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McKnight v. Rees: Delineating the Qualified Immunity "Haves" and "Have-nots" Among Private Parties

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McKnight v. Rees: Delineating the Qualified Immunity "Haves" and "Have-nots" Among Private Parties

I. INTRODUCTION

Federal, state, and local governments are increasingly turning to the private sector for assistance in operating prison facilities. At year-end 1996, privately operated prison facilities housed three percent of the adult prison population, a thirty-two percent increase in the adult privatized-prison industry.[1] In *McKnight v. Rees*,[2] the Sixth Circuit recently addressed one of the legal questions surrounding the privatization of prisons. The court held that qualified immunity does not apply to privately employed prison officials[3] facing civil rights suits brought by prisoners, even though it would apply to government-employed prison officials performing the same functions.[4] The Sixth Circuit's analysis was based solely on policy factors relating to whether private parties should be entitled to qualified immunity in the same way that equivalent government officials would be. These policy considerations, specifically the court's determination that privately employed prison officials would be prone to infringe on prisoner rights in order to maximize profits, led the court to deny qualified immunity.[5]

McKnight's analysis is troublesome both because of the result the court reached and because the policy analysis it employed charts a course toward ad hoc determinations in the area of granting qualified immunity. This Note urges a differ-

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1. *See* CHARLES W. THOMAS & DIANNE BOLINGER, UNIVERSITY OF FLORIDA CENTER FOR STUDIES IN CRIMINOLOGY & LAW, PRIVATE ADULT CORRECTIONAL FACILITY CENSUS (1997).

2. 88 F.3d 417 (6th Cir. 1996), *cert. granted*, Richardson v. McKnight, 117 S. Ct. 504 (1996).

3. "Privately employed prison officials" will be the term used throughout this Note to refer to the independent corporations/entitites that the government contracts with to perform specified functions related to maintaining prison facilities.

4. *McKnight*, 88 F.3d at 424-25.

5. *See infra* notes 91-93 and accompanying text.

ent approach toward granting qualified immunity, a functional approach that would reign in the policy analysis used in *McKnight* by decreasing the weight placed on policy in making determinations of which private officials are entitled to qualified immunity. *McKnight* largely ignored this functional approach,[6] even though it is a well-established guide to when courts should grant immunity to publicly employed officials.[7] The application of the functional approach also makes sense when the official seeking qualified immunity is a private official.

Adopting the functional approach would lead to the conclusion that qualified immunity applies both to prisoner suits filed against government-employed prison authorities acting in a discretionary role and prisoner suits filed against privately contracted prison authorities acting in the same role. Part II provides important background information on qualified immunity by discussing Supreme Court decisions dealing with the grant of qualified immunity—decisions that directly relate to the issue confronted in *McKnight*. Although the Court has never addressed whether private prison officials are entitled to qualified immunity, it has stated that publicly employed prison officials comparable to the officials in *McKnight* are entitled to qualified immunity. Further, the Court has recently addressed, in a context other than the prison setting, whether a private party is entitled to qualified immunity.[8] Additionally, the lower federal courts, including two circuit courts, have addressed whether private parties are entitled to qualified immunity in circumstances similar to the *McKnight* case. These decisions will be discussed to provide a framework under which to analyze *McKnight*. With this background in place, Part III then recites the facts of *McKnight* and the analysis employed by the Sixth Circuit. Part IV suggests an analysis, relying on a functional approach to determining immunity questions, that would establish a rebuttable presumption that qualified immunity applies to private officials if a government-employed official

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6. *See infra* note 90 and accompanying text.

7. *See infra* notes 11-17 and accompanying text.

8. *See* Wyatt v. Cole, 504 U.S. 158 (1992) (holding that a private-party defendant who was sued after using a state replevin statute that was later invalidated is not entitled to qualified immunity).

performing the same task would be entitled to immunity. Part V concludes that this approach dictates that privately contracted prison officials should be entitled to qualified immunity.

II. BACKGROUND

A. *Qualified Immunity Determined by Function*

Official immunity bars plaintiffs from bringing a damages action directly against a government official for an alleged wrong. Scholars have identified the English maxim that "the King can do no wrong" as the ultimate source of official immunity.[9] Official immunity in one of two forms—absolute or qualified immunity from suit—has been granted to various officials of all three federal branches of government and to equivalent state authorities.[10]

In determining what level of immunity to grant, the Court has often used what it refers to as a "functional approach" in concluding whether to grant immunity.[11] As the Supreme Court has explained,

> Under [the functional] approach, [the Court] examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.

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9. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984); *see also* Scheuer v. Rhodes, 416 U.S. 232, 239-40 (1974).

10. *See* Harlow v. Fitzgerald, 457 U.S. 800, 806-07 (1982). Absolute immunity has been extended to (1) judges acting in their judicial capacity, *see* Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967); (2) prosecutors acting in their prosecutorial function, *see* Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecuting attorney); (3) legislators, *see* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Tenney v. Brandhove, 341 U.S. 367 (1951); (4) the President of the United States, *see* Nixon v. Fitzgerald, 457 U.S. 731 (1982); and (5) witnesses, *see* Briscoe v. LaHue, 460 U.S. 325 (1983). Qualified immunity has been extended to (1) various state and federal executive officials, *see* Procunier v. Navarette, 434 U.S. 555 (1978) (state warden, corrections department head, and various prison officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor and national guard); (2) federal cabinet members, *see Butz*, 438 U.S. 478; (3) presidential advisors/White House staff, *see Harlow*, 475 U.S. 800; (4) police officers, *see Pierson*, 386 U.S. 547; and (5) school board members, *see* Wood v. Strickland, 420 U.S. 308 (1975).

11. *See* Forrester v. White, 484 U.S. 219, 224, 227 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions . . . .").

> . . . .
> . . . *[I]mmunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.*[12]

As the Court stated in *Briscoe v. LaHue*:[13] "[I]mmunity analysis rests on functional categories, *not on the status of the defendant.*"[14] For example, a state supreme court that acted in a legislative capacity to promulgate state bar rules is entitled to the same immunity from injunctive relief that state legislators would enjoy.[15] Conversely, a prosecutor that normally would enjoy absolute immunity is entitled only to qualified immunity when not functioning as a prosecutor;[16] legislators similarly lose their absolute immunity when not functioning as legislators.[17]

Qualified immunity determined to be applicable through this functional analysis is typically used to shield defendants from suits against state officials authorized by 42 U.S.C. § 1983.[18] Once an official has been found to be in a category of

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12. *Id.* (emphasis added); *see also* Cleavinger v. Saxner, 474 U.S. 193, 201 (1985) ("[I]mmunity flows . . . from the nature of the responsibilities of the individual official.").

13. 460 U.S. 325 (1983).

14. *Id.* at 342 (emphasis added).

15. *See* Supreme Court of Virginia v. Consumers Union, Inc., 446 U.S. 719, 731-32 (1980); *see also* Doe v. McMillan, 412 U.S. 306, 322-23 (1973) (finding Public Printer entitled to the same degree of immunity that legislators would be granted had the legislators themselves published and disseminated documents that allegedly violated privacy of plaintiffs).

16. *See* Buckley v. Fitzsimmons, 509 U.S. 259, 272-78 (1993) (manufacturing evidence and making allegedly false statements at a press conference exceeded the scope of prosecutorial function); Burns v. Reed, 500 U.S. 478, 487-96 (1991) (prosecutor's action of testifying at probable cause hearing warranted absolute immunity, but giving legal advice to a police officer about whether probable cause existed to justify an arrest exceeded the prosecutorial function, thus allowing only qualified immunity as to that function).

17. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 125-28 (1979) (denying absolute immunity to senator that gave "Golden Fleece" awards to parties involved in what the senator deemed wasteful government spending).

18. 42 U.S.C. § 1983 (1996) reads, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), the Supreme Court created a cause of action against federal officials equivalent to that of § 1983. The

officials to which qualified immunity applies, the immunity bars a plaintiff from bringing a damages action so long as the official acted in the discretionary function associated with his/her office and in doing so did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[19]

In order to determine if qualified immunity should apply to a certain type of official, the Court engages in what amounts to a two-part balancing test. It first looks to see if the category of officials "was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871."[20] If so, the

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vast majority of prisoner suits are brought under § 1983 against state officers. The qualified immunity doctrine is identical regardless of which authorization is used. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]ithout congressional directions to the contrary, we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."); see also Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 433 n.5 (1993); Harlow v. Fitzgerald, 457 U.S. 800, 818 n.30 (1982).

19. *Harlow*, 457 U.S. at 818.

20. Tower v. Glover, 467 U.S. 914, 920 (1984). This aspect of the two-prong test could be supported as an exercise of statutory interpretation: the common law tradition of granting qualified immunity to certain officials is so strong that legislative silence is interpreted as preserving the immunity. *See* Owen v. City of Independence, 445 U.S. 622, 637 (1980) ("[W]e have, on several occasions, found that a 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.'" (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967))); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) ("We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition [of immunity] so well grounded in history and reason by covert inclusion in the general language before us.").

