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INTRODUCTION

A variety of economic and political forces are driving government to aggressively explore the value of privatization. The process can take many forms,[1] but the most common approach in the United States involves government contracting with the private sector for the delivery of essential public services.[2] As the number and variety of contracting decisions have grown, so, too, have the complexities of the legal issues that have confronted both contracting units of government and the private firms on which they rely for service delivery. Although one might assume that the legal implications of privatization would have been

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1. Privatization has been broadly defined as "the attainment of any public policy goal through the participation of the private sector." National Commission for Employment Policy, Privatization and Public Employees: The Impact of City and County Contracting Out on Government Workers 7 (May 1988). Because an underlying purpose of privatization is to foster competition in areas previously dominated by a governmental monopoly, familiar forms of privatization include voucher programs that allow the holders of vouchers to select what they perceive to be the best provider of a given service (*e.g.*, education, housing, and health care), asset divestitures (*e.g.*, the sale of Conrail by the federal government via a public stock offering in 1987), and the contracting out of a broad array of services. *See generally* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 Marq. L. Rev. 449 (1988); Reason Foundation, Sixth Annual Report on Privatization: Privatization, 1992 (1992).

2. *See, e.g.*, Touche Ross, Privatization in America: An Opinion Survey of City and County Governments on Their Use of Privatization and Their Infrastructure Needs (1987); President's Commission on Privatization, Privatization: Toward More Effective Government (1988).

thoroughly explored prior to decisions to contract, experience reveals that this assumption is often invalid.[3]

To be sure, presupposing reliance on reasonably sophisticated procedures for selecting independent contractors and drafting contracts, contracting decisions usually will give rise to few unusual or complex legal issues. For example, the decision of a municipality to rely on private rather than public employees for janitorial services, refuse collection, or waste water treatment is unlikely to yield extraordinary legal concerns. However, the general appeal of privatization has prompted government to contract with the private sector for types of services that can and do give rise to quite a broad array of novel legal and constitutional questions. This is especially true regarding services that have implications for the liberty interests of those who receive the services.

Notwithstanding various novel and as-yet-unresolved questions, these more complex forms of privatization are becoming common. With increasing frequency, contracting decisions find government relying on private firms to provide types of services that traditionally have been provided largely or entirely by government agencies. Illustrations of this include contracting for the management of mental health care facilities, detention facilities which house detainees of the Immigration and Naturalization Service, correctional facilities for adjudicated delinquents, local jails which house pre-trial detainees as well as sentenced offenders, and state and federal prisons.

Concerned primarily with the implications for correctional privatization, this article forecasts how the federal courts ultimately will resolve questions regarding the availability to private employees of a qualified immunity from civil rights damage suits brought under 42 U.S.C. § 1983 or the federal analog to section 1983 created by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[4] The analysis reveals that decisions by the Supreme Court during

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3. The author's personal experience provides a clear illustration of this fact. In 1985 the Florida Legislature enacted enabling legislation which authorized private management of both local and state-level correctional facilities. Fla. Stat. Ann. § 944.105 (West Supp. 1992) (authorizing state-level contracting), and Fla. Stat. Ann. § 951.062 (West Supp. 1992) (authorizing local-level contracting). The following year, and after one Florida county had relied on the new law when it contracted with a private corporation for the management of its county jail, the Florida House Committee on Corrections, Probation and Parole requested that an in-depth analysis of the legal implications be prepared. The author of this article was the principal author of that analysis. Charles W. Thomas et al., The Privatization of American Corrections: An Assessment of Its Legal Implications (1988). *See also* Charles W. Thomas & Linda S. Calvert Hanson, *The Implications of 42 U.S.C. Section 1983 for the Privatization of Prisons*, 16 Fla. St. U. L. Rev. 933 (1989); and Charles W. Thomas, *Prisoners' Rights and Correctional Privatization*, 10 Bus. & Prof. Ethics J. 3 (1991).

4. 403 U.S. 388, 91 S. Ct. 1999 (1971).

the past quarter of a century have authorized a diverse set of local, state, and federal officials to assert a qualified immunity from liability for monetary damages where the constitutional right violated was not clearly established at the time of the alleged violation.[5] When qualified immunity is available, it is settled law that defendants should be permitted to terminate most actions brought against them via motions to dismiss or motions for summary judgment.[6] Indeed, any rejection by a trial court of a claim of qualified immunity is immediately appealable.[7] Qualified immunity is said to be justified because it permits government officials to dedicate their energy, time, and resources to serving the public interest rather than being preoccupied by unnecessary litigation.[8] However, whether private defendants in section 1983 or *Bivens* damage suits will enjoy the same qualified immunity from suit remains uncertain despite the recent holding of the Supreme Court in *Wyatt v. Cole*.[9]

Basic Background Considerations

As a general rule, private persons named as defendants in a section 1983 or a *Bivens* damage suit have no need to rely on the judicially-created qualified immunity. They can support a motion to dismiss or, if necessary, a motion for summary judgment simply by demonstrating that they were not government officials and are thus not subject to liability for these constitutional torts. It is well-established that private conduct generally does not satisfy the "color of law" and "state action" prerequisites for a section 1983 action.[10] Thus, it is generally not possible for plaintiffs to cast private parties as defendants in either section 1983 or *Bivens* actions. When, however, circumstances are such that the harmful conduct of a private individual is fairly attributable to the state, the "state action" requirement of the Fourteenth Amendment is met and the private individual is said to have satisfied the "color of law"

5. Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987).

6. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727 (1982); Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2897 (1978); Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683 (1974).

7. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).

8. Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736 (1982).

9. 112 S. Ct. 1827 (1992) (holding that qualified immunity is not available to private parties in section 1983 damage suits involving reliance on state replevin, garnishment, and attachment statutes).

10. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349, 95 S. Ct. 449, 453 (1974) (quoting from The Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883)); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764 (1982); and Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777 (1982).

element of section 1983.[11] This is true both as a general aspect of section 1983 litigation[12] and as a specific aspect of section 1983 litigation in cases involving government contracts with private persons for correctional services.[13]

Given facts sufficient to qualify a private person as a defendant in a section 1983 or a *Bivens* damage action, simple logic and considerations of fairness might suggest that the same policy considerations that provide the foundation for many recent qualified immunity decisions of the Court would extend in a substantially identical manner to private persons whose conduct satisfies the fair attribution test the Supreme Court articulated in *Lugar v. Edmondson Oil Co.*[14] Until recently, however, the Supreme Court neither accepted nor rejected this position. Lacking clear direction, the federal circuit courts differed widely in their judgments regarding when and even if a private person cast as a defendant in a section 1983 suit can assert a qualified immunity. Some decisions reflect the view that a qualified immunity from damage suits exists only when the named defendant is a public official.[15] Other decisions reflect a willingness to deal similarly with public officials and private persons who assert a qualified immunity.[16] Still other decisions seek to draw an

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11. As will be discussed more fully later in the analysis, the core purpose of 42 U.S.C. § 1983 is to provide a civil remedy for persons who suffer deprivations of constitutional rights as a consequence of misconduct by state officials. It was enacted "for the expressed purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'" Lugar v. Edmondson Oil Co., 457 U.S. 922, 934, 102 S. Ct. 2744, 2752 (1982) (quoting from Lynch v. Household Finance Corp., 405 U.S. 538, 92 S. Ct. 1113 (1972)). In cases involving state officials, the "state action" requirement of the Fourteenth Amendment and the "color of law" requirement of section 1983 have "consistently been treated as the same thing." United States v. Price, 383 U.S. 787, 794, 86 S. Ct. 1152, 1157 (1966). However, the tests are separate and independent when a private party is named as a defendant. Purely private conduct causing constitutional deprivations is beyond the scope of section 1983. *See, e.g., Jackson*, 419 U.S. at 349, 95 S. Ct. at 453. By itself, private conduct satisfying the "color of law" element of section 1983 is insufficient to state a section 1983 claim. The "party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because . . . he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the States." *Lugar*, 457 U.S. at 937, 102 S. Ct. at 2754. Substantially the same approach is relied upon when private parties are named in *Bivens* damage suits with the exception, of course, that the focus is on "federal action" rather than "state action." *See, e.g.*, Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984).

12. *See, e.g., Lugar*, 457 U.S. 922, 102 S. Ct. 2744.

13. *See, e.g.*, West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250 (1988).

14. 457 U.S. 922, 102 S. Ct. 2744 (1982).

15. *See, e.g.*, Connor v. City of Santa Ana, 897 F.2d 1487 (9th Cir.), *cert. denied*, 111 S. Ct. 59 (1990).

16. *See, e.g.*, Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002, 109 S. Ct. 1105 (1989).

awkward line between qualified immunity and a good faith defense, the former being made available to public officials and the latter being made available to private persons.[17]

Importantly, and as will be discussed in greater detail later in this article,[18] the recent but narrow holding of the Supreme Court in *Wyatt v. Cole*[19] did not resolve core features of the disagreements that have surfaced in decisions of the federal circuit courts. To be sure, the *Wyatt* holding reveals a firm refusal to allow private party defendants named in section 1983 damage suits to assert a qualified immunity when their alleged misconduct involved reliance on a presumptively valid state replevin, garnishment, or attachment statute. The interests of such defendants, argued Justice O'Connor in delivering the opinion of the Court, "are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion" in the categories of persons who enjoy a qualified immunity from such damage suits.[20] "Qualified immunity," said Justice O'Connor,

> strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions . . . . Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service.[21]

Apparently in large measure because private party defendants in the types of cases represented by *Wyatt* act in the pursuit of a narrow commercial rather than a public interest, they will not be accorded a qualified immunity from suit. This prompted a sharp dissent from Chief Justice Rehnquist with which Justices Souter and Thomas joined,[22] so it is unlikely that the qualified immunity issue has been settled even in the set of circumstances on which the *Wyatt* court focused its attention. The focus of this analysis, however, is on the quite different circumstances the courts have and will continue to encounter when a governmental entity has determined that important public interests can best be served by relying on a private rather than a public provider of an essential service. Although such circumstances do implicate the commercial interests of private parties, they are easily distinguished from the facts presented by *Wyatt* in that the private parties are working

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17. *See, e.g.*, Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988).
18. *See infra* notes 154-160 and accompanying text.
19. 112 S. Ct. 1827 (1992).
20. Wyatt v. Cole, 112 S. Ct. 1827, 1833 (1992).
21. *Id.*
22. *Id.* at 1837 (Rehnquist, C.J., dissenting).

under contract with and serving the vital interests of a governmental entity. These circumstances thus fall well beyond the scope of the holding in *Wyatt*, so suits brought against this increasingly large category of private actors will almost certainly continue to yield contradictory opinions by the federal circuit courts as well as the growing number of state courts before which section 1983 claims are litigated.[23]

It is also worth noting that the legal and social policy implications of contrary opinions regarding the availability of qualified immunity are considerable. Correctional privatization has become the most hotly debated topic those with interests in the nation's correctional system have witnessed during this century. Much of that debate flows from the opposing claims that are advanced by proponents and opponents of privatization. Proponents contend that the private sector can provide correctional services equal to or better than those now provided by government agencies and do so at a significantly lower cost.[24] Privatization opponents believe that the promise of quality improvements at reduced costs is nothing more than empty marketing rhetoric.[25]

A fair and objective comparison of public versus private alternatives presupposes that public and private competitors will meet on what amounts to a "flat playing field." Importantly, prisoner claims of constitutional deprivations are exceedingly common and quite costly to litigate even though they are seldom successful.[26] Thus, a major but arguably unfair advantage in the competitive arena would go to the public sector if the courts determine that public corrections officials can assert a qualified immunity but that their private sector counterparts cannot. Consequently, the primary objective of this article will be to anticipate whether judicial interpretations of the immunities available to defendants in constitutional tort actions will have the presumably unintended consequence of supporting the traditional monopoly public sector correctional agencies have enjoyed.

