on the valuation ladder. Unfortunately, the Court's choice will create more inefficiencies than it eliminates.

Perhaps most disturbing about the Court's holding in *Rash* is its scope. Even though § 506(a) is invoked most commonly in the context of personal automobile loans,[72] nothing in the Court's opinion suggests that its rule should be limited to that context. Moreover, § 506(a) applies to all chapters of the Bankruptcy Code, not just Chapter 13.[73] Therefore, the Court in *Rash* has handed down a broad rule for valuing property in the bankruptcy context.[74] Unfortunately, the Court's opinion is based on an incomplete law and economics analysis that will often lead to inefficient transactions between creditors and debtors. By failing to focus clearly on the economic effects of its decision, the Court in *Rash* simultaneously penalized unsecured creditors, secured creditors, and debtors.

B. Civil Rights Act

Qualified Immunity — Privatized Governmental Functions. — With prison populations increasing rapidly, more and more states are turning to privatization to trim their corrections budgets.[1] Riding the crest of this trend are the private sector prison providers,[2] whose combined business has grown more than fifty percent since 1996 and currently generates revenues of over a billion dollars a year.[3] Industry spokespeople and other advocates claim that prison privatization also benefits the taxpayer by saving states millions of dollars annually in incarceration costs.[4] Civil libertarians, however, fear that placing re-

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72 *See* Carlson, *supra* note 50, at 5 ("In chapter 13, the battle is usually fought over cars."); *The Valuation Debate*, *supra* note 49, at 41.

73 *See Rash*, 117 S. Ct. at 1887 (Stevens, J., dissenting) ("It is crucial to keep in mind that § 506(a) is a provision that applies *throughout* the bankruptcy code . . . ."); Brief of Amici Curiae in Support of Petitioner at 3, *Rash* (No. 96-454) ("The standard of valuation under 11 U.S.C. § 506(a) affects all collateral, not just cars, and all types of bankruptcy cases, not just Chapter 13 filings.").

74 *See* Brief for Donald and Madelaine Taffi as Amicus Curiae Supporting Respondents at 5, *Rash* (No. 96-454) ("Determination of the manner in which the amount of a secured claim is determined . . . will therefore have a significant impact on virtually every chapter 11 and chapter 13 reorganization in which a creditor is asserting a secured claim.").

1 *See* Lisa Belkin, *Rise of Private Prisons: How Much of a Bargain?*, N.Y. TIMES, Mar. 27, 1989, at A14. At least 27 state governments, as well as the federal government and some localities, have entered into contracts with privately run prisons, which currently house over 80,000 prisoners across the country. *See* Fox Butterfield, *For Privately Run Prisons, New Evidence of Success*, N.Y. TIMES, Aug. 19, 1995, at A7; Nzong Xiong, *Private Prisons: A Question of Savings*, N.Y. TIMES, July 13, 1997, at C5.

2 The two largest of these companies, Corrections Corporation of America (CCA) and Wackenhut Corrections Corporation, together control about 75% of the private prisons in America. *See* Xiong, *supra* note 1.

3 *See id.*

4 *See, e.g.*, *id.* (reporting that a Louisiana study on prison costs per prisoner found that the two private prisons in the study had per diem averages of $22.93 and $23.49, compared to a

sponsibility for prisoners in private hands may lead to violations of inmates' constitutional rights.[5]

Last Term, in *Richardson v. McKnight*,[6] the Supreme Court gave the civil libertarians something to cheer about by holding that private prison guards are not entitled to qualified immunity from liability under 42 U.S.C. § 1983.[7] Finding that competitive market forces operate to discourage private prison guards from displaying unwarranted timidity in the performance of their duties, the Court saw no need to extend qualified immunity in this case.[8] It did not, however, address the further question whether qualified immunity applies in the more likely situation in which private parties perform government contracts in the absence of competitive market forces. Lower courts should resist the temptation to conclude from this silence that an extension of qualified immunity is appropriate in such cases. As the private prison example — incorrectly characterized by the Court as a competitive market — illustrates, the profit motive animating private firms may mean that qualified immunity for private parties is inappropriate even, and especially, when competitive market forces do not obtain.

