NOTE

RETHINKING PRISONER LITIGATION: SHIFTING FROM QUALIFIED IMMUNITY TO A GOOD FAITH DEFENSE IN § 1983 PRISONER LAWSUITS

*Stephen W. Miller**

INTRODUCTION

The vindication of constitutional and federal statutory rights is a significant source of litigation in federal courts. Section 1983 of Title 42[1] of the United States Code provides an avenue of redress for citizens whose constitutional or federal statutory rights have been violated under color of state law.[2] Section 1983 has been used to enforce such rights, especially by plaintiffs who otherwise might not have the ability to seek effective redress.[3] Prisoners constitute one such class of

* Candidate for Juris Doctor, Notre Dame Law School, 2009; B.A., Political Science, University of Notre Dame, 2006. Thanks to Professor Jennifer Mason McAward for providing the idea for this Note, and to the members of the *Notre Dame Law Review* for their tireless work and helpful suggestions. Finally, thanks to my family, especially to my fiancée, Nadia, for all your love and support.

1 42 U.S.C. § 1983 (2000). This section provides that:

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

Id.

2 *See* Monroe v. Pape, 365 U.S. 167, 180 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 216 (1871)), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

3 *See, e.g.*, *infra* notes 19–23 and accompanying text.

plaintiffs,[4] as most of their interactions with prison officials involve action under color of state law.[5]

The current state of prisoner § 1983 litigation is marked by inconsistency. A prisoner whose constitutional or statutory rights have been violated by prison officials faces significant challenges to even have her grievances heard in court as new laws require that a prisoner exhaust all administrative procedures before filing her suit.[6] Assuming the prisoner meets the requirements, her suit will progress differently depending upon whom she sues. If the defendant is a state prison official, he may be allowed to assert qualified immunity, thus diminishing the prisoner's chance of successfully achieving redress.[7] If the defendant is a privately employed guard, however, he is not allowed to assert qualified immunity, but may be able to assert some form of good faith defense.[8] Under this current regime, both prisoners and prison guards are treated unjustly.

Adding to the mix is the argument that the federal courts have been inundated with mostly frivolous prisoner lawsuits. While some allege the use of excessive force by guards, others allege the denial of their constitutional right to a certain kind of peanut butter.[9] Given the characterization of the frivolous nature of the latter and the perception that the majority of prisoner suits fit that mold,[10] prisoner suits have become a convenient target for those seeking to limit access

---

4 *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 425 (1993).

5 *See infra* Part I.B.

6 *See* 42 U.S.C. § 1997e(a) (2000).

7 *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978).

8 *See* Richardson v. McKnight, 521 U.S. 399, 413 (1997). Though the Court in *Richardson* did not reach this precise question, both the majority and the dissent assumed that private prison guards are amenable to suit under § 1983.

9 Though the "Peanut Butter Case" is a frequently cited example of frivolous prisoner lawsuits, the case may not have been as utterly frivolous as it has been made out to be:

> In the "chunky peanut butter" case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account $2.50 under the following circumstances. He had ordered two jars of peanut butter; one sent by the canteen was the wrong kind, and a guard had quite willingly taken back the wrong product and assured the prisoner that the item he had ordered and paid for would be sent the next day. Unfortunately, the authorities transferred the prisoner that night to another prison, and his prison account remained charged $2.50 for the item that he had ordered but had never received.

Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996).

10 *See id.* at 520–22.

to the federal courts under § 1983. When the Prison Litigation Reform Act (PLRA) of 1995[11] was passed in 1996,[12] the prevailing thought was that prisoner litigation would be curtailed significantly.[13] Congress passed the Act in response to the increasing number of prisoner lawsuits being filed and their perceived collective frivolity.[14] An initial examination of the Act's effects seemed to indicate that it had been successful in decreasing the number of prisoner suits.[15] However, it is unclear whether this represents only a decrease in the amount of frivolous prisoner suits, or whether the decrease has also managed to keep legitimate claims out of federal court.[16]

Although § 1983 prisoner litigation currently suffers from several deficiencies that threaten to undermine the just result § 1983 seeks, this Note does not advocate for a complete overhaul of the system. Rather, it hopes to resolve one of the most glaring flaws in the current system—the varying defenses afforded to private and public prison guards. This Note proposes that courts abandon the doctrine of qualified immunity and replace it with a good faith defense in the prisoner litigation context. Such a shift would make it easier for prisoners with meritorious claims to have their cases heard. Further, it would introduce a measure of consistency and fairness with respect to prison guard defendants in § 1983 lawsuits. This may be palatable to those afraid of federal court inundation as the flooded courtroom concern—a concern that helped justify the use of qualified immunity—has been somewhat alleviated by the PLRA. Moreover, such a shift

11 Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1366–77 (1996) (codified in scattered sections of 11, 18, 28, 42 U.S.C.).

12 Though named the Prison Litigation Reform Act of 1995, the Act was not passed until 1996. For purposes of this Note, I will refer to the date included in the title of the Act.

13 *See* MARGO SCHLANGER & GIOVANNA SHAY, PRESERVING THE RULE OF LAW IN AMERICA'S PRISONS: THE CASE FOR AMENDING THE PRISON LITIGATION REFORM ACT 1–2 (2007), http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf.

14 *See* James B. Jacobs, *Prison Reform Amid the Ruins of Prisoners' Rights*, *in* THE FUTURE OF IMPRISONMENT 179, 185 (Michael Tonry ed., 2004) (calling the PLRA "[t]he most profound blow to the prisoners' rights movement," and stating that it was "the political branches' effort[] to prevent the judiciary from recognizing and enforcing prisoners' rights" by seeking "to deter prisoners from filing federal lawsuits"); *see also* Cindy Chen, Note, *The Prisoner Litigation Reform Act of 1995: Doing Away with More Than Just Crunchy Peanut Butter*, 78 ST. JOHN'S L. REV. 203, 209–14 (2004) (arguing that the PLRA was intended to curb the filing of prisoner lawsuits and has had the effect of eroding prisoners' rights).

15 *See* Brian J. Ostrom et al., *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1526 (2003).

16 *See* SCHLANGER & SHAY, *supra* note 13, at 2.

would further the important principles underlying § 1983 by removing the obstacles facing prisoners who allege violations of their constitutional or federal statutory rights.

In Part I, this Note discusses the history and purposes of § 1983 litigation and the immunities and defenses available to defendants. This Part lays the foundation upon which the remainder of the Note will rely, specifically that the purposes of § 1983 dictate a reassessment of the current prisoner litigation regime. Part II provides an overview of the PLRA and reveals how its preliminary effects on prisoner litigation make it possible, in light of both the reasons for its passage and the purposes of § 1983, to make the shift from qualified immunity to a good faith defense. Finally, Part III examines the operation of § 1983 and the doctrine of qualified immunity with regard to prisoner litigation by performing a functional analysis on two Supreme Court cases: *Procunier v. Navarette*[17] and *Richardson v. McKnight*.[18] This Part argues that there is no meaningful distinction between public and private prison guards and, as such, both should be treated similarly with regard to § 1983 litigation. Ultimately, this Part concludes that while both sets of guards should be amenable to suit under § 1983, neither should be entitled to qualified immunity in its current form.