The current Supreme Court, as a general rule, looks only to the literal language of a statute to glean its meaning. In *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1994), the Court stated:

> The best evidence of [a statute's meaning] is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

See also United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms.'" (quoting Caminetti v. Unitad States, 242 U.S. 470, 485 (1917))). Occasionally the Court is forced to go beyond pure textualism and interpret a statute against a backdrop principle that surely was intended to be incorporated into the statute. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1721 (1996) (noting that application of abstention doctrines "reflecta the common-law

Court grants qualified immunity unless, under the second prong of the balancing analysis, "§ 1983's history or purposes nonetheless counsel against recognizing the same immunity."[21] This two-part analysis provides guidance as to whether qualified immunity should be granted to a particular category of officials, irrespective at this preliminary point of inquiry whether the right in question was clearly established.[22] The functional analysis described above seems primarily to address the first prong of this two-part analysis.

Yet the Court's two-part analysis clearly places some emphasis on policy factors. For example, the Court weighs the importance of providing damages relief to a plaintiff on one hand and "'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority'" on the other as an overarching consideration in whether to grant qualified immunity.[23] Further, the Court considers several policy factors under the second prong of the two-part balancing test: (1) whether denying qualified immunity would lead to expen-

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background against which the statutes conferring jurisdiction were enacted" (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989))).

21. *Id*; *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 268-69 (1993); Wyatt v. Cole, 504 U.S. 158, 164 (1992). This aspect of the test—history and purpose—focuses on policy matters surrounding the grant of qualified immunity and has led scholars to suggest qualified immunity is an exercise of federal common law power. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989) (arguing that qualified immunity "stands as a legal principle defined primarily by the Court's own policy judgment"); Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and* Bivens *Damages Suits*, 53 LA. L. REV. 449, 460 (1992); *cf.* Anderson v. Creighton, 483 U.S. 635, 645 (1987) (noting that the Supreme Court has "reformulated qualified immunity along principles not at all embodied in the common law").

22. A substantial body of case law is devoted to determining what statutory or constitutional rights were "clearly established" at the time of infringement. This line of cases will not be addressed in this Note, however, because the subject here is whether a category of defendants can ever be granted qualified immunity, not whether the clearly established nature of the infringement—an issue relating to the merits of the case—bars the application of a qualified immunity that would otherwise exist.

23. *Harlow*, 457 U.S. at 807 (quoting Butz v. Economou, 438 U.S. 478, 506 (1978)); see also Scheuer v. Rhodes, 416 U.S. 232, 242 (1974) ("Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.").

sive litigation;[24] (2) whether official energy would be diverted from important public issues if qualified immunity were denied to a certain official;[25] (3) whether denying qualified immunity would deter talented candidates from entering public service;[26] and (4) whether the fear of suit will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."[27] In short, although the Supreme Court has made statements such as "[w]e do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy"[28] and "our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice,"[29] the broad balancing factors involved in this two-part test show that policy matters play an important role in developing the doctrine of qualified immunity.

B. The Immunity of Public Prison Officials

The Supreme Court applied this two-part analysis in addressing whether publicly employed prison officials are entitled to qualified immunity. In *Procunier v. Navarette*,[30] the Supreme Court extended qualified immunity to prison officials faced with § 1983 suits brought by prisoners.[31] The Court's analysis was terse, stating only that as part of the executive branch, "prison officials . . . were not absolutely immune from liability in this § 1983 damages suit and could rely only on . . . qualified immunity."[32]

The Supreme Court has never expressly determined whether the *Procunier* immunity would apply if prison officials were employed by a private entity instead of directly by the state. *Wyatt v. Cole*,[33] the Supreme Court's only express declaration of

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24. *Harlow*, 457 U.S. at 814.
25. *Id.*
26. *Id.*
27. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
28. Tower v. Glover, 467 U.S. 914, 922-23 (1984).
29. Malley v. Briggs, 475 U.S. 335, 342 (1986).
30. 434 U.S. 555 (1978).
31. Six defendants were named in *Procunier*, ranging in authority from the warden and director of the state's department of corrections to prison officials who handled incoming mail. *See id.* at 556-57.
32. *Id.* at 561.
33. 504 U.S. 158 (1992).

qualified immunity as applied to private parties, must therefore be considered in conjunction with *Procunier* when privately employed prison officials seek qualified immunity.

C. Qualified Immunity of Private Defendants—Wyatt v. Cole

Wyatt involved two members of a "soured cattle partnership," one of which, Bill Cole, had seized much of his partner's property prior to trial, as allowed by a Mississippi statute later held to be unconstitutional.[34] After the statute was invalidated and the property ordered to be returned, Cole was forced to defend himself against a § 1983 suit brought by his former partner who claimed that the illegal seizure violated due process. The Court found that although Cole was a private party, he was a state actor in that he had acted under the ambit of the invalid statute to have the property seized.[35] However, the Court refused to grant Cole the accompanying qualified immunity that a government official who had relied on a seemingly valid state statute would have enjoyed.[36]

The *Wyatt* Court justified its denial of qualified immunity on the ground that special policy concerns involved in suing government officials were absent when applied to private parties.[37] Specifically,

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34. *See Wyatt*, 504 U.S. at 160.

35. The Supreme Court had already determined that private parties could be held liable as state actors for § 1983 liability in certain circumstances. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (announcing a two-part test to determine if a private party's conduct is "fairly attributable" to the state and therefore properly subjects the private party to § 1983 liability); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970) (holding that a private party conspiring with a state official could be subject to § 1983 liability). The *Lugar* Court expressly avoided the question of whether qualified immunity would be available to private parties held to be state actors. *See Lugar*, 457 U.S. at 942 n.23 ("We need not reach the question of the availability of [a good-faith defense or qualified immunity] to private individuals at this juncture."). In *West v. Atkins*, 487 U.S. 42, 54 (1988), the Supreme Court held that a privately contracted prison physician "acted under color of state law" so as to fulfill § 1983's state action requirement. The *West* rationale likely extends to other prison officials, like the guards in *McKnight*, subjecting them to § 1983 liability. *See* Brief for Petitioner, Richardson v. McKnight, 1997 WL 10351, at *16-19 (U.S. 1997) (No. 96-318) (concluding that prison officials perform state functions to a greater degree than the prison doctor found to be a state actor in *West*).

36. *See Wyatt*, 504 U.S. at 168.

37. *See id.* at 167 ("[R]ationales [justifying the grant of qualified immunity] are not applicable to private parties.").

> [a]lthough principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion. Unlike school board members . . . or Presidential aides, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending . . . qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service. Moreover, unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes. In short, the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity.[38]

Yet the *Wyatt* Court dampened its holding by noting that it was "a very narrow one: '[w]hether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials.'"[39] *Wyatt*, then, focused almost exclusively on the second prong of the two-part test described above,[40] determining whether the history and purpose of § 1983 warranted extension of qualified immunity to a party relying on a seemingly valid state statute.

However, *Wyatt* gave no clear guidance about when, if the holding was truly to be narrow, qualified immunity could be granted to private parties.[41] The opinion contained some broad language suggesting that private parties would not be entitled

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38. *Id.* at 168 (citations omitted).

39. *Id.* (quoting Pet. for Cert. i.).

40. *See supra* note 21 and accompanying text. This focus was justifiable because there is not a clear analogy between a government actor that initiates seizure proceedings in the same way that a private party was authorized under the statute. *See* discussion *infra*, text accompanying notes 113-17.

41. *See* Burrell v. Board of Trustees, 970 F.2d 785, 794-95 (11th Cir. 1992) (noting that although *Wyatt* "did not explicitly overrule decisions holding that qualified immunity is available to private defendants in other circumstances, the Court's analysis does not bode well for the continued vitality of these decisions").

to qualified immunity in any circumstances,[42] but at the same time it contained other language—the "narrow holding" language[43]—that stopped short of such a bright-line rule. The Sixth Circuit's approach in *McKnight* seemingly attempts to resolve this confusion by treating every assertion of qualified immunity as a fact-specific, policy-based inquiry.[44]

Other courts have taken a different approach toward applying qualified immunity to private parties after *Wyatt*. Prior to *McKnight*, only district courts had directly addressed whether privately employed prison officials were entitled to qualified immunity. Of the four district court decisions, three found that privately employed prison officials were entitled to qualified immunity, while one denied qualified immunity to such officials. Further, two circuits—the Tenth and Seventh Circuits—addressed whether qualified immunity should be granted to private parties in situations similar to that faced in *McKnight*.[45] These cases will be examined to determine how *Wyatt* should be interpreted, thus providing guidance on whether qualified immunity should be granted to privately employed prison officials.

1. The Seventh Circuit

In *Sherman v. Four County Counseling Center*,[46] the Seventh Circuit granted qualified immunity to a private psychiatric clinic and one of its doctors that administered court-ordered medication.[47] The court stated that "*Wyatt* does not bar, and public policy requires qualified immunity be extended to [pri-

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42. *See Wyatt*, 504 U.S. at 168 (declaring that the rationales supporting the grant of qualified immunity "are not transferrable to private parties").

43. *See supra* note 39 and accompanying text.

44. *See* McKnight v. Rees, 88 F.3d 417, 420 (6th Cir. 1996) (declaring that neither Sixth Circuit precedent nor *Wyatt* directly controlled the outcome because "each of those cases relied in part on the fact that the policy rationales that support qualified immunity did not apply on the facts").

