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Section 1983 Litigation: History and Policy Spell the Demise of Qualified Immunity for Private Defendants - Wyatt v. Cole

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SECTION 1983 LITIGATION: HISTORY AND POLICY SPELL THE DEMISE OF QUALIFIED IMMUNITY FOR PRIVATE DEFENDANTS

Wyatt v. Cole
112 S. Ct. 1827 (1992)

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I. INTRODUCTION

Over the past twenty-five years, the United States Supreme Court has developed qualified immunity which protects public officials from liability for civil rights violations committed while exercising their discretionary responsibilities.[1] The doctrine is premised on the English common law maxim that the "king can do no wrong."[2] While lower federal courts consistently applied the Supreme Court's qualified immunity doctrine to protect a variety of public officials, many of these same courts were split on the issue of whether qualified immunity should be available to private defendants facing civil rights litigation.[3]

In *Lugar v. Edmondson Oil Co.*,[4] the Supreme Court left open the question of whether private parties faced with 42 U.S.C. § 1983[5] litigation may rely on a good faith defense or on qualified immunity.[6] This question was answered by the Court in *Wyatt v. Cole*.[7] In *Wyatt*, the Court analyzed the common law origins of qualified immunity[8] and the rationale for allowing public officials faced with

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1. The 1967 case of Pierson v. Ray, 386 U.S. 547 (1967), was the first time the Court recognized qualified immunity. For further discussion, see *infra* notes 80-108 and accompanying text.

2. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1033 (5th ed. 1984).

3. *See infra* notes 168-240 and accompanying text.

4. 457 U.S. 922 (1982).

5. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

42 U.S.C. § 1983 (1982).

6. *Lugar*, 457 U.S. at 942 n.23. Justice O'Connor stated:

> Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem 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. *We need not reach the question of the availability of such a defense to private individuals at this juncture. . . . Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions . . . .*

Id. (citations omitted) (emphasis added).

7. 112 S. Ct. 1827 (1992).

8. *Id.* at 1831-32.

§ 1983 litigation to invoke qualified immunity[9] and held that qualified immunity is not available to private party § 1983 defendants.[10]

This note first examines the historical origins of qualified immunity and identifies the rationale for denying qualified immunity to private parties. The note then evaluates the soundness of this rationale and seeks to identify what defenses, if any, remain available to private party § 1983 defendants in the wake of *Wyatt*.

II. FACTS AND PROCEDURAL HISTORY

In July 1986, respondent Bill Cole sought to dissolve a partnership in a cattle business with petitioner Howard Wyatt.[11] When no agreement could be reached on division of the partnership assets, Cole consulted with an attorney, respondent John Robbins II.[12] On Cole's behalf, Robbins filed a replevin action in Mississippi state court.[13]

After Robbins filed the replevin complaint and bond, the state court ordered the county sheriff to seize cattle, a tractor, and other personal property from Wyatt.[14] At a post-seizure hearing, the state court dismissed Cole's replevin complaint and ordered the property seized pursuant to the writ of replevin be returned to Wyatt.[15] Cole refused to comply with the order.[16]

Instead of pursuing the matter in state court, Wyatt filed suit in federal district court under § 1983.[17] In his federal claim, Wyatt challenged the constitutionality of Mississippi's replevin statute and sought injunctive relief and damages from the respondents, the County Sheriff, and the deputies involved in the seizure.[18]

The district court held Mississippi's replevin statute violated due process.[19] While the court did find the replevin statute to be unconstitutional, it also found

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9. *Id.* at 1833.

10. *Id.* at 1834.

11. *Id.* at 1829.

