AN UNQUALIFIED APPLICANT: THE INEQUITABLE APPLICATION OF QUALIFIED IMMUNITY TO BAIL BONDSMEN IN LIGHT OF *FILARSKY V. DELIA* AND *GREGG V. HAM*

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ABSTRACT

The fugitive is a puppet and the bondsman is his master. The bondsman may pull the puppet's strings at any time and for any reason, track the defendant, and return the fugitive to prison on a whim. These are the historic powers of the bondsman granted by the United States Supreme Court in Taylor v. Taintor, *and have become nearly undisputed. But a more recent tale has also begun to unfold, illuminating that the bondsmen may have strings of their own. Controlled by the most powerful of puppet masters—the courts—the bondsmen's strings operate as a check on the bondsmen's activities and the procedures by which they recapture fugitives. One movement out of line, and the courts can snap the bondsmen's strings, subjecting them to timely and costly litigation. The only freedom from these strings comes in the form of qualified immunity, a judicially created doctrine that serves as a bar to civil liability.*

This Note addresses the applicability of qualified immunity to bail bondsmen, specifically in the context of the United States Court of Appeals for the Fourth Circuit's recent decision in Gregg v. Ham, *which denied bondsmen access to this doctrine, and the Supreme Court's qualified immunity analysis in* Filarsky v. Delia, *which granted qualified immunity to special prosecutors. Particularly, this paper supports three central propositions: (1) the current qualified immu-*

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nity analysis can be reduced to a determination of whether a party receives private or public compensation; (2) this qualified immunity test leads to irrational and inequitable results in the case of bondsmen, who are denied immunity for performing the same function that immunity-granted police officers undertake; and (3) a functional analysis test is a better alternative for the qualified immunity standard because it eliminates the arbitrary and unfounded distinctions between public and private employees. Under the current qualified immunity test, a bondsman's strings can never be cut. Only with the introduction of a more realistic and transparent qualified immunity standard can equitable treatment finally be afforded to the bondsman.

I. INTRODUCTION

"Money is the string with which a sardonic destiny directs the motions of its puppets." – W. Somerset Maugham

It has long been said that bondsmen hold their principals on a string.[1] The bondsman may move, control, and alter the actions of the accused pursuant to contractual authority.[2] One flick of the wrist, and the bondsmen can pull the string at any time, whenever they please.[3] The principal becomes merely a puppet on the bondsman's marionette stage. This is the tale that has been spun since *Taylor v. Taintor* in 1872, in which the United States Supreme Court affirmed the nearly unlimited rights of bondsmen over their principals.[4] But the sequel to this story has only recently begun to unfold: who is the puppet master behind the bondsman?

Every year, approximately ten percent of defendants on bail do not show up for court—they effectively "skip" or "jump" bail.[5] In

1. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 371–72 (1872); Jim M. Hansen, *The Professional Bondsman: A State Action Analysis*, 30 CLEV. ST. L. REV. 595, 596 (1981).

2. Jonathan Drimmer, *When Man Hunts Man: The Rights and Duties of Bounty Hunters in the American Criminal Justice System*, 33 HOUS. L. REV. 731, 745 (1996) (describing that the bondsman's rights over the principal are derived from the contract between the bondsman and defendant).

3. *Taintor*, 83 U.S. at 372 (noting that bondsmen "may pull the string whenever they please").

4. *Id.* at 375; Matthew L. Kaufman, *An Analysis of the Powers of Bail Bondsmen and Possible Routes to Reform*, 15 N.Y.L. SCH. J. HUM. RTS. 287, 292 (1999).

5. *See* Gerald D. Robin, *Reining in Bounty Hunters*, 24 No. 2 GPSOLO 28 (2007); Andrew D. Patrick, *Running from the Law: Should Bounty Hunters be Considered State Actors and Thus Subject to Constitutional Restraints?*, 52 VAND. L. REV. 171, 175 (1999); Todd C. Barsumian, *Bail Bondsmen and Bounty Hunters: Re-Examining the Right to Recapture*, 47

pursuit and capture of these fugitives, the law has traditionally afforded bondsmen and bounty hunters wide latitude.[6] This latitude results in abuses of power and complaints of unconstitutionality.[7] As a species of the private businessman, the bondsman has long been associated with stories of corruption, greed, and exploitation.[8] Typically unrestrained by Fourth Amendment safeguards,[9] the bondsman can enter the principal's home,[10] use unreasonable force to apprehend the principal,[11] and imprison the defendant.[12]

Although bondsmen can use unreasonable means to apprehend a defendant, they may still face civil liability for their actions,[13] particularly in the United States Court of Appeals for the Fourth Circuit.[14] The Fourth Circuit, in *Jackson v. Pantazes*, recognized that bail bondsmen are state actors and may be held liable for violations of constitutional rights under the Fourteenth Amendment.[15] Recognizing the symbiotic relationship between the court system and the bondsman,[16] the Fourth Circuit noted that joint activity between a police officer and a bondsman is sufficient to simultane-

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DRAKE L. REV. 877, 878 (1999); Emily M. Stout, *Bounty Hunters as Evidence Gatherers: Should They Be Considered State Actors Under the Fourth Amendment When Working with the Police?*, 65 U. CIN. L. REV. 665, 668 (1997).

6. Stout, *supra* note 5, at 670.

7. Kaufman, *supra* note 4, at 304–05.

8. Forrest Dill, *Discretion, Exchange and Social Control: Bail Bondsmen in Criminal Courts*, 9 LAW & SOC'Y REV. 639, 643 (1975).

9. *See* Holly J. Joiner, *Private Police: Defending the Power of Professional Bail Bondsmen*, 32 IND. L. REV. 1413, 1414, 1433 (1999); Stout, *supra* note 5, at 671; Hansen, *supra* note 1, at 602.

10. Eric Helland & Alexander Tabarrok, *The Fugitive: Evidence on Public Versus Private Law Enforcement from Bail Jumping*, 47 J.L. & ECON. 93, 97 (2004).

11. Milton Hirsch, *Midnight Run Re-Run: Bail Bondsmen, Bounty Hunters, and the Uniform Criminal Extradition Act*, 62 U. MIAMI L. REV. 59, 67 (2007); Helland & Tabarrok, *supra* note 10, at 97.

12. Helland & Tabarrok, *supra* note 10, at 97; John A. Chamberlin, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. ILL. L. REV. 1175, 1179 (1998).

13. Joiner, *supra* note 9, at 1427; Barsumian, *supra* note 5, at 893.

14. To face civil liability for violations of constitutional rights, the bondsman must be considered a state actor because private actors cannot violate constitutional rights. Jon Loevy, *Section 1983 Litigation in a Nutshell: Make a Case out of It!*, 17 DCBA BRIEF 14 (2004). The Fourth Circuit's holding in *Jackson v. Pantazes* that a bondsman is a state actor represents the exception, not the rule. Barsumian, *supra* note 5, at 895. Other circuits which have addressed this issue have been "reluctant to impose state-actor liability upon bondsmen where the specific factual situation did not involve the blatant police participation that *Jackson* involved." *Id.* For example, see Dean v. Olibas, 129 F.3d 1001 (8th Cir. 1997) (holding that a bondsman is not a state actor); Landry v. A-Able Bonding, Inc., 75 F.3d 200, 204 (5th Cir. 1996) (noting that just because a bondsman possesses an arrest warrant does not render him a state actor); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 554 (9th Cir. 1974) (rejecting the argument that a bondsman is an arm of the court).

15. 810 F.2d 426, 429 (4th Cir. 1986).

16. *Id.* at 430; Barsumian, *supra* note 5, at 895.

ously satisfy the state action test.[17] The bondsman has therefore become a Fourth Circuit state actor, subject to stringent judicial controls. Thus, in the Fourth Circuit, it appears that the justice system pulls the bondsman's strings.

However, the analysis reaches deeper than the mere conclusion that a bondsman is subject to judicial restraints. Like all puppets, bondsmen yearn for freedom from their strings. They desire autonomy—to not fear civil liability for pursuing their principals. The bondsmen wish to see the strings cut. How though, can a state actor break free from these well-established judicial controls? The answer lies in the doctrine of qualified immunity.

Qualified immunity, granted to public officials who engage in discretionary decision making, provides a bar to civil liability.[18] Available to state actors, qualified immunity serves as an incentive to accept employment with a government agency, and deters unwarranted timidity in the decision-making process.[19] An officer entitled to qualified immunity bypasses the judicial system,[20] and receives protection for his potentially unreasonable actions. Thus, it is through qualified immunity that the bondsman's strings could potentially be severed.

This Note examines the applicability of qualified immunity to bail bondsmen in light of the Supreme Court's qualified immunity analysis in *Filarsky v. Delia*,[21] and the Fourth Circuit's 2012 decision in *Gregg v. Ham*.[22] Specifically, this Note argues that the current Supreme Court test for qualified immunity—which essentially depends on the source of compensation—is inequitable and irrationally denies bondsmen qualified immunity despite their performance of a state function. To establish this thesis, Part II offers a succinct background, describing the historical evolution of the bail bond system and the nature of qualified immunity. In Part III, this Note discusses the specific cases of *Filarsky v. Delia* and *Gregg v. Ham*, outlining the main factual details and relevant legal reasoning. Fi-

17. *Jackson*, 810 F.2d at 429 (noting that "in cases where a private party and a public official act jointly to produce the constitutional violation, both parts of the *Lugar* test are simultaneously satisfied").

18. Alyssa Van Duizend, *Should Qualified Immunity be Privatized?: The Effect of* Richardson v. McKnight *on Prison Privatization and The Applicability of Qualified Immunity under 42 U.S.C. § 1983*, 30 CONN. L. REV. 1481, 1491 (1998).

19. Richardson v. McKnight, 521 U.S. 399, 408 (1997).

20. Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 479 (2011).

21. 132 S. Ct. 1657 (2012).

22. 678 F.3d 333 (4th Cir. 2012).

nally, Part IV offers an analysis of what *Filarsky* and *Gregg* reveal about the current qualified immunity test. The section concludes by arguing that this current test is irrational when applied to bondsmen and further advocates for the implementation of a functional analysis test.

