THE PUBLIC INTEREST IN PRIVATE PARTY IMMUNITY: EXTENDING QUALIFIED IMMUNITY FROM 42 U.S.C. § 1983 TO PRIVATE PRISONS

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INTRODUCTION

A decade ago, proponents of privatizing governmental services hailed the private operation of correctional facilities as a way to improve prison conditions and reduce costs.[1] Skeptics doubted these claims and warned of the danger in delegating the care of inmates to corporations "more interested in doing *well* than in doing *good*."[2] Although the problems of prison overcrowding and escalating costs still frustrate state policy makers,[3] contracting with private parties for the operation of prisons and jails remains a serious alternative for legislatures unwilling to spend state funds on additional public facilities. Roughly one-third of the states have passed legislation enabling state and local agencies to contract with private firms for full-scale correctional services,[4] and several oth-

1. *See, e.g.*, PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 146–59 (1988); Harry Bacas, *When Prisons and Profits Go Together*, NATION'S BUS., Oct. 1984, at 62.

2. Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 542 (1989).

3. See Dana C. Joel, *The Privatization of Secure Adult Prisons: Issues and Evidence*, *in* PRIVATIZING CORRECTIONAL INSTITUTIONS 51, 51–52 (Gary W. Bowman et al. eds. 1993).

4. ALASKA STAT. § 33.30.031(a) (1995); ARK. CODE ANN. § 12–50–106 (Michie 1995); COLO. REV. STAT. § 17–27–104 (1986 & Supp. 1995): FLA. STAT. ANN. §§ 957.01–.14 (West Supp. 1995); KY. REV. STAT. ANN. § 197.505(1) (Baldwin 1991); LA. REV. STAT. ANN. § 1800.4(A) (West 1989 & Supp. 1996); Mont. Code Ann. § 53–30–106(3) (1995); N.M. STAT. ANN. § 33–1–17 (Michie 1990); OKLA. STAT. ANN. tit. 57, § 504(7) (West 1991 & Supp. 1996); S.D. CODIFIED LAWS ANN. § 24–11–39 (1995); TENN. CODE ANN. § 41–24–103 (1990 & Supp. 1995); TEX. GOV'T CODE ANN. § 494.001(a) (West 1990); UTAH CODE ANN. § 64–13–26 (1993); VA. CODE ANN. § 53.1–262 (Michie Supp. 1995); W. VA. CODE §§ 25–5–1 to –20 (1992 & Supp. 1995); WIS. STAT. ANN. § 301.08(1)(b) (West 1991); WYO. STAT. § 7–18–104 (1995).

ers are considering similar legislation.[5] The number of private facilities in actual operation continues to increase.[6]

Despite this increase, opponents of private incarceration argue that the introduction of the profit motive will lead private prison officials to reduce the level of care afforded to inmates and cut corners with respect to the protection of inmates' constitutional rights.[7] To counteract this financial disincentive, opponents argue that private prisons should not be given the same qualified immunity from section 1983 suits enjoyed by officials of public prisons.[8] Civil rights damage suits under 42 U.S.C. § 1983[9] are the most common avenue of redress available to an inmate who claims a government official[10] has violated a right guaranteed by the Con-

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5. Enabling legislation has been introduced in Arizona, Indiana, Pennsylvania, and South Carolina. Joel, *supra* note 3, at 60. Nebraska and North Carolina have also considered enabling legislation. 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).

6. In 1984, Corrections Corporation of America opened the first privately operated adult jail in Hamilton County, Tennessee. *See* CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS 31 (1990). In 1990, about a dozen states contracted out the operations of prisons to the private sector. *Id.* at 20. A 1992 survey revealed that at least 18 private firms were operating over 50 facilities, and that an additional 8 facilities were to be opened in 1993. Charles W. Thomas, *Growth in Corrections Accelerates*, PUBLIC WORKS FINANCING, July/Aug. 1992, at 11, 13. The confluence of factors providing the impetus for the private prison industry is described in Thomas & Logan, *supra* note 5, at 217–221.

7. *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).

8. *See id.*

9. 42 U.S.C. § 1983 provides in pertinent part:

> Every Person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (1988). A plaintiff also may bring a civil damage suit against federal officials directly under the Constitution. Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 388 (1971). The analysis is the same whether a suit proceeds under § 1983 or under *Bivens*. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e 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.").

10. A § 1983 suit may proceed only where the defendant acted "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." 42 U.S.C. § 1983. The standard for determining whether an individual acted "under color of state law" for § 1983 purposes is the same as the constitutional standard for determining "state action." Lugar v. Edmondson Oil Co., 457 U.S. 922, 928–29 (1982) (citations omitted).

stitution or the laws of the United States. Qualified immunity, however, bars section 1983 suits against certain local, state, and federal officials when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[11] Those opposed to extending qualified immunity to private prison officials argue that such immunity, when combined with the financial self-interest of private prisons, will water down section 1983's important protections and allow private prisons to maximize profits by violating the rights of inmates.[12] Denying qualified immunity, even when a prison official could not reasonably have known that his conduct was unconstitutional, will force private prison officials to think carefully before taking action that may result in a constitutional violation.[13]

Proponents of privatization respond by arguing that private entities under contract to operate correctional facilities should be afforded the same qualified immunity as their public sector counterparts. Because private prisons serve the same function as public prisons, they qualify as "state actors" and thus are subject to the same panoply of constitutional restrictions.[14] Fairness suggests

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11. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). A varying degree of immunity—either absolute or qualified—is available to most public officials engaged in functions requiring the exercise of discretion. For example, executive and administrative officials performing important discretionary functions are entitled to qualified immunity. Qualified immunity bars liability unless an official reasonably should have known that his conduct would violate a clearly established statutory or constitutional right. *Harlow*, 457 U.S. at 818–19. A right is "clearly established" if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Absolute immunity provides a complete bar to liability without regard to the clarity of the right violated or the unreasonableness of the official's conduct. Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Judges, prosecutors, and legislators are afforded absolute immunity for actions taken in the performance of their judicial, prosecutorial, and legislative duties, respectively. *See* Stump v. Sparkman, 435 U.S. 349, 355–56 (1978) (judges); Imbler v. Pachtman, 424 U.S. 409, 420–29 (1976) (prosecutors); Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951) (legislators).

12. *See* Kay, *supra* note 7, at 887–88.

13. *Id.*

14. Although no court has determined whether a private prison is a state actor subject to suit under § 1983, no private prison has challenged its status as a state actor. In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Supreme Court made it much easier for plaintiffs to bring suit against private parties under the "joint participation" rationale of state action. A private defendant is a state actor when the party "acted together with or . . . obtained significant aid from state officials." *Id.* at 937. The Court applied the "joint participation" rationale in West v. Atkins, 487 U.S. 42 (1988), and concluded that a physician under contract with the state to provide medical services to

that private prison officials should be able to assert the same qualified immunity from section 1983 suits as public prison officials.[15] Section 1983 suits by prisoners are common and are costly to litigate, even though they are seldom successful.[16] Proponents assert that extending qualified immunity to private prisons will create a "flat playing field" upon which public and private entities could fairly compete.[17]

Until recently, the Supreme Court had not decided whether considerations of fairness would justify extending qualified immunity to private as well as public defendants.[18] But in the case of *Wyatt v. Cole*,[19] the Supreme Court resolved the issue when it stated that "principles of equality and fairness" alone do not justify extending qualified immunity to private defendants.[20] In *Wyatt*, the Court rejected qualified immunity for private defendants who are sued under section 1983 for invoking an unconstitutional state replevin, garnishment or attachment statute.[21] The Court reasoned that although "equality and fairness" may suggest treating public and private defendants similarly, these interests are "not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion."[22] Rather, the role of qualified immunity exclusively involves "protecting government's ability to

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inmates at a state prison hospital acts "under color of state law" within the meaning of 42 U.S.C. § 1983 when he treats an inmate. *Id.* at 57. Furthermore, a private individual may act "under color of state law" if he exercises those powers "traditionally exclusively reserved to the State." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). Under the reasoning of these cases, there appears to be little doubt that private prison officials meet the requirement for state action. Commentators who have addressed the issue agree. *See, e.g.*, Robbins, *supra* note 2, at 602.

15. In Procunier v. Navarette, 434 U.S. 555 (1978), the Court extended qualified immunity from § 1983 suits to state prison officials.

16. Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and* Bivens *Damage Suits*, 53 LA. L. REV. 449, 454 (1992).

17. *See, e.g., id.*

18. This lack of direction has led to conflict among the circuits over whether private defendants may assert a qualified immunity defense. See *infra* text accompanying notes 97–139.

19. 504 U.S. 158 (1992).

20. *Id.* at 168.

21. *Id.* at 168–69. The replevin statute at issue in *Wyatt* was held unconstitutional because it violated due process by failing to afford judges discretion to deny writs of replevin. *Id.* The Court assumed, without deciding, that the private defendant in *Wyatt* qualified as a state actor. *Id.* at 160; *cf.* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (holding that the private use of a state attachment statute constitutes "state action").