I. SECTION 1983 LITIGATION: HISTORY, PURPOSES, REQUIREMENTS, AND DEFENSES

What is now 42 U.S.C. § 1983 was first passed as part of Section 1 of the Ku Klux Klan (Civil Rights) Act of 1871.[19] Though the statute remained largely unutilized for nearly its first hundred years of existence, the Supreme Court in *Monroe v. Pape*[20] breathed life into § 1983, acknowledging that the statute provided a cause of action for the vindication of federal statutory and constitutional rights.[21] Congress enacted the statute in the wake of the Civil War largely due to

17 434 U.S. 555 (1978).

18 521 U.S. 399 (1997).

19 Ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2000)).

20 365 U.S. 167 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

21 *See id.* at 180 ("[T]he legislation was passed . . . to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."). *Monell* overruled the second holding in *Monroe*, which stated that the City of Chicago could not be held liable in a § 1983 action. *Monell*, 436 U.S. at 690. *Monell* thus broadened the scope of potential defendants in a § 1983 suit to include municipalities. *Id.*

conditions in the southern states where state laws protecting individual rights were not enforced equally with regard to former slaves.[22] According to the Court, § 1983 targets the "'[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[23] The remainder of this Part delves into the purposes and mechanics of a § 1983 suit. Subpart A discusses the purposes of litigation under § 1983. This subpart also sets forth the mechanics of a § 1983 suit by setting forth the statute's requirements. Subpart B describes the various immunities (absolute and qualified), and defenses (good faith) associated with § 1983 suits, and introduces some of the conflict involved with their application.

A. Purposes and Requirements of a § 1983 Suit

The general purposes underlying § 1983 litigation are deterring officials from using their positions to deprive individuals of their rights protected by the Constitution or federal statutes,[24] and providing victims of such deprivations with a remedy in federal court.[25] While the drafters of the statute clearly had the plight of former slaves close to mind,[26] the statute provides a federal cause of action for *any* person who has been deprived of her federally protected rights by a defendant acting under color of state law.[27] The fact that it provides a federal cause of action is significant, especially from a historical point of view, because the statute interposes (theoretically) a more neutral

22 *See Monroe*, 365 U.S. at 183.

23 *See id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). In addition to essentially resurrecting § 1983 litigation, the *Monroe* decision also stood for the proposition that a defendant in a § 1983 suit could be someone acting under color of state law and engaging in unauthorized misconduct. Previously, liability was limited to government officials acting within the scope of their authority. *See* The Civil Rights Cases, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority . . . .").

24 *See* Scheuer v. Rhodes, 416 U.S. 232, 243 (1974) (citing *Monroe*, 365 U.S. at 171–72).

25 *See* Carey v. Piphus, 435 U.S. 247, 254–57 (1978). Put differently, § 1983 is meant to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citing *Carey*, 435 U.S. at 254–57 (1978)).

26 For an extensive analysis of the legislative history behind § 1983, see Justice Douglas' majority opinion in *Monroe*, 365 U.S. at 172–87.

27 42 U.S.C. § 1983 (2000). The statute provides an avenue for the redress of injuries that likely occurred only because the defendant was cloaked with the state's authority. *See Monroe*, 365 U.S. at 183.

arbiter in these cases where the defendant is, in some manner, a representative of the state.[28]

To sufficiently make out a § 1983 claim, a plaintiff must first be able to show that she has been deprived of some right protected by the Constitution or federal law.[29] Second, the plaintiff must show that the alleged deprivation occurred under color of law, meaning that the defendant acted either (1) with the power of the state behind him, or (2) with the apparent power of the state behind him.[30] Regardless of the identity or legal status of the named defendant in a § 1983 case, the plaintiff must demonstrate that the person acted under color of a state "statute, ordinance, regulation, custom, or usage."[31]

Significantly, the second showing does not require that the defendant acted in an official capacity on behalf of the state. According to the Supreme Court, in certain circumstances, private parties can act under color of law.[32] However, private parties simply following a law,

28 One of the supporting reasons the statute's proponents put forth was that state courts were unable or unwilling to enforce their own laws, especially with respect to the former slaves. *See Monroe*, 365 U.S. at 176 ("'That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing . . . is a sufficient reason why Congress should . . . enact the laws necessary for the protection of citizens of the United States.'" (quoting CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871) (statement of Sen. Osborn))). Given the provision of this federal cause of action, it follows that a prospective § 1983 plaintiff may be more likely to pursue her claim in a forum where she feels she has a better chance for redressing her injury.

29 42 U.S.C. § 1983. While as a matter of pleading, it would seem that simply alleging a deprivation of a constitutionally protected right is sufficient for § 1983 purposes, it is important in current qualified immunity jurisprudence whether or not the right was clearly established at the time of the alleged deprivation. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

30 *See* United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment.").

31 42 U.S.C. § 1983.

32 *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 939–41 (1982); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); *see also* Sheila M. Lombardi, Note, *Media in the Spotlight: Private Parties Liable for Violating the Fourth Amendment*, 6 ROGER WILLIAMS U. L. REV. 393 (2000) (presenting a collection of conflicting cases detailing under which circumstances a private person, namely a member of the media, may be acting under color of law while on a police "ride-along" program). In *Lugar*, the Court cited four instances in which the Supreme Court had held that private actors could be said to act under color of law: (1) where the private actor engages in an activity that was traditionally an exclusively public function; (2) where there was state compulsion on the private actor; (3) the "nexus" test; and (4) where there is joint action between the private actor and the state. *Lugar*, 457 U.S. at 939.

without "something more," do not act under color of law.[33] In any case, the court will engage in an intensely fact-specific analysis as to whether the private party's action was sufficiently transformed into state action for purposes of a § 1983 suit.[34] If it finds that someone acting under color of state law deprived the plaintiff of a constitutional or federal right, the court must then analyze what immunities or defenses are available to the defendant.

B. Immunities and Defenses to § 1983 Suits

Despite the fact that § 1983 fails to mention any defenses in its text,[35] the Supreme Court has consistently allowed for some form of immunity to be asserted if the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'"[36] As a general matter, a § 1983 defendant today can assert immunity if someone similarly situated when the 1871 Act was passed would have been able to assert immunity and if policy concerns dictate continuing the immunity.[37] Thus, possible immunities and defenses to a § 1983 suit vary depending on the defendant's status or position.

1. Absolute Immunity

Traditionally, absolute immunity from civil damages has been accorded to legislators,[38] judges,[39] and prosecutors[40] so long as they

33 *See Lugar*, 457 U.S. at 939.

34 *See id.*

35 *See* Imbler v. Pachtman, 424 U.S. 409, 417 (1976) ("[Section 1983] creates a species of tort liability that on its face admits of no immunities . . . .").

36 Owen v. City of Independence, 445 U.S. 622, 637 (1980) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)); *see also* Wyatt v. Cole, 504 U.S. 158, 163–64 (1992) ("If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U.S.C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law.").

37 *See Wyatt*, 504 U.S. at 164; City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259 (1981) (illustrating the conflicting policies of § 1983 and immunity, 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 immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983").

38 *See* Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (recognizing absolute immunity for legislators).