Additionally, there is a more profound legal and philosophical issue that is pushed into sharp relief by privatization in general and correctional privatization in particular. When a major social and political movement like privatization—a movement whose impact is international and not merely national in its scope—seeks to redefine the boundaries between the public and private sector, what should be the role of law?

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23. *See*, regarding the growth in section 1983 claims being brought in state rather than federal courts, Steven H. Steinglass, Section 1983 Litigation in State Courts (1992).

24. *See, e.g.*, Charles H. Logan, Private Prisons: Cons and Pros (1990).

25. *See, e.g.*, Ira P. Robbins, The Legal Dimensions of Private Incarceration (1988).

26. *See, e.g.*, Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988); and Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L.J. 1567 (1989).

In the correctional context, for example, decisions to explore the potential value of private management of facilities almost always presuppose the enactment of enabling legislation which adequately expresses a clear policy judgment by the legislative branch of government.[27] Once a clear policy choice has been made, to what degree should the courts recognize the emerging new boundaries and thereby facilitate change? Alternatively, to what degree should the courts preserve historic distinctions between the public and private sector either until legislative action is so unequivocal or until the process of change is so complete that the content of judicial decisions are essentially preordained? These questions will not find final answers here, but it is certain the questions appear at every turn in any consideration of whether qualified immunity is or is not exclusively a means of shielding public officials from the negative effects of insubstantial litigation.

An Overview of the Analytical Approach

This analysis will be divided into five parts. Part I reviews the general rationale upon which the courts have relied when called on to evaluate the appropriateness of either absolute or qualified immunity. Part II adds to this background by reviewing the major Supreme Court cases that have defined the tests to be used in evaluating qualified immunity defenses raised in *Bivens* and in section 1983 actions.[28] Part III shifts the focus of the analysis from a general to a specific level by examining the conflict that divides the federal circuit courts. Based on this consideration of lower court holdings and the position taken by the Supreme Court in *Wyatt*, it is argued in Part IV that there are compelling reasons why private citizens—especially those with responsibilities that otherwise of necessity would be vested in government officials—should enjoy precisely the same degree of immunity from a suit as is enjoyed by their public sector counterparts. This article closes with a brief summary and conclusions section.

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27. Absent such legislation, contracting decisions are subject to nondelegation doctrine challenges. *See* Robbins, *supra* note 25; Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. Rev. 911 (1988).

28. The primary concern of the analysis is with the availability of a qualified immunity defense to defendants in actions brought under 42 U.S.C. § 1983. This purpose is not contradicted by, where appropriate, consideration of cases involving *Bivens* as well as section 1983 actions. The Supreme Court has consistently observed that considerations of access to a qualified immunity defense do not presuppose different tests or standards. For example, in Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2909 (1978), the Court observed that "we deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials."

I. THE ORIGINS AND EVOLUTION OF THE QUALIFIED IMMUNITY DEBATE

Examination of the present conflict regarding the availability of qualified immunity to private defendants who are alleged to have caused a deprivation of constitutional rights requires a careful assessment of how and why the Supreme Court created a qualified immunity for government officials as well as the sources of judicial disagreement when private defendants seek to raise the same barrier to damage suits. Before turning to those core concerns of this analysis, however, it is necessary to put the general issue into perspective. This can be accomplished by a very abbreviated overview of the history and purpose of 42 U.S.C. § 1983 and an equally brief description of how the general rationale for both absolute and qualified immunity has developed in recent decades.[29]

A. The Origins, Purpose, and Recent History of Section 1983

The origins of 42 U.S.C. § 1983 can be traced to Section 1 of the Civil Rights Act of 1871.[30] Its clear purpose was to provide a civil enforcement mechanism for the Fourteenth Amendment. For nearly the first one hundred years of its existence, however, the ability of section 1983 to play this role was undermined by narrow judicial interpretations of its scope. Plaintiffs could rely on this federal remedy if confronted by a state statute or other similarly formal policy statement that abridged a constitutionally protected right,[31] but the remedy vanished when dep-

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29. Emphasizing section 1983 in this fashion is appropriate even though much of the analysis deals with both section 1983 and *Bivens* damage suits. First, the vast majority of suits brought by prisoner plaintiffs are brought under section 1983 rather than *Bivens*. This is largely because only approximately five percent of the nation's total prisoner population is comprised of federal prisoners. Second, the problem of qualified immunity in *Bivens* actions, and also the legal reasoning relied upon by courts addressing its availability, is substantially the same in both section 1983 and *Bivens* suits. *See, e.g.*, *Butz*, 438 U.S. 478, 98 S. Ct. 2894; Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2265 (1979); and Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1980).

30. Ch. 22, § 1, 17 Stat. 13 (1871). The language of the present statute in its entirety reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

31. *See, e.g.*, Myers v. Anderson, 238 U.S. 368, 35 S. Ct. 932 (1915), and Nixon v. Herndon, 273 U.S. 536, 47 S. Ct. 446 (1927).

rivations were proximately caused by state officials whose conduct violated state law. The dominant view was that state officials who acted in violation of state law had not acted "under color of law" and that any remedy would thus have to be found in provisions of state law rather than in section 1983.

Among other things, this narrow view of the scope of section 1983 gave rise to what Professor Charles Abernathy has quite properly described as the "Brer Rabbit defense."[32] Defendants whose conduct violated state law moved to dismiss section 1983 claims by arguing that the only appropriate forum for plaintiffs was a state rather than a federal court. Presumably, of course, the suggestion that only a state court forum would be appropriate was motivated in part by the "home field advantage" they felt would accrue to them in that forum.

Three decades ago the United States Supreme Court, in the landmark case of *Monroe v. Pape*,[33] fired a lethal shot at Brer Rabbit by holding that state officials were subject to suit under 42 U.S.C. §1983 even if their conduct violated state law. The *Monroe* Court also held that the availability of a cause of action under state law was no barrier to section 1983 suits. "The federal remedy," said the *Monroe* Court, "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[34]

Monroe thus laid the foundation for what was quickly to become what many view as the most significant provision of modern federal law.[35] The foundation was soon to be strengthened by at least four developments. First, in *Maine v. Thiboutot*[36] the Court held that section 1983 was not limited to circumstances involving deprivations of constitutional rights and that plaintiffs could rely on it as a remedy for violations of rights secured by federal statutes.[37] Second, in *Thiboutot*

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32. Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441, 1445 (1989).

33. 365 U.S. 167, 81 S. Ct. 473 (1961).

34. *Id.* at 183, 81 S. Ct. at 482.

35. *See, e.g.*, Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees (1986). The authors' claim, expressed in the very first sentence of this influential treatise, is quite matter-of-fact: "No statute is more important in contemporary American law than Section 1 of the Civil Rights Act of 1871."

36. 448 U.S. 1, 100 S. Ct. 2502 (1980).

37. The scope of the holding of Maine v. Thiboutot continues to be debated. Generally speaking, however, plaintiffs can rely on section 1983 remedies when a federal statute has conferred a right to them and the statute does not itself contain an exclusive remedy for the violation of the right conferred. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 101 S. Ct. 1531 (1981); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 101 S. Ct. 2615 (1981); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 107 S. Ct. 266 (1987); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 110 S. Ct. 444 (1989); and Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 110 S. Ct. 2510 (1990).

and in *Martinez v. California*[38] the Court held that section 1983 plaintiffs could bring their claims in either state or federal court. Third, the enactment of the Civil Rights Attorney's Fees Awards Act of 1976, which amended 42 U.S.C. § 1988, authorized trial courts to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs" in section 1983 actions. The definition of "prevailing party" is expansive. For instance, in *Hensley v. Eckerhart*,[39] the Supreme Court held that plaintiffs meet the definition "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[40] Not surprisingly, the availability of fees to prevailing parties has encouraged attorneys to litigate section 1983 claims far more vigorously than they would have otherwise. Finally, although relevant only in cases involving local units of government as potential defendants, the Court's 1978 decision in *Monell v. Department of Social Services*[41] overruled the portion of *Monroe* that held municipalities immune from section 1983 liability. By holding that a municipality was a "person" for section 1983 purposes, *Monell* massively expanded the number of potential section 1983 claims.

In short, the past three decades have witnessed the transformation of section 1983 from its relatively trivial pre-*Monroe* status into the dominant means by which a broad array of constitutional and federal statutory rights are shielded from assault by public officials or private persons whose conduct satisfies the "state action" and "color of law" tests. Its broad scope includes the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Thus, an exceedingly diverse array of conduct involving representatives of state or local government can give rise to a section 1983 suit. Its remedies include "an action at law, suit in equity, or other proper proceeding for redress." Further, similar but less expansive developments involving constitutional deprivations caused by the exercise of federal rather than state power have taken place since the Court's 1971 decision in *Bivens*.[42] These developments in the area of constitutional torts swiftly reached a point resulting in many thousands of suits each year.

B. The Growing Tension Between Judicial Definitions of the Public Interest, the Rights of Section 1983, and Bivens *Plaintiffs*

The manner in which *Monroe* and to a lesser extent *Bivens* required the federal courts to address an issue that necessarily arises in a diverse

38. 444 U.S. 277, 100 S. Ct. 553 (1980).

39. 461 U.S. 424, 103 S. Ct. 1933 (1983).

40. *Id.* at 433, 103 S. Ct. at 1939.

41. 436 U.S. 658, 98 S. Ct. 2018 (1978).

42. In addition to Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971); *see, e.g.*, Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264 (1979), and Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1980).

set of circumstances within which plaintiffs alleged that government conduct caused them to suffer deprivations of rights secured by the Constitution is of central importance to this analysis. It was quickly recognized that subjecting government officials to personal liability for damages creates a dilemma which the courts must approach with considerable caution. On the one hand, of course, there is a clear need to protect the rights of citizens. It is generally recognized that the availability of damage awards can serve that objective both in the obvious sense of fairly compensating victims and in the somewhat less obvious sense of known personal liability exposure serving as a deterrent to further misconduct. Indeed, it often is the case that "[i]njunctive or declaratory relief is useless to a person who has already been injured."[43] In such cases, as the Supreme Court observed in *Bivens*, "it is damages or nothing."[44] On the other hand, however, there is a need "to protect the officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[45]

A persistent tension thus flows from a strong desire on the part of the courts simultaneously to balance the rights of individual plaintiffs, the rights of defendants, and the public interest. It necessarily follows that such a balancing of interests often requires compromise. A major means by which the courts have sought to create a reasonable balance between these often contrary interests has been provided by judicial decisions classifying circumstances under which government officials enjoy either an absolute or a qualified immunity from damage suits. If defendants are in a position which permits them to assert a qualified immunity defense successfully, then the action brought against them ordinarily will not survive beyond their motions for summary judgment.[46]

The primary concern here is with interpretations of when qualified immunity is appropriate. Still, it is worth noting that the availability of either absolute or qualified immunity from damage suits flows in large measure from the function of the officials whose acts are said to have been the causes of injuries rather than from the positions they hold.[47] For example, the Supreme Court has held that "judicial, prosecutorial,

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43. Butz v. Economou, 438 U.S. 478, 504, 98 S. Ct. 2894, 2910 (1978).

44. *Bivens*, 403 U.S. at 410, 91 S. Ct. at 2012.

45. *Butz*, 438 U.S. at 506, 98 S. Ct. at 2911.

46. This will not always be the case, for there are some section 1983 causes of action wherein the intent of the defendant is cast as an element of the alleged constitutional tort. *See, e.g.*, Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 Emory L.J. 369 (1989).

