers for the provision of essential prison services as a cost-saving measure. And in public prisons, too, correctional officers enjoy considerable power over prisoners absent effective oversight mechanisms. It should thus be unsurprising that, in terms of day-to-day structure and functioning, private prisons operate pretty much like public prisons—and that the conditions in each are far from safe or humane."[95]

Despite the differences between public and private prisons, which continue to provide validity to the Court's holding in *Richardson*, there are sufficient similarities to suggest that there is no reason to treat prisoners in these facilities any different from one another. Prisoners in both public and private prisons are under the supervision of prison officials whose conduct is not often effectively monitored. This public and private prison distinction should not foreclose one

[92] *Id.* at 507.
[93] *Id.*
[94] *Id.* at 508.
[95] *Id.* at 510.

group of prisoners from recovering damages from these officials over another simply because of who operates the facilities they are housed in.

VI. The Need for Reform

What the above discussion has demonstrated is that despite the similarities between public and private prisons, public and private prisoners are not treated equally under the law in terms of being able to remedy an infringement by a prison official upon their protected rights. Under the current system and state of the law, public prison guards are not subject to § 1983 liability for the actions they take in their official capacity, as long as they did not violate a clearly established right of which a reasonable person should have known. The Supreme Court has deemed these guards to be entitled to this qualified immunity defense from liability so that they can effectively perform their duties without fear of being sued for their actions. The Court has said that this gives them incentive to discipline. Essentially, the idea is to help ensure that guards will keep prisoners in line and under control while they are under the guards' watch. However, private prison guards are not entitled to a qualified immunity defense. The Court in *Richardson* said that private guards do not need incentive to discipline like the public guards do. They have enough incentive to do their jobs because their employer can just simply be replaced with any other private firm who is willing to undertake the challenge of running a prison.[96]

As previously mentioned, prisoners are greatly affected by this differing treatment between public and private guards. Prisoners in public and private facilities, just like the guards in those facilities, are treated differently under the law despite the fact that there is nothing among their day-to-day activities that differentiates them. Prisoners are prisoners, regardless of where they are assigned to serve out their sentences. It does not make a difference whether a

[96] *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

prisoner is housed in a private prison or in a public prison—he is still stripped of his liberty and freedom. However, a private prisoner will have a much easier time bringing a § 1983 claim against a private guard than will a public prisoner against a public guard, by virtue of the Supreme Court's decision in *Richardson* not to extend qualified immunity to private prison officials. A public prisoner's suit will likely be dismissed at the summary judgment stage, while a private prisoner's suit will much more likely be heard and decided on the merits.

The Court does not make any mention of how *Richardson* affects prisoners. The Court offers no rationale for why private prisoners should more easily be able to recover damages from a guard who violated their constitutional right to be free from cruel and unusual punishment than should public prisoners. If they have suffered the same wrong, why should they not have an equal opportunity to remedy that wrong? Prisoners, by definition, have lost certain rights. But they have not lost *all* rights, which the fact that they can even attempt to bring a § 1983 action makes clear.

As Professor Sharon Dolovich explained in great detail, and as I recounted above, private and public prisons do share some similarities. Both facilities are scenes of violence and both facilities lack any sort of effective oversight measures to protect against potential abuses being carried out within their walls. Because the facilities themselves are not completely different, one can infer that the prisoners in private and public facilities are not that different, either. So why, then, has the Supreme Court determined that it shall effectively treat prisoners differently based on where they are housed? They perform the same tasks and serve the same roles within the prison system. It makes sense, then, that all prisoners should be treated equally. More specifically, all prisoners should have the same opportunities to have their § 1983 claims against prison officials heard on their merits.

Under my proposal of changes to be made to the doctrine of qualified immunity, private and public prisoners will have the same chances of successfully bringing a § 1983 claim against prison officials. This is the goal the Supreme Court should be striving for, rather than creating a large chasm between the public and private sectors in the correctional system. These changes need to be made because they will help ensure equality and fairness regarding certain aspects of a § 1983 lawsuit. Prisoners will not have to worry about their meritorious claims getting dismissed before any facts of the case have even been revealed. No longer will the case be where two prisoners who were subjected to the same amount of force by prison officials will have one of their cases summarily dismissed and one of their cases heard on the merits simply because of whether the officials were employed by the government or by a private entity.