South Central Correctional Center (SCCC) is a 1506-bed, medium-security prison in Clifton, Tennessee, operated for the state by the Nashville-based Corrections Corporation of America (CCA).[9] On March 3, 1994, SCCC inmate Ronnie Lee McKnight, claiming a violation of his Eighth Amendment rights, filed an action for damages un-

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$26.60 average at the state-run facility). *But cf. id.* (describing a G.A.O. report finding it impossible to conclude from previous studies that privatization saves money).

[5] *See* Belkin, *supra* note 1.

[6] 117 S. Ct. 2100 (1997).

[7] *See id.* at 2108. Section 1983 provides a cause of action for citizens who suffer "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" at the hands of any person acting "under color" of state law. 42 U.S.C. § 1983 (1994).

[8] *See Richardson*, 117 S. Ct. at 2106–07. Officials at risk of "personal liability for acts taken pursuant to their official duties . . . may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." Forrester v. White, 484 U.S. 219, 223 (1988).

[9] *See* Kevin McKenzie, *Tennessee Considers the Pros and Cons of Prisons for Profit*, COM. APPEAL, May 25, 1997, at A1; Paula Wade, *CCA Prisons Could Save $100 Million, Exec Tells Hearing*, COM. APPEAL, May 8, 1997, at A1. SCCC is operated by CCA pursuant to a Tennessee statute, which allows for the private operation of "only . . . one (1) medium security or minimum security facility." TENN. CODE. ANN. § 41-24-103 (Supp. 1996). In the 1980s, CCA made a bid for a 99-year lease of the entire Tennessee prison system that failed after questions were raised regarding its legality. *See* W.J. Michael Cody & Andy D. Bennett, *The Privatization of Correctional Institutions: The Tennessee Experience*, 40 VAND. L. REV. 829, 841–42 (1987). A bill currently pending in Tennessee would enable state officials to contract with private prison providers "for the operation of any or all 21 state prisons." Richard Locker, *Prison Bill Won't See Action by End of This Session: Privatization Foes Cheer Decision*, COM. APPEAL, May 23, 1997, at B1. CCA has claimed that it could run the whole state system at savings of at least $100 million, though legislators are skeptical of this claim. *See* Wade, *supra*.

der § 1983 against SCCC warden John Rees[10] and prison guards Daryll Richardson and John Walker.[11] McKnight alleged that Richardson and Walker placed him in "tight restraints" during a transfer and thereby caused "serious medical injury which actually required hospitalization."[12] The defendants responded that, as correctional officers, they were entitled to qualified immunity from § 1983 actions, and moved to dismiss.[13]

The district court denied the defendants' motion, holding that "employees of a private, for-profit corporation" are not entitled to qualified immunity.[14] The Sixth Circuit, hearing the case on interlocutory appeal, affirmed.[15] The court explained that the purpose of qualified immunity is to strike a balance between "the vindication of constitutional guarantees and the furtherance of the public interest."[16] This balance is upset when, as was true here, the officials in question are "principally motivated" not "by a desire to further the interests of the public," but rather by a desire "to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security."[17] An extension of qualified immunity to the defendants in this case, the court feared, would lead privately operated correctional facilities to "cut[] corners on constitutional guarantees."[18]

In a 5–4 decision, the Supreme Court affirmed,[19] ruling narrowly that qualified immunity is unavailable to employees of private firms undertaking "a major lengthy administrative task (managing an insti-

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[10] Rees was subsequently dismissed from the litigation. *See* McKnight v. Rees, 88 F.3d 417, 418 (6th Cir. 1996).

[11] *See id.*

[12] *Id.* at 418–19. According to McKnight, his "discomfort was so evident that other inmates on the bus implored petitioners to loosen the restraints." Brief of Respondent at 1–2, *Richardson* (No. 96-318), *available in* 1997 WL 58604. Richardson and Walker allegedly responded with taunts and abusive language and told McKnight that "he 'was getting what he deserved' and that he should 'suffer.'" *Id.*

[13] *See McKnight*, 88 F.3d at 419. In *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court extended qualified immunity to state-employed prison guards. *See id.* at 561. If the defendants in *Richardson* had been granted qualified immunity, McKnight would have had to show that their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (establishing the standard for qualified immunity).