22. *Wyatt*, 504 U.S. at 168.

perform its traditional functions . . . [and] preserv[ing officials'] ability to serve the public good . . . ."[23] Notwithstanding the unfairness of denying qualified immunity to a private party who qualifies as a state actor, extending qualified immunity in this situation would serve only the private financial interests of the defendant and would not operate "to safeguard government, and thereby . . . protect the public at large."[24] After *Wyatt*, any extension of qualified immunity to private parties depends on whether the extension benefits the public interest.[25]

Although *Wyatt* resolves the immunity issue for private defendants who claim qualified immunity in pursuit of their private commercial interests, courts will confront a very different set of facts when a private prison asserts a qualified immunity defense.[26] Unlike the private party in *Wyatt*, a private prison performs an important public function and serves important public interests.[27] The contractual relationship between the private prison and the state often is based on a legislative conclusion that the private entity can best meet public needs.[28] Perhaps more importantly, extending qualified immunity to private prisons may serve the same "traditional purposes of qualified immunity" that are served by affording qualified immunity to state prison officials.[29] Whether these distinctions are sufficient to justify the extension of qualified immunity to private prisons is the principal concern of this Note.

The novelty of the legal issue and consequent lack of cases addressing claims of qualified immunity by private prisons have made it difficult to assess how courts will treat the argument that

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23. *Id.* at 167.

24. *Id* at 168.

25. *See infra* text accompanying notes 69–71.

26. *See* Thomas, *supra* note 16, at 453 (concluding that the circumstances surrounding a private prison official's claim of qualified immunity "are easily distinguished from the facts presented by *Wyatt*").

27. *See infra* text accompanying notes 163–65.

28. For example, Tennessee law states that a prison contractor must offer "substantial cost savings to the state" at a "level and quality of services which are at least equal to those which would be provided by the state." TENN. CODE ANN. § 41-24-104(c)(1), (2) (1990). Florida law requires a private contractor to provide cost savings to the state of at least 7% over the public sector costs for a similar facility. *See* FLA. STAT. ANN. § 957.07 (West Supp. 1995). Texas law requires cost savings to the state of at least 10%. *See* TEX. GOV'T CODE ANN. § 494.003(c)(4) (West 1990).

29. *See infra* text accompanying notes 174–75.

qualified immunity should be extended to private prisons.[30] This Note seeks to remove some of that uncertainty by examining four recent federal district court decisions that have decided claims of qualified immunity by private prisons: *Tinnen v. Corrections Corp. of America*,[31] *Smith v. United States*,[32] *Manis v. Corrections Corp. of America*,[33] and *Citrano v. Allen Correctional Center*.[34] Although three district courts have extended qualified immunity to private prisons, one court has denied qualified immunity.[35] This Note addresses the objections of the dissenting court and argues that despite the objections, qualified immunity should be extended to private prisons.

Part I sets forth the rationale behind the judicial recognition of qualified immunity from liability under section 1983 and discusses the approach taken by the Supreme Court in determining whether to extend qualified immunity to new classes of defendants. Part II identifies the conflict among the circuits over whether qualified immunity should be extended to private parties and examines the recent holding in *Wyatt v. Cole*, which addressed the split in the circuits. Part III argues that *Wyatt* does not preclude granting private prisons the same qualified immunity as their public counterparts because distinctions exist between the private defendant in *Wyatt* and private prisons. Part III then discusses the four federal district court decisions that have decided claims of qualified immunity by private prisons and addresses objections to the expansion of qualified immunity. The Note concludes that private prison officials, like their public counterparts, should be immune from liability under section 1983 unless prison officials should have known that their conduct would violate the clearly established statutory or constitutional rights of an inmate.

30. *See* Thomas, *supra* note 16, at 471 (noting "limited Supreme Court guidance" regarding the issue and "few reported cases . . . factually based on this type of relationship between the public and private sectors").

31. No. 91-2188-TUA, 1993 U.S. Dist. LEXIS 20309 (W.D. Tenn. Sept. 21, 1993).

32. 850 F. Supp. 984 (M.D. Fla. 1994).

33. 859 F. Supp. 302 (M.D. Tenn. 1994).

34. 891 F. Supp 312 (W.D. La. 1995).

35. *See infra* text accompanying notes 178–227.

I. THE DEVELOPMENT OF QUALIFIED IMMUNITY DOCTRINE

A. *The Rationale for Immunity from Section 1983*

In *Tenney v. Brandhove*,[36] the Supreme Court first considered whether a defendant could assert immunity from suits brought under section 1983. *Tenney* involved a civil rights damage suit against several members of the California legislature.[37] Although section 1983 on its face makes liable "[e]very person who, under color of any statute"[38] deprives another of his civil rights, the Court concluded that Congress, by its general language, did not intend to abolish all common law immunities.[39] Based on this statutory construction, the Court interpreted section 1983 to incorporate all immunities existing when Congress enacted section 1 of the Civil Rights Act of 1871.[40] In later cases, the Court made clear that its interpretation also prohibits any extension of immunities beyond those recognized at common law.[41] In *Tenney*, the Court held that legislators are entitled to assert absolute immunity from civil damage suits because the common law clearly recognized the privilege of legislators to be free from liability when acting "in the sphere of legitimate legislative activity."[42] After *Tenney*, a defendant may assert a claim of immunity from section 1983 only if a similarly situated defendant would have enjoyed the same immunity from tort liability at common law.

The Supreme Court also recognized the possibility that the important purposes of section 1983[43] might be frustrated if officials clothed with the authority of the state are afforded immunity for every alleged constitutional deprivation.[44] Because of this

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36. 341 U.S. 367 (1951).

37. *Id.* at 369.

38. *Id.* (citing 8 U.S.C. § 43 (current version at 42 U.S.C. § 1983 (1988))).

39. *Id.* at 376.

40. Ch. 22, § 1, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983 (1988)).

41. *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 638 (1980) (stating that § 1983 incorporates an immunity only if that immunity "was well established at common law at the time § 1983 was enacted").

42. *Tenney*, 341 U.S. at 376.

43. The important purposes of § 1983 are to deter officials from using their positions to deprive individuals of their civil rights, Scheuer v. Rhodes, 416 U.S. 232, 243 (1974), and to compensate victims if such deterrence fails, Carey v. Piphus, 435 U.S. 247, 254–57 (1978).

44. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981) (observing that "because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any pre-existing

threat, the Court added to its historical analysis an inquiry into whether the public policy considerations that support a particular government official's claim of immunity from section 1983 are sufficiently similar to the traditional purposes that underlie the common law immunity.[45] By recognizing only those claims of immunity from section 1983 that are justified by the same policy considerations relied upon at common law, this inquiry serves to strike a balance between the government's interest in effectively performing its traditional functions and the individual plaintiff's right to receive compensation when injured by official misconduct.[46] These two inquiries form the test used by courts to determine whether to recognize a particular defendant's claim of immunity. The defendant in a section 1983 suit is entitled to immunity if the defendant's conduct would have been shielded from tort liability at common law in 1871 and if the same strong public policy reasons underlying the common law immunity support an identical immunity from section 1983 today.

B. *The Court's "Functional Approach to Immunity Questions"*

In determining under the first prong of the test for immunity whether a particular governmental official would have been immune from liability at common law, the Court looks to the function that the official is required to perform.[47] If an official sued under section 1983 acts pursuant to a function protected by immunity at common law, the official satisfies the first prong of the test for immunity.[48] The Court has been insistent on nothing, as was the common law tradition, that immunity is not a reward for hold-

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immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983").

45. *See* Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (noting that "decisions on § 1983 immunities . . . [are] predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it"); *see also City of Newport*, 453 U.S. at 258–59 (stating that only after consideration "of both history and policy has the Court construed § 1983" to incorporate a particular immunity).

46. *See* Wyatt v. Cole, 504 U.S. 158, 167 (1992).

47. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (focusing on the officer's duties rather than his title); *Imbler*, 424 U.S. at 430 (focusing on "the functional nature of the activities" performed by prosecutors).

48. If the function that the official performs was accorded absolute immunity at common law, the official will be accorded absolute immunity from liability under § 1983. *See infra* text accompanying notes 58–60. If the function was accorded only good faith immunity at common law, the official will enjoy only qualified immunity from liability under § 1983. *See infra* text accompanying notes 62–67.

ing public office, but rather derives from the performance of an important government "function."[49] To claim an immunity from section 1983 liability, a defendant must show that "the responsibilities of his office embraced a function" so important as to merit immunity at common law and that "he was discharging the protected function when performing the act for which liability is asserted."[50]

For example, in *Pierson v. Ray*,[51] several police officers were sued under section 1983 for violating the civil rights of several black clergymen who had entered the segregated area of a bus terminal and were arrested.[52] The Mississippi breach of peace statute, under which the plaintiffs were arrested, was later found unconstitutional in a separate case. The Supreme Court stated that, at common law, police officers were not liable for false arrest or imprisonment if they acted in good faith and with probable cause in making an arrest.[53] Placing considerable emphasis on an officer's function or "duty" to make arrests when probable cause exists,[54] the Court afforded the officers qualified immunity from section 1983 suits arising out of the performance of their law enforcement function.[55]

The Court's "functional approach to immunity questions"[56] explicitly recognizes that for certain special functions, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of re-

49. Harlow v. Fitzgerald, 457 U.S. 800, 812–13 (1982).

50. *Id.* The Supreme Court has stated that it looks to the common law when assessing a particular official's claim of immunity because its "role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting § 1983." Burns v. Reed, 500 U.S. 478, 493 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)). The Court also stated that it does not "have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Id.* (quoting Tower v. Glover, 467 U.S. 914, 922–23 (1984)).

51. 386 U.S. 547 (1967).

52. *Id.*

53. *Id.* at 556–57.

54. *Id.* at 555.