47. *See, e.g.*, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S. Ct. 1967 (1980) and Burns v. Reed, 111 S. Ct. 1934 (1991).

and legislative functions require absolute immunity."[48] Thus, there are circumstances which give rise to an award of absolute immunity from suits to persons other than judges, prosecutors, and legislators when their functions are deemed to be sufficiently quasi-judicial, quasi-prosecutorial, or quasi-legislative.[49] Conversely, the immunity accorded judges, prosecutors, and legislators can become qualified rather than absolute when the functions they perform are not deemed to require so complete a degree of insulation from civil damage suits.[50] Generally speaking, however, most administrative and executive officials are accorded a qualified rather than an absolute immunity from civil damage suits.

Put just a bit differently, decisions to accord an absolute or a qualified immunity from civil damage suits do not flow from a special sympathy the courts have for section 1983 or *Bivens* defendants merely because they are government officials. They flow instead from a consistent desire, when and where appropriate, to prevent such suits from placing those charged with the execution of government policies in the untenable position of being required to exercise discretion while at the same time exposing them to personal liability for discretionary acts they reasonably believed to be lawful and from undermining the willingness of officials to serve the public interest through a vigorous and decisive exercise of their powers.[51] Thus, two themes are prominent in the developing body of what amounts to a federal common law regarding immunity from damage suits. One theme places a priority on the unfairness of holding officials accountable for deprivations of rights which were not clearly established at the time of the deprivations. The other theme justifies immunity from suit primarily on policy grounds.

Although recent decisions arguably place greater emphasis on the latter public interest rationale than on the former fairness rationale, repeatedly one or both of these points has been given emphasis in relevant decisions of the Supreme Court. Thus, for example, in *Pierson v. Ray*[52] the Court observed that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in

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48. Harlow v. Fitzgerald, 457 U.S. 800, 811, 102 S. Ct. 2727, 2734 (1982).

49. *See, e.g., Butz*, 438 U.S. 478, 98 S. Ct. 2894 (administrative law judges and federal hearing examiners are entitled to absolute immunity given their quasi-judicial functions) and Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S. Ct. 1171 (1979) (some officials of county government are entitled to absolute immunity given their quasi-legislative functions).

50. *See, e.g.*, Forrester v. White, 484 U.S. 219, 108 S. Ct. 538 (1988) (non-judicial, administrative acts by judges are not to be accorded absolute immunity).

51. *See, e.g., Harlow*, 457 U.S. at 813, 102 S. Ct. at 2735; and Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987).

52. 386 U.S. 547, 87 S. Ct. 1213 (1967).

damages if he does. . . . [T]he same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held to be unconstitutional, on its face or as applied."[53] A few years later the Court noted "two mutually dependent rationales" in *Scheuer v. Rhodes*:[54]

> (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.[55]

Similarly, the 1982 case of *Harlow v. Fitzgerald*[56] placed heavy emphasis on the general costs of damage suits by noting that such suits impose

> a cost not only to the defendant officials, but to society as a whole. These social costs 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. . . . [Also] 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."[57]

Finally, in *Anderson v. Creighton*[58] the Court noted that "permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[59]

These and other related features of the major qualified immunity cases that have been decided by the Supreme Court require more careful and individualized treatment before considering the conflicting views on the availability of immunity to private party defendants. Indeed, because both the Supreme Court and the lower courts have varied the importance they assign to common law immunities which were available when section 1983 was enacted in 1871, the historical dimension of the issue demands special attention.

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53. *Id.* at 555, 87 S. Ct. at 1218. It should be noted that the Court used this case to extend its holding in Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783 (1951), regarding the availability of absolute immunity to legislators, acting within their legislative roles, to judges.

54. 416 U.S. 232, 94 S. Ct. 1683 (1973).

55. *Id.* at 240, 94 S. Ct. at 1688.

56. 457 U.S. 800, 102 S. Ct. 2727 (1982).

57. *Id.* at 814, 102 S. Ct. at 2736, quoting from Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S. Ct. 803 (1950).

58. 483 U.S. 635, 107 S. Ct. 3034 (1987).

59. *Id.* at 638, 107 S. Ct. at 3038.

II. THE JUDICIAL DEVELOPMENT OF QUALIFIED IMMUNITY

Efforts by commentators and courts to define the nature and scope of immunity as it pertains to constitutional torts have confronted a host of problems from the very beginning. Not the least consequential of these problems flows from the fact that the plain language of 42 U.S.C. § 1983 does not provide for either absolute or qualified immunity. To the contrary, it simply states that "[e]very person who," under color of state law, "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable . . . in an action at law, suit in equity, or other proper proceeding for redress."[60] Thus, the plain language of the statute suggests that no person, without regard to the nature of his or her office or to the function he or she serves, will be permitted to assert either an absolute or a qualified immunity from damage suits brought under section 1983 or, presumably, *Bivens*.[61]

It is true, of course, that the Supreme Court resolved this problem to its own satisfaction in early immunity cases. In *Pierson*,[62] the first case in which the Court held that a qualified immunity was available to some section 1983 defendants, a majority of the Court brushed aside the apparent problem. The Court said,

> [w]e do not believe that this settled principle of law [the availability of absolute immunity to judges as a matter of common law] was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities.[63]

Even in 1967, however, it was far from clear whether the Court was validly interpreting the intent of the Forty-Second Congress or was responding to its own social policy considerations by recognizing immunities for section 1983 defendants which the Forty-Second Congress had not envisioned in 1871. Indeed, a sound case can be made to support the hypothesis that the Forty-Second Congress fully understood

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60. 42 U.S.C. § 1983 (1981).

61. 403 U.S. 388, 91 S. Ct. 1999 (1971). Here again it should be emphasized that judicial decisions regarding the availability of either absolute or qualified immunity consistently have failed to draw a consequential distinction between *Bivens* actions brought against federal officials and section 1983 actions brought against state officials or private parties. Even in recent opinions of the Supreme Court reviews of precedent blend these two types of constitutional torts together with little or no effort to distinguish one from the other. *See, e.g., Anderson*, 483 U.S. 635, 107 S. Ct. 3034.

62. 386 U.S. 547, 87 S. Ct. 1213 (1967).

63. *Id.* at 554, 87 S. Ct. at 1218; *see also* Tenney v. Brandhove, 341 U.S. 367, 71 S. Ct. 783 (1951).

that the legislation it was considering would deprive officials of common-law immunity defenses but decided not to recognize those defenses given the broad remedial purposes of the statute it later enacted.[64]

One need go no further than the text of *Pierson* itself to begin to support this position. Specifically, in *Pierson*[65] Justice Douglas wrote a sharp dissent to the majority opinion just as he previously had dissented from an earlier holding in *Tenney v. Brandhove*,[66] a 1951 case in which the Court accorded absolute immunity from suit to legislators so long as they "were acting in a field where legislators traditionally have power to act."[67] With multiple references to the debate which took place before this civil rights legislation was enacted, Justice Douglas argued that

> [t]he position that Congress did not intend to change the common-law rule of judicial immunity ignores the fact that every member of Congress who spoke to the issue assumed the words of the statute meant exactly what they said and that judges would be liable. . . . In light of the sharply contested nature of the issue of judicial immunity it would be reasonable to assume that the judiciary would have been expressly exempted from the wide sweep of the section, if Congress had intended such a result.[68]

Thus, quite apart from what tests are appropriate for determining when defendants in constitutional tort actions enjoy the right to assert a qualified immunity from suit, the history of judicial efforts to accord at least some officials some type of immunity are beset with much ambiguity. The problem cannot be validly brushed aside as the Court did in *Pierson* via the simple assertion that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities"[69] when it enacted what is now codified by 42 U.S.C. § 1983. Indeed, sharp criticism of such a simplistic approach is abundant. Recently, for example, Rudovsky argued that:

> Its development in the Supreme Court has been marked by ad hoc decision-making, conflicting rationales, and a high degree of doctrinal manipulation. Today, it stands as a legal principle defined primarily by the Court's own policy judgment that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be sub-

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64. *See, e.g.*, Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741 (1987).

65. *Pierson*, 386 U.S. at 558, 87 S. Ct. at 1220 (Douglas, J., dissenting).

66. 341 U.S. 367, 71 S. Ct. 783 (1951).

67. *Id.* at 379, 71 S. Ct. at 789.

68. *Pierson*, 386 U.S. at 561, 563, 87 S. Ct. at 1221, 1222.

69. *Id.* at 554, 87 S. Ct. at 1218.

ordinated to the governmental interest in effective and vigorous execution of governmental policies and programs.[70]

Rudovsky's criticism of the present status of the qualified immunity defense is perhaps a bit too caustic, but he is undeniably correct in pointing to a balancing of interests test that the Court has struggled to create. A fair reading of the cases that have been decided by the Court supports the view that a flexible blend of historical interpretation and social policy considerations has provided the foundation for this set of opinions.

The Court's emphasis on the history of section 1983 need not occupy us any longer. More important to the purpose here is identifying the evolving standards the Court has established for evaluating the viability of qualified immunity defenses. The first case in which this issue was decided was *Pierson*,[71] which involved the liability of several police officers and a municipal police justice. The officers had arrested several civil rights demonstrators and charged each with a misdemeanor. Although the case was remanded for retrial,[72] the Court suggested that a police officer should be excused from liability "for acting under a statute he reasonably believed to be valid,"[73] even if the statute later was found to be unconstitutional, and held that "the defense of good faith and probable cause . . . is . . . available to them [police officers] in the action under Section 1983."[74] However, beyond this modest language, a reference to the linkage between the recognition of a qualified immunity in section 1983 actions and some liability limitations previously recognized in tort law,[75] and the fact that the case made immunity considerations an important aspect of constitutional tort jurisprudence, one finds little in *Pierson* on which to base the prediction of future developments.

A few years later the Court again confronted problems regarding the availability of qualified immunity in the case of *Scheuer v. Rhodes*.[76] *Scheuer* involved section 1983 damage claims brought against the Governor of Ohio and various other state officials on behalf of students who were killed during the anti-war demonstrations at Kent State University. The Court rejected any general rule that the government officials enjoy an absolute immunity from damage suits,[77] and noted that

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70. David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 36 (1989).

71. *Pierson*, 386 U.S. 547, 87 S. Ct. 1213.

72. *Id.* at 558, 87 S. Ct. at 1219.

73. *Id.* at 555, 87 S. Ct. at 1218.

74. *Id.* at 557, 87 S. Ct. at 1219.

75. *Id.*

76. 416 U.S. 232, 94 S. Ct. 1683 (1973).

77. *Id.* at 232, 94 S. Ct. at 1683.

> in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of the discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. *It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.*[78]

The implication of *Scheuer* was that future qualified immunity cases would confront *both* an objective test via its "reasonable grounds for the belief" language *and* a subjective test via its "good-faith belief" language.[79] It was uncertain which party would bear the burden of proof.

However clear the implications of *Scheuer* may now appear to have been regarding the evaluation of qualified immunity defenses, less than a year was to pass before the Court chose to clarify its position in *Wood v. Strickland*.[80] This somewhat unusual case involved a section 1983 action brought against members of an Arkansas school board by two sixteen-year-old girls following a school board decision to expel them from a public school after a determination that they had served "spiked" punch at a school function.[81] Noting lower court confusion regarding interpretations of qualified immunity raised by school officials,[82] and also noting the quasi-legislative and the quasi-judicial functions school board members often have,[83] the Court held that school board members are entitled to a qualified immunity.

More importantly, the Court sought to explain its position on the objective and subjective components of the test implied in *Scheuer*. "As we see it," said the Court,

> the appropriate standard contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right [the subjective test], but an act violating a student's constitutional rights can be no more justified by ignorance or

78. *Id.* at 247-48, 94 S. Ct. at 1692 (emphasis added).