[14] *McKnight*, 88 F.3d at 419. The district court opinion was unreported and incorporated *Manis v. Corrections Corp. of America*, 859 F. Supp. 302 (M.D. Tenn. 1994), a prior decision denying qualified immunity to private prison guards. *See* Brief of Petitioners at 1, *Richardson* (No. 96-318), *available in* 1997 WL 10351.

[15] *See McKnight*, 88 F.3d at 418. Denials of qualified immunity are appealable under interlocutory order. *See* Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).

[16] *McKnight*, 88 F.3d at 424.

[17] *Id.* In so finding, the court did not deny the significant public service performed by prison guards employed by private companies. *See id.* ("[I]t is beyond peradventure that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest . . . .").

[18] *Id.*

[19] *See Richardson*, 117 S. Ct. at 2103.

tution) with limited direct supervision by the government . . . for profit and potentially in competition with other firms."[20] Writing for the majority,[21] Justice Breyer began his analysis by characterizing the recent case *Wyatt v. Cole*[22] as "pertinent authority."[23] Admitting that *Wyatt* "did not answer the legal question" precisely before the Court,[24] Justice Breyer interpreted the case to require the Court "to look both to history and to the purposes" of the qualified immunity doctrine to determine whether the petitioners were entitled to immunity.[25]

Canvassing the history of suits against private prison contractors, the Court failed to find "a 'firmly rooted' tradition of immunity applicable to privately employed prison guards."[26] Instead, the Court specifically noted that the common law "forbade [private] jailers to subject 'their prisoners to any pain or torment'"[27] and that it "authorized prisoner lawsuits to recover damages" in such cases.[28] Turning to policy considerations, the Court observed that the purpose of immunity doctrine is to protect the "government's ability to perform its traditional functions."[29] The doctrine achieves its purpose in two ways: first, by "protecting the public from unwarranted timidity [in the exercise of their duties] on the part of public officials" fearing lawsuits; and second, by "ensur[ing] that talented candidates [are] not deterred by the threat of damages suits from entering public service."[30]

Applying these two policy considerations to the case at hand, the Court found that neither compelled the application of immunity. With

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[20] *Id.* at 2108. In so holding, the Court explicitly distinguished those cases involving "a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision." *Id.*

[21] Justice Breyer was joined by Justices Stevens, O'Connor, Souter, and Ginsburg.

[22] 504 U.S. 158 (1992). In *Wyatt v. Cole*, the Court addressed the question whether qualified immunity is available to private parties "charged with § 1983 liability for 'invoking state replevin, garnishment, and attachment statutes' later declared unconstitutional." *Richardson*, 117 S. Ct. at 2103 (quoting *Wyatt*, 504 U.S. at 159).

[23] *Richardson*, 117 S. Ct. at 2103.

[24] *Id.* at 2104. The *Wyatt* Court declined to extend qualified immunity to the petitioners in that case but "explicitly limited its holding" to the narrow question of "private persons . . . who conspire with state officials." *Id.* (quoting *Wyatt*, 504 U.S. at 168) (internal quotation marks omitted).

[25] *Id.*

[26] *Id.* The Court noted that "private contractors were heavily involved in prison management during the 19th century" and in some cases shouldered the responsibility for a state's entire prison system. *Id.* Yet, despite the fact that "*[g]overnment*-employed prison guards may have enjoyed a kind of immunity defense arising out of their status as public employees at common law," the Court found many cases suggesting a common law remedy for inmates against private prison contractors and no evidence of any immunity for these jailers. *Id.* at 2104–05.

[27] *Id.* at 2105 (quoting *In re* Birdsong, 39 F. 599, 601 (S.D. Ga. 1889)).

[28] *Id.*

[29] *Id.* (quoting *Wyatt*, 504 U.S. at 167) (internal quotation marks omitted).