55. *Id.* at 557. The immunity was qualified by requiring the officers to show that they reasonably believed in good faith that the arrest was constitutional, even though the arrest later was held to be unconstitutional. *Id.*

56. Forrester v. White, 484 U.S. 219, 224 (1988).

taliation."[57] For example, officials exercising legislative,[58] judicial[59] and prosecutorial[60] functions are accorded absolute immunity for acts performed in furtherance of their respective "core" functions.[61] Other officials exercising significant discretion in the performance of important executive and administrative functions are accorded qualified immunity. These officials include police officers,[62] state prison officials,[63] school board members,[64] state hospital administrators,[65] federal cabinet members[66] and FBI agents.[67] In each of these instances, immunity from section 1983 derives from the important governmental function that the official is required to perform, and not from any reward for holding public office or any sympathy that the courts have for governmental officials.[68]

C. *The Traditional Purposes of Qualified Immunity*

Since the initial recognition in *Tenney v. Brandhove* that a government official may assert immunity from liability under section 1983, the Court's ensuing line of cases largely has pushed the historical part of its two-part test into the background and has brought into sharp relief the important considerations of public policy that were crucial in justifying the recognition of immunities at common law.[69] Several key policy considerations underlie the

57. Imbler v. Pachtman, 424 U.S. 409, 428 (1976) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

58. Tenney v. Brandhove, 341 U.S. 367 (1951).

59. Stump v. Sparkman, 435 U.S. 349 (1978).

60. *Imbler*, 424 U.S. at 409.

61. For example, absolute immunity for judges is limited to "judicial acts." Forrester v. White, 484 U.S. 219, 227 (1988) (holding that nonjudicial, administrative acts by judges are to be accorded only qualified immunity). Absolute immunity for prosecutors is likewise limited to acts "intimately associated with the judicial phase of the criminal process." Burns v. Reed, 500 U.S. 478, 493 (1991) (citation omitted) (holding that acts taken pursuant to the prosecutorial function of giving legal advice to police are to be accorded only qualified immunity).

62. Pierson v. Ray, 386 U.S. 547 (1967)

63. Procunier v. Navarette, 434 U.S. 555 (1978).

64. Wood v. Strickland, 420 U.S. 308 (1974).

65. O'Connor v. Donaldson, 422 U.S. 563 (1975).

66. Butz v. Economou, 438 U.S. 478 (1978).

67. Anderson v. Creighton, 483 U.S. 635, 644–46 (1987).

68. *See* Forrester v. White, 484 U.S. 219, 229 (1988) (stating that "it [is] the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis").

69. *See* Procunier v. Naverarette, 434 U.S. 555, 568 (1978) (Stevens, J., dissenting)

recognition of immunity from liability under section 1983 and comprise what the Supreme Court today calls "the traditional purposes of qualified immunity."[70] An examination of the Court's immunity decisions demonstrates that if a new class of defendants is to successfully claim immunity from section 1983, the extension of immunity must: (1) ensure that governmental officials are not deterred from exercising the important functions of their office; (2) ensure that able citizens are not deterred from accepting public office; and (3) protect the public from the substantial costs associated with the litigation of repeated section 1983 suits.[71]

In the Supreme Court's first immunity decision, *Tenney v. Brandhove*,[72] the Court did not discuss extensively the interests that underlie the recognition of absolute immunity for legislators, but it did note that such immunity was justified by the public interest.[73] The Court stated that "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good."[74] The Court emphasized the importance of ensuring that legislators are not deterred from performing their legislative duties, including the duty of investigation.[75] By recognizing that absolute legislative immunity was necessary to further these important public interests, the Court established a precedent of conditioning immunity on a showing that the immunity is required to serve the public interest. This precedent has been followed in nearly every case since *Tenney*.

In *Pierson v. Ray*,[76] the Court's second immunity decision, the Court briefly and perhaps unwittingly wandered from its earli-

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(noting that the Court's initial "inquiry into the common law . . . [has] been abandoned"). Several commentators argue that the Court has eschewed its historical analysis by extending immunity to new classes of defendants largely upon "free-wheeling policy choice[s]." Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)). *See, e.g.*, 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 ("Today, [qualified immunity] stands as a legal principle defined primarily by the Court's own policy judgment that an individual's right to compensation . . . should be subordinated to the governmental interest . . . .").

70. Wyatt v. Cole, 504 U.S. 158, 168 (1992).

71. *See infra* text accompanying notes 74–96.

72. 341 U.S. 367 (1951).

73. *Id.* at 377.

74. *Id.*

75. *Id.* at 377–78.

76. 386 U.S. 547 (1967).

er position in *Tenney* that the expansion of immunity must be necessary to serve the public interest. In *Pierson*, the Court held that the interest of fairness required recognizing qualified immunity for police officers who are sued under section 1983 for making an arrest pursuant to an unconstitutional statute.[77] The Court stated that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[78] The Court reasoned that "the same consideration" required recognizing qualified immunity from section 1983 when an officer acts under a law subsequently held to be unconstitutional.[79] Although qualified immunity for police officers also may serve the public interest of ensuring that officers are not deterred from exercising their important duties, the Court failed to identify this rationale and relied solely on the injustice of denying qualified immunity to law enforcement officials.[80]

In later cases, the Court moved away from the unfairness or injustice rationale and toward the notion that immunity is required for the public good. In *Scheuer v. Rhodes*,[81] a case extending qualified immunity to a governor and other state officials, the Court set forth "two mutually dependent rationales"[82] for the common law immunity doctrine:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[83]

The Court stated that in determining whether to recognize immunity from liability, "one policy consideration seems to pervade the analysis: the public interest requires decisions and action to enforce laws for the protection of the public."[84]

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77. *Id.* at 555.
78. *Id.*
79. *Id.*
80. *See id.* at 554–57.
81. 416 U.S. 232 (1974).
82. *Id.* at 240.
83. *Id.*
84. *Id.* at 241.

Beginning with *Scheuer,* all of the Court's subsequent section 1983 immunity decisions have relied heavily on the argument that the public will be harmed if officials are deterred from effectively performing vital public functions due to the threat of liability under section 1983. The officials with which the Court is most concerned are those required to exercise a significant degree of discretion in safeguarding the public. For example, in *Scheuer*, the Court extended qualified immunity to the governor of Ohio and several officers of the Ohio National Guard for their conduct in connection with the student killings at Kent State University in 1971.[85] The Court emphasized that qualified immunity served the purpose of ensuring that officials are undeterred in the execution of important discretionary functions:

> In common with police officers, . . . officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office. . . . When a condition of civil disorder in fact exists, there is obvious need for prompt action . . . .[86]

A year later in *Wood v. Strickland,*[87] the Court applied the same rationale in extending qualified immunity to school board officials. Echoing a familiar line, the Court stated:

> Denying any measure of immunity in these circumstances "would contribute not to principled and fearless decision-making but to intimidation." The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently [and] forcefully.[88]

Finally, in *Imbler v. Pachtman,*[89] the Court extended absolute immunity to prosecutors for acts falling within the scope of their prosecutorial duties, concluding that to deny such an immunity "would prevent the vigorous and fearless performance of the

85. *Id.* at 238–49.
86. *Id.* at 246.
87. 420 U.S. 308 (1975).
88. *Id.* at 319–20 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
89. 424 U.S. 409 (1976).

prosecutor's duty that is essential to the proper functioning of the criminal justice system."[90]

In the 1982 case of *Harlow v. Fitzgerald*,[91] the Court identified for the first time two additional policy considerations underlying qualified immunity: the need to protect society from the substantial costs associated with the litigation of repeated section 1983 suits and the need to prevent the deterrence of able citizens from seeking public office.[92] These two rationales figured prominently in *Harlow*, in which the Court extended qualified immunity to high-ranking White House aides. The Court stated:

> [I]t cannot be disputed seriously that [section 1983] claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.[93]

Three years after *Harlow*, the Court once again relied on the need to shield the public from the substantial expense of defending section 1983 suits, holding that under the "collateral order" doctrine, orders denying qualified immunity are subject to immediate appeal even absent a final judgment.[94] The Court concluded that

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90. *Id.* at 427–28.

91. 457 U.S. 800 (1982).

92. *Id.* at 814.

93. *Id.* The need to restrict litigation costs was of such importance that the Court in *Harlow* relied on this consideration to alter the standard governing the adjudication of qualified immunity claims. Prior to *Harlow*, qualified immunity was an affirmative defense entitling a defendant to summary judgment when the defendant did not know (a subjective test) or reasonably should not have known (an objective test) that his conduct would deprive the plaintiff of protected rights. *Id.* at 815. After concluding that "substantial costs attend the litigation of the subjective good faith of government officials," *id.* at 816, the Court discarded the subjective test in favor of the objective test alone and held that defendants are not liable under § 1983 as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The Court explicitly stated that it was altering the standard for qualified immunity in order to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.*

94. Mitchell v. Forsythe, 472 U.S. 511, 525–26 (1985). Although 28 U.S.C. § 1291 vests in the court of appeals jurisdiction over appeals only from "final decisions" of the district courts, the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), held that a decision of a district court is appealable, even though it is not final, if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consider-

the important cost-saving purpose of qualified immunity would be lost if a case is permitted to go to trial.[95] *Harlow* and later cases that recognized these two additional rationales for qualified immunity require courts to scrutinize future claims of qualified immunity to ensure that the extension of immunity serves all three important purposes enumerated by the Court.[96]

II. EXTENDING QUALIFIED IMMUNITY TO PRIVATE PARTIES

A. *The Conflict in the Circuits over Private Party Immunity*

Even though the Supreme Court's immunity decisions have been remarkably consistent, the courts of appeals have split in their resolution of qualified-immunity defenses raised by private defendants.[97] Most of the cases decided by the courts of appeals involve a private defendant who is faced with a civil damage suit under section 1983 for either invoking the aid of a public official under an unconstitutional state statute[98] or conspiring with a public official to act outside the official's scope of authority.[99] Typically, a creditor or other private party invokes a presumably valid state attachment, garnishment, or replevin statute in order to se-

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ation be deferred until the whole case is adjudicated." The Court's holding in *Cohen* is known as the "collateral order" doctrine. *See Mitchell*, 472 U.S. at 524-25.

