Journal of Civil Rights and Economic Development

Volume 5
Issue 2 *Volume 5, 1990, Issue 2*

Article 3

March 1990

Qualified Immunity for Private Party Defendants in Section 1983 Civil Rights Cases

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NOTES & COMMENTS

QUALIFIED IMMUNITY FOR PRIVATE PARTY DEFENDANTS IN SECTION 1983 CIVIL RIGHTS CASES

The constitutional basis for civil rights actions is established in the thirteenth, fourteenth and fifteenth amendments to the United States Constitution.[1] While these post-Civil War amend-

[1] *See* U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.

U.S. CONST. amend. XIII, § 1 provides that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.* As evidenced by its words, the purpose of this amendment was twofold - to abolish slavery and to proscribe conditions of enforced compulsory service in the United States. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (thirteenth amendment is "absolute declaration that slavery or involuntary servitude shall not exist in any part of United States") (quoting Civil Rights Cases, 109 U.S. 3, 20 (1883)); Pollack v. Williams, 322 U.S. 4, 17 (1944) (aim is "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout United States"); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 37 (1873) ("use of the word 'servitude' is intended to prohibit all forms of involuntary slavery of whatever class or name"); Jobson v. Henne, 355 F.2d 129, 131 (2d Cir. 1966) (thirteenth amendment "proscribe[s] conditions of 'enforced compulsory service of one to another' ") (quoting Hodges v. United States, 203 U.S. 1, 16 (1906)); Jordan v. Lewis Grocer Co., 467 F. Supp. 113, 116 (N.D. Miss. 1979) ("purpose of the amendment was to abolish all practices involving enforced subjection akin to slavery or compulsion by the states or private individuals").

U.S. CONST. amend. XIV, § 1 provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

ments are for the most part self-executing,[2] they also authorize

> of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The primary purpose of this amendment was to establish the citizenship of the newly emancipated slaves, and to provide protection for citizens from state action which might deprive them of their citizenship. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253, 268 (1967) ("fourteenth amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race"); United States v. Wong Kim Ark, 169 U.S. 649, 676 (1898) (main purpose of amendment is "to establish the citizenship of free negroes . . . and to put it beyond doubt that all blacks, as well as whites, born or naturalized within . . . United States, are citizens of United States") (citations omitted); Elk v. Wilkins, 112 U.S. 94, 101 (1884) (main object of fourteenth amendment was to resolve disputes regarding citizenship of "free negroes" and to put beyond doubt that all persons born or naturalized in United States are citizens of United States and state in which they reside); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 72-74 (1873) (conferring citizenship on "negro race" and providing definition of citizenship, respectively, were primary and secondary purposes of fourteenth amendment).

U.S. CONST. amend. XV, § 1 provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* The purpose of this amendment was to guarantee the right of people, regardless of their color or political persuasion, to effectively participate in the American democratic political system. *See, e.g.*, Hadnott v. Amos, 394 U.S. 358, 364 (1969) (amendment forbids states from discriminating against blacks in matters having to do with voting); Lane v. Wilson, 307 U.S. 268, 275 (1939) (amendment guards "against contrivances by a state to thwart equality in the enjoyment of the right to vote . . . regardless of race or color") (citations omitted). *See also* City of Mobile, Ala. v. Borden, 446 U.S. 55, 61 (1980) (amendment prohibits states from "discriminat[ing] against negros in matters having to do with voting"); Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (fifteenth amendment enables blacks to vote in every state of Union); Kirksey v. City of Jackson, Miss., 663 F.2d 659, 664 (5th. Cir. 1981) ("goal of the fourteenth and fifteenth amendments 'is to assure effective black minority participation in democracy' ") (quoting United States v. Bd. of Supervisors of Forrest County, 571 F.2d 951, 955 (5th Cir. 1978)); Rice v. Elmore, 165 F.2d 387, 392 (4th. Cir. 1947) (fourteenth and fifteenth amendments prohibit "election machinery [that] den[ies] the Negro, on account of his race or color, any effective voice in the government of his country or the state or community wherein he lives"), *cert. denied*, 333 U.S. 875 (1948).

[2] *See, e.g.*, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (thirteenth amendment "by its own unaided force and effect . . . abolished slavery, and established universal freedom") (quoting Civil Rights Cases, 109 U.S. 3, 20 (1873)); Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("While the amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation"); U.S. v. Lackey, 99 F. 952, 955 (D. Ky. 1900) (purpose of amendment given instantaneous effect, requiring no further congressional action to perfect constitutional right), *rev'd* 107 F. 114 (6th Cir. 1901); People v. Lavender, 48 N.Y.2d 334, 338 n.2, 398 N.E.2d 530, 532 n.2, 422 N.Y.S.2d 924, 926 n.2 (1979) (provision of thirteenth amendment that neither slavery nor involuntary servitude except as punishment for crime shall exist within United States is self-executing). *Compare* South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (prohibition of fifteenth amendment against denial of right to vote on account of race, color or previous condition of servitude is self-executing) *and* Guinn and Beal v. United States, 238 U.S. 347, 363 (1915) (command of fifteenth amendment self-executing) *and* Apache County v. U.S., 256 F. Supp. 903, 906 (D.C. Cir. 1966) (same) *with* United States v. Reese, 92 U.S. (2 Otto.) 214, 217 (1875) ("[f]ifteenth amend-

Congress to enact laws which advance their purposes.[3] 42 U.S.C. § 1983 was enacted pursuant to this constitutional grant of power.[4]

ment does not confer the right of suffrage upon any one" and it has no other effect than to forbid discrimination regarding right to vote "on account of race, color or previous condition of servitude").

[3] *See* U.S. CONST. amend. XIII, § 2; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2. Each of these sections provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.*

Shortly after each amendment's ratification, Congress adopted enforcing legislation. *See* Civil Rights Act of 1875, 18 Stat. 336-37 (1875) (enacted to enforce thirteenth and fourteenth amendments); Civil Rights Act of 1871, 17 Stat. 13 (1871) (enacted to enforce fourteenth and fifteenth amendments); Force Act of 1871, 16 Stat. 440 (1871) (enacted to enforce fifteenth amendment); The Enforcement Act of 1870, § 18, 16 Stat. 141, 144 (1870) (section 18 was congressional attempt at re-enactment of Civil Rights Act of 1866 to enforce fourteenth amendment); Anti-Peonage Act of 1867, 14 Stat. 546 (1867) (enacted to enforce thirteenth amendment); Civil Rights Act of 1866, 14 Stat. 27 (1866) (enacted to enforce thirteenth amendment). *See generally* 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (1970) (discussing congressional action pursuant to Civil War Amendments).

However, soon after the enactment of these statutes, the Supreme Court either restrictively construed or invalidated much of this legislation. *See, e.g.*, Hodges v. United States, 203 U.S. 1, 14-20 (1906) (construing Civil Rights Act of 1866), *overruled*, Jones v. Alfred H. Mayer Co., 392 U.S. 443 (1968); Civil Rights Cases, 109 U.S. 3, 25 (1883) (discussing Civil Rights Act of 1875); United States v. Harris, 106 U.S. (16 Otto.) 629, 633-44 (1882) (invalidating Ku Klux Klan Act of 1871); United States v. Reese, 92 U.S. (2 Otto.) 214, 215-22 (1875) (limiting scope of Enforcement Act of 1870).

