No. 95-318

In the
Supreme Court of the United States

October Term, 1996

DARYLL RICHARDSON, et al., Petitioners,

v.

RONNIE LEE McKNIGHT, Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TENNESSEE IN SUPPORT OF RESPONDENT*

TABLE OF CONTENTS

APPENDIX

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Tennessee is one of its statewide affiliates. The ACLU and its affiliates serve as counsel in numerous civil rights actions brought pursuant to 42 U.S.C. §1983, and have frequently represented prisoners who allege violations of their constitutional rights. Accordingly, the ACLU is vitally interested in the scope of the immunities available under §1983, and has participated in many cases before this Court addressing that issue.

STATEMENT OF THE CASE

Respondent Ronnie Lee McKnight weighs approximately 300 pounds and is in poor health. He is incarcerated at the South Central Correction Center (SCCC) in Clifton, Tennessee, a correctional facility operated by the Corrections Corporation of America (CCA), a private, for-profit corporation under contract with the State of Tennessee. *See Private Prison Contracting Act of 1986, T.C.A. §41-24-101, et seq. CCA operates several of Tennessee's prisons, including SCCC. CCA is one of the largest and most financially secure prison firms in the industry. Petitioners Daryll Richardson and John Walker work for CCA as prison guards.*

Mr. McKnight filed this action against petitioners for compensatory and punitive damages under 42 U.S.C. §1983 in the United States District Court for the Middle District of Tennessee. The complaint alleged violations of respondent's Eighth Amendment right to be free from cruel and unusual punishment. Specifically, Mr. McKnight alleged that while petitioners were transporting him from Nashville to the SCCC facility in Clifton, petitioners restrained him with handcuffs and ankle shackles that cut off his circulation. The restraints were extremely painful and caused his limbs to swell. Mr. McKnight further alleged that he pleaded with petitioners to loosen the shackles and handcuffs. Other inmates who were being transported at the same time witnessed Mr. McKnight's pain and swelling and also pleaded with petitioners to loosen the restraints. According to Mr. McKnight, petitioners responded to these pleas with abusive language, and told him to "suffer." When he arrived at SCCC, respondent needed assistance to walk. The injuries caused by the handcuffs and shackles were so severe that Mr. McKnight required hospitalization. He continues to receive medical treatment for his injuries.

Petitioners moved to dismiss the complaint on the ground that they were entitled to qualified immunity notwithstanding their status as nongovernmental employees of a private, for-profit corrections corporation. The district court denied the motion to dismiss, and the Sixth Circuit affirmed.

SUMMARY OF ARGUMENT

This Court should not extend qualified immunity to petitioners because there is neither common law support nor public policy justification for doing so. See *Wyatt v. Cole, 504 U.S. 158, 161 (1992)(qualified immunity is only available to §1983 public official defendants if a comparable immunity existed at common law when §1983 was enacted, and if public policy justifies the extension); id. at 170 (Kennedy, J., concurring)(public policy reasons alone cannot support the judicial recognition of a new §1983 immunity in the face of legislative silence).*

Section 1983 incorporates immunities "firmly rooted in the common law," 504 U.S. at 164. Immunity for profit-making private prisons and their nongovernmental employees is not one of these. When §1983 was enacted in 1871, public prisons leased their inmates to privately run prison work farms in lumber mills, railroads, mines and other industries. All reported cases from this era regarding inmates' rights hold private prisons and their employees liable for abuses inflicted on inmates.

In addition to an absence of common law support, there are no public policy reasons for granting qualified immunity to petitioners. Petitioners would not be immunized under Tennessee law had respondents pleaded a common law tort. The victims of constitutional torts should not be treated less favorably. To the contrary, these victims should be provided with §1983's intended remedial protections. Moreover, there is no reason to suppose that the threat of §1983 liability will chill decisionmaking by nongovernmental prison guards any more than the threat of common law liability.

This Court's qualified immunity cases have recognized that lawsuits against government officials entail "substantial costs" that may interfere, at times, with the public interest in having an efficient and well-functioning government. *Harlow v.*

Fitzgerald, 457 U.S. 800, 816 (1982). This Court has also emphasized repeatedly, however, that §1983 exists 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, 504 U.S at 161. These interests must be balanced in determining whether a party is entitled to qualified immunity. Id. at 167.

The balance in this case tips in respondent's favor. The public interest in governmental efficiency is not implicated here where it is private individuals and their corporate employer, not the public, who will absorb the cost of litigation. The common law attempts to match liability for loss with the party who creates the risk. Constitutional law should follow that principle, particularly because of the magnitude of the rights at stake.

