ASSERTION OF QUALIFIED IMMUNITY BY PRIVATE STATE ACTORS AFTER *FILARSKY*: AN APPLICATION TO THE EMPLOYEES OF PRISON HEALTH CARE CONTRACTORS

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I. INTRODUCTION

Imagine two state prison employees: one is a health care provider employed by an independent contractor to provide mental health services to inmates in the facilities of a state prison; the second is a prison intake officer, employed directly by the same state prison to perform a suicide screening to inmates. Further, imagine the estate of an inmate who committed suicide sues both employees under 42 U.S.C. § 1983[1] for their failure to identify the inmate's serious risk to commit suicide and initiate the prison's suicide prevention protocol.

It is undisputed that the state-employed prison officer will be entitled to the defense of qualified immunity.[2] This defense "gives government officials breathing room to make reasonable but mistaken judgments," protecting "all but the plainly incompetent or those who knowingly violate the law."[3] The question that arises, however, is whether such a defense is equally available to the health care provider who is not employed directly by the state prison but rather by an independent contractor. The Seventh Circuit answered this question in *Estate of Clark v. Walker* where it held that that a privately employed nurse working at a state prison facility was *not* eligible for qualified immunity.[4]

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1 Section 1983 provides a federal cause of action for private parties whose federal constitutional rights were violated by government employees or any other person acting "under color of state law." *See generally* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1 (Kris Markarian ed., 3d ed. 2014) (explaining the issues that arise in § 1983 litigation).

2 *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment 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.").

3 Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).

4 Estate of Clark v. Walker, 865 F.3d 544, 551 (7th Cir. 2017).

The question of whether privately employed medical providers working at state prisons may assert qualified immunity is part of a broader ongoing debate as to when private individuals who are acting under "color of state law" may assert the defense of qualified immunity in an action under 42 U.S.C. §1983.[5] The Supreme Court has addressed this issue three times but reached inconsistent holdings.[6] Most importantly, the Supreme Court has failed to establish an easy standard of general applicability.[7] Thus, lower courts are left to engage in a complex, case-by-case determination that has led to conflicting conclusions about various private actors' ability to invoke the defense.[8] As a result, there is great uncertainty in this area.[9]

This Note examines this question in the particular context of whether and when the defense should be available to medical personnel of independent contractors who provide health care services to state prison facilities.[10] As the number of prison conditions lawsuits continues to increase,[11] there will be numerous suits in which private medical personnel and state-employed prison staff are sued as co-defendants. Unlike the latter, however, who broadly enjoys qualified immunity, the availability of this defense to the former is uncertain.[12]

The recent trend among lower courts is to either deny the assertion of the defense or to avoid addressing the issue all together by denying qualified

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5 Andrew W. Weis, Note and Comment, *Qualified Immunity for "Private" § 1983 Defendants After* Filarsky v. Delia, 30 GA. ST. U. L. REV. 1037, 1040 (2014).

6 *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992) (finding that immunity was not an available defense for private defendants with no connection to government interest because "the rationales mandating qualified immunity for public officials are not applicable to private parties"); Richardson v. McKnight, 521 U.S. 399, 412 (1997) (holding that private prison guards could not use qualified immunity as a defense to a § 1983 claim because there was no historical basis for immunity and policy concerns did not weigh heavily enough in favor of the defendants); Filarsky v. Delia, 566 U.S. 377, 380 (2012) (holding that attorney retained by local government, but not employed full time, could state the defense of qualified immunity because government employees doing the same work could seek the protection of qualified immunity and because common law drew no distinction between government employees and those working on behalf of the government); *see also* Weis, *supra* note 5, at 1040 (addressing the confusion caused by the holdings in these three cases).

7 Weis, *supra* note 5, at 1040.

8 *Id.*

9 Karen Blum et al., *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 TOURO L. REV. 633, 642 (2013) ("There will inevitably be a circuit split on this issue in the near future, and the Supreme Court will undoubtedly revisit the question. Until then, practicing attorneys should keep a close watch on their own circuits to understand that circuit's position on qualified immunity for private actors after Filarsky.").

10 *Developments in the Law – State Action and the Public/Private Distinction, III. Private Party Immunity from Section 1983 Suits*, 123 HARV. L. REV. 1266, 1271 (2010).

11 *Federal Judicial Caseload Statistics 2017*, U.S. COURTS, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017 (last visited Nov. 11, 2017) (showing that fillings in the US district courts addressing prison conditions increased 36 percent, or 2,812 petitions, for the twelve -month period between March 31, 2016 to March 31, 2017).

12 Weis, *supra* note 5, at 1040.

immunity on its merits.[13] Until recently, the Seventh Circuit followed the second approach and avoided taking a clear stand on the availability of the defense to private medical personnel.[14] However, in October of 2017 the court changed its approach.[15] By issuing the opinion in *Estate of Clark*, the Seventh Circuit clearly held that private medical personnel working in state prisons may not assert the defense.[16]

While *Estate of Clark* at least gives a clear directive and removes previous uncertainty, the court's brief discussion regarding the relevant case law and its failure to engage in its own comprehensive analysis raises concerns about its reasoning and leaves room for second-guessing its conclusion. The question thus remains: is the asymmetry between similarly situated, and often closely collaborated, public and private state actors justified?

This comment introduces an analytical framework that reconciles the Supreme Court's disparate precedents on the larger issue of the availability of the qualified immunity defense to private state actors. Employing this framework, this comment further argues that the employees of private health care contractors who provide on-site health care services to state prison facilities are in "close nexus" with state prison correctional officers. Because this "close nexus" raises the same policy concerns that led to the adoption of qualified immunity for state actors, employees of private health care contractors who provide on-site services to state prison facilities should be allowed to assert qualified immunity.

More specifically, Part II describes the legal origins and evolution of the doctrine of qualified immunity, with particular focus on the history of its expansion to private persons engaged in state action. It also presents the different approaches various circuit courts have followed on the issue of assertion of qualified immunity by private correctional health care providers. Part III suggests that the appropriate framework for reconciling the relevant

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[13] *See III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1272–74 (reviewing circuit cases on the availability of qualified immunity to private medical personnel).

[14] *See, e.g.*, Petties v. Carter, 836 F.3d 722, 733–34 (7th Cir. 2016), *as amended* (Aug. 25, 2016), *cert. denied*, 137 S. Ct. 1578 (2017) (mem.) (noting that even assuming that qualified immunity was available there were factual disputes that precluded the grant of summary judgment on qualified immunity grounds); Zaya v. Sood, 836 F.3d 800, 807 (7th Cir. 2016) (noting that there was no need to address the issue of assertion because the defendant's mental status precluded the granting of summary judgment on qualified immunity grounds); Holtz v. Coe, No. 14-CV-367-NJR-DGW, 2016 WL 5369464, at *9 (S.D. Ill. Sept. 26, 2016) (discussing that "the Seventh Circuit has made clear that it has yet to definitively decide whether or not qualified immunity is available to employees of a private company providing medical services to inmates"). *But see* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 794 (7th Cir. 2014) (discussing in dicta that "[a]lthough Richardson involved a private prison, some circuits (including our own) have applied Richardson to private medical providers, holding that they are similarly barred from asserting immunity under § 1983").

[15] Estate of Clark v. Walker, 865 F.3d 544, 550 (7th Cir. 2017) (holding that "private medical personnel in prisons are not afforded qualified immunity").

[16] *Id.*

Supreme Court decisions is a sliding scale approach: the closer the nexus between private and government employees, the more the qualified immunity policy consideration will be implicated, and the lesser the common law history inquiry will weigh. Conversely, when the private employee performs an assigned duty in independence from other government employees, the qualified immunity policy consideration will be mitigated. In such cases, a court will have to search deeper into the common law history and should only allow the defense to be asserted if there is a common law tradition of immunity as to the closest analogous private actor.

Then, Part III applies this framework to the narrower issue of availability of the defense of qualified immunity to the employees of correctional health care contractors. This application suggests that there is a presumption of "close nexus" between employees of private health care contractors who provide on-site services to state prison facilities and the state prison correctional officers in these same facilities. Because of this presumption, courts should permit assertion of qualified immunity by private health care contractors who provide on-site services in state prison facilities unless the opposing party shows that the health care provider performed the governmental function independently and without any substantial supervision or control by the government.

Finally, Part III analyzes *Estate of Clark* under the suggested framework to demonstrate how the proposal works. It concludes that *Estate of Clark* was incorrectly decided, and the court should have allowed the assertion of qualified immunity by the privately employed nurse, as it did with the state-employed correctional officer, because the privately employed nurse performed on-site correctional health services, in a state prison, and was therefore in close nexus with the state-employed correctional officers.

II. BACKGROUND

Section 1983 provides a federal cause of action for private parties whose federal constitutional rights were violated by government employees, or any other person acting "under color of state law."[17] One of the most important and frequently raised defenses on § 1983 is the defense of qualified immunity.[18] Qualified immunity shields executive officials from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

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[17] 42 U.S.C. § 1983 (2012) ("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 . . . ."); *see generally* SCHWARTZ, *supra* note 1.

[18] SCHWARTZ, *supra* note 1.

known."[19] Therefore, two conditions must be met for qualified immunity to apply to those who are entitled to assert it: first, the challenged conduct must not violate a clearly established statutory or constitutional right, and second, that right must be clearly established in a way that a reasonable person in the same position as the defendant would have been aware that such right exists.[20]

However, a fundamental issue is who may assert qualified immunity in the first place.[21] It is well established that § 1983 creates civil liability not only for government employees but also for other private individuals or entities who are engaged in state actions.[22] What is not yet clearly determined, however, is whether and when those private state actors who are suable under § 1983 may assert the defense of qualified immunity.[23] The Supreme Court has struggled with this issue on three occasions, failing to reach consistent holdings and come up with a generally applicable standard.[24] To understand the difficulties in deciding whether private defendants are entitled to qualified immunity, it is first necessary to give a brief introduction to the origins of qualified immunity.

A. Origins of the Defense of Qualified Immunity to Government Employees

Qualified immunity shields executive officials from civil liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[25] The origins of the doctrine stem from the assumption that because Congress did not expressly abolish the traditional and well settled common law defenses

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[19] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[20] Frank H. Stoy, Comment, *Should Outside Counsel Be Left Out in the Cold? An Examination of Opposing Standards Regarding Qualified Immunity:* Delia v. City of Rialto *and* Cullinan v. Abramson, 50 DUQ. L. REV. 645, 645–46 (2012); SCHWARTZ, *supra* note 1, at 143.

[21] SCHWARTZ, *supra* note 1, at 145; *see also III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1267; Weis, *supra* note 5, at 1040; Stoy, *supra* note 20, at 645–46.

[22] SCHWARTZ, *supra* note 1, at 81 (emphasizing that both the Supreme Court and lower federal courts have generally interpreted the "color of state law" requirement as having the same meaning with the "state action" requirement imposed by the Fourteenth Amendment); *see also* West v. Atkins, 487 U.S. 42, 50-51 (1988) (concluding that a private physician who provides medical care to inmates acts under "color of state law" within the meaning of section 1983); Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 (1982) (holding that a private creditor, who used the aid of state officials to attach a property under a state prejudgment attachment statute, engaged in state action and acted under color of state law).

[23] Weis, *supra* note 5, at 1040; Stoy, *supra* note 20, at 645–46.

[24] Weis, *supra* note 5, at 1040; Stoy, *supra* note 20, at 645–46.