II. Background of the Commercial Bonding System & Qualified Immunity

A. *Emergence of the Modern Bail Bonding System in America*

The evolution of America's modern bail system predates the Norman Conquest of England.[23] Providing an alternative to blood feuds, the Anglo-Saxon legal process developed a system of compensation for private grievances.[24] Under this system, the defendant located a surety who would guarantee the accused's appearance in court and pay the defendant's fine upon conviction.[25] In the event that the defendant failed to appear in court, the surety simply paid the ordered fine to the private accuser, and the matter was deemed settled.[26]

With the Norman Conquest, however, challenges plagued the seemingly straightforward bond establishment.[27] In 1066, capital and corporal punishments replaced monetary fines for more serious offenses, and defendants acquired increased incentives to flee.[28] Furthermore, the practice of "hostageship" became more fre-

23. Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth*, 33 N.Y.U. Rev. L. & Soc. Change 199, 206 (2009) (noting that the American bail system not only predates the Norman invasion of England, but also predates written English law); Chamberlin, *supra* note 12, at 1178; Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, Pretrial Justice Institute 6 (Sept. 24, 2010), http://www.pretrial.org/1964Present/PJI-History%20of%20Bail%20Revised%20Feb%202011.pdf.

24. Schnacke et al., *supra* note 23, at 1 ("As Anglo-Saxon law developed, wrongs once settled by feuds . . . were settled through a system of 'bots,' or payments designed to compensate grievances. Essentially, crimes were private affairs . . . and suits brought by persons against other persons typically sought remuneration as the criminal penalty.").

25. *Id.* at 2.

26. *Id.* This promise to pay the defendant's fine in the event of flight was known as bail. The amount pledged under this system was identical to the defendant's fine upon conviction. Scholars have thus argued that this bail process may have been the last "rational application of bail" because it accounted not only for the seriousness of the crime, but also fully satisfied the debt owed if the defendant did not appear in court. *Id.*; *see also* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 Syracuse L. Rev. 517, 520 (1983).

27. Schnacke et al., *supra* note 23, at 2 (describing that the system of bail grew increasingly complex following the Norman Conquest in 1066).

28. *See id.* As these penalties increased in severity, the understanding of which defendants should be granted bail simultaneously shifted. *Id.* The first category of defendants to forfeit their right to bail were those accused of homicide. *Id.*

quently utilized as a war tactic in England.[29] The hostage would remain imprisoned unless a surety promised to assume the hostage's place in the event of flight.[30] Under this system, the surety suffered the hostage's punishment if the hostage escaped.[31]

Although the notion of bail is traceable to these ancient practices, it was only during the first thousand years AD that the modern, recognizable bail system developed in medieval England.[32] In England, magistrates "rode a circuit" through various counties to adjudicate cases.[33] This process, however, substantially delayed trials and kept prisoners indefinitely confined in cells characterized by unsanitary conditions.[34] Due to the high mortality rate accompanying exposure to the unhygienic prison setting, and the extensive delays in procuring a hearing or trial, the modern bail bond system emerged.[35] Sheriffs released prisoners into the custody of third-party sureties who guaranteed the appearance of defendants in court.[36] By assuming custody of the defendant, the surety served as the defendant's jailer and "became the state's proxy for the pretrial criminal process."[37] As a "jailer," the surety exercised rights and

29. Fisher, *supra* note 23, at 206 ("Hostageship was an ancient English war tactic in which a hostage was held for a time in exchange for a promise.").

30. *Id.* ("A surety was appointed to be responsible for the hostage, and the surety's body was placed in a state of metaphorical hostageship.") (citation omitted) (internal quotation marks omitted).

31. *Id.*

32. *Id.*; Joiner, *supra* note 9, at 1414 ("The system of bail originated in medieval England as a way to free prisoners before trial."); Drimmer, *supra* note 2, at 744 ("The American system of bail, and the right of bounty hunters to search for and arrest criminal defendants, descends directly from the English common law."); Schnacke et al., *supra* note 23, at 1.

33. Schnacke et al., *supra* note 23, at 3; *see* Fisher, *supra* note 23, at 206; Chamberlin, *supra* note 12, at 1179 (noting that magistrates would travel the countryside and appear in a specific area for only a few months each year); Drimmer, *supra* note 2, at 744–45.

34. Fisher, *supra* note 23, at 206.

35. *See id.* at 206.

36. Chamberlin, *supra* note 12, at 1179; John H. Murphy, *State Control of the Operation of Professional Bail Bondsmen*, 36 U. CIN. L. REV. 375, 376–77 (1967); *see The Administration of Bail*, 41 YALE L. J. 293, 297 (1931) (describing that a defendant released on bail was delivered into the personal custody of the surety). Sheriffs possessed the ability to grant bail as a result of the broad discretion given to them by magistrate judges to hold and detain prisoners prior to trial. Schnacke et al., *supra* note 23, at 3. As the system initially developed, sheriffs accepted the defendant's word that he would return to court and did not mandate promises by a surety. *See* Joiner, *supra* note 9, at 1414. However, as the system advanced, the use of a surety offered increased assurance of the defendant's appearance, and thus became the preferred method for granting bail. *See id.*

37. Drimmer, *supra* note 2, at 745; *see* Reese v. United States, 76 U.S. (9 Wall.) 13, 21 (1869) (noting that the "principal is, in the theory of the law, committed to the custody of the sureties as to [the] jailers of his own choosing"); Chamberlin, *supra* note 12, at 1179–80 ("This allowed a surety to imprison the accused, the same as if he was a jailer.").

control over the accused comparable to a sheriff's rights over an escaped prisoner.[38]

The surety's rights as a jailer were the logical outgrowth of the surety becoming bound "body for body" with the defendant.[39] Thus, at common law, the surety exercised a nearly absolute right to restrain, control, and surrender his principal.[40] Although the surety exercised these powers, flight of a defendant was rare in medieval England.[41] The tight-knit nature of each community ensured that the sheriff was personally acquainted with the defendant's friends and family members.[42] This personal interaction enabled the sheriff to evaluate the trustworthiness and honesty of the defendant before granting pretrial release.[43] Additionally, transportation methods remained undeveloped and essentially primeval during this stage in history, making flight an unrealistic option.[44]

The American system of bail borrowed extensively from this English precedent, adopting a nearly identical bail process in the American colonies.[45] However, America's rapid socio-economic

38. Fisher, *supra* note 23, at 207 ("The notion that bail was a metaphorical prison became a legal fiction in English common law, giving bail bondspeople and their agents the same authority over escaped principals as the police would have over an escaped prisoner." (citing Taylor v. Taintor, 83. U.S. 366, 371-72 (1872))); Drimmer, *supra* note 2, at 747 ("Thus, at common law, when a surety assumed custody of a suspect, he served as the defendant's 'jailer' and in that role enjoyed the rights of a sheriff over an escaped prisoner.").

39. Adam M. Royval, United States v. Poe: *A Missed Opportunity to Reevaluate Bounty Hunters' Symbiotic Role in the Criminal Justice System*, 87 DENV. U. L. REV. 789, 790 (2010); *see* Chamberlin, *supra* note 12, at 1178–79; Murphy, *supra* note 36, at 377 (noting that the third-party surety was bound to substitute his body for punishment if the defendant failed to appear in court).

40. Hirsch, *supra* note 11, at 68 ("[T]hat the surety may, in his sole discretion, seize his principal, do so with reasonable force, and return the principal to the custody of the obligee . . . were so well-entrenched at English common law that they invited no citation to authority."); 41 GEORGE E. DIX & JOHN M. SCHMOLESKY, CRIMINAL PRACTICE AND PROCEDURE § 21:12 (3d ed. 2011) ("At common law, a surety such as a bondsman was regarded as having custody of the principal and thus was entitled, himself or through his agents, to seize the principal and surrender him to authorities." (citing *Taintor*, 83 U.S. at 371)).

41. Joiner, *supra* note 9, at 1414.

42. Royval, *supra* note 39, at 790 (noting that flight of a defendant was rare because of the "compact nature of English development," which enabled and promoted widespread recognition of defendants); Fisher, *supra* note 23, at 207; Chamberlin, *supra* note 12, at 1180; Murphy, *supra* note 36, at 377 (detailing that the purpose of bond was further served and reinforced by the personal relationship between the third-party surety and the defendant).

43. Fisher, *supra* note 23, at 207 (explaining that the flight risk of a defendant was low because the sheriff had personal knowledge of the trustworthiness of the accused and his family).

44. Joiner, *supra* note 9, at 1414.

45. Brian K. Pinaire, *Who Let (The) Dog Out? On the British Roots of American Bounty Hunting*, 47 No. 6 CRIM. LAW BULLETIN ART 4, 1172-73 (2011); Royval, *supra* note 39, at 790 ("The United States bail system was modeled after the pretrial detention ideology of the English common law."); Fisher, *supra* note 23, at 207 (noting that the English bail system was imported to America); Kaufman, *supra* note 4, at 289; Chamberlin, *supra* note 12, at 1185

development quickly outgrew the English bail system.[46] By the early 1800s, America had doubled in size and tripled in population.[47] Thirty-seven cities by 1840 included populations with over 10,000 inhabitants, and these numbers rapidly increased with massive immigration from Europe in the nineteenth century.[48] According to Holly Joiner, "[r]apid population growth made it less likely that a sheriff or judge would be personally acquainted with either the defendant or the surety."[49] A judge's inability to evaluate and ascertain the trustworthiness, honesty, and reliability of the selected sureties had the potential to undermine the entire bail system.[50]

Thus, the modern, commercialized bail administration emerged as a compromise between the inherent difficulties of the suretyship process and the necessity of pre-trial release.[51] Because finding sureties became nearly impossible due to a judge's lack of personal interaction with the defendants, the bail system transformed into a financial obligation.[52] No longer were sureties required to subject their bodies to punishment if the defendant failed to appear.[53] Rather, a defendant's flight required the surety to pay the remaining balance of the defendant's bond.[54] Hence, the bail system presented a lucrative opportunity for financial gain.[55]

(noting that the "American system is not identical, but rather a variation of [the English] system"); Drimmer, *supra* note 2, at 747-48.