Private prisons exist primarily to make a profit, not to serve the public. Accordingly, there is a built-in financial incentive to cut corners, even at the expense of constitutional rights. Cutbacks in personnel and training are a common cost-saving measure. The abuses that have occurred as a result are well-documented in judicial opinions and government reports. See, e.g., *Medina v. O'Neil, 589 F.Supp. 1265 (S.D.Tex. 1984), rev'd in part & vacated in part, 838 F.2d 800 (5th Cir. 1988) (where a prison guard, untrained in the use of firearms, accidentally shot and killed a detainee, and wounded another using a shotgun to force detainees back into their cells); see, e.g., INS, The Elizabeth, New Jersey Contract Detention Facility Operated by Esmor, Inc., Interim Report, July, 20, 1995 (where the continuous abuse of detainees by ill-trained overworked guards culminated in a protest riot). Indeed, the American Bar Association has cautioned against granting qualified immunity to private prisons and their employees because the risk of abuse to inmates is so high. Without the threat of liability, these abuses would often go unchecked; government oversight has frequently proved an inadequate alternative.*

This Court has never recognized a §1983 immunity defense unless it has been necessary to further the public interest. Here, the public interest lies in providing maximum protection for constitutional rights rather than maximum profits for private prison corporations.

ARGUMENT

I. THE DOCTRINE OF QUALIFIED IMMUNITY SHOULD NOT APPLY TO NONGOVERNMENTAL PRISON GUARDS EMPLOYED BY FOR-PROFIT CORPORATIONS WHO VIOLATE THE CONSTITUTIONAL RIGHTS OF INMATES COMMITTED TO THEIR CARE BY THE STATE

In 1871, the United States Congress enacted 42 U.S.C. §1983 "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. at 161;Carey v. Piphus, 435 U.S. 247, 254-57 (1978). Congress intended §1983 to have an expansive sweep and its breadth to aid in the "preservation of human liberty and human rights." Owen v. City of Independence, 445 U.S. 622, 636 (1980)(citing Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)). See also Monell v. New York City Dep't of Social Services, 436 U.S. 658, 683-87 (1978).*

The language of 42 U.S.C. §1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen, 445 U.S. at 635; see also Imbler v. Pachtman, 424 U.S. 409, 417 (1976)(the plain language of 42 U.S.C. §1983 "admits no immunities"). Nonetheless, this Court has extended "absolute immunity" to certain governmental officials,*[2] *and "qualified immunity" to other governmental officials.*[3] *The Court justified extension of these immunities on two grounds -- the existence of those immunities in the common law when §1983 was enacted, and the public policy interest in having an effective government that is not consumed with defending against frivolous suits. See Wyatt, 504 U.S. at 164; Imbler, 424 U.S. at 424-29.*

Both rationales are inapplicable here. The extension of qualified immunity to guards in private, for-profit prisons is neither supported by the common law nor by public policy. This Court should therefore hold that petitioners are not entitled to the qualified immunity enjoyed by public officials under §1983. A contrary result would needlessly impair what this Court has defined as the broad and important purposes of §1983: "to provide compensation to the victims of past abuses, [and] to serve as a deterrent against future constitutional deprivations . . . ." *Owen, 445 U.S. at 651 (1980).*

At a time when it has become more and more difficult for plaintiffs to recover for damages under §1983 because of procedural and substantive changes in qualified immunity law,[4] extending §1983 qualified immunity to private prison guards would undermine §1983's remedial goals.[5] The "injustice of [that] result should not be tolerated." 445 U.S. at 651.

This Court's prior decisions recognize as much. When the Court refused to extend qualified immunity to municipal corporations in *Owen, it specifically rested its holding on the similarity between municipal corporations on the one hand,*

and private corporations and individuals on the other.

Id. at 640.[6] *That comparison would not have made any sense had the Court believed that private corporations and individuals were themselves entitled to qualified immunity.*

A. There Is No Historical Support For Petitioners' Claim To Qualified Immunity

This Court has noted that §1983 should be interpreted "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs, 475 U.S. at 339; Imbler, 424 U.S. at 418. In applying that rule of statutory construction, the Court has consistently looked to the common law when §1983 was enacted to determine who is entitled to immunity. The Court has not been mechanical in its reliance on history, however, and has specifically rejected the "assum[ption] that Congress intended to incorporate every common-law immunity into §1983 in unaltered form." Malley, 475 U.S. at 340.*