Subsequently, Congress remained largely silent with respect to further attempts to enforce the Civil War Amendments until the 1960's. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-12 at 330-31 (2d ed. 1988). During the 1960's, however, civil rights protection once again became an important topic and several Supreme Court decisions "appeared to hold that the power of Congress to enforce the thirteenth, fourteenth and fifteenth amendments was without significant internal limits, being restricted only by the rationality standard of *McCulloch v. Maryland*, and of course the Bill of Rights." *Id.* at 331. (footnotes omitted). *See generally* R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 19.2-19.5, 19.6-19.12 (1986) (discussing congressional enforcement of thirteenth, fourteenth and fifteenth amendments); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 5-13 & 5-14 at 331-40 (1988) (same).

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court focused on the issue of whether Congress may modify the substantive scope of guarantees under the Civil War Amendments. This case involved Congress' right to grant the power to vote to any citizen eighteen years or older for all federal and state elections. *Id.* at 117. The Court, absent a majority, sustained the statute with respect to federal elections, but held that Congress had exceeded its fourteenth amendment legislative power in lowering the voting age for state elections. *Id.* at 134-35. However, because the decision was so sharply divided and the Justices could not agree on any broad proposition regarding Congress' power under the Civil War amendments, this case really had no effect on the cases decided by the Court in the 1960's. *Id.* at 112-15 (court split 5-4). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-14 at 342 (1988) ("*[O]regon v. Mitchell* says nothing in itself . . . .").

[4] 42 U.S.C. § 1983 (1981 & supp. 1989). This statute, entitled "Civil Action for Deprivation of Rights," provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

Section 1983 enables an individual who has been deprived of a constitutional right by any person acting under color of state law to bring a civil action against that person.[5] This statute is aimed at

> subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

[5] *Id.* This section derives from the Civil Rights Act of 1871, Act of Apr. 20, 1871, ch. 22 § 1, 17 Stat. 13 (1871) (originally known as Ku Klux Klan Act of 1871), and "was enacted to provide a measure of Federal control over state and territorial officials who were reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union sympathizers." H.R. REP. No. 96-548, 96th Cong., 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 2609, 2609. *See also* Allen v. McCurry, 449 U.S. 90, 98 (1980) (primary goal of § 1983 to "override the corrupting influences of Ku Klux Klan and its sympathizers on the governments and law enforcement agencies of the Southern States"); Robinson v. Conlisk, 385 F. Supp. 529, 533 (N.D. Ill. 1974) (purpose of section, derived from Ku Klux Klan Act, "to counteract the rising tide of terrorism in the southern states"). *See generally* Eisenberg, *Section 1983: Doctrinal Foundations and the Empirical Study*, 67 CORNELL L. REV. 482 (1982) (discussing historical background leading to enactment of § 1983); Gilden, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983) (overview of § 1983); Note, *Civil Rights: Liability of a Private Coconspirator Under 42 U.S.C. § 1983 When Acting in Conspiracy With an Immune State Judge*, 33 OKLA. L. REV. 824, 825 (1980) (background and purpose of Civil Rights Act of 1871).

Section 1983 "create[s] a right of action in federal court against local government officials who deprive citizens of their constitutional rights by failing to enforce the law, or by unfair and unequal enforcement." H.R. REP. No. 96-548, 96th Cong. 1st Sess. 1, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 2609, 2609. *See also* United States v. City of Philadelphia, 644 F.2d 187, 198 (3d Cir. 1980) (underlying purpose of congressional scheme to protect individual's constitutional rights); Duchesne v. Sugarman, 566 F.2d 817, 829 (2d Cir. 1977) (provision of section which establishes federal cause of action designed to protect citizens against misuse of power). Thus, an aggrieved citizen is provided a neutral federal forum in which to litigate his complaint, instead of being forced to sue state officials in state court. H.R. REP. No. 96-548, 96th Cong. 1st Sess. 1, *reprinted in* 1979 U.S. CODE. CONG. & ADMIN. NEWS 2609, 2609. *See also* Dahl v. City of Palo Alto, 372 F. Supp. 647, 651 (N.D. Cal. 1974) (§ 1983 is an effort by Congress to provide forum and remedy for those whose civil rights were being violated but who could not get relief in courts or state agencies). The Supreme Court has held that, subject to certain exceptions, exhaustion of state remedies is not requisite in section 1983 lawsuits. *See* Patsy v. Board of Regents of the State of Florida, 457 U.S. 496, 516 (1982) (relief under Civil Rights Act may not be defeated because relief was not first sought under state law); Steffel v. Thompson, 415 U.S. 452, 464 (1974) (same); Gibson v. Berryhill, 411 U.S. 564, 575-77 (1973) (same); Damico v. California, 389 U.S. 416, 416-17 (1967) (same). *See also* Hudson v. Palmer, 468 U.S. 517, 530-36 (1984) (providing exceptions to general rule that section 1983 plaintiffs can go directly into federal court without first exhausting state remedies).

Section 1983 is particularly important to plaintiffs because it allows them to recover monetary damages for deprivation of their civil rights. *See* Carey v. Piphus, 435 U.S. 247, 254-57 (1978) (basic purpose of damages award under this section should be to compensate person for injuries caused by deprivation of constitutional rights); Endicott v. Huddleston, 644 F.2d 1208, 1216-17 (7th Cir. 1980) (damages are available under section 1983 for actions found to have been violative of constitutional rights and to have caused compensa-

compensating victims of civil rights violations and deterring future civil rights abuses.[6] Courts have interpreted section 1983 broadly in order to best effectuate these purposes.[7]

The plain language of section 1983 appears to provide for the unqualified liability of anyone violating another person's constitutional liberties.[8] Nevertheless, the United States Supreme Court

ble injury); Zarcone v. Perry, 572 F.2d 52, 55-56 (2d Cir. 1978) (general principles of damages apply in civil rights actions). The courts have awarded many different types of damages under this section. *See* Bradley v. Coughlin, 671 F.2d 686, 690 (2d Cir. 1982) (nominal damages available in civil rights action if plaintiff can show he was denied due process, even absent proof of actual injury); Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 764 (1st Cir.) (prejudgment interest award allowed in section 1983 action), *cert. denied*, 454 U.S. 898 (1981); Bryan v. Jones, 519 F.2d 44, 46 (5th Cir.) (damages for pain and suffering available in section 1983 action), *cert. denied*, 429 U.S. 865 (1975); Sebastian v. Texas Dept. of Corrections, 558 F. Supp. 507, 509 (S.D. Tex. 1983) (plaintiff in action under this section may recover damages for loss of reputation and mental distress).