[25] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

of good faith and probable cause at the time § 1983 was adopted, it must have intended to retain them.[26]

The first case that recognized qualified immunity was the Supreme Court's 1967 decision of *Pierson v. Ray*.[27] There, police officers were sued under § 1983 for making arrests pursuant to a statute that was later held unconstitutional.[28] The police officers contended they were acting with the belief that the statute was valid.[29] Therefore, they alleged, they were entitled to assert the same defense of good faith and probable cause that would be available to them in the common-law action of false arrest and imprisonment.[30]

The Court agreed, holding that the defense of good faith and probable cause is available to defendants sued under § 1983.[31] In doing so, it emphasized that § 1983 "should be read against the background of tort liability" and that the legislative record of § 1983 gave "no clear indication that Congress meant to abolish wholesale all common-law immunities."[32] The Court based its holding on the assumption that had Congress intended to abolish those common law defenses and immunities, it would have explicitly done so.[33]

The Court followed this approach for fifteen years, during which it extended the availability of the good faith and probable cause defenses to all government officials, regardless of the existence of a common law tradition as to the particular actors.[34] However, in *Harlow v. Fitzgerald*, the Supreme Court utterly reconstructed that framework, abandoning *Pearson*'s subjective component of good faith and transforming the defense to what is known today as the objective qualified immunity.[35]

In *Harlow*, the Court held that qualified immunity should not rest upon the subjective knowledge or intent of the government employee, which were

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26 Pierson v. Ray, 386 U.S. 547, 554-55 (1967); *see also* Weis, *supra* note 5, at 1047.
27 *Pierson*, 386 U.S. at 554.
28 *Id.* at 557.
29 *Id.* at 555.
30 *Id.*
31 *Id.* at 547.
32 *Id.* at 556, 554.
33 *Id.* at 554-55.
34 *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) (holding that similarly to police officers, other "officials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office"); Wood v. Strickland, 420 U.S. 308, 320 (1975) (extending qualified immunity to the school board officials due to their need to exercise judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and the students"); *see also* Weis, *supra* note 5, at 1047; *III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1270 (noting that the Court has "abandoned any pretense of historical inquiry, largely because it had trouble interpreting the common law for many offices").
35 Weis, *supra* note 5, at 1048.

components of the common law defense of good faith.[36] Rather, government officials performing discretionary functions shall be shielded from liability under § 1983 so long as "their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable* person would have known."[37]

The Court emphasized that policy considerations are inherent in any qualified immunity inquiry and require a balance between the need for providing a sufficient remedy in case of constitutional violations, on the one hand, and, on the other hand, the need for preventing the social cost that derives from frivolous suits against government employees.[38] Resting heavily on the policies underpinning qualified immunity, namely the prevention of "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service,"[39] the Court concluded that abandoning the subjective component of the common law defense and applying a wholly objective standard would strike the best balance by permitting the disposal of frivolous and unmeritorious suits at the early stage on summary judgment.[40] Because this policy-balancing is inherent in any qualified immunity inquiry,[41] it should also inform the analysis of the application of qualified immunity to private state actors.

B. Expansion of the Defense of Qualified Immunity to Private State Actors

The Supreme Court has addressed private party qualified immunity in three cases.[42] The Court has not precluded the assertion of the defense by private parties in general.[43] Rather, it has followed a case-by-case approach, focusing on two main factors: first, the common law history and tradition, and second, the policy considerations that justified the adoption of the

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36 Harlow v. Fitzgerald, 457 U.S. 800, 815-16 (1982) ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial . . . [because] good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.").

37 *Id.* at 818 (emphasis added).

38 *Id.* at 814.

39 *Id.* at 816.

40 *Id.* at 817 (explaining that "[j]udicial inquiry into subjective motivation" are generally inappropriate for decision at the stage of summary judgment, and in addition, they "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues," thus being "peculiarly disruptive of effective government").

41 *Id.* at 814.

42 *See* Wyatt v. Cole, 504 U.S. 158, 168 (1992); Richardson v. McKnight, 521 U.S. 399, 404 (1997) (noting that the Court in *Wyatt* did not "answer to the question before it as one applicable to all private individuals-irrespective of the nature of their relation to the government"); Filarsky v. Delia, 566 U.S. 377, 380 (2012); *see generally* Weis, *supra* note 5, at 1040 (addressing the confusion caused by the holdings in these three cases).

43 Weis, *supra* note 5, at 1048.

qualified immunity defense for government employees.[44] However, the Court has failed to analyze these factors in a coherent fashion, creating great uncertainty as to the applicable framework and resulting in outcomes that are inconsistent on their face.[45]

1. Wyatt v. Cole

First, in the 1992 case *Wyatt v. Cole*, the Supreme Court refused to allow the assertion of qualified immunity by "private defendants faced with 42 U.S.C. § 1983 liability for invoking a state replevin, garnishment, or attachment statute."[46] There, the plaintiff brought an action under § 1983 against his former partner and the partner's attorney, who had invoked the Mississippi replevin statute authorizing the county sheriff to seize plaintiff's property; the statute provided that state judges were mandatorily required to issue a writ of replevin once the applicant had posted a bond and had sworn at a state court that he is entitled to the property.[47] The lower courts found the state replevin statute unconstitutional but held that the former partner and his attorney were entitled to good faith-qualified immunity.[48]

The Supreme Court reversed, holding that the former partner and his attorney were not entitled to assert the defense of qualified immunity because they were private parties.[49] Even though the Court acknowledged the existence of a good faith defense under the common law history and tradition, it did not give that existence much weight and primarily based its decision on the policy reasons that led to the adoption of the doctrine of qualified immunity to government employees in the first place.[50]

The Court's analysis emphasized that the private defendants did not assert the subjective common law defense of good faith but the "type of

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44 *See Wyatt*, 504 U.S. at 168; *Richardson*, 521 U.S. at 401; *Filarsky*, 566 U.S. at 380; *see generally* Weis, *supra* note 5, at 1040.

45 *See generally* Weis, *supra* note 5, at 1040 (addressing the confusion caused by the holdings in these three cases); Blum, *supra* note 9, at 642 (noting the inconsistencies in the Court's opinions which will "inevitably" lead to a circuit split and until the Supreme Court revisits the issue, practicing attorneys must be vigilant in their understanding of local court positions on the doctrine of qualified immunity for private actors).

46 *Wyatt*, 504 U.S. at 159.

47 *Id.* at 159-60.

48 *Id.* at 162-63 (discussing the appellate court's holding that the defendants in this case were entitled to qualified immunity for actions prior to the statute being invalidated based on policy concerns in the "important public interest in permitting ordinary citizens to rely on presumptively valid state laws")

49 *Id.* at 167.

50 *Id.* at 165-69 (quoting Malley v. Briggs, 475 U.S. 335, 340-41 (1986)) (noting that even though "[i]n 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause," private parties would still not be entitled to the objective qualified immunity from suit that was recognized in *Harlow* for government employees).

objectively determined, immediately appealable immunity" that the Court recognized for government employees in *Harlow*.[51] The Court then suggested that, on its own, the existence of a good-faith common-law defense at the time of the adoption of § 1983 was insufficient to support the expansion of the objective qualified immunity defense to private parties.[52] Rather, the basis for recognizing such an objective immunity was "the special policy concerns involved in suing government officials," which the Court found inapplicable to private parties.[53]

In particular, the Court reasoned that objective qualified immunity recognized in *Harlow* "acts to safeguard government, and thereby to protect the public at large, not to benefit its agents."[54] Even though "equality and fairness" may support expanding the protection to private parties who "rely unsuspectingly on state laws," the Court determined that those interests are essentially distinguishable from the interests that led to the adoption of qualified immunity for government employees: "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good."[55]

Consequently, the Court explained, the extension of the defense to "private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service."[56] Additionally, the court reasoned that, "the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes."[57] "In short," the Court concluded, "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of [qualified immunity]."[58]

The Court's holding, however, was deliberately narrow, thereby limiting its scope to the specific issue of whether the *objective immunity* recognized in *Harlow* was available to private individuals "faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute."[59] Most importantly, the Court explicitly left open the possibility that such private defendants "could be entitled to an affirmative defense based on good

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[51] *Id.* at 166-67.

[52] *Id.* at 165-66 (reasoning that a good-faith defense is not the same thing as being immune from suit, and that the respondents were incorrectly given the type of immunity discussed in *Harlow* by the lower courts, which was carved out for "government officials performing discretionary functions").

[53] *Id.* at 167.

[54] *Id.* at 168.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 168-69.

faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."[60]

2. Richardson v. McKnight

The second Supreme Court case that addressed private-party qualified immunity was the 1997 case *Richardson v. McKnight*.[61] There, the Court rejected the assertion of the doctrine of qualified immunity by employees of a private prison operated by a government contractor.[62] In reaching its decision, the Court repeated *Wyatt*'s framework looking at the following two factors: (1) the principles of tort immunities and defenses applicable at common law when Congress enacted 42 U.S.C. § 1983 in 1871; and (2) the policy that led to the adoption of *Harlow*'s version of qualified immunity, namely the protection of the robust and uninterrupted performance of government functions and the attraction of "talented candidates."[63]

The Court started its analysis with the history factor, looking for a "'firmly rooted' tradition of immunity applicable to privately employed prison guards."[64] However, unlike previous cases such as *Pierson* and *Wyatt* where the Court was looking for good-faith and probable cause common law defenses,[65] in *Richardson* the Court followed a different approach. In particular, it focused its research on looking for an immunity from suit—not merely liability.[66] After engaging in a long and detailed analysis of the common law history and tradition relating to private prison litigation in United States and England, the Court concluded "that no *immunity from suit* would exist for the type of intentional conduct at issue."[67] Nonetheless, the Court explicitly stated that such an immunity was indeed provided "for certain private defendants, such as *doctors* or lawyers who performed services at the behest of the sovereign."[68]

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[60] *Id.* at 169.

[61] Richardson v. McKnight, 521 U.S. 399, 401 (1997).

[62] *Id.* at 412.

[63] *Id.* at 400, 403; *see also* Weis, *supra* note 5, at 1041 (noting that both in *Wyatt* and in *Richardson* the Court adopted a two-part test that weighed both the historical and policy grounds for immunity rather than a functional approach).

[64] *Richardson*, 521 U.S. at 404.

[65] Pierson v. Ray, 386 U.S. 547, 556-57 (1967) ("Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause."); Wyatt v. Cole, 504 U.S. 158, 165 (1992) (discussing whether the Court could infer Congress's intent not to abrogate the defenses of malicious prosecution or abuse of process that were available to private defendants at common law).

[66] *Richardson*, 521 U.S. at 406 (noting that there was no evidence of giving private employees immunity from suits at issue in the case, rather than looking for evidence of liability).

[67] *Id.* (emphasis added).

[68] *Id.* at 406 (emphasis added) (first citing Tower v. Glover, 467 U.S. 914, 920 (1984); then citing J. BISHOP, COMMENTARIES ON NON-CONTRACT LAW §§ 704, 710 (1889)).

Further, *Richardson* was the first case that engaged in a detailed analysis of the common-law-history factor in the context of private-actor qualified immunity. In doing so, it gave the lower courts directives for the level of specificity they should apply: they should not look generally at common law defenses, but rather at whether there was a well-rooted tradition of suit-immunity for the *particular private defendant*.[69] Defining its inquiry with such specificity, the Court imposed a heightened standard that made the finding of sufficient common law history in support of the expansion of qualified immunity almost impossible. Interestingly, this analysis resembles the one the Court applied when it first recognized the defense of qualified immunity in *Pierson*[70] but later abandoned by extending the availability of the defense to all government officials without inquiring in the common law history and tradition but focusing solely on policy considerations.[71]

After its history analysis, the Court turned to the policy inquiry.[72] Initially, it rejected the defendant's argument that he should be entitled to qualified immunity because he performed the same functions as state prison guards.[73] The Court stated that the "functional approach in immunity cases" is only relevant in deciding "which type of immunity—absolute or qualified—a public officer should receive."[74]

Then, the Court distinguished private actors from government officials on the ground that the three principal policy concerns dictating qualified immunity—unwarranted timidity, distraction, and the deterrence of able people from public service—are not present at the same level when the defendant is a private individual.[75] First, the Court introduced the "competitive market pressure" argument under which ordinary market

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69 *Id.* at 404 (looking for a "'firmly rooted' tradition of immunity applicable to privately employed prison guards"); *see III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1270.

70 Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that the defense of good faith and probable cause was available to police "officers in the common-law action for false arrest and imprisonment," and thus, it should also be available to them when they are sued under § 1983).

71 *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 642–43 (1987) ("[The Court] has been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide."); Scheuer v. Rhodes, 416 U.S. 232, 246 (reasoning that, similarly to police officers, other "officials with a broad range of duties and authority" must also be protected by the defense of qualified immunity based on policy considerations); Wood v. Strickland, 420 U.S. 308, 320 (1975) (extending qualified immunity to the school board officials because of their need to exercise judgment "independently, forcefully, and in a manner best serving the long-term interest of the school and the students"); *see also* Weis, *supra* note 5, at 1047; *III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1270 (noting that the Court has "abandoned any pretense of historical inquiry, largely because it had trouble interpreting the common law for many offices").

72 *Richardson*, 521 U.S. at 407.