Whether Congress intended to incorporate a particular immunity defense into §1983 turns on whether the immunity reflects a tradition "so firmly rooted in the common law and supported by such strong policy reasons that `Congress would have specifically so provided had it wished to abolish the doctrine.'" *Wyatt, 504 U.S. at 164 (quoting Owen, 445 U.S. at 637, and Pierson v. Ray, 386 U.S. at 555).*

In this case, there is no historical support for extending qualified immunity to private prisons or their employees, as the lower court properly found. *McKnight v. Rees, 88 F.3d 417, 420 (6th Cir. 1996)(finding no evidence of immunity for private parties). See also 2C Addison, Law of Torts 261 (1881)(at common law, protective clauses did not exempt government contractors and their workers from personal liability for negligent performance of governmental work).*

From the eighteenth century through the beginning of the twentieth century, "government appointed jailers ran jails for a profit." David Yarden, "Prisons, Profits, And The Private Sector Solution," Am.J.Crim.L. 325, 326 (Winter 1994). Indeed, prisoners were expected to pay their own way. *Id. Many prisons leased their inmates to farms, lumber mills, railroads, mines and other industries. Id. By 1885, 75 percent of all prisoners were engaged in productive labor, most under private contract agreements. Alexis Durham, III, "Privatization of Punishment: The Nineteenth & Twentieth Century Experience," Criminology, Vol. 27 (1989).*

The history of abuse in private prisons is chilling. It is:

> a well-documented tale of inmate abuse and political corruption. In many instances, private contractors worked inmates to death, beat or killed them for minor rule infractions, or failed to provide inmates with the quantity and quality of life's necessities (food, clothing, shelter, etc.) specified in their often meticulously drafted contracts.

Donahue, "Prisons for Profit: Public Justice, Private Interests," Economic Policy Institute (1988), at 19 (citing John J. DiLulio, Jr., *Private Prisons (May 1987)).*

The few reported cases from that era regarding inmates' rights detail the horrendous abuses inflicted on inmates by private contractors and their employees, for which the contractors and their employees were held liable. *See, e.g., Weigel v. Brown, 194 F. 652 (8th Cir. 1912)(holding a private contractor liable for false imprisonment and unlawful whipping); In Re Birdsong, 39 F. 599 (S.D.Ga. 1889)(holding private jailer liable for inflicting cruel and unusual punishment on prisoners); Hall v. O'Neil Turpentine Co., 47 So. 609 (Fla.Sup.Ct. 1908)(holding that an assignment of a convict labor contract was not against public policy when the subcontract held the sublessee liable and responsible for its acts). Cf. Edwards v. Town of Pocahontas, 47 F. 268 (W. D.Va. 1891)(holding that a municipal corporation housing prisoners was not entitled to sovereign immunity and was liable for the unsanitary conditions that injured a convict's health).*

Because there is no deep-rooted common law tradition to support petitioners' claim for qualified immunity, it should be rejected under this Court's precedents.

B. Extending Qualified Immunity To Petitioners Would Be Contrary to Public Policy

In the absence of a strong common law tradition, at least some members of this Court have taken the position that public policy reasons alone cannot support the judicial recognition of a new §1983 immunity in the face of legislative silence. *See Wyatt, 504 U.S. at 170 (Kennedy, J., concurring). But even if the Court can appropriately consider public policy concerns when interpreting the scope of §1983, petitioners' claim for qualified immunity should be rejected in this case.*

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform . . . ." *Wyatt, 504 U.S. at 167; Harlow v. Fitzgerald, 457 U.S. at 819. Petitioners' principal error is in assuming that only the second half of that equation involves the public interest. This Court has taken a more nuanced approach.*

To be sure, the Court's qualified immunity cases have recognized that lawsuits against government officials entail "substantial costs" that may interfere, at times, with the public interest in having an efficient and well-functioning government. *Id. at 816. As set forth in Harlow, these costs include:*

> the expenses of litigation, the diversion of official energy from pressing public issues . . . the deterrence of able citizens from acceptance of public office . . . . [and] the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties.

Id. at 814 (internal quotation omitted).