45. These decisions are similar in that each deals with a privately contracted government official or a private party under the command of a government officials, but the cases do not specifically address whether privately employed prison officials are entitled to qualified immunity. *See infra* Parts II.C.1, II.C.2

46. 987 F.2d 397 (7th Cir. 1993).

47. *See id.* at 406; *see also* Williams v. O'Leary, 55 F.3d 320, 323-24 (7th Cir. 1995) (granting qualified immunity to a privately employed prison doctor accused of negligently failing to treat an inmate's medical problems).

vate parties like] Four County."[48] The Seventh Circuit distinguished *Sherman* from *Wyatt* because the private hospital was exercising discretion in discharging government-imposed duties in *Sherman* rather than "voluntarily engag[ing] in illegal activities in the advancement of their own self-interest," as occurred in *Wyatt*.[49] The Seventh Circuit reasoned that if a government-employed hospital official had performed the same acts, it would have been entitled to qualified immunity.[50]

Policy concerns also supported the grant of qualified immunity to Four County:

> Four County was fulfilling a public duty. If the actions it took pursuant to court order subject it to suit, private hospitals might well refuse to accept involuntary patients. This refusal would increase the load on the strained resources of the state's public hospitals. . . . We believe the public interest in maximizing the number of facilities available for the detention and treatment of the mentally ill is best served by not exposing private facilities to liability for discretionary medical judgments made under court order.
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> . . . We refuse to give private hospitals the Hobson's choice of obeying a court's order directing discretionary medical treatment, and facing liability for the resulting medical judgment, or refusing to make a medical judgment, and exposing hospital staff and patients to the risk of harm posed by a potentially violent mental patient.[51]

The Seventh Circuit reaffirmed this holding in *Williams v. O'Leary*,[52] in which a privately employed prison doctor was granted qualified immunity from a suit brought by an inmate,[53] a factual situation nearly identical to *McKnight*.[54] The Seventh Circuit concluded that "[i]n cases involving 'a private party acting under a government contract fulfilling a governmental function; parties fulfilling statutorily mandated duties under a

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48. *Sherman*, 987 F.2d at 405.

49. *Id.* at 406 (quoting Felix de Santana v. Velez, 956 F.2d 16, 20 (1st Cir. 1992)).

50. *See id.* at 405.

51. *Id.* at 406.

52. 55 F.3d 320 (7th Cir. 1995).

53. *See id.* at 324.

54. The *McKnight* court referred to *Williams* as "factually analogous to the case at bar." *See* McKnight v. Rees, 88 F.3d 417, 422 (6th Cir. 1996).

contract; and a physician acting pursuant to a court order,' qualified immunity [is] applied."[55]

2. The Tenth Circuit

The Tenth Circuit has adopted a similar approach toward interpreting *Wyatt* when confronted with the issue of granting qualified immunity to private parties. In *Warner v. Grand County*,[56] the Tenth Circuit extended qualified immunity to a private party asked to conduct a strip search of a suspected drug carrier.[57] The court found that *Wyatt* was distinguishable on its facts because "granting [the *Warner* defendant] qualified immunity [was] consistent with *Wyatt*'s discussion of the underpinnings of qualified immunity."[58] The court embraced the Seventh Circuit's *Sherman* analysis and found similar policy concerns that favored granting qualified immunity to the *Warner* defendant:

> Ms. Parker served as Officer Richmond's agent in carrying out an investigatory function unique to the government. If Ms. Parker, or others like her, are not permitted to raise the shield of qualified immunity, they might reject requests to aid state officials in performing governmental functions. This would clearly constrain state officials' agility in performing such functions, frustrate the government's investigatory power, and thereby limit the state's ability to service the public good. We conclude that granting Ms. Parker qualified immunity is wholly consistent with *Wyatt*'s discussion of the policies embodied therein.
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> . . . It would be anomalous to deny Ms. Parker qualified immunity when Officer Richmond would have received immunity had he performed the search.[59]

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55. *Williams*, 55 F.3d at 323 (quoting Burrell v. Board of Trustees, 970 F.2d 785, 795 (11th Cir. 1992)). The Eleventh Circuit first introduced the distinction employed by the Seventh Circuit. *See Burrell*, 970 F.2d at 795 (noting that *Wyatt* could be read more broadly than its "narrow holding" suggested, but even under the narrow construction of *Wyatt*, qualified immunity did not apply when private individual did not act pursuant to government contract, or court order).

56. 57 F.3d 962 (10th Cir. 1995).

57. *See id.* at 967.

58. *Id.* at 965.

59. *Id.* at 967.

The Tenth Circuit verbalized its test for when to grant private parties qualified immunity a bit differently than the Seventh Circuit, but the analysis is identical: "We hold that a private individual who performs a government function pursuant to a state order or request is entitled to qualified immunity if a state official would have been entitled to such immunity had he performed the function himself."[60]

3. Citrano v. Allen Correctional Center

A few district courts have also read *Wyatt* narrowly, similar to the approach in the Seventh and Tenth Circuits discussed above, and determined that qualified immunity should be granted to privately employed prison officials.[61] These decisions are best represented by *Citrano v. Allen Correctional Center*.[62] The *Citrano* plaintiffs, two prisoners in a privately operated Louisiana correctional center, claimed that they were beaten by

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60. *Id*; *see also* Eagon v. City of Elk City, 72 F.3d 1480, 1489-90 (10th Cir. 1996) (reaffirming the Tenth Circuit position by granting qualified immunity to a private party employed by the city to determine which signs could be displayed at a Christmas pageant); DeVargas v. Mason & Hanger-Silas Mason, Co., 844 F.2d 714, 721-22 (10th Cir. 1988) (noting that when private parties contract with the government to perform services the government must perform, the need for qualified immunity is at its peak).

Prior to *Wyatt*, the First Circuit had made virtually the same distinction as to when private parties could be granted qualified immunity. *See* Frazier v. Bailey, 957 F.2d 920, 928 (1st Cir. 1992) (finding that private social workers under contract with the government were entitled to qualified immunity because they "were compelled by the government to undertake the [allegedly unlawful] investigation of [the plaintiff]" and "were performing duties that would otherwise have to be performed by a public official who would clearly have qualified immunity"); Rodriques v. Furtado, 950 F.2d 805, 815 (1st Cir. 1991) (granting qualified immunity to private doctor that performed vaginal cavity search because the doctor was "'invested with [and has accepted] the responsibilities of a public official in the public interest'" and denying qualified immunity would hamper the state's ability to perform such searches in an efficient, hygienically safe manner (quoting Duncan v. Peck, 844 F.2d 1261, 1264 (6th Cir. 1988))).

Wyatt arguably left these decisions intact, based on the fact that they were conspicuously absent from the *Wyatt* court's opinion. *See* Sherman v. Four County Counseling Ctr., 987 F.2d 394, 404 (7th Cir. 1993) ("The Supreme Court [in *Wyatt*] did not cite or discuss any of the cases involving private defendants performing quasi-governmental functions or roles.").

61. *See* Citrano v. Allen Correctional Ctr., 891 F. Supp. 312 (W.D. La. 1995); Smith v. United States, 850 F. Supp. 984 (M.D. Fla. 1994); Tinnen v. Corrections Corp. of Am., No. 91-2188-TUA, 1993 U.S. Dist. LEXIS 20309 (W.D. Tenn. Sept. 20, 1993).

62. 891 F. Supp. 312 (W.D. La. 1995).

prison guards and that other prison officials conspired to deny needed medical and legal services to remedy the beating.[63] The *Citrano* court concluded that private prison officials, including the guards and administrative officials involved in *Citrano*, should be granted qualified immunity.

In reaching its conclusion, the *Citrano* court forcefully argued that *Wyatt* did not mandate a denial of qualified immunity to all private parties, and especially not to privately employed prison officials. Addressing the issue of whether private prison officials were motivated by self-interest and therefore prone to infringe prisoner rights, a concern that seemed to control the outcome in *McKnight*,[64] the *Citrano* court said:

> [T]here does not seem to be any basis for concluding that prison workers employed by government contractors have any less interest than government employed prison workers in the good of the public or in civil rights. It seems more reasonable to conclude that because they perform the same functions and face the same problems on a day to day basis that their subjective attitudes about their jobs are more alike than different. Moreover, the rationale underlying qualified immunity does not assume that public officials are subjectively motivated by the desire to serve the public's interests. Rather it is based on the underlying assumption that the public interest will best be served if those performing public functions can do so without the threat of unnecessary litigation clouding their decisions and their actions.[65]

Further, *Citrano*, in contrast to *McKnight*, applied the Supreme Court's functional approach,[66] noting that "[t]he determination of whether qualified immunity applies to the [prison] personnel . . . must . . . turn on an analysis of function and *not on their status as private parties versus state employees*."[67] The *Citrano* court explained why the functional approach should be used to provide guidance as to whether private prison officials are entitled to qualified immunity, despite *Wyatt*'s seeming

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63. *See id.* at 314.
64. *See infra* notes 91-93 and accompanying text.
65. *Citrano*, 891 F. Supp. at 319.
66. *See supra* notes 11-17 and accompanying text.
67. *Citrano*, 891 F. Supp. at 316 (emphasis added).

reliance on policy in denying qualified immunity to a private party:

> The prison guards and correctional officers at ACC are required to perform the same functions and are faced with the same types of situations requiring the exercise of discretion as are state employees working in state prisons . . . . The mere fact that their contractual ties to the state are different does not provide a logical basis for denying these workers the benefit of qualified immunity. *They are the functional equivalent of state prison employees,* and as such, the same rationales underlying the grant of qualified immunity to state prison officials have equal application to them.
>
> It is the public interest, not the personal interest of the alleged violator, that justifies the granting of qualified immunity.[68]

4. Manis v. Corrections Corp. of America

Citrano's result was challenged at the district court level, though. Prior to *Citrano* and *McKnight*, one district court had found that privately employed prison officials were not entitled to qualified immunity. This decision, *Manis v. Corrections Corp. of America*,[69] involved a claim of deliberate indifference to a prisoner's medical needs in violation of the Eighth Amendment. The defendants, a private correctional facility and one of its employees, argued that they were entitled to qualified immunity as a shield against the suit. The court, relying on a prior Sixth Circuit decision,[70] determined that at common law qualified immunity had never been granted to private parties, a fatal blow to the defendants' claim for qualified immunity.[71]

The *Manis* court not only found a lack of historical support for the grant of qualified immunity, but also found policy concerns that weighed against granting qualified immunity. The court concluded that private parties performing government functions upset the balance that qualified immunity attempts to strike:

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68. *Id.* at 317 (emphasis added).
69. 859 F. Supp. 302 (M.D. Tenn. 1994).
70. *See* Duncan v. Peck, 844 F.2d 1261, 1264 (6th Cir. 1988).
71. *See Manis*, 859 F. Supp. at 305.

> "[A] private party is governed only by self-interest and is not invested with the responsibility of executing the duties of a public official in the public interest . . . ." Indeed, corporate officers owe a fiduciary duty to advance stockholders' interests, but they owe no such fiduciary duty to the public at large. Thus, unlike public officials, corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public.[72]

The Sixth Circuit decided *McKnight* against this backdrop of case law.

III. *McKNIGHT V. REES*

A. The Facts

In *McKnight*, a prisoner in the Tennessee corrections system sued two prison guards.[73] The prisoner claimed that the guards: (1) shackled him too tightly, thus causing serious physical injury; (2) refused to provide needed medical assistance; and (3) taunted him when he complained of the tight cuffs—all in violation of the Eighth Amendment.[74] The prison guards were employees of Corrections Corporation of America,[75] a private, for-profit corporation contracting with Tennessee to operate some state prisons.

In the district court, the prison guards moved to dismiss the action based on a claim that they were protected by qualified immunity.[76] The guards claimed they were entitled to qualified immunity because they were functioning as state corrections authorities at the time of the alleged constitutional violations.[77] The district court, in harmony with a previous decision in the district,[78] denied the guards qualified immunity because the

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72. *Id.* (quoting *Duncan*, 844 F.2d at 1264).

73. Initially, the prison warden was named as a defendant. However, the warden was dismissed from the suit in the district court action. *See* McKnight v. Rees, 88 F.3d 417, 418 (6th Cir. 1996).

74. *See McKnight*, 88 F.3d at 418-19.

75. Corrections Corporation of America is the largest private contractor involved in prison privatization, with approximately 55% of the market share. *See* THOMAS, *supra* note 1, at 28.

76. *See McKnight*, 88 F.3d at 418.

77. *See id.* at 419.

78. *See* Manis v. Corrections Corp. of Am., 859 F. Supp. 302 (M.D. Tenn. 1994);

guards were employees of a private, for-profit corporation.[79] On interlocutory appeal,[80] the Sixth Circuit affirmed the district court's denial of the motion to dismiss.[81]

B. *The Court's Reasoning*

In affirming the denial of the prison guards' motion to dismiss, the *McKnight* court first concluded that if the prison guards had been employed directly by the state of Tennessee, *Procunier* would have required that qualified immunity shield any actions performed within the scope of state-mandated discretionary duties.[82] The court hesitated to grant qualified immunity in this case, however, because the prison guards were employed only indirectly by the state through an independent contracting relationship.

Despite the post-*Wyatt* line of cases in the lower federal courts holding that private parties acting under contract, order, or request of government officials should be granted qualified immunity if government officials acting the same way would enjoy such immunity,[83] the Sixth Circuit viewed the precise issue in *McKnight* as unaddressed. No circuit had ruled on the narrower issue of whether correctional officials employed by a private, for-profit corporation under contract with the government are entitled to qualified immunity.[84] District courts alone had addressed this precise issue. These district courts were split in their outcome: two, *Citrano v. Allen Correctional*

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discussion *supra* Part II.C.4. The district court also faced precedent in the circuit that private parties were not entitled to qualified immunity, but could be entitled to a good faith defense. *See* Duncan v. Peck, 844 F.2d 1261, 1266-67 (6th Cir. 1988). The *Duncan* case reflected reasoning later adopted, at least in part, by the Supreme Court in *Wyatt v. Cole*, 504 U.S. 158 (1992). *See supra* notes 35-45 and accompanying text.

79. *See* McKnight v. Rees, No. 1-94-0042, 1995 WL 871830 (M.D. Tenn. March 1, 1995).

80. In *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985), the Supreme Court made denials of qualified immunity immediately appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), which allows certain important collateral questions to be immediately appealable as "final decisions" within the language of 28 U.S.C. § 1291, despite the fact that judgment on the entire case has not been rendered.

81. *See McKnight*, 88 F.3d at 420.

82. *See id.* at 419 (citing Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) and Williams v. Bass, 63 F.3d 483, 486 (6th Cir. 1995)).

83. *See supra* notes 46-68 and accompanying text.

84. *See McKnight*, 88 F.3d at 423.

Center[85] and *Smith v. United States*,[86] allowed qualified immunity, while one, *Manis v. Corrections Corp. of America*,[87] disallowed it.[88]

The Sixth Circuit found the *Manis* result more persuasive. The court found that *Citrano* and *Smith* relied almost exclusively on the functional approach to decide if qualified immunity applies.[89] While acknowledging the validity of this functional approach as "an initial matter," the court held:

> [W]e do not believe the analysis begins and ends with asking the question whether the private party is performing a government function. We must also examine whether the "special policy concerns involved in suing government officials" also support the grant of qualified immunity to private actors performing what are traditionally governmental functions, as is the case here.[90]

The Sixth Circuit then found a "special policy concern" that trumped the functional approach—the prison guards in this case worked at a for-profit company whose prime motivation was not public service but, instead, profit. Prison guards working at a for-profit company instead of directly for the state would be prone to disregard constitutional rights in order to maximize profits.[91] This tendency to maximize profits would disrupt the balance qualified immunity strikes between compensating those who have been injured and protecting the government's ability to perform its functions.[92] Although the state had legitimate interests in public welfare and minimizing pris-

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85. 891 F. Supp. 312 (W.D. La. 1995); see discussion *supra* Part II.C.3.

86. 850 F. Supp. 984 (M.D. Fla. 1994).

87. 859 F. Supp. 302 (M.D. Tenn. 1994); *see* discussion *supra* Part II.C.4.

88. *See McKnight*, 88 F.3d at 423. The Sixth Circuit did not mention *Tinnen v. Corrections Corp. of America*, No. 91-2188-TUA, 1993 U.S. Dist. LEXIS 20309 (W.D. Tenn. Sept. 20, 1993), which also held that qualified immunity applies to private, for-profit prison guards.

89. *See McKnight*, 88 F.3d at 423; *see also supra* notes 11-17 and accompanying text.

90. *McKnight*, 88 F.3d at 423 (quoting Wyatt v. Cole, 504 U.S. 158, 167 (1992)).

91. *See id.* at 424. The *McKnight* court cited one student's observation that "[e]ntrepreneurial jailers benefit directly, in the form of increased profits, from every dime not spent," as support for the proposition that for-profit jailers would not protect constitutional rights to the same degree as state-employed jailers. *Id.* at 424 (quoting James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 357 (1986)).

92. *See supra* note 23 and accompanying text.

on costs, the court held that qualified immunity must give way to ensure protection of prisoner rights when the government employs private prison officials.[93]

Further, the Sixth Circuit found that denying qualified immunity to private prison employees actually served the state's interests, or at least did not harm its interests, in two ways. First, the *McKnight* decision would not deter talented, qualified parties from entering the private, for-profit corrections market.[94] Although contracting firms like Correction Corporations of America would surely be forced to inject the costs of defending prisoner suits into the overall contract price to the government entity, they would still be able to turn a profit, and thus qualified personnel would not be deterred from working at such companies.[95] Second, states like Tennessee would not have to pay extra money out of their coffers because of the *McKnight* decision.[96] Instead, states would be relieved of monitoring costs associated with determining whether prisoner rights were violated because this would now be the expense of the privately contracted firm.[97] The Supreme Court has granted certiorari to review this important case[98] and has heard oral arguments.[99]

IV. ANALYSIS

A. Determining Which Parties Are Entitled to Qualified Immunity

If the *McKnight* defendants were government-employed, the case would have been a straightforward application of the Supreme Court's decision in *Procunier* that such officials are to be accorded qualified immunity so long as they do not violate clearly established rights.[100] However, the Sixth Circuit cor-

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93. *See McKnight*, 88 F.3d at 423-24.
94. *See id.* at 424.
95. *See id.* at 424-25.
96. *See id.* at 424.
97. *See id.*
98. *See* Richardson v. McKnight, 117 S. Ct. 504 (1996).
99. See 1997 WL 136255 for the transcript of oral arguments.
100. Despite some functional similarities to other government officials that have been granted immunity, officials can be denied qualified immunity if they exercise a lower level of discretion. *See* Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (suggesting that the scope of qualified immunity can vary depending on, among other factors, "the scope of discretion and responsibilities of the office"). However, the level of discretion of the *McKnight* defendants appears to be equal to that of prison officials in

rectly noted that *McKnight* involved a slightly different situation than *Procunier* because the *McKnight* defendants were privately employed.[101] Because the *McKnight* defendants were private parties, the Supreme Court's analysis in *Wyatt* comes into play.