[6] *See* Burnett v. Grattan, 468 U.S. 42, 53 (1984) (underlying goals of § 1983 include compensation of persons whose rights have been violated and prevention of abuse of state power); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981) (compensation and deterrence of future misconduct are major objectives of § 1983); Robertson v. Wegmann, 436 U.S. 584, 591 (1978) ("The policies underlying § 1983 include compensation of person injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law."); Carey v. Piphus, 435 U.S. 247, 254 (1978) (basic purpose of damages award under this section to compensate person for injuries caused by deprivation of constitutional rights). *See also* Madison v. Wood, 410 F.2d 564, 567 (6th Cir. 1969) ("The essence of an action under § 1983 is . . . a claim to recover damages for injury wrongfully done to the person."); Holden v. Boston Hous. Auth., 400 F. Supp. 399, 401 (D. Mass. 1975) (§ 1983 "expresses a social policy that aggrieved citizen should be able to seek legal redress against one who deprives him of his rights under [fourteenth] amendment"). *Cf.* Hernandez v. Pierce, 512 F. Supp. 1154, 1158 (S.D.N.Y. 1981) (§ 1983 does not create substantive rights - it merely provides remedy for violation of rights conferred by constitution or other statutes); Note, *A Board Does not a Bench Make: Denying Quasi-Judicial Immunity of Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241, 423 (1988) (§ 1983 was enacted "to compensate those whose constitutional rights have been violated"). *See supra*, note 5 and accompanying text (discussing § 1983).

[7] *See, e.g.*, Green v. Dumke, 480 F.2d 624, 628 n.7 (9th Cir. 1973) ("contours of § 1983 must necessarily remain flexible to accommodate changing circumstances and exigencies of a given era"); Birnbaum v. Trussell, 371 F.2d 672, 676 (2d Cir. 1966) (§ 1983 "should be interpreted with sufficient liberality to fulfill its purpose of providing a federal remedy in a federal court in protection of a federal right"); Courtney v. School Dist. No. 1, 371 F. Supp. 401, 403 (D. Wyo. 1974) (actions brought under this section "[are] to be liberally viewed so as to effectuate the rights" intended). *See supra*, note 5 and accompanying text (discussing underlying purposes of § 1983).

[8] *See supra* notes 4-5 and accompanying text (discussing section 1983). *See also* Tower v. Glover, 467 U.S. 914, 920 (1984) ("[o]n its face § 1983 admits no immunities"); Owen v. City of Independence, 445 U.S. 622, 635 (1980) ("[b]y its terms § 1983 'creates a species of tort liability that on its face admits of no immunities . . . [i]ts language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted") (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

has determined that the legislative history of section 1983 evinces a congressional intent to exempt certain public officials from suit brought under section 1983 for monetary damages.[9] For example, the President,[10] judges,[11] prosecutors,[12] and legislators[13] all enjoy absolute immunity from personal liability under section 1983. This judicially created doctrine of immunity[14] is designed to protect the constitutional status of the office rather than the officer.[15] Such immunity insures that the public interest in efficient government is furthered by protecting the officer in his or her decision making capacity.[16] Further, the immunities defenses have been

[9] *See* Pierson v. Ray, 386 U.S. 547, 554 (1967) ("[w]e do not believe that this settled principal of [judicial immunity] law was abolished by § 1983 . . . [t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common law immunities"), *overruled*, Harlow v. Fitzgerald, 457 U.S. 800 (1982); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (Court rejects contention that "[C]ongress [in enacting the Civil Rights Act] . . . would impinge on a [legislative immunity] tradition so well grounded in history and reason by covert inclusion in the general language before the Court"). *See also* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981) (immunities based in part on Supreme Court's assumption that "members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary."); Jones v. Preuit & Maudlin, 851 F.2d 1321, 1324 (11th Cir. 1988) ("[w]hile section 1983 itself is silent as to immunities, the Supreme Court has held that the provision incorporates immunities which were well established at common law and which are consistent with the purposes of the statute"), *vacated*, 489 U.S. 1002 (1989); Duncan v. Peck, 844 F.2d 1261, 1263 (6th Cir. 1988) ("[i]n spite of the fact that §1983 allows no immunities on its face, the Supreme Court has repeatedly recognized various forms of immunity for government officials sued under section 1983").

[10] Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982).

[11] Stump v. Sparkman, 435 U.S. 349, 355-56 (1978); *Pierson*, 386 U.S. at 553. *See also* Cleavinger v. Saxmen, 474 U.S. 193, 200-01 (1985) (discussing judicial immunity).

[12] Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

[13] Eastland v. United States Serviceman's Fund, 421 U.S. 491, 502-03 (1975). *See also* Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-32 (1980) (discussing legislative immunity).

[14] *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 106 (1980) (Blackmun, J., dissenting) (§1983 incorporates "judicially created immunity doctrine"); Owen v. City of Independence, 445 U.S. 622, 638 (well established common law immunity incorporated into §1983), *reh'g denied*, 446 U.S. 993 (1980); *Pierson*, 386 U.S. at 554-55 (establishing judicial immunity for §1983 action, based on existence at common law).

[15] *See* Sparks v. Duval County Ranch Co., 604 F.2d 976, 979 (5th Cir. 1979) (en banc) ("absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for the judge"), *aff'd*, 449 U.S. 24 (1980); *see also Jones*, 851 F.2d at 1343 (Johnson, J., dissenting) ("[q]ualified immunity is intended to protect the public office as opposed to the public officer"), *vacated*, 489 U.S. 1002 (1989); Marlin v. Malhoy, 830 F.2d 237, 250 (D.C. Cir. 1987) (immunity does not go beyond duties of officer).

[16] *See Harlow*, 457 U.S. at 800, 814 (insubstantial claims affect both individuals being sued, and public at large); Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982) (president granted absolute immunity to prevent diversion "from his public duties, to the detriment

embraced by the courts in order to eliminate the costs of insubstantial claims against government officials.[17]

The touchstones for determining whether immunity may attach to a particular office are whether a similar defense existed at common law prior to the enactment of section 1983, and whether strong public policy reasons support its continued use within the context of section 1983.[18]

In *Lugar v. Edmondson Oil Co.*,[19] the Supreme Court determined that when a private party is a "state actor" for purposes of the fourteenth amendment, they are likewise acting "under color of state law" for section 1983 purposes.[20] Consequently, the Court was prompted to note the propriety of an immunity defense for a private party defendant in a section 1983 lawsuit.[21] The Court, however, expressly reserved judgment on the issue of whether a section 1983 defendant should be allowed to assert such a quali-

of not only the President and his office but also the Nation that the Presidency was designed to serve"); Dartland v. Metropolitan Dade County, 681 F. Supp. 1539, 1546 (S.D. Fla. 1988) ("acting official is entitled to qualified immunity if his decision is based on a legitimate attempt to balance . . . efficient government [with constitutional rights]"), *rev'd*, 866 F.2d 1321 (11th Cir. 1989).

[17] *See Harlow*, 457 U.S. at 814. The *Harlow* Court asserted that the social costs of suits against government officials include:

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

Id. (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

[18] *See Owen*, 445 U.S. at 638.

[19] 457 U.S. 922 (1982).