46. Schnacke et al., *supra* note 23, at 4 ("[T]he early colonies applied English law verbatim, but differences in beliefs about criminal justice . . . , differences in colonial customs, and even differences in crime rates between England and the colonies led to more liberal criminal penalties and, ultimately, changes in the laws surrounding the administration of bail."); Joiner, *supra* note 9, at 1415.

47. Fisher, *supra* note 23, at 207 (citing LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 190 (2004)).

48. *Id.* at 207–08 (citing KRAMER, *supra* note 47, at 190). Additionally, America gained cultural and ethnic diversity through the slave trade, as well as immigration from China and Latin America. *Id.* at 208. As the nineteenth century progressed, "America became less a cultural derivative of England populated by Anglo-Saxons and more a patchwork nation in which recent European and other immigrants of varied ethnicities lived together." *Id.*

49. Joiner, *supra* note 9, at 1415; *see* Fisher, *supra* note 23, at 208 ("It was no longer sensible to insist on the personalized surety system, as people lived in communities in which their neighbors were strangers and their families were often in other states or other countries.").

50. Joiner, *supra* note 9, at 1416.

51. Pinaire, *supra* note 45, at 1173 (stating that the commercial bond system was created to handle the increase in number and diversity of the population); Joiner, *supra* note 9, at 1416.

52. Chamberlin, *supra* note 12, at 1181 ("Thus, the promise of the surety to guarantee the appearance of the principal at trial was transformed into a promise to pay money if the accused failed to appear.").

53. Fisher, *supra* note 23, at 207 (noting that bail originally required a body for a body, but then transformed into forfeiture of property or money).

54. Chamberlin, *supra* note 12, at 1181.

55. *Id.*

Capitalizing on this financial prospect, commercial bondsmen replaced friends and family members as sureties.[56] In return for a premium—typically ten percent of the defendant's total bail[57]—the bondsman pledged the defendant's appearance in court.[58] If a defendant failed to appear, the only party at risk of losing substantial money for this non-appearance was the bondsman.[59] In return for undertaking this financial liability, the bondsman became vested with the traditional rights of sureties and used bail as a virtual form of imprisonment.[60] The United States Supreme Court affirmed the powers of bondsmen over their principals in *Taylor v. Taintor*, holding that bondsmen may, at their pleasure, seize the principal and "deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done . . . . They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose."[61] This opinion suggests that the tactical and practical methods utilized by bondsmen exceed the powers of police and law enforcement officials, who are subject to Fourth Amendment constraints.[62]

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56. Fisher, *supra* note 23, at 208 ("Commercial bail practices filled the gap where family and friends had once stood as a disincentive to skip bail."); *see* Stephen Freeland, *The Invisible Badge: Why Bounty Hunters Should be Regarded as State Actors Under the Symbiotic Relationship Test*, 49 WASHBURN L.J. 201, 206 (2009).

57. Patrick, *supra* note 5, at 175; Monrad G. Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109, 115 (1966) (explaining that the bail bondsman's fee is typically between 5%–10% of the bond's face value); Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed with Inmates*, NPR (Jan. 21, 2010), http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates (noting that the typical bail bond fee is at least 10% of the total bail amount).

58. Joiner, *supra* note 9, at 1415; Kathy A. Gibbs, *International Extradition: Bounty Hunting and the American Bail Bondsman*, 9 ASILS INT'L L.J. 87, 87 (1985); Mary A. Toborg, *Bail Bondsmen and Criminal Courts*, 8 JUST. SYS. J. 141, 142 (1983).

59. Paulsen, *supra* note 57, at 115 ("Under the professional bondsman system the only one who loses money for non-appearance is the professional bondsman, the money paid to obtain the bond being lost to the defendant in any event.").

60. Royval, *supra* note 39, at 791 ("Despite this change, the idea that a bondsman was equivalent to a jailor, and that bond was a continued imprisonment from the initial capture by the state, lived on."); Joiner, *supra* note 9, at 1416 ("By acting as surety, not only did the bondsman have the right to exercise the privileges of custody, but he also had a duty to deliver the defendant to trial or face forfeiture. This duty was similar to the duty of early sureties in England who were required to turn themselves in or to forfeit money and land if the accused did not appear."); Drimmer, *supra* note 2, at 749, 753; *see* Nicolls v. Ingersoll, 7 Johns. 145, 148 (N.Y. 1810) ("[B]y the practice of the courts of that state, special bail might take their principal when they pleased, and surrender him into the custody of the sheriff . . . .").

61. 83 U.S. (16 Wall.) 366, 371 (1872).

62. *See* Joiner, *supra* note 9, at 1432 ("The means used by bail bondsmen also exceed, to some extent, the means available to police officers."); *see also* Gibbs, *supra* note 58, at 90 (describing that the bondsman's power exceeds the sheriff's power over defendants).

Where does this seemingly unlimited power of bail bondsmen come from? The United States Constitution does not entitle a defendant to bail or pretrial release;[63] instead, it protects a defendant against excessive bail.[64] Nonetheless, Congress passed the Judiciary Act of 1789, which guaranteed bail for all non-capital offenses.[65] This right to bail has subsequently been incorporated in almost every state constitution.[66] Although defendants possess this statutory right to bail, most defendants still require the financial assistance of a bondsman to post the required bail.[67] The use of a bondsman creates a bilateral contract.[68] First, the bondsman contracts with the defendant to post bail in return for the defendant's payment of a fee and promise to appear in court.[69] This contractual agreement establishes the bondsman's custodial rights over the defendant, including the bondsman's right to pursue and capture the defendant if the defendant jumps bail.[70] Second, the bondsman signs a contract with the government, ensuring full payment of the bail if the defendant fails to appear in court.[71] Thus, the bondsman's control over a defendant arises as a product of the contractual arrangements between the bondsman and the defendant.[72]

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63. Sara G. Austrian, *Bail*, 72 GEO. L.J. 422, 422 (1983) (stating that the Constitution does not require bail to be made available).

64. Joiner, *supra* note 9, at 1415; Austrian, *supra* note 63, at 422 (quoting U.S. CONST. Amend. VIII); *Preventive Detention Before Trial*, 79 HARV. L. REV. 1489, 1498 (1966) (noting that the Eighth Amendment does not provide an affirmative right to bail).

65. Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73 (1789) ("And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death . . . ."); *see* Fisher, *supra* note 23, at 207 (explaining that the Judiciary Act of 1789 includes an affirmative right to bail); Joiner, *supra* note 9, at 1415.

66. Joiner, *supra* note 9, at 1415; *The Administration of Bail*, *supra* note 36, at 293 ("Thirty-five states by constitution and one by statute guarantee that, [a]ll persons shall be bailable by sufficient sureties except for capital offenses where the proof is evident or the presumption great.") (internal quotation marks omitted).

67. Joiner, *supra* note 9, at 1421–22.

68. *Id.* at 1429.

69. *Id.*

70. *Id.*

71. *Id.*

72. In re Von Der Ahe, 85 F. 959, 961 (W.D. Pa. 1898) (quoting Worthen v. Prescott, 11 A. 690, (Vt. 1887)) (describing that the authority of bondsmen arises from contract rather than law); Royval, *supra* note 39, at 793 (discussing *In re Von Der Ahe*, 85 F. at 960-61); Freeland, *supra* note 56, at 209 (stating that in *Taylor v. Taintor*, the Supreme Court affirmed that the bondsman's right to apprehension arises from the contractual relationship between the bondsman and the principal); Hirsch, *supra* note 11, at 69 (quoting Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 551 (9th Cir. 1974)); Chamberlin, *supra* note 12, at 1182 ("Implied in the furnishing of the bond is the development of a contract between the bondsman and bailee . . . ."); Drimmer, *supra* note 2, at 754 (explaining that courts have found bondsmen's participation in the criminal process "originated not through any judicial action or state law, but from the private contract between the defendant and the bondsman"); Hansen, *supra* note 1, at 613 (revealing that bond is contractual in nature).

The contractual nature of the bondsman's rights helped transform the bonding system into a thriving commercial enterprise. Profit is the bondsman's alleged driving force.[73] Because a defendant's failure to appear in court requires the bondsman to pay the full amount of bail,[74] the bondsman possesses a strong financial incentive to pursue and capture any fleeing principal.[75] This exchange of bail for profit has become a recognizable business in the United States[76] and contributes to the efficient functioning of the American criminal justice system.

B. *The Doctrine of Qualified Immunity*

Because the Fourth Circuit has deemed that bondsmen are state actors, the defense of qualified immunity could help sever the bondsman's civil liability strings. The doctrine of qualified immunity arose from the common law theory that, while government officials must be held responsible for reckless and inappropriate actions, these officials should not be subjected to liability for reasonable discretionary decisions.[77] Historically, qualified immunity insulated government defendants from liability to claims brought by private citizens under 42 U.S.C. § 1983.[78] Section 1983 represents a vehicle for the enforcement of constitutional rights and entitles plaintiffs to bring suit in a federal forum.[79] Maintenance of a § 1983 suit requires state action.[80] Private actors are typically immune from suit under § 1983 due to the simple fact that a private actor

73. Joiner, *supra* note 9, at 1424. It is interesting to note that "[n]ationally, the bail industry is quite lucrative, reportedly taking in more than $4 billion annually and 'netting $400 million a year in profits.'" Chamberlin, *supra* note 12, at 1188 (quoting Christian Parenti, *'I Hunt Men': Meet the Self-Ordained Officers of the Bail-Bond Industry*, THE PROGRESSIVE, Jan. 1997, at 23).

74. Barsumian, *supra* note 5, at 879 (making clear that bondsmen risk forfeiture of bonds when principals fail to appear).

75. *See* Helland & Tabarrok, *supra* note 10, at 97 (noting that "just to break even, 95 percent of [a bondsman's] clients must show up in court").

76. Murphy, *supra* note 36, at 377 n.12.

77. Frank H. Stoy, *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, 647 (2012).

78. Stoy, *supra* note 77, at 650–51; Cathy H. Greer, *Governmental Employee Immunity in Actions Brought Pursuant to 42 U.S.C. § 1983*, 38-OCT COLO. LAW. 29, 30 (2009) (describing that qualified immunity protects a defendant from liability when sued in his personal capacity); *see* Loevy, *supra* note 14, at 18.