39 *See* Forrester v. White, 484 U.S. 219, 227 (1988) (recognizing absolute immunity for judges).

were performing what the Court determined to be "core" functions of their positions.[41] The Supreme Court has usually justified the recognition of absolute immunity in terms of public policy. For example, in *Tenney v. Brandhove*,[42] 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. One must not expect uncommon courage even in legislators."[43]

Absolute immunity stems from the Court's belief that certain public positions require such important discretionary functions that those who occupy them should be allowed to discharge their duties without fearing that their decisions, which may turn out to be wrong or harmful, could subject them to a future lawsuit.[44] Without the immunity, legislators, judges, and prosecutors may perform their jobs too timidly to be effective. Moreover, the Court has worried that qualified people may be dissuaded from seeking out these and other public service positions due to fear of civil liability.[45] For the abovementioned classes of possible defendants, courts have concluded that these concerns outweigh the purposes and policies underlying § 1983. However, mindful that granting absolute immunity for any potential defendant based on these concerns would make § 1983 an empty shell, the courts have limited the application of absolute immunity to these narrow classes of defendants.

---

40 *See, e.g.*, Burns v. Reed, 500 U.S. 478, 493 (1991) (recognizing absolute immunity for prosecutors for acts "'intimately associated with the judicial phase of the criminal process'" (quoting *Imbler*, 424 U.S. at 430)).

41 *See* Robert G. Schaffer, Note, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1058 (1996).

42 341 U.S. 367 (1951).

43 *Id.* at 377.

44 *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976). *Imbler* provided that:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

Id. (footnote omitted).

45 *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 320 (1975) (stating, in the context of recognizing qualified immunity for school board members, that "[t]he most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure").

2. Qualified Immunity

Qualified immunity, like absolute immunity, provides protection for those acting under color of state law from civil liability, though it does not function as a total bar to suit. The Court has generally afforded this kind of immunity to government officers whose duties include the exercise of significant discretion.[46] Among those who have been granted qualified immunity are police officers,[47] state prison guards,[48] school board members,[49] and FBI agents,[50] to name a few.

Early decisions involving qualified immunity, such as *Scheuer v. Rhodes*,[51] relied on both the subjective good faith of the actor and an objective standard of reasonableness.[52] The *Scheuer* Court set forth the following reasons justifying the grant of qualified immunity to the governor and state officials in Ohio who were sued as a result of their roles in the 1971 Kent State shooting:

> (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.[53]

These are fair justifications, and under the *Scheuer* formulation, a balance was struck between the policies underlying § 1983 and public policy—specifically, that those who are deprived of their rights by someone acting under color of law would have a method for redress, and the interests of those acting for the public in being free from civil liability where (1) the officer had a good faith belief that his actions were constitutional, and (2) there were reasonable grounds for the belief.

---

46 *See* Schaffer, *supra* note 41, at 1058 (citing the "important governmental function that the official is required to perform" as the reason for the grant of immunity, not as a "reward for holding public office or any sympathy that the courts have for governmental officials").

47 *See* Pierson v. Ray, 386 U.S. 547, 556–57 (1967).

48 *See* Procunier v. Navarette, 434 U.S. 555, 561–62 (1978).

49 *See Wood*, 420 U.S. at 321.

50 *See* Anderson v. Creighton, 483 U.S. 635, 638–41 (1987).

51 416 U.S. 232 (1974).

52 *See id.* at 247–48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity . . . .").

53 *Id.* at 240 (emphasis added).

The Court altered its test for qualified immunity, however, in *Harlow v. Fitzgerald*.[54] Here, the Court eliminated the subjective element of the test.[55] Now, when assessing whether qualified immunity is appropriate in a § 1983 claim, the Court will analyze whether the actor's conduct violated a clearly established right, and whether a reasonable person in the actor's position would have known of that right.[56] So long as the official did not violate a clearly established right of which he should have known, the official enjoys qualified immunity. The change to the qualified immunity standard was deliberate, reflecting the Court's attempt to fix the flaws found in the *Scheuer* test. According to *Harlow*, the new requirement that a right be clearly established stemmed from the judgment that officials should not be forced to anticipate the development of constitutional law.[57] The Court also stated that the public good would be better served if an official facing a decision, the consequences of which could deprive a person of his or her constitutional or statutory rights, acted independently and "'without fear of consequences.'"[58]

The subjective element of the test was rejected, it seems, largely out of a desire to limit litigation costs and disruption of government functions, as it is difficult and time consuming to confirm the subjective motivations of an actor.[59] Under *Harlow*, district courts do not permit discovery until the threshold question of whether a clearly established constitutional or statutory right was violated has been

54 457 U.S. 800 (1982).

55 *See id.* at 818.

56 *See id.* ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). As the test currently stands, this analysis is a rigid two-step process. First, the Court makes an assessment on whether the alleged conduct violated a clearly established right, and only if the answer to that question is "yes" will the Court decide whether a reasonable actor would have known of that right. *See* Saucier v. Katz, 533 U.S. 194, 200–01 (2001). This rigid construction may not be the law for long, however, as the Court in granting certiorari in *Pearson v. Callahan* asked the parties to brief and argue "[w]hether the Court's decision in *Saucier v. Katz* should be overruled?" Pearson v. Callahan, 128 S. Ct. 1702, 1702–03 (2008) (citation omitted).

57 *See Harlow*, 457 U.S. at 818–19.

58 *Id.* at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).

59 *See id.* at 816–17 (discussing the costs of subjective inquiries, and stating that "[j]udicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government" (footnote omitted)).

answered.[60] The Court's rationale for eliminating the subjective analysis and prohibiting discovery until the threshold question is answered was that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[61] As is discussed in Part II, this concern has arguably been addressed through other developments in prisoner litigation.

In its current form, qualified immunity is available to state officials in positions where the exercise of discretion is an integral part of the position. Ultimately, under the current test, a defendant is entitled to qualified immunity if he did not violate a clearly established constitutional or federal statutory right of which he reasonably should have known.

3. A Good Faith Defense

The question that has caused some confusion regards whether a private actor, who may be acting under color of state law for purposes of § 1983, is entitled to assert the same qualified immunity defense as his state-employed counterpart. The Supreme Court twice has held that private actors, though acting under color of state law for purposes of § 1983, are unable to assert qualified immunity.[62] The Court in *Wyatt v. Cole*[63] reasoned that qualified immunity is actually meant to protect the public through its protection of the government, even though the government's agents receive the benefit of not being held liable for damages in a § 1983 suit.[64] At the close of the majority's opinion in *Richardson v. McKnight*, however, the Court left open the possibility of a good faith defense for private actors in a § 1983 suit.[65]

This suggested good faith defense stemmed from earlier incarnations of qualified immunity that analyzed the subjective intent of the defendant in determining whether the immunity was granted in a

60 *Id.* at 818–19. For a closer examination of how the Harlow standard has been applied, see Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 142–49 (2007).

61 *Harlow*, 457 U.S. at 817–18.

62 Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that there is no qualified immunity for prison guards working in a privately run prison); Wyatt v. Cole, 504 U.S. 158, 168–69 (1992) (holding that there is no qualified immunity for private persons who invoked a state replevin, garnishment, or attachment statute); *see infra* Part III.B.