79. This case expanded the class of government officials to whom a qualified immunity defense was available in section 1983 from the police, the group identified by *Pierson*, to include state governors, chief executive officers of state universities, and senior and subordinate officers of state national guard groups.

80. 420 U.S. 308, 95 S. Ct. 992 (1975).

81. *Id.* at 311-13, 95 S. Ct. at 995-96.

82. *Id.* at 308, 95 S. Ct. at 994.

83. *Id.* at 319, 95 S. Ct. at 999.

> disregard of settled, indisputable law [the objective test] on the part of one entrusted with supervision of students' daily lives than be the presence of actual malice. . . . Therefore . . . we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took . . . 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.[84]

Thus, school board members, and by implication any others who claimed qualified immunity, would not be shielded from damage claims in section 1983 actions if they acted *either* with "the malicious intention to cause a deprivation"[85] *or* with a "disregard of . . . clearly established constitutional rights."[86] Put differently, the *Wood* Court depicted the qualified immunity defense as one which posed *both* questions of law to be resolved on a motion for summary judgment *and* a factual issue to be resolved quite probably if not necessarily at trial—presupposing, of course, allegations of malice. This two-pronged approach to evaluating qualified immunity remained in place throughout the balance of the 1970s and the early part of the 1980s as the Supreme Court extended the availability of qualified immunity to other categories of government officials.[87]

The objective prong of the *Wood* test caused the lower courts relatively few problems. They understood the test to be one which posed a purely legal issue capable of resolution on a motion for summary judgment by defendants. The same cannot be said of the subjective prong of the test. Its application often involved factual contradictions

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84. *Id.* at 321-22, 95 S. Ct. at 1000-01.

85. *Id.*

86. *Id.*

87. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486 (1975) (qualified immunity defense made available to state mental hospital administrators), and Procunier v. Navarette, 434 U.S. 555, 98 S. Ct. 855 (1978) (qualified immunity defense made available to corrections officials). Some commentators have argued that post-*Wood* cases expanded the scope of the qualified immunity defense. *See, e.g.*, Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 Temp. L. Rev. 61 (1989). The point need not be debated here, but there is language in *Navarette* that can be seen as either clarifying or expanding the objective prong of the *Wood* test:

> the immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct violated the constitutional norm.

Procunier, 434 U.S. at 562, 98 S. Ct. at 860.

between plaintiffs' assertions of malicious intent on the part of defendants and defendants' claims that they had no such intent. This is precisely the type of question that courts traditionally have depended on trial juries to answer.

Not surprisingly, the subjective prong of the *Wood* test invited creative pleadings on the part of attorneys representing section 1983 plaintiffs "because even conclusory allegations of malicious intent would force an official into court to defend against an otherwise frivolous lawsuit."[88] Reliance on this tactic, of course, undermined the goal of the *Wood* Court to use the qualified immunity test as a means of shielding officials from the loss of time and resources they would encounter if they were continuously obliged to mount full-scale legal defenses when they encountered frivolous lawsuits.

Clearly, then, the Court's approach to qualified immunity in *Wood*, while perhaps adding some necessary clarification to its earlier cases, fell short of achieving its policy objectives at the same point at which the growing appeal of section 1983 was spawning a flood of constitutional tort litigation. The opportunity to alleviate the mounting tension came in *Harlow v. Fitzgerald*.[89] There the Court began by noting that

> [t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. . . . It cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs 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. . . . In identifying qualified immunity as the best attainable accommodation of competing values . . . we relied on the assumption that this standard would permit "[i]nsubstantial lawsuits [to] be quickly terminated."[90]

The *Harlow* Court went on to recognize explicitly that the subjective prong of the two-pronged *Wood* test had undermined the goal articulated in *Butz v. Economou*[91] of precluding insubstantial claims from proceeding

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88. Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 Yale L.J. 126, 132 (1985).

89. 457 U.S. 800, 102 S. Ct. 2727 (1982).

90. *Id.* at 813-14, 102 S. Ct. at 2736 (quoting from Butz v. Economou, 438 U.S. 478, 507-08, 98 S. Ct. 2894, 2911-12 (1978)).

91. 438 U.S. 478, 98 S. Ct. 2894 (1968).

to trial. The Court concluded that "it now is clear that substantial costs attend the litigation of the subjective good faith of government officials."[92] In particular, the Court argued, "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government."[93]

Based on these considerations—considerations clearly driven more by a perceived need to resolve a social policy dilemma than by any deference to common-law immunities which may have existed in 1871—the Court then abandoned the subjective prong of the *Wood* test and held that "government 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."[94] The expressed view of the Court was that relying exclusively on a purely objective test

> as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. . . . If the law . . . was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.[95]

Additionally, the *Harlow* Court held out the possibility that officials might be able to plead a qualified immunity even in cases involving infringements of clearly defined rights "if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard."[96]

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92. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737.

93. *Id.* at 817, 102 S. Ct. at 2737-38.

94. *Id.* at 818, 102 S. Ct. at 2737. Even though *Harlow* involved a *Bivens* rather than a section 1983 action, the Court, quoting from its earlier language in *Butz*, made it clear that the holding in *Harlow* was intended to apply to section 1983 cases.

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. Section 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under Section 1983 and suits brought directly under the Constitution against federal officials."

Id. at 818 n.30, 102 S. Ct. at 2738 n.30.

95. *Id.*

96. *Id. See also* Barnett v. Housing Auth., 707 F.2d 1571 (11th Cir. 1983); McElveen v. County of Prince William, 725 F.2d 954 (4th Cir.), *cert. denied*, 469 U.S. 819, 105 S. Ct. 88 (1984); Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010, 106 S. Ct. 1183 (1986); Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988).

Notwithstanding the clear intent of the *Harlow* Court to fashion a purely objective means by which the lower courts could dispose of meritless *Bivens* and section 1983 cases at the earliest possible phase of litigation, a host of substantive and procedural problems left unresolved by *Harlow* spawned subsequent clarifying cases[97] as well as a good deal of scholarly commentary.[98] Many if not most of the problems the Court has agreed to consider have involved such questions as when "statutory or constitutional rights of which a reasonable person would have known" became "clearly established,"[99] the amount of time that should pass between when a statute is enacted or a right is declared and the time at which officials of varying ranks and with varying access to counsel reasonably can be expected to have knowledge of the implicated right, and the degree to which clearly established law must match the facts of new cases.

Such problems as these surprised no one. In *Harlow*, for instance, the Court expressly declined to define "the circumstances under which 'the state of the law' should be 'evaluated by reference to the opinions of this Court, the Courts of Appeals, or of the local District Court.'"[100] Similarly, because even the objective test established by *Harlow* requires that attention be given to the facts of individual cases as well as to the status of existing law at the time of alleged infringements of rights, it is improbable that the *Harlow* Court or any other court could formulate more specific standards than those established in *Harlow* and refined in at least some regards by such recent cases as *Anderson*.[101]

There remain, in short, problems with the objective test created in *Harlow* and its progeny for evaluating qualified immunity claims. There

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97. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452 (1982); Davis v. Scherer, 468 U.S. 183, 104 S. Ct. 3012 (1984); Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985); Malley v. Briggs, 475 U.S. 335, 106 S. Ct. 1092 (1986); and Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987).

98. *See, e.g.*, Balcerzak, *supra* note 88; Alfredo Garcia, *The Scope of Policy Immunity From Civil Suit Under Title 42 Section 1983 and* Bivens*: A Realistic Appraisal*, 11 Whittier L. Rev. 511 (1989); Catherine D. Glover and Elizabeth W. Fox, *Qualified Immunity for Private Party Defendants in Section 1983 Civil Rights Cases*, 5 St. John's J. Legal Comment. 267 (1980); Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 Ariz. L. Rev. 115 (1991); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 Ga. L. Rev. 597 (1989); John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 Cornell L. Rev. 462 (1990); Matasar, *supra* note 64; Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. Pitt. L. Rev. 935 (1989); Urbonya, *supra* note 87; Gildin, *supra* note 46; and Note, Anderson v. Creighton*: Qualified Immunity—Is Good Faith All That Is Required?*, 10 Bridgeport L. Rev. 255 (1989).

99. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982).

100. *Id.* at 819 n.32, 102 S. Ct. at 2738 n.32 (quoting from Procunier v. Navarette, 434 U.S. 555, 565, 98 S. Ct. 855, 861 (1978)).

101. *Anderson*, 483 U. S. 635, 107 S. Ct. 3034.

is no reason to suspect that these problems will be resolved soon. Importantly, however, the Court has repeatedly observed that permitting discretionary government activities to give rise to meritless civil damage suits so adversely affects the ability of government to meet its obligations to the public that defendants in such suits must have a right to terminate such suits by motions for summary judgment. Indeed, the Court has made it abundantly clear that "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability."[102]

The Court has described its recognition of the appropriateness of according a broad spectrum of public officials access to qualified immunity from section 1983 and *Bivens* damage suits as having flowed from understandings of immunity defenses that were well-established when the Forty-Second Congress enacted what is now 42 U.S.C. § 1983. As has long been its habit, the Court thereby has sought to deny that it has created any new body of immunity law. However, this time-honored judicial tactic is almost universally viewed as being an altogether transparent means by which the Court has justified its creation of a new body of immunity law during recent decades. Discussing both absolute and qualified immunities, Professor Schuck describes this reality accurately and concisely:

> Damage remedies under Section 1983 are subject to whatever official or governmental immunities the defendant is entitled to invoke. The immunities are wholly creatures of federal common law; their availability in a given case depends upon a two-part inquiry that analyzes both historical and policy considerations. First, if an immunity was established at common law in 1871 (when Section 1983 was enacted), did the enacting Congress intend to preserve or abrogate it? Second, if an immunity was not so established, would the purposes of Section 1983 be advanced by recognizing it?[103]

The problem to which attention now turns, therefore, involves how the lower courts have interpreted the scope of existing qualified immunity law when various categories of private rather than government actors have sought to rely on it in their efforts to shield themselves from section 1983 and *Bivens* damage suits. The true question being raised is substantially the same as Professor Schuck's second question. Would the purposes of section 1983 and *Bivens* be properly served by permitting private persons to claim a qualified immunity from suit and, if so, what standards ought to define the circumstances under which such an immunity is appropriate?

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102. Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985) (orders denying qualified immunity subject to immediate appeal) (emphasis in original).

103. Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 203-04 (1983). *See also* Matasar, *supra* note 64, at 64.

III. The Availability of Qualified Immunity to Private Defendants in Section 1983 and *Bivens* Actions

A critical evaluation of judicial views regarding the availability of qualified immunity to private parties in section 1983 or *Bivens* actions is not easy. Much of the difficulty flows from the limited Supreme Court guidance and the modest number of section 1983 and *Bivens* cases that have reached the lower federal courts. Further, forecasting how the immunity issue will be resolved where private parties have acted on behalf of government as a consequence of government decisions to privatize methods of service delivery is hampered by the fact that few reported cases were factually based on this type of relationship between the public and private sectors.

Over and above these relatively matter-of-fact obstacles to achieving the purpose of this analysis is a more general problem. The fundamental purpose of section 1983 is to provide a civil remedy for plaintiffs who suffer constitutional deprivations because of the conduct of state officials. *Bivens* actions have substantially the same purpose, but they address deprivations caused by federal officials. Thus, purely private conduct, including conduct that undeniably causes deprivations of well-established constitutional rights, cannot provide a suitable basis for either a section 1983 or a *Bivens* suit. Only when the relationship between government and private persons is such that the private persons are transformed into state actors in the section 1983 context or federal actors in the *Bivens* context can plaintiffs establish a cause of action against a private person.