95. *Id.*

96. As several commentators have noted, the Supreme Court has not been concerned with the absence of empirical proof that qualified immunity actually furthers these three purposes. *See, e.g.*, Jack M. Beerman, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 94–97 (1989); Gary S. Gilden, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Acts*, 38 EMORY L.J. 369, 389–90 & nn.89–90 (1989); Sheldon H. Nahmod, *Constitutional Wrongs Without Remedies: Executive Official Immunity*, 62 WASH. U. L.Q. 221, 248 (1984–85); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 282.

97. Private parties may be sued under § 1983 for actions taken "under color of law." *See* Adickes v. Kress, 398 U.S. 144, 145 (1970) (holding that private-restaurant owners who conspire with police to violate the coustitutional rights of blacks may be sued for damages under § 1983).

98. *See, e.g.*, Jones v. Preuit & Maudlin, 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 489 U.S. 1002 (1989); Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988); Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983); Folsom Investmeut Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982).

99. *See, e.g.*, Felix de Santana v. Velez, 956 F.2d 16 (1st Cir. 1991), *cert. denied*, 506 U.S. 817 (1992); Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983); Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1978).

cure money or other property from an alleged debtor.[100] After the debtor successfully challenges the constitutionality of either the statute or the conduct of a public official, the debtor brings a section 1983 claim against the private party who invoked the state aid. The private party then seeks to defend the case by asserting a qualified-immunity defense. The courts of appeals have diverged widely in deciding claims of qualified immunity by these private defendants.

The circuits that have extended qualified immunity to private defendants rely heavily on both the unfairness of holding private defendants liable for invoking state statutes that they reasonably believed were valid and the public interest in encouraging citizens to rely on presumptively valid legal processes instead of resorting to other, possibly illegal forms of self-help. In *Folsom Investment Co. v. Moore*,[101] the U.S. Court of Appeals for the Fifth Circuit extended qualified immunity to a private defendant sued under section 1983 for invoking an unconstitutional state attachment statute.[102] The court stated that under the first prong of the immunity test, "such a citizen, although not immunized per se, would not have been subject to tort liability prior to the passage of § 1983."[103] The court explained that, at common law, a defendant in a malicious prosecution or wrongful attachment suit would not have been liable unless the plaintiff could show malice or a lack of probable cause.[104] The court reasoned that the existence of this protection at common law was sufficient to transform the protection into qualified immunity from section 1983 liability.[105] Under the second prong of the immunity test, the court pointed to the "important public interest in permitting ordinary citizens to rely on presumptively valid state laws."[106] This "compelling public policy" justified extending qualified immunity to private defendants.[107]

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100. *See* cases cited *supra* note 98.
101. 681 F.2d 1032 (5th Cir. 1982).
102. *Id.* at 1037.
103. *Id.* at 1038.
104. *Id.*
105. *Id.*
106. *Id.* at 1037.
107. *Id.* at 1038.

In *Jones v. Preuit & Mauldin*,[108] the Eleventh Circuit also extended qualified immunity to private defendants, basing its decision on "the existence of a good faith and probable cause defense in common law"[109] as well as "powerful policy considerations."[110] The court in *Jones* expanded upon the reasoning of the Fifth Circuit in *Folsom Investment*:

> In the same way that we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional.[111]

The court also stated that it would be unfair to treat private parties as state actors but deny them the same immunity granted to public officials. Such a result, the court stated, would render private defendants "*more* liable" than public defendants.[112]

The Eleventh Circuit's decision in *Jones* drew a strong dissent. The dissent argued that the considerations of public policy underlying the Supreme Court's past immunity decisions simply do not support extending qualified immunity to private defendants:

> Despite the fact that the defendants in this case do not occupy public office . . . , the majority concludes that they are entitled to qualified immunity. There is no justification for this extension . . . . Because none of the policy considerations which support the qualified immunity doctrine is present in this case, the majority creates its own policy rationale for providing private actors with qualified immunity. It argues that citizens should not be exposed to liability based on their use of a state statutory attachment procedure. While the simplicity of this suggestion may be appealing, the majority errs by proposing its own policy justification for extending qualified immunity to private defendants.[113]

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108. 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 489 U.S. 1002 (1989)

109. *Id.* at 1324.

110. *Id.* at 1325.

111. *Id.* at 1325.

112. *Id.*

113. *Id.* at 1343 (Johnson, J., dissenting).

The dissent branded the decision of the majority "judicial policy-making"[114] and concluded that the extension of qualified immunity to private parties was improper because "no public office or official discretion is protected."[115]

In *De Vargas v. Mason & Hanger-Silas Mason Co., Inc.*,[116] the Tenth Circuit also upheld a private party's claim of qualified immunity. The situation in *De Vargas*, however, was very different from most other private party immunity decisions and, as the court itself recognized, was closely analogous to that of a private prison.[117] In *De Vargas*, the defendant was a private corporation under contract with a state agency to perform security inspection services.[118] The private contractor was sued under section 1983 for refusing to process the plaintiff's employment application in violation of his civil rights.[119] The contractor refused to process the application because its contract with the state prevented the contractor from hiring individuals with certain physical handicaps.[120] The Tenth Circuit affirmed the claim of qualified immunity, holding that private parties performing government functions in accord with duties imposed by a government contract—and sued solely on the basis of the performance of those duties—are entitled to raise the defense of qualified immunity.[121]

The court in *De Vargas* stated that the private contractor's claim of qualified immunity "presents the strongest arguments for extending qualified immunity to private . . . defendants."[122] The court held that the private contractor's claim met both prongs of the traditional test for qualified immunity. First, the court noted that "the functions which the private [contractor] performed pursuant to contract are functions which governmental employees would

114. *Id.*

115. *Id.* at 1344.

116. 844 F.2d 714 (10th Cir. 1988), *cert. denied after appeal from remand*, 498 U.S. 1074 (1991).

117. *Id.* at 722 n.11.

118. *Id.* at 715–16.

119. *Id.* at 716.

120. *Id.* The specific regulation at issue stated that "[a] one-eyed individual shall be medically disqualified for security inspector duties." *Id.*

121. *Id.* at 722. In *De Vargas*, the court explicitly expressed no opinion regarding the result it might reach if a private contractor performed acts not *specifically* required by a government contract, such as discretionary acts performed while operating a private prison. *Id.* at 722 n.11.

122. *Id.* at 721.

perform had the government not contracted them out."[123] Second, the court stated that the policy considerations making immunity necessary at common law "apply equally to all private defendants acting pursuant to contract."[124] The court stated that "denying immunity would make contractor defendants . . . more timid in carrying out their duties and less likely to undertake government service."[125] The court also stated that "[f]orcing such private contractor[s] . . . to defend meritless damages actions at trial creates the same distractions from public duties as it does for public employees."[126] Because the private defendant performed a "governmental function" and supported its claim of qualified immunity with the same traditional policy considerations identified in past immunity cases, the court in *De Vargas* allowed the private defendant to assert a defense of qualified immunity.[127]

In *Downs v. Sawtelle*,[128] the First Circuit rejected the argument of a private defendant and refused to extend qualified immunity to private parties. *Downs* was a section 1983 case against a private party, the plaintiff's guardian, who allegedly conspired with public officials to sterilize the plaintiff against her will.[129] The First Circuit stated that unlike public officials who enjoyed immunity at common law, private individuals were never "shielded from damage liability in a comparable fashion."[130] The court also stated that the policy considerations underlying immunity for public officials do not support immunity for private parties: "private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors and other public officials."[131] Finally, the court held that although "fairness [may] militate in favor of extending some immunity to private parties acting in concert

123. *Id.* at 722.
124. *Id.* at 723.
125. *Id.*
126. *Id.* at 717.
127. *Id.* at 720–25. *See also* Frazier v. Bailey, 957 F.2d 920, 928–29 (1st Cir. 1992) (holding that a private social worker who performed statutorily mandated duties pursuant to a contract with the state is entitled to qualified immunity); Rodriques v. Furtado, 950 F.2d 805, 816 (1st Cir. 1991) (holding that a private physician who conducted vaginal search of drug suspect pursuant to a search warrant is entitled to qualified immunity).
128. 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1978).
129. *Id.* at 3.
130. *Id.* at 15.
131. *Id.*

with state officials," fairness was not a proper factor to consider.[132] Because none of the traditional policy considerations underlying immunity at common law supported qualified immunity for private parties, the First Circuit refused to expand the qualified immunity doctrine.[133]

In *Duncan v. Peck*,[134] the Sixth Circuit also refused to extend qualified immunity to private parties. Unlike the First Circuit case, however, *Duncan* involved a factual situation identical to cases in other circuits that extended qualified immunity to private parties. In *Duncan*, a private defendant was faced with liability under section 1983 for securing a prejudgment attachment order under a statute later held to be unconstitutional.[135] The court denied qualified immunity because there was "no evidence that private parties were immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties."[136] The court rejected the argument that a good faith defense at common law could be transformed into qualified immunity.[137] The court also rejected any policy basis for extending immunity to private parties.[138] The court concluded that "a private party is governed only by self-interest and is not invested with the responsibilities of executing the duties of a public official in the public interest."[139]

B. *Resolving the Conflict*: Wyatt v. Cole

In *Wyatt v. Cole*,[140] the Supreme Court acknowledged the conflict among the circuits and addressed, for the first time, the

132. *Id.* at 15–16.