12. *Id.*

13. *Id.* Mississippi's then-extant replevin statute, MISS. CODE ANN. § 11-37-101 (West Supp. 1988), allowed an individual to obtain a court order for seizure of another's property by posting a replevin bond, swearing to a state court that the applicant was entitled to the property, and that the adversary wrongfully took and detained the property in question. Wyatt v. Cole, 112 S. Ct. 1827, 1829 (1992). The statute gave the judge no discretion in deciding whether or not to issue the writ of replevin. *Id.*

14. *Wyatt*, 112 S. Ct. at 1829.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Wyatt v. Cole, 710 F. Supp. 180, 183 (S.D. Miss. 1989). In holding the statute to be unconstitutional, the district court found that the Due Process Clause of the Fourteenth Amendment prevents the taking of private property by replevin without pre-seizure notice and a pre-seizure hearing. *Id.* at 182 (citing Fuentes v. Shevin, 407 U.S. 67 (1972); North Ga. Finishing v. Di-Chem, 419 U.S. 601 (1975)). In both of these cases, the Supreme Court held that statutes allowing seizures prior to notice and a hearing violated due process. *Fuentes*, 407 U.S. at 96; *North Ga. Finishing*, 419 U.S. at 606. The district court found that the lack of judicial discretion in deciding whether or not to issue a writ of replevin under Mississippi's statute made it unnecessary to decide the validity of the statute on inadequate notice grounds. *Wyatt*, 710 F. Supp. at 182 (citing Johnson v. American Credit Co. of Ga., 581 F.2d 526 (5th Cir. 1978)).

Mississippi amended its replevin statute in 1990 to comport with due process. *See* MISS. CODE ANN. § 11-37-101 (West Supp. 1990).

that Cole and Robbins were entitled to qualified immunity from suit for damages arising prior to such a finding of unconstitutionality.[20]

The United States Court of Appeals for the Fifth Circuit affirmed the district court's grant of qualified immunity to Cole and Robbins.[21]

The Supreme Court held that qualified immunity, as reformulated and enunciated in *Harlow v. Fitzgerald*,[22] is not available to private defendants facing § 1983 liability for invoking state replevin, garnishment, and attachment statutes.[23]

III. History and Law

A. Section 1983 and Qualified Immunity

Section 1983 created a "species of tort liability."[24] The Court in *Mitchum v. Foster*[25] stated that § 1983 "opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation."[26] The *Mitchum* Court further stated: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' "[27]

Beginning with the 1961 case of *Monroe v. Pape*,[28] the Court expanded the spectre of § 1983 by holding that § 1983 provides a remedy for *all* violations of constitutional rights by persons acting under color of law.[29] The *Monroe* Court extensively reviewed the legislative history of § 1983 in reaching this conclusion.[30]

1. Legislative History of § 1983

In 1868, the Reconstruction Congress passed the Fourteenth Amendment to the Constitution.[31] The amendment was primarily aimed at providing equal protection and due process of law to recently freed slaves.[32] Section Five of the

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20. Wyatt v. Cole, 112 S. Ct. 1827, 1829 (1992).

21. Wyatt v. Cole, 928 F.2d 718 (5th Cir. 1991), *rev'd*, 112 S. Ct. 1827 (1992).

22. 457 U.S. 800 (1982). *Harlow* was handed down the day before the Court's decision in *Lugar*.

23. *Wyatt*, 112 S. Ct. at 1834.

24. *See* Anderson v. Creighton, 483 U.S. 635 (1980); Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

25. 407 U.S. 225 (1972).

26. *Id.* at 239.

27. *Id.* at 242 (quoting *Ex Parte* Virgina, 100 U.S. 339, 346 (1879)).

28. 365 U.S. 167 (1961), *overuled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

29. *Monroe*, 365 U.S. at 171.

30. *Id.* at 171-91.

31. The United States Constitution Amendment XIV, § 1 provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

For historical background on the Fourteenth Amendment, see generally WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PROCESS TO JUDICIAL DOCTRINE (Harvard University Press 1988).

32. *See infra* note 37.

Fourteenth Amendment[33] empowers Congress to enact appropriate legislation to enforce the provisions of the Amendment.[34]

The Forty-second Congress, acting pursuant to Section Five of the Fourteenth Amendment, enacted the Ku Klux Klan Act [hereinafter the Act].[35] Section 1983 is a codification of section one of the Act.[36] Legislative history to the Act indicates that it was intended to counter the systematic discrimination and violence directed at blacks that had developed in the South subsequent to the Civil War.[37] The original title to the Act was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes."[38] During floor debate on the Act, Representative Bingham stated that the purpose of the Act was to be "the enforcement . . . of the Constitution on behalf of every citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution."[39] Senator Edmunds, Chairman of the Senate Committee on the Judiciary and floor manager of the Act, stated:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [the Civil Rights Act of 1866], which has since become part of the Constitution [the Fourteenth Amendment].[40]

Citing the Act's legislative history, the Court in *Carey v. Piphus*[41] stated that § 1983 was intended to create a special species of tort liability "in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution."[42]

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33. U.S. CONST. amend. XIV, § 5.