[30] *Id.* The Court recalled Judge Learned Hand's warning that the threat of liability would "dampen the ardor of all but the most resolute, or the most irresponsible" public officials. *Id.* at 2106 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.))) (internal quotation marks omitted).

respect to the first prong — preserving the ability of government officials to serve the public good — Justice Breyer argued that, unlike their state-operated counterparts, private prisons are subject to "competitive market pressures" that make their employees less likely to exhibit "the most important special government immunity-producing concern — unwarranted timidity."[31] According to Justice Breyer, these market pressures mean that, in order to retain their contracts, private prison operators must ensure that their employees are neither too aggressive (which would create liability for "damages that raise costs") nor too timid (which would leave the firm vulnerable to replacement by a competing firm that had demonstrated an ability to do "both a safer and a more effective job").[32] As for the second prong — the concern about deterring talented candidates from seeking public service jobs[33] — Justice Breyer argued that, unlike the state, private prison operators are able to shield their employees from personal liability through salary offsets or statutorily required insurance schemes and thus are able to neutralize this threat.[34]

In dissent, Justice Scalia[35] berated the majority for departing from the "settled practice of determining § 1983 immunity on the basis of the public function being performed."[36] Expressly invoking this "public function" approach, Justice Scalia reviewed both recent Supreme Court precedent and case law "virtually contemporaneous with the enactment of § 1983"[37] and found no reason to deny relief to the petitioners, who in the performance of their duties were "indistinguishable" from state-employed guards.[38]

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[31] *Id.* at 2105.

[32] *Id.* The Court assumed that private prisons, unconstrained by "civil-service restrictions," are able to employ contractual incentives to pressure their employees to achieve this balance. *Id.* at 2107. Justice Breyer noted that government employees, by contrast, are subject to lower levels of accountability and to "civil service rules" that limit the ability of supervisors to reward or to penalize individual employees. *Id.*

[33] *See id.*

[34] *See id.* Justice Breyer also addressed a third purpose of qualified immunity: to prevent the increased risk of lawsuits from "'distrac[ting]' these employees 'from their . . . duties.'" *Id.* (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Justice Breyer argued that the Court's qualified immunity doctrine "do[es] not contemplate the complete elimination of lawsuit-based distractions," *id.*, and that the Tennessee legislature reserved to state officials important discretionary tasks relating to prison discipline, parole, and good time, *see id.* This latter observation seems to suggest that any increased distraction caused by the Court's holding will not interfere with the tasks that the state deemed to be most important to the running of a prison. *See id.*

[35] Justice Scalia was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas.

[36] *Richardson*, 117 S. Ct. at 2109 (Scalia, J., dissenting). The *Richardson* Court labeled this claim a "misreading" of precedent. *See Richardson*, 117 S. Ct. at 2106. Although the majority conceded that the Court "has sometimes applied a [public function] approach in immunity cases," it noted that such an approach was used only "to decide which type of immunity — absolute or qualified — a public officer should receive." *Id.*

[37] *Id.* at 2110 (Scalia, J., dissenting) (citing Alamango v. Board of Supervisors, 32 N.Y. Sup. Ct. 551 (1881)).

[38] *See id.* at 2112.

After making clear his view that "history and not judicially analyzed policy governs this matter,"[39] Justice Scalia proceeded to explain why he found the Court's arguments distinguishing private from public prisons to be "even on [their] own terms . . . unconvincing."[40] First, Justice Scalia pointed out that a state's cancellation of a prison management contract is "not a market choice," but rather a political decision in which benign neglect or other less seemly considerations like "personal friendship, political alliances, [and] in-state ownership of the contractor" are likely to influence the result.[41] In fact, "short of mismanagement so severe as to provoke a prison riot," state officials will be inclined to award contracts not to the firm with the best disciplinary record, but to the lowest bidder.[42] Second, rejecting the Court's suggestion that private firms are better able to attract and keep talented candidates than are public agencies, Justice Scalia observed that nothing prevents states from insuring public employees against civil liability or from doing away with the restrictive civil service salary and seniority "encrustations" that currently prevent the use of incentives to influence employee performance.[43]