The effect of this barrier to potential section 1983 and *Bivens* plaintiffs is clear. The plaintiff must establish that the relationship between a private person and state or federal officials allows the private person to be cast as a defendant in a constitutional tort action. If plaintiffs are unable to shoulder that burden, any consideration of the immunity from suit the private party might assert becomes superfluous. If, on the other hand, that burden is shouldered successfully, the burden shifts to the private party defendant.

In practical terms, then, any consideration of qualified immunity for private defendants in section 1983 or *Bivens* damage suits necessarily involves a two-pronged analysis. Even though the focus of this commentary is on the qualified immunity dimension of this analysis, at least a general consideration of the "state action" and "federal action" dimension is necessary.

A. Transforming Private Parties Into State or Federal Actors

Because the vast majority of reported cases have arisen in the section 1983 context, it is appropriate to focus on how a private party can be transformed into what amounts to a state actor. Importantly, however, substantially the same logic is relied upon when the federal courts

confront *Bivens* suits in which private persons are named as defendants.[104]

The core analytical problem requires drawing a bright line between the "state action" requirement that must be satisfied before the "shield" of the Fourteenth Amendment can be raised and the "color of law" element one finds in section 1983. In the typical section 1983 cases involving government officials, this important distinction is rather routinely brushed aside. In *United States v. Price*,[105] for example, the Court observed that "[i]n cases under Section 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."[106] Indeed, even when confronted with cases in which government officials had engaged in conduct which violated state law, the Court has held that the conduct still constituted state action and still satisfied the color of law requirement.[107]

Judicial approaches change significantly when a private party rather than a government official is cast as a defendant. "Under color of law" ceases to be equivalent to "state action." Instead, assessments of whether a private party qualifies as a section 1983 defendant must distinguish and then consider separately the state action requirement of the Fourteenth Amendment and the color of law requirement of section 1983. The most distinctive feature of this review is that private conduct which is found to meet the "color of law" requirement does not by itself transform private acts into conduct which is fairly attributable to the state. Although the plain language of the statute speaks in terms of persons who act "under color of any statute, ordinance, regulation, custom, or usage" of any state, interpretations of section 1983 in cases involving private defendants consistently have demanded evidence of some type or degree of linkage between private conduct and the state itself.[108]

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104. *See, e.g.*, Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984); and F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989).

105. 383 U.S. 787, 86 S. Ct. 1152 (1966).

106. *Id.* at 794 n.7, 86 S. Ct. at 1157 n.7.

107. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473 (1961).

108. The Court has not developed a precise test for the circumstances that transform a private actor who cannot be cast as a defendant in a section 1983 or *Bivens* suit into a quasi-state actor against whom such suits may be brought. In Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961), for example, the Court observed that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." The Court on numerous occasions has sought to clarify its position on the issue, the most notable of these being Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S. Ct. 2744 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764 (1982); and Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777 (1982). More recent cases suggest that the issue continues to pose considerable difficulties for the lower courts. *See, e.g.*, West v. Atkins, 487 U.S. 42, 108 S. Ct. 2250 (1988) and National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454 (1988).

This demand, in turn, has resulted in variously named tests being relied upon before conduct satisfying the section 1983 color of law requirement also would be viewed as satisfying the Fourteenth Amendment state action requirement. It is not necessary for each of the various tests to be examined in any detail here.[109] It is sufficient to note that private conduct, although not ordinarily subject to claims brought under section 1983 even when the conduct complained of was authorized by state law, becomes subject to a section 1983 suit only when "the conduct allegedly causing the deprivation of a federal right" is "fairly attributable to the State."[110] This is possible when the private party "has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."[111] Even though the fair attribution test of *Lugar* is not impossible for section 1983 or *Bivens* plaintiffs to meet, the difficulties it presents are such that private parties only infrequently appear as defendants.

B. Cases Addressing the Availability of Qualified Immunity to Private Defendants

As noted earlier, decisions regarding the availability of qualified immunity to private defendants in either section 1983 or *Bivens* damage suits are not numerous. Apart from the problems plaintiffs encounter in meeting the fair attribution test of *Lugar*, the paucity of cases is a consequence of the relatively recent origins of qualified immunity in the section 1983 context and the even more recent origins of *Bivens* suits. The first recognition of a qualified immunity even for public officials in section 1983 cases came in 1967 with the holding of the Court in *Pierson v. Ray*;[112] *Bivens* actions did not exist before 1971. Further, as was established in Part II of this analysis, the law of qualified immunity did not develop rapidly. Indeed, significant expansions of the scope of and meaningful efforts to define the standards for qualified immunity defenses did not come until the period following the 1974 holding of the Court in *Scheuer v. Rhodes*.[113]

A majority of the federal circuit courts have taken a position on the issue notwithstanding influences that have combined to limit the number of reported cases within which private access to qualified immunity is addressed. As will quickly become apparent, the differences in their positions are sharp.

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109. *See generally* 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation § 2 (3d ed. 1991); Thomas & Calvert Hanson, *supra* note 3; Schwartz & Kirklin, *supra* note 35, at 98-112.

110. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 2753 (1982).

111. *Id.*, 102 S. Ct. at 2754.

112. 386 U.S. 547, 87 S. Ct. 1213 (1967).

113. 416 U.S. 232, 94 S. Ct. 1683 (1974).

1. Lower Court Decisions According Qualified Immunity to Private Defendants

Folsom Investment Co. v. Moore,[114] a Fifth Circuit case, involved a private party who had invoked a state attachment statute. *Folsom* is a better illustration than would be provided by isolated earlier cases involving private defendants because it was not decided until after the Supreme Court issued opinions in both *Lugar* and *Harlow*. Indeed, the Fifth Circuit delayed deciding this case until the state action issue before the Court in *Lugar* had been resolved.[115]

Based at least in significant part on a portion of the Court's opinion in *Lugar*,[116] the Fifth Circuit held "that a Section 1983 defendant who has invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional."[117] This holding, the court went on to observe, did not flow from any judgment that the qualified immunity was derived from any immunity the county sheriff may have had when he enforced the attachment statute. Specifically, said the court:

> the private party who invokes a presumptively valid attachment law is not entitled to an immunity because the officer executing it is. Rather, quite independently, the private party is entitled to an immunity because of the important public interest in permitting ordinary citizens to rely on presumptively valid state

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114. 681 F.2d 1032 (5th Cir. 1982); *see also* Howard Gault Co. v. Texas Rural Legal Aid, 848 F.2d 544 (5th Cir. 1988) (trial court's denial of qualified immunity to private defendants who had not acted with objective good faith was appropriate).

115. *Folsom*, 681 F.2d at 1037.

116. Writing for the majority in *Lugar*, Justice White observed that

> [i]n our view . . . this problem [subjecting private persons to liability for section 1983 damage claims] should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23, 102 S. Ct. 2744, 2756 n.23 (1982). Justice Powell, whose dissenting opinion was joined by Justices Rehnquist and O'Connor, agreed with this suggestion: "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." *Id.* at 956 n.14, 102 S. Ct. at 2763 n.14 (Powell, J., dissenting).

117. *Folsom*, 681 F.2d 1032, 1037. The holding also sought to apply the *Harlow*-based objective test. Of potential significance in that regard is the Fifth Circuit's view that application of this objective test in cases involving private defendants might reasonably be less stringent than would be the test as applied to public officials. Specifically, the Court suggested that "we are unwilling to conclude for all times that a private citizen should be charged with the same degree of knowledge as to whether a statute or practice is unconstitutional that would be attributed to a public official." *Id.*

> laws, in shielding citizens from monetary damages when they reasonably resort to a legal process later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal. . . . *There are compelling public policy justifications for an immunity protecting a private citizen. . . . These reasons alone justify an immunity.*[118]

Over and above compelling policy reasons, the *Folsom* court also noted the pre-section 1983 availability of a common law defense in attachment cases.[119] This appears to reflect the court's effort to distinguish this case from the position the Supreme Court had taken a year earlier in *Owen v. City of Independence*,[120] a case in which the Court denied immunity defenses to local units of government in part on the basis of the lack of related common law defenses at the time section 1983 was enacted. Thus, the *Folsom* court, although basing its holding primarily on policy considerations, was able to contend that "[w]e have merely transformed a common law defense extant at the time of Section 1983's passage into an immunity."[121]

Other courts confronted with debtor-creditor cases both within and beyond the boundaries of the Fifth Circuit have been persuaded that private defendants in section 1983 damage suits should be permitted to assert a qualified immunity from monetary damage suits. For example, in *Buller v. Buechler*[122] the Eighth Circuit confronted a section 1983 action brought against private parties following their invocation of a state garnishment statute with the aid of state officials.[123]

The *Buller* court emphasized the injustice that would arise were state officials permitted to plead qualified immunity when the private parties with whom they were involved could not avail themselves of the same immunity defense.[124] The court noted both the pre-1871 existence of a

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118. *Id.* at 1037-38 (emphasis added).

119. *Id.* at 1038.

120. 445 U.S. 622, 100 S. Ct. 1398 (1981).

121. *Folsom*, 681 F.2d 1032, 1038.

122. 706 F.2d 844 (8th Cir. 1983). *See also, e.g.*, Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487 (8th Cir. 1987), *cert. denied*, 486 U.S. 1001, 108 S. Ct. 1723 (1988) (the Eighth Circuit, citing *Buller*, acknowledged the availability of a qualified immunity to private parties who relied on a presumptively valid attachment statute).

123. The Eighth Circuit has re-stated substantially the same position regarding qualified immunity in other cases. *See, e.g.*, Lux v. Hansen, 886 F.2d 1064, 1066-67 (8th Cir. 1989) (protection of qualified immunity extends to private party defendants who act in joint participation with public officials).

124. Note should be made, however, of a subsequent Eighth Circuit case, Chicago & N.W. Transp. Co. v. Ulery, 787 F.2d 1239 (8th Cir. 1986). The case involved a private

defense based on probable cause in analogous areas of tort law and compelling social policy justifications for permitting private defendants to rely on a qualified immunity defense. "It would be anomalous," observed the court,

> 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.[125]

Similarly, in *Jones v. Preuit and Mauldin*[126] the Eleventh Circuit, confronted with an attachment proceeding which had given rise to a section 1983 damage claim, held that a private defendant is entitled to qualified immunity unless, following the *Harlow* standard, "he knew or should have known that his actions violated clearly established constitutional rights."[127] The Eleventh Circuit emphasized the injustice that would necessarily follow private defendants and public officials were treated unequally. "Since *Lugar* rests on the premise that private and public actors may sometimes be equated, there is little reason to deny to private defendants the type of immunity which has been granted to public defendants."[128] Further, the Eleventh Circuit recognized a significant point that escaped attention in many other cases. Specifically, when the dual requirements of section 1983 for proof of conduct under color of law and of the Fourteenth Amendment for state action are satisfied in section 1983 damage suits brought against private parties, those private parties are transformed for all relevant purposes into quasi-state actors and thus would appear to be entitled to the same immunity from suit that traditional state actors enjoy.

Although these and related cases from the Fifth, Eighth, and Eleventh Circuits differ in various regards, they share a common denominator—each involved a private defendant whose assertion of qualified immunity was based on conduct authorized by a presumptively valid

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party defendant in a section 1983 action, and the Eighth Circuit refused to apply the rule of immediate appealability of refusals to grant qualified immunity to government officials established in Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985), on the grounds that the rule "has no application . . . where the defendants . . . are not public officials but private parties suable under 42 U.S.C. Section 1983 only because they allegedly conspired with other persons acting under color of state law." *Chicago & N.W. Transp. Co.*, 787 F.2d at 1240-41.

125. *Buller*, 706 F.2d at 851.

126. 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 489 U.S. 1002, 109 S. Ct. 1105 (1989).