Yet *Wyatt*'s ambiguities can be seen in the fact that applying the analysis of either the Seventh Circuit in *Sherman* and *Williams*, the Tenth Circuit in *Warner*, or the *Citrano* district court would likely require granting qualified immunity to the prison officials in *McKnight*, a result contrary to the Sixth Circuit's outcome. *Citrano* expressly reached the opposite result as *McKnight* in a case that is difficult to distinguish from *McKnight* on its facts.[102] Under the Seventh Circuit's test, the *McKnight* defendants were "private part[ies] acting under a government contract fulfilling a governmental function"[103] and would therefore be entitled to qualified immunity. Under the Tenth Circuit test, the *McKnight* defendants were "perform[ing] a government function pursuant to a state . . . request"[104]—the request coming in the form of a contract to provide prison services—and would therefore enjoy the benefit of qualified immunity.

The divergence of these outcomes and that of *McKnight* stems from differing views among these lower federal courts regarding the ambiguities of *Wyatt*: how much emphasis to place on policy factors, which way these factors cut in determining whether qualified immunity applies, and how the functional approach should be used in the qualified immunity analysis. *McKnight* and *Manis* focused almost exclusively on policy concerns, the second prong of the Supreme Court's analysis of when to grant qualified immunity.[105] In contrast, courts like

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Procunier, one of whom merely handled incoming and outgoing mail. *See* Procunier v. Navarette, 434 U.S. 555, 556 n.2 (1978).

101. *See McKnight*, 88 F.3d at 419 ("It is not immediately apparent . . . whether *private* correctional officers, performing by contract functions admittedly similar to those traditionally within the governmental sphere, should or should not be granted similar immunity.").

102. *See supra* Part II.C.3.

103. *See supra* note 55 and accompanying text.

104. *See supra* note 60 and accompanying text.

105. *See McKnight*, 88 F.3d at 420 ("[W]e must examine the public policy underpinnings of qualified immunity to determine whether these defendants should be allowed to utilize its protections."); *see also supra* note 21 and accompanying text.

those deciding *Warner*, *Sherman*, *Williams*, and *Citrano* are content to limit *Wyatt* to its facts, emphasize the "narrow holding" language, and place more weight on the functional approach under the first prong of the qualified immunity analysis, showing a reluctance to make a formalistic distinction between privately employed and publicly employed officials that perform identical services.[106]

Perhaps the best way to sort through this confusion is to break the analysis of whether privately employed prison officials are entitled to qualified immunity into two separate analytical questions. The first question that needs to be addressed is whether *Wyatt* signaled an intent by the Supreme Court to deny qualified immunity to all private parties. The second question, assuming that the first question is answered in the negative, is which private parties are entitled to qualified immunity. *McKnight*'s analysis did not directly address either of these questions, which consequently led to a decision that provides little or no guidance about when private parties are entitled to qualified immunity. These questions will be discussed in turn.

1. *Determining if private parties can ever benefit from qualified immunity*

The Supreme Court has provided some guidance as to whether private parties are ever entitled to qualified immunity. The Court seems willing to grant qualified immunity to at least some private parties. This willingness can be gleaned from the fact that the Court in *Wyatt* took great pains to emphasize the narrowness of its holding.[107] If it intended for all private parties to be barred from using qualified immunity, the *Wyatt* Court would have established that bright-line rule when it had the chance.

Additional evidence of this willingness to grant qualified immunity to private parties is found in the Supreme Court's decision in *Antoine v. Byers & Anderson, Inc.*[108] This post-*Wyatt*

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106. *See* Warner v. Grand County, 57 F.3d 962, 967 (10th Cir. 1995) (finding a strip search was an "investigatory function unique to the government"); Sherman v. Four County Counseling Ctr., 987 F.2d 397, 406 (7th Cir. 1993) (psychiatric clinic was "fulfilling a public duty" in administering court-ordered medication); Citrano v. Allen Correctional Ctr., 891 F. Supp. 312, 316 (W.D. La. 1995).

107. *See supra* note 39 and accompanying text.

108. 508 U.S. 429 (1993).

decision implied that qualified immunity would be available to a privately employed court stenographer.[109] The *Antoine* Court engaged in a functional analysis of court reporting, attempting to find an analogous historical counterpart to a court reporter at common law, without any concern for the fact that the privately employed court stenographer might be motivated by profit.[110] If the Court were principally concerned with the profit motivation or with the defendant's status as a private versus public official as an absolute bar to qualified immunity, it would have taken the opportunity in *Antoine* to clearly establish such concerns. The analysis would have focused on policy concerns surrounding the grant of qualified immunity to a privately employed court stenographer. Instead, the *Antoine* Court grounded its analysis on the functions a court reporter performs and the level of immunity to which officials performing those functions are entitled.[111] Moreover, the fact that witnesses enjoy qualified immunity[112] shows the Court's willingness to allow some private parties the benefit of qualified immunity. Many witnesses are privately employed and are seeking a profit through the function they are performing.

2. *Determining which private parties are entitled to qualified immunity*

Once it is accepted that the Supreme Court intends for some private parties to benefit from qualified immunity, the Court in reviewing *McKnight* is left with the task of articulating a test to determine which private parties will receive this immunity. The test must guide courts on the appropriate role of the functional approach in determining whether to grant qualified immunity to private parties. Although the functional test was not ex-

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109. *See Antoine*, 508 U.S. at 436 (noting that court reporter function was not analogous to that of a judge and therefore absolute immunity was unavailable). Although *Antoine* did not mention qualified immunity, the Court apparently granted the defendant qualified immunity; *cf.* Citrano, 891 F. Supp. at 318 (reading *Antoine* as holding that qualified immunity is available to privately employed court reporters).

110. *See Antoine*, 508 U.S. at 432-35.

111. *See id.* at 434-35. Petitioners in *Antoine* argued that the function of court reporting was analogous to the common law function of taking notes at trial, a function performed by the judge. Had the analogy been accepted, the court reporter would have benefitted from the absolute immunity that judges enjoy. *See id.* at 436-37.

112. *See* Briscoe v. LaHue, 460 U.S. 325 (1983).

pressly mentioned in *Wyatt*, it is too firmly ingrained in other Supreme Court cases to be ignored.[113] The test must also demonstrate what relevance and what weight policy considerations have in determining whether to grant or deny qualified immunity to private parties.

In reviewing *McKnight*, the Supreme Court should hold that when a private defendant is found to function in the same capacity as a government defendant to whom qualified immunity would apply, a rebuttable presumption should exist that privately employed defendants enjoy the same immunity as the equivalent government-employed defendant. Only the existence of substantial and undebatable countervailing policy concerns should be allowed to overcome the presumption that qualified immunity exists in such cases. This approach has the advantage of synthesizing past Supreme Court pronouncements on when qualified immunity can be granted. It does so by using the functional approach as an anchor for qualified immunity decisions in relation to private parties and allowing policy considerations to determine the outcome in only rare cases, such as *Wyatt*.[114]

One might argue that the approach just suggested is not harmonious with *Wyatt* because the *Wyatt* court never even mentioned the functional approach. However, *Wyatt* should not be read as discarding the functional approach.[115] The *Wyatt* Court likely failed to address the functional approach only because the *Wyatt* defendant quite clearly did not perform a function analogous to that of any government official previously granted qualified immunity. Instead, the private defendant in *Wyatt* acted under the impetus of the state replevin statute for the seizure of property; the actual seizure was performed under court order by a county sheriff.[116] In *Wyatt*, the private party was not under contract with the government to perform the functions of the sheriff, nor did he perform any function that the government would otherwise have had to perform. The *Wyatt* defendant was not the functional equivalent of any gov-

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113. *See supra* notes 11-17 and accompanying text.

114. *See Citrano*, 891 F. Supp. at 318 ("There is no suggestion in *Wyatt* that the Supreme Court intended to abandon its longstanding practice of functional analysis of immunity cases.").

115. *See id.*

116. *See* Wyatt v. Cole, 504 U.S. 158, 160 (1992).

ernment official but instead used a state law to spur a government official's action—seizure of property.

A critical distinction, then, can be drawn between *Wyatt*-like defendants and privately employed prison official defendants like those in *McKnight*: *Wyatt*-like defendants do not functionally hold a public office,[117] and if the private defendant opts not to use state attachment laws, the government has no affirmative duty to step in and use the attachment laws itself. In contrast, privately employed prison officials like those in *McKnight* hold the same office and perform the same function that government officials would otherwise have to perform. If private parties elect not to act as prison officials, the government has an affirmative constitutional duty to employ its own officials. Private prison officials, then, do not just work in harmony with state-employed agents, they *replace* state-employed agents. Policy analysis may have been the appropriate focus in the nonreplacement scenario of *Wyatt*,[118] but it should not be the sole focus in the replacement scenario that *McKnight*-like cases present.