63 504 U.S. 158 (1992).

64 *Id.* at 167–68.

65 521 U.S. at 413–14.

given case.[66] In his dissent in *Procunier v. Navarette*, Justice Stevens shaped a good faith standard such that the official would sacrifice his qualified immunity[67] if he knew or should have known that his official conduct would violate the plaintiff's constitutional rights, or if the official acted with malice or with intent to cause injury.[68] Unhelpfully, the Supreme Court has not yet ruled on whether this kind of affirmative defense would be available for a private actor sued under § 1983 in lieu of qualified immunity.

If it were met with approval, there are a number of ways in which a good faith defense could operate. As an initial matter, the good faith defense would protect those private individuals who acted with the reasonable belief that their actions were legal, and whose actions were neither motivated by malice nor an intent to injure. The next question is on whom the burden of proof would rest, and on this question, the courts are conflicted.[69] Dicta in *Harlow* provides guidance for how the Supreme Court might answer this question—namely, placing the burden on the plaintiff so as to avoid the situation where "bare allegations of malice" would be enough to subject a defendant to the costs of discovery and trial.[70] This stance, however, can operate unjustly, as there is obvious difficulty in proving a negative. Specifically, requiring the plaintiff to prove that the defendant did not act in good faith is quite problematic because the defendant is the ultimate repository of truth on that question.[71] The better solution could be an affirmative good faith defense, which would place the burden on the defendant to set forth the reasons for his actions.[72]

As of yet, a good faith defense for private actors in § 1983 suits, though discussed, has not been approved explicitly by the Supreme Court. The Court should approve of the defense for these actors as a matter of fairness. If these actors can be held liable under § 1983,

66 *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974).

67 As *Procunier* was decided before *Harlow*, the subjective intent and good faith of the official were still relevant to Justice Stevens' discussion of qualified immunity. *See* Procunier v. Navarette, 434 U.S. 555, 568–74 (1978) (Stevens, J., dissenting).

68 *See id.* at 571.

69 *See generally* Mark N. Ohrenberger, Note, *Prison Privatization and the Development of "Good Faith" Defense for Private-Party Defendants to 42 U.S.C. § 1983 Actions*, 13 WM. & MARY BILL RTS. J. 1035, 1047–54 (2005) (discussing the various ways courts have assigned the burden of proof for a good faith defense in § 1983 suits).

70 *See* Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

71 Furthermore, assuming the defendant did act in good faith, requiring him to set forth such supporting facts does not seem too onerous as to weigh against placing the burden on the defendant. Also, for a discussion on the power of the district courts to dismiss meritless prisoner lawsuits, see Part II, *infra*.

72 The affirmative defense approach is suggested in Part III.D *infra*.

they should be able to assert a defense similar to state actors sued under § 1983. The question remains, however, whether the current set of immunities, even with a good faith defense for private actors, is the best paradigm for § 1983 prisoner litigation.

II. The Prison Litigation Reform Act and its Effect on Prisoner Litigation

Congress enacted the PLRA in an attempt to limit the amount of supposedly frivolous prisoner lawsuits being brought in federal court.[73] While the PLRA has certainly achieved its primary purpose, it also has erected significant obstacles for prisoners filing meritorious claims.[74] The immediately observable effects of the Act seem to show that it has succeeded in decreasing the number of prisoner suits brought under § 1983.[75] Subpart A gives a brief overview of the new wrinkles the PLRA has added to prisoner litigation. These changes include new requirements on prisoners, such as filing fees for indigent prisoners and administrative remedy exhaustion, while also giving the district courts greater flexibility in their power to dismiss suits. Subpart B discusses how the effects of the Act, namely a decreased prisoner litigation docket, may make it more palatable for courts to replace qualified immunity with a good faith affirmative defense.

A. Requirements of the PLRA

The PLRA imposes a number of requirements on prisoners by way of six filing provisions.[76] These provisions all complicate a prisoner's attempt to file a suit. For purposes of this Note, the four appli-

73 *See* Schlanger & Shay, *supra* note 13, at 1.

74 *See id.* at 1–2 (arguing that the PLRA is "undermining the rule of law in America's prisons," and that it is "'prevent[ing] inmates from raising legitimate claims'" (alteration in original) (quoting 141 Cong. Rec. S14,627 (daily ed. Sept. 29, 1995) (statement of Sen. Hatch))); *see also* Ann H. Mathews, Note, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. Rev. 536, 546–47 (2002) ("Though the PLRA purportedly prevents only frivolous claims from being heard by federal courts, the Act actually creates serious obstacles to all prisoner claims . . . ." (foonote omitted)). This Part does not endeavor to assess all of the elements of the PLRA, nor does it argue the constitutionality of the Act. What this Part does is introduce some of the Act's basic elements and discuss how the effects of the Act as observed thus far have, as a practical matter, changed the landscape of prisoner litigation, making more palatable the introduction of a good faith affirmative defense standard to prisoner § 1983 litigation.

75 *See, e.g.*, Ostrom et al., *supra* note 15, at 1537 ("[T]he most obvious change [following the passage of the Act], of course, has been the rapid and precipitous decline in the volume of prisoner litigation.").

76 *See* Mathews, *supra* note 74, at 547–48.

cable provisions will be discussed. First, indigent prisoners are required to pay filing fees.[77] Second, the trial court "may dismiss a prisoner's claim sua sponte if the court determines that . . . the action is frivolous, malicious, or fails to state a claim."[78] Third, what is known as the "three strikes" rule prohibits a prisoner who has had three actions dismissed under the second filing provision from proceeding in forma pauperis without demonstrating he or she is in "imminent danger of serious physical injury."[79] Most onerously, the fourth provision requires a prisoner wishing to bring suit with regard to prison conditions to exhaust the administrative remedies available in his prison before filing suit.[80] This provision is quite serious, as the Supreme Court has held that the PLRA bars "even meritorious claims from court if an inmate has failed to comply with all of the many technical requirements of the prison or jail grievance system."[81] In the twelve years since the passage of the PLRA, these provisions have had a significant effect on prisoner litigation.

B. Preliminary Effects of the PLRA on Prisoner Litigation

Since the PLRA was passed, the number of prisoner lawsuits filed in federal court has decreased substantially.[82] For example, inmate suits filed in 2005 numbered eleven per thousand inmates, compared with the twenty-six suits per thousand inmates in 1995, immediately preceding the passage of the PLRA.[83] This can mean any number of things, but a few of the possibilities are worth discussing. First, this

77 28 U.S.C. § 1915(b)(1) (2006).

78 Mathews, *supra* note 74, at 548 (citing 42 U.S.C. § 1997e(c)(1) (2000)).

79 28 U.S.C. § 1915(g) (2006).

80 42 U.S.C. § 1997e(a) (2000). This exhaustion requirement may be the most controversial of the filing provisions and has been attacked by various groups and authors. *See, e.g.*, Stop Prisoner Rape, SPR Fact Sheet: The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention (Oct. 2007), http://www.spr.org/en/factsheets/Prison%20Litigation%20Reform%20Act.pdf (discussing how the exhaustion requirement "has prevented scores of prisoner rape survivors from seeking redress"); *see also* SCHLANGER & SHAY, *supra* note 13, at 3 ("[T]he PLRA's provision barring federal lawsuits by inmate plaintiffs who have failed to comply with their prisons' internal grievance procedures—no matter how onerous, futile, or dangerous such compliance might be for them. This obstructs rather than incentivizes constitutional oversight of prison conditions.").