[20] *Lugar*, 457 U.S. at 935. The Supreme Court held that a private party could be deemed to be acting under color of state law when acting in conjunction with state officials in garnishment or attachment proceedings. *Id.* at 939-42. The Court found that the lower courts' construction of the "under color of state law" requirement was inconsistent with its prior decisions and failed to give sufficient weight to the line of cases in which the Court considered constitutional due process requirements in the context of garnishment actions and prejudgment attachments. *Id.* at 927. The Court criticized the Court of Appeals for ignoring these cases simply because the issue in the present case was not whether there was "state action," but whether respondents acted under color of state law. *Id.* at 927-29. It held that "[w]hether they are identical or not, the [two concepts] are obviously related." *Id.* at 928.

[21] *Id.* at 942 n.23 ("We need not reach the question of the availability of . . . [a qualified immunity] defense to private individuals at this juncture."); *Id.* at 956 n.14 (Powell, J., dissenting) ("The Court suggests that respondent may be entitled to claim good-faith immunity from this suit for civil damages. This is a positive suggestion with which I agree.").

fied immunity defense.[22] Subsequent to *Lugar*, a number of circuit courts addressed the issue of qualified immunity in section 1983 actions and reached different conclusions where private individuals were concerned.[23]

This Note will first discuss section 1983 immunities law. It will then survey the courts' treatment of the defense of qualified immunity as applied to private party defendants in section 1983 civil rights actions. Without losing sight of the need to enforce section 1983, this Note will assert that the policy bases for allowing government officials qualified immunity may also be applicable for private party defendants. However, qualified immunity is appropriate for private parties only when such persons are relying on presumptively valid state statutes to enforce their rights.

I. Immunity Doctrine: Development and Policy

A. *Absolute Immunity*

Absolute immunity protects certain government officials from liability under section 1983 claims when their actions are carried out in their official capacity.[24] When absolute immunity is success-

[22] *Id.* at 942 n.23.

[23] *Compare* DeVargas v. Mason & Hanger-Silas Mason Co., Inc., 844 F.2d 714, 722 (10th Cir. 1988) (granting qualified immunity to private party defendants) *and* Jones v. Preuit & Maudlin, 851 F.2d 1321, 1325 (11th Cir. 1988) (same), *vacated*, 489 U.S. 1002 (1989) *and* Buller v. Buechler, 706 F.2d 844, 852 (8th Cir. 1983) (same) *and* Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1038 (5th Cir. 1982) (same) *with* F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1319 (9th Cir. 1989) (denying qualified immunity for private party defendant) *and* Duncan v. Peck, 844 F.2d 1261, 1267 (6th Cir. 1988) (same) *and* Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (same). *See also* Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (raising issue but not deciding whether to extend qualified immunity to private party defendant).

[24] *See supra* notes 10-13 and accompanying text (discussing absolute immunity for President, judges, prosecutors and legislators). *See also* Butz v. Economou, 438 U.S. 478 (1978). The *Butz* Court held that, in light of the safeguards provided in agency adjudication to assure the independent judgment of hearing examiners and administrative law judges, these persons "performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts." *Id.* at 514. The Court found that "the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." *Id.* In addition, agency officials responsible for the initiation of proceedings and agency attorneys who arrange for the presentation of evidence on the record in the course of such proceedings are entitled to absolute immunity from damages liability for their part in the administrative process. *Id.* at 516-17. *See also* W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts §132 at 1056-60 (1984) (discussing

fully invoked, the lawsuit is dismissed on summary judgment.[25]

In order to successfully invoke the defense of absolute immunity, the defendant must show that his official function is such as to require an absolute shield from liability,[26] and that his acts were performed in the course of his official conduct.[27]

B. Qualified Immunity

Like absolute immunity, qualified immunity is also an affirmative defense to a section 1983 action.[28] However, qualified immu-

absolute immunity of legislative, judicial and executive officers).

Although it appears that absolute immunity puts the defendant "above the law", the Supreme Court has stated that:

> [a] rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action that do not apply with equal force to other executive officials. The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.

Nixon v. Fitgerald, 457 U.S. 731, 757-58 (1982) (footnotes omitted).

[25] *See* Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982).

[26] *Id.* at 812-13.

[27] *Id.* at 813.

[28] *See Harlow*, 457 U.S. at 815; Gomez v. Toledo, 446 U.S. 635, 635-40 (1980); Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600 (1989) (qualified immunity should be pleaded and proved by defendant).

If successfully invoked, qualified immunity will act as an "*immunity from suit* rather than a mere defense from liability; and like absolute immunity, is effectively lost if a case is erroneously permitted to go to trial." *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in original). Accordingly, the rationale in absolute immunity cases which permits immediate appealablity of orders denying immunity is also applicable to qualified immunity denials. *Id.* at 527. The goal of sparing the defendant possible harassment and the time of going to trial would be defeated if defendant was forced to go to trial before appealing the denial of immunity. *Id. See also* P. HARDY & J. WEEKS, PERSONAL LIABILITY OF PUBLIC OFFICIALS UNDER FEDERAL LAW 4 (4th ed. 1988) (qualified immunity acts as "immunity from suit and [is] not merely a defense to liability"); Note, *Nixon v. Fitzgerald, Presidential Immunity as a Constitutional Imperative*, 32 CATH. U.L. REV. 759, 760 (1983) (like absolute immunity, once qualified immunity granted, plaintiff's recovery precluded).

Since qualified immunity is such an important procedural tool, a denial of the qualified immunity defense is appealable as a matter of right. *See Mitchell*, 472 U.S. at 526-28 (purpose of qualified immunity - sparing defendant possible harassment and time of going to trial - would be defeated if defendant was forced to defend himself before appealing court's denial of immunity). *See, e.g.*, Tubbesing v. Arnold, 742 F.2d 401, 404-05 (8th Cir. 1984) (although qualified immunity defense entitled defendant to summary judgment on damages claim, order denying summary judgment on equitable remedy of reinstatement immedi-

nity strikes a balance between the need to protect certain public officials from lawsuits and the need to provide a remedy to citizens who may have suffered constitutional violations.[29] Consequently, qualified immunity only protects officials from suit when their actions are objectively reasonable under clearly established law.[30]

Qualified immunity was first addressed by the Supreme Court in *Pierson v. Ray*.[31] *Pierson* addressed the issue of whether police officers could assert the defense of good faith and probable cause to an action under section 1983 for arrests made pursuant to an unconstitutional statute.[32] The Court determined that the existence of these defenses at common law in false arrest and imprisonment actions laid the precedential foundation for granting police officers qualified immunity under section 1983.[33] Further, public

ately appealable based on policies underlying qualified immunity). *See also* P. HARDY & J. WEEKS, *supra*, at 4 ("denial of qualified immunity is immediately appealable"). *But cf.* Kaiter v. Town of Boxford, 836 F.2d 704, 708 (1st Cir. 1988) (where defendant claims both qualified and absolute immunity, court "will not entertain interlocutory appeal on one of the claims while the other is reserved for later pretrial proceedings"); Chicago & N.W. Transp. Co. v. Ulery, 787 F.2d 1239, 1240-41 (8th Cir. 1986) (policy behind immediate appeals of qualified immunity defense does not apply when all defendants are private parties who have allegedly conspired with others). *See generally* Note, *Qualified Immunity and Interlocutory Appeal: Is the Protection Lost When Legal and Equitable Claims Are Joined?*, 87 COLUM. L. REV. 161 (1987) (discussing procedural conflict between "final judgment rule" and rule advocating immediate appealability of denial of qualified immunity defense in cases involving both legal and equitable claims).