At the same time, the Court has never lost sight of the fundamental purpose of §1983, which is "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, 504 U.S. at 161. Even when dealing with government officials, therefore, the Court has only recognized a qualified immunity defense "when it was necessary to preserve their ability to serve the public good or to ensure that talented candidates are not deterred by the threat of damage suits from entering public service." Id. at 167.*

The Court has emphasized, moreover, that immunities are "not for the protection or benefit of a malicious or corrupt [official], but for the benefit of the public whose interest it is that [officials] should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson, 386 U.S. at 554 (citations omitted). See also Wyatt, 504 U.S. at 167-68. Most significantly, the Court has never recognized a §1983 immunity defense unless it has been necessary to further those goals.*

In *Wyatt, for example, this Court refused to extend qualified immunity to private individuals seeking replevin under a state statute that was ultimately declared unconstitutional. In denying qualified immunity to the private party in Wyatt, this Court reiterated the "special policy concerns in suing government officials" articulated in Harlow. The Court was unwilling to assume, however, that those same concerns applied to the private defendants in Wyatt, even though they were plainly acting under color of state law. 504 U.S. at 167-68.*

The Court was careful to note that its holding in *Wyatt was a limited one. Id. at 168-69. Despite that disclaimer, however, the language and logic ofWyatt are equally applicable here.*

1. The Victims of Constitutional Torts Should Not Be Treated Less Favorably Than the Victims of Common Law Torts

Under Tennessee law, neither petitioners nor their corporate employers could claim the benefit of sovereign immunity if they had been sued for assault and battery. *See T.C.A. §41-24-107(b). Petitioners offer no explanation, and none is readily apparent, why the issue of immunity should turn on whether the prisoners in this case pleaded a constitutional tort or a common law tort. Indeed, if anything, our system regards the violation of a constitutional right as more serious and thus more in need of a meaningful remedy. At the very outset, therefore, the argument for qualified immunity in this case rests on a set of inverted values.*

It also rests on a misunderstanding of the qualified immunity doctrine and the purposes it is meant to serve. Fairly assessed, the "special policy concerns" that this Court has identified in favor of qualified immunity -- public cost and governmental efficiency -- simply do not apply when the named defendants are private guards employed by a for-profit prison operated under contract to the state. *See Forrester v. White, 484 U.S. 219, 224 (1988)(courts should "seek to evaluate the effect that exposure to a particular form of liability would have on the appropriate exercise of [the relevant government] functions").*

This is not to say that the threat of §1983 litigation may not cause even private prison guards to think twice before acting. That is not always such a bad thing, however. Furthermore, there is no reason to believe that the chilling effect of potential §1983 litigation is any greater than the chilling effect of potential common law tort actions. In both cases, the market can (and will) adjust to the cost of doing business.

While that market adjustment may reduce the profit margin of private prison corporations, this Court has never permitted government, let alone private parties, to trade constitutional rights for economic gain. To the contrary, the Court has recognized that the threat of liability can promote the public interest by helping to deter constitutional violations. *See Wyatt,*

504 U.S. at 161. For precisely that reason, the American Bar Association (ABA) has recommended that private prison corporations be:

> required to assume all liability arising under the contract and should be prohibited from using immunity defenses, such as sovereign immunity or qualified immunity, to limit such liability . . . The rationale is clear: it creates an economic incentive for the private contractor to provide adequate inmate care and treatment. Permitting a contractor to escape liability would severely undermine the goal of accountability.

ABA, *Guidelines Concerning Privatization of Prison and Jails (March 29, 1989).*

This approach is consistent with prevailing legal norms. Generally speaking, the law attempts to match liability for loss with the party who creates the risk of loss. *See, e.g., Herbert Hart & Anthony Honore, Causation in the Law, (2d ed. 1985).*

It is noteworthy, moreover, that Tennessee has codified that general rule in this particular context by requiring private prison contractors to have adequate insurance plans that specifically cover civil rights claims. T.C.A. §41-24-107(a)(2); *see also Az.St. §41-1609.01(M)(2)(requiring similar coverage).*

As tort law has recognized for centuries, the party best able to prevent the risk is the party who should be allocated that risk. Here, it is reasonable to allot the risk of suit to petitioners and CCA, their corporate employer. CCA benefitted from its contract with Tennessee through substantial earnings. Part of its business planning to yield those profits was an awareness, based on the Tennessee statute denying prison contractors sovereign immunity, T.C.A. §41-24-107(b), that it was liable for common-law torts in state courts. It was also aware, based on Tennessee's statutory insurance requirement, that it could be sued for civil rights violations.

Those who criticize the decision below do not challenge the value of accountability directly. Nor do they dispute the ability of private prison corporations to calculate the financial risks and opportunities of any venture through standard business planning. They do, however, suggest that the cost of running prisons without qualified immunity may become too expensive for private entrepreneurs. That, of course, is a judgment for the private sector to make. It is not a reason to engraft a new immunity onto §1983 that will further erode the statute's remedial goals.

In addition, the argument is sometimes made that §1983 damages are unnecessary to achieve accountability because government will monitor private prisons and assure their compliance with the Constitution. Even if true, this calculus omits the interest of the prisoner whose constitutional rights are violated despite monitoring. In fact, there are good reasons to doubt that public monitoring can or will ever be an adequate safeguard.