Having dispensed with the Court's arguments, Justice Scalia next dismissed as "implausible" the basis for the Sixth Circuit's affirmance[44] — that, because private prison guards are principally motivated by a desire to ensure the continued profitability of the firm for which they work, the extension of qualified immunity to them could lead to an increase in constitutional violations.[45] Criticizing the Sixth Circuit for giving "no hint" as to how a guard's violation of inmates' constitutional rights might lead to greater profits for the employer, Justice Scalia argued that private prison operators, "whose § 1983 damages come out of their own pockets, . . . would, if anything, be more careful in training their employees to avoid constitutional infractions."[46] Justice Scalia concluded by scolding the Court for drawing an imprecise and "obscure" public/private distinction and for reaching a decision of which "[t]he only sure effect" would be to raise "artificially . . . the cost of privatizing prisons."[47]

The *Richardson* Court's silence as to whether qualified immunity ought to be available to private actors performing delegated govern-

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39 *Id.* at 2110.

40 *Id.* at 2110–11.

41 *Id.* at 2111.

42 *Id.*

43 *See id.* at 2112.

44 *See id.*

45 *See* McKnight v. Rees, 88 F.3d 417, 424 (6th Cir. 1996).

46 *Richardson*, 117 S. Ct. at 2112 (Scalia, J., dissenting).

47 *Id.* at 2112–13 ("Whether this will cause privatization to be prohibitively expensive, or instead simply divert state funds that could have been saved or spent on additional prison services, it is likely that taxpayers and prisoners will suffer as a consequence.").

mental tasks in the absence of competitive market forces, coupled with its actual holding, may tempt lower courts to conclude that employees in privatized industries should be denied qualified immunity only when a fully functioning market exists. As the private prison example suggests, however, resort to this easy conclusion would be a mistake. Justice Breyer's finding of a competitive market is questionable in this context, and the example of private prisons illustrates that the extension of qualified immunity to private actors may in fact be inappropriate when — and precisely because — market forces are absent.

Qualified immunity is intended to counter the "perverse incentives" created by the fear of personal liability for § 1983 damages, a fear that can "*inhibit* officials in the proper performance of their duties."[48] To determine whether the extension of qualified immunity is necessary to avoid this outcome, courts attempt to strategize from the perspective of the officials in question, to gauge the strength of the constraints that potential § 1983 liability would have on the ability of "[this] particular official or class of officials" to perform its assigned functions.[49] Although the Court has been sparing in "free[ing public officials] of the obligation to answer for their acts in court,"[50] a finding that fear of § 1983 liability would induce public officials to unwarranted timidity in the exercise of their duties has weighed strongly in favor of granting immunity.[51]

Justice Breyer was convinced that competitive market pressures in the private prison context were sufficient to discourage such timidity. As Justice Scalia suggested in his dissent, however, the private prison market, in which the buyers are always government officials acting as agents of the state, may not work the way the Court imagines it does.[52] First, given the "hidden delivery" of prison services[53] and the many obstacles to adequate state monitoring of private facilities,[54] state representatives are unlikely to expend much effort to make sure that prison officials operate at the optimal levels of safety and effective-

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48 Forrester v. White, 484 U.S. 219, 223 (1988).

49 *Id.* at 224.

50 *Id.*

51 *See, e.g.*, Cleavinger v. Saxner, 474 U.S. 193, 205 (1985); Wood v. Strickland, 420 U.S. 308, 319 (1975).

52 *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting).