VII. Prior Proposals of Reform

As is made evident above, this injustice in the law regarding prisoners should not be allowed to continue. The status quo must change. It is not surprising, then, that since *Richardson*, numerous proposals regarding the disposition of § 1983 claims brought against officials by prisoners have been suggested. While any change is better than maintaining status quo, I will propose a more preferable solution, of which neither of the following proposals makes mention.

Among the most radical of suggestions that has been proposed in the wake of *Richardson* is to completely abolish qualified immunity in the prison litigation context and instead provide prison guards, *all* prison guards, with a good faith defense.[97] Stephen Miller determined the contours of this defense by using Justice Stevens's dissent in *Procunier*.[98] Under this standard, a guard would have no immunity from suit if he either (1) knew or should have known that the

[97] Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting From Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 Notre Dame L. Rev. 929, 931 (2009).
[98] *Id.* at 940.

actions he was taking in his official capacity would violate the prisoner's constitutional rights, or (2) if he acted with malice or with intent to cause injury.[99] Miller writes that one of the benefits of this type of defense is that it would protect those who reasonably believed that their actions were legal, as well as not protect those who acted with malice.[100] "Such a fault-based system promotes a better-functioning justice system."[101]

While this new defense certainly is beneficial for plaintiffs and opens the door for them to more likely be able to successfully bring claims, it also benefits prison officials, as well as the courts.[102] Applying this standard to all guards, regardless of whether they are private or public, will produce consistent results in factually-similar circumstances.[103] Courts will have more guidance as to how to decide such cases and, with consistent case law as to how a court would view a factual scenario, prison officials can better organize the training of their guards to ensure that they are less likely to engage in prohibited actions.[104] Stephen Miller argues that "[s]uch a shift would make it easier for prisoners with meritorious claims to have their cases heard" and it would "introduce a measure of consistency and fairness with respect to prison guard defendants in § 1983 lawsuits."[105]

Another possible solution is to simply judge officials' conduct based on a heightened negligence standard. Professor Sharon Dolovich explained what this entails when defining "cruelty" in terms of Eighth Amendment prison conditions claims.[106] This same standard could be used to determine if a prison guard can claim immunity from § 1983 excessive force claims.

---

[99] *Id.*
[100] *Id.*
[101] *Id.* at 944.
[102] *Id.* at 954.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 931.
[106] Sharon Dolovich, Article, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881 (2009).

Under such a standard, if prisoners "were subjected to a substantial risk of serious harm of which a reasonably attentive prison official would have known," than the official would not be entitled to any immunity from liability.[107] However, if the prison guard's acts did not pose an objectively-perceived substantial risk of serious harm, the guard could claim immunity. This is essentially the Eighth Amendment standard used by the courts in prison conditions claims (without the subjective component), but that does not preclude it from being used in claims of excessive force.

If a change were to be made to the current law, guards would probably prefer that this be the replacement. However, on its face, a "substantial risk of serious harm" seems to be a fairly high burden for a plaintiff prisoner to satisfy in excessive force claims. While this standard still allows for more cases to be heard on the merits and not just summarily tossed out of court, it is questionable whether this makes it any easier for prisoners to successfully bring their claims, which of course is a main priority in reforming this area of the law.

Professor Dolovich makes mention of another standard: the strict liability standard.[108] This is certainly more favorable to prisoners than the heightened negligence standard because here they would be able to recover damages regardless of any good intentions the guard may have had.[109] However, even Dolovich acknowledges the weaknesses of such a standard. In cases brought directly against individual guards, strict liability "risks unfairness by foreclosing officers from showing that nothing in their conduct, or in the institutional context more generally, indicated insufficient concern with prisoners' needs."[110]

---

[107] *Id.* at 948.
[108] *Id.* at 964.
[109] *Id.* at 965.
[110] *Id.* at 966.

One final suggestion that could be used to replace qualified immunity is to impose a deliberate indifference standard on the guards' conduct. "With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness."[111] Doretha Van Slyke argues that this is beneficial to prison officials because it prevents mere accidents and negligence from forming the basis of a constitutional violation.[112] At the same time, it is beneficial to prisoners because "it does not place an onerous burden of proof on the inmate."[113] However, perhaps our correctional officers should be entitled to a bit more protection than "recklessness" when it comes to acting in such a high-anxiety, tension-filled location as a prison.