Many states already have statutes in place that require public officials to monitor the performance of private prisons. Yet, notwithstanding these statutory requirements, the monitoring record is at best spotty. The explanation for this failure to oversee, once again, is largely economic. More often than not, government officials are sold on the idea of privatization because they believe it will reduce costs. And, because of their desire to reduce costs as much as possible in the current political climate, they do not always budget for the cost of monitoring the private prison in calculating the contract price. *See James Gentry, "The Panopticon Revisited: The Problem Of Monitoring Private Prisons," 96 Yale L.J. 353, 359 (Dec. 1986). When they do, they often discover that the combined costs of the contract and monitoring exceed the costs to the government in running the prison system itself. Id. "Monitoring expenditures are thus capped by a criterion wholly unrelated to prison quality." Id.*[7]

Recognizing a new qualified immunity under these circumstances would not promote the public interest. To the contrary, it would subordinate the public interest to the private interest of for-profit prison corporations.

2. Private Prisons Primarily Exist To Make A Profit And Not To Serve The Public

In the United States, there are 21 companies, earning more than $250 million dollars in annual revenues, managing 88 prisons that house 50,000 inmates. Steven Donziger, *The Prison-Industrial Complex; What's Really Driving The Rush To Lock 'Em Up, Washington Post, Mar. 17, 1996, at C3. This amounts to a twenty-fold private prison population increase since 1984. Id.*

The impact of this rapid private prison industry growth is reflected on the stock exchange. Shares of the third largest private prison corporation, Wackenhut Corrections, soared 203 percent in 1996. Sandra Block, *Everybody's Doin' The Jailhouse Stock, USA Today, June 5, 1996, at B3. The stock traded at 100 times Wackenhut's 1996 estimated earnings, significantly higher than the average 17 times estimated earnings for the Standard & Poor's 500. Id. Shares of CCA, petitioners'*

employer and one of the largest and best capitalized of the private prison firms, traded at 111 times their 1996 estimated earnings. Id. In 1995 alone, CCA's revenue grew 36% to more than $207 million. See CCA, 1996 Annual Report to Shareholders 2, 6. As of June 30, 1996, CCA was the "number one stock performer of all the companies listed on the New York Stock Exchange," according to CCA's Chairman and Chief Executive Officer. Shannon Turner, Interview, Dow Jones Investor Network, Sept. 12, 1996, available in WESTLAW, Newspapers, Magazines, and News Service Database, All News File.[8] Some private prison companies openly admit to operating prisons "mainly to make a buck." Douglas Dunham, "Inmate Rights and the Privatization of Prisons," Col.L.Rev. 1475, 1484 (Nov. 1986)(citing Desert News, June 20-21, 1985, at B7).

3. Private Prisons Have Financial Incentives To Cut Corners At The Expense Of Inmates' Constitutional Rights

Despite their profitability, recent studies show that private prisons may not be the "magical solution" to cure governments' fiscal woes that they were touted to be. There has been little or no demonstrable cost difference between private and public prison maintenance.

In 1996, the United States General Accounting Office (GAO) reviewed five studies completed since 1991 which compared the operational costs and/or the quality of service of private and public correctional facilities. In its Report to the Subcommittee on Crime, Committee of the Judiciary, House of Representatives, GAO "could not conclude whether privatization saves money." GAO, Report, Aug. 16, 1996. The studies GAO analyzed reported little difference, or such mixed results that they were inconclusive. *Id.*

The soundest study was from the state of Tennessee. Id. On February 1, 1995, Tennessee issued the results of a two-year evaluation of three nearly identical prisons within its borders -- one private, which is owned by CCA, and two public.[9] In contrast to petitioners' assertions, (Pet.Br. at 44-45), Tennessee found very little difference in average inmate costs per day among the three facilities -- $35.39 for the private facility, and $34.90 and $35.45, respectively for the two public facilities. Id. A New Mexico study reviewed by GAO showed CCA's average inmate costs per day for its private women's prison were 50 percent *more than the average estimate for male inmates in the state-run prisons. Mark Oswald,Cost Savings Of Private Prisons Inconclusive, The Santa Fe New Mexican, Aug. 26, 1996, at A1.*

To remain competitive, private prison corporations must devise ways to trim costs or to sell their services regardless of the *de minimis savings they afford. The first choice (not spending money) creates the direct benefit of additional profits.*

The second choice (lobbying to secure anticipated profits) requires added expenses. Thus, from a profit-making perspective, there is a greater incentive for private prisons to cut corners. See Gentry, *supra, at 357.*