53 James Theodore Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 356–57 (1986).

54 These obstacles include the shared desire of the provider and the state to contain costs, *see* DAVID SHICHOR, PUNISHMENT FOR PROFIT 123 (1995), the undesirable "blur[ring] of the chain of command" that occurs when prison administrators must answer to government officials, *id.* at 120, the incentives of government monitors to play down any "improprieties" on the part of the prison operator, *see* Gentry, *supra* note 53, at 359–60, and the risk that government monitors will be co-opted by the private contractors with whom they work, *see* SHICHOR, *supra*, at 120–21.

ness.[55] Second, because private prisons are "funded entirely by government, firms like CCA must ally themselves with politicians to sustain their growth."[56] This strategy, when successful, means that factors like politicians' need to secure future campaign contributions and the existence of friendships between state officials and firm owners are likely to weigh heavily in the allocation and renewal of contracts.[57] Finally, Justice Breyer's argument assumes that, if an initial contracting firm proved inadequate in the delivery of safe and effective prison services, the state could and would move to replace it.[58] The combination of significant start-up costs[59] and a limited pool of contractors,[60] however, renders the existence of a competitor able and prepared to assume the cancelled contract unlikely.[61] Moreover, once the state divests itself of the responsibility for running a prison, it becomes very difficult for it to resume operation[62] — and the higher the proportion of the state's incarcerated population that has been previously entrusted to a private entity, the greater the difficulty.[63]

Given that, when state officials set out to privatize a sphere of governmental responsibility, "public officials [will be] the only purchaser, and other people's money the medium of payment," the assumption of competitive market pressures in the context of *any* government privatization is likely to be "fanciful."[64] A narrow reading of *Richardson* might suggest that, for this reason, it will generally be appropriate for courts to extend qualified immunity to private actors performing gov-

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55 *See Richardson*, 117 S. Ct. at 2106. State legislators, after all, have "many issues vying for their attention." *Id.* at 2111 (Scalia, J., dissenting).

56 Steven Donziger, *The Prison-Industrial Complex: What's Really Driving the Rush to Lock 'Em Up*, WASH. POST, Mar. 17, 1996, at C3.

57 *See Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting). In Tennessee, for example, an investigation into the Nashville-based CCA revealed "a small but impressive network of political contacts, a history of generous campaign contributions by CCA executives, and business ties among [CCA owner Tom] Beasley and top state officials." Richard Locker, *Personal, Political, Business Ties Bind CCA, State*, COM. APPEAL, May 25, 1997, at B3. Even cost considerations, ostensibly the central attraction of privatization, have been known to take a back seat to political pressure. For example, when CCA's 1986 bid to run South Central turned out not to be the lowest, "state leaders invented a new and controversial evaluation system that ended up declaring CCA the winner." Paula Wade, *Is Private Prison Deal All Locked Up?*, COM. APPEAL, Apr. 27, 1997, at B5.

58 *See Richardson*, 117 S. Ct. at 2106.

59 *See* Gentry, *supra* note 53, at 358.

60 *See* SHICHOR, *supra* note 54, at 126.

61 This would be especially true in situations in which the initial provider "own[ed] the only suitable facilities or employ[ed] most of the persons in the area with experience in corrections work." Gentry, *supra* note 53, at 357.

62 *See* Cody & Bennett, *supra* note 9, at 843–44, 847–48.

63 *See* J. Michael Keating, Jr., *Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 130, 142 (Douglas C. McDonald ed., 1990). For these reasons, states may well decide "to accept some contractor abuses [rather] than to remedy them by resuming state operation." Gentry, *supra* note 53, at 358 n.28.

64 *Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting).

ernment contracts. However, in some contexts, including that of private prisons, other forces may counter the incentive to timidity that § 1983 creates. Specifically, a particularly formidable and distinctive pressure — the profit motive — arguably is able, when market forces are absent, to operate on private prison providers to curtail timidity among their employees in a way that renders qualified immunity unnecessary.[65]

Private prison providers work within extremely narrow profit margins.[66] Because their primary appeal for the government is their potential to reduce the costs of incarceration, prison management firms are limited in what they can charge a state per inmate per day.[67] Thus, these firms must economize in ways that state-operated prisons need not,[68] primarily (although by no means exclusively) by "hiring fewer staff members, paying lower wages, and reducing staff training."[69] As one industry observer explains, because "80%–90% of a prison's budget goes to staffing and training," private providers "must reduce expenditures in these areas if they are to make a profit."[70] And because these providers tend to be "entrenched" in their positions, managers can cut costs in these ways with minimal fear that they will lose their contracts as a result.[71] The management strategies that they are therefore able to adopt put pressures on guards to discharge their duties not timidly, but aggressively.