VIII. New Proposal

The problem with these aforementioned solutions is that the Supreme Court is unlikely to completely abolish qualified immunity altogether in the prison litigation context, especially given its history under the common law. If reform is going to occur, it appears that changes to the existing doctrine itself are going to have to be made, rather than simply wholeheartedly doing away with the doctrine. The main purpose behind reform is that prisoners in all types of prisons should have an equal opportunity in bringing a successful claim of excessive force against prison officials. There needs to be more equality and fairness in the disposition of these § 1983 claims. If reform meets these goals, equality and fairness can certainly be accomplished.

---

[111] *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).
[112] Doretha M. Van Slyke, Note, *Hudson v. McMillian and Prisoners' Rights: The Court Giveth and the Court Taketh Away*, 42 Am. U. L. Rev. 1727, 1734 (1993).
[113] *Id.*

I now propose the following changes to Eighth Amendment lawsuits alleging excessive use of force: Instead of the jury making the final determination as to whether or not the Eighth Amendment rights of a prisoner have been violated, as is the case today, the judge will ultimately determine whether or not the prison official acted "maliciously and sadistically to cause harm." After examining the totality of the circumstances, if the judge finds that the official did act with such intent, the *private* prisoner will then be entitled to recover damages, because private prison officials are not entitled to a qualified immunity defense. In a case brought by a *public* prisoner, though, the judge will have to make an additional finding as to whether or not it would be appropriate under the circumstances for the public prison official to assert a qualified immunity defense. Under this new standard, public prison officials will still be entitled to a qualified immunity defense, while private prison officials will not, but the ultimate decision as to whether qualified immunity can be asserted in a given case will be made by the judge.

The burden of proof will be on the plaintiff prisoner to demonstrate to the court that the official acted maliciously and sadistically. In addition, the extent of the injuries sustained by the prisoner will be just one factor to consider, as will be the subjective intent of the prison official. Again, the judge will look at the totality of the circumstances in making a final determination, with no one factor being dispositive.

Under this new standard, prison guards will be held accountable for their egregious conduct. They will no longer be able to hide behind the cloak of a qualified immunity defense if their conduct did not violate a clearly established right of which a reasonable person should have known. By virtue of their positions, guards have inherent power to discipline prisoners and maintain peace and order within the prison environs. With this new test, however, they will have to think more carefully about the actions they take.

This new standard also benefits prisoners because it puts them on equal footing with one another in terms of bringing a claim against a prison official. In addition, those prisoners who have suffered even the most serious harm will not have their cases simply thrown out of court due to an immediate invocation of qualified immunity by the defendant. All prisoners with legitimate claims will have an equal chance of getting their cases heard. As Stephen Miller writes, "We must be mindful…that there are indeed meritorious claims that arise out of the prison context and that we have an obligation to ensure that the rights of some of our most vulnerable citizens are not being trampled."[114] This new standard helps fulfill that obligation.

IX. Conclusion

The defense of qualified immunity to § 1983 excessive force claims in the prison litigation context needs to be overhauled. It currently protects prison officials from facing liability for their actions, no matter how extreme, as long as they did not violate a clearly established right. Even if this were acceptable, this immunity only applies to public prison guards, and not to their private counterparts. This has resulted in unfairness and inequality among prisoners in these different prisons, which now needs to be rectified. Prisoners, when bringing Eighth Amendment claims of excessive force against the officials who watch over them, need to be treated equally under the law, no matter who employs those officials.

To accomplish this goal, all legitimate claims of excessive force brought by prisoners against prison officials must be heard by a judge. The judge will decide whether the Eighth Amendment has been violated, and the judge will decide whether public prison officials can assert qualified immunity. With this new standard, prisoners with meritorious claims will have

[114] Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting From Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 Notre Dame L. Rev. 929, 955 (2009).

an equal opportunity to successfully bring a § 1983 lawsuit against officials. This new test creates fairness and equality for all, certainly much more so than does the current state of the law.