Cutting labor costs is the most obvious source of higher profits. Labor accounts for roughly 60 percent of the overall costs of corrections. Donahue, *supra, at 14. Thus, a reduction in the hiring and training of line personnel would have the biggest impact on private prison costs and short-term profitability. The obvious implication of these lower labor costs is a lower quality workforce. Id. at 15. The ABA Guidelines, supra, provide: "a prison or jail cannot be operated safely and in accordance with constitutional, statutory and contractual standards without an adequately trained staff."*

Constitutional violations have resulted when private prisons kept their operating costs low by cutting back on their security personnel, *see, e.g., Ruiz v. Estelle, 503 F. Supp. 1265 (S.D.Tex. 1980), aff'd in relevant part, 679 F.2d 1115 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983), and by cutting back on guard training. See, e.g., Medina v. O'Neil, 589 F.Supp. 1028. In Medina, a private guard, untrained in the use of firearms, accidentally shot and killed a detainee and seriously wounded another when he attempted to use his shotgun as a cattle prod to force sixteen detainees into their tiny cell.*

On June 18, 1995, noncriminal immigrants who were being detained by the United States Immigration and Naturalization Service (INS) at a private detention center run by Esmor, Inc. (Esmor) in Elizabeth, New Jersey, rioted to protest repeated incidents of abuse and inhumane conditions of confinement. Before local officials closed the center, INS performed a program review and investigation of the center's operation. In an interim report issued July 20, 1995, INS found Esmor to be in severe violation of its contract.[10]

INS, *The Elizabeth, New Jersey Contract Detention Facility Operated By Esmor, Inc., Interim Report, July 20, 1995.*

The *Interim Report noted that "many of the guards hired by [the company] did not meet the requirements of the contract or were only marginally qualified." Id. Some guards were employed before receiving a mandatory 40-hour training course, and the contractual requirement of 120 additional hours of training was not met in many instances. Id. Because of low level of*

salaries, the employee turnover rate was a high 60 percent. Id. Esmor guards who did remain had to compensate for the shortness of staff by performing large quantities of overtime work. Id. The guards, therefore, were not only ill-trained but overworked.

Esmor guards mistreated and harassed detainees. *Id. The identified abuses included: physical beatings, issuance to female detainees of oversized male underwear with question marks written in the crotches, awakening detainees with frequent and unnecessary security checks, refusal to issue sanitary napkins to female detainees who were menstruating, and theft of detainee property.*[11] *As stated by one commentator: "If the central goal of privatization is saving money, if incarceration contracts are awarded on the basis of costs, and if it is technically possible to cut costs by lowering standards, then quality control becomes an urgent issue." Donahue, supra, at 20.*

Reducing labor costs are not the only means by which private prison corporations can reduce expenses. There may be financial incentives in disciplining prisoners, as well. These incentives are in direct conflict with inmates' constitutional rights. In an ABA study of private corrections, Professor Ira B. Robbins expressed concern that private prison firms would have an "institutional bias toward disciplining prisoners." Robbins, "The Legal Dimensions Of Private Incarceration," 38 Am.U.L.Rev. 531, 574 (Spring 1989). For example, a decision to deny privileges or services would reduce operating costs and promote administrative convenience. *Id. Another example, ultimately causing revenue gains, involves the decision to revoke a prisoner's good-time credits. Id.*

"Good-time" is awarded for exemplary behavior in prison. It is deducted from the length of sentences and taken into account in making parole decisions. Dunham, supra. Infractions of prison rules are often punished by the forfeiture of good-time credits. *Id. Denial of these sentence credits increases a private prison's profit quotient by lengthening a prisoner's incarceration period. While this particular issue is not directly implicated in this case because a Tennessee statute places good-time determinations in the hands of the state, T.C.A §41-24-112, Professor Robbins' concerns are not improbable. Other states, such as New Mexico, delegate good-time determination to private prisons. Oswald, supra. It is noteworthy that, in 1994, women inmates in CCA's facility in New Mexico were found to have lost more good-time than male inmates in state-run prisons. Id.*

II. ANY GOOD FAITH AFFIRMATIVE DEFENSE WHICH MAY BE AVAILABLE TO PRIVATE FOR-PROFIT DEFENDANTS IN LIMITED CIRCUMSTANCES AS PROTECTION AGAINST FRIVOLOUS SUITS BROUGHT UNDER 42 U.S.C. §1983 IS NOT APPLICABLE HERE

In *Wyatt, this Court held that, even though a private for-profit party invoking an unconstitutional state replevin statute to seize property was not entitled to qualified immunity, it might be able to assert a "good faith affirmative defense."*