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65 Justice Scalia's hypothesis that private prison operators would encourage timidity among their employees in an effort to reduce § 1983 liability implicitly recognizes this dynamic — that the absence of competitive market forces confers on private prison operators greater freedom to pursue profits. *See id.*

66 *See* Sam Howe Verhovek, *Operators Are Not Worried by Ruling*, N.Y. TIMES, June 24, 1997, at B10 ("Even a small increase in their costs could be enough to eliminate the price advantage that many companies can now offer . . . , which is almost uniformly the factor that leads governments to privatize.").

67 *See* Xiong, *supra* note 1.

68 Indeed, in many cases, state-operated prisons *cannot* economize in these areas. *See, e.g.*, TENN. CODE ANN. §§ 50-7-211 to -305 (1991) (codifying the terms and benefits of employment with the state).

69 Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475, 1498 (1986). *But cf.* Belkin, *supra* note 1 (quoting industry officials attributing savings to their freedom from government rules, such as rules governing procurement); Butterfield, *supra* note 1 (attributing savings to "reducing labor costs by making prisons a better place in which to work").

70 Dunham, *supra* note 69, at 1498 n.158 (quoting Telephone Interview by Douglas Dunham with Richard Ford, Director of Jail Operations, National Sheriffs' Association (Mar. 11, 1986)). Because labor is the major expense in running a prison, private firms, in order to make a profit, must reduce labor costs "in one or more of the following ways: (a) cutting salaries or the pay scale of employees; (b) providing less or no fringe benefits and pension funds; (c) economizing on the screening procedures of employees; (d) hiring fewer employees; (e) hiring less qualified employees; (f) providing less training . . . ." SHICHOR, *supra* note 54, at 190 (citations omitted).

71 *See* Gentry, *supra* note 53, at 357; *cf.* SHICHOR, *supra* note 54, at 128 (describing the practice of "low-balling," in which contractors deliberately underbid, banking "on the growing dependence of government agencies on their services that will make it very hard, almost impossible, to terminate the contract").

To see why this is so, it is only necessary to consider what prison guards actually do day-to-day. Guarding inmates requires constant interaction in a tense atmosphere with people who are bored, frustrated, resentful, and possibly dangerous.[72] Successful negotiation of the demands of this work — which includes protecting inmates from harm as well as ensuring the guard's own personal safety — requires training, experience, good judgment, and presence of mind. Guards who are overworked and undertrained, or who are working in prisons that are understaffed as a result of their employers' desire for profits, will be at a serious disadvantage in such a volatile environment and thus will be unlikely to exhibit "unwarranted timidity" or inhibition in the performance of their duties.[73]

Justice Scalia, recognizing that the absence of market pressures gives private prison operators wide discretion in performing their contracts, hypothesized that profit-seeking managers would "down-play discipline" and encourage timidity among the guards in an effort to reduce the cost of § 1983 liability.[74] Certainly, the fear of litigation costs arising from § 1983 suits will provide an incentive against skimping on the costs of staffing and training. However, even on Justice Scalia's analysis, it is an open, empirical question whether the anticipated cost of § 1983 suits outweighs the money to be saved by hiring fewer, less qualified guards and training them less. The related, more complicated question is whether the pressure on guards to be timid in the

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[72] *See* SHICHOR, *supra* note 54, at 194–97. These pressures are also likely to exist, albeit in a more muted form, in public prisons, a fact that raises the question whether, notwithstanding the Court's holding in *Procunier v. Navarette*, 434 U.S. 555 (1978), qualified immunity is really necessary to ensure that public prison guards approach their responsibilities with the appropriate level of aggression and zeal.