133. *Id.* at 16. In Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983), the Ninth Circuit also refused to extend qualified immunity to private parties. *Id.* at 385 n.10. *See also* F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1318–19 (9th Cir. 1989) (stating categorically, without reasoning, that private parties are not entitled to immunity from § 1983 suits).

134. 844 F.2d 1261 (6th Cir. 1988).

135. *Id.* at 1262.

136. *Id.* at 1264.

137. *Id.* at 1265.

138. *Id.* at 1266.

139. *Id.* Although the court in *Duncan* denied qualified immunity to private parties, it stated that private parties can raise a "good faith" defense to § 1983 suits. *Id.* The distinction between the two defenses is that a good faith defense examines the subjective intent of the private defendant, whereas qualified immunity is based on an objective standard and can be decided on the pleadings. *See id.* at 1266.

140. 504 U.S. 158 (1992).

scope of qualified immunity for private parties.[141] *Wyatt* involved a situation, typical of the cases arising in the circuits, in which a private defendant is faced with liability under section 1983 for invoking an unconstitutional replevin, garnishment, or attachment statute.[142] With the aid of his attorney, Cole filed a complaint under the Mississippi replevin statute, and a state court ordered the seizure of property in the possession of Wyatt.[143] Later, the court conducted a post-seizure hearing and ordered Cole to return the property to Wyatt; Cole refused, and Wyatt brought suit in federal court, arguing that the statute violated his right to due process by failing to afford judges discretion to deny writs of replevin. Wyatt also sought damages against Cole under section 1983.[144] The district court declared the replevin statute unconstitutional on due process grounds but held that Cole was entitled to qualified immunity.[145] The Fifth Circuit affirmed the decision.[146]

The Supreme Court reversed, stating that Cole's claim of qualified immunity failed to satisfy its traditional two-part test.[147] The Court first stated that there was insufficient common law support for private party immunity in suits of this nature.[148] Even though private defendants would have enjoyed a good faith defense at common law for the closely analogous torts of malicious prosecution and abuse of process, such a defense did not entitle them to qualified immunity.[149] The Court brushed aside the inconsistency with its holding in *Pierson v. Ray,* in which the Court transformed a good faith defense at common law for the analogous torts of wrongful arrest and imprisonment into qualified im-

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141. *Id.* at 161.

142. *Id.* at 161–62.

143. *Id.* at 160.

144. *Id.*

145. *See* Wyatt v. Cole, 710 F. Supp 180, 183 (S.D. Miss. 1989), *aff'd,* 928 F.2d 718 (5th Cir. 1991), *reh'g denied,* 934 F.2d 1263 (5th Cir. 1991), and *rev'd,* 504 U.S. 158 (1992).

146. *See* Wyatt v. Cole, 928 F.2d 718 (5th Cir. 1991), *reh'g denied,* 934 F.2d 1263 (5th Cir. 1991), and *rev'd,* 504 U.S. 158 (1992).

147. *Wyatt,* 504 U.S. at 164.

148. *Id.* at 165–66.

149. *Id.* The Court stated that although the commou law defense of good faith might entitle private defendants such as Cole to a similar affirmative defense of good faith from liability under § 1983, it did not entitle private defendants to the "type of objectively determined, immediately appealable immunity that respondeuts asserted below." *Id.* at 169, 166.

munity for police officers.[150] The apparent inconsistency shows that the Court was more concerned with the second policy-oriented prong of its traditional immunity test. In fact, the Court stated, "the reasons for recognizing such an immunity [in *Pierson*] were based not simply on the existence of a good-faith defense at common law, but on the special policy concerns involved in suing government officials."[151]

Under the second prong of the traditional immunity test, Justice O'Connor, writing for the Court, reviewed the special policy considerations underlying qualified immunity for public officials:

> Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions . . . . [W]e have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service.[152]

Justice O'Connor stated that "[t]hese rationales are not transferable to private parties."[153] She contrasted the rationales with the interests advanced by the Fifth Circuit in support of extending qualified immunity to private defendants such as Cole.[154] The interests advanced by the Fifth Circuit included encouraging citizens to rely on presumptively valid state laws to resolve disputes and shielding individuals from money damages when they reasonably resort to state laws later held to be unconstitutional.[155] Justice O'Connor concluded that "such interests are not sufficiently similar to the traditional purposes of qualified immunity" to justify the extension of qualified immunity to private parties.[156]

The Court's obvious concern was that the benefits of qualified immunity would inure not to the public interest, which is the case when a public official asserts immunity, but rather solely to the commercial interests of private parties. The Court stated that "private parties hold no office requiring them to exercise discretion;

150. *Id.* at 165–67 (discussing Pierson v. Ray, 386 U.S. 547, 555–57 (1967)).
151. *Id.* at 167.
152. *Id.* (citations omitted).
153. *Id.* at 168.
154. *Id.*
155. *Id.* at 163.
156. *Id.* at 168.

nor are they principally concerned with enhancing the public good."[157] The Court also stated that the cost-saving rationale identified in *Harlow v. Fitzgerald* was inapplicable in suits against private defendants like Cole because "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."[158] Concluding that "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,"[159] the Court refused to extend qualified immunity to private defendants such as Cole.

III. EXTENDING QUALIFIED IMMUNITY TO PRIVATE PRISONS

A. *Distinguishing* Wyatt

Although *Wyatt* presents a hurdle for private parties claiming qualified immunity from section 1983 suits, it should not preclude the extension of qualified immunity to private prisons. The Court's holding in *Wyatt* makes clear that private defendants who invoke the aid of state officials under an unconstitutional state statute or conspire with state officials to act outside the scope of their authority are not entitled to qualified immunity.[160] The Court admonished, however, that its holding was limited, implying that *Wyatt* would not necessarily bar qualified immunity for private parties faced with liability under section 1983 in different circumstances.[161] Significantly, the Court in *Wyatt* did not cite or discuss *De Vargas*, a pre-*Wyatt* private party immunity decision that involved a private party performing a government function pursuant to a contract with the state.[162] Accordingly, the circumstances surrounding a private prison's claim of qualified immunity should

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 164.
161. In *Wyatt*, Justice O'Connor stated:

> The question on which we granted certiorari is a very narrow one . . . . The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment or attachment statute. That answer is no.

Id. at 168–69 (citations omitted).

162. *See supra* notes 116-27 and accompanying text.

be sufficiently distinguishable from those of the private defendant in *Wyatt* to justify the extension of qualified immunity to private prisons.

First, unlike the defendant in *Wyatt*, private prison officials perform a government function that was protected by immuuity at common law. Under the Court's "functional" approach, qualified immunity attaches to the government function performed.[163] Private prison officials are engaged in the same function and are required to make the same discretionary decisions as state prison officials. By operating a prison under a contract with the government, a private prison is the functional equivalent of a state-run prison. In *Procunier v. Navarette*,[164] the Court extended qualified immunity to officials and employees of state prisons.[165] Because private prison officials perform a government function that was protected by immunity at the time Congress enacted section 1983, they should be entitled to the same qualified immunity enjoyed by state prison officials.

Several post-*Wyatt* private party immunity decisions illustrate the argument for extending qualified immunity to private parties based on their performance of a governmnent function. These decisions all rest upon the functional equivalence of the private defendants and state officials, and the fact that the public will benefit by extending qualified immunity to the private defendants.[166] In

163. *See supra* notes 47–68 and accompanying text.

164. 434 U.S. 555, 561 (1978).

165. *Id.* at 560–62. Although the Court in *Procunier* did not explicitly discuss the immunity afforded prison officials at common law, the Court noted the consensus in the courts of appeals that "prison and jail administrators performing discretionary functions" are entitled to qualified immunity. *Id.* at 561 n.7. Justice Stevens dissented in *Procunier*, stating that the majority had abandoned the traditional "inquiry into the common law [that] was an essential precondition to the recognition of the proper immunity for any official." *Id.* at 568 (Stevens, J., dissenting).

166. *See* Warner v. Grand County, 57 F.3d 962, 967 (10th Cir. 1995) (granting immunity to private individual who performed strip search pursuant to police request); Williams v. O'Leary, 55 F.3d 320, 324 (7th Cir. 1995) (granting immunity to private physicians who treated prison inmates pursuant to contract with state), *cert. denied*, 116 S. Ct. 527 (1995); Sherman v. Four County Counseling Ctr., 987 F.2d 397, 402–03 (7th Cir. 1993) (granting immunity to private hospital who treated mental patient pursuant to court order); Saavedra v. City of Albuquerque, 859 F. Supp. 526, 528–29 (D.N.M. 1994) (granting immunity to private persounel hearing officer who conducted employee grievance hearing pursuant to contract with city).

Compare Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785, 792 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993) (holding that college trustecs who conspired with public officials to fire employee were not entitled to qualified immunity)

Sherman v. Four County Counseling Center,[167] the Seventh Circuit extended qualified immunity to a private mental health center that administered anti-psychotic medication against the will of a patient pursuant to a court order.[168] The Seventh Circuit reasoned that a state hospital would be protected by qualified immunity if it had acted precisely as the private facility did.[169] In *Warner v. Grand County*,[170] the Tenth Circuit also extended qualified immunity to a private defendant, the female director of a local crisis center, who performed a strip search of several female detainees pursuant to a police request.[171] The Tenth Circuit reasoned that when a private party performs a government function that the state does not choose to perform, the private party is entitled to the same immunity that public officials would receive had they performed the function.[172] It did not matter in either of these decisions that the party performing the government function was a private entity. In each decision, the court concluded that the functional equivalence of the private defendants and public officials removed the case from the ambit of *Wyatt*.[173]

A private prison should satisfy the second, policy-oriented prong of the test for qualified immunity as well. The three tradi-

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with Moore v. Wyoming Medical Ctr., 825 F. Supp. 1531, 1535–36 (D. Wyo. 1993) (holding that private employees of medical center who confined mental patient to hospital against her will without direction from public officials were not entitled to qualified immunity).