This distinction between replacing government employees versus working in concert with them would make sense of the Supreme Court's "narrow holding" language in *Wyatt*.[119] The Supreme Court, in deciding *McKnight* in a way that grants qualified immunity to private prison officials, can point to privately employed prison officials and others who replace what would otherwise have to be government actors as the reason behind not establishing an absolute bar from granting qualified immunity to private parties when it had the chance. In *McKnight*-like cases, in contrast to *Wyatt*, the first prong of the qualified immunity analysis is answered by a prior Supreme Court analysis—*Procunier*.

Adopting *McKnight*'s case-by-case, open-ended pure policy inquiry, in lieu of the approach suggested here, would only

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117. One of the crucial factors justifying the denial of qualified immunity to the defendant in *Wyatt* was the fact that the defendant did not hold a public office like that of a school teacher or presidential aide. *See supra* note 38 and accompanying text. Prison official defendants like those in *McKnight*, in contrast to the *Wyatt* defendant, do hold such a public office.

118. *See* Thomas, *supra* note 21, at 483 (noting that the *Wyatt* court emphasized policy considerations).

119. *See supra* note 39 and accompanying text.

serve to prove critics correct that the Court's qualified immunity analysis is nothing more than unwarranted judicial activism.[120] *McKnight*'s approach takes a giant step toward establishing a bright-line rule that private parties are never entitled to qualified immunity. The *McKnight* defendants arguably have the strongest claim of any private party to qualified immunity because they were performing the exact function as government officials already determined, in *Procunier*, to be entitled to qualified immunity. If qualified immunity is rightfully denied in such a case, it is hard to imagine a private party that could ever lay claim to qualified immunity, a result that runs counter to *Wyatt*'s "narrow holding" language.

The approach suggested here does not discard policy analysis altogether. However, it does propose to limit the weight placed on policy concerns in determining whether to grant or deny qualified immunity to private parties. The Sixth Circuit's failure to ground its analysis in anything but policy shows the danger of such an open-ended inquiry. The Sixth Circuit seemed to rely on only one of several policy concerns surrounding the grant of qualified immunity to privately employed prison officials to control its decision. Yet the policy concern that seemed to control the outcome of the case, the idea that privately employed prison officials will infringe on prisoner rights in order to maximize profits is, as will be discussed,[121] questionable. The approach suggested here would avoid reliance on such questionable policy concerns as a controlling factor in the grant or denial of qualified immunity.

B. Applying the Approach to McKnight

1. The first prong of qualified immunity analysis

If *McKnight* were to have used the approach suggested in this Note, the privately employed prison defendants would have been granted qualified immunity. Instead of leapfrogging the functional approach,[122] the Sixth Circuit should have relied on *Procunier* as establishing a rebuttable presumption, under the first prong of the aforementioned analysis, that prison offi-

120. *See* Rudovsky, *supra* note 21, at 36.
121. *See infra* Part IV.B.1.
122. *See supra* note 90 and accompanying text.

cials—whether privately or publicly employed—are entitled to qualified immunity. The *McKnight* court then should have searched for policy concerns, under the second prong, only in an effort to determine if substantial countervailing policy matters rebut the *Procunier* presumption of qualified immunity.

Instead, the Sixth Circuit seemed to consider even the first prong of the two-part qualified immunity analysis as unresolved because no Supreme Court decision had addressed whether privately employed prison officials are entitled to qualified immunity. Framing the issue in this artificially narrow way allowed the Court to find little guidance from *Procunier*. Yet the only difference between the *McKnight* facts and those of *Procunier* is that the prison officials in *McKnight* were privately employed, an issue of defendant status that is irrelevant under a proper understanding and application of the functional approach.[123] The unique character of private employment *is* important to the considerations weighed in the second prong of the Court's qualified immunity analysis,[124] but policy concerns, without more, should *not* be allowed to control the outcome in a case like *McKnight* where the functions performed have already been determined by the Supreme Court to warrant qualified immunity and a functional analysis shows that there is little difference between the government actors in the case at bar and those previously granted immunity.[125]

2. *The second prong*—McKnight's *misplaced policy concern*

The remainder of this Note thoroughly analyzes policy factors to see if the presumption that privately employed officials are entitled to qualified immunity can be rebutted by substantial countervailing policy concerns. Policy analysis reveals two things. First, the *McKnight* court's assertion that profit motivation will cause private prison officials to infringe prisoners' rights is false.[126] Second, the policy factors stressed in *Wyatt*[127]

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123. *See supra* notes 11-17 and accompanying text.

124. *See supra* note 21 and accompanying text.

125. *See supra* notes 90-93 and accompanying text; *see also* Reply Brief, Richardson v. McKnight, 1997 WL 87984, at *3 (U.S. 1997) (No. 96-318) (noting absurdity of treating privately and publicly employed prison officials separately under qualified immunity analysis).

126. *See supra* notes 90-91 and accompanying text. Although the *McKnight* court cited only to a student note as support for this proposition, other commentators have

suggest that qualified immunity should be granted to private prison officials because such a grant would be in the public interest.[128]

Several facts not considered by the *McKnight* court suggest that, despite *McKnight*'s contrary assertion, privately employed prison officials ensure that prisoners' rights are protected to an equal or greater degree than do publicly employed prison officials. These facts include: (1) contract specificity in the agreements between the government and private prison corporations as to the level of prison conditions, which ensures that prisoner rights, especially against overcrowding, are protected; (2) the existence of other monitoring devices, such as the media and financial consequences that private prison corporations suffer if they infringe on prisoner rights; and (3) surveys that suggest that privately operated prisons provide a higher quality prison environment than publicly operated facilities. Each will be discussed in turn.

a. Contract specificity. One reason private prison officials are likely to protect prisoner rights as effectively as public officials is the degree of specificity required in contracts with private prison corporations. Private entities typically contract with government agencies on a per-prisoner basis.[129] The state there-

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made a similar argument. *See, e.g.*, Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867, 887 (1987) ("Employees of a private corrections firm are responsible for making a profit for the organization. They do not answer to the public at large as do state employees; rather, they answer to their superiors and, in the case of corporate employees, to their stockholders. Unlike state employees, corporate employees may be forced to choose between making money and safeguarding the rights of inmates. A defense of qualified immunity, if awarded to those private employees, might encourage them to cut corners to maximize profits."). In fact, though, it is far from clear that private prison officials will tend to violate prisoners' rights more often than public officials. *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 64 (1990) ("[G]overnment employees no less than others have self-interests that can conflict with the rights of prisoners. It will not do to say or imply that public prisons are run by civil servants who have no profit motives and therefore can be trusted not to compromise prisoners' rights, health, or safety."). Logan goes on to suggest that bureaucratic pressures may hamper public prison officials' ability to protect prisoner rights. *See id.* at 84; *see also* Citrano v. Allen Correctional Ctr., 891 F. Supp. 312, 319 (W.D. La. 1995) (concluding that it is more reasonable to assume that privately employed and publicly employed prison officials will have the same attitude and ability to protect prisoner rights).

127. *See supra* note 38 and accompanying text.

128. *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992).

129. *See* Thomas, *supra* note 21, at 449.

fore cannot cram excess prisoners into a facility without breaching the contract if the facility is run by a private company.[130] No equivalent contractual constraint exists to prevent state-employed prison officials from overcrowding prison facilities. The fact, then, that contract specificity minimizes overcrowding concerns also means that prisoner rights related to overcrowding are protected. As one commentator states: "'When jails and prisons are overcrowded, even the most benign administrators have difficulty with sanitation, feeding, recreation schedules, work arrangements, and health services.' Overcrowding causes fire hazards, inadequate or delayed medical services, unsanitary food and kitchen conditions, and increased rates of violence."[131] These overcrowding-based concerns are ameliorated when government entities contract with private prison officials.

b. Monitoring devices. Privately contracted prison facilities are also subject to greater monitoring than equivalent public facilities, a second reason that privately employed prison officials are perhaps more likely to place a high value on prisoners' rights than the *McKnight* court asserted. As one scholar has observed:

> [T]he contract itself [between the public sector and the private prison company] . . . is highly visible to competitors, investors, shareholders, and insurers. A misstep in any of the variables incorporated into a contract places the private firm under intense scrutiny that can affect that firm's profitability, . . . not to mention its integrity.[132]

The effect that public financial monitoring has on ensuring that constitutional rights are not violated cannot be under-

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130. *See* Richard C. Brister, *Changing the Guard: A Case for Privatization of Texas Prisons*, 76 PRISON J. 1, 27 (1996) ("Most contracts between public and private sectors are much more detailed than the 'legislative mandates public corrections agencies are obliged to follow.' Contracts set forth goals to be reached, standards to be met, measurable yardsticks, and sanctions to be imposed if obligations of the contract are not met with satisfaction." (citation omitted)).

131. Pamela M. Rosenblatt, Note, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?*, 8 N.Y.L. SCH. J. HUM. RTS. 489, 492-93 (1991) (footnotes omitted).