127. *Id.*

128. *Id.* at 1325.

state statute. With the scope of both section 1983 and *Bivens* damage suits reaching beyond conduct authorized by statutes, it is reasonable to ask whether this statutory common denominator serves as a necessary condition for qualified immunity.

The apparent answer is that qualified immunity can be asserted in other types of situations. This is particularly well-illustrated by *DeVargas v. Mason & Hanger-Silas Mason Co.*[129] *DeVargas* involved both a section 1983 and a *Bivens* action, the *Bivens* action flowing from the alleged involvement of federal officials in conduct said to have deprived the plaintiff of access to employment. Importantly, the conduct of the private defendant was said to have been required by the terms of a government contract rather than a state or federal statute. Although the trial court had recognized the immunity of the government officials from damage suits, it had denied the private defendant's claim to qualified immunity. Under the rule established by *Mitchell*,[130] the Tenth Circuit was asked to review the denial of immunity.

The *DeVargas* court experienced little difficulty in reaching the holding that the trial court had erred in its denial of qualified immunity to the private defendants. Those defendants, the court argued, "reasonably thought that their contract with a government body *required* them to act in a certain manner."[131] The court then identified two compelling reasons why the private defendants deserved qualified immunity from damage suits.

> First, the government authority involved requires private defendants to act as they do. Indeed, were they to act otherwise they would likely be liable for breach of contract to the governmental body with whom they contracted. Not to allow immunity here places defendants between Scylla and Charybdis—potentially liable either to plaintiffs for obeying the contract, or to government bodies for breaching it.[132]

More important to the purpose of this analysis, the court went on to argue that

> the functions which the private parties performed pursuant to contract are functions which governmental employees would perform had the government not contracted them out. The Supreme Court instructs courts to examine the function of individual defendants—the nature of their individual responsibilities—not their status, in resolving immunity defenses. . . . *We conclude*

129. 844 F.2d 714 (10th Cir. 1988), *cert. denied*, 111 S. Ct. 799 (1991).
130. Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806 (1985).
131. *DeVargas*, 844 F.2d at 722 (emphasis in original).
132. *Id.* at 721-22.

that when private party defendants act in accordance with the duties imposed by a contract with a governmental body, perform a governmental function, and are sued solely on the basis of those acts performed pursuant to contract, qualified immunity is proper.[133]

2. *Lower Court Decisions Refusing to Accord Qualified Immunity to Private Defendants*

These and related cases coming from the Fifth, Eighth, Tenth, and Eleventh Circuits have not been persuasive to the other federal circuits that have considered the issue.[134] Elsewhere one finds a combination of disagreement, confusion, and indecision. Thus, refusals to accord qualified immunity to private defendants must be categorized somewhat awkwardly into refusals to take a position on the issue, proposals that something analogous to but different from qualified immunity be made available to private defendants, and simple rejections of the hypothesis that qualified immunity can be asserted by private defendants in constitutional tort damage suits.

First, confusion about or refusals to rule on the qualified immunity issue is well-illustrated by *Henry v. Ryan*,[135] a recent section 1983 case decided by the district court for the Northern District of Illinois, which falls within the Seventh Circuit. In this unusual case a state court found Henry in contempt following his refusal to provide blood and saliva samples as required by a grand jury subpoena and confined him in a county jail until he agreed to provide the samples. Henry claimed violations of rights secured by the Fourth Amendment and subsequently brought a section 1983 action against DuPage County, Illinois, various county officials, and private employees of a corporation which provided medical services to the county in its jail. The government officials and the private employees contended that any applicable Fourth Amendment right was not clearly established at the time of the incident and that they therefore enjoyed a qualified immunity from Henry's damage suit.

The district court had little difficulty in finding the government officials immune from the damage aspect of the plaintiff's suit. It also had little difficulty in finding that the medical services firm and its employees met the fair attribution test the Supreme Court developed in *Lugar* and applied in the contract medical services case of *West v.*

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133. *Id.* at 722 (emphasis added).

134. Folsom Inv. Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982); Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983); *DeVargas*, 844 F.2d 714; and Jones v. Preuit and Mauldin, 808 F.2d 1435 (11th Cir. 1987).

135. 775 F. Supp. 242 (N.D. Ill. 1991).

Atkins.[136] However, finding no guidance in earlier Seventh Circuit cases, the court looked to cases previously decided in the Fifth, Eighth, and Tenth Circuits.

The court saw a particularly close relationship with the decision of the Tenth Circuit in *DeVargas v. Mason & Hangar-Silas Mason Co.*[137] and focused on the contractual obligations of the private firm and its employees. This immediately produced confusion. The *DeVargas* court had not confronted the government contracting for jail or prison services and had explicitly refused to reach any conclusion regarding "the propriety of granting qualified immunity when a private contractor performing a governmental function, such as operating a prison, performs acts not required by the contract."[138] The district court then observed that "[a]lthough the company and its employees seem to have been performing a function ordinarily within the government's province, it is not clear whether the actions taken . . . were pursuant to a policy dictated by contractual terms and/or applicable state law."[139] The court declined to rule on the qualified immunity issue until it had more information regarding the nature of the services provided by the private firm and its employees.

A second and in some ways an even more troublesome approach to the immunity issue is illustrated by *Duncan v. Peck*.[140] There the Sixth Circuit began its analysis in a traditional, straightforward manner by considering whether common-law immunities were available to private defendants in attachment cases at the time when section 1983 was enacted and whether strong policy reasons justifying immunity could be identified.[141]

Unlike most of the cases discussed previously, however, the Sixth Circuit found no basis for according qualified immunity to private defendants either in common law or in social policy considerations and thus declined to follow the precedent established by those cases. Instead, the court contended that prior holdings permitting private parties to raise immunity defenses had "improperly confused good faith immunity with a good faith defense."[142] The court then advanced the atypical view that public officials should be permitted to raise a qualified immunity, which "is designed to protect defendants from the difficulties of defending a suit by dismissing the case before the parties have engaged

136. 487 U.S. 42, 108 S. Ct. 2250 (1988).
137. 844 F.2d 714 (10th Cir. 1988), *cert. denied*, 111 S. Ct. 799 (1991).
138. *Id.* at 722 n.11.
139. Henry v. Ryan, 775 F. Supp. 247, 251 (N.D. Ill. 1991).
140. 844 F.2d 1261 (6th Cir. 1988).
141. *Id.* at 1264.
142. *Id.* at 1266.

in costly and time consuming discovery,"[143] and that private parties should be permitted to raise a good faith defense, which "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."[144]

Although the application of this distinction to the case at hand resulted in a decision to affirm the trial court's granting of summary judgment, the double standard advanced in *Duncan* is troublesome. It recommends applying the *Harlow*-mandated objective test only to immunity claims by public officials but applying a subjective test to good faith claims advanced by private parties whose conduct satisfies the fair attribution test of *Lugar*. Adopting such an approach clearly would disallow a termination of meritless cases on motions for summary judgment so long as plaintiffs were sufficiently creative in framing their pleadings. This, of course, is precisely what the Supreme Court sought to avoid by its holding in *Harlow*.[145]

Finally, the rule of law being applied in some federal circuits is that private defendants in constitutional tort damage suits cannot assert a qualified immunity. An early example of this matter-of-fact position was provided in 1978 by the First Circuit in *Downs v. Sawtelle*.[146] However, this case is of questionable merit because it was decided before both *Lugar* and *Harlow*. At least in some ways, therefore, cases like *Howerton v. Gabica*[147] should be seen as more authoritative.

Howerton involved an effort by a landlord to evict two tenants who had failed to pay their rent. The issue before the Ninth Circuit following a trial court dismissal of the plaintiffs' suit was quite narrow: Had the degree of assistance provided by local police to the appellees during the course of their efforts to evict the appellants been sufficient to convert their private conduct into state action within the meaning of section 1983? The presence of a relevant state statute coupled with the involve-

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143. *Id.*

144. *Id.* The awkward approach taken by the Sixth Circuit in *Duncan* may have been persuasive in section 1983 actions brought in at least some state courts. *See, e.g.*, Alaska Pac. Assur. Co. v. Brown, 687 P.2d 264 (Alaska 1984), and Stensvad v. Towe, 759 P.2d 138 (Mont. 1988). This surely is true regarding the latter case in that the court expressly speaks in terms of a good faith defense which is an issue of fact. *Id.* at 143. The former case, however, may reflect nothing more than a court relying upon pre-*Lugar* terms of art (*e.g.*, "good faith compliance with a validly enacted law") when the test is in fact objective rather than subjective and when the issue is one of pure law rather than of fact.

145. Harlow v. Fitzgerald, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738 (1982).

146. 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910, 99 S. Ct. 278 (1978); *see also* Lovell v. One Bancorp, 878 F.2d 10 (1st Cir. 1989) (appellate court lacked jurisdiction to hear interlocutory appeal following trial court's refusal to accord private section 1983 defendant qualified immunity).

147. 708 F.2d 380 (9th Cir. 1982).

ment of a local police officer was such that the court had little difficulty finding that the conduct of the appellees met both the "state action" requirement of the Fourteenth Amendment and the "color of law" requirement of section 1983.

Importantly, no immunity issue was before the court. Further, the text of the opinion provides no discussion or analysis of qualified immunity. Nonetheless, Judge Fletcher, writing for the three-member court, included a brief footnote in which he concluded that "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."[148]

Despite the fact that the language of this footnote regarding an issue not before the court should be classified only as dicta, recent decisions by the Ninth Circuit rely on *Howerton* as persuasive if not mandatory precedent. For example, *Howerton* appears to have been taken as mandatory precedent in the recent case of *F.E. Trotter, Inc. v. Watkins*.[149] There, dealing with a *Bivens* rather than a section 1983 damage suit and relying directly on *Howerton*, the Ninth Circuit held that "qualified immunity is not available to private parties in a *Bivens* suit."[150]

Even more recently the Ninth Circuit, in *Conner v. City of Santa Ana*,[151] indirectly relied on *Howerton* in a section 1983 case based in part on a private towing company's and its employees' warrantless seizure and removal of plaintiffs' vehicles per the request of local police. The court reasoned that any constitutional rights of the plaintiffs had not been clearly recognized at the time of the seizure and removal and accorded qualified immunity to all non-municipal defendants.[152] The Ninth Circuit reversed and remanded the case, finding that the relevant law was clearly established. Somewhat ironically, however, a footnote in the case simply asserts that the trial court's "grant of immunity must also be reversed as private parties acting under color of law are not entitled to qualified immunity defense."[153]

C. *The Probable Consequences of the Decision of the Supreme Court in* Wyatt v. Cole.

With the contradictory positions taken by the federal circuit courts giving rise to growing confusion, it was clear that the Supreme Court

148. *Id.* at 385 n.10.
149. 869 F.2d 1312 (9th Cir. 1989).
150. *Id.* at 1318.
151. 897 F.2d 1487 (9th Cir. 1990).
152. *Id.* at 1490.
153. *Id.* at 1492 n.9. The authority cited in the footnote is F.E. Totter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989), but it has already been observed that this case relied on *Howerton* for its authority.

would be forced to devise one or more means of evaluating claims of qualified immunity for private party defendants in section 1983 and *Bivens* damage actions. Its first but almost certainly not last effort to do so came toward the end of its 1991-92 term in the case of *Wyatt v. Cole*.[154]

The facts in *Wyatt* are fairly typical of cases in which private parties, with significant assistance from state officials, relied upon a presumptively valid state statute in the pursuit of their commercial interests. Specifically, Cole and his attorney filed a complaint in replevin in a Mississippi court against Wyatt. The state court, to which the statute granted no discretion when relevant procedures had been followed, issued an order for the seizure of various property in the possession of Wyatt.