81 SCHLANGER & SHAY, *supra* note 13, at 8 (citing Woodford v. Ngo, 126 S. Ct. 2378 (2006)).

82 *See* Ostrom et al., *supra* note 15, at 1541–44.

83 *See* Schlanger & Shay, *supra* note 13, at 2 (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 131 tbl.C-2A (1997), *available at* http://www.uscourts.gov/judicial_business/c2asep97.pdf; ADMIN OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 166 tbl.C-2A (2006)).

could mean that the decrease was largely in frivolous suits that would have been filed, in which case the PLRA is having its intended effect. If this is the case, that means that the cases that do get filed are likely meritorious, which in turn creates a greater impetus for protecting the ability of those inmates who file such suits to have their cases heard. Another possibility is that the decrease represents both frivolous and meritorious claims that were not filed because of the onerous requirements of the Act. If this is the case, the PLRA is having a broader, detrimental effect on prisoner litigation.[84]

One way to ensure that the inmates who file meritorious suits are given a chance for redress is to replace qualified immunity with a good faith affirmative defense. From a practical standpoint, this is a feasible proposition, as the decrease in prisoner suits should free up the courts to deal more comprehensively with the suits that are filed. Combining this decrease in cases filed with the ability of the district courts to dismiss sua sponte claims that appear frivolous, malicious, or meritless,[85] the courts should, in light of the purposes of § 1983,[86] discard qualified immunity in prisoner § 1983 litigation in favor of a good faith affirmative defense. Doing so will enable prisoners with meritorious claims to get past summary judgment and have their issues heard in court. This will help provide an effective constitutional check on the prison system and its officers.

The benefits of this switch to a good faith defense would not run solely to prisoners. A good faith defense aims to protect those who are not at fault, regardless of their employer. It is strikingly unfair to hold a guard liable for violating a prisoner's constitutional rights, given the nature of prisons and the interactions between the inmates and guards, where the guard honestly and reasonably believes that his conduct was constitutional.[87] A good faith defense protects those

84 There is support for the idea that the PLRA is preventing inmates from raising legitimate claims. *See id.* ("The shrunken inmate docket is *less* successful than before the PLRA's enactment; more cases are dismissed, and fewer settle. An important explanation is that constitutionally meritorious cases are now faced with new and often insurmountable obstacles." (footnote omitted)).

85 *See supra* note 78 and accompanying text.

86 *See supra* Part I.A.

87 *See* Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 91 (2004) (arguing that, in the context of a private party–good faith defense, there is "unfairness [in] imposing damages liability on private defendants whose honest and reasonable belief in the constitutionality of their conduct turns out later to have been mistaken"). This analysis should be applied to publicly employed prison guards as well—there is no reason to believe that it would be more just to hold liable a publicly employed prison guard for violating a clearly established right of which he should have known, who honestly and reasonably believed in the constitu-

whose jobs require the exercise of discretion in delicate, dangerous situations; as far as liability is concerned, a guard would need only to articulate the reasons or set of circumstances that led him to choose the action he did, regardless of the legal state of the constitutional right at the time he acted. The guard who acts with malice and the guard who tries to circumvent the rules will not be protected, while the guard who makes a reasonable determination in good faith will not face damages liability. Such a fault-based system promotes a better-functioning justice system.

The PLRA has succeeded in decreasing the amount of prisoner lawsuits filed in federal courts. The greatest danger in allowing this pattern to continue is that meritorious prisoner suits may not be heard in federal court, thus potentially leaving a vulnerable class of plaintiffs without meaningful opportunity for redress. Such a result is contrary to the purposes and goals of § 1983.

III. PRISONER § 1983 LITIGATION

The fact that § 1983 suits frequently arise from a prison context is not surprising, as just about every action taken by prison officials can be considered done under color of state law by virtue of their position and function. Additionally, prisons are not, nor are they meant to be, pleasant environments. As such, prison conditions give rise to numerous inmate complaints that may be phrased as deprivations of the inmates' constitutional or federal statutory rights. Subpart A analyzes a Supreme Court decision in a § 1983 suit brought against prison guards in a state prison, and discusses the Court's recognition of qualified immunity in this context. Subpart B analyzes a Supreme Court decision in a § 1983 suit brought against prison guards in a privately run prison, and discusses the Court's decision *not* to recognize qualified immunity for these guards. Subpart C analyzes Justice Scalia's dissent in the privately run prison case in which he applied a functional analysis to determine that the private prison guards should be entitled to assert qualified immunity. Finally, this Part will argue that, combining a functional analysis with the overriding purposes of § 1983, neither private nor state prison guards should be entitled to assert qualified immunity to a § 1983 suit; rather, they should be able to assert an affirmative good faith defense.

---

tionality of his actions. If the guard honestly and reasonably believed his actions were constitutional *and* the right he violated was clearly established, the fault lies with the employer for not having properly trained its guards, and in such a situation it is the employer—the state or a private firm—that should be held liable.

A. *Prisoner Lawsuits Against State Prison Officials:* Procunier v. Navarette

The Supreme Court took up the issue of whether state prison guards are entitled to assert qualified immunity from suit in a § 1983 action in *Procunier v. Navarette*. In *Procunier*, Navarette was a prisoner in a California state prison who charged six prison officials with conduct that allegedly violated his constitutional rights.[88] Three of the six implicated in the suit were subordinate officials who were charged with, among other things, a "knowing disregard" for Navarette's First, Fifth, and Fourteenth Amendment rights.[89] The other three were supervisors, alleged to have conspired with and knowingly condoned the subordinates' conduct.[90] The Supreme Court granted certiorari in the case to determine "[w]hether negligent failure to mail certain of a prisoner's outgoing letters states a cause of action under section 1983."[91] Additionally, the Court agreed to determine whether the prison officers and officials were entitled to assert any kind of immunity defense.[92]

---

88 Procunier v. Navarette, 434 U.S. 555, 556 (1978). Justice Stevens' dissenting opinion spells out the facts alleged by Navarette more fully:

> These claims tell us that prison officials prevented Navarette from corresponding with legal assistance groups, law students, the news media, personal friends, and other inmates . . . . Some of this mail was deliberately confiscated . . . and some was mishandled simply because the guards were careless in performing their official duties.

Id. at 570 (Stevens, J., dissenting).

89 *See id.* at 557–58 (majority opinion).

90 *See id.* at 558.

91 *Id.* at 559 n.6 (internal quotation marks omitted). Following the pattern in these cases, the Court defined the right narrowly.

92 *See id.* at 560–63. The Court stated that it was necessary to determine whether, at the time of the events alleged, Navarette's mailing privileges were constitutionally protected and whether the guards knew or should have known that their alleged conduct violated that protected right. *Id.* at 559–60 & n.6 (citing as authority SUP. CT. R. 23.1(c) which treats questions on subsidiary issues as "'fairly comprised' by the question presented"). The Court also stated that its power to decide "is not limited by the precise terms of the question presented." *Id.* at 560 n.6 (citing Blonder-Tongue Labs., Inc., v. Univ. of Ill. Found., 402 U.S. 313, 320 n.6 (1971)).