504 U.S at 169. The Court did not resolve that issue, however, because it was not "fairly before" the Court. Id. Here too, the issue of a good faith defense is "not fairly before the Court" and should not be reached. Brief for Appellant at i, *Richardson v. McKnight, 88 F.3d 417 (6th Cir. 1996)(No. 96-318). Amici nevertheless offer these brief observations.*

Because the issue was not raised in *Wyatt, this Court did not define the parameters of the good faith affirmative defense. See 504 U.S. at 169. Its discussion of the defense, however, as well as the reasoning of the concurring opinion, indicate that, if the good faith defense exists for private defendants, it would be available only in very limited circumstances that are readily distinguishable from the present case. See id. (limiting the probable availability of the good faith defense to the use of unconstitutional garnishment, prejudgment attachment, and replevin statutes).*

Lower courts interpreting Wyatt have extended the good faith affirmative defense only to private parties who acted pursuant to a state law or ordinance that was later declared unconstitutional. *See Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988) (allowing a private party to a contract to raise a good faith affirmative defense to their participation in an unconstitutional deprivation of property); Wyatt v. Cole, 994 F.2d 1113 (5th Cir. 1993)(allowing private rancher to raise a good faith defense to his role in an unconstitutional deprivation of property); Britt v. Whitehall Income Fund '86, 891 F.Supp. 1578 (M.D.Ga. 1993)(allowing warehouse partnership to raise a good faith defense against their contribution to an unconstitutional arrest);Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994)(allowing lessors to raise a good faith defense to their participation in an unconstitutional deprivation of property); Nemo v. City of Portland, 910 F.Supp. 491 (D.Or. 1995)(allowing city park corporation employee to raise a good faith defense for inhibiting the free exercise of speech and assembly); Vector Research v. Howard & Howard Attorneys, 76 F.3d 692 (6th Cir. 1996)(allowing manufacturer and its attorneys raise a good faith defense for their participation in an unconstitutional search and seizure).*[12]

The defendants in these post-*Wyatt cases were entitled to assert a good faith affirmative defense because they believed that the laws upon which they relied when they violated plaintiffs' rights were valid. Absent a facially valid statute -- and none*

exists in this case -- there is much less reason to depart from the general principle that §1983 "should be read against the background of tort liability that makes a man responsible for the consequences of his actions." Pierson, 386 U.S. 556 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

When the challenged behavior in a §1983 lawsuit takes place pursuant to a legislative enactment, it may well be reasonable to assign primary responsibility for the constitutional violation to the state rather than the private individuals who relied on the state's erroneous constitutional judgment. A very different situation exists, however, when there is no underlying statute, and thus no claim that the state has directed, authorized, or ratified the defendants' unconstitutional acts. In the latter case, there is no obvious reason why the private defendant in a §1983 suit should be treated differently than any other tortfeasor, who could not avoid liability in a nonconstitutional context by asserting a good faith defense.

As Justice Kennedy remarked in *Wyatt, "there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." 504 U.S. at 174 (concurring). In this case, petitioners do not even claim to have relied upon a statute, ordinance or any other positive law in their interactions with respondent. Under these circumstances, even a limited good faith defense should not apply.*

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted,

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NOTES

1 Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

2 See *Nixon v. Fitzgerald, 457 U.S. 731 (1982)(president);Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (federal legislators); Tenney v. Brandhove, 341 U.S. 367 (1951)(state legislators) Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)(regional legislators); Butz v. Economou, 438 U.S. 478 (1978)(executive officials acting in a judicial capacity); Stump v. Sparkman, 435 U.S. 349 (1978)(judges); Pierson v. Ray, 386 U.S. 547 (1967)(judges); Supreme Court of Virginia v. Consumers Union of the United States, Inc., 446 U.S. 719 (1980)(judges acting as legislators); Imbler v. Pachtman, 424 U.S. 409 (prosecutors); Briscoe v. LaHue, 460 U.S. 325 (1983)(witnesses, including police officers acting as witnesses); but see Malley v. Briggs, 475 U.S. 335 (1986)(no absolute immunity for police officers acting as complaining witnesses).*

3 *See Scheuer v. Rhodes, 416 U.S. 232 (1974)(governors); Wood v. Strickland, 420 U.S. 308 (1975)(school board officials); Butz v. Economou, 438 U.S. 478 (cabinet members), Harlow v. Fitzgerald, 457 U.S. 800 (presidential advisors); Mitchell v. Forsyth, 472 U.S. 511 (1985) (United States Attorney General). This Court has also extended qualified immunity to defendants who exercise discretion in executing state police powers: O'Connor v. Donaldson, 422 U.S. 563 (1975)(mental hospital administrators); Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); Anderson v. Creighton, 483 U.S. 635 (1987)(police officers acting in their capacity as law enforcement officials; however qualified immunity does not protect those who are "plainly incompetent" or who "knowingly violate the law"); Pierson v. Ray, 386 U.S. 547 (police officers).*