79. Greer, *supra* note 78, at 29 (stating that § 1983 is a vehicle for enforcing federal rights); Loevy, *supra* note 14 (describing that a federal forum is likely to be more swift and less political when determining the outcome of a case).

80. Loevy, *supra* note 14; Hansen, *supra* note 1, at 627.

cannot violate another's constitutional rights[81] unless he acts under the color of state law.[82]

However, the passage of § 1983 created tension between the desire to remedy violations of established rights and the fear of deterring private individuals from serving in a governmental capacity.[83] In 1982, the Supreme Court clarified the doctrine of qualified immunity to remedy this tension and encourage civic participation.[84] Qualified immunity offers "protection from personal liability to government defendants who have not had 'fair warning' that their conduct violated the law."[85]

As such, qualified immunity presents the greatest barrier to success in § 1983 suits.[86] This immunity provides a shield from litigation to all governmental employees undertaking and performing discretionary functions that are not wanton or reckless.[87] Qualified immunity is thus both pervasive and effective,[88] serving to bar a plaintiff's claim.[89] However, granting qualified immunity to governmental officials in all cases would defeat the purpose of enacting

81. Hansen, *supra* note 1, at 627 (detailing that § 1983 does not provide "legal redress for private conduct"). To bring a cognizable claim under § 1983, there must be state action. The reason a private actor cannot violate another's constitutional rights is that the constitutional protections of the Fourth and Fourteenth Amendments do not apply unless there is state action. Kaufman, *supra* note 4, at 294–95.

82. Loevy, *supra* note 14 (describing that only state actors performing under color of law may be subject to suit under § 1983); Van Duizend, *supra* note 18, at 1489 (noting that § 1983 can only be violated by an individual acting under the color of state law). Acting under "color of law" is analogous to performing within the scope of employment. *See* Loevy, *supra* note 14. More specifically, the Supreme Court defined action based on "color of law" as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 929 (1982) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

83. Reinert, *supra* note 20, at 480.

84. *See* Caryn J. Ackerman, *Fairness or Fiction: Striking a Balance Between the Goals of Section 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1033 (2006) ("Qualified immunity is meant to balance § 1983's concerns of prevention, compensation, and punishment with the competing concerns of overdeterrence, conservation of government funds, and fairness to defendants."); Richardson v. McKnight, 521 U.S. 399, 408 (1997) ("Earlier precedent described immunity as protecting the public from unwarranted timidity on the part of public officials by, for example, encouraging the vigorous exercise of official authority, by contributing to principled and fearless decision-making, and by responding to the concern that threatened liability would, in Judge Hand's words, dampen the ardour of all but the most resolute, or the most irresponsible public officials.") (citation omitted) (internal quotation marks omitted).

85. Reinert, *supra* note 20, at 480.

86. *Id.* at 479; Ackerman, *supra* note 84, at 1028 (admitting that qualified immunity is a significant obstacle for plaintiffs asserting § 1983 claims).

87. *See* Ackerman, *supra* note 84, at 1028.

88. *Id.* at 1032.

89. *See* Van Duizend, *supra* note 18, at 1491 ("Once qualified immunity is applied to an official, plaintiffs are prohibited from bringing section 1983 civil rights damages actions for any conduct that was within the discretionary function required by an official's job.").

§ 1983.[90] To determine whether qualified immunity is available to a governmental actor, the Supreme Court enacted a two-part test. First, the court must determine whether the plaintiff suffered a deprivation of a constitutional right.[91] If the answer to this question is yes, the court must then consider whether the constitutional right was clearly established.[92] A right is "clearly established" if a reasonable officer would be aware of the right and realize the conduct is unlawful in that particular situation.[93] Officers, therefore, receive qualified immunity if they acted reasonably in light of the surrounding circumstances and if the plaintiffs' right was not clearly established.[94]

Qualified immunity, however, may also apply to private individuals acting under the color of state law, further complicating the analysis. A private individual's ability to invoke qualified immunity is determined on a case-by-case basis.[95] For each private defendant, the court must ascertain whether individuals in this profession were afforded qualified immunity at common law,[96] and the court must look at the relevant policy concerns involved in suing governmental employees to see if they are applicable to the private actor.[97] Undertaking this analysis requires the court to examine whether history reveals a "firmly rooted tradition" of immunity applicable to the private actor.[98] A private actor's performance of a governmental function does not automatically entitle them to qualified immu-

90. Ackerman, *supra* note 84, at 1033.

91. Merchant v. Bauer, 677 F.3d 656, 661–62 (4th Cir. 2012) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)); Greer, *supra* note 78, at 31; Ackerman, *supra* note 84, at 1042 (citing Wilson v. Layne, 526 U.S. 603, 609 (1999)).

92. *Merchant*, 677 F.3d at 662 (quoting Figg v. Schroeder, 312 F.3d 625, 635 (4th Cir. 2002)); Greer, *supra* note 78, at 31; Ackerman, *supra* note 84, at 1042 (citing *Wilson*, 526 U.S. at 609).

93. *Merchant*, 677 F.3d at 665 (citing *Saucier*, 533 U.S. at 201).

94. 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."); Reinert, *supra* note 20, at 483 ("[A] government official sued in his or her individual capacity is entitled to qualified immunity: (1) if the defendant behaved reasonably in light of clearly established law; or (2) if that conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (internal quotation marks omitted)).

95. Reinert, *supra* note 20, at 483.

96. *Id.*

97. Wyatt v. Cole, 504 U.S. 158, 167 (1992); Sheila M. Lombardi, *Media in the Spotlight: Private Parties Liable for Violating the Fourth Amendment*, 6 ROGER WILLIAMS U. L. REV. 393, 403–04 (2000).

98. Richardson v. McKnight, 521 U.S. 399, 403–04 (1997) (discussing the holding of *Wyatt* that there must be a firmly rooted tradition of immunity in the common law before the doctrine of qualified immunity applies); *see* 15 AM. JUR. 2d *Civil Rights* § 111 (2012) (noting that history must reveal a firmly rooted tradition of immunity); 2 IVAN E. BODENSTEINER & ROS-

nity.[99] Instead, history must demonstrate that private actors performing these governmental duties have traditionally received qualified immunity.[100] The application of qualified immunity to the private sector must further the doctrine's goals of (1) protecting against timidity in decision making,[101] (2) preventing the deterrence of private actors from accepting government employment,[102] and (3) safeguarding against excessive exposure to unfettered litigation.[103]

In *Richardson v. McKnight*, the Supreme Court determined that "history [did] *not* reveal a firmly rooted tradition of immunity" in the case of private prison guards.[104] In *Richardson*, Tennessee privatized management of correctional facilities, and outsourced the employment of prison guards to a private firm.[105] Examining both the history and policy concerns applicable in qualified immunity cases, the Court concluded that private individuals had been involved in the operation of jails since the eighteenth and nineteenth centuries.[106] States had previously leased their entire prison system to private companies without ever affording the employees qualified immunity.[107] The Court explained:

> Our research, including the sources that the parties have cited, reveals that in the 19th century (and earlier) sometimes private contractors and sometimes government itself carried on prison management activities. And we have found no conclusive evidence of a historical tradition of immunity for private parties carrying out these functions. His-

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ALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:17 (2d ed. 2012).

99. *Richardson*, 521 U.S. at 399.

100. *Id.*

101. Filarsky v. Delia, 132 S. Ct. 1657, 1665 (2012) ("[The Supreme Court has] called the government interest in avoiding unwarranted timidity on the part of those engaged in the public's business the most important special government immunity-producing concern.") (internal quotation marks omitted) (explaining that qualified immunity helps "to avoid unwarranted timidity in performance of public duties"); *see* Van Duizend, *supra* note 18, at 1494.

102. *See Filarsky*, 132 S. Ct. at 1665 (describing that affording immunity to those acting on behalf of the government ensures that "talented candidates are not deterred by the threat of damages suits from entering public service") (internal quotation marks omitted); Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236 (2006) ("[Q]ualified immunity is necessary to guard against 'overdeterrence,' the idea that exposure to liability will deter officials not only from unconstitutional actions, but also from lawful conduct that advances the public good.").

103. *Filarsky*, 132 S. Ct. at 1665; Chen, *supra* note 102, at 236 (noting that unfettered litigation against officials can result in great social costs).

104. *Richardson*, 521 U.S. at 404; *see* Stoy, *supra* note 77, at 648.

105. *Richardson*, 521 U.S. at 402.

106. *Id.* at 405.

107. *Id.* at 405–06.

> tory therefore does not provide significant support for the immunity claim.[108]

In making this determination, the Court decided that the qualified immunity policy of encouraging unwarranted timidity was not present with private employers.[109] Private companies are subjected to competitive market pressures,[110] and are better able to offer salaries that compensate for the accompanying liability.[111] The Court found a very limited threat of deterrence, noting that "privatization helps to meet the immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service."[112] Furthermore, private companies are often protected by comprehensive insurance-coverage requirements, insulating employees from exposure to unlimited liability.[113] Thus, the Court concluded that "government employees typically act within a *different* system," and that the harms necessitating qualified immunity were not present in this circumstance.[114]

Although the Court in *Richardson* narrowed its holding,[115] it broadly denied immunity in the context of "a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with *limited direct supervision* by the government, [which] undertakes that task *for profit* and potentially *in competition with other firms*."[116] This holding left open the possibility of qualified immunity being extended to a private individual "briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision."[117] Expanding on this interpretation, the United States Court of Appeals for the Ninth Circuit determined that a contract between the City of Los Angeles and Lockheed Information Management Services, which provided Lockheed with control over project activities while the city maintained general oversight, was not the type of "close official supervision" with a "private individual" that would entitle Lockheed to

108. *Id.* at 407.

109. *Id.* at 409.

110. *Id.*

111. *Id.* at 411.

112. *Id.* (internal quotation marks omitted).

113. *Id.*

114. *Id.* at 410-11.

115. *Id.* at 413 ("[W]e have answered the immunity question narrowly, in the context in which it arose.").

116. *Id.* (emphasis added).