34. *Id.*

35. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)). Section 1 of the Ku Klux Klan Act is also known as the Civil Rights Act of 1871. For the text of 42 U.S.C. § 1983, see *supra* note 5.

36. For the text of § 1983, see *supra* note 5.

37. *See generally* CONG. GLOBE, 42d Cong., 1st Sess., at app. 78 (1871). For a particularly good summary of the history of the Act, see Monroe v. Pape, 365 U.S. 167, 170-86 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978). In *Monroe*, Justice Douglas used a historical analysis of the Act to find that the illegal actions of thirteen Chicago police officers made the officers amenable to suit as their illegal actions constituted action under color of law within the contemplation of § 1983. *Monroe*, 365 U.S. at 171-86. Without a search warrant, the officers broke into the plaintiffs' home, detained plaintiff Monroe for more than ten hours on open charges without allowing him to call his family, and finally released him without any charges being made against him. *Id.* at 169. Before finding that the plaintiffs had stated a prima facie case, Justice Douglas stated that a man must be held "responsible for the natural consequences of his actions." *Id.* at 187. *See also* EVERETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-1877 (Garland Publishing 1987).

38. *See supra* note 35.

39. *See* CONG. GLOBE, 42d Cong., 1st Sess. at app. 81.

40. *See id.* at 568.

41. 435 U.S. 247 (1978).

42. *Id.* at 253 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (citing Monroe v. Pape, 365 U.S. 167, 172-83 (1961))); *see also id.* at 225-34 (Frankfurter, J., dissenting in part); Mitchum v. Foster, 407 U.S. 225, 238-42 (1972).

2. From *Monroe v. Pape* to *Lugar v. Edmondson Oil Co.* – § 1983 Matures

In *Monroe v. Pape*,[43] the Court expanded what had previously been a narrow interpretation of § 1983.[44] According to the Court in *Monroe*, § 1983 was intended to provide:

> [A] federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.[45]

In *Adickes v. S. H. Kress & Co.*,[46] the Supreme Court adopted a two prong approach to § 1983 actions.[47] The Court held that a § 1983 plaintiff must show that he or she has been deprived "of a right secured by the Constitution and laws of the United States"[48] *and* that the deprivation was effected by one acting "under color of any statute . . .of any State."[49]

The petitioner in *Adickes* was a white school teacher who, accompanied by six black students, was refused service at S. H. Kress' lunch counter.[50] Adickes was subsequently arrested for vagrancy.[51] She filed suit in federal district court alleging a denial of equal protection.[52] The complaint was filed under § 1983 and alleged that S. H. Kress' employees had conspired with local police to deprive her of federally protected rights.[53] The district court directed a verdict for the defendants.[54] The Fifth Circuit Court of Appeals affirmed, holding that § 1983 " 'requires that the discriminatory . . . usage be proved to exist in the locale where the discrimination took place, and in the State generally.' "[55] The Supreme Court reversed, holding

> [t]he involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful. Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983.[56]

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43. 365 U.S. 167 (1961).

44. *See* ROBERT H. FREILICH AND RICHARD G. CARLISLE, SWORD AND SHIELD: SECTION 1983: CIVIL RIGHTS VIOLATIONS: THE LIABILITY OF URBAN, STATE AND LOCAL GOVERNMENT 47 (ABA Press 1983). According to Freilich and Carlisle, *Monroe* "marked the beginning of modern § 1983 litigation." *Id.*

45. *Monroe*, 365 U.S. at 180.

46. 398 U.S. 144 (1970).

47. *Id.* at 150.

48. *Id.*

49. *Id.*

50. *Id.* at 146. The black school children were not refused service or arrested. *Id.*

51. *Id.*

52. *Id.* at 147.

53. *Id.*

54. *Id.*

55. Adickes v. S. H. Kress & Co., 409 F.2d 121, 124 (5th Cir. 1968).

56. *Id.* at 152 (citations omitted).