[29] *See* Easter House v. Felder, 852 F.2d 901, 916 (7th Cir. 1988), *vacated*, 861 F.2d 494 (7th Cir. 1988). In *Felder*, the court stated that "[i]n delineating the contours of the qualified immunities defense, the Supreme Court has sought to balance the rights of citizens, for whom 'an action for damages may offer the only realistic avenue for vindication of constitutional guarantees,' against the costs to society of involving public officials in unwarranted litigation." *Id.* (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)). *See also* Butz v. Economou, 438 U.S. 478, 507-08 (1978) (court balanced protection of officials and citizens and held federal officials entitled to qualified immunity for constitutional violations occurring in exercise of official judgment).

[30] *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See also* Liffiton v. Kueker, 850 F.2d 73, 76 (2d Cir. 1988) (qualified immunity available only where defendant's actions "objectively reasonable").

[31] 386 U.S. 547 (1967), *overruled*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[32] *Pierson*, 386 U.S. at 551-52. In *Pierson*, a group of black and white clergymen were arrested and convicted for violating a breach of peace statute when they attempted to use segregated bathrooms at an interstate bus terminal. *Id.* at 548-49. After their convictions were dropped on appeal, the clergymen brought a section 1983 action seeking damages against the arresting officers and the convicting judge. *Id.* at 550.

[33] *Id.* at 557. The Court restated its earlier pronouncement that §1983 " 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.' " *Id.* at 556 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled*, Monell v. Department of Social Services, 436 U.S. 658 (1978)). The Court held

policy interests dictated against subjecting police officers to liability under section 1983 if they acted in good faith and with probable cause.[34] Since *Pierson*, qualified immunity has been extended to parole officers,[35] jailers,[36] public utilities commission officials,[37] immigration and naturalization officers[38] and correctional administrators,[39] based upon the scope of discretion and particular function of their office.[40]

Prior to the Supreme Court decision in *Harlow v. Fitzgerald*,[41] once it was determined that immunity attached, the test for whether it should be granted required an inquiry into both the subjective and objective factors of a constitutional violation. In *Wood v. Strickland*,[42] the Supreme Court held that qualified immunity would be denied if defendants either knew or should have known that their actions violated a clearly established constitutional right, or if they had acted with actual malice.[43] Because the subjective element required a factual inquiry, it became very diffi-

that the common law defenses of good faith and probable cause available to police officers in false arrest actions were available to police officers in actions under § 1983. *Id.*

[34] *Id.* at 555. The Court noted that under the prevailing view in the country "a police officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved." *Id.*

[35] Wolfel v. Sanborn, 555 F.2d 583, 591 (6th Cir. 1977), *cert. denied*, 459 U.S. 1115 (1983).

[36] Bryan v. Jones, 530 F.2d 1210, 1213-15 (5th Cir.) (en banc), *cert. denied*, 429 U.S. 865 (1976).

[37] Schlegal v. Bebout, 841 F.2d 937, 945 (9th Cir. 1988).

[38] Ramirez v. Wegg, 835 F.2d 1153, 1156 (6th Cir. 1987).

[39] Knell v. Bensinger, 522 F.2d 720, 725 (7th Cir. 1975).

[40] *See* Forrester v. White, 484 U.S. 219, 224-25 (1988) (function performed rather than identity of actor examined to determine whether qualified immunity available). *See also* Buller v. Buechler, 706 F.2d 844, 851 n.9 (8th Cir. 1983) (recognizing Supreme Court's functional approach to immunity under § 1983); Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982) (Supreme Court has propounded "functional" rather than "derivative" approach to immunities).

[41] 457 U.S. 800 (1982).

[42] 420 U.S. 308 (1975), *overruled*, 457 U.S. 800 (1982).

[43] *Id.* at 321. The *Wood* Court determined that "there must be a degree of immunity if the work of the school is to go forward." *Id.* The Court then defined the scope of that immunity by holding that:

> a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id. at 322.

cult for trial courts to summarily dispose of insubstantial claims, thus defeating the main purpose of the immunity defense.[44] As a result, the Court in *Harlow*[45] abandoned the subjective element of the *Wood* test.[46] It held that "government officials performing discretionary functions generally are shielded for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[47]

II. Qualified Immunity For Private Party Defendants

A. *The Case for Qualified Immunity*

The defense of qualified immunity for private defendants was recognized by the Fifth Circuit in *Folsom Investment Co. v. Moore*,[48] the Eighth Circuit in *Buller v. Buechler*,[49] and the Eleventh Circuit in *Jones v. Preuit & Maudlin*.[50] Each of these cases concerned alleged unconstitutional attachments of property pursuant to state creditors rights statutes.[51] In each case, the courts looked to com-

[44] *See supra*, note 15-17 and accompanying text (discussing purposes of immunities).

[45] 457 U.S. 800 (1982).

[46] *Id.* at 817-18. In *Harlow*, the Court granted qualified immunity to presidential aids acting within the scope of their duties by relying solely on the objective reasonableness of their conduct. *Id.* at 818. *See generally* Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126 (1985) (reviewing *Harlow* objective test with respect to Civil Rights claims in which defendant's "state of mind" is element of plaintiff's substantive claim).

[47] *Harlow*, 457 U.S. at 818. The Supreme Court has recently provided some guidance on the issue of whether a right is "clearly established." *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987). The Court stated that:

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

Id. (citations omitted). *See also Harlow*, 457 U.S. at 818 (on summary judgment, judge may determine not only currently applicable law but also established law at time action occurred).

[48] 681 F.2d 1032 (5th Cir. 1982).

[49] 706 F.2d 844 (8th Cir. 1983).

[50] 851 F.2d 1321 (11th Cir. 1988), *vacated*, 489 U.S. 1002 (1989).

[51] *See Jones*, 851 F.2d at 1322-23; *Buller*, 706 F.2d at 846; *Folsom*, 681 F.2d at 1033-35. In *Folsom*, defendants were three real estate brokers who had entered into an exclusive brokerage contract with the plaintiff. *Folsom*, 681 F.2d at 1033. Defendants instituted proceedings for damages stemming from plaintiff's breach of their exclusive contracts. *Id.* Defendants were able to attach 200 acres of plaintiff's land pursuant to a judicial order. *Id.* at

mon law and public policy to find a basis for extending immunity.[52] The common law element was satisfied by virtue of the fact that the actions of malicious prosecution and wrongful attachment existed prior to the enactment of section 1983 and that the proper defense to these actions was absence of malice and probable cause.[53]

The courts also asserted that an individual had the prerogative to rely on presumptively valid laws[54] and to be protected from damages for resorting in good faith to the legal process.[55] With

1034. After the first lawsuit was settled, plaintiff brought an action against defendants under § 1983, claiming wrongful and unconstitutional attachment of his land. *Id.*

Buller concerned the defendant's garnishment of plaintiff's proceeds from an auction. *Buller*, 706 F.2d at 846. The garnishment was obtained by defendant's attorney pursuant to a statute that had been declared unconstitutional six years earlier. *Id.* The amount taken by the defendant was approximately $265,000 in excess of the debt owed by plaintiff. *Id.* The court held that qualified immunity could be asserted by the defendants, and remanded the case to determine whether, in light of the unconstitutionality of the statute, the defendants were acting in good faith at the time of the garnishment. *Id.* at 852.