73 *Id.* at 408-09.

74 *Id.* at 408.

75 *Id.* at 400; Weis, *supra* note 5, at 1054–55.

pressures create sufficient productivity incentives to the private prisons and negate any unwarranted timidity concern.[76] Second, the Court suggested that "privatization" ensures that "talented candidates" will be compensated to the level required to entice their entry into the public service, alleviating the risk of deterrence "by the threat of damages suits."[77] Last, the Court found that the "risk of 'distraction' alone," unsupported by any history or other policy considerations, could not justify the expansion of qualified immunity in that case.[78]

The Court concluded that neither the job of operating a private prison nor its organizational structure indicates any "special reasons significantly favoring an extension of governmental immunity."[79] As the Court noted, "[t]he job is one that private industry might, or might not, perform," and indeed, "private firms did sometimes perform without relevant immunities."[80] Further, the Court continued, "[t]he organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily present in government departments."[81] Unable to find a reason that would significantly favor the extension of immunity, the Court concluded that "private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case."[82]

3. Filarsky v. Delia

Finally, the Supreme Court revisited the issue of the availability of qualified immunity to private state actors in the 2012 case *Filarsky v. Delia*.[83] There, Delia, a firefighter, brought a lawsuit under §1983 against Filarsky, a private attorney who was employed by the city to conduct an internal affairs investigation against Delia.[84] Filarsky asserted qualified immunity.[85] In a unanimous decision, the Supreme Court found that both history and policy considerations favored allowing Filarsky to assert qualified immunity.[86]

Unlike in *Wyatt* and *Richardson*, the *Filarsky* Court began its analysis from a different starting point: it first looked at whether a government

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76 *Richardson*, 521 U.S. at 409-11.
77 *Id.* at 411.
78 *Id.* at 411-12.
79 *Id.* at 412.
80 *Id.*
81 *Id.*
82 *Id.*
83 Filarsky v. Delia, 566 U.S. 377, 380 (2012).
84 *Id.*
85 *Id.* at 383.
86 *Id.* at 380.

employee performing the same governmental function as Filarsky would be entitled to qualified immunity.[87] Having found that a government employee would be entitled to qualified immunity "for the sort of investigative activities at issue," the Court then focused its analysis on whether any distinction between government and private state actors who perform the same "sort of investigative activities" was justified.[88]

In answering that question, the Court first looked at the "common law as it existed when Congress passed § 1983 in 1871."[89] The Court emphasized that governmental functions at that time differed substantially in scale and resources compared to today and required more active involvement of private citizens even for the performance of core governmental activities such as criminal prosecution.[90] Thus, the Court concluded, "it should come as no surprise that *the common law did not draw a distinction between public servants and private individuals engaged in public service* in according protection to those carrying out government responsibilities."[91]

Moreover, *Filarsky*'s analysis of common law history and tradition is distinguishable from *Richardson* as to one additional point: the applicable level of specificity. Unlike in the latter, where the Court looked at the common law history for the closest analogous tradition,[92] in the former the Court searched for examples of government actors who are generally involved "in adjudicative activities."[93]

The Court further found that the policy considerations that justified extending qualified immunity to government employees are also present in cases where the private individuals "*work in close coordination* with public employees" for four reasons.[94] First, avoiding unwarranted timidity from those performing governmental functions "is of vital importance" regardless of the basis of employment.[95] Second, the need for attracting "talented candidates" is even more enhanced when the government performs functions requiring "specialized knowledge or expertise" that cannot be covered by its permanent workforce.[96] Third, allowing the filing of meritless suits against private state actors will not only distract the performance of those individuals, but it will also affect the government employees with whom the

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87 *Id.* at 384.
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.* at 387 (emphasis added).
92 Richardson v. McKnight, 521 U.S. 399, 404 (1997) (looking for a "'firmly rooted' tradition of immunity applicable to privately employed prison guards").
93 *Filarsky*, 566 U.S. at 387 ("Government actors involved in adjudicative activities, for example, were protected by an absolute immunity from suit.").
94 *Filarsky*, 566 U.S. at 391 (emphasis added).
95 *Id.* at 390.
96 *Id.*

private individual is in close collaboration.[97] Finally, "[d]istinguishing among those who carry out the public's business based on the nature of their particular relationship with the government also creates significant line-drawing problems."[98]

Filarsky was the first Supreme Court holding that expanded the doctrine of qualified immunity to private state actors, which is a major shift in the Court's decisions in this area. It is also significant for two additional reasons. First, unlike in *Wyatt* and *Richardson*, the Court did not limit its holding to the particular facts of the case.[99] Rather, it reached a broad conclusion under which a private individual temporarily retained by the government to carry out its work should be entitled to seek qualified immunity from suit under § 1983.[100] Second, in taking a broader approach, the Court moved away from its precedent by adopting just the sort of functionalistic approach that *Richardson* had seemed to reject: qualified immunity under § 1983 should not differ based on whether an individual works for the government as a full-time employee, or on some other basis.[101]

C. Decisions on Private Correctional Health Care Providers

In the landmark case *Estelle v. Gamble*, the Supreme Court recognized that a prison doctor's "deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983."[102] Twelve years later, in *West v. Atkins*, the Supreme Court expanded this holding by finding that physicians who contract with the state to provide prison health care services act under color of state law, and therefore, can be sued under § 1983.[103] As the Court explained, the private prison health care providers perform governmental functions and carry out the state's "constitutional duty to provide adequate medical treatment" to prison inmates.[104]

The Court, however, has never addressed whether prison health care providers who are sued under §1983 are entitled to assert the defense of qualified immunity. Consequently, the lack of any Supreme Court decision on point, along with the Court's inconsistent precedent on the broader issue of private party qualified immunity, have resulted in contradictory

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97 *Id.* at 391.

98 *Id.*

99 *Id.* at 380 (noting that the question presented was whether "an individual hired by the government to do its work is prohibited from seeking [qualified] immunity" instead of asking whether the specific work done in this case by this specific party allowed for qualified immunity).

100 *Id.*

101 *Filarsky*, 566 U.S. at 380; Weis, *supra* note 5, at 1041 (noting that both in *Wyatt* and in *Richardson* the Court adopted a two-part test that weighed both the historical and policy grounds for immunity rather than a functional approach).

102 Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

103 West v. Atkins, 487 U.S. 42, 54 (1988).

104 *Id.* at 56.

approaches by the several circuits.[105] Some circuits, like the Sixth, Ninth, and Eleventh Circuits, have held that qualified immunity is unavailable to private health care providers.[106] Conversely, other circuits, like the First, Second, Third, and Fifth Circuit, permit the assertion of the defense by prison health care providers.[107] Other circuits, like the Tenth Circuit, do not directly address the issue. Rather, they assume *arguendo* that providers can assert the defense, but then they deny qualified immunity on its merits.[108] The Seventh Circuit, until recently, had similarly avoided addressing the issue by denying qualified immunity on its merits or through other procedural maneuvers.[109] In its October 2017 decision *Estate of Clark*, however, the court changed its previous unclear standing and adopted the Sixth Circuit's position, which categorically denies qualified immunity to prison health care providers.[110]

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105 *See III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1272–74 (presenting the circuit split on the availability of qualified immunity to private medical personnel).

106 *See, e.g.*, McCullum v. Tepe, 693 F.3d 696, 697 (6th Cir. 2012); Jensen v. Lane Cty., 222 F.3d 570, 576 (9th Cir. 2000); Hinson v. Edmond, 192 F.3d 1342, 1347 (11th Cir. 1999), *amended*, 205 F.3d 1264 (11th Cir. 2000).

107 *See, e.g.*, Estate of Henson v. Wichita Cty., 795 F.3d 456, 460 (5th Cir. 2015) (affirming the district court's granting of qualified immunity to a private physician contracted by the county to provide medical services at its jail facilities); Chauncey v. Evans, No. 2:01-CV-0445, 2003 WL 21730580, at *2 (N.D. Tex. Feb. 11, 2003) ("Given the nature of the responsibilities of the defendants, the provision of medical care which the State is obligated to provide to prisoners, and the prison setting in which the provision of such care occurred, the Court concludes defendants are entitled to claim qualified immunity against plaintiff's claims."); Estate of Henson v. Wichita Cty., No. CIV.A.7:06CV044O-AH, 2008 WL 3287098, at *4 (N.D. Tex. Aug. 7, 2008); Lee v. Wyatt, No. CIV-07-773-W, 2009 WL 1741387, at *26 (W.D. Okla. Jan. 20, 2009).

108 Carmody v. Ensminger, No. 16-CV-02603-PAB-NYW, 2017 WL 4150601, at *4 (D. Colo. Sept. 19, 2017); *see also*, Gen. Steel Domestic Sales, L.L.C. v. Chumley, 840 F.3d 1178, 1182 (10th Cir. 2016) (Noting that it is "hesitant to extend immunity from suit to a private party without a statutory basis," and that "[i]mmunity from suit is a benefit typically only reserved for governmental officials."); Kellum v. Mares, 657 F. App'x 763, 768 (10th Cir. 2016) (denying qualified immunity on its merits).

109 *See, e.g.*, Petties v. Carter, 836 F.3d 722, 733–34 (7th Cir. 2016), *as amended* (Aug. 25, 2016), *cert. denied*, 137 S. Ct. 1578 (2017) (noting that even assuming that qualified immunity was available, there were factual disputes that precluded the grant of summary judgment on qualified immunity grounds); Zaya v. Sood, 836 F.3d 800, 807 (7th Cir. 2016) (noting that there was no need to address the issue of assertion because the defendant's mental status precluded the granting of summary judgment on qualified immunity grounds); Holtz v. Coe, No. 14-CV-367-NJR-DGW, 2016 WL 5369464, at *9 (S.D. Ill. Sept. 26, 2016) (discussing that "the Seventh Circuit has made clear that it has yet to definitively decide whether or not qualified immunity is available to employees of a private company providing medical services to inmates"); Sain v. Wood, 512 F.3d 886, 893 (7th Cir. 2008) (noting that "[g]iven the absence of any record addressing Richardson's multi-factored test, the district court did not commit plain error in assuming" that prison health care provider was entitled to assert qualified immunity). *But see* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 794 (7th Cir. 2014) (discussing in dicta that "[a]lthough Richardson involved a private prison, some circuits (including our own) have applied Richardson to private medical providers, holding that they are similarly barred from asserting immunity under § 1983").

110 Estate of Clark v. Walker, 865 F.3d 544 (7th Cir. 2017).

1. Circuits Denying Assertion of Qualified Immunity by Private Correctional Health Care Providers

The vast majority of the circuits have adopted *Richardson*'s framework and rationale, categorically denying the assertion of qualified immunity by prison health care providers.[111] Most of those cases were issued before *Filarsky* and based their conclusion on the lack of a firmly rooted common law tradition of an immunity, coupled with the "market pressure" policy consideration that the Court articulated in *Richardson*.[112]

For instance, in *Harrison v. Ash*, the Sixth Circuit reaffirmed its holding that jail nurses, employed by a for-profit private medical provider rather than the state, were categorically precluded from asserting qualified immunity defense to a § 1983 action brought by an inmate because there was no firmly rooted common law practice of extending immunity to private actors.[113] Further, the court noted that the policy considerations supporting qualified immunity did not support the extension of the defense to nurses.[114] Using *Richardson*'s justification, the court reasoned that market pressures would force the independent contractor and its employees to effectively execute their contractual duties.[115]

Similarly, the Ninth Circuit in *Jensen v. Lane County* rejected the assertion of qualified immunity by a private physician providing services to mental patients who were involuntarily detained in a county treatment facility.[116] The court there rejected the physician's argument of a firmly rooted common law history and tradition of immunity, finding that Oregon's involuntary commitment statute, which precludes liability so long as the person acts in good faith, did not suffice to provide the "firmly rooted tradition" that the Supreme Court requires under *Richardson*.[117]

The Eleventh Circuit followed the same approach in *Hinson v. Edmond*.[118] There, the court found qualified immunity unavailable to a physician who

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[111] *See, e.g.*, Jensen v. Lane Cty., 222 F.3d 570, 576 (9th Cir. 2000) (holding that qualified immunity was "categorically unavailable" to private physician providing services to county pursuant to contract); McCullum v. Tepe, 693 F.3d 696, 704 (6th Cir. 2012) (finding that a prison psychiatrist was not entitled to assert qualified immunity).