In his dissent, Chief Justice Burger took issue with the majority's treatment of qualified immunity in the first instance, as he stated that the issue was not properly before the Court. *Id.* at 566–67 (Burger, C.J., dissenting). Justice Stevens also dissented from the case. He argued that the Court's treatment of immunity was unwise in this case because there had not been sufficient development of the record. He stated that this was important because a more fully developed record might not have "completely foreclose[d] the possibility that the plaintiff might be able to disprove a good-faith defense that has not yet even been pleaded properly." *Id.* at 574 (Stevens, J., dissenting). It is worth noting that *Procunier* was decided before the current test for

The controlling test at this time was articulated in *Wood v. Strickland*.[93] To determine whether the officials were entitled to qualified immunity under the *Wood* standard, the first inquiry is whether the allegedly violated constitutional right was clearly established at the time of the conduct.[94] The follow-up inquiry is whether the defendants "knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm."[95] The Court, in this case, agreed with the prison officials and officers that "in 1971 and 1972 when the conduct involved in this case took place there was no established First Amendment right protecting the mailing privileges of state prisoners and that hence there was no such federal right about which they should have known."[96] The Court similarly agreed with the prison officials as to the second *Wood* inquiry, which gives no protection where "the official has acted with 'malicious intention' to deprive the plaintiff of a constitutional right or to cause him 'other injury.'"[97] The Court concluded that the

qualified immunity was approved in *Harlow*. *See supra* notes 46–60 and accompanying text.

93 420 U.S. 308 (1975).

94 *See Procunier*, 434 U.S. at 562 (citing Wood v. Strickland, 420 U.S. 308, 322 (1975), 420 U.S. at 322).

95 *Id.* The rationale for this second prong was expressed in *Pierson v. Ray*, where the Court stated that an executive official cannot be expected to predict the future of constitutional law. *See* Pierson v. Ray, 386 U.S. 547, 557 (1967).

96 *Procunier*, 434 U.S. at 562–63.

97 *Id.* at 566 (quoting *Wood*, 420 U.S. at 322). Though the Court disposed of this point rather quickly, Justice Stevens' dissent discussed how Navarette's allegation, undeveloped in the record, included that some of his mail was "deliberately confiscated because the guards regarded Navarette as a troublesome 'writ-writer.'" *Id.* at 570 (Stevens, J., dissenting).

Interestingly, this language, "a troublesome writ-writer," illuminates one of the major purposes underlying the PLRA—stopping prisoners like Navarette from continuously filing supposedly frivolous lawsuits. *See supra* Part II.A. In all likelihood, the effects of the PLRA would have made Navarette's filing this suit more difficult.

Navarette's suit was not frivolous on a number of counts. For one, there was sufficient authority within the circuit to convince the Court of Appeals for the Ninth Circuit that there was some constitutionally protected right regarding a prisoner's mail and that Navarette had pled sufficiently to survive summary judgment. *See* Navarette v. Enomoto, 536 F.2d 277, 279–80 (9th Cir. 1976) ("A prisoner does not shed his first amendment right to free expression upon entering the prison gates. . . . [W]e think Navarette's allegations, although inartfully worded, permit proof entitling him to relief." (citing McKinney v. DeBord, 507 F.2d 501, 505 (9th Cir. 1974); Seattle-Tacoma Newspaper Guild, Local # 82 v. Parker, 480 F.2d 1062, 1065 (9th Cir. 1973)), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978). Though the Supreme Court determined that there was no basis for the guards to have reasonably known about such a right and that they did not act with disregard for such a right

prison officials in question here did not act maliciously or with intent to cause injury, and thus were entitled to qualified immunity.[98]

B. Prisoner Lawsuits Against Private Prison Officials: Richardson v. McKnight

The Supreme Court took up the issue of whether private prison guards are entitled to assert qualified immunity in a § 1983 action in *Richardson v. McKnight*. Ronnie McKnight was a prisoner in a private correctional facility in Tennessee who brought suit against two prison guards, Richardson and Walker.[99] McKnight filed a § 1983 suit alleging that the guards, while acting under color of law,[100] inflicted a physical injury upon him by placing him in "extremely tight physical restraints."[101] The guards contended that they were entitled to qualified immunity and moved to dismiss.[102]

Writing for the majority, Justice Breyer began by analyzing certain elements of the Court's decision in *Wyatt v. Cole* that were relevant to the discussion in the present case. The factors pertinent to this discussion were: (1) the reaffirmation that despite § 1983's main purpose being the deterrence of *state actors* from using their authority to deprive citizens of their rights, *private parties* may be liable under § 1983 in certain circumstances; and (2) that immunity from a § 1983 suit should be recognized where the immunity "'was . . . firmly rooted in the common law,'" *and* where policy considerations were strong enough in support of immunity that Congress would have specifically provided that it was abolishing the doctrine had it wished to do so.[103]

---

that would amount to a lack of good faith, Navarette presented a legitimate question for the Court to decide. *See Procunier*, 434 U.S. at 565. Admittedly, not all prisoner lawsuits will present such questions meriting an answer from the Supreme Court, but the animus against prisoner litigation that helped inspire the PLRA makes little of the fact that some will. *See supra* Part II.

98 *See Procunier*, 434 U.S. at 566. Had this case come before the Court following the adoption of the qualified immunity test in *Harlow*, the case likely would have been decided similarly, as *Harlow* does not significantly change the analysis. *See supra* Part I.C.2.

99 *See* Richardson v. McKnight, 521 U.S. 399, 401 (1997).

100 *See supra* note 32 and accompanying text (describing how and in what circumstances courts will hold that private parties act under color of law).

101 *See Richardson*, 521 U.S. at 401.

102 *See id.* at 401–02.

103 *See Richardson*, 521 U.S. at 403–04 (first citing Wyatt v. Cole, 504 U.S. 158, 162 (1992) and then quoting *id.* at 164). Justice Breyer also found that *Wyatt* was limited in its holding that private persons who conspire with state officials and invoke a state replevin statute are not entitled to immunity. *Id.* at 404.

The Court then undertook the typical qualified immunity analysis by assessing the history of such immunity for private prison guards and the policy concerns inherent in recognizing it today. Regarding the historical analysis, Justice Breyer found no "firmly rooted" tradition of immunity applicable to private prison guards, even citing evidence that the common law "provided mistreated prisoners in prison leasing States with remedies against mistreatment by those private lessors."[104] The policy concerns presented a closer question.[105] The main policy supporting qualified immunity as a general matter is its promise to protect the "'government's ability to perform its traditional functions.'"[106] Qualified immunity does this by (1) protecting officials engaged in such discretionary activities so that they can fulfill their responsibilities without fear of civil liability, and (2) not deterring otherwise qualified individuals from public service.[107] The prison guards in this case had a cogent argument for qualified immunity based on this policy precedent, as they argued that they performed the same functions and were subject to the same concerns as state prison guards.[108]

The Court rejected the guards' argument, however, first stating that the performance of a government function is not enough to automatically entitle someone to qualified immunity.[109] Second, the Court maintained that the competitive pressures of the marketplace in which private prisons operate address the concern that the guards

104 *See id.* at 404–05.