Lugar v. Edmondson Oil Co.,[57] decided twelve years after *Adickes*, has had broad implications for § 1983 litigation.[58] Writing for the majority, Justice White stated: "Whether they are identical or not, the state-action and under-color-of-state-law requirements are obviously related."[59] Justice White opined that "it is clear that in a § 1983 action brought against a state official, the statutory requirement of action 'under color of state law' and the 'state action' requirement of the Fourteenth Amendment are identical."[60]

Justice White further stated that "while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action."[61] While this implicates state action for purposes of the Fourteenth Amendment, private misuse of a state statute has § 1983 implications as well. The majority opinion recognized a two-prong approach to state action cases.[62] The first prong required that a deprivation be "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible."[63] The second prong mandated that the person responsible for the deprivation must be one who is a state actor.[64] Justice White stated in *Lugar* that if the second prong

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57. 457 U.S. 922 (1982). *Lugar* is factually similar to *Wyatt*. Respondents in *Lugar* filed an *ex parte* action under a Virginia statute which allowed prejudgment attachment of petitioner's property. *Id.* at 924. The statute allowed respondent to file a petition in state court for attachment of petitioner's property. *Id.* at 925. The respondent had to state a belief that petitioner "was disposing of or might dispose of his property in order to defeat his creditors." *Id.* at 924. The clerk of court then issued a writ of attachment which sequestered respondent's property. *Id.* at 925. At a post seizure hearing, a state trial judge dismissed the attachment order. *Id.* at 926. Petitioner then filed a § 1983 action. *Id.* In his complaint, he alleged that the private party respondent had acted in concert with a state official to deprive him of his property without due process of law. *Id.*

The Court intimated, but did not hold that Virginia's attachment statute was unconstitutional. *Id.* at 941-42.

58. The Court in *Lugar* held that conduct which is found to be state action for purposes of the Fourteenth Amendment also satisfies the action under color of law requirement of § 1983. *Id.* at 936.

59. *Id.* at 928. Through an intricate analysis of the Fourteenth Amendment, § 1983, and the Court's state action jurisprudence, the Court held that conduct satisfying state action under the Fourteenth Amendment also satisfies § 1983's under color of law requirement, but the converse does not hold true. *Id.* at 935 n.18.

State action under the Fourteenth Amendment and action under color of law under § 1983 are beyond the scope of this note. For articles on state action under the Fourteenth Amendment and action under color of law under § 1983, see Eric H. Zagrans, *Under Color of What Law?: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499 (1985); Sheldon Nahmod, *Section 1983 Discourse: The Move From Constitution to Tort*, 77 GEO. L.J. 1719 (1989); Susanah H. Mead, *Evolution of the "Species of Tort Liability" Created by 42 U.S.C. § 1983: Can Constitutional Tort be Saved From Extinction?*, 55 FORDHAM L. REVIEW 1 (1986); Gary S. Gilden, *The Standard of Culpability in Section 1983 and Bivens Actions: The Prima Facie Case, Qualified Immunity and the Constitution*, 11 HOFSTRA L. REV. 557 (1983); *see also* Allison Hartwell Eid, *Private Party Immunities to Section 1983 Suits*, 57 U. CHI. L. REV. 1323 (1990). *See also* ROBERT H. FREILICH AND RICHARD G. CARLISLE, SWORD AND SHIELD: SECTION 1983: CIVIL RIGHTS VIOLATIONS: THE LIABILITY OF URBAN, STATE AND LOCAL GOVERNMENT (ABA Press 1983).

Justice White quoted Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970):

> "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of [§ 1983]. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

Lugar, 457 U.S. at 941 (quoting *Adickes*, 398 U.S. at 152 (quoting United States v. Price, 383 U.S. 787, 794 (1966))).

60. *Lugar*, 457 U.S. at 929.

61. *Id.* at 941.

62. *Id.* at 937.

63. *Id.* (citations omitted).