117. *Id.*

qualified immunity.[118] The Ninth Circuit reasoned that Lockheed fit the description of a firm rather than an individual, and therefore the ruling in *Richardson* was controlling.[119] Even if a court were to determine that the holding in *Richardson* was inapplicable, the court must still conduct the two-part qualified immunity test set forth above.[120]

III. CASE BACKGROUND

A. *Emergence of Modern Qualified Immunity Precedent:* Filarsky v. Delia

On April 30, 2012, the Supreme Court shed light on when a private individual is entitled to qualified immunity. In *Filarsky v. Delia*, the City of Rialto, California hired attorney Steve Filarsky to assist in a formal internal affairs investigation.[121] Filarsky, an experienced employment attorney, had previously represented the City in several investigations, though he was not a governmental employee.[122] The present investigation sought to determine if firefighter Nicholas Delia missed three weeks of work due to illness or to undertake a home construction project.[123] Investigators observed Delia purchasing building supplies, including rolls of fiberglass insulation, from a home improvement store during his absence from work.[124] When confronted by Filarsky about the fiberglass insulation, Delia admitted to purchasing the product, but denied having started the project.[125] In response, Filarsky recommended that the City verify Delia's claim by requiring Delia to produce the fiberglass insulation.[126] Delia, however, refused to cooperate, even when Filarsky suggested Delia place the fiberglass insulation out in his yard.[127] Frustrated by Delia's unwillingness to assist with the

118. Ace Beverage Co. v. Lockheed Info. Mgmt. Serv., 144 F.3d 1218, 1219–20 (9th Cir. 1998).

119. *Id.* at 1220.

120. Wyatt v. Cole, 504 U.S. 158, 167 (1992) (holding that the test for qualified immunity is whether (1) there is a firmly rooted tradition of immunity in the given profession and (2) the policy rationale underlying qualified immunity is applicable to the present case).

121. 132 S. Ct. 1657 (2012).

122. *Id.* at 1660.

123. *Id.* (describing that the City thought Delia was using his time off to conduct a construction project and that Delia was not truly ill). Delia allegedly became ill when he responded to a toxic spill in August 2006, and the doctor recommended that Delia miss three weeks of work. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

investigation, Filarsky then ordered Delia to produce the materials.[128] Delia's counsel subsequently responded by threatening to sue the City and Filarksy, and eventually filed suit for violation of Delia's Fourth Amendment rights.[129]

The district court granted summary judgment based on qualified immunity to all individual defendants, including Filarsky, holding "that Delia had not demonstrated a violation of a clearly established constitutional right, because Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered his house."[130] The Ninth Circuit affirmed the district court's ruling with respect to all defendants except Filarksy.[131] Agreeing that Filarsky's order violated the Fourth Amendment, the Ninth Circuit ruled that because Filarsky was not a city employee, he was not entitled to qualified immunity.[132] Filarsky subsequently appealed to the United States Supreme Court.[133]

The question presented to the Supreme Court was whether an individual temporarily hired by the government to perform a specific, limited function was prohibited from seeking immunity simply because he did not work for the government on a full-time basis.[134] In answering this question, the Supreme Court engaged in an extensive historical analysis of special prosecutors and systematically examined the policy rationales underlying the defense of qualified immunity.[135] Prior to the passage of § 1983 in 1871, the scope and size of government were smaller, and employees had fewer obligations.[136] Governmental budgets were tight, and there was no need to maintain a bureaucracy staffed by attorneys and officials.[137] Instead, the Court concluded, "government was administered by members of society who temporarily or occasionally discharged public functions."[138]

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128. *Id.*

129. *Id.* at 1660–61.

130. *Id.* at 1661 (internal quotation marks omitted).

131. *Id.*; *see* Stoy, *supra* note 77, at 651 (noting that the Ninth Circuit Court of Appeals affirmed the entitlement of city officials to qualified immunity).

132. *Filarsky*, 132 S. Ct. at 1661.

133. *Id.*

134. *Id.* at 1660.

135. *Id.* at 1662–67; *see* Stoy, *supra* note 77, at 656 (stating that the Supreme Court "relied heavily" on the common law prior to passage of § 1983).

136. *Filarsky*, 132 S. Ct. at 1662.

137. *Id.*

138. *Id.* (internal quotation marks omitted).

In particular, private citizens frequently undertook government work, and criminal prosecutions were performed by both government and private citizens.[139] The Attorney General even maintained his own private law practice until 1853, when the governmental position became full time.[140] The Court found no common law distinction between a private citizen who worked for the government full time and a citizen who worked part time.[141] Thus, the Court authorized the applicability of qualified immunity to individuals working with the government on a part-time basis.

Additionally, the Court found that Filarsky had over twenty-nine years of experience in the area of employment law—far more experience than any City employee—and possessed expertise in conducting internal affairs investigations.[142] Because individuals have freedom to explore non-governmental careers that will not expose them to liability, the Court determined that the policy rationale for applying qualified immunity was present in this circumstance.[143] According to the Court, the fact that an individual can pursue private employment with less liability "makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts."[144] The threat of full liability could significantly deter participation in government projects.[145]

In reversing the Ninth Circuit's holding, the Supreme Court further distinguished this case from *Richardson*. The Court noted that this was not a situation in which a private firm managed an administrative task with limited direct government supervision.[146] Instead, this was a case where the government pursued a private individual for assistance in a narrow and specific task.[147] Filarsky worked di-

139. *Id.* at 1663 ("At the time § 1983 was enacted, private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State.").

140. *Id.*; *see* Stoy, *supra* note 77, at 656 ("The Court even pointed out that at one time, the Attorney General of the United States was a part time position.").

141. *See Filarsky*, 132 S. Ct. at 1664 ("The protections provided by the common law did not turn on whether someone we today would call a police officer worked for the government full-time or instead for both public and private employers. Rather, at common law, a special constable, duly appointed according to law, had all the powers of a regular constable so far as may be necessary for the proper discharge of the special duties [e]ntrusted to him, and in the lawful discharge of those duties, was as fully protected as any other officer.") (internal quotation marks omitted).

142. *Id.* at 1666.

143. *See id.* at 1664–66.

144. *Id.* at 1666.

145. *See id.*

146. *Id.* at 1667.

147. *See id.*

rectly with city officials constantly during the internal investigation, and thus was not subjected to *limited* government oversight.[148] Therefore, given the historical protection afforded to private citizens serving as temporary attorneys,[149] the Court concluded that qualified immunity extended to special prosecutors.[150] However, it is important to note that in her concurrence, Justice Sotomayor cautioned against affording qualified immunity to every private individual who works in conjunction with the government.[151] The historical "roots" and policy rationales of qualified immunity must still be present.[152]

B. *A Fourth Circuit Caveat:* Gregg v. Ham

Although the Supreme Court's ruling seemingly suggested that private individuals working in concert with the government should be afforded qualified immunity, the Fourth Circuit distinguished this holding in *Gregg v. Ham*, determining that bail bondsmen were not entitled to immunity.[153] Ham, an employee for Quick Silver Bail Bonds LLC, posted a $20,000 bond for Tyis Rose who subsequently failed to appear in court.[154] After the court issued a fugitive warrant for Rose's arrest, Ham initiated a search for Rose in the community where Rose's parents lived.[155] Following months of searching, Ham saw Rose flee from a vehicle parked next to Gregg's home and into a nearby wooded area.[156] Gregg, who suffered from rheumatoid arthritis and other ailments that confined her to the house, lived only one and a half miles away from Rose's parents.[157]

When Ham failed to apprehend Rose in the woods, he returned to Gregg's property two days later with Justin Yelton, Sumter County Sheriff's Deputy.[158] Ham had not asked Yelton to obtain a

148. *Id.* at 1666.

149. *Id.* at 1663 (noting that government employees performing prosecution work were entitled to immunity at common law).

150. *Id.* at 1668.

151. *Id.* at 1669 (Sotomayor, J., concurring) ("[I]t does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U.S.C. § 1983.").

152. *Id.*

153. 678 F.3d 333, 341 (4th Cir. 2012).

154. *Id.* at 337. Tyis Rose was initially arrested for assault with intent to kill. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

search warrant, and a warrant was never issued.[159] Ham and Yelton approached Gregg's home and requested entry.[160] Hesitant initially, Gregg eventually acquiesced after perceiving that Ham was armed with a gun.[161] Upon gaining entry, Ham allegedly kept his shotgun raised during the search.[162] When neither Ham nor Yelton could locate Rose, Ham became agitated and screamed questions at Gregg regarding Rose's location.[163] Yelton eventually intervened, but Gregg called 911 after the two men departed to complain about the search and her treatment.[164] Although Gregg's brother warned Ham not to return to the property, Ham later approached Gregg to let her know that the reward for Rose's capture had been increased.[165] As a result of these unwanted encounters, Gregg suffered from severe anxiety, depression, and post-traumatic stress disorder.[166]

In response to these events, Gregg filed suit in the Court of Common Pleas in Sumter County, South Carolina, against Ham, Quick Silver, the Sumter County Sheriff's Department, and Yelton.[167] Among the various causes of action alleged, Gregg maintained that the defendants violated her Fourth and Fourteenth Amendment rights and filed suit under 42 U.S.C. § 1983.[168] The action was removed to federal court based on the federal question presented by Gregg's § 1983 claim.[169] While the claims against the Sheriff's Department and Yelton were subsequently settled, the claims against Ham and Quick Silver were tried to a jury.[170] The jury ruled in Gregg's favor on the § 1983 claim, awarding her a total

159. *Id.*

160. *Id.*

161. *Id.* Ham also allegedly shook the front door like he was going to break it in and shouted that he was going to force his way into the house if Gregg did not open the door. *Id.* Gregg harbored fear that Yelton and Ham might harm her if she did not comply with their orders. *Id.* According to Ham and Yelton, however, Gregg consented to the search verbally several times. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 337–38. Even after Gregg's sister confronted Ham during this visit, Ham allegedly responded that he could do whatever he pleased. *Id.* at 338.

166. *Id.* at 338.

167. *Id.*

168. *Id.* Gregg also filed causes of action for gross negligence and recklessness, trespass, assault, and intentional infliction of emotional distress. *Id.* These claims are not discussed here because the conflict in the case turns on the application of qualified immunity to the § 1983 claim.