105 *See id.* at 407–08.

106 *See id.* at 408 (quoting *Wyatt*, 504 U.S. at 167).

107 *See id.*; *see also* Butz v. Economou, 438 U.S. 478, 506 (1978) (phrasing the purpose of qualified immunity as protecting the public by "encouraging the vigorous exercise of official authority"); Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (stating that the threat of civil liability would "dampen the ardor of all but the most resolute, or the most irresponsible" and thus deter many qualified individuals from public service).

108 *See Richardson*, 521 U.S. at 408.

109 *See id.* at 408–09. Justice Breyer took issue with a purely functional approach to the determination of private party immunity, stating that private industry frequently overlaps with government activities in areas such as energy production, waste disposal, and mail delivery. *Id.* at 409. The distinguishing factor is that prison guards, privately or publicly employed, exercise a different kind of discretion. It would seem that a prison guard is in a position requiring the exercise of discretion that could potentially infringe the constitutional rights of others by virtue of the job itself, whereas U.S. postal workers and those who work for private mail delivery companies are not engaged in similar activities. In other words, despite the large overlap generally between government and industry, there does not appear to be such a great overlap in the areas involving the kind of discretionary actions that have traditionally implicated the policies behind qualified immunity.

would perform their jobs too timidly: if a private prison employed lackadaisical or timid guards, it would be in danger of having its contract cancelled.[110] Thus, the Court reasoned that private prisons already have an incentive to ensure that their guards perform their duties neither too harshly (lest they risk civil damages that would raise costs),[111] nor too timidly. Third, the Court stated that the nature of private prisons addresses the deterrence with which qualified immunity is concerned. Employees in the private sector may be paid more or receive more benefits than their government-employed counterparts.[112] Also, at least in Tennessee, private prisons were required to carry comprehensive insurance, which in turn increased the likelihood that the private prison guards would be indemnified in the event of a damage award against them.[113] Therefore, according to the Court, deterrence was not a major concern for private prison guards. Finally, the Court discounted the worry that the threat of a lawsuit would be a distraction for the guards, insisting that the possibility of distraction was not "sufficient grounds for an immunity."[114]

In conclusion, the Court reiterated that without a special reason for such an extension of "governmental" immunity under § 1983 to private prison guards, the Court would not grant such immunity despite the fact that the guards may be liable under § 1983 like their public counterparts.[115] The opinion closed with three caveats: (1) the district court is to determine whether the private prison guards are even liable under § 1983 as acting under color of state law; (2) the holding is limited to this context, in that "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms"; and (3) that while qualified immunity is not available to these defendants, a good faith defense may be available where a private party faces § 1983 liability.[116]

---

110 *See id.* at 409.

111 *See id.*

112 *See id.* at 411.

113 *See id.*

114 *See id.*

115 *See id.* at 412 ("Since there are no special reasons significantly favoring an extension of governmental immunity, and since *Wyatt* makes clear that private actors are not *automatically* immune . . . , we must conclude that private prison guards . . . do not enjoy immunity from suit in a § 1983 case.").

116 *Id.* at 413.

C. A Functional Approach

In his dissent in *Richardson*, Justice Scalia argued that the majority's decision not to recognize qualified immunity for the private prison officials is misguided, proposing that courts should apply a "functional approach" to determine whether private parties are entitled to assert qualified immunity to a § 1983 suit.[117] Scalia began with his own historical analysis and stated that the majority relied more on the absence of a case recognizing immunity for private prison guards than on any rejection of such immunity.[118] He further attacked the majority's emphasis on history by stating that *Procunier* held that state prison guards could assert qualified immunity despite a similarly inconclusive history.[119] Justice Scalia then wrote that the principles underlying a recognition of immunity "plainly cover the private prison guard if they cover the nonprivate."[120] He defined the principles as such: "(1) immunity is determined by function, not status, and (2) even more specifically, private status is not disqualifying."[121] By relying on a functional analysis, Justice Scalia seems to apply a similar analytical framework to that which is used to determine whether to hold a private actor liable under § 1983. That is, if a private actor can be held liable under § 1983 as acting under color of state law for performing a function that is traditionally or exclusively within the purview of the state, it would follow that such an actor should have the same defenses or immunities as is accorded to his state actor counterpart.

---

117 Justice Scalia argued in dissent:

> Today the Court declares that this immunity is unavailable to employees of private prison management firms, who perform the same duties as state-employed correctional officials, who exercise the most palpable form of state police power, and who may be sued for acting "under color of state law." This holding is supported neither by common-law tradition nor public policy, and contradicts our settled practice of determining § 1983 immunity on the basis of the public function being performed.

Id. at 414 (Scalia, J., dissenting).

118 *See id.* at 414–15.

119 *See id.* at 415 (stating that there is a history of government-employed prison officials who were "successfully sued at common law, often with no mention of possible immunity").

120 *Id.* at 416.

121 *Id.* Justices Breyer and Scalia argued as to the role of a functional analysis in determining a grant of immunity. Justice Scalia cited numerous cases supporting the proposition that the grant of any immunity rests on a functional analysis, *see id.* at 416–17, while Justice Breyer argued that a functional analysis was appropriate only to the determination of whether to grant absolute or qualified immunity to a *government* actor, *see id.* at 408 (majority opinion).

Justice Scalia next addressed the policy considerations cited by the majority against recognizing qualified immunity for private prison guards by again applying a functional approach. He found that there is no functional distinction between state and private prison guards. He faulted the "market pressures" analysis as unavailing because politicians, who are subject to various influences unrelated to the open market, make the decisions regarding which firms receive government contracts for private prisons and whether a firm is retained to continue operating the prisons.[122] As such, he argued that market pressures do not play an actual role in the running of private prisons insofar as the actions of private prison guards are concerned.

He then addressed the theory that the availability of civil rights liability insurance means that private prison guards do not need immunity because the insurance would cover damages levied against them in a § 1983 suit. Noting, however, that the insurance is available to state prison guards as well, he pointed out that "governments [like] private prison employers, [do not] have any *need* for § 1983 immunity."[123] Finally, Justice Scalia addressed an argument put forth by the court of appeals that private prison guards are more likely to violate prisoners' constitutional rights than are state prison guards because of a profit motive.[124] He found that there was no support for that assertion, and in fact seemed to think that private prison firms would be more vigilant in training their guards because damages would be paid by them, not by the public.[125]

The overarching theme of the Justice Scalia's dissent is that function should be the determinative factor in recognizing immunity:

> Today's decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, . . . in the powers that they possess over prisoners, . . . [and] in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability.[126]

---

122 *See id.* at 418–20 (Scalia, J., dissenting) (discussing how considerations of cost and service in making these determinations regarding private prisons will likely be pushed aside for considerations such as "personal friendship, political alliances, [and] in-state ownership of the contractor"). Furthermore, Justice Scalia recognized that the likely number one factor in the determination of which firm gets a private prison contract is *cost*, not disciplinary record. As such, private prison managers possibly are more in need of immunity than are state prison officials because private prisons might choose to avoid strong discipline so as to keep their insurance rates low. *See id.*

123 *See id.* at 420–21.