[112] *See, e.g.*, *Jensen*, 222 F.3d at 576 (holding that qualified immunity was "categorically unavailable" to private physician providing services to county pursuant to contract); *Tepe*, 693 F.3d at 704 (finding that a prison psychiatrist was not entitled to assert qualified immunity).

[113] Harrison v. Ash, 539 F.3d 510, 522 (6th Cir. 2008); *see also Jensen*, 222 F.3d at 576 (9th Cir. 2000) (holding that qualified immunity was "categorically unavailable" to private physician providing services to county pursuant to contract).

[114] *Harrison*, 539 F.3d at 523-25.

[115] *Id.*

[116] *Jensen*, 222 F.3d at 577.

[117] *Id.*

[118] *See, e.g.*, Hinson v. Edmond, 192 F.3d 1342, 1347 (11th Cir. 1999), *amended*, 205 F.3d 1264 (11th Cir. 2000).

was employed by a private, for-profit company that had contracted with the county to provide medical services to jails, based on the absence of any strong reason to distinguish them from the privately employed prison guards in *Richardson*.[119] The same reasoning was adopted by the Eighth Circuit in *Weigand v. Spadt*, where the court rejected the assertion of qualified immunity by the employees of a private, non-profit corporation that contracted with the city to provide emergency medical services.[120] The court explained that the corporation was "systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government," and "the risk of 'distraction' alone" could not justify the expansion of the defense of qualified immunity.[121]

All of these cases, however, were issued before 2012, when *Filarsky* signaled a change in the Supreme Court's approach. The landmark post-*Filarsky* case that denied qualified immunity to prison health care providers is *Tepe*.[122] There, the mother of a deceased inmate filed a suit against the prison psychiatrist claiming deliberate indifference to her son's serious medical needs under § 1983.[123] Tepe, a part-time psychiatrist employed by an independent non-profit organization to provide mental-health services to state prisons, asserted qualified immunity.[124] The court denied Tepe's assertion, holding that there is no "history of immunity from suit at common law for *a privately paid physician working for the public*, and the policy rationales that support qualified immunity are not so strong as to justify . . . ignoring this history, or lack of history."[125]

As to the common law history inquiry, the court followed *Richardson*'s narrow approach, focusing only on whether "a *private doctor* working for a state institution would have been immune from a suit for damages at common law.[126] However, the court rejected *Richardson*'s finding that "[a]pparently the [common] law did provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign."[127] The court in *Tepe* found the authority cited by the Supreme Court in support of its conclusion as speculative and "mistaken."[128] Conducting its own research in the common law history, the court looked at American and English cases involving private physicians *in private practice*,

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[119] *Id.*
[120] Weigand v. Spadt, 317 F. Supp. 2d 1129, 1140 (D. Neb. 2004).
[121] *Id.* (quoting Richardson v. McKnight, 521 U.S. 399, 411 (1997)).
[122] McCullum v. Tepe, 693 F.3d 696, 697 (6th Cir. 2012).
[123] *Id.*
[124] *Id.*
[125] *Id.* (emphasis added).
[126] *Id.* (emphasis added).
[127] *Tepe*, 693 F.3d at 701.
[128] *Id.* at 701-02 (noting that "[c]ontrary to Bishop's unsupported speculation, it does not appear that doctors generally enjoyed any special kind of immunity," and thus "Bishop was mistaken").

English civil medical-malpractice cases decided as early as 1374, and three American medical-malpractice cases from 1794, 1832, and 1891, respectively, involving public medical providers.[129] In "the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law," the court concluded that "there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed § 1983."[130]

The court devoted only two small paragraphs of its analysis to the policy considerations inquiry.[131] After restating the three policy goals of § 1983,[132] the court "acknowledge[d] that it is somewhat odd for a government actor to lose the right to assert qualified immunity, not because his job changed, but because a private entity, rather than the government, issued his paycheck."[133] Nonetheless, the court concluded without any further justification that the market pressure considerations that rendered immunity inappropriate to the staff of a privately run prison in *Richardson* suggest that immunity is also inappropriate to a private physician providing health services to a state-run correctional facility.[134]

After the issuance of *Tepe*, many Circuits that had found qualified immunity categorically unavailable to prison health care providers under *Richardson* reaffirmed their holdings, adopting *Tepe*'s analysis.[135]

2. Circuits Permitting Assertion of Qualified Immunity by Private Correctional Health Care Providers

In 2015, the Fifth Circuit affirmed its district court's granting of qualified immunity to a private physician contracted by the county to provide medical services at its jail facilities.[136] The fact that the court in that case

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[129] *Id.* at 701-04.

[130] *Id.* at 704.

[131] *Id.*

[132] *Id.* (referring to the need for preventing "unwarranted timidity on the part of public officials," the need for "ensur[ing] that talented candidates were not deterred by the threat of damages suits from entering public service," and the need for avoiding "the distraction from job duties that lawsuits inevitably create").

[133] *Tepe*, 693 F.3d at 704 (citing Richardson v. McKnight, 521 U.S. 399, 412 (1997)).

[134] *Id.*

[135] *See, e.g.*, Barnes v. Corizon Health, Inc., No. 2:13-CV-862-WKW, 2014 WL 3767583, at *6 (M.D. Ala. July 31, 2014); Hasher v. Hayman, No. 08-4105 (CCC), 2013 WL 1288205, at *9 (D.N.J. Mar. 27, 2013); Zikianda v. Cty. of Albany, No. 1:12-CV-1194, 2015 WL 5510956, at *63 (N.D.N.Y. Sept. 15, 2015).

[136] Estate of Henson v. Wichita Cty., 795 F.3d 456, 460 (5th Cir. 2015); *see also* Estate of Henson v. Wichita Cty., 652 F. Supp. 2d 730, 747 (N.D. Tex. 2009), *on reconsideration, sub nom.* Estate of Henson v. Wichita Cty., 988 F. Supp. 2d 726 (N.D. Tex. 2013), *aff'd sub nom.* Estate of Henson v. Wichita Cty., 795 F.3d 456 (5th Cir. 2015) (noting that "[a]s an initial matter, the Court notes that

considered the merits of qualified immunity and affirmed the district court's grant of qualified immunity to the doctor at least implies that the Fifth Circuit agrees with the proposition that private health care providers can assert qualified immunity. This is in accordance with several decisions of the Fifth Circuit district courts that have found private health care providers entitled to assert qualified immunity.[137]

Indicative is *Chauncey v. Evans*, where the court rejected the state inmate's argument that *Richardson* precludes the assertion of qualified immunity by the defendants who were employed by one of the medical contractors for the state and "worked *each day* as medical professionals providing care to inmates *at the prison unit* where plaintiff was incarcerated."[138] Finding this interpretation of *Richardson* "too broad," the court underlined that *Richardson*'s holding was deliberately narrow "and [did not] involve a private individual . . . acting under close official supervision."[139]

The court, further, emphasized that private medical care providers at the correctional facilities assume the same "obligation to the mission that the State, through the institution, attempts to achieve" as other institutional physicians.[140] Underlying that "the provision of onsite medical care to prisoners is a *'joint effort' requiring 'close cooperation and coordination' between medical care providers and other prison officials*," the court concluded that private prison health care providers "are not in the same position as the *Richardson* defendants, who were supervised not by State prison officials, but by the private company which employed them."[141]

Contrary to the defendants in *Richardson*, the court continued, the private prison health care providers in this case "*performed their duties entirely within the context of the prison unit and acted under close official supervision*, with the result that the *Richardson* holding is not determinative of their entitlement to qualified immunity."[142] Because of "the nature of the responsibilities of the defendants, the provision of medical care which the State is obligated to provide to prisoners, and the prison setting in which the provision of such care occurred," the court concluded that the privately

Dr. Bolin is entitled to assert the defense of qualified immunity even though he is a contract physician").

[137] Chauncey v. Evans, No. 2:01-CV-0445, 2003 WL 21730580, at *2 (N.D. Tex. Feb. 11, 2003); *Estate of Henson*, 2008 WL 3287098, at *4 (noting that "[t]he fact that Dr. Bolin is a contract physician does not alleviate his entitlement to the qualified immunity defense").

[138] *Chauncey*, 2003 WL 21730580, at *2 (emphasis added).

[139] *Id.* (alteration in original) (quoting Richardson v. McKnight, 521 U.S. 399, 413 (1997)).

[140] *Id.* (quoting Polk County v. Dodson, 454 U.S. 312, 320 (1981)).

[141] *Id.* (emphasis added).

[142] *Id.* (emphasis added).

employed prison health care providers were entitled to claim qualified immunity.[143]

Following a similar approach, the First Circuit has held that qualified immunity was available to private state actors even before the issuance of *Richardson* and *Filarsky*.[144] Under this court's reasoning, a private state actor is entitled to qualified immunity if the actor is the "functional equivalent of a public official."[145] Relevant factors includ: "(1) whether 'the parties were under contract to perform the duties statutorily required of the state'; (2) whether they were 'compelled by the government' under the contract to undertake the challenged conduct; and (3) whether they 'were performing duties that would otherwise be performed by a public official'" who would be clearly entitled to assert qualified immunity.[146]

Based on this reasoning, a First Circuit district court held that the employees of a correctional health care contractor who, under contract with the state, provided *on-site medical services* to inmates were entitled to assert qualified immunity: these health care providers were "fulfilling the state's duty to provide medical care to prisoners," and therefore, "they were the functional equivalent of a public official."[147] In a similar case, the First Circuit found that a private physician who assisted the police department in conducting a body search was entitled to qualified immunity because he was the "functional equivalent of a public official": (1) he "did not act on his own initiative," but rather, "he was pressed into service by the State"; (2) "[h]e was uniquely qualified to carry out this search in a safe and hygienic manner"; and (3) as a matter of policy, the denial of qualified immunity would deter physicians from performing body cavity searches, "signal[ing] a loss to society of a valuable crime detection procedure" and depriving the

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143 *Id.*; *see also* Estate of Henson v. Wichita Cty., 652 F. Supp. 2d 730, 747 (N.D. Tex. 2009), *on reconsideration, sub nom.* Estate of Henson v. Wichita Cty., 988 F. Supp. 2d 726 (N.D. Tex. 2013), *aff'd sub nom.* Estate of Henson v. Wichita Cty., 795 F.3d 456 (5th Cir. 2015) (noting that "[a]s an initial matter, the Court notes that Dr. Bolin is entitled to assert the defense of qualified immunity even though he is a contract physician").

144 *See* Burke v. Town of Walpole, 405 F.3d 66, 89-92 (1st Cir. 2005) (noting that forensic odontologists who was employed as an independent consultant by the county's district attorney was "both subject to suit under section 1983 and eligible for the balm of qualified immunity"); Camilo-Robles v. Hoyos, 151 F.3d 1, 10-12 (1st Cir. 1998) (finding that private psychiatrists who contract with the police department to evaluate staff's mental health are state actors and entitled to *assert* qualified immunity but then denying qualified immunity on its merits); Frazier v. Bailey, 957 F.2d 920, 929 (1st Cir. 1992); Rodriques v. Furtado, 950 F.2d 805, 815 (1st Cir.1991) (holding that private physician who assisted the police department in conducting a body search was entitled to qualified immunity). *But see* Chavez v. Zachowski, No. CIV.A. 12-10251-JGD, 2013 WL 6072874, at *2 (D. Mass. Nov. 15, 2013) (noting that assertion of qualified immunity after *Richardson* is a complex issue "and should be evaluated in light of the particular relationship between those defendants and the state").

145 *Frazier*, 957 F.2d at 929.

146 Husband v. Fair, No. CIV.A. 86-2865-Z, 1993 WL 343669, at *6 (D. Mass. Aug. 30, 1993) (citing Frazier v. Bailey, 957 F.2d 920, 929 (1st Cir. 1992)).