169. *Id.*

170. *Id.*

of $100,000 in compensatory and punitive damages.[171] On appeal, Ham challenged the jury instruction on qualified immunity, arguing that this legal doctrine should have been applied to him prior to trial by the court.[172]

Following Supreme Court precedent both in *Richardson* and *Filarsky*, the Fourth Circuit conducted a historical and policy-based examination of the application of qualified immunity to bail bondsmen at common law.[173] The Fourth Circuit determined that the history of supporting the extension of qualified immunity to bondsmen was scarce and almost non-existent.[174] However, the court neglected to perform an in-depth analysis of this history, summarily concluding that there was no "firmly rooted tradition" of applying this doctrine to bondsmen.[175] Moreover, the court determined that the policy justifications were insufficient to grant bondsmen immunity.[176] Noting that the bondsman's work was fueled by a "strong profit motive," the court decided that bondsmen were not entrusted with a public function.[177] However, even assuming arguendo that bail bondsmen performed a public function, "the economic incentives . . . would ensure an ample number of qualified persons willing to assume the occupational risks of apprehending fugitives."[178] Bondsmen therefore did not represent an "arm of the court,"[179] but instead operated purely out of financial self-interest.[180] Thus, a bondsman would not be deterred from pursuing this employment given the established profit motive.[181]

171. *Id.* The jury awarded Gregg nominal damages on the § 1983 and trespass claims, $50,000 in compensatory damages for the assault claim, and $50,000 in punitive damages. *Id.* The $50,000 in punitive damages included $30,000 for the § 1983 claim. *Id.*

172. *Id.* ("Ham contends that he is entitled to a new trial on the § 1983 claim because the district court improperly submitted the legal question of qualified immunity to the jury.").

173. *Id.* at 340 ("Thus, when determining whether a private party acting under color of state law is entitled to qualified immunity, the Supreme Court has instructed courts to look both to history and to the purposes that underlie government employee immunity.") (internal quotation marks omitted).

174. *Id.* (noting that when the *Richardson* test is applied, the history behind qualified immunity does not support its application to bondsmen).

175. *Id.* (stating only that "there is no evidence that bail bondsmen have historically been afforded immunity for their actions").

176. *Id.* ("[T]he policy justifications underlying qualified immunity do not apply to bail bondsmen."); *see also* Bailey v. Kenney, 791 F. Supp. 1511, 1524 (D. Kan. 1992) ("With respect to bail bondsmen, the court finds none of the compelling policy reasons that traditionally justify the availability of qualified immunity to state actors performing discretionary functions.").

177. *Gregg*, 678 F.3d at 340–41.

178. *Id.* at 341 (internal quotation marks omitted).

179. *Id.* at 340.

180. *Id.* at 341 n.6.

181. *See id.* at 341.

Furthermore, Ham did not act according to Yelton's direction.[182] Yelton was not in charge of the apprehension, and had not obtained a formal search warrant.[183] According to the court, "[Ham] was not employed by the Sheriff's Department and did not report to law enforcement. Moreover, the sheriff did not call on Ham to assist in its efforts to apprehend Rose . . . ."[184] Ham therefore did not exercise his right to capture a fugitive as a result of government orders. Unlike Filarsky, who was temporarily hired and pursued *by* the government, Ham actively *sought* governmental assistance and received no government compensation.[185] Thus, Ham was not a private individual assisting the government in a highly supervised task. Ham was a private actor who had simply obtained governmental backup to fulfill his contractual right of pursuing and apprehending a fugitive.

IV. ANALYSIS

A. *What* Filarsky *and* Gregg *Reveal About the Current Qualified Immunity Test*

The Fourth Circuit's explanation that bondsmen were not traditionally afforded qualified immunity at common law is sparse and unsatisfying. The court neglects to articulate the history surrounding bail bondsmen and how the functions of a bondsman differ from those of the immunity-protected sheriff. How could two individuals—both of whom have been authorized to pursue and capture a fugitive—receive such varied qualified immunity determinations? The court's answer is nonexistent. Instead of explaining this history and discrepancy, the court abruptly concluded that history denied the application of qualified immunity to bondsmen. No explanation. No analysis. It was a cut-and-dry conclusion according to the court. And in fact, no case law or secondary authority specifically addresses *how* the history of bondsmen supports the denial of qualified immunity. This section argues that the qualified immunity standard set out in *Filarsky* and followed by *Gregg* has simplified the qualified immunity analysis to one question: who writes the paycheck?

An examination of qualified immunity case law produces an interesting and relatively persistent trend: individuals on the govern-

182. *Id.* at 341 n.6.
183. *Id.* at 337.
184. *Id.* at 341 n.6.
185. *Id.*

ment payroll are substantially more likely to receive qualified immunity than individuals receiving compensation from private entities.[186] In *Richardson*, the Supreme Court held that privately-employed prison guards were not entitled to qualified immunity, whereas publicly-employed prison guards could use the doctrine.[187] Although public and private guards perform essentially identical functions, private guards are not compensated by taxpayer dollars, whereas public guards are.[188] Similarly, in *Filarsky*, the city recruited the attorney for a limited-time governmental function,[189] during which the city paid the attorney from governmental funds, not from private sources.[190] Had Filarsky undertaken an identical case without governmental involvement, his paycheck would have been written by a private individual, and Filarsky would not have been entitled to qualified immunity.[191] Moreover, the Supreme Court's dicta in *Filarsky* directly alludes to this distinction between public and private compensation in the context of police officers:

> At the time § 1983 was enacted, however, "the line between public and private policing was frequently hazy. Private detectives and privately employed patrol personnel often were publicly appointed as special policemen, and the means and objects of detective work, in particular, made it difficult to distinguish between *those on the public payroll and private detectives*."[192]

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186. *See, e.g.*, Filarsky v. Delia, 132 S. Ct. 1657 (2012); Cook v. Martin, 148 F. App'x 327, 340-41 (6th Cir. 2005); Rosewood Serv., Inc. v. Sunflower Diversified Serv., Inc., 413 F.3d 1163, 1169 (10th Cir. 2005); Richardson v. McKnight, 521 U.S. 399 (1997);

187. *Richardson*, 521 U.S. at 412.

188. *See generally* Daniel J. Juceam, *Privatizing Section 1983 Immunity: The Prison Guard's Dilemma After* Richardson v. McKnight, *117 S. Ct. 2100 (1997)*, 21 HARV. J.L. & PUB. POL'Y 251, 254–55 (1997) (describing that private prison management firms pay the private prison guards).

189. *Filarsky*, 132 S. Ct. at 1660.

190. *See* Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 297 (2001) (mentioning that a private prosecutor is not paid by the government, whereas a special prosecutor hired by the government receives government payment); Kevin P. Craver & Sarah Sutschek, *Special Prosecutors Harder to Come By*, NORTHWEST HERALD (Aug. 21, 2012, 5:30 AM), http://www.nwherald.com/mobile/article.xml/articles/2012/08/20/r_oei3ckkar2wu8vkqozdl7q/index.xml (noting that the government has the right to an itemized bill and the opportunity to participate in all contractual agreements with the special prosecutor prior to paying the prosecutor).

191. *See generally* John D. Bessler, *The Public Interest and The Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 536–38 (1994) (explaining that a private attorney or prosecutor—one not paid by the government—receives private compensation and thus has loyalty towards the individuals paying his fee. The private attorney therefore is not serving a *public* function but is instead advancing private interests).

192. *Filarsky*, 132 S. Ct. at 1664 (emphasis added) (quoting David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1210 (1999)).

Thus, the Supreme Court's opinion in *Filarsky* subtly capitalized on a major determinant for qualified immunity—the source of compensation.

Although it had never been expressly mentioned by the Supreme Court until *Filarsky* that compensation could be the determining factor, an analysis of circuit court decisions prior to *Filarsky* illustrates a strong trend towards denying qualified immunity to applicants not receiving public compensation.[193] In *Harrison v. Ash*, the Sixth Circuit held that prison nurses employed by a private, for-profit medical provider could not assert qualified immunity, even though immunity might be available to nurses employed directly by the county.[194] Likewise, the Ninth Circuit in *Halvorsen v. Baird* found that "[a] *private* firm providing a municipality with involuntary commitment services for inebriates does not enjoy qualified immunity."[195] In arriving at this decision, the Ninth Circuit concluded that qualified immunity did not depend on whether a private firm was for-profit or not-for-profit; rather, the analysis centered on the fact that private employees, in general, are provided incentives to perform effectively. Such incentives might not be available for public officials[196]—specifically, increased compensation. Furthermore, the Ninth Circuit in *United States v. Rhodes* held that financial compensation is a factor to consider when determining if a private party is an agent of the state.[197] The inference from this conclusion is that compensation provided by the government makes one a government official entitled to qualified immunity, whereas private compensation makes one a *private* party not entitled to qualified immunity.

If compensation remains such a huge determining factor in the qualified immunity analysis, the next logical question is: why? This answer relies heavily on the historic policy justifications surrounding the application of qualified immunity. As previously discussed,

193. *See, e.g.*, Cook v. Martin, 148 F. App'x 327, 340-41 (6th Cir. 2005) (noting that a private physician who had been employed by a subcontractor of a private company—thus receiving private compensation—was not entitled to qualified immunity); Rosewood Serv., Inc. v. Sunflower Diversified Serv., Inc., 413 F.3d 1163, 1169 (10th Cir. 2005) (explaining that a private developmental disability service provider could not assert qualified immunity); Jensen v. Lane County, 222 F.3d 570, 579 (9th Cir. 2000) (holding that a private doctor who evaluates the danger of a mentally ill patient was not entitled to qualified immunity).

194. 539 F.3d 510, 521 (6th Cir. 2008).

195. 146 F.3d 680, 685 (9th Cir. 1998) (emphasis added).

196. *Id.* at 686.