124 *See id.* at 421–22. The majority of the Court did not address this question.

125 *Id.*

126 *Id.* at 422.

Treating state and private prison guards similarly regarding qualified immunity would produce an equitable result. It seems logical that if private prison guards may be defendants in a § 1983 suit by acting under color of state law, then it is only reasonable that they should be afforded defenses similar to others who act under color of state law. While Justice Scalia and the dissenters in *Richardson* would recognize qualified immunity for private prison guards, when the question is considered in light of the purposes and policies underlying § 1983 lawsuits, neither state nor private prison guards should be entitled to assert qualified immunity. Rather, a good faith defense is more appropriate and in line with the purposes and goals of § 1983.

D. A Good Faith Defense for All Prison Officials in § 1983 Suits

While § 1983 is meant to act as a method of redress for wrongs done to individuals under color of state law, qualified immunity can act as an effective bar to its achievement.[127] Since determinations of qualified immunity are supposed to occur before the discovery phase, a § 1983 plaintiff who truly may have been wronged may never get to present her case if the suit is resolved on summary judgment on the issue of immunity. Of course, where an essentially meritless § 1983 suit is involved, qualified immunity operates to eliminate many of the costs associated with litigating a § 1983 suit. However, utilizing an affirmative good faith defense, instead of qualified immunity, will produce a more equitable result for both parties.

A serious problem with the *Harlow* qualified immunity standard is that determinations of the immunity can turn on how broadly or narrowly the district court construes the right that was allegedly violated. Take for example the Fourth Circuit case *Robles v. Prince George's County*.[128] This case involved a plaintiff who was tied to a pole in an empty parking lot late at night by police officers who had arrested him on a traffic warrant.[129] Despite finding that the actions of the police officers constituted a due process violation, the Fourth Circuit upheld the district court's grant of qualified immunity by defining the scope of the constitutional right inappropriately narrowly: because the right not to be tied to a pole in a parking lot late at night by police officers was not clearly established at the time of the action, the officers were

127 *See, e.g.*, Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 617 (2007).

128 302 F.3d 262 (4th Cir. 2002).

129 *See id.* at 267.

allowed to assert qualified immunity.[130] It is not clear that the public is better served by having these officers avoid liability for their actions while the victim (whom the court acknowledged was a victim by agreeing that the actions constituted a due process violation), is left without redress under the statute specifically designed for such a situation.

Applying a good faith defense standard to the facts of *Robles* creates a more equitable result.[131] The defendants would have been held liable insofar as they knew or should have known, as police officers, that by tying the plaintiff to a pole, they were depriving him of his due process rights. In light of the nature of the defendants' actions, it seems impossible that they acted with an honest, reasonable belief that their actions were constitutional. Further, given the facts, it seems as though the defendants intended to cause the plaintiff harm. Under a good faith standard, the officers would not be able to escape liability. The result under a good faith defense standard seems to be more favorable to the public good. These results are also more consistent with the purposes of § 1983 in that those deprived of their constitutional or federal statutory rights by someone acting under color of law have an avenue for redress.

While *Robles* dealt with police officers as the defendants, similar circumstances arise in the prison context where guards are in constant contact with, and have near absolute control over, prisoners. For example, a different result occurred in *Hope v. Pelzer*.[132] Here, the prisoner-plaintiff was chained to a hitching post for seven hours outside in the Alabama sun. He was given water no more than twice, and was not allowed a visit to the bathroom as punishment for arguing with prison guards.[133] Despite the inherently cruel nature of the act, binding Eleventh Circuit precedent, an Alabama Department of Corrections regulation, and a report from the Department of Justice to the Alabama Department of Corrections that the use of a hitching

130 *See id.* at 270–71. The issue of what is "clearly established" for purposes of § 1983 litigation is another source of controversy in this area. The "clearest" guidance given by the Supreme Court came in *Anderson v. Creighton*, 483 U.S. 635 (1987), which stated:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citation omitted).

131 *See supra* notes 67–68 and accompanying text.

132 536 U.S. 730 (2002).

133 *Id.* at 734–35.

post was not constitutional,[134] the court of appeals granted qualified immunity to the guards.[135] The Supreme Court reversed, "readily conclud[ing] that the respondents' conduct violated 'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[136] In this case, the current test for qualified immunity applied to state prison guards almost produced an unconscionable result. If the guards in *Hope* had been employed by a private prison rather than by the State of Alabama, under current jurisprudence, they may have been able to assert a good faith defense. Under such a defense standard, however, it seems highly unlikely that the court of appeals would have found that the guards should prevail considering the malicious, retributive nature of their acts.

While a good faith affirmative defense may produce better results for plaintiffs in a § 1983 suit, it can be argued that this paradigm would also produce better results for the public. First, applying the same standard for defenses to potential defendants in § 1983 suits, regardless of whether their employer is the state or a private firm, would produce consistent results based on similar factual circumstances. This would provide better guidance to both the courts that decide these cases, as well as to prison officials in structuring their training to ensure that those who exercise discretion over prisoners are less likely to act in a prohibited manner. Second, providing a system in which prisoners who can make out a meritorious claim under § 1983 can get beyond the summary judgment stage makes it more likely that actual constitutional harms are redressed. This, in turn, produces a system more consistent with the purposes and goals of § 1983. Third, the claim that otherwise qualified individuals would be deterred from public service without the promise of qualified immunity is somewhat dubious. If certain individuals are deterred from serving as prison guards because of the threat of personal liability for acting unreasonably in their duties or for acting in an intentionally malicious manner, our justice system would be better served by those individuals not taking law enforcement jobs.[137]

---

134 *Id.* at 741–42.

135 *Id.* at 733. The court of appeals held that the actions constituted cruel and unusual punishment, but held that since there was no precedent case with materially similar facts, the guards were entitled to qualified immunity as the right was not "clearly established." *Id.*

136 *Id.* at 742 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

137 The argument that the absence of qualified immunity will make officials hesitant in the performance of their duties misses the point; under a good faith affirmative defense paradigm, these officials will not be liable unless they acted unreasonably or in an intentionally harmful way.

For all of these reasons, private prison guards and state prison guards should be treated similarly with respect to § 1983 defenses, and the defense should be a good faith affirmative defense rather than qualified immunity.

Conclusion

Prisoner lawsuits under § 1983 are not popular with the courts or with legislators. This unpopularity is likely the result of the thought, rightfully in many cases, that these suits are frivolous and occupy an inordinate amount of judicial time, energy, and resources. We must be mindful, however, that there are indeed meritorious claims that arise out of the prison context and that we have an obligation to ensure that the rights of some of our most vulnerable citizens are not being trampled. The current formulation of qualified immunity for state prison guards in a § 1983 suit is not the best fit. Rather, to best vindicate the purposes of § 1983, a good faith affirmative defense, similar to the one suggested by the Court in *Richardson*, should apply to both state and private prison guards. While the constitutional need for this shift may not be so readily apparent as to demand an immediate change, other developments in prisoner litigation, some of which have been brought about by the PLRA, have produced an environment in which the shift is both practically feasible and necessary for the protection of prisoners' rights and the public good.