147 *Id.* at *5–6.

detainees from the benefit of being searched in a medically approved manner.[148]

Other circuits have sporadically found qualified immunity available to privately employed correctional health care providers without, however, analyzing the issue of assertion.[149] For instance, the Second Circuit has found entitled to qualified immunity prison physicians and private consulting physicians who were sued by a state prisoner under § 1983.[150] Similarly, the Third Circuit has recently found entitled to qualified immunity a supervising physician at a federal prison who was sued along with other federal prison officials.[151] Significantly, the physician was not a "Federal Bureau of Prisons" ("BOP") employee but had been contracted by the "BOP" to perform the surgery on the prisoner.[152] This after-*Filarksy* holding seems to silently abrogate earlier precedents by the Third Circuit district courts that had denied "the more demanding objective standard of reasonable belief that governs qualified immunity" to private state actors,[153] noting that under *Richardson*, qualified immunity "in these circumstances [was] questionable."[154] Even in these earlier cases, however, the Third Circuit district courts had allowed private state actors to assert the subjective defense of "good faith."[155]

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[148] Rodriques v. Furtado, 950 F.2d 805, 815 (1st Cir. 1991).

[149] *See, e.g.*, Hogan v. Carter, 85 F.3d 1113, 1118–19 (4th Cir. 1996) (finding qualifying immunity available to a prison physician who was responsible for emergencies at the mental health correctional facility without, however, discussing the status of his employment and the issue of assertion). *But see* Enow v. Baucom, No. PWG-16-4042, 2018 WL 925422, at *10 (D. Md. Feb. 16, 2018) (recognizing that under *Filarsky* "private individuals may assert qualified immunity when they are 'retained by the [government] to assist [in a task for which] government employees performing such work are entitled to seek the protection of qualified immunity,'" but noting that there is no authority supporting that "*Filarsky* has been extended to contractual medical or mental health care providers working in correctional facilities").

[150] Pabon v. Wright, 459 F.3d 241, 255 (2d Cir. 2006). *But see* Tewksbury v. Dowling, 169 F. Supp. 2d 106, 113-15 (E.D.N.Y. 2001) (holding that neither the common-law tradition nor the purposes behind qualified immunity supported its application to privately employed physicians); Zikianda v. Cty. of Albany, No. 1:12-CV-1194, 2015 WL 5510956, at *16 (N.D.N.Y. Sept. 15, 2015) (finding that a private physician contracting with a state prison to provide services as a prison medical director is not entitled to qualified immunity).

[151] Michtavi v. Scism, 808 F.3d 203, 205-07 (3d Cir. 2015).

[152] *Id.*

[153] Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994).

[154] Miller v. Hoffman, No. CIV. A. 97-7987, 1999 WL 415397, at *7 (E.D. Pa. June 22, 1999), *aff'd*, 225 F.3d 649 (3d Cir. 2000); *see also* Foster v. City of Philadelphia, No. CIV.A. 12-5851, 2014 WL 5821278, at *18 (E.D. Pa. Nov. 10, 2014) (discussing the issue of private state actor qualified immunity in a different context).

[155] *Miller*, 1999 WL 415397, at *6–7 (citing Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994)); *see also* Wyatt v. Cole, 504 U.S. 158, 169 (1992) ("[The Court did] not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.").

3. Circuits That Have yet to Decide Whether Qualified Immunity Can Be Asserted by Private Correctional Health Care Providers

Some Circuits avoid directly addressing the issue of assertion of qualified immunity by private health care providers. Instead, they engage in a case-by-case determination that always leads to the denial of qualified immunity on its merits. For instance, the Tenth Circuit explicitly states that it has yet to decide whether qualified immunity is available "to employees of a private company providing medical services to inmates."[156] However, it consistently denies such motions on their merits and has never found a private prison health care provider not liable on the grounds of qualified immunity.[157]

The Seventh Circuit until recently had also followed that same approach.[158] Even though since 2013 the court had signaled in its dicta a shift toward the denial of qualified immunity to private prison health care providers,[159] it was not until 2017 that the court took a clear stand.[160] In its October 2017 decision *Estate of Clark*, the court explicitly adopted the Sixth Circuit's position in *Tepe*, which categorically denies qualified immunity to private prison health care providers.[161]

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156 Carmody v. Ensminger, No. 16-CV-02603-PAB-NYW, 2017 WL 4150601, at *4 (D. Colo. Sept. 19, 2017); *see also* Gen. Steel Domestic Sales, L.L.C. v. Chumley, 840 F.3d 1178, 1182 (10th Cir. 2016) (noting that it is "hesitant to extend immunity from suit to a private party without a statutory basis," and that "[i]mmunity from suit is a benefit typically only reserved for governmental officials"); Kellum v. Mares, 657 F. App'x 763, 768 (10th Cir. 2016) (denying qualified immunity on its merits).

157 *Carmody*, 2017 WL 4150601, at *4; *see also Chumley*, 840 F.3d at 1182; *Kellum*, 657 F. App'x at 768.

158 *See, e.g.*, Petties v. Carter, 836 F.3d 722, 733–34 (7th Cir. 2016), *as amended* (Aug. 25, 2016), c*ert. denied*, 137 S. Ct. 1578, 197 L. Ed. 2d 704 (2017) (noting that even assuming that qualified immunity was available there were factual disputes that precluded the grant summary judgment on qualified immunity grounds); Zaya v. Sood, 836 F.3d 800, 807 (7th Cir. 2016) (noting that there was no need to address the issue of assertion because the defendant's mental status precluded the granting of summary judgment on qualified immunity grounds); Holtz v. Coe, No. 14-CV-367-NJR-DGW, 2016 WL 5369464, at *9 (S.D. Ill. Sept. 26, 2016) (discussing that "the Seventh Circuit has made clear that it has yet to definitively decide whether or not qualified immunity is available to employees of a private company providing medical services to inmates"). *But see* Shields v. Ill. Dep't of Corr., 746 F.3d 782, 794 (7th Cir. 2014) (discussing in dicta that "[a]lthough *Richardson* involved a private prison, some circuits (including our own) have applied *Richardson* to private medical providers, holding that they are similarly barred from asserting immunity under § 1983").

159 *Shields*, 746 F.3d at 794 (Discussing in dicta that "[a]lthough *Richardson* involved a private prison, some circuits (including our own) have applied *Richardson* to private medical providers, holding that they are similarly barred from asserting immunity under § 1983").

160 Estate of Clark v. Walker, 865 F.3d 544, 551 (7th Cir. 2017); *see also* Rasho v. Elyea, 856 F.3d 469, 479 (7th Cir. 2017), *reh'g denied* (May 5, 2017) ("[The court construes] the Supreme Court's holding that employees of privately-operated prisons may not assert a qualified-immunity defense also to deny that defense to employees of private corporations that contract with the state to provide medical care for prisoners.").

161 *Estate of Clark*, 865 F.3d at 551.

4. Estate of Clark v. Walker

In *Estate of Clark*, a correctional officer and a privately-employed nurse, both intake staff in a county jail, were sued under § 1983 for being deliberately indifferent towards an inmate's serious risk of suicide.[162] All defendants invoked the defense of qualified immunity.[163] The district court denied both defendants' assertions on their merits on the ground that it was clearly established at the time of the event that "inmates have the right to be free from deliberate indifference to a known risk of suicide."[164] Most importantly, however, the court provided an additional reason for denying the privately-employed nurse's motion: drawing a line between the privately-employed nurse and the state-employed correctional officer, the court underscored that, unlike the latter, the privately employed nurse was not even entitled to raise the defense of qualified immunity.[165]

Rejecting the nurse's argument that, under *Filarsky*, she is entitled to qualified immunity "because she performed a specialized service and worked closely with" the correctional officer defendant, the court explained that the nurse failed to address in her brief the common law or policies underpinning qualified immunity.[166] Focusing on *Filarsky*'s reaffirmation of *Richardson*, and finding Supreme Court's language in *Filarsky* "cautionary," the district court read *Filarsky* as emphasizing the sufficiency of the private market incentives "to protect employees when 'a private firm, systematically organized to assume a major lengthy administrative task . . . or profit and potentially in competition with other firms,' assumes responsibility for managing an institution."[167]

The court went on to note that the Seventh Circuit has not given a clear answer on that issue.[168] Finding, however the Sixth Circuit's analysis in *Tepe* persuasive, the court concluded that it was "not satisfied that the immunity defense automatically extends" to the privately employed nurse "simply because her employer had a contract with" the county jail. [169]

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[162] The inmate committed suicide within five days after entering in the county jail. The defendants, who were the intake staff the day the inmate entered the jail, failed to initiate the jail's suicide prevention protocol even thought they were aware of the inmate's suicidal risk. The initial lawsuit included further defendants who were granted summary judgment, and thus, did not become parties in the appeal. *See* Estate of Clark v. Cty. of Green Lake, No. 14-C-1402, 2016 WL 4769365, at *1 (E.D. Wis. Sept. 13, 2016), *aff'd in part sub nom.* Estate of Clark v. Walker, 865 F.3d 544 (7th Cir. 2017).

[163] *Estate of Clark*, 865 F.3d at 546.

[164] *Id.*

[165] *Estate of Clark*, 2016 WL 4769365, at *1.

[166] *Id.* at *13.

[167] *Id.*

[168] *Id.*

[169] *Id.*

On appeal, the Seventh Circuit affirmed the district court's analysis and holding.[170] First, the court cited prior dicta and recent precedent in which it had construed *Richardson* to extend to employees of private corporations that contract with the state to provide medical care for prison inmates.[171] Then, the court emphasized that *Filarsky* reaffirmed *Richardson* and noted that *Filarsky* reached its conclusion by "asking whether the person asserting qualified immunity would have been immune from liability under the common law in 1871 when Congress passed the law later codified as § 1983."[172] Finding *Tepe*'s historical analysis "persuasive," and without engaging in any policy consideration, the court held categorically, that "private medical personnel in prisons are not afforded qualified immunity."[173]

D. Scholars' Views on Assertion of Qualified Immunity by Private Parties

Several scholars have considered the issue of assertion of qualified immunity by private parties. Most find common ground in criticizing the incompatibility between *Richardson* and *Filarsky*, the complexity of the common law history and policy inquiry, and the resulting inconsistency.[174] One scholar has suggested that *Filarsky* implicitly abandoned the two-part common law history and policy inquiry of *Wyatt* and *Richardson* and adopted a functionalistic approach. [175] Under this approach, the crucial concern in analyzing the assertion of qualified immunity by private parties is the *function* the defendant performs—not the common law history and the policy considerations.[176] Similarly, Harvard Law Review Association has argued that the great inconsistency in the area can be resolved if the Supreme Court clarifies the gravity of each one of those two factors as well as the party who bears the burden of proof.[177] Alternatively, the Harvard Law Review

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170 Estate of Clark v. Walker, 865 F.3d 544, 550-51 (7th Cir. 2017).

171 *Id.* at 550 (citing Petties v. Carter, 836 F.3d 722, 734 (7th Cir. 2016) (en banc) ("[Q]ualified immunity does not apply to private medical personnel in prisons."); Rasho v. Elyea, 856 F.3d 469, 479 (7th Cir. 2017) ("This Court has construed the Supreme Court's holding that employees of privately-operated prisons may not assert a qualified-immunity defense also to deny that defense to employees of private corporations that contract with the state to provide medical care for prisoners.")).

172 *Estate of Clark*, 865 F.3d at 550.

173 *Id.* at 550–51.

174 *See, e.g.*, Weis, *supra* note 5, at 1076; Blum, *supra* note 9, at 641; *III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1277–78; Michael E. Saucier, *THE EMERGING DEFENSE: Qualified Immunity for Private Actions*, 56 No. 7 DRI FOR DEF. 82 (2014).

175 Weis, *supra* note 5, at 1074.

176 *Id.*

177 *III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1278 ("Lower courts have attempted to apply this standard, but they have been confused by Richardson's use of precedent and the complex mix of factors in its analysis and have reached divergent conclusions about various categories of private actors.").