197. 713 F.2d 463, 467 (9th Cir. 1983); Stout, *supra* note 5, at 681 ("Central to this holding [in *United States v. Rhodes*] was the fact that Cunningham received no direct financial compensation from the police for his participation. The court said financial compensation is a factor to be considered when determining if a private party is an agent of the state.").

qualified immunity was created to protect against unwanted timidity in public job functions requiring discretionary decision making, and to encourage citizens to participate in governmental functions and employment.[198] Qualified immunity guards against the possibility of unlimited liability, and serves as a benefit or incentive to attract skillful job applicants.[199] The truth is that private employment allegedly mitigates these risks by operating in a market economy with increased salaries to balance the potential liability.[200]

The Supreme Court has noted that unwarranted timidity is the main driving force behind qualified immunity.[201] As previously discussed by the Court in *Richardson*, timidity is not typically present with private companies, and when it is, competitive pressures from the market ensure appropriate action by employees.[202] As the Court explained:

> Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do both a safer and a more effective job . . . . In other words, marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance.[203]

Furthermore, the District of Kansas highlighted this principle specifically in the context of bail bonding.[204] The court determined that denying bondsmen qualified immunity would not inhibit any enthusiasm for the profession, and would not deter candidates from making discretionary decisions.[205]

The Fourth Circuit in *Gregg v. Ham* capitalized on this reasoning with respect to the policy argument against qualified immunity, and furthered the Supreme Court's distinction between private and public compensation for immunity purposes.[206] The Fourth Circuit focused heavily on the bondsman's "profit motive" and the eco-

198. Richardson v. McKnight, 521 U.S. 399, 409–11 (1997).

199. *Filarsky*, 132 S. Ct. at 1665-66; Chen, *supra* note 102, at 236.

200. *Richardson*, 521 U.S. at 409–11.

201. *Filarsky*, 132 S. Ct. at 1665; *Richardson*, 521 U.S. at 408; Van Duizend, *supra* note 18, at 1494.

202. *Richardson*, 521 U.S. at 409–10.

203. *Id.*

204. Bailey v. Kenney, 791 F. Supp. 1511, 1524 (D. Kan. 1992).

205. *Id.*

206. 678 F.3d 333, 340–41 (4th Cir. 2012).

nomic incentives allegedly available to private actors.[207] By using these factors to conclude that bondsmen did not perform a public function, the Fourth Circuit eliminated any connection between private compensation and the performance of a public function. Under the Fourth Circuit's reasoning, any individual who receives private compensation has an economic motivation to perform successfully and in society's best interest, and therefore will not face unwarranted timidity in the decision-making process. The Fourth Circuit's analysis, while performed in the specific context of bondsmen, is generally applicable to all categories of private employees. It would be illogical for the court to hold that bondsmen operate solely for profit because they receive private compensation but privately-employed doctors and nurses do not.

The above Supreme Court and Fourth Circuit history demonstrates an established precedent to deny qualified immunity in most situations where an individual receives private compensation. Receiving private payment suggests that the individual is: (a) not a government officer (to which qualified immunity is typically afforded);[208] (b) not acting under the direct influence and guidance of the government;[209] and (c) not furthering the public interest, but instead performing out of self-interest (typically monetary).[210] Thus, the bondsman acts more like a private firm—for profit and in competition with other firms—undertaking an administrative task with limited government supervision. The Supreme Court directly addressed this scenario in *Richardson* and denied qualified immunity.[211] Therefore, when performing a qualified immunity analysis, one should ask not "where is the money?" but instead, "who pays the money?" Is it the government or a private company that holds

207. *Id.* at 341.

208. *See* Stewart v. State, 527 P.2d 22, 24 (Okla. Crim. App. 1974) ("We believe that when an off-duty police officer accepts private employment and is receiving compensation from his private employer he changes hats from a police officer to a private citizen when engaged in this employment and he is therefore representing his private employer's interest and not the public's interest.").

209. *See* State v. Palms, 592 S.W.2d 236, 239 (Mo. Ct. App. 1979) (noting that an off-duty reserve officer in private employment is not acting in his public capacity).

210. *See* Duncan v. Peck, 844 F.2d 1261, 1264 (6th Cir. 1988) (noting that a private party is governed only by self-interest and it is not invested in the public welfare); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 555 (9th Cir. 1974); People v. Houle, 13 Cal. App. 3d 892, 895 (Cal. Ct. App. 1970) ("A bondsman, in making an arrest of an absconded defendant, is acting to protect his own private financial interest and not to vindicate the interest of the state."); United States v. Poe, 556 F.3d 1113, 1124 (10th Cir. 2009) (noting that bounty hunters and bondsmen operate to further their own interests and to secure financial gain).

211. 521 U.S. 399, 413 (1997).

the employee by a string? In the case of bail bondsmen, the answer will almost always be a private entity.

B. *Normative Analysis: Why Bail Bondsmen Should Receive Qualified Immunity*

Although the Fourth Circuit's conclusion conforms to current Supreme Court precedent, the result that bondsmen are not entitled to qualified immunity for apprehending fugitives—which is the same job a police officer performs with immunity—is inequitable and arbitrary. The current qualified immunity test articulated by the Supreme Court creates unwarranted distinctions between which parties will be protected by the immunity doctrine and which defendants must bear the risk of liability themselves. These decisions and distinctions are not being made in a clear, coherent, and transparent manner.[212] Rather, significant mystery and confusion exists surrounding which parties are protected. The current test for qualified immunity is anything but simple and produces irrational results. This section advances the argument for a new qualified immunity test based on an analysis of the functional duties undertaken by the party rather than the party's random designation as either a "private" or "public" employee. Under a functional analysis test, the arbitrary distinctions between bondsmen and police officers become insignificant, and both would receive qualified immunity for performing the same function of apprehending a fugitive. Only under a functional analysis test can the qualified immunity doctrine finally produce equitable results. This section first explains how the current qualified immunity test elicited an irrational outcome in *Gregg v. Ham*, and then examines how the functional analysis test remedies the inequity.

1. The Inequitable Effects of Qualified Immunity on Bondsmen

The current test for qualified immunity mandates that the actor would have received the qualified immunity defense had the case been brought under common law.[213] Because immunity was only granted to governmental officials or private parties acting under the direct supervision of the government, implicit in the qualified immunity determination is that the actor must have performed a public function. The thrust of the Fourth Circuit's argument in denying

212. *See* Diana Hassel, *Living A Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 152 (1999) (explaining that civil rights law and the qualified immunity doctrine are, "in effect, being designed in the dark").

213. *See supra* Part II.B.

qualified immunity to bondsmen rested on the court's opinion that bondsmen were "not entrusted with a public function,"[214] and therefore were not granted immunity at common law. In deciding that bondsmen did not advance a public function, the court focused on two primary factors: (1) the bondsman's right to pursue his principal arose from contract law, not state power, and (2) the bondsman received private compensation for his work, therefore giving rise to a profit motive.[215]

Arguably, however, bondsmen *do* perform a public function. The term "public function" denotes the performance of an activity traditionally reserved to the state.[216] This means that, but for the outsourcing of these activities to private parties, the function would be undertaken by the government.[217] If bondsmen and bounty hunters did not pursue fugitives who skipped bail, the task would fall to police officers and sheriffs to apprehend the defendants.[218] As this sub-section illustrates, bondsmen have assumed the traditionally state-reserved task of apprehending fugitives.[219] It is this factor that weighs heavily in favor of bondsmen receiving qualified immunity. The existence of either factor—or both—discussed in the Fourth Circuit's opinion cannot negate the fundamental fact that bondsmen undertake the state functions of capture and arrest.[220]

The development of the bail bond industry, in effect, represented the state's attempt to privatize a section of the criminal justice system. By outsourcing the methods of release and capture of defendants, the criminal justice system received a huge benefit from the use of bondsmen.[221] Kaufman explains that by "using the

214. Gregg v. Ham, 678 F.3d 333, 340 (4th Cir. 2012) (reasoning that "[t]here is no need, however, for qualified immunity to shield bondsmen from suit, as they are not entrusted with a public function").

215. *Id.*

216. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

217. Perez v. Sugarman, 499 F.2d 761, 765 (2d Cir. 1974).

218. Kaufman, *supra* note 4, at 299–300.

219. *Id.* at 300. "In the workings of the bail system, it is possible to discern a pattern of reciprocal sharing of discretionary powers between criminal court officials and bail bondsmen which facilitates the control of defendants in the pretrial period." Dill, *supra* note 8, at 642.

220. Kaufman, *supra* note 4, at 300 ("Essentially, the bail bondsman is granted powers traditionally reserved by the sovereign.").

221. *Id.* at 299. Bondsmen not only help maintain social control over defendants, but they also facilitate judicial operations. Toborg, *supra* note 58, at 142. For example, bondsmen send repeated court reminders to defendants, call defendants prior to their court date, and help correct mistakes made by the court in scheduling a defendant's appearance (for instance, one defendant might be scheduled to appear in two court rooms at one time). *Id.*

surety to secure the release of the accused prior to trial, the State is not forced to expend money on incarceration."[222] This shift to relying on the private sector to perform traditionally public functions has become a governmental necessity because the government faces immense pressure to make each dollar stretch as far as possible.[223] Cuts in police budgets can make the return of fugitives difficult,[224] with Baltimore alone possessing over 54,000 un-served arrest warrants as of 1999.[225] The cuts in budget have the effect of overwhelming police departments and forcing the justice system to use bondsmen for functions that would otherwise be reserved to the police.[226] The police therefore rely heavily on bondsmen to shoulder the responsibility of pursuing fugitives who skip bail.[227] The common law "provided absolute immunity from subsequent damages liability for all persons—*governmental or otherwise*—who were integral parts of the judicial process."[228] Because bondsmen are an integral part of the justice system, they should receive access to the qualified immunity defense.

Despite the fact that bondsmen have undertaken this traditionally state-reserved function in an effort to assist the criminal justice system and lower costs, the Fourth Circuit maintained that it is precisely this private form of compensation that can be used to deny bondsmen access to immunity.[229] The source of compensation, however, should not determine access to immunity, especially when the type of payment changes because of the government's decision to privatize a certain industry. Privatization does not change an employee's ultimate function. Rather, the decision to privatize can be undertaken for a myriad of reasons, including increases in effi-

222. Kaufman, *supra* note 4, at 299. The bond system also prevents prison overcrowding, Chamberlin, *supra* note 12, at 1181, and ensures that a defendant maintains his presumption of innocence until proven guilty. Hansen, *supra* note 1, at 597.

223. Van Duizend, *supra* note 18, at 1482; *see* Joiner, *supra* note 9, at 1419 (stating that the increased costs associated with law enforcement cause states to increasingly rely on the private sector).