The court in *Burrell*, 970 F.2d at 796, explained the distinction between these two lines of cases:

> [W]here the private defendants are not alleged simply to have fulfilled their duties under a government contract, or to have assumed under court order the responsibilities of a public official, but are alleged to have acted in concert with public officials for the sole purpose of depriving another of her constitutional rights, private defendants cannot claim the protection of qualified immunity . . . . Private individuals who associate themselves with a public official to encroach on another's constitutional rights must bear the risk of trial.

Id. at 796.

167. 987 F.2d 397 (7th Cir. 1993).

168. *Id.* at 406. In *Sherman*, a court order provided that the patient was to be taken to the private facility and that the private facility was to "give whatever treatment is deemed necessary and appropriate with or without the consent of the Respondent." *Id.* at 402–03.

169. *Id.* at 405.

170. 57 F.3d 962 (10th Cir. 1995).

171. *Id.* at 965.

172. *Id.*

173. *See, e.g., id.* at 965; Sherman v. Four County Counseling Ctr., 987 F.2d 397, 405 (7th Cir. 1993).

tional purposes of qualified immunity—preserving the diligent exercise of official discretion, preventing the deterrence of able citizens from accepting public service, and reducing the damaging costs of litigation—all support the extension of qualified immunity to private prisons. Like public prison officials, private prison officials are entrusted with exercising a large degree of discretion in overseeing the day-to-day activities of inmates.[174] The threat of damage suits would have no less dampening effect on the ardor of private officials in their exercise of discretion than it has on public officials. Furthermore, unrestricted liability for even unknowable constitutional violations likely would deter qualified contractors from accepting government contracts and qualified individuals from working for private prisons, just as it would deter able citizens from accepting public service. Finally, the substantial litigation costs that would result from a denial of immunity, rather than burdening the private contractor, would be passed on to the public in the form of higher costs for correctional services. Extending qualified immunity to private prisons will benefit the public by preserving the cost savings produced by private incarceration.[175]

Although *Wyatt* is distinguishable from the situation presented by private prisons, several concerns militate against the extension of qualified immunity to private prisons. Foremost among these concerns is the argument that private prisons are run for profit and thus operate under a distinct conflict of interest. In the case of a private corporation under contract to run a private prison, a danger exists that the actions of the corporation will run counter to the public interest. For example, a private prison might cut corners on medical treatment or commit other constitutional transgressions that result in financial savings. Given such dangers, denying qualified immunity may be necessary to ensure the vigilant protection of inmates' rights. Second, an immunity rule that guarantees the unfettered exercise of official discretion, although

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174. The Supreme Court has recognized the difficulties inherent in the operation of a prison that make the exercise of discretion essential:

> The administration of a prison is a difficult undertaking at best, for it concerns persons many of whom have demonstrated a proclivity for antisocial, criminal, and violent conduct. . . . [M]any inmates do not refrain from harassment and intimidation. The number of non-meritorious prisoners' cases that come into this Court's notice is evidence of this.

Cleavenger v. Saxner, 474 U.S. 193, 203 (1985).

175. Many state statutes require private prisons to provide cost savings to the state in order to maintain their contract with the state. *See supra* note 28.

proper when a defendant genuinely acts for the public good, may be inappropriate when private interests are involved. The fairness concerns that support qualified immunity for public officials perhaps should not apply to corporate officers and employees who are seeking to maximize corporate profits. Finally, because the common law never recognized immunity for private citizens, the extension of qualified immunity to private prison officials may be nothing more than a "freewheeling policy choice"[176] by the courts that private prison officials should enjoy at least the same level of immunity as public prison officials. Such a policy choice would be an illegitimate exercise of judicial power in light of the courts' limited role in qualified immunity cases.[177]

B. *The Early Federal District Court Decisions*

The argument for extending qualified immunity to private prisons is novel. Only four federal district courts have rendered decisions on the issue.[178] Perhaps because of the scant precedent in the area of private party immunity and the controversial nature of the claim, the decisions are conflicting. These decisions highlight the central problem of extending qualified immunity to private prisons: in the case of private prisons, there is an increased risk that qualified immunity will allow prison officials to maximize corporate profits at the expense of inmates' protected rights. Although the first two district courts which addressed the proposed expansion of qualified immunity failed to discuss this problem, the two later opinions squarely addressed the policy arguments against extending qualified immunity to private prisons.

In the first case to decide a private prison's claim of qualified immunity, *Tinnen v. Corrections Corp. of America*,[179] the U.S. District Court for the Western District of Tennessee held that the private defendant, Corrections Corporation of America (CCA),

176. Wyatt v. Cole, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

177. The courts' role in qualified immunity cases is limited to interpreting congressional intent at the time Congress enacted 42 U.S.C. § 1983. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980). Thus, courts may not expand the qualified immunity doctrine beyond those immunities existing at common law in 1871. *See supra* text accompanying notes 38–41.

178. *See supra* notes 30–35.

179. No. 91-2188-TUA, 1993 U.S. Dist. LEXIS 20309 (W.D. Tenn. Sept. 21, 1993).

was entitled to assert a defense of qualified immunity.[180] CCA was under contract with the city of Mason, Tennessee, to operate the West Tennessee Detention Facility (WTDF), which housed inmates from overcrowded federal and District of Columbia correctional facilities. Tinnen, a District of Columbia inmate at WTDF, brought a section 1983 suit against the warden, the deputy warden, a prison counselor, a prison physician, and the chief of prison security, alleging that he had been denied access to the court, refused proper medical treatment, and deprived of property in violation of his protected rights.[181]

Concluding that the private prison officials were entitled to assert a defense of qualified immunity, the court stated that the rationales underlying qualified immunity fully applied to private employees of a governmental contractor as well as direct governmental employees.[182] First, the court held that the private prison officials met the historical test for qualified immunity because they were required by contract to perform a governmental function. The court stated that "while the parties have not presented the court with any common law recognition of private party immunity, our law clearly establishes that those who are employed to administer jails and prisons housing government detainees are entitled to qualified immunity."[183] The court thus distinguished the case of *Duncan v. Peck*,[184] in which the Sixth Circuit declined to extend qualified immunity to private parties due to the absence of private party immunity at common law.[185] The court in *Tinnen* stated that private prison officials, unlike the private defendants in *Duncan*, are "required to exercise the same functions for the benefit of the public good with appropriate force and decision as are the government employees hired as warden, deputy warden, prison physician, prison counselor, or as chief of prison security."[186] The court concluded that because the private prison officials are functional equivalents of government prison officials, the private defendants satisfied the first prong of the test for qualified immunity: At common law, the private prison officials would have been im-

180. *Id.* at *12.
181. *Id.* at *2.
182. *Id.* at *9–*10.
183. *Id.* at *10–*11.
184. 844 F.2d 1261 (6th Cir. 1988); *see also supra* text accompanying notes 134–39.
185. *See Tinnen*, 1993 U.S. Dist. LEXIS 20309 at *3–*5, *10–*11.
186. *Id.* at *9.

mune from liability for actions taken in good faith in operating the prison facility.[187]

The court also found that the traditional purposes of qualified immunity supported the private prison's claim of qualified immunity.[188] The court stated that like their public counterparts, private prison officials "face the dilemma of being required by law to use their discretion in a way that might unfairly expose them to lawsuits,"[189] and that they "must be free to exercise their discretion for the public good without fear . . . of inmate damage suits."[190] The court concluded that "no perceptible reason has been presented to distinguish between those prison administrators who are paid directly by the government and those who are paid by a corporation which is paid by the government."[191] The court did not discuss the possibility that private prison officials might be encouraged to violate inmates' rights in order to increase the corporation's profits.

In *Smith v. United States*,[192] the second qualified immunity decision involving a private prison, the U.S. District Court for the Middle District of Florida also extended qualified immunity to private prison officials.[193] The plaintiff in *Smith* brought a *Bivens* action[194] against Goodwill Industries Suncoast, Inc., a private corporation under contract with the United States to operate the Orange County Community Treatment Center, as well as several prison officials.[195] The plaintiff, a female inmate at the facility, alleged that a prison employee had made sexual advances toward her in violation of her Fifth Amendment right to equal protection and her Eighth Amendment right to be free from cruel and unusual punishment.[196] Holding in favor of the private defendants, the court distinguished this situation from that in *Wyatt v. Cole* and concluded that "[a]lthough a private contractor may be princi-

187. *Id.* at *10–*11.
188. *Id.* at *10.
189. *Id.* at *10 (quoting Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988)).
190. *Id.* at *9–*11.
191. *Id.* at *12.
192. 850 F. Supp. 984 (M.D. Fla. 1994).
193. *Id.* at 987.
194. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Supreme Court held that plaintiffs may bring civil rights damage suits against federal officials directly under the Constitution. *See supra* note 9.
195. *Smith*, 850 F. Supp. at 985.
196. *Id.* at 984–85.

pally concerned with its private interests, a private contractor is distinct from the private defendants in *Wyatt*."[197] The court stated that unlike the private defendants in *Wyatt*, the private prison officials in this case were required to "exercise discretion under the government contract and to perform a public service."[198] Although the court did not address each part of the two-part test for qualified immunity, the court concluded that the private prison officials were entitled to raise qualified immunity as a defense to the inmate's claims.[199] As in *Tinnen*, the court in *Smith* did not address the argument that the extension of qualified immunity might encourage prison officials to increase profits at the expense of inmates' rights.