After a post-seizure hearing, Cole's complaint in replevin was dismissed, and he was ordered to return the seized property to Wyatt. Cole refused to comply with the order. Wyatt then brought suit in a federal district court to challenge the constitutionality of the Mississippi statute, to seek injunctive relief, and to obtain damages from the county sheriff, the deputies who had been involved in the seizure, Cole, and Cole's attorney.

The district court invalidated the state statute on due process grounds but, holding that they were entitled to qualified immunity, dismissed the suit against both the government officials and the private parties.[155] The grant of qualified immunity to all defendants was subsequently affirmed by the Fifth Circuit,[156] but the Supreme Court granted certiorari in an effort to resolve the existing conflicts between the federal circuits.

Suffice it to say that an expansive interpretation will be accorded *Wyatt* by plaintiffs' attorneys and that quite a narrow interpretation will be advanced by defendants' attorneys. A fair reading of the case, however, reveals multiple points at which the *Wyatt* majority sought to avoid reaching beyond the limited facts of the case before the Court. This is well-illustrated by the Court's observation that

> [t]he question on which we granted certiorari is a very narrow one: "[W]hether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials. . . ." The precise issue encompassed in this question . . . is whether qualified immunity . . . is available for private defendants faced with

154. 112 S. Ct. 1827 (1992).

155. Wyatt v. Cole, 710 F. Supp. 180 (S.D. Miss. 1989), *aff'd*, 928 F.2d 718 (5th Cir.), *reh'g denied*, 934 F.2d 1263 (5th Cir.), *cert. granted*, 112 S. Ct. 47 (1991) and *rev'd*, 112 S. Ct. 1827 (1992).

156. Wyatt v. Cole, 928 F.2d 718 (5th Cir.), *reh'g denied*, 934 F.2d 1263 (5th Cir.), *cert. granted*, 112 S. Ct. 47 (1991) and *rev'd*, 112 S. Ct. 1827 (1992).

> Section 1983 liability for invoking a state replevin, garnishment or attachment statute. That answer is no.[157]

The Court fashioned a rationale for the apparently narrow holding in *Wyatt* by retracing the familiar two-part test involving an examination both of immunities that existed when section 1983 was enacted in 1871 and of policy considerations. Significantly, the emphasis was on the policy considerations. The Court concluded that those policy considerations did not support the desire of the private party defendants in *Wyatt*-type cases to enjoy a qualified immunity from suit.

> Although principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.[158]

The rationale and holding of *Wyatt* will be a source of obvious concern to those sensitive to the unfairness of a private defendant being obliged to shoulder the burden of proceeding to trial when the public officials on whose assistance they relied are able to assert a qualified immunity from suit. More than one person to whom the holding applies will see little to defend the double standard it establishes.

Importantly, however, given the narrowness of the *Wyatt* holding and its accompanying rationale, one cannot fairly read *Wyatt* as being the final word. It certainly does not stand for the principle that private defendants in section 1983 or *Bivens* damage suits cannot assert a qualified immunity. To the contrary, it can be argued that private parties working under contract with governmental entities and whose contractual obligations call for them to serve the public interest are in a position which is so closely analogous to their public sector counterparts that no meaningful distinction relevant to qualified immunity can be drawn between them and public officials. After all, it is settled law that *access to qualified immunity is linked to the function a defendant fulfills rather than the position he or she holds.* When the function a private employee serves is equivalent to the function a public official would otherwise serve, it follows that the same policy considerations which support qualified immunity of the public official would also support qualified immunity of the private employee. Thus, the test advanced by the Court in *Procunier v. Navarette*[159] and modified by *Harlow v. Fitzgerald*[160]

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157. Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992).
158. *Id.* at 1833.
159. 434 U.S. 555, 98 S. Ct. 855 (1978).
160. 457 U.S. 800, 102 S. Ct. 2727 (1982).

that permits public prison officials to assert qualified immunity from damage suits should apply with equal force to private prison officials in the wake of *Wyatt*.

IV. INTERPRETATION AND IMPLICATIONS FOR PRIVATIZATION

Few would disagree with the assertion that the development of the state action doctrine through which the Court has expanded the scope of section 1983 and *Bivens* suits and the qualified immunity doctrine through which the Court has tried to insulate defendants from the negative effects of frivolous damage suits are among the most difficult aspects of constitutional tort jurisprudence. When both doctrines are confronted simultaneously—as they must be in a variety of situations involving privatization—significant disagreement and confusion necessarily materialize.

To be sure, the Court has had more than one opportunity to decrease the magnitude of the problem. When *Lugar v. Edmondson Oil Co.*[161] was decided a decade ago, for example, the Court could have refined both the state action and qualified immunity doctrines. Although Justice Powell clearly felt that *Lugar* suggested the availability of an immunity from suit for private defendants in section 1983 and, at least by implication, *Bivens* damage suits,[162] the Court expressly declined to rule on the issue.[163] The recent holding of the Court in *Wyatt v. Cole*[164] may clarify immunity law as it applies in damage suits whose facts are dominated by debtor-creditor disputes, but it leaves at least as many issues open as it closes.

The only means for resolving the continuing ambiguities is to identify the root cause of the disarray one finds in past opinions and to suggest how the present confusion should be reduced or eliminated in the troublesome cases that privatization initiatives are certain to produce. Of particular importance to this analysis is how the issue should be resolved in situations which involve types of privatization that find private firms contracting with government to provide types of services that historically have been provided largely or exclusively by government itself.

The position taken here is easily summarized. It is settled law that deprivations of constitutional rights caused by private conduct are or-

161. 457 U.S. 922, 102 S. Ct. 2744 (1982).

162. *Id.* at 956 n.14, 102 S. Ct. at 2763 n.14 (Powell, J., dissenting).

163. *Id.* at 942 n.23, 102 S. Ct. at 2756 n.23. Importantly, however, the same note does clearly express the view that the Court favored establishing an affirmative defense for private defendants in constitutional tort cases over defining the scope of such actions so narrowly as to change the dominant view of when they could be brought against private parties.

164. 112 S. Ct. 1827 (1992).

dinarily beyond the scope of the remedies provided by both section 1983 and *Bivens*. In the section 1983 context, for instance, the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful."[165] Even private conduct authorized by state law and which therefore meets the "color of law" prerequisite of a section 1983 action does not by itself alter this reality. There must be more. In both the section 1983 and the *Bivens* contexts, there must be persuasive evidence that the conduct of the private party is fairly attributable to the state itself.[166]

The conversion of private conduct into "state action" for section 1983 purposes or "federal action" for *Bivens* purposes is not easy. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[167] However, when a plaintiff can shoulder the burden of proving that private conduct is fairly attributable to government, the private defendant is transformed into a quasi-state or quasi-federal official. Simple considerations of fairness and equity support allowing such persons the same basic protections against groundless damage suits as are enjoyed by their counterparts who are government officials.[168]

To be sure, the holding in *Wyatt v. Cole*[169] undermines any argument that a fairness rationale standing alone will persuade the Supreme Court to enthusiastically view claims of qualified immunity by any and all private defendants who satisfy the "state action" and "color of law" tests. There must be more at stake than the commercial interests of defendants who relied on a state replevin, garnishment, or attachment statute. There must also be a sound basis for contending that claims for qualified immunity are bolstered by a compelling public policy rationale. If the facts of past section 1983 and *Bivens* actions involving private defendants are at all representative, then such a public policy rationale will not be available to many if not most private defendants. Notwithstanding the holding in *Wyatt*, when the function of a private employee is substantially identical to that of what otherwise would be a public official, then a firm foundation for both—or neither—being able to assert a qualified immunity from damage suits remains in place.[170]

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165. Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948).

166. *See, e.g., Lugar*, 457 U.S. 922, 102 S. Ct. 2744.

167. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961).

168. The position advanced here regarding qualified immunity does not extend to such other immunities as sovereign immunity or Eleventh Amendment immunities.

169. 112 S. Ct. 1827 (1992).

170. The relevant case law consistently examines the function being served by the conduct of one who asserts qualified immunity rather than the nature of the position occupied by such a person. *See, e.g.*, Burns v. Reed, 111 S. Ct. 1934 (1991); Butz v.

Privatization initiatives such as the private management of jails and prisons create precisely this foundation.

Stating a matter-of-fact position on the qualified immunity issue—even though it is a position that a majority of the federal circuits which have considered the issue seem inclined to accept—does little to advance the analysis. What is required is a critical assessment of how some federal and state courts have arrived at a contrary conclusion. Such an assessment must provide a more solid basis for anticipating how subsequent courts will deal with qualified immunity cases in the context of the types of privatization under consideration. Thus, the balance of this section will focus on general problems with the approaches some courts appear to have taken, more specific problems with the types of cases on which attention has most commonly focused, and the implications the analysis has for privatization.

A. The Core Problem of Historical Balance

If there is a single flaw in the approach some courts—including the Supreme Court—have taken to the problem of qualified immunity, it is one of historical balance. Initial considerations of qualified immunity were not necessary until, in effect, the Supreme Court created the two dominant forms of constitutional torts in *Monroe v. Pape*[171] and in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*[172] in 1961 and 1971. *Monroe* and its progeny transformed what for nearly one hundred years had been a largely dormant and inconsequential provision of federal civil rights law into a very broad civil remedy by which those who suffered deprivations caused by state conduct could obtain relief. It cannot plausibly be argued that the Forty-Second Congress imagined the diverse uses to which the Civil Rights Act of 1871 would be put. Substantially the same can fairly be said of the novel civil remedy the Supreme Court forged in *Bivens* for those who suffered deprivations as a consequence of federal conduct.

Notwithstanding these fairly obvious facts, a majority of the courts that have addressed the appropriateness of qualified immunity for either public or private defendants have applied a two-pronged test. This is most obvious in the section 1983 context. First, was an equivalent immunity available in 1871? Second, are there compelling policy considerations that recommend according a qualified immunity from suit? Although some relevant cases either ignore the historical prong of the

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Economou, 438 U.S. 478, 98 S. Ct. 2894 (1978); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 100 S. Ct. 1967 (1980).

171. 365 U.S. 167, 81 S. Ct. 473 (1961).

172. 403 U.S. 388, 91 S. Ct. 1999 (1971).

test altogether or assign it comparatively little significance, the typical case involves an appellate court applying what amounts to an historical litmus test.

The test is badly flawed even if viewed as potentially relevant in the first place. This was established early in this analysis.[173] Beyond that fair criticism of the historical litmus test is the logical flaw in the approach taken by courts which apply it. Specifically, judicial decisions of the post-*Monroe* era permit plaintiffs to name private party defendants in section 1983 and *Bivens* damage suits. These decisions greatly expanded the scope of the remedy provided by section 1983 or the more recent remedy provided by *Bivens*.

To expand the scope of civil remedies but to preserve a focus on the history of immunities is flawed in at least two regards. It offends common sense notions of balance and fairness. It also instantly places private defendants in an impossible position. This was recently described quite well by Eid:[174]

> The problem stems from the fact that the Court has used history to inform its analysis of the scope of immunity to Section 1983 liability but has neglected history when considering the scope of the liability itself. . . . This inconsistency has not posed a problem for public officers because they enjoyed the protection of immunities at common law. But private parties are not similarly situated. They were not entitled to immunity protection in 1871 because they had no need of it; they were not considered state actors under Section 1983 for another century. *Thus, to look back at the common law for an answer to the question whether a private individual in a particular situation is entitled to claim an immunity is to answer the question before the inquiry begins.*

There simply is no need to preserve the awkwardness or unfairness of this fundamentally flawed historical litmus test if its purpose is to promote the core objectives of section 1983 or *Bivens*. Those objectives clearly are to deter conduct fairly attributable to the state that causes constitutional deprivations and to provide a civil remedy in situations within which the deterrent objective has not been achieved.