132. Brister, *supra* note 130, at 12. *See also* Robert G. Schaffer, Note, *The Public Interest in Private Party Immunity: Extending Qualified Immunity From 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1086 (1996) (noting that most states that contract with private prisons require a state-employed contract monitor to ensure that prisoners' rights are not violated).

stated. If the public perceives that a private prison facility has shirked its constitutional duties toward prisoners, the resulting "bad press" and tarnished image can be catastrophic for the private corporation.[133] In 1995, for example, prisoners at one privately operated facility engaged in what was labeled a riot. No injuries occurred, but the government shut down the facility. The resulting harm to the reputation of the corporation involved, Esmor Correctional Services, Inc.,[134] caused the stock of the company to plummet from twenty dollars a share to seven dollars a share.[135]

Much graver problems have been experienced in the public sector, but there is no equivalent financial penalty. In *Madrid v. Gomez*,[136] for example, prison officials working for the state of California's Pelican Bay facilities were found guilty of using unconstitutionally excessive force. These guards had fired electric darts and rubber bullets from a thirty-eight-millimeter gas gun at a prisoner after the prisoner refused to slide a food tray under the door.[137] They also beat that prisoner over the head with the butt of the gas gun.[138] In another incident, the guards snapped a bone in a different prisoner's arm after the prisoner had been verbally abusive to a female guard.[139] A third, African American prisoner who was mentally ill was placed in 140-degree water to clean fecal material off of him. The prisoner suffered third-degree burns, and his skin from the buttocks down "had peeled off and was hanging in large clumps around his legs, and had turned white with some redness."[140] Noting the white color, one guard's uncontroverted statement was that "it 'looks like we're going to have a white boy before this is through.'"[141]

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133. *See generally* Charles W. Thomas & Charles H. Logan, *The Development, Present Status, and Future Potential of Correctional Privatization in America*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 213, 221 (Gary W. Bowman et al. eds., 1993).

134. Esmor's prison facilities now operate under the name Correctional Services Corporation.

135. *See* Sandra Block, *Everybody's Doin' the Jailhouse Stock*, USA TODAY, June 5, 1996, at 3B.

136. 889 F. Supp. 1146 (N.D. Cal. 1995).

137. *See id.* at 1162.

138. *See id.*

139. *See id.* at 1165.

140. *See id.* at 1167.

141. *Id.*

Admittedly, the *Madrid* case presents the exception rather than the rule as to the behavior of government-employed prison officials. This Note does not attempt to condemn government-employed prison officials. However, incidents like *Madrid* demonstrate that publicly employed prison officials are not enshrined with some impenetrable altruistic force that privately employed prison officials lack. Both categories of prison officials may be tempted to violate prisoners' rights. But the drastic financial penalties associated with a privately operated facility like Esmor do not exist in the public sector and provide a huge incentive to ensure that prisoners' rights are protected.

c. Surveys related to prisoner satisfaction and prison quality. Finally, surveys and prison studies provide another fact that counters *McKnight*'s assertion that privately employed prison officials will violate prisoners' rights. If it were true that the profit motivation led to infringements on constitutional rights, this would be reflected in prisoner dissatisfaction at privately operated facilities and a decrease in quality at such facilities.

Yet surveys and studies show that the opposite is true. Two prominent studies revealed that "[b]y and large, both staff and inmates gave better ratings to the services and programs at the privately operated facilities; escape rates were lower; there were fewer disturbances by inmates; and in general, staff and offenders felt more comfortable at the privately operated facilities."[142] Another survey comparing a state-operated and a federally operated prison with a privately operated prison with the intent of determining which had better conditions concluded that "[t]he private prison outperformed the state and federal prisons, often by quite substantial margins, across nearly all dimensions."[143] All these facts suggest that the *McKnight* court's

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142. Brister, *supra* note 130, at 11 (discussing two 1988 surveys, one commissioned by the American Bar Association Foundation, the other sponsored by the National Institute of Justice, which was conducted by the Urban Institute).

143. Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 601 (1992); *cf.* DAVID SHICHOR, PUNISHMENT FOR PROFIT: PRIVATE PRISONS/PUBLIC CONCERNS 230-31 (1995) (reviewing all the private prison official surveys to date and concluding that "[g]enerally, the existing evaluation studies seem to show a somewhat lower cost and higher quality of services in private facilities, although these findings . . . are not universal"). Shichor notes that one particular facility has been surveyed far in excess of other facilities and notes that some studies have focused on facilities that are not

assertion that privately employed prison officials would be likely to infringe on prisoner rights to maximize profits is questionable at best.

3. *Advantages of granting qualified immunity to private prison officials*

While the *McKnight* court focused on a questionable policy negative surrounding the grant of qualified immunity to private prison officials, it failed to consider the policy benefits of such a grant. The fact that the official involved might benefit in a way that the public at large would not fully share does not erase the public good that private prison officials provide.[144] In *Cleavinger v. Saxner*,[145] the Supreme Court stated that granting "immunity status is for the benefit of the public *as well as for the individual concerned.*"[146] The Court seems to suggest here that there is no harm in a party benefitting financially or otherwise from the grant of qualified immunity, so long as the public also benefits. The rest of this Note is designed to show what benefits the public will receive indirectly or directly through the grant of qualified immunity to private parties. These benefits include the increased ability to contract with private firms, which in turn helps fight overcrowding and reduce incarceration costs. Additionally, granting qualified immunity to privately employed prison officials will help deter frivolous prisoner litigation.

a. Preserving the ability to contract with private firms. The Seventh Circuit in *Sherman* noted that denying qualified immunity to privately contracted officials would have an adverse effect on the government's ability to contract with private hospitals.[147] The Supreme Court has echoed *Sherman*'s concern that the law should be shaped in a way that does not

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"mainline prisons." *Id.* at 231. So, although the results are favorable for the private prisons, more research is needed, as evidenced by the fact that the U.S. General Accounting Office has been reluctant to believe that studies show "a clear advantage of private prisons over publicly operated prisons." *Id.*

144. *But see* McKnight v. Rees, 88 F.3d 417, 423-24 (6th Cir. 1996) (noting that the public does have an interest in maintaining correctional facilities, but this interest is not strong enough to outweigh the effect the for-profit motivation will have on infringing on prisoners' constitutional rights).

145. 474 U.S. 193 (1985).

146. *Id.* at 203 (empbasis added).

147. *See supra* note 51 and accompanying text. The Tenth Circuit has noted similar policy concerns. *See supra* note 59 and accompanying text.

impair the government's ability to contract with the private sector. In *Boyle v. United Technologies Corporation*,[148] the Court used federal common-law power to provide a "[g]overnment contractor defense" to the manufacturer of a helicopter,[149] despite the fact that Congress had considered and opted not to create such a defense on its own.[150] The defense shielded the helicopter manufacturer from a design defect suit brought by the survivors of a pilot who was killed because he was trapped inside the helicopter and drowned.[151] The Court supported its power to create the defense on the ground that "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected."[152]

To be sure, *Boyle* and *Sherman* focused on the same concern in varying situations. Yet the common denominator is a recognition that potentially increased liability discourages privatization, which is undesirable from the government's perspective. Denying qualified immunity to privately employed prison officials increase liability, a factor that would discourage prison privatization.

Reluctance of private prison companies to contract with the government would in turn be harmful because, just as the *Sherman* court noted that public hospital resources are strained, so too are public prison resources strained. At the end of 1995, the fifty states were estimated to be operating at an average of 114% of their highest prison capacity.[153] Twenty-eight states were so overcrowded as to necessitate forcing local entities to house state prisoners; in eight states more than 10% of the state prison population was forced to be housed in local facilities.[154] Only twelve states reported operation levels at or be

148. 487 U.S. 500 (1988).

149. *Id.* at 512-13.

150. *See id.* at 515 n.1 (Brennan, J., dissenting).

151. *See id.* at 502-03.

152. *Id.* at 507.

153. *See* DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEPT. OF JUSTICE, PRISON AND JAIL INMATES 8 (1996).

154. *See id.* at 7; *see also* Rosenblatt, *supra* note 131, at 489; *Whitman Lengthens 14-year Prison Overcrowding Emergency*, STAR-LEDGER (Newark, N.J.), Mar. 29, 1996, at O22 (noting that prison overcrowding in New Jersey has forced the exercise of

low 99% of capacity.[155] Local jails fare a little better, but even these operate at 93% of capacity, down from a peak of 108% capacity in 1989.[156] Further, the overcrowding problem will likely increase at even more dramatic rates because cracking down on crime by incarcerating more individuals has become politically trendy.[157] By granting qualified immunity to private prison officials and thus encouraging the option of privatization, the Supreme Court will preserve the availability of government officials to use privatization as a tool to fight overcrowding problems.

Reluctance on the part of private parties to accept private prison contracts would also increase the costs of incarceration for government entities. Confining all the nation's prisoners costs taxpayers fifty billion dollars annually.[158] "[P]rivate corporations can do the work as well as or better than public managers of jails and prisons, and do it less expensively, and with greater flexibility."[159] Qualified immunity should be granted to privately employed prison officials so that the private sector will be encouraged to manage prisons and thus allow the government to decrease incarceration costs through contracting.

b. Weeding out insubstantial prisoner lawsuits. Granting qualified immunity to private prison officials would, contrary to *McKnight's* holding, serve the "public good" under *Wyatt*'s

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emergency powers to require local jails to house state prisoners for the last fourteen years).