C. *The Dissenting Court:* Manis v. Corrections Corp. of America

In *Manis v. Corrections Corp. of America*,[200] the U.S. District Court for the Middle District of Tennessee disagreed with the conclusion reached by the first two federal district court decisions and held that the private defendant, CCA, was not entitled to assert a qualified immunity defense to an inmate's section 1983 suit.[201] The court argued that the private defendant failed to satisfy either part of the two-part test for qualified immunity. The court was concerned particularly with what it called "the implicit danger of affording qualified immunity to private parties."[202]

Manis involved a section 1983 suit by an inmate incarcerated at a prison operated by CCA who alleged that CCA employees were deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights.[203] In rejecting CCA's claim of qualified immunity, the court concluded first that CCA failed to meet the requirement of showing an analogous immunity at common law. The court rejected the functional argument and relied on the Sixth Circuit decision in *Duncan v. Peck* for the argument that the common law never extended the doctrine of tort immunity to

197. *Id.* at 986.
198. *Id.*
199. *Id.* at 987.
200. 859 F. Supp. 302 (M.D. Tenn. 1994).
201. *Id.* at 306.
202. *Id.* at 305.
203. *Id.* at 303.

include private defendants.[204] The *Manis* court held that this finding was "fatal" to CCA's claim of qualified immunity.[205]

Although the court rejected CCA's argument that it was the functional equivalent of a public prison and thus was entitled to the same qualified immunity, the court discussed why CCA also failed the second policy-oriented test for qualified immunity. The court took issue with the conclusion in *Tinnen* and *Smith* that public policy supports extending immunity to private prisons.[206] Focusing on the conflict of interest inherent in the private operation of a correctional facility, the court stated:

> In the case of a private for-profit corporation hired to perform a public function, there is an increased risk that the corporation's actions will diverge from the public interest. Unlike public officials, corporate officers and employees are hired to serve the interests of the corporation, and, more specifically, its stockholders, whose principal interest is earning a financial return on their investment. Indeed, corporate officers owe a fiduciary duty to advance stockholders' interests, but they owe no such fiduciary duty to the public at large.[207]

This conflict of interest, the court stated, created "an obvious temptation to skimp on civil rights whenever it would help to maximize shareholders' profits."[208] The court reasoned that extending qualified immunity to private prisons was not in the public interest and that in such a situation "the threat of incurring money damages might provide the *only* incentive for a private corporation and its employees to respect the Constitution."[209] Parting company with the *Tinnen* and *Smith* decisions, the court concluded that because CCA was a "purely private corporation," there was no compelling reason why CCA should not have to defend civil damage suits by inmates without the benefit of qualified immunity.[210]

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204. *Id.* at 304–05.
205. *Id.* at 305.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 306.
210. *Id.*

D. *The Response:* Citrano v. Allen Correctional Center

A year later in *Citrano v. Allen Correctional Center*,[211] the U.S. District Court for the Western District of Louisiana disagreed with the reasoning of the court in *Manis v. CCA* and held that private prison officials are entitled to qualified immunity.[212] *Citrano* demonstrates that the court in *Manis v. CCA* failed to apply the proper analysis in determining whether to extend qualified immunity to private prisons, and that the decision reached in *Manis* was wrong.

In *Citrano,* two inmates brought a section 1983 action against a private governmental contractor, Wackenhut Corporation, and several of the private contractor's employees. Wackenhut operated the Allen Correctional Center (ACC) under a contract with the state of Louisiana.[213] The inmates alleged that several prison employees assaulted them and hindered their attempts to seek redress for their injuries. They also alleged that prison officials were deliberately indifferent to their serious medical needs.[214] The court first recognized that the doctrine of qualified immunity was an attempt by the Supreme Court to resolve the tension between a plaintiff's right to compensation when injured by official misconduct and the public interest in the effective performance of certain discretionary governmental functions.[215] The court examined several of the Supreme Court's past qualified immunity decisions and concluded that these decisions extended qualified immunity to new classes of defendants based on the governmental functions the defendants performed.[216] The court concluded that "[t]he determination of whether qualified immunity applies to the personnel at ACC must also turn on an analysis of function and not on their status as private parties versus state employees."[217] The court thus disagreed with *Manis* that the absence of private party immunity at common law was fatal to a private prison's claim of immunity.[218] The court stated that the Supreme Court in *Wyatt* neither

211. 891 F. Supp. 312 (W.D. La. 1995).
212. *Id.* at 316–17.
213. *Id.* at 314–15.
214. *Id.* at 314.
215. *Id.* at 316.
216. *Id.* at 316–18.
217. *Id.* at 316.
218. *Id.* at 318. The *Citrano* court noted:

abandoned its longstanding practice of employing a functional approach nor intended to create a bright line rule that private parties never are entitled to qualified immunity.[219] The court in *Citrano* relied on the fact that the private defendants were performing a governmental function protected by immunity at common law and therefore held that the defendants satisfied the historical test for qualified immunity.[220]

Although the *Manis* court was correct that courts must look to history and must not expand the scope of qualified immunity beyond its historical roots at common law,[221] the *Manis* court misconstrued the proper analysis by basing the extension of qualified immunity on a defendant's status as a public, not private, employee. The Supreme Court has made clear that the doctrine of qualified immunity does not depend on a defendant's status as a public official but on the particular governmental function the defendant is required to perform.[222] The primary justification for the doctrine of qualified immunity is that it serves to safeguard the government's ability to perform vital discretionary functions. Given this justification, whether the defendant in a section 1983 action is a public official or a private party should not matter as long as the defendant was performing a governmental function, and the performance of that function is important enough to merit qualified immunity.[223]

> The significance of a lack of evidence that the common law ever extended qualified immunity to private citizens is questionable. . . . It is apparent that the common law determined questions regarding immunities based on a functional approach rather than blindly distinguishing between private parties and government employees. Accordingly, immunities were extended to witnesses, jurors, and arbitrators based on the function they served and the rationales underlying the grant of immunity.

Id.

219. *Id.*

220. *Id.* at 317 (stating defendants "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").

221. *See* Manis v. Corrections Corp. of Am., 859 F. Supp. 302, 314 (M.D. Tenn. 1994).

222. *See supra* text accompanying notes 47–68.

223. The *Citrano* court stated:

> Ordinarily those performing these official functions will be public officials, but this court has found no evidence that the common law would have denied this protection to the functional equivalent of a public official merely because he was an employee of a government contractor versus a direct employee of the government.

Citrano, 891 F. Supp. at 318.

The court in *Citrano* also concluded that public policy supports the extension of qualified immunity to private prisons.[224] Reviewing the policy rationales for qualified immunity, the court stated:

> Litigation costs money and diverts public servants' energy from their public responsibilities. The threat of liability serves as a deterrent factor to those considering public service. There is also the danger that fear of litigation will "dampen the ardor of all but the most resolute, or the most responsible public officials, in the unflinching discharge of their duties."[225]

The court concluded that the repeated litigation of section 1983 claims against private contractors and their employees would create the same social costs that occur when state-operated prisons are sued.[226] Litigation costs would be passed on indirectly to the state and the threat of litigation would deter private contractors when they consider whether to contract with the state as well as qualified individuals who might otherwise seek employment with a private contractor. The threat of litigation would have no less of a dampening effect on the employees of a private contractor in the discharge of their duties than it does on public officials. In short, a private contractor performs the same public function as a state-operated prison and the public interest similarly would benefit if the private contractor is allowed to perform that function free from threats of unnecessary litigation.[227]

Once again, the reasoning of *Citrano* demonstrates that the *Manis* court's analysis is flawed. The *Manis* court argued that the extension of qualified immunity to private prisons is unwarranted because "corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public."[228] This statement in itself may be a dubious assertion given that private contractors must fulfill the state's expectations in order to maintain their contracts. Moreover, the significance of the statement is questionable. Qualified immunity is not based on the fact that public officials are subjectively motivated by a genuine desire to serve the public's

224. *Id.* at 317.
225. *Id.* (citation omitted).
226. *Id.*
227. *Id.*
228. Manis v. Corrections Corp. of Am., 859 F. Supp. 302, 305 (M.D. Tenn. 1994).

best interests. Rather, qualified immunity is based on the assumption that the public interest will be best served if those who are required to perform governmental functions are allowed to do so without the threat of unnecessary lawsuits distracting them.[229] The test is not whether qualified immunity serves a defendant's private interests—which it does even when extended to public officials—but whether the extension of qualified immunity benefits the public interest. Extending qualified immunity to employees of private prisons benefits the public interest just as it does when extended to state prison employees: It aids in the effective and efficient performance of an important governmental function, preserves discretion of the officials, and prevents the deterrence of qualified individuals from accepting government service. Moreover, the extension of qualified immunity reduces the costs of incarcerating inmates and thus reduces the cost to the public of financing private prisons. As long as qualified immunity benefits the public in these ways, the fact that it also benefits the financial interests of private defendants is irrelevant.