Jones involved liens on the plaintiff's cotton-picking machines, obtained by defendant as a result of plaintiff's failure to pay for repairs. *Jones*, 851 F.2d at 1322. Alabama law provided for a mechanics lien to be attached to machines upon which work was performed. *Id.* Jones brought a suit against defendants, declaring that the lien obtained via the Alabama statute was unconstitutional, and therefore violated his due process rights. *Id.* at 1323.

[52] *See Jones*, 851 F.2d at 1324-25 (court found that common law doctrines were founded on sound public policy of encouraging citizens to utilize laws without fear of retribution); *Buller*, 706 F.2d at 850-51 (court found strong public interest in permitting individuals to rely on presumptively valid state statutes); *Folsom*, 681 F.2d at 1037-38 (private parties enforcing rights under presumptively valid statute immune from monetary damages).

[53] *See Jones*, 851 F.2d at 1322-24 (defense of good faith at common law "supports availability of qualified immunity in present day §1983 suits"); *Buller*, 706 F.2d at 850 (common law good faith defense supports qualified immunity in §1983 liability cases); *Folsom*, 681 F.2d at 1037-38. The *Folsom* court, concluding that Congress did not intend the pre-emption of existing common law remedies when enacting §1983, recognized that they were effectively transforming a common law defense into qualified immunity. *Id.* The court maintained that:

> [t]he existence of a probable cause defense at common law convinces us that Congress in enacting §1983 could not have intended to subject to liability those who in good faith resorted to legal process. *We have merely transformed a common law defense extant at the time of §1983's passage into an immunity.*

Id. (emphasis added).

[54] *See Jones*, 851 F.2d at 1325 (when citizen utilizes state law "he should do so with confidence that he need not fear liability resulting from the legislature's constitutional error"); *Buller*, 706 F.2d at 851 ("strong public interest in permitting private individuals to rely on presumptively valid state laws"); *Folsom*, 681 F.2d at 1037-38 (public policy justifications for immunity protecting a private citizen who relies on presumptively valid state statute "alone justify an immunity"). *But see* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1981) (private actors who invoked presumptively valid state law liable under §1983).

[55] *See Jones*, 851 F.2d at 1325 (immunity only available to defendants who "act in good faith"); *Buller*, 706 F.2d at 850-51 (discussing history of "good faith defense"); *Folsom*, 681

these concerns in mind, each court weighed the policy ramifications of extending qualified immunity to private parties.[56]

The *Buller* court determined that to deny qualified immunity to defendants simply because they were not government officials would be unjust because it was only through the judicial label of "state actor" that defendants would be liable at all.[57] The *Jones* court analogized the policy of encouraging people to seek public office to the policy of encouraging private parties to settle their differences by utilizing the judicial system.[58] Because defendants were unaware that their actions were improper, further deterrence of unconstitutional actions would not be realized by holding them liable.[59] The *Jones* court concluded that granting immunity exclusively to government officials would effectively present private individuals with greater liability than their public counterparts.[60]

Judge Tjoflat, concurring in *Jones*,[61] questioned the plurality's reliance on a common law defense as a foundation for extending qualified immunity.[62] Instead, he suggested that federal courts in-

F.2d at 1038 (compelling public policy reasons for good faith defense).

[56] *See Jones*, 851 F.2d at 1325 (policy considerations support grant of qualified immunity); *Buller*, 706 F.2d at 851 (same); *Folsom*, 681 F.2d at 1037-38 (same).

[57] *Buller*, 706 F.2d at 851. The court determined that:

> it would be anomalous to hold that private individuals are state actors within the meaning of section 1983 because they invoked a state garnishment statute and the aid of state officers; but deny those private individuals the qualified immunity possessed by the state officials with whom they dealt because they technically are not state employees.

Id.

The court also acknowledged that the policies behind § 1983, deterrence and compensation, would continue to be served where the defendant had violated a clearly constitutional right. *Id.* at 851. *See generally supra*, note 6 and accompanying text (discussing purposes of § 1983).

[58] *See Jones*, 851 F.2d at 1325. The court believed that the legal system:

> encourag[es] citizens to employ existing lawful mechanisms to resolve their claims and disputes. What we encourage we ought not seek to punish. In the same way that we wish to encourage citizens to undertake public service, so must we encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional.

Id.

[59] *Id.*

[60] *Id.* at 1325. The court believed this outcome was not the purpose of Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). *Id.*

[61] *Jones*, 851 F.2d at 1329 (Tjoflat, J., concurring).

[62] *See id.* at 1332 (rejecting common law defense rationale in favor of federal courts inherent power to fashion just remedies for constitutional wrongs).

trinsically have the ability to formulate remedies for constitutional wrongs.[63] Thus, he asserted that immunity law under section 1983 should derive from "remedial decision making"[64] by the court, based upon balancing the equities served by awarding monetary damages to absolve constitutional infractions with the inequities of holding these defendants liable.[65]

B. The Case Against Qualified Immunity

Downs v. Sawtelle[66] was the first case to deny qualified immunity to private party defendants. In *Downs*, the First Circuit refused to extend the defense to a private individual who conspired with doctors at a public hospital to sterilize her deaf-mute sister against her sister's will.[67] The court feared that the extension of qualified immunity could negate the protection afforded by section 1983.[68] Additionally, the court contrasted the responsibility of public office with that of private individuals and refused to extend the defense of qualified immunity to a private party.[69]

[63] *See id.* Judge Tjoflat stated that under *Bivens* actions, courts have the authority to fashion "*any available remedy* to make good the wrong done." *Id.* at 1333 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971)). Further, Judge Tjoflat interpreted this authority to apply to § 1983 actions. *Id.* at 1334. *See* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

[64] *Jones*, 851 F.2d at 1335.

[65] *Id.* at 1335 (federal courts have power and obligation to formulate fair remedies, given all interests).

[66] 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978).

[67] *See Downs*, 574 F.2d at 4-6, 15-16.

[68] *See id.* at 15-16. The *Downs* court reiterated "that § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" *Id.* at 15. (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)). The *Downs* court asserted, however, that while a "good faith" qualified immunity defense for public officials has been an integral part of that background, "private individuals are in [no] way shielded from damages liability in a comparable fashion." *Id.*

[69] *See id.* at 15-16. The court in *Downs* applied a two part test to determine whether the defense should be extended in this case. *See id.* at 13 (citing Imbler v. Pachtman, 424 U.S. 409 (1976)). The court asked first whether the defense existed at common law in this situation, and second, whether public policy reasons dictate that it should be extended. *See id.* at 13-14. The court stated that "[while] certain officials are . . . entitled to rely upon such an immunity . . . the [Supreme] Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion." *See id.* at 15. In addition, the court stated that:

> [p]rivate parties . . . are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing . . . public officials.