64. *Id.*

of the state action analysis is satisfied by private misuse of a statute, then the conduct in question may be properly addressed in a § 1983 action.[65]

In a dissenting opinion in *Lugar*, Justice Powell questioned the majority's characterization of state action and action under color of law.[66] Justice Powell criticized the Court's holding in another respect. He stated that the majority erroneously "holds that respondent, a private citizen who did no more than commence a legal action of a kind traditionally initiated by private parties, thereby engaged in 'state action.' "[67] This, according to Justice Powell, is inconsistent with the Court's precedent.[68] The proper inquiry should be, according to Justice Powell, "whether the respondent, a private citizen whose only action was to invoke a presumptively valid state attachment process, had acted under color of state law."[69]

Justice Powell's concern that private individuals can be held liable for invoking presumptively valid statutes was answered in footnote twenty-three of the majority opinion.[70] In this footnote, Justice O'Connor stated that Justice Powell's concern should be addressed not by changing the nature of a § 1983 cause of action, but rather by allowing such individuals to invoke a good faith defense or qualified immunity.[71] Justice Powell retorted that he agreed with the majority's suggestion that the respondent may have good faith immunity available on remand.[72] The suggestion made in dicta by the majority's opinion in footnote twenty-three led the respondents in *Wyatt* to assert qualified immunity.

3. Historical Development of Qualified Immunity in § 1983 Actions

The Act, the legislative history of the Act, and its modern-day progeny, § 1983, are devoid of any reference to immunities. Absolute immunity, which extends to judges and legislators, existed prior to the passage of the Civil Rights Act of

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65. *Id.* at 941.
66. *Id.* at 945 (Powell, J., dissenting).
67. *Id.*
68. *Id.* at 945.
69. *Id.* at 946.
70. *Id.* at 942 n.23.
71. *Id.*
72. *Id.* at 956 n.14.

1871.[73] Absolute immunity, therefore, protects judges, legislators, and prosecutors from damage actions under § 1983.[74] Absolute immunity protects judges when acting within their jurisdiction,[75] legislators when acting within a traditional legislative capacity,[76] and prosecutors when acting as advocates in criminal proceedings.[77]

Absolute immunity acts as an automatic and complete shield to liability in § 1983 actions.[78] It would be almost one hundred years after the passage of the Civil Rights Act of 1871 before the Court would develop qualified immunity to afford protection to public officials not traditionally protected by absolute immunity.[79]

The 1967 case of *Pierson v. Ray*[80] saw the genesis of a qualified or good faith immunity from suit.[81] In *Pierson*, fifteen black and white clergymen entered a waiting room at a bus terminal, disobeying a sign that read "White Waiting Room Only—By Order of the Police Department."[82] They were arrested by respondent police officers and charged under a state statute[83] which made it a misdemeanor for persons to congregate in a public place under circumstances which created a threat of breach of the peace.[84] After a trial in which the clergymen were found guilty and sentenced to the maximum penalty of four months in jail and a fine of $200, one of the clergymen appealed.[85] After the appellate court ordered a new trial,[86] the trial court granted the petitioner's motion for a directed verdict, and the cases against the other petitioners were dropped.[87] Petitioners then brought a

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73. Stump v. Sparkman, 435 U.S. 349 (1978) (judges); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (legislators); Tenney v. Brandhove, 341 U.S. 367 (1951) (legislators).

The Speech and Debate Clause of Article I of the Constitution extends privilege from arrest (immunity) to senators and representatives while going to and returning from a session and for any speech and debate that takes place during a session. U.S. CONST. art. I, § 6.

In Hafer v. Melo, 112 S. Ct. 358 (1991), the Court denied a state executive official's assertion of absolute immunity. *Id.* at 364. In Burns v. Reed, 111 S. Ct. 1934 (1991), the Court affirmed a grant of absolute immunity to a state prosecuting attorney in a § 1983 action for participating in a probable cause hearing. *Id.* at 1944. The Court denied the same prosecutor's assertion of absolute immunity for giving advice to the police. *Id.* at 1945.

> Neither he nor the court below has identified any historical or common-law support for such an extension. *American common law* [is determinative] . . . . [We do] *not have a license to establish immunities from § 1983 actions in the interests of what* [we] *judge to be sound public policy.*

Id. at 1936 (citations omitted) (emphasis added).

74. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, § 7.01 (2d ed. 1986) [hereinafter NAHMOD].

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *See* Pierson v. Ray, 386 U.S. 547 (1967).

80. 386 U.S. 547 (1967).