Furthermore, the possibility that qualified immunity might inure to the financial benefit of private defendants should cause little concern. The court in *Manis* argued that the conflict of interest posed by a private prison's for-profit status would encourage private prison officials to "skimp" on enforcing inmates' rights when it would benefit the corporation.[230] As the court in *Citrano* correctly noted, however, private prison officials would encounter great difficulty if they did in fact attempt to "skimp" on the enforcement of inmates' rights.[231] First, qualified immunity provides protection from liability only when an objectively reasonable official could have believed that what he did was lawful in light of clearly established law.[232] Punishing an official for conduct that he could not have reasonably known to have been improper can provide little additional deterrent value.[233] Given the limited na-

229. *See* Wyatt v. Cole, 504 U.S. 158, 167 (1992) (stating that qualified immunity has been recognized for those who perform governmental functions "where it was necessary to preserve their ability to serve the public good").

230. *Manis*, 859 F. Supp. at 305.

231. Citrano v. Allen Correctional Ctr., 891 F. Supp. 312, 319–20 (W.D. La. 1995).

232. *See supra* note 11; *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) (stating that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

233. *See* Jones v. Preuit & Mauldin, 851 F.2d 1321, 1325 (11th Cir. 1988) (stating that

ture of immunity, it would be difficult for an official to profit from repeated constitutional violations.[234] Officials who knowingly and purposefully violate the Constitution to increase corporate profits will not enjoy the protection of qualified immunity. The *Manis* court concluded otherwise without demonstrating how officials could accomplish the difficult task of squeezing profits from the violation of inmates' rights while at the same time remaining immune from liability for damages under section 1983.[235]

Second, mechanisms other than litigation exist to ensure that private prison officials do not violate the rights of inmates.[236] State enabling legislation often sets forth strict contractual provisions that must be contained in every contract with a private contractor. These provisions contain standards and criteria against which a private contractor's performance is measured.[237] Cost

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"[n]o additional deterrence can be achieved by punishing individuals who could not reasonably have known that their actions were improper").

234. *Citrano* stated:

> Further, squeezing profits out of violations of constitutional rights would be a tricky path to navigate at best. Qualified immunity does not allow the clever or unusually well-informed violator of constitutional rights to evade liability. . . . Qualified immunity does not open a window of opportunity for the exploitation of constitutional rights. This court fails to see any significant danger that the grant of qualified immunity in this case will serve as a disincentive to compliance with the Constitution.

Citrano, 891 F. Supp. at 319–20.

235. The *Citrano* court also noted:

> Nor is it clear how profits and "skimping" on civil rights are related. *Manis* does not articulate how a corporation might reasonably expect to materially increase profits through civil rights violations. Even if it is assumed that expenses can be reduced by "skimping" on civil rights, government is no doubt also motivated to cut costs.

Id. at 319.

236. The Supreme Court has stated that liability under § 1983 is not always necessary to ensure that public officials do not violate citizens' civil rights because alternative safeguards exist. For example, in Imbler v. Pachtman, 424 U.S. 409 (1976), the Supreme Court stated that the extension of absolute immunity to prosecutors "does not leave the public powerless to deter misconduct or to punish that which occurs." *Id.* at 429. The Court noted that other "checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.* The Court pointed to existing liability for willful criminal acts and the availability of professional discipline by the state bar to deter prosecutorial misconduct. *Id.*

237. *See, e.g.*, FLA. STAT. ANN. §§ 957.04(1)(d), 957.07, 957.11 (West Supp. 1995); N.M. STAT. ANN. § 33–1–17(c)(1) (Michie 1990); TENN. CODE. ANN. §§ 41–24–105(d), (e) (Supp. 1995); TEX. LOCAL GOV'T CODE ANN. §§ 361.062(1), (8) (West 1996). Private prisons are often, if not always, required to meet the demanding national accreditation standards of the American Correctional Association. *See* Thomas & Logan, *supra* note 5, at 238 n.9.

and quality standards enhance the accountability of private contractors, often creating greater accountability than that in state prisons.[238] The quality of care in private facilities is often higher as well.[239] Contract provisions also remove private prison personnel from all decisions directly implicating inmate release and parole eligibility,[240] sentence credits,[241] furlough and work releases,[242] and disciplinary action.[243] Most contracts allow states to impose financial sanctions[244] or even cancel a contract and take control of a facility if a private contractor fails to meet the state's requirements.[245] Private contractors are not free to maximize profits without considering that the interests of the corporation and its shareholders are best served by meeting the state's expectations.[246]

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238. Two commentators have stated:

> The true structure of traditional government-managed departments of corrections is radically different from what the critics seem to imagine. Multiple layers of unelected government officials commonly exist between elected officials in the executive and legislative branches of government and those who actually deliver correctional services. When inefficiency or ineffectiveness does exist, it is exceedingly difficult to detect and . . . it is substantially more difficult to place responsibility directly at the feet of those who are elected. . . .
>
> The irony, of course, is that one of the most obvious advantages of contracting is that it significantly enhances accountability and control.

Thomas & Logan, *supra* note 5, at 232.

239. Studies have compared responses from inmates in public and private facilities regarding their assessment of certain areas of care, including conditions of confinement, programs and services, disciplinary procedures, grievance mechanisms, access to legal assistance, release procedures, and relations with visitors. In these studies, inmates usually rated private facilities equal to or higher than state facilities in the various areas of comparison. *See id.* at 226–29.

240. *See, e.g.*, ARK. CODE ANN. § 12–50–108(1) (Michie 1995); FLA. STAT. ANN. § 957.06(5) (West Supp. 1995); TENN. CODE ANN. § 41–24–110(1) (1990); TEX. GOV'T CODE ANN. § 494.004(1) (West 1990).

241. *See, e.g.*, FLA. STAT. ANN. § 957.06(5) (West Supp. 1995); N.M. STAT. ANN. § 33–3–9(D) (Michie Supp. 1995); TENN. CODE ANN. § 41–24–110(2) (1990); TEX. GOV'T CODE ANN. § 494.004(2) (West 1990).

242. *See, e.g.*, ARK. CODE ANN. § 12–50–108(3) (Michie 1995); FLA. STAT. ANN. § 957.06(6) (West Supp. 1995); TENN. CODE ANN. § 41–24–110(3) (1990); TEX. GOV'T CODE ANN. § 494.004(3) (West 1990).

243. *See, e.g.*, ARK. CODE ANN. § 12–50–108(5) (Michie 1995); FLA. STAT. ANN. § 957.06(3) (West Supp. 1995); TENN. CODE ANN. § 41–24–110(5) (1990).

244. Wayne H. Calabrese, *Low Cost, High Quality, Good Fit: Why Not Privatization, in* PRIVATIZING CORRECTIONAL INSTITUTIONS, *supra* note 3, at 187–89.

245. *See, e.g.*, FLA. STAT. ANN. § 957.14 (West Supp. 1995); N.M. STAT. ANN. § 33–1–17(C)(4), (7) (Michie 1990); TENN. CODE ANN. § 41–24–104(a)(4) (Snpp. 1995).

246. In addition to an interest in profitability, shareholders have an interest in maintaining their stock's value, which conld fall if a private contractor faces scandal, lawsuits or uninsurability due to mismanagement. *See* Thomas & Logan, *supra* note 5, at 233.

Finally, monitoring by state officials and public scrutiny are routine when a private contractor operates a correctional facility.[247] Most states who contract for the private operation of prisons and jails require a state-employed contract monitor to check private contractors' quality of care and to verify compliance with contractual standards.[248] In some cases, the monitor is a full-time employee who works at the private facility.[249] In addition, external observers (such as the media and human rights organizations) provide informal monitoring of private prisons.[250] The level of scrutiny received by a private contractor ordinarily exceeds that received by state-operated prisons.[251] Although monitoring and public scrutiny cannot ensure that private prison officials always will act properly, they do provide a greater incentive to protect prisoners' rights. The court in *Manis* failed to take into account the policing effect of these alternative safeguards.

CONCLUSION

Qualified immunity serves to safeguard the effective performance of important governmental functions. It should not matter whether those functions are performed by governmental employees or private parties. Just as qualified immunity for public officials protects the effective functioning of government by preserving discretion and restricting the social costs of litigation, extending qualified immunity to private contractors operating correctional facilities serves the same purposes. Although qualified immunity inures to the financial benefit of private contractors who are motivated by a desire to make a profit, it also benefits states and ultimately the public. Moreover, there is little risk that private contractors will be able to "skimp" on the enforcement of inmates' rights in order to increase corporate profits. Qualified immunity

247. *See* LOGAN, *supra* note 6, at 206–07.

248. *See, e.g.*, FLA. STAT. ANN. § 957.04(1)(g) (West Supp. 1995) (requiring a full-time monitor to have unlimited access to the private facility); KY. REV. STAT. ANN. § 197.510(28) (Baldwin 1991) (requiring frequent monitoring); N.M. STAT. ANN. § 33–1–17(C)(7) (Michie 1990) (requiring monitoring of compliance); TENN. CODE. ANN. § 41–24–109 (1990) (same). *See also* LOGAN, *supra* note 6, at 206.

249. Calabrese, *supra* note 244, at 184. *See, e.g.*, TEX. GOV'T CODE ANN. § 494.003(c)(1) (West 1990).

250. *See* LOGAN, *supra* note 6, at 207.

251. *See* Calabrese, *supra* note 244, at 184–85; LOGAN, *supra* note 6, at 207; Thomas & Logan, *supra* note 5, at 232.

provides only limited protection from liability under section 1983, and mechanisms other than liability, including strict contract provisions, state monitoring, and public scrutiny, operate to ensure that the civil rights of inmates are protected.