Association suggests the Supreme Court should abandon the two-part inquiry and adopt a case-by-case functional standard.[178]

On the other side of the spectrum, Prof. William Baude argues that *Filarsky* does not call for an expansion of qualified immunity under "contemporary common law and equity principles."[179] Rather, it reemphasizes the Court's previous insistence to its role as Congress's mere interpreter under the guidance of the traditional common law.[180]

As to the prison health care providers, all scholars emphasize the circuit split.[181] Prof. Karen Blum notes that "it is truly difficult to distinguish private health care workers from private prison guards," suggesting that *Richardson* should equally apply to both.[182] Michael E. Saucier, however, notes that *Richardson* is only an exception in the general rule prescribed in *Filarsky* and argues that those performing work "in pursuit of government objectives, principally concerned with enhancing the public good," including prison health care providers, should be entitled to assert the defense of qualified immunity.[183]

III. ANALYSIS

This analysis begins with an interpretation that reconciles *Richardson* and *Filarsky* and suggests the appropriate framework for analyzing private state actors' qualified immunity under the *Filarsky* regime. It suggests that *Filarsky* does not support the abandonment of the common law history inquiry in determining a private actor's qualified immunity.[184] What it does, however, is establish a sliding scale approach: the closer the nexus between private and government employees, the more the qualified immunity policy consideration will be implicated, and the lesser the common law history inquiry will weigh. Conversely, when the private employee performs the assigned duty in independence from other government employees, the qualified immunity policy consideration will be mitigated. In these occasions, the court will have to search deeper into the common law history

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178 *Id.*

179 William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 54 (2018).

180 *Id.*

181 *See, e.g.*, Weis, *supra* note 5, at 1062–63; Blum, *supra* note 9, at 640-41; Saucier, *supra* note 174, at 82 ("After *Filarsky*, case law has largely furthered the emerging trend supporting extending qualified immunity to private individuals [even though] . . . there are strong exceptions to expansion of the doctrine, creating potential review by the Supreme Court for these conflicts in the circuit courts.").

182 Blum, *supra* note 9, at 641.

183 Saucier, *supra* note 174, at 82.

184 Weis, *supra* note 5, at 1075–76 (suggesting that "the two-part test is needlessly complicated and redundant," and suggesting the abandonment of the common law history inquiry).

and tradition to support the extension of qualified immunity to the particular private actors.

The application of this analysis to private correctional health care providers suggests that there is a strong presumption of a "close nexus" between the private health care providers who perform on-site services in state correctional facilities and the state-employed correctional officers in these facilities. Because of this presumption, the courts do not need to engage in the fact-sensitive "close nexus" inquiry whenever an on-site private health care provider raises the defense of qualified immunity unless the opposing party shows that the health care provider performed the governmental function independently from the state-employed correctional staff or without substantial control or supervision by the state. Unless such showing is made, the courts should permit the assertion of qualified immunity by on-site private correctional health care providers because the strong presence of the policy considerations that underpin qualified immunity will mitigate the need for a firmly rooted common law history and tradition of immunity as to the specific state actor.

Based on this analysis, this Note suggests that the Seventh Circuit in *Estate of Clark* incorrectly adopted *Tepe*'s categorical denial of qualified immunity. Instead, the court should have allowed the assertion of qualified immunity by the privately employed nurse, as it did with the state-employed correctional officer, because the privately employed nurse provided on-site health care service, in a state prison facility, and in close nexus with the state-employed correctional officer.

A. Proposed Test for Private-Actor Qualified Immunity After *Filarsky*

As suggested above, in *Filarsky* the Supreme Court moved away from its precedents, *Wyatt* and *Richardson*, and adopted a functionalistic approach holding that § 1983 should not differ based on whether an individual works for the government as a full-time employee or on some other basis.[185] Because *Richardson* and *Filarsky* reached opposite conclusions, it has been argued that those two cases are incompatible and that *Filarsky* implicitly overruled *Richardson*.[186] However, *Filarsky* itself suggests the opposite: it explicitly states that the Court's previous decisions in *Wyatt* and *Richardson* are not contrary to its holding.[187] Therefore, the questions that arise are what distinguishes *Filarsky* from *Richardson* and when the one controls over the other.

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185 Filarsky v. Delia, 566 U.S. 377, 389 (2012); *see also* Weis, *supra* note 5, at 1041.

186 Weis, *supra* note 5, at 1041 (noting that both in *Wyatt* and in *Richardson* the Court adopted a two-part test that weighed both the historical and policy grounds for immunity rather than a functional approach).

187 *Filarsky*, 566 U.S. at 392.

The answer to those questions lies on the facts of the two cases. As both *Filarsky* and *Richardson* state, the decisive facts in *Richardson* were the following: the defendant was (1) an employee of a private firm, (2) "systematically organized to assume a major lengthy administrative task (managing an institution)", (3) "with limited direct supervision by the government," and (4) "undertak[ing] that task for profit and potentially in competition with other firms."[188] Further, as *Filarsky* suggested, all of those facts—combined—were sufficient "to *mitigate the concerns underlying recognition of governmental immunity* under § 1983."[189] The last phrase clearly illustrates that the Court in *Filarsky* read, and then applied, *Richardson* as a decision focused on policy considerations—not on the common law history and tradition.[190]

Filarsky can be distinguished from *Richardson* on the following aspects. First, Filarsky was not an employee of a private firm but a private attorney.[191] Second, the characteristic of a "systematic organization" was missing because Filarsky was a private individual. Further, Filarsky was not assigned a "major lengthy administrative task (managing an institution)" but a more limited in scope one, namely the administrative investigation interviews.[192] Even more, this task had a further unique characteristic: it required "specialized knowledge or expertise" that the government employees lacked.[193] Third, Filarsky, "worked in close coordination," and "alongside" the city employees who participated in Delia's investigation.[194] Finally, the task assigned to Filarsky was not an isolated event but part of a continuous collaboration with the city under which Filarsky represented the City in several investigations.[195]

The aggregate effect of those dissimilarities between *Richardson* and *Filarsky* is sufficient to justify the Court's facially inconsistent holdings. It does so by enhancing the policy considerations behind the recognition of qualified immunity and respectively limiting the *Richardson* "market pressure" counterincentive where the governmental function is not performed by "systematically organized" private *entities* but rather by private *individuals* contracting directly with the states.

For instance, the need for expertise in the performance of the investigative duties assigned to Filarsky enhanced the need for assurance that talented candidates will not be deterred from public services. As the Court

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188 *Id.* at 393.

189 *Id.* (emphasis added).

190 Weis, *supra* note 5, at 1041 (suggesting that "the two-part test is needlessly complicated and redundant," and suggesting the abandonment of the common law history inquiry).

191 *Filarsky*, 566 U.S. at 381.

192 *Id.* at 393

193 *Id.*

194 *Id.* at 391.

195 *Filarsky*, 566 U.S. at 397–98 (Sotomayor, J., concurring).

emphasized, this need is even more compelling for positions requiring "specialized knowledge or expertise," such as attorneys and *doctors*, because the government will usually rely for the performance of those functions not on its permanent work force, but on private individuals and professionals.[196] In other words, when no sufficiently qualified government or state employee is available to perform a highly demanding governmental function, the government depends on qualified private individuals.

Further, the close and continuous collaboration between Filarsky and the city employees enhanced the policy concern of avoiding "the harmful distractions from carrying out the work of government that can often accompany damages suits."[197] As *Filarsky* noted, "[n]ot only will such individuals' performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation."[198] The Court explained that if the suit against Filarsky proceeded, it would be highly likely that the state employed defendants who had been entitled to assert qualified immunity would "all be required to testify, given their roles in the dispute."[199] Therefore, allowing suit under § 1983 against private individuals assisting in the performance of governmental duties "will substantially undermine" one of the most important reasons immunity was accorded in the first place, namely the prevention of harmful distractions.[200]

Finally, as the Court underscored, the fact that Filarsky was merely a private individual, rather than an employee of a "systematically organized" private company working in a "privately run" facility, mitigated the market pressure counterincentives introduced in *Richardson*.[201] In other words, the risk of unwarranted timidity by government employees is sufficiently mitigated by the market pressure incentives only when the governmental function is provided by a systematically organized market, *independently* from the government entity. A decisive factor, therefore, *is whether the private entity operates independently or the government exercises some control over the performance* of the governmental function. This distinction seems reasonable considering that in a systematically organized and independently operating market the private nature of the employment is not a mere formality. Rather, it affects the terms, conditions, and ultimately the

196 *Id.* at 390 (majority opinion).
197 *Id.*
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.* at 393 ("We explained that the various incentives characteristic of the private market in that case ensured that the guards would not perform their public duties with unwarranted timidity or be deterred from entering that line of work.").

nature of the performed function; it turns a governmental function to a private service.

It is, however, important to note that the aforementioned factors do not seem to weigh equally in the Court's holding. Rather, the most decisive one seems to be the close and continuous coordination between the private and government employees. Justice Sotomayor's concurring opinion is illuminating:

> [C]onferring qualified immunity on individuals like Filarsky helps "protec[t] government's ability to perform its traditional functions," and thereby helps "protect the public at large." *When a private individual works closely with immune government employees,* there is a real risk that the individual will be intimidated from performing his duties fully if he, and he alone, may bear the price of liability for collective conduct.
>
> This does not mean that a private individual may assert qualified immunity only when *working in close coordination with government employees*. For example, *Richardson*'s suggestion that immunity is also appropriate for individuals "serving as an adjunct to government in an essential governmental activity" would seem to encompass modern-day special prosecutors and comparable individuals hired for their independence. There may yet be other circumstances in which immunity is warranted for private actors. The point is simply that such cases should be decided as they arise, as is our longstanding practice in the field of immunity law.[202]

Because the aforementioned policies so overwhelmingly supported the extension of qualified immunity and mitigated the market pressure counterincentive, the Court was willing to lessen the gravity of the common law history factor. In fact, the Court did so by altering the common law history inquiry: the new question was whether there was a common law history in distinguishing between private and government employees in the protection afforded for the performance of governmental functions[203]—not whether there was a firmly rooted history of immunity for the particular private state actor.[204] Furthermore, the Court lessened the degree of

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202 *Id.* at 397–98 (Sotomayor, J., concurring) (emphasis added) (citations omitted) (first quoting Wyatt v. Cole, 504 U.S. 158, 167–168 (1992); and then quoting Richardson v. McKnight, 521 U.S. 399, 413 (1997)).

203 *Id.* ("[I]t should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities[, and thus,] immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.").

204 Richardson v. McKnight, 521 U.S. 399, 404 (1997) ("History does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards.").

specificity applied in the common law history inquiry.[205] Because the policy considerations supported the extension of qualified immunity so overwhelmingly, the Court did not have to look for a "firmly rooted history" of common law immunity for the exact same private individual. Rather, the history of common law immunity provided to other private individuals performing similar—or even only related—functions did suffice to support extension of qualified immunity to Filarsky.[206]

Therefore, *Filarsky* does not support, as it has been suggested, the abandonment of the common law history inquiry in determining a private actor's qualified immunity.[207] What it does, however, is establish a sliding scale approach: the closer the nexus between private and government employees, the more the qualified immunity policy consideration will be implicated, and the lesser the common law history inquiry will weigh. A sufficiently close nexus will be found, for instance, when the performance of the governmental function requires "specialized knowledge or expertise" that can be provided only by private parties, when the private and government employees work "alongside" and "in close coordination," and when the government exercises some control over the performance of the governmental function at issue.[208]

Once such a close nexus between the private and government employee is established, the history inquiry should be only focused on whether there is a common law tradition in distinguishing between private and government employees in the protection afforded for the p*erformance of governmental functions in general*. On the other hand, when the close nexus is missing, for instance when the private employee performs the assigned duty in independence from other government employees, as in *Richardson*, the market pressure incentives will be compelling, and the qualified immunity will not extend to private state actors unless the common law indicates a "firmly rooted history" of immunity *for the closest analogous private actor*.[209]

It is important to note that *Filarsky* gave an additional directive to the lower courts: the analysis performed in *Filarsky* should be the main rule applicable to all "typical case[s] of an individual hired by the government to

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205 Weis, *supra* note 5, at 1068.

206 *See, e.g.*, *Filarsky*, 566 U.S. at 387-89 (discussing only as an example the immunity provided to governmental actors performing adjudicative activities similar to those performed by Delia, while also looking to other—unrelated—private individuals who were entitled to qualified immunity, such as individuals engaged in law enforcement activities, public wharfmaster, notaries public, trustees of a public institution, and school board members).

207 Weis, *supra* note 5, at 1075–76 (arguing that "the two-part test is needlessly complicated and redundant" and suggesting the abandonment of the common law history inquiry).

208 *Filarsky*, 566 U.S. at 390-93.