224. Royval, *supra* note 39, at 794.

225. Helland & Tabarrok, *supra* note 10, at 98.

226. Royval, *supra* note 39, at 794.

227. Joiner, *supra* note 9, at 1419; Royval, *supra* note 39, at 789 ("Bondsmen, and the bounty hunters they hire, have gradually developed into an inextricable part of the criminal justice system, and states heavily rely on the industry to detain, search for, and recapture fugitives in a cost-effective manner.").

228. Richardson v. McKnight, 521 U.S. 399, 418 (1997) (Scalia, J., dissenting) (quoting Briscoe v. LaHue, 460 U.S. 325, 335 (1983)).

229. *See generally* Gregg v. Ham, 678 F.3d 333 (4th Cir. 2012).

ciency and reduction in cost.[230] Altering the source of compensation should therefore not change the fundamental duties associated with the position.

Furthermore, privatized services can have characteristics of traditionally public functions.[231] The mere privatization of a function does not equate to the government completely dissociating itself from that historically governmental task.[232] Rather, privatization entails a large range of government involvement, and both government and private actors can supply public goods and services.[233] Privatization may imply that the government has withdrawn from being the main provider of that service, not that the service is suddenly unregulated.[234] Therefore, just because a private job function is exercised in tandem with the duties and obligations of police officers[235] does not mean that bondsmen have not been accorded a public function.

Additionally, the demand for services remains the same despite the identity of the service provider.[236] "Yet those who suffer at the hands of government actors experience no less harm because government employees, rather than those of a private firm, cause their injuries."[237] Despite this very basic fact, that the harm remains constant regardless of the actor, governmental officials enjoy immunity from liability whereas private employees do not.[238] The same policy and fairness concerns are present, however, in the qualified immunity analysis despite whether the actor receives state or private compensation.[239] Logic and fairness require that a level playing field be established. An unfair cost advantage results by providing "the public sector with a qualified immunity [defense] not available to its private counterparts."[240]

230. U.S. General Accounting Office, Privatization: Lessons Learned by State and Local Governments 12–14 (1997), *available at* http://www.gao.gov/archive/1997/gg97048.pdf.

231. Clayton P. Gillette & Paul B. Stephan, Richardson v. McKnight *and the Scope of Immunity After Privatization*, 8 SUP. CT. ECON. REV. 103, 105 (2000).

232. *Id.* at 116.

233. *Id.*

234. *Id.* The government can privatize actions in a manner that constrains the private firm's discretion and duties. *Id.* at 117.

235. Gregg, 678 F.3d at 340–41.

236. Gillette & Stephan, *supra* note 231, at 105.

237. *Id.* at 106.

238. *Id.* (noting that "if government actors largely behave in a public-regarding fashion . . . then for a broad range of privatized services, the private service providers also should enjoy immunity").

239. Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution To Prison Overcrowding*, 76 N.C. L. REV. 2209, 2240 (1998).

240. *Id.*

The Fourth Circuit further argued that the incentives available to bondsmen fully compensated for any increased liability.[241] In particular, the Fourth Circuit discussed the bondsman's profit motive and access to liability insurance.[242] The Fourth Circuit's argument, however, lacks persuasion. The median salary for a sheriff in the United States was $96,462 in 2012.[243] In stark contrast, the average salary of a bail bondsman ranged from only $45,949 to $78,378 in 2010.[244] It does not make intuitive sense that the bail bondsman would have a stronger profit motive than the sheriff, especially when the bondsman's salary is significantly lower. Both the bondsman and sheriff must apprehend fugitives as part of their job description in order to make money. The non-performance of this duty by either party could result in decreased pay or termination. The bondsman therefore does not possess a stronger profit motive than the sheriff to perform his job, and the Fourth Circuit has not offered any evidence to support its contention that bondsmen operate with different incentives than sheriffs. Similarly, the Fourth Circuit's position that liability insurance offers bondsmen the same protection as qualified immunity is inherently flawed. As Justice Scalia observed in his dissent in *Richardson v. McKnight*, "civil-rights liability insurance is no less *available* to public entities than to private employers."[245] The Fourth Circuit's reasoning is unpersuasive and illogical.

In fact, bondsmen may even have a greater need for immunity in certain circumstances. Bondsmen, who know they can be held liable for civil rights violations may become more timid in their methodology and in the actual decision to pursue a fugitive. While the bondsman forfeits the defendant's amount of bail if the defendant is not returned to court, the bail amount may be significantly less than the cost of fighting a liability lawsuit. The bondsman may determine that an economic advantage exists in some instances to

241. *See supra* Part III.B.

242. *See supra* Part III.B.

243. *Sheriff/Police Chief Salary*, SALARY.COM, http://www1.salary.com/Sheriff-Police-Chief-Salary.html (last visited Nov. 2012).

244. Ian Graham, *The Average Salary of Bail Bondsman*, EHOW MONEY, http://www.ehow.com/facts_7244544_average-salary-bail-bondsman.html (last visited Nov. 3, 2012); *see also Bail Bondsman Job Description, Careers as a Bail Bondsman, Salary, Employment – Definition and Nature of the Work, Education and Training Requirements, Getting the Job*, STATE UNIVERSITY.COM, http://careers.stateuniversity.com/pages/7711/Bail-Bondsman.html (last visited Nov. 3, 2012) (noting that the median annual salary for a bail bondsman can be as low as $20,000).

245. 521 U.S. 399, 420 (1997) (Scalia, J., dissenting); Lori DaCosse, Richardson v. McKnight: *Barring Qualified Immunity From 42 U.S.C. 1983 For Private Jailers*, 26 PEPP. L. REV. 149, 163 (1999); Duitsman, *supra* note 239, at 2250.

not pursue a criminal defendant where there is a possibility that the bondsman could be sued.[246] In that case, the exact ills sought to be prevented by qualified immunity are present, and the bondsman will underperform to avoid legal action.[247] As such, the application of qualified immunity to police officers and sheriffs but not to bondsmen is inequitable, arbitrary, and relies on faulty reasoning.

2. The Functional Analysis Test—A Better Contender

Given the inherent problems associated with the current qualified immunity test, the replacement of the present standard with a functional analysis test would ensure equitable and predictable results. Justice Scalia championed this functional approach in his dissent in *Richardson v. McKnight*, implying that an "inquiry into function, rather than public or private status, provided the best means for resolving the scope of immunity."[248] Under a functional analysis approach, the court would examine the nature of the function performed, and evaluate whether that function exposes the individual to a form of liability that triggers qualified immunity.[249] This test would prevent the occurrence of random and mysterious distinctions between "public" and "private" individuals and enable parties to predetermine their likelihood of obtaining qualified immunity. Thus, an individual's status as a "private" employee would not disqualify the person from receiving immunity.[250]

Under this functional analysis test, both bondsmen and police officers would receive qualified immunity based on their function of apprehending fugitives. Similarly, the result in *Richardson* would have been more consistent and equitable since private prison guards perform the same function as public guards.[251] It is the function—and not the actor who performs it—which should govern the outcome. This test results in a uniform application of qualified im-

246. Justice Scalia pursued a similar line of reasoning in his dissent in *Richardson v. McKnight*, advocating that private prison guards may have more of a need for immunity as an incentive to discipline the prisoners. 521 U.S. 399, 420-21 (1997) (Scalia, J., dissenting).

247. *See* Gillette & Stephan, *supra* note 231, at 109.

248. *Id.* at 108.

249. *Richardson*, 521 U.S. at 416 (Scalia, J., dissenting) (noting that "under the [functional analysis] approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions").

250. DaCosse, *supra* note 245, at 162 ("Instead, Justice Scalia posited examining immunity in light of the following: (1) immunity is determined by function, not status, and (2) even more specifically, private status is not disqualifying.") (internal quotation marks omitted).

251. Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 94 (2004).

munity principles and prevents judicially established policy from dictating the outcome.[252]

Furthermore, the functional test possesses common law roots that make it an acceptable alternative for the current qualified immunity doctrine. In *Filarsky v. Delia*, the petitioner's brief explicitly noted that historically, "eligibility for immunity turned not on a person's formal institution into a governmental position, but on whether the temporarily engaged private individual was the functional equivalent of a government employee."[253] The court would not look to whether the *private* individual had historically received immunity for performing that task, but rather looked to whether immunity attached to government employees who performed that function.[254] As such, the functional analysis test does not contradict common law principles and would provide a fairer and more just outcome.

V. Conclusion

The current qualified immunity test provides no relief to the bondsmen from their strings. By "feeding off the federal and state bail systems,"[255] the bondsman has been deemed a market actor not entitled to qualified immunity in the Fourth Circuit. According to *Gregg*, the bondsman is simply driven by his desire to make a profit and his contribution to the public welfare fades to the background. The motivation behind a bondsman's actions, however, is only speculative, and the Fourth Circuit offers no concrete proof that the bondsman is not influenced by a desire to contribute to public safety.

The form of compensation is too insignificant a factor on which to base the qualified immunity decision. Compensation is often determined by the government's decision to privatize a certain entity, and these professions should not be penalized simply because they can perform the function at a lower cost. The need for the function does not decrease simply because the job has been outsourced, and the potential civil rights violations are no less prevalent among private businessmen than government employees. The current qualified immunity test creates arbitrary and unfounded distinctions that make it nearly impossible to decipher whether an individual will

252. *See Richardson*, 521 U.S. at 418 (Scalia, J., dissenting).

253. Brief for Petitioner at 8, Filarsky v. Delia, 132 S. Ct. 1657 (2012) (No. 10-1018).

254. *Id.*

255. Chamberlin, *supra* note 12, at 1177.

receive access to that doctrine. It is time for a change and an increase in the transparency of the qualified immunity determination.

The functional analysis test provides the exact change and transparency that qualified immunity needs. This test looks not at whether the individual was a private or public actor, but instead focuses on whether the *ultimate* function performed could create unwarranted timidity or deter actors from engaging in the profession. The result is a more uniform application of the defense, and a substantial decrease in confusion among courts that are forced to apply the new standard. Under the more reliable functional analysis test, the bondsman may finally be able to sever his unwanted strings.