4 *See Harlow v. Fitzgerald, 457 U.S. 800 (objective test for qualified immunity can be resolved on summary judgment before discovery takes place); Mitchell v. Forsyth, 472 U.S. 511 (denial of qualified immunity to a defendant can be reviewed on interlocutory appeal); Anderson v. Creighton, 483 U.S. 635 (defendants who do not meet objective test may still receive qualified immunity if they can show they reasonably believed their actions were legal); Laura Oren, "Immunity and Accountability in Civil Rights Litigation: Who Should Pay?", 50 U.Pitt.L.Rev. 935, 995 (1989)(qualified immunity resembles absolute immunity from suit); A. Allise Burris, Note: "Qualified Immunity in §1983 and Bivens Actions," 71 Tex.L.Rev. 123, 160 (1992)(same).*

5 *See, e.g., Stephen J. Shapiro, "Public Officials' Qualified Immunity In §1983 Actions UnderHarlow v. Fitzgerald And Its Progeny: A Critical Analysis," 22 U.Mich.L.Rev. 249, 262-63 (1989)(qualified immunity shields defendants who act maliciously or in bad faith to violate constitutional rights); H. Allen Black, Note: "Balance, Band-Aid, or Tourniquet: The Illusion of Qualified Immunity For Federal Officials," 32 Wm. & Mary L.Rev. 733 (1991)(qualified immunity prevents plaintiffs from even learning whether their constitutional rights were violated and further prevents the development of constitutional law.)*

6 Writing for the majority in *Owen, Justice Brennan stated that:*

> "There is nothing in the character of a municipal corporation which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation."

Id. at 640 (quoting T. Shearman & A. Redfield, A Treatise on the Law of Negligence §120, p.139 (1869)).

7 *See also Ward McAfee & David Shichor, A Historical-Sociological Analysis of California's Private Prison Experience in the 1850s: Some Modern Implications, Crim. Just. Hist., Vol. 11 (1990)("Given that the primary motive for resorting to privatization is to cut costs, maintenance of a thorough (and costly) oversight role would inevitably come into criticism. In the California situation, oversight was discontinued as an unnecessary expense").*

8 CCA's Chairman also indicated during the same interview that CCA's credit line grew from $20 million to $170 million in 1996 and that, as of end of the second quarter, CCA also had $120 million dollars in cash. Id.

9 Tennessee Select Oversight *Committee on Corrections, Comparative Evaluation of Privately Managed Corrections Corporation of America Prison (South Central Correctional Center) and State Managed Prototypical Prisons (Northeast Correctional Center, Northwest Correctional Center)(February 1, 1995).*

10 Despite these violations and Esmor's substantial loss when the Elizabeth facility was closed, the company's growth was not deterred. After changing its name to Correctional Services Corporation (CSC), the company again earned record revenues in less than a year. *Correctional Services Corporation Reports Second Quarter Operating Results, Business Wire, Aug. 13, 1996. From 1992 to 1996, CSC's revenues have nearly tripled. Id.*

11 For dramatic accounts of individual cases at Esmor*, see Prepared Testimony by Mary Diaz, Director Women's Commission For Refugee Women and Children, Federal News Service, May 8, 1996, regarding the story of Hawi Abda Jama, who received political asylum after two years of confinement and abuse, and Celia W. Dugger, Woman's Plea For Asylum Puts Tribal Ritual On Trial, New York Times, Apr. 15, 1996, at A2, recounting the story of Fauziya Kasinga, who received political asylum to escape female genital mutualization in Togo.*

12 In spite of this general agreement, the lower courts are split on the precise substantive definition of the good faith affirmative defense. Some courts regard the good faith inquiry as *strictly subjective. See Jordan, 20 F.3d at 1276 (the defense depends on the "subjective state of mind"); Nemo, 910 F.Supp. at 498-99 (focusing on a "subjective belief of good faith"). Other courts include an objective component in determinations of good faith. See Wyatt 994 F.2d at 1118 (addressing the objective question of whether defendant should have known his conduct was unconstitutional); Britt, 891 F.Supp. at 1583-84 (focusing on an objective determination of whether reliance on the constitutionality of a statute was reasonable).*

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