Permitting private defendants in these actions to assert a qualified immunity does not defeat those objectives. It does nothing more than permit those defendants to terminate insubstantial suits on motions for summary judgment. In cases involving deprivations of clearly recognized

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173. *See supra* text accompanying notes 60-70.

174. Allison H. Eid, *Private Party Immunities to Section 1983 Suits*, 57 U. Chi. L. Rev. 1323, 1346 (1990) (emphasis added).

rights, plaintiffs' actions would survive. Indeed, it has been shown that the range and the quality of remedies available in actions brought against private defendants is greater than those that would be available in substantially identical actions brought against public officials.[175]

B. Distinguishing Between a Fairness and a Compelling Public Policy Basis for Qualified Immunity

The case can and should be made that another fundamental cause of the disparity one finds in the reactions of the courts to efforts by private defendants in section 1983 and *Bivens* damage suits can be traced to the imperfect reasoning of the Supreme Court in *Lugar*. *Lugar* involved a small wholesale oil dealer to whom money was owed by the operator of a truckstop. The creditor relied upon a presumptively valid state statute to seek prejudgment attachment of the debtor's property. A writ of attachment was issued and executed by a county sheriff, but a state trial court, after finding that the creditor had not satisfied the statutory grounds for the attachment in his *ex parte* petition, ordered the attachment dismissed. The debtor then brought a section 1983 action against the creditor in which he alleged that the joint conduct of state officials and the creditor had deprived him of his property without due process of law.[176]

The critical portion of *Lugar* is not what it does contain but what it lacks. What it lacks is a plaintiff who brought a section 1983 action against a state official whose involvement with the creditor was such that the Court found that the private defendant was a state actor. If the true purpose of section 1983 is to shield "any citizen of the United States or other person within the jurisdiction thereof" from constitutional deprivations caused by state action, then the proper defendant in creditor-debtor cases like *Lugar* should be the state official who rendered aid and assistance rather than the creditor who relied on a presumptively valid state statute. It is, after all, the active involvement of state officials that transforms what would be purely private conduct, which falls beyond the scope of either section 1983 or *Bivens*, into state or federal action.

This critique of the state action doctrine does not require further development here. It is important to recognize, however, that much of the tension one finds in recent developments of the qualified immunity doctrine is distorted by cases which present facts that are similar to those in *Lugar*. If the core purpose of qualified immunity is to serve the public interest by increasing the likelihood that public officials will pursue their responsibilities as vigorously as possible, that purpose is

175. Thomas, *supra* note 3.

176. Lugar v. Edmondson Oil Co., 457 U.S. 922, 924-25, 102 S. Ct. 2744, 2747 (1982).

not served by according qualified immunity to a private party defendant whose interest is purely commercial. Indeed, when confronted with such cases, the courts are left with no justification for according qualified immunity other than that of fairness.

Cases of the type represented by *Lugar* and *Wyatt* are easily distinguished from situations involving private parties working under contract with government to provide services government otherwise would be obliged to provide itself. Correctional privatization initiatives illustrate this fact particularly well. Private corrections firms and their employees will argue that they should be able to raise a qualified immunity from insubstantial section 1983 or *Bivens* suits because considerations of fairness recommend against their being treated any differently than their public sector counterparts to whom qualified immunity has been available since the Supreme Court decided *Procunier v. Navarette*[177] in 1978. Following the decision of the Supreme Court in *Wyatt*, however, fairness cannot be the only or even the primary supporting rationale.

A fairness rationale must be pushed to the side and at least two other considerations must be pushed into sharp relief. First, emphasis must be given to the manner in which the conduct of a private party defendant was either authorized or required by the terms of a contract. Second, special attention must be given to how the absence of qualified immunity would hamper the ability of a private defendant in a section 1983 or *Bivens* damage suit to act on behalf of government in the service of the public interest. The Court has repeatedly emphasized the notion that "public officers require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability."[178] Often, argued the Court in *Harlow*, damage suits

> run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs 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 . . . in the unflinching discharge of their duties."[179]

The implication is clear. Heavy responsibilities are imposed on those who manage the nation's jails and prisons. The efficient and effective discharge of those responsibilities—without regard to whether those responsibilities fall on the shoulders of public or private persons—is of

177. 434 U.S. 555, 98 S. Ct. 855 (1978).

178. Harlow v. Fitzgerald, 457 U.S. 800, 806, 102 S. Ct. 2727, 2732 (1982).

179. *Id.* at 814, 102 S. Ct. at 2736, quoting from Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

vital significance both to those who are confined and who work within the nation's correctional system and to the general public. A recognition of these realities stands as the principal justification for permitting public correctional officials to assert a qualified immunity. Because the functions of public and private corrections officials are indistinguishable, the same compelling policy justifications should be relied upon to allow both to enjoy a qualified immunity from insubstantial section 1983 and *Bivens* damage suits.

V. Summary and Conclusions

Government is confronting growing pressures to devise more efficient and effective means of providing essential public services. Increasingly often, responses to these pressures find government contracting with the private sector for services that government traditionally has provided largely or entirely through the efforts of public agencies and their employees. Indeed, during the past decade the privatization movement has reached beyond efforts to rely on private means of delivering types of public services that have no special governmental basis and into areas once thought of as being inherently governmental in their character. This is best exemplified by the rapidly growing appeal of correctional privatization.[180]

Decisions to privatize in such areas as corrections often were made in the absence of clear understandings of the legal implications of the decisions. This was unavoidable. Policy makers were forced to choose between a "business as usual" approach in corrections or contract with private corrections firms with the full knowledge that the resulting blurring of the boundaries between the public and private sectors would ultimately give rise to new law. It was not possible to know the precise form the new law would take. The development of that body of law could not begin to take form until actual disputes confronted the courts.

This analysis has focused on one troublesome but important area of law whose parameters continue to be poorly defined. Specifically, much historical experience reveals that prisoners are predisposed to litigate constitutional claims aggressively. That a subset of these suits has merit is obvious to anyone who has even the most casual awareness of

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180. Prior to the early 1980s there were no jails or prisons in the United States that were managed by private firms. *See, e.g.*, Logan, *supra* note 24. However, the most recent research on the development of correctional privatization reveals that eighteen private firms presently have contracts to operate such facilities, that fifty-two facilities housing a total of 17,317 prisoners are now under private management, and that an additional eight facilities with a design capacity of 5202 prisoners will be opened by June 30, 1993. Charles W. Thomas, *Growth in Corrections Accelerates*, Public Works Financing 11, 13 (July/August 1992).

how correctional law has developed during the past quarter of a century. It is no less obvious that a large proportion of prisoner suits brought under 42 U.S.C. § 1983 or *Bivens* are without substance. Recognizing compelling policy reasons for the earliest possible termination of insubstantial damage suits, the Supreme Court has permitted public correctional officials to assert a qualified immunity from suits involving deprivations of constitutional rights that were not clearly recognized at the time of the alleged deprivation. The availability of qualified immunity to those officials generally allows them to terminate insubstantial suits on motions for summary judgment. However, whether the same immunity will be made available to similarly situated private correctional employees has not been decided.

Based on a review of the development of the qualified immunity doctrine and its application to cases involving private defendants in section 1983 and *Bivens* damage suits, the analysis reveals that the federal circuit courts are in sharp disagreement regarding whether private defendants can assert a qualified immunity. To be sure, many of the cases reviewed involved suits which involved creditor-debtor relationships and thus may not be of great value to those concerned with the legal implications of privatization. Ambiguities involving these cases are likely to be reduced substantially following the recent decision in *Wyatt*. However, cases involving the pursuit of commercial interests by private parties whose conduct meets the state action requirement purely because they received significant assistance from state or federal officials are easily distinguished from those involving the pursuit of public interest by private parties whose contracts oblige them to work on behalf of public agencies. Unfortunately, the contrary positions advanced by the circuit courts do not vanish when attention focuses narrowly on situations involving private defendants who engaged in conduct permitted or required by their contracts with government.[181]

The rationale of courts that have declined to permit private defendants in section 1983 or *Bivens* actions to assert a qualified immunity from damage suits relies heavily on a combination of historical and policy considerations. The historical focus, which is especially apparent

181. *See, e.g.*, DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714 (10th Cir. 1988) (private party defendants acting in accordance with government contract may assert qualified immunity in section 1983 damage suit); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312 (9th Cir. 1989) (private party defendants acting in accordance with government contract may not assert qualified immunity from *Bivens* damage suit); Conner v. City of Santa Ana, 897 F.2d 1487 (9th Cir. 1990) (private defendants acting on instructions of local police to remove vehicles from private property may not assert qualified immunity from section 1983 suit); and Henry v. Ryan, 775 F. Supp. 247 (N.D. Ill. 1991) (declining to rule on availability to qualified immunity in section 1983 action by private provider of medical services in local jail).

in section 1983 cases, emphasizes the immunities that were available to public and private parties more than one hundred years ago. This approach tends to result in the conclusion that private defendants enjoyed no common-law immunities and thus should not be accorded any new immunity in the constitutional tort context. The policy focus emphasizes the fact that disallowing qualified immunity to private defendants does not interfere with their ability to serve the public interest because, at least in the typical case, their conduct is aimed at serving a purely private rather than a public interest.

This analysis sharply criticizes the validity of these historical and policy considerations. The basis for the criticism has at least four facets. First, even in situations which involve private defendants whose interests are essentially commercial, significance should be given to preserving the fairness of the legal process. The creditor-debtor cases reviewed in the analysis, for instance, involve damage suits brought by debtors against creditors who relied on presumptively valid state statutes and who received consequential assistance from state officials. Regardless of whether the common law of the last century recognized an immunity from suit by such private defendants, considerations of simple fairness and equity recommend immunity when the alleged deprivations involve a constitutional right that was not clearly recognized at the time of the alleged misconduct. Those who accept this criticism will see little judicial wisdom in the position taken by the Court in *Wyatt*.

Second, it is unclear whether the Forty-Second Congress intended to disallow claims of absolute or qualified immunity. Thus, even if some special significance is attributed to historical considerations, the validity of any historical litmus test is easily challenged.

Third, post-*Monroe* judicial enlargements of the scope of section 1983 and more recent interpretations of the scope of suits brought under *Bivens* radically redefined the meaning of the term "constitutional tort." It is exceedingly difficult to adhere to a rigid and arguably flawed conception of the history of immunities and also to accept a so highly flexible definition of what constitutes a section 1983 or *Bivens* cause of action.

Finally, it is undeniably true that the same public policy rationale which forms the foundation for authorizing public officials to assert a qualified immunity from damage suits is not necessarily sound in cases involving private defendants. However, as more and more essential public services flow from contracts with the private sector rather than from the efforts of public officials, the public policy basis for according qualified immunity to public officials applies with precisely the same force to private parties.

There are, of course, harsh critics of correctional privatization who have strong ideological objections to any mechanism which would elevate the appeal of private corrections firms to government. Just as those

critics claimed, with little if any legal basis and with no success whatsoever in the courts, that decisions to privatize were inherently unconstitutional, they are likely to attack the conclusions reached here as ones that unfairly and improperly create an advantage for the private corrections industry.

This criticism is wrong as a matter of both fact and law. The only implication of the conclusions reached in this analysis is that both public and private corrections employees confront exceedingly difficult responsibilities, responsibilities that demand much of them as they work in contexts known to be ones which routinely give rise to damage suits. To shield both equally from insubstantial suits, and also to expose each group equally to more consequential litigation, strikes a reasonable balance between the legitimate interests of prisoner plaintiffs and the larger public interest. It also is equitable and just in the most fundamental meaning of those terms.