81. *Id.* at 557.

82. *Id.* at 552.

83. MISS. CODE ANN. § 2087.5 (1942).

84. *Pierson*, 386 U.S. at 549.

85. *Id.* at 549-50.

86. *Id.* at 550.

87. *Id.* at 549.

§ 1983 action for damages against respondents in federal district court.[88] After the jury returned verdicts for the respondents on both counts, the clergymen appealed to the United States Court of Appeals for the Fifth Circuit.[89]

The Fifth Circuit held that the respondent police officers would be liable under § 1983 for an unconstitutional arrest, even if made in good faith and with probable cause.[90] Citing *Golden v. Thompson*,[91] the court held that the officers would have good faith immunity under the common law of Mississippi and that this immunity should be available to the officers in the § 1983 action.[92] The court went further, however, saying that the Supreme Court's holding in *Monroe v. Pape*[93] foreclosed the officers from asserting such an immunity.[94]

The Supreme Court in *Pierson* stated that the Fifth Circuit had misread its holding in *Monroe*.[95] The *Pierson* Court further stated that the holding in *Monroe* must be viewed from two perspectives: liability on the one hand, and defenses on the other.[96] The Court then held the common law defenses of good faith and probable cause to be available to the officers in the § 1983 action.[97] "The legislative record [of the Act] gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[98]

With this holding, the Court, perhaps unknowingly, created what would in later cases evolve into qualified immunity.[99] The Court recognized this in *Imbler v. Pachtman*,[100] holding that § 1983 "creates a species of tort liability that on its face

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88. *Id.*

89. *Id.* The Fifth Circuit's opinion is reported at Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), *aff'd in part*, 386 U.S. 547 (1967).

90. *Pierson*, 352 F.2d at 221. The court held the arrest to be unconstitutional because the state statute under which petitioners had been charged had been declared unconstitutional in Thomas v. Mississippi, 380 U.S. 524 (1965), decided four years *after* petitioners' arrest. *Pierson*, 352 F.2d at 221. Even though the statute was presumptively valid at the time of the arrest, the court held that its subsequent invalidation and the Supreme Court's holding in Monroe v. Pape, 365 U.S. 167 (1961), negated the police officers' assertion of good faith and probable cause as defenses. *Pierson*, 352 F.2d at 221.

91. 11 So. 2d 906 (Miss. 1943).

92. *Pierson*, 352 F.2d at 219.

93. 365 U.S. 167 (1961).

94. *Pierson*, 352 F.2d at 218.

95. Pierson v. Ray, 386 U.S. 547, 556 (1967). The police officers in Monroe asserted that their activities were illegal so as to take them outside § 1983's requirement that the wrongdoer act under color of state law. *Id.* The Court rejected this argument and refused to dismiss the action simply because the plaintiffs had failed to plead that the police officers had specific intent to deprive them of their civil rights. *Id.* The *Pierson* Court stated that the holding in *Monroe* did not intimate a view on what defenses might be available to the officers. *Id.*

96. *Id.* at 556-57.

97. *Id.* at 557.

98. *Id.* at 554.

99. John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 464 (1990). For an overview of the historical origins of qualified immunity, see Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987); Comment, Harlow v. Fitzgerald: *The Lower Courts Implement the New Standard for Qualified Immunity under Section 1983*, 132 U. PA. L. REV. 901 (1984); *see* NAHMOD, *supra* note 74, at §§ 3-4; John F. Wagner, Jr., Annotation, *Availability of Qualified Immunity Defense to Private Parties in Action under 42 U.S.C. § 1983*, 95 A.L.R. FED. 82 (1989).