155. *See* GILLIARD & BECK, *supra* note 153, at 8.

156. *See id.* at 11.

157. *See* Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 696 (1995) ("One of the most significant trends in criminal justice is the growing emphasis on imprisonment. Legislators have continuously responded to constituent fears by establishing longer sentences or mandatory minimum sentences for wide varieties of crimes and criminals. As a result, United States prison populations have increased nearly 400% in the twenty-five years from 1968 to 1993.").

158. *See* Brister, *supra* note 130, at 1.

159. David Schichor & Dale K. Sechrest, *Delegating Prison Operations to Public or Private Entities*, CORRECTIONS TODAY, Oct. 1, 1996, at 112; *see also* Robert S. Guzek, *The Economics of Privatizing Criminal Justice Facilities*, *in* PRIVATIZING THE UNITED STATES JUSTICE SYSTEM 290, 292-93 (Gary W. Bowman et al. eds., 1992) (showing the cost savings associated with a hypothetical private versus public prison facility). Most states that allow privatization of prisons require that the private prisons be as cost-efficient or more cost-efficient than if the public sector were operating the prison. *See* Brister, *supra* note 130, at 8-9 (citing Tennessee and Texas as examples); Schaffer, *supra* note 132, at 1053 n.28 (citing Florida and Tennessee as examples).

policy-based considerations in another way. As discussed previously,[160] one of the key concerns involved in determining whether to grant qualified immunity is whether a denial of immunity would lead to unnecessary, expensive litigation.[161] In fact, the Supreme Court in *Harlow v. Fitzgerald*[162] reformulated the whole immunity doctrine of measuring what rights are clearly established for the purpose of qualified immunity doctrine in order to ensure that "insubstantial lawsuits" would not burden government officials.[163] The fact the Court has gone to great lengths to shape the qualified immunity doctrine in this way shows that limiting insubstantial lawsuits serves the public good.

No class of litigants launches more insubstantial lawsuits than prisoners.[164] As Judge Reavley has observed:

> Unlike most litigants, prisoners have everything to gain and nothing to lose by filing frivolous suits. Filing a suit *in forma pauperis* costs a prisoner little or nothing; time is usually of little importance to a prisoner and prisoners are not often deterred by the threat of possible sanctions for malicious

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160. *See supra* note 24 and accompanying text.

161. *See* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

162. 457 U.S. 800 (1982).

163. *Id.* at 814, 817-18 (citing Butz v. Economou, 438 U.S. 478 (1978)). In *Harlow*, the Court altered the landscape of the qualified immunity doctrine by discarding a prior subjective component of the immunity doctrine that barred the use of qualified immunity if the official did not act in good faith. *See* Wood v. Strickland, 420 U.S. 308, 321-22 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). The Court concluded that the subjective component focused on the official's intent; intent nearly always boiled down to a question of fact; and under Rule 56 of the Federal Rules of Civil Procedure, as then construed, summary judgment was not appropriate for disputed questions of fact. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982). The Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), subsequently interpreted summary judgment in a way that allayed many of the concerns addressed in *Harlow*, but the fully objective qualified immunity standard remains the black-letter law today.

164. *See* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21, 21 (1994) ("[T]he vast majority of . . . prisoner civil rights complaints are small claims at best, and completely groundless and frivolous at worst."); *see also* Angie Cannon, *Inmate Lawsuits Targeted*, LAS VEGAS REV.-J., May 27, 1996, at 1B (noting that prisoners prevail in one-half of one percent of lawsuits they file); Sandra Ann Harris, *Prisoners' Lawsuits Swamp Federal Courts*, NEWS TRIB. (Tacoma), Oct. 26, 1995, at D10 ("[O]nly . . . 2 percent of prisoner lawsuits [nationwide] reach settlement, and 1 percent go to trial."); Deborah Nelson, *Prisoners' Lawsuits Rise 60%*, CHI. SUN-TIMES, Oct. 12, 1992, at 1 ("Five percent [of prisoner suits in Cook County, Illinois] are settled. Five percent go to trial. Few prisoners win at trial.").

> or frivolous actions or perjury. Moreover, a prisoner, while he may be unsuccessful, can at least look forward to a "short sabbatical in the nearest federal courthouse." Thus, the temptation to file frivolous or malicious suits is strong, and these suits clutter up the federal courts, wasting scarce and valuable judicial resources, subjecting prison officials unnecessarily to the burdens of litigation and preventing prisoner suits with merit from receiving adequate attention.[165]

Statistics support Judge Reavley's observation. In 1973, 98,560 civil suits were filed in United States federal district courts, 17,218 of which were prisoner suits.[166] In comparison, in 1993, 229,850 civil suits were filed in the federal district courts, 53,451 of which were prisoner suits.[167] During that time, the percentage of § 1983 prisoner suits related to overall civil suits also rose, from 4.97% to 14.36%.[168]

Denying qualified immunity to prison officials—private or public—would lead to prisoners' frivolous lawsuits being dismissed at a later stage of trial than would normally occur, with a resulting increase in cost to society. Although the total social cost of frivolous prisoner litigation is difficult to determine, one scholar in 1986 suggested the figure exceeded $100 million annually.[169] The societal costs of such frivolous litigation is probably closer to $200 million today since the prison population at the combined federal and state levels has nearly doubled since 1986.[170] Privately operated prisons currently house only a

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165. Green v. McKaskle, 788 F.2d 1116, 1119-20 (5th Cir. 1986) (citations omitted) (quoting Cruz v. Beto, 405 U.S. 319, 327 (1972)); *see also* Merritt v. Faulkner, 823 F.2d 1150, 1157 (7th Cir. 1987), where Judge Posner stated:

> [E]xperience has shown that frivolous cases are the norm in prisoner civil rights litigation. Inmates have much time on their hands . . . and bountiful access to law libraries and the federal courts . . . . Inmates love turning the tables on the prison's staff by hauling it into court. They like the occasional vacation from prison to testify in court. They enjoy being able to portray themselves as victims rather than predators. They delight in transmuting remorse for their criminal behavior into righteous indignation against their keepers. Their antics are not a free good, however; they waste the time of prison officials, federal judges, and . . . appointed counsel . . . .
>
> We should cast a colder eye on these cases.

166. *See* Doumar, *supra* note 164, at 23.

167. *See id.*

168. *See id.*

169. *See* Roger A. Hanson, *What Should Be Done When Prisoners Want to Take the State to Court?*, 70 JUDICATURE 223, 225 (1987).

170. The tetal prison population in 1986 was roughly 820,000. Howard Kurtz,

small percentage of the overall prison population and therefore represent only a fraction of this societal cost at present.[171] However, the rate of growth of such private facilities is phenomenal,[172] and thus the denial of qualified immunity to these frivolous suits could eventually cost millions of dollars in defending such suits. The qualified immunity analysis suggested in this Note would defray these costs and preserve the government's ability to contract with the private sector in a way that also reigns in ad hoc, policy-based determinations.

V. CONCLUSION

Under the analysis urged in this Note, the Sixth Circuit erred in *McKnight*. Privately employed prison officials should be granted qualified immunity. The functional approach is meaningless if a court can simply mention it exists and then jump straight to policy considerations as the controlling point of analysis in granting or denying qualified immunity. The Sixth Circuit should have instead clung to the Supreme Court's functional analysis using *Procunier* to establish a rebuttable presumption that the *McKnight* defendants are to be accorded qualified immunity because privately employed prison officials function exactly the same way that *Procunier*-like prison officials did. The Sixth Circuit should then have searched for substantial and undebatable policy concerns that might alter this conclusion.

This Note has argued that such substantial and undebatable policy considerations do not suggest denial of the grant of qualified immunity to private prison officials and therefore the presumption that qualified immunity applies to private prison officials should control. The degree of contract specificity, the existence of monitoring devices, and surveys and studies all counter the idea expressed in *McKnight* that privately

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Barge Seen as Remedy to Overcrowded N.Y. Jails; Court Freezes Plan to Move Inmates to Former British Troop Ship Anchored in East River, WASH. POST, Nov. 27, 1987, at A4. The latest statistics from the Department of Justice show that the current prisoner population is 1,585,400. *See* GILLIARD & BECK, *supra* note 153, at 1.

171. *See supra* note 1 and accompanying text.

172. The total capacity of all adult private prison facilities under contract is currently 84,428, which represents a 32% increase from 1995. *See supra* note 1 and accompanying text.

employed prison officials will seek profit to the detriment of prisoners' rights.

Further, several benefits will be achieved by granting qualified immunity to privately employed prison officials. Privatization will be encouraged because increased liability will have been checked. Availability of privatization will in turn help fight overcrowding and will decrease incarceration costs. Granting qualified immunity to prison officials will also discourage frivolous prisoner lawsuits from being filed. These facts suggest that policy concerns fail to overcome a rebuttable presumption that qualified immunity should be granted to a private prison official performing a function that a government official would otherwise have to perform. Denying this shield of qualified immunity would serve only to unnecessarily arm privately employed prison officials with a powerful sword to wreak financial havoc as state and federal authorities struggle to incarcerate an increasing flow of criminals.

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