The Ninth Circuit has summarily refused to extend the defense of qualified immunity to private party defendants.[70] In *Howerton v. Gabica*,[71] private party landlords conspired with a police officer to evict their tenants.[72] The court concluded, in a footnote, that while the landlords may have believed they were acting within their rights, "there is no good faith immunity for private parties who act under color of state law to deprive [another] of his or her constitutional rights."[73] In *Thorne v. City of El Segundo*,[74] the court indicated a possible retreat from this position when it noted the Eighth Circuit's acceptance of the defense.[75] However, recently in *F.E. Trotter v. Watkins*,[76] the court expressly relied on *Howerton* to conclude that, just as in section 1983 actions, qualified immunity is unavailable to private defendants in "*Bivens*"[77] actions.[78]

> Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights.

Id. at 15-16. *See also* Forrester v. White, 484 U.S. 219, 224 (1988) (official seeking exemption from damages liability under § 1983 has burden of showing exemption is justified by "overriding considerations of public policy"); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258-59 (1981) ("Only after careful inquiry into considerations of both history and policy has the Court construed section 1983 to incorporate a particular immunity defense.").

[70] *See* F. E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1318 (9th Cir. 1989) ("we hold that qualified immunity is not available as a defense to private parties in a *Bivens* suit"); Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) ("there is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights"). *Cf.* Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (raising but not deciding question of whether independent contractor acting for city could claim qualified immunity defense).

[71] 708 F.2d 380 (9th Cir. 1983).

[72] *See Howerton*, 708 F.2d at 381-82.

[73] *Id.* at 385 n.10.

[74] 802 F.2d 1131 (9th Cir. 1986).

[75] *See Thorne*, 802 F.2d at 1140 n.8 (comparing Ninth Circuit's holding in *Howerton* with *Buller* which granted qualified immunity to private individuals deemed to be state actors).

[76] 869 F.2d 1312 (9th Cir. 1989). In *F.E. Trotter*, a private engineering corporation conspired with the Navy to manipulate data in order to affect a study of the impact of aircraft noise and accident potential of a Naval Air Station on surrounding lands. *Id.* at 1313.

[77] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). A *Bivens* action is a suit brought directly under the Constitution against federal officials. *See id.* at 397. Courts are divided as to whether a *Bivens* action may be brought against a private party. *Compare* Reuber v. United States, 750 F.2d 1039, 1054-57 (D.C. Cir. 1984) (construing *Bivens* to encompass actions against private parties given finding of state action) *and* Yiamouyiannis v. Chemical Abstracts, Serv., 521 F.2d 1392, 1393 (6th Cir. 1975) (per curiam) (same), *cert. denied*, 439 U.S. 983 (1978) *and* Dobyns v. E-Systems, Inc., 667 F.2d 1219, 1221 (5th Cir. 1982) (same) *with* Fletcher v. Rhode Island Hosp. Trust Nat'l. Bank, 496 F.2d 927, 932 n.8 (1st Cir.) (no federal cause of action under *Bivens*

In *Duncan v. Peck*,[79] the Sixth Circuit, confronted with facts similar to those of the *Jones*, *Buller*, and *Folsom* cases, refused to extend qualified immunity to a private party who relied on an attachment statute which was subsequently declared unconstitutional.[80] The court found "no evidence that the common law ever extended the immunity to include private citizens,"[81] and held that the public policy reasons for the doctrine of official immunity "do not apply to private actors."[82]

The *Duncan* court strongly criticized the Fifth, Eighth and Eleventh Circuits' treatment of the qualified immunity issue.[83] The court asserted that these circuits "improperly confuse[d] good faith immunity with a good faith defense."[84] The court explained that while the former is based on an objective analysis,[85] the latter

against private party under color of federal law or custom), *cert. denied*, 419 U.S. 1001 (1974) *and* Stevens v. Morris-Knudsen Saudi Arabia Consortium, 576 F. Supp. 516, 520-25 (D. Md. 1983) (court noted that Supreme Court has never appled *Bivens* type claim to private defendants, and should only be utilized in very limited exceptions), *aff'd*, 755 F.2d 375 (4th Cir. 1985). *See generally* Gilden, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983) (discussing § 1983 and *Bivens* actions).

[78] *F. E. Trotter*, 869 F.2d at 1318.

[79] 844 F.2d 1261 (6th Cir. 1988).

[80] *See Duncan* 844 F.2d at 1264 (court found that neither public policy nor common law created foundation for extending qualified immunity).

[81] *Id.*

[82] *Id.* The court cited *Scheuer v. Rhodes*, 416 U.S. 232, 239-40 (1974) as the source of two public policy justifications for the doctrine of official immunity:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Duncan, 844 F.2d at 1264 (quoting *Scheuer*, 416 U.S. at 240). The court further stated that

> [p]rivate parties do not face the dilemma of being required by law to use their discretion in a way that might unfairly expose them to lawsuits . . . and [that] private part[ies] [are] governed only by self-interest and [are] not invested with the responsibility of executing the duties of a public official in the public interest.

Id. Finally, the court reasoned that if it were to extend the defense of qualified immunity to private party defendants, not only would it be "improperly extending the immunity doctrine far beyond its underlying rationales," but it would also be "significantly distorting the common law defenses to malicious prosecution and wrongful attachment torts by substituting the [*Harlow*] objective test for good faith for the common law's subjective standard." *Id.* at 1267.

[83] *Duncan*, 844 F.2d at 1266-67. *See infra* notes 86-89 and accompanying text (discussing *Duncan* court's reasoning behind criticism of Fifth, Eighth and Eleventh Circuits' qualified immunity approach).

[84] *Id.* at 1266.

[85] *Id.* ("Good faith immunity is designed to protect defendants from the difficulties of

includes subjective factors.[86] Thus, while it is proper to look for historical and policy bases for a good faith defense, such an analysis is flawed because the adoption of a good faith immunity would require courts to deviate from the *Harlow* standard.[87]

It is suggested that the *Duncan* court properly attempts to comply with *Harlow*, yet fails to adequately consider the policy ramifications of holding citizens liable for invoking presumptively valid statutes. The *Jones*, *Buller*, and *Folsom* courts extended immunity primarily on the basis of compelling policy reasons.[88] It is suggested that this position is within both the policy goals of *Pierson* and the bounds of *Harlow*. The historical basis for extending immunity, rather than adding a subjective element, served merely to supplement a sound policy rationale.

Moreover, Judge Tjoflat in his concurrence in *Jones* asserted that the notion that section 1983 adopts all prior tort law defenses is a legal fiction that glosses over the federal courts' power to fashion remedies in areas Congress has not addressed.[89] Further, as Judge Coffin in *Downs* noted, many functions that existed at common law do not exist today.[90] Therefore, perhaps, when a court conducts an inquiry into the bases for immunity it should not feel compelled to deny immunity merely because there is no common law basis.

It is suggested that the better approach would be to insure that public policy supports the immunity. Of course, courts will have to comply with the requisite balancing test outlined in *Harlow* to insure that the remedies afforded by section 1983 are not lost. Further, they will have to determine that a defendant's actions were objectively reasonable under clearly established law. In this fash-

defending a suit by dismissing the case before the parties have engaged in costly and time consuming discovery.").