209 *But see* Weis, *supra* note 5, at 1075 ("[W]ith respect to the policy basis for immunity, *Filarsky* clarified that this is not subject to a fact-sensitive balancing test. [Rather,] the policy inquiry weighs in favor of immunity for those engaged in public service, regardless of the type of employment.").

assist in carrying out its work."[210] In other words, the *Richardson* analysis is the exception. In deciding whether the main rule or the exception applies, courts should first engage in a factual determination about the details of the particular employment relationship. In the absence of facts that would substantially "mitigate the concerns underlying recognition of governmental immunity under § 1983," the *Filarsky* approach will apply.[211] Therefore, the categorical denial of qualified immunity to particular groups of private professionals goes against *Filarsky*; qualified immunity "*cases should be decided as they arise*."[212]

At first glance, this framework may appear hard in its application because it requires a factual "close nexus" inquiry that may raise factual disputes. Nonetheless, it is still more consistent with the Court's approach in *Filarsky* compared to a line-drawing, formalistic approach that categorically and unjustly denies qualified immunity based on the state actor's form of the employment. More importantly, the categorical denial of qualified immunity does not serve the need of disposing of unmeritorious §1983 suits at the early stage on summary judgment. Further, the district court judges are familiar with the application of fact-sensitive inquiries. For instance, the district court judges frequently engage in similar inquires under the "public function" and "pervasive entwinement" tests.[213] Qualified immunity doctrine is also riddled with hard-to-apply rules, such as the "constitutional violation" inquiry that determines the merits of the defense.

B. Applying the After-*Filarsky* Regime to Private Correctional Health Care Providers

As suggested above, the critical point in *Filarsky*'s sliding scale approach is to establish a "close nexus" between the private and the government state actors: the closer the nexus between private and government employees, the more the qualified immunity policy consideration will be implicated, and the lesser the common law history inquiry will weigh. As *Filarsky* suggests, factors that indicate a sufficient "close nexus" are, for instance, whether the performance of the governmental function requires "specialized knowledge or expertise" that can be provided only by private parties, whether the private and government employees work "alongside" and "in close coordination," and whether the government exercises some control over the performance of the governmental function.[214]

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210 *Filarsky*, 566 U.S. at 393.
211 *Id.*
212 *Id.* at 397–98 (Sotomayor, J., concurring) (emphasis added).
213 *III. Private Party Immunity from Section 1983 Suits*, *supra* note 10, at 1278 n.109.
214 *Filarsky*, 566 U.S. at 390-93.

While under the suggested approach the availability of qualified immunity to private state actors is to be determined on a case-by-case basis, the nature and organization of correctional health care services provide some general guidance and directives. First, similarly to the investigative function in *Filarsky*, the performance of correctional health care services requires "specialized knowledge or expertise" that can be provided only by well-educated and sufficiently-trained medical personnel. Prison population is disproportionately more vulnerable to poor health than the general population: it largely consists of drug addicts, low-income, undereducated, and uninsured individuals.[215] It is not the rare case that these individuals have never received health care services before entering the correctional system.[216] Therefore, the need for sufficiently qualified medical personnel is critical.

While there are states that operate their prison health care services using state-employed medical personnel, more and more states rely solely on private health care contractors for the performance of their governmental duty to provide adequate health care services, as a cost-cutting measure.[217] Indeed, states are forced to rely on private entities and professionals not only when there are no equally qualified state employees, but also when the cost for the performance of the governmental function directly by the government is significantly higher, rendering contracting the only feasible alternative.

Further, the limited availability of qualified state or government employees in small and rural areas makes this problem even more urgent.[218] Smaller municipal and local jails rarely contract with national health care contractors, relying primarily for their inmates' health care services on private local providers.[219] Interestingly, some states even incentivize medical providers to work in their jails by offering to help them pay off their medical

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[215] *See* Cmty. Oriented Corr. Health Servs., *Health Intake, Assessment, and Routine Care Processes in County Jails: A Brief Overview for a NACo Webinar*, at 5 (2013), http://www.cochs.org/files/HEALTH_INTAKE_ASSESSMENT_AND_ROUTINE_CARE_PROCESS_IN_JAIL.pdf (explaining "the health care services assembly line as it operates in many jails across the country" an entails the collaboration of correctional staff and medical providers); Alexandria Macmadu et al., *Correctional Health Is Community Health*, ISSUES SCI. & TECH. (Nov. 2, 2015), http://issues.org/32-1/correctional-health-is-community-health/.

[216] *See* Cmty. Oriented Corr. Health Servs., *supra* note 215, at 5; Macmadu, *supra* note 215.

[217] *See* Jordan Andrews, *The Current State of Public and Private Prison Healthcare*, U. PENN. (Feb. 24, 2017), https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison ("As of 2012, over 20 states have switched over to private health care operations in their prisons as a cost-cutting measure.").

[218] *See What Are Some of the Challenges Facing Rural and Small Town America?*, EPA, https://www.epa.gov/sites/production/files/2014-06/documents/ref_herman_081612.pdf (last visited Nov. 11, 2017).

[219] Macmadu, *supra* note 215.

school debts.[220] While qualified immunity will shield from frivolous claims the state-employed medical and correctional personnel, private health care providers may be left to "bear the price of liability for collective conduct," on their own.[221] Such risk may deter those local health care providers from contracting with the small municipal and local jails, to the detriment of the inmates' health care.[222]

Second, similarly to the close and continuous collaboration between Filarsky and the city employees, private prison health care personnel *who provide on-site services within the prison facility* are in close and continuous collaboration with the prison's correctional staff.[223] For instance, the "intake processing," the initial health screening inmates receive right after being transferred in the correctional facility, is usually performed by correctional staff working alongside the medical personnel: the correctional officer completes a questionnaire without exercising independent judgment as to clinical issues, while the medical personnel, usually a nurse, conducts medical tests like blood sugar test, TB skin test, chest X-Ray or even HIV screening.[224] When those screening procedures reveal a serious problem, the inmate "is referred to a licensed primary care provider" to perform a more extensive assessment.[225]

Such close collaboration suggests that when an inmate sues a private medical personnel for a mistake in the intake processing, the distractions of lawsuits will not only affect the performance of the duties of this private health care provider but also the correctional officers who participated in the screening and who will necessarily be involved in the litigation, at least as a witnesses.[226] Therefore, allowing suits under § 1983 against private correctional health care providers who work alongside state-employed correctional staff would substantially undermine one of the most important

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220 Susan Abram, *LA County Offers to Help Doctors Pay Off Medical School Debt — If They Work in Its Jails*, L.A. DAILY NEWS (Feb. 26, 2018, 11:31 PM), https://www.dailynews.com/2018/02/26/la-county-offers-to-pay-off-student-debt-for-new-doctors-if-they-work-in-its-jails/.

221 Filarsky v. Delia, 566 U.S. 397–98 (2012) (Sotomayor, J., concurring).

222 *Id.* at 391 (majority opinion) ("Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct . . . Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.").

223 *See* Cmty. Oriented Corr. Health Servs., *supra* note 215, at 2-3 (explaining that "the health care services assembly line as it operates in many jails across the country" requires the collaboration of correctional staff and medical providers).

224 *Id.* at 3.

225 *Id.*

226 *See Filarsky*, 566 U.S. at 391 (noting that if the suit against Filarsky had proceeded, "it would be highly likely that the state employed defendants who had been entitled to assert qualified immunity would 'all be required to testify, given their roles in the dispute'").

reasons immunity was accorded in the first place, namely the prevention of harmful distractions.[227]

Finally, while the employees of correctional health care contractors are not private individuals like Filarsky, but rather employees of a "systematically organized" private company similar to these in *Richardson*, there is a significant differentiation as to the medical personnel that provide on-site services in state correctional facilities. Unlike *Richardson*'s private prisons who performed the correctional functions independently, state correctional facilities indeed exercise some control over the performance of on-site health care services provided by private medical personnel in their facilities.[228] For instance, there are both internal and external processes for the purpose of asserting the quality of health care services, such as internal or external audits and inspections, quality assurance reviews, or internal peer-review practices.[229]

The above analysis indicates that there is a strong presumption of a "close nexus" between the private correctional health care providers and the state-employed correctional staff when the former perform on-site correctional services in a state correctional facility: (1) correctional health services require "specialized knowledge or expertise" that in many cases can only be feasible if provided by private parties; (2) private medical personnel and immune state-employed correctional staff work "alongside" and "in close coordination"; and (3) state prisons exercise some control over the performance of health care services provided by private medical personnel in their facilities.

Because of the close-nexus presumption, the assertion of qualified immunity by on-site private health care providers should be performed under the *Filarsky* framework. That means that courts should not look for a firmly rooted common law history and tradition of immunity as to the specific state actor, like the Court did in *Richardson*. Rather, courts should read common law tradition more generally, taking into consideration the evolution of the correctional health care system and focusing on whether there is a "firmly rooted tradition" in distinguishing between public and private correctional health care providers.[230] Similarly to *Filarsky*, where the Supreme Court's research revealed a widespread trend of "mixture of public employees and private individuals" in the performance of governmental functions due to the limited scope of the governmental activities and the lack of sufficient state or federal resources at the late 19th century,[231] research on the immunities provided to correctional health care personnel may lead to a similar

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227 *Id.*
228 *See* Cmty. Oriented Corr. Health Servs., *supra* note 215, at 6.
229 *Id.*
230 *Filarsky*, 566 U.S. at 384-87.
231 *Id.*

conclusion: because it was not until 1976 that the Court set the standards for the states' duty to provide adequate medical care to their prisoners, public health care services nowadays substantially differ from those at 1879.[232]

In addition, *Du Bois v. Decker*, which was cited in *Tepe* in support of the conclusion that there was no firmly rooted history of immunity as to city physicians who were sued for medical malpractice, leads to the exact opposite proposition.[233] In that case, the city doctor asserted, among others, that he provided his services gratuitously, and therefore should "be liable, if at all, only for gross negligence."[234] The court rejected that argument, stating that "*the fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill*."[235] The court in *Tepe*, mistakenly interpreted this passage, together with the fact that neither the city physician nor the court mentioned any kind of immunity, as suggesting that "a paid physician (*whether remunerated from the public or private fisc*) would [not] have been immune from suit at common law."[236] In doing so, the court concluded that the common law tradition did not support the assertion of qualified immunity by Tepe.[237]

However, in the light of the *Filarsky* analysis, this case suggests exactly the opposite conclusion: at the time Congress passed § 1983, there was no well rooted tradition in distinguishing between public or private doctors providing health care services for public institutes. Rather, the standard of care would be the same, regardless of the health care provider's form of employment.[238] Therefore, similarly to *Filarsky*, the common law history and tradition does not support the conclusion that qualified immunity under § 1983 should vary depending on the health care provider's basis of employment.[239]

Based on the above analysis, there is a presumption of "close nexus" between private correctional health care providers who perform on-site services in state prisons and the state-employed correctional officers in these

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[232] Estelle v. Gamble, 429 U.S. 97, 105 (1976); *see also* William J. Rold, *Thirty Years After* Estelle v. Gamble*: A Legal Retrospective*, 14 J. CORRECTIONAL HEALTH CARE 11, 13-18 (2008), http://journals.sagepub.com/doi/abs/10.1177/1078345807309616 ("In a 1972 study of American jails . . . , the American Medical Association found that[, before *Estelle*,] 25% had no medical facilities whatsoever, 65.5% had first aid as the only medical care available, 28% had no regular sick call, and 11.4% did not have a physician on call.").

[233] McCullum v. Tepe, 693 F.3d 696, 703 (6th Cir. 2012) (citing Du Bois v. Decker, 29 N.E. 313, 315 (N.Y. 1891)).

[234] *Id.*

[235] *Id.* at 703-04 (emphasis added).

[236] *Id.* at 704 (emphasis added).

[237] *Tepe*, 693 F.3d at 704.

[238] Du Bois v. Decker, 29 N.E. 313, 315 (N.Y. 1891).