[73] If anything, evidence suggests that the more realistic problem is excessive zeal. In 1995, investigations following a riot by inmates at an Elizabeth, New Jersey, Immigration and Naturalization Service facility run by Esmor Correctional Services Corporation revealed that private prison guards who were ill-trained, overworked, and outnumbered had routinely abused inmates physically, "shackled them during visits, [and] placed them in punishment cells for little documented reason . . . [as] part of a systematic methodology designed by some Esmor guards as a means to control the general detainee population." John Sullivan & Matthew Purdy, *Parlaying the Detentions Business into Profit*, N.Y. TIMES, July 23, 1995, at A1. In 1996, minimally trained employees of a Capital Corrections Resources-run jail in Brazoria County, Texas, were captured on videotape "forcing prisoners to crawl, kicking them[,] and encouraging dogs to bite them." *Prison Privatization Is No Panacea*, HARTFORD COURANT, Aug. 24, 1997, at C2. At the time of the beating, the jailers had "had only 40 hours of classroom training." Kim Bell, *Texas Jail Firm Says Incident Was Overblown*, ST. LOUIS POST-DISPATCH, Aug. 26, 1997, at 1A. These examples suggest that qualified immunity is not only unnecessary but, if extended to private prison guards, may even unduly insulate them from the deterrent effect of § 1983 and thus create a greater risk of violations of constitutional rights. *See* John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 471 (1990).

[74] *Richardson*, 117 S. Ct. at 2111 (Scalia, J., dissenting) ("[T]he more cautious the prison guards, the fewer the lawsuits, the higher the profits."). Because repeated or frequent lawsuits would presumably lead to an increase in a given firm's insurance rates, the mere fact that private prison providers must purchase liability insurance up front, *see id.*, does not negate the interest of profit-maximizing prison providers in constraining the litigation costs arising from § 1983 claims.

face of possible § 1983 actions outweighs the pressure created by their employers' need to reduce costs and thereby maximize profits.

In the prison context, the answers to these questions arguably cut against extending qualified immunity to private prison guards.[75] In any case, lower courts must resist the temptation to read *Richardson* to suggest that qualified immunity is appropriate for private parties performing "a major lengthy administrative [governmental] task" when competitive market pressures are absent.[76] After *Richardson*, a finding of competitive market forces in the context of government privatizations will justify the denial of qualified immunity. However, as the prison example suggests, a finding of no market forces is only the first step in determining whether any countervailing forces operate to check the tendency to undue timidity that potential § 1983 liability creates. The prison example also suggests something further: when seeking countervailing forces in the absence of market pressures, the profit motive invariably animating the private performance of a government contract would be a good place to start.

C. *Patent Act*

Doctrine of Equivalents. — Although complexity in law proves to be inevitable in certain contexts, it "can inhibit beneficial transactions, impose deadweight losses, create frustrating delays, consume the energies of talented individuals, breed new and difficult-to-resolve disputes, and discourage compliance."[1] Even seemingly simple rules can produce complex effects.[2] Last Term, in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*,[3] the Supreme Court unnecessarily increased the complexity of patent law. The Court addressed the doctrine of

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[75] First, although prison management firms were previously uncertain about whether their employees could claim qualified immunity, clear evidence exists that these firms were nonetheless cutting costs in staffing and training so as to maximize their profit margins. *See* SHICHOR, *supra* note 54, at 191; Dunham, *supra* note 69, at 1498 & n.158. Second, the restrictions on § 1983 actions by prison inmates that the Prison Litigation Reform Act of 1996, 28 U.S.C.A. § 1915 (West Supp. 1997), imposes seem certain to leave private firms freer to cut costs on staffing and training without incurring correspondingly greater litigation costs. *See* Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 . . . ."). Finally, the costs of litigation are merely expected future costs, dependent on the probability of suit. All other things equal, firms are likely to prefer the certainty of saving through immediate staffing and training cuts to the uncertainty of future savings in litigation costs arising from increased expenditures in these areas.

[76] *Richardson*, 117 S. Ct. at 2108.

[1] Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 19 (1992).

[2] *See, e.g.*, PETER COVENEY & ROGER HIGHFIELD, FRONTIERS OF COMPLEXITY: THE SEARCH FOR ORDER IN A CHAOTIC WORLD 95 (1995).

[3] 117 S. Ct. 1040 (1997).