[86] *Id.* ("A good faith defense . . . is likely to be based in large part on the facts of the case, with the suit only being dismissed after trial, or on summary judgment if the defendant can show that there is no material dispute as to the facts.").

[87] *Duncan*, 844 F.2d at 1266 (court finds no justification for subtle yet significant transformation of this defense into an immunity). *See also* Harlow v. Fitzgerald, 457 U.S 800, 819 (1982) (enunciation of *Harlow* standard).

[88] *See Jones*, 851 F.2d at 1325; *Buller*, 706 F.2d at 851; *Folsom*, 681 F.2d at 1037-38.

[89] *Jones*, 851 F.2d 1332-33.

[90] *See* Downs v. Sawtelle, 574 F.2d 1, 16 (1st Cir.) (Coffin, J., dissenting) (noted various functions, such as social workers, which did not have historical root in common law), *cert. denied*, 439 U.S. 910 (1978).

ion, however, the inquiry into the historical justification would be limited, thereby preventing the problem that the Sixth Circuit has identified.

C. DeVargas v. Mason & Hanger-Silas Mason Co.: A Taxonomy for Section 1983 Actions

In *DeVargas v. Mason & Hanger-Silas Mason Co.*,[91] the court granted qualified immunity to a private party defendant[92] based on policy considerations.[93]

The *DeVargas* court observed that a scale for categorizing scenarios where private parties could incur liability under section 1983 had evolved.[94] The first level is where a defendant conspired with government officials to act outside the boundary of the law;[95] the

[91] 844 F.2d 714 (10th Cir. 1988).

[92] *DeVargas*, 844 F.2d at 715-16. The private party defendant was commissioned by the Regents of the University of California to hire security personnel for the Los Alamos National Laboratory (LANL). *Id.* Believing that the contractual relationship required him to do so, the defendant refused to process plaintiff's application for security inspector. *Id.* Thereafter, plaintiff brought suit against the private party defendants, LANL, DOE, and the Regents based on *Bivens* and § 1983 claims. *Id.* at 716.

[93] *DeVargas*, 844 F.2d at 721-22. The court based its holding on two related policy arguments. *Id.* First, the defendant was required to act as he did pursuant to governmental authority. *Id.* If the private party were to follow the terms of the governmental contract, he could potentially be liable to individuals for damages under section 1983. *Id.* at 722. *See also supra*, note 5 and accompanying text (discussing liability under section 1983). However, if he acted in derogation of the contract, he would be liable to the government for breach of their contract. *DeVargas*, 844 F.2d at 722. *See generally* J. CALAMARI & J. PERILLO, CONTRACTS ch. 14 (1987) (comprehensive discussion of damages available for breach of contract). The court concluded that a grant of immunity would be the only equitable way to remedy this injustice. *DeVargas*, 844 F.2d at 722 ("Not to allow immunity here places defendants between Scylla and Charybdis . . . .") (footnote omitted).

Second, and perhaps more importantly, the court determined that the defendant was functionally equivalent to a government employee. *Id.* In fact, the defendant was performing the same function that a government employee would have performed, had there been no contract. *See id.* at 715-16. Therefore, the court concluded that the policies behind the extension of immunity to governmental officials should be equally applicable in this instance. *See id.* at 717 ("Just as qualified individuals may be deterred from public service if they are subjected to the cost and disruption of defending claims to which they are immune, so too might qualified private contractors be deterred form entering into contracts with government bodies.").

[94] *DeVargas*, 844 F.2d at 721.

[95] *See* F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1313 (9th Cir. 1989) (private engineering corporation allegedly conspired with Navy to manipulate data in order to affect study of impact of aircraft noise and accident potential of Naval Air Station on surrounding lands); Howerton v. Gabica, 708 F.2d 380, 381-82 (9th Cir. 1983) (landlord allegedly conspired with police officer to evict tenants); Downs v. Sawtelle, 574 F.2d 1, 4-6 (1st Cir.) (private defendant allegedly conspired with hospital and doctors to sterilize plaintiff, deaf

next is where a defendant acted pursuant to an unconstitutional statute that authorized his or her conduct;[96] and the final level is where a defendant reasonably believed that a government contract required him to perform a specific function.[97] *DeVargas* fits within the final category on the scale,[98] where qualified immunity is most appropriate. Clearly, no immunity is appropriate on the first level.[99] The *DeVargas* taxonomy could be useful in future section 1983 actions, as it would allow judges to dispose of many cases and avoid unnecessary litigation. Only when a case falls into the middle rung would the court need to conduct further inquiry. It is suggested that the proper analysis would be to look at public policy and then balance this with the need to remedy constitutional violations. Thus, if a defendant were invoking a presumptively valid statute, qualified immunity is reasonable.

Conclusion

It has been said that "[t]he resolution of immunity questions in-

mute, against her will), *cert. denied*, 439 U.S. 910 (1978).

[96] *See* Duncan v. Peck, 844 F.2d 1261, 1262-63 (6th Cir. 1988) (private party defendant relied in good faith on statute subsequently declared unconstitutional in attachment proceedings); Jones v. Preuit & Maudlin, 851 F.2d 1321, 1322-23 (11th Cir. 1988) (private party defendant relied in good faith on judicial authorization of attachment proceedings), *vacated*, 489 U.S. 1002 (1989); Buller v. Buechler, 706 F.2d 844, 846 (8th Cir. 1983) (private party defendants relied in good faith on state garnishment statute previously declared unconstitutional in garnishment of proceeds of plaintiff's auction sale); Folsom Inv. Co., v. Moore, 681 F.2d 1032, 1033-35 (5th Cir. 1982) (private party defendant relied in good faith on presumptively valid state attachment statute).

[97] *See* DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 715-16 (10th Cir. 1988) (private corporation hired by Department of Energy to employ security inspectors violated plaintiff's constitutional rights by refusing to process his application based on physical handicap); Thorne v. City of El Segundo, 802 F.2d 1131, 1138 (9th Cir. 1986) (independent contractor who performed polygraph for police violated plaintiff's rights of privacy and free association by inquiring into off-duty sexual activity).

[98] *See DeVargas*, 844 F.2d at 722.

[99] *See* Adickes v. S.H. Kress, 398 U.S. 144 (1970). In *Adickes*, the Supreme Court held that private individuals who conspire with public officials to deprive others of their constitutional rights are clearly to be held liable. *Id.* at 152. In *Adickes*, petitioner, a white school teacher from New York, brought suit against respondent under section 1983 for an alleged violation of her constitutional rights under the Equal Protection Clause of the fourteenth amendment when respondent refused to serve her lunch at its restaurant facilities, and subsequently had her arrested upon her departure from the store on a charge of vagrancy. *Id.* at 146-47. At the time of both the refusal and arrest, petitioner was with six black youths who were her students in a Mississippi "Freedom School" where she was teaching during the summer of 1964. *Id.*

herently requires a balance between the evils inevitable in any available alternative."[100] In considering whether to extend the defense of qualified immunity to private party defendants, the courts should heed this flexible approach and examine the equities behind extension in each case in conjunction with the purposes of section 1983. Under this approach, qualified immunity should generally be extended to private party defendants except in cases where their grievances prove to be unjustified under current legal standards.

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[100] Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982).