[239] Filarsky v. Delia, 566 U.S. 377, 389 (2012) ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.").

same facilities. Under this presumption, courts do not need to engage in the fact-sensitive "close nexus" inquiry every time an on-site private correctional health care provider asserts qualified immunity. The opposing party will be able to rebut this presumption by showing that the health care provider performed the governmental function independently from the state-employed correctional staff or under the strict control and supervision of the private correctional health care contractor. Unless such showing is made, the courts should permit the assertion of qualified immunity by on-site private correctional health care providers because the strong presence of the policy considerations that underlie qualified immunity will mitigate the need for a showing of a firmly rooted common law history of immunity as to the specific state actor. Because the "close nexus" presumption will eliminate the fact-sensitive close nexus inquiry, it will further promote another policy inherent in any qualified immunity inquiry: the disposal of frivolous and unmeritorious suits at the early stage on summary judgment.[240]

C. *Tepe* and *Clark*: Misreading *Filarsky*

As aforementioned, in *Estate of Clark v. Walker*, a correctional officer and a privately employed nurse were sued under § 1983 for being deliberately indifferent towards a prisoner's serious risk of suicide.[241] Clark committed suicide within five days after he entered the prison facility.[242] The intake staff and the two defendants failed to initiate the jail's suicide prevention protocol even though they knew that Clark was assessed as having a maximum risk of suicide.[243] Both defendants asserted the defense of qualified immunity, and the district court denied both defendants' assertions.[244] However, as to the privately contracted nurse, the court emphasized that she was not even entitled to raise the defense of qualified immunity because she was a private contractor—not a government employee.[245]

The Seventh Circuit Court of Appeals affirmed the district court's denial of qualified immunity, holding *categorically*, that "private medical personnel in prisons are not afforded qualified immunity."[246] The court based its holding on the Sixth Circuit case, *Tepe*, finding its reasoning "persuasive."[247] In particular, the court stated that "[i]n a detailed opinion, the Sixth Circuit applied *Filarsky*'s historical method and held that a privately

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240 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).
241 Estate of Clark v. Walker, 865 F.3d 544, 546 (7th Cir. 2017).
242 *Id.*
243 *Id.*; *see also* Cmty. Oriented Corr. Health Servs., *supra* note 215, at 2-3 (explaining "the health care services assembly line as it operates in many jails across the country").
244 *Estate of Clark*, 865 F.3d at 546.
245 *Id.*
246 *Id.* at 551 (emphasis added).
247 *Id.* at 550-51.

employed doctor working for a state prison could not invoke qualified immunity . . . . We found the Sixth Circuit's reasoning persuasive . . . [and we hold] that private medical personnel in prisons are not afforded qualified immunity."[248]

However, the Seventh Circuit erred in adopting *Tepe*'s analysis and reaching a categorical conclusion because *Tepe* misread *Filarsky*. Treating *Filarsky*'s holding as the exception, rather than the rule, the court in *Tepe* did not apply *Filarsky* but *Richardson*. Indeed, the court closed its common law history discussion stating that "[t]he first piece of the *Richardson*"—not *Filarsky*—analysis did not support the assertion of qualified immunity by Tepe.[249] The Sixth Circuit's analysis in *Tepe* deviated from the *Filarsky* approach in the following ways.

First, unlike the Supreme Court's analysis in *Filarsky*, the Sixth Circuit skipped any discussion on the availability of qualified immunity to government employees who performed the same governmental functions as Tepe, namely correctional health care services.[250] By doing so, the court failed to approach the issue from the *Filarksy*'s perspective: whether the distinction between government and private state actors was valid.[251] Because states are split as to whether they assign their correctional health services to private contractors or state employees,[252] *Tepe*'s approach creates the very same line-drawing problems that the Court in *Filarsky* emphatically tried to avoid.[253]

As a result, *Tepe*'s reading of common law history was far narrower than the one performed by the Supreme Court in *Filarsky*. In *Filarsky*, the Supreme Court emphasized that the reading of common law of 1871, when Congress passed §1983, requires the appreciation of the nature and size of the government at that time.[254] The Supreme Court's research revealed a widespread trend of "mixture of public employees and private individuals" in the performance of governmental functions due to the limited scope of the governmental activities and the lack of sufficient state and federal resources at the late 19th century.[255] *Tepe*, on the other hand, did not engage in a similar inquiry because it did not look at the scope or the nature of the correctional

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248 *Id.* at 550 (citing McCullum v. Tepe, 693 F.3d 696, 697 (6th Cir. 2012)).

249 McCullum v. Tepe, 693 F.3d 696, 704 (6th Cir. 2012).

250 *See, e.g.*, Dolihite v. Maughon By & Through Videon, 74 F.3d 1027, 1051 (11th Cir. 1996) (granting summary judgment on grounds of qualified immunity to a psychologist who was a state employee of a state adolescent hospital).

251 Filarsky v. Delia, 566 U.S. 377, 384 (2012).

252 *See* Andrews, *supra* note 217 ("As of 2012, over 20 states have switched over to private health care operations in their prisons as a cost-cutting measure.").

253 *Filarsky*, 566 U.S. at 391 ("Distinguishing among those who carry out the public's business based on the nature of their particular relationship with the government also creates significant line-drawing problems.").

254 *Id.* at 384.

255 *Id.* at 384-87.

health services provided at 1871, when Congress enacted § 1983. As already suggested, such research could have revealed findings similar to those in *Filarsky*: because it was not until 1976 that the Court set the standards for the states' duty to provide adequate medical care to their prisoners, public health care services nowadays substantially differ from those in 1879.[256] Therefore, the significant differences in the nature and size of the correctional health services nowadays support a less strict reading of the common law history and tradition of 1871, a reading similar to the one performed in *Filarsky*.[257]

Second, the Court in *Filarsky* looked at the common law history to see whether in general there was a "firmly rooted tradition" in distinguishing "between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities."[258] Even though it discussed—as an example—the immunity provided to government actors performing adjudicative activities similar to those performed by Filarsky,[259] it also discussed immunities provided to other—unrelated—private individuals engaging in public service, such as individuals engaged in law enforcement activities, public wharfmaster, notaries public, trustees of a public institution, school board members, etc.[260] This approach is significantly broader than the one conducted in *Tepe*, where the court narrowly looked on whether "a *private doctor* working for a state institution would have been immune from a suit for damages at common law."[261]

Third, as suggested *supra*, the court in *Tepe* misinterpreted the common law history. In support of its holding the court cited a passage from an 1891 case, *DuBois v. Decker*, where a city physician was sued for medical malpractice.[262] The city doctor asserted, among others, that he provided his service gratuitously, and therefore should "be liable, if at all, only for gross negligence."[263] The court rejected that argument, stating that "*the fact that he was paid by the city instead of the plaintiff did not relieve him from the duty to exercise ordinary care and skill*."[264] The court in *Tepe*, misinterpreted this passage, along with the fact that neither the city physician nor the court mentioned any kind of immunity, as suggesting that "a paid physician

256 Estelle v. Gamble, 429 U.S. 97, 105 (1976); *see also* Rold, *supra* note 232, at 13-18 ("In a 1972 study of American jails . . . , the American Medical Association found that[, before *Estelle*,] 25% had no medical facilities whatsoever, 65.5% had first aid as the only medical care available, 28% had no regular sick call, and 11.4% did not have a physician on call.").

257 *See* Rold, *supra* note 232, at 13-18.

258 Filarsky v. Delia, 566 U.S. 377, 384-87 (2012).

259 *Id.* at 387 (emphasis added) ("Government actors involved in adjudicative activities, *for example*, were protected by an absolute immunity from suit.").

260 *Id.* at 384-87.

261 McCullum v. Tepe, 693 F.3d 696, 702 (6th Cir. 2012) (emphasis added).

262 *Id.* at 703 (citing Du Bois v. Decker, 29 N.E. 313, 315 (N.Y. 1891)).

263 *Id.*

264 *Id.* at 703-704 (emphasis added).

(*whether remunerated from the public or private fisc*) would [not] have been immune from suit at common law."[265] In doing so, the court concluded that the common law tradition did not support the assertion of qualified immunity by Tepe.[266]

However, in the light of *Filarsky*, this case suggests exactly the opposite outcome: at the time Congress passed § 1983, there was no well rooted tradition in distinguishing between public or private doctors providing health care services for public institutes. Rather, the applicable standard of care would be the same, regardless of the health care provider's form of employment.[267] Similarly to *Filarsky*, therefore, prison health care providers' entitlement to qualified immunity should not depend on the form of their employment.[268]

The above analysis shows that *Tepe* mistakenly applied the *Richardson* approach in analyzing the common law history because the threshold examination of the nexus between the private medical provider and the state employed correctional staff should have led it to use the *Filarsky* analysis.[269] Therefore, the Seventh Circuit erred in adopting *Tepe*. Instead, as suggested *supra*, the Seventh Circuit should have initiated its analysis with a factual determination about the details of the particular employment relationship. Because the Seventh Circuit did not engage in such a factual determination, significant facts for our analysis are missing. However, the known facts indicate that the defendant was a privately employed nurse who provided on-site services in a state prison facility "alongside" and "in close coordination and collaboration" with her co-defendant, a state-employed correctional officer. Based on these facts, the "close-nexus" presumption could have been applied.

Further, the known facts indicate that this presumption probably would have not been rebutted. First, the initiation of the jail's suicide prevention protocol required the co-action of the two defendants, the privately employed nurse and the correctional officer.[270] This suggests that the governmental function was provided in an operative scheme that required the participation of both private medical personnel and administrative or correctional staff. Second, the privately employed nurse was the only person in this jail having

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265 *Id.* at 704 (emphasis added).

266 *Tepe*, 693 F.3d at 704.

267 Du Bois v. Decker, 29 N.E. 313, 315 (N.Y. 1891).

268 Filarsky v. Delia, 566 U.S. 377, 389 (2012) ("[I]mmunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.").

269 *See* Weis, *supra* note 5, at 1068-75 (noting the difference on the level of specificity between *Filarsky* and *Richardson*, and suggesting that *Richardson*'s approach is explicitly limited to the facts of the particular case and implicitly overruled).

270 Estate of Clark v. Walker, 865 F.3d 544, 546 (7th Cir. 2017).

an advanced medical training.[271] As explained, this fact enhances the need for assuring that talented candidates will not be deterred from assuming the relevant governmental function. Third, while specific facts about the control exercised in the particular correctional facility over the nurse's performance of the on-site health services are missing, it can be assumed that some kind of control or supervision was indeed exercised.[272] Because these facts substantially distinguish this case from *Richardson*, the Seventh Circuit erred in adopting *Tepe*'s reasoning.[273] Under the *Filarsky* framework, the court should have permitted the assertion of qualified immunity by the privately employed nurse, as it did with her co-defendant, the state-employed correctional officer.

IV. CONCLUSION

In conclusion, this Note suggests that *Filarsky* establishes a sliding scale approach under which the closer the nexus between private and government employees, the more the qualified immunity policy consideration will be implicated, and the lesser the common law history inquiry will weigh. As *Filarsky* suggests, factors that indicate a sufficient "close nexus" are, for instance, whether the performance of the governmental function requires "specialized knowledge or expertise" that can be provided only by private parties, whether the private and government employees work "alongside" and "in close coordination," and whether the government otherwise controls the performance of the governmental function. When a "close nexus" between the private and the government employees exists, the history inquiry is focused on whether there was a common law history in distinguishing between private and government employees in the protection afforded for the performance of governmental functions. Conversely, when the facts do not support such "close nexus" between private and government employees, as in *Richardson*, the market pressure incentives will be compelling, and the qualified immunity will not extend to private state actors unless the common law indicates a "firmly rooted tradition" of immunity for the closest analogous private actor.

The application of this analysis to private correctional health care providers suggests that there is a strong presumption of a "close nexus" between the private health care providers who perform on-site services in state correctional facilities and the state-employed correctional officers in these same facilities. Because of this "close-nexus" presumption, the courts

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[271] *See* Brief for Defendant-Appellant at 10-12, Estate of Clark v. Walker, No. 14-CV-1402 (7th Cir. 2016), 2016 WL 7115186 ("[A] physician visited once every two weeks and Nurse Kuehn's supervisor visited once a month.").

[272] *See supra* notes 228-29 and accompanying text.

[273] *Filarsky*, 566 U.S. at 393.

do not need to engage in the fact-sensitive "close-nexus" inquiry unless the opposing party shows that the health care provider performed the governmental function independently from the state-employed correctional staff and without any substantial control or supervision by the state. Unless such showing is made, the courts should permit the assertion of qualified immunity by on-site private correctional health care providers because the strong presence of the policy considerations that underlie qualified immunity will mitigate the need for a showing of a firmly rooted common law history of immunity as to the specific state actor.

Finally, based on this analysis, this Note suggests that the Seventh Circuit in *Estate of Clark* incorrectly adopted *Tepe*'s categorical denial of qualified immunity: the court should have allowed the assertion of qualified immunity by the privately employed nurse, as it did with the state-employed correctional officer, because the privately employed nurse provided on-site health care services, in a state prison facility, and in "close nexus" with the state-employed correctional officer.