100. 424 U.S. 409 (1976).

admits of no immunities."[101] The Court stated in *Imbler* that prior § 1983 cases must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[102]

Seven years after *Pierson* was handed down, the Court again addressed the qualified immunity issue in *Scheuer v. Rhodes*.[103] In *Scheuer*, the Court narrowed the class of officials entitled to absolute immunity.[104] The Court also refused to establish precise contours for qualified immunity:

> [T]he scope of . . . immunity will necessarily be related to facts . . . . Final resolution of this question must take into account the functions and responsibilities of [the defendants in question] in their capacities as officers of the state government, as well as the purposes of 42 U.S.C. § 1983.[105]

Just as the Courts in *Pierson* and *Monroe* had done, the *Scheuer* Court used a historical backdrop for its decision.[106] In what would in later cases become a more fully developed standard for qualified immunity, the Court stated that "[i]t 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 . . . ."[107] This holding suggested a dual criteria for qualified immunity. The words "reasonable grounds for the belief formed at the time" suggest an objective standard, while the words "good faith belief" suggest a subjective standard for qualified immunity.[108]

In *Wood v. Strickland*,[109] the Court addressed the issue of whether an objective or subjective qualified immunity standard applied to school board officials. Just as it had with all prior qualified immunity decisions, the *Wood* Court found qualified immunity and its common-law origins to be inextricably linked.[110] Addressing the issue before the Court, Justice White stated that the appropriate standard for

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101. *Id.* at 417.

102. *Id.* at 418 (citing Tenney v. Brandhove, 341 U.S. 367 (1951)).

103. 416 U.S. 232 (1974). *Scheuer* was a § 1983 action which arose after Ohio National Guardsmen shot several students at Kent State University during an anti-Vietnam demonstration. *Id.* at 238.

104. Kirby, *supra* note 99, at 472-73. According to this commentator, by narrowing the class of public officials entitled to invoke absolute immunity, the Court expanded the class of public officials entitled to invoke qualified immunity. Kirby, *supra* note 99, at 472-73.

105. *Scheuer*, 416 U.S. at 243.

106. *Id.* at 243-45.

107. *Id.* at 247-48. The *Scheuer* Court held that qualified immunity, as enunciated in the opinion, applied to a public official's discretionary acts. *Id.* The scope of the official's discretion and responsibilities would determine the availability of qualified immunity. *Id.*

108. One commentator has noted that while *Scheuer* suggested an objective-subjective test for qualified immunity, the lower federal courts continued to apply varying standards. 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, 372 (1989).

109. 420 U.S. 308 (1975).

110. *Id.* at 319-22.

qualified immunity contains both objective *and* subjective elements.[111] Justice White stated:

> Such a standard imposes neither an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983.[112]

While the holding in *Wood* was limited by the Court to school board officials,[113] the opinion set the tone for the application of qualified immunity in other contexts.[114] Justice Powell's dissenting opinion argued that the standard should be wholly objective.[115]

The Court eschewed extending qualified immunity to municipalities sued under § 1983 in *Owen v. City of Independence*.[116] Again, relying on the common law as it existed at the time of the passage of the Civil Rights Act of 1871, the Court stated:

> In each of these cases [*Procunier, Imbler, O'Connor, Wood*, and *Scheuer*], our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.[117]

Until 1980, the Court had not addressed the issue of whether or not a private party could be sued under § 1983.[118] This was one of the issues which faced the

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111. *Id.* at 321. The appeals court had held the standard to be objective while the district court had initially determined it to be a subjective standard. *Id.* The Court held: "[t]he disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an 'objective' versus a 'subjective' test of good faith. As we see it, the appropriate standard necessarily contains elements of both." *Id.*

112. *Id.* at 322. This assessment is a balance of what Justice White says is "a standard of conduct based not only on permissible intentions [subjective], but also on knowledge of the basic, unquestioned constitutional rights [objective] . . . ." *Id.*

113. *Id.* at 319.

114. *See* Gildin, *supra* note 108, at 372.

115. Wood v. Strickland, 420 U.S. 308, 329 (1975) (Powell, J., dissenting). The Court adopted an objective standard for qualified immunity in Harlow v. Fitzgerald, 450 U.S. 800 (1982).

116. 445 U.S. 622 (1980).

117. *Id.* at 638 (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976)).

118. According to Professor Nahmod, before *Dennis*, most lower federal courts addressing the issue "concluded without much analysis that a private person did not act under color of law . . . ." *See* NAHMOD, *supra* note 74, at § 2.10.

Court in *Dennis v. Sparks*.[119] The Court found that private parties are amenable to suit under § 1983, despite the fact that the public official with whom they may have conspired may be entitled to absolute immunity.[120] This, the Court held, is a result of balancing the harms and benefits of allowing the private party to invoke immunity.[121]

The Court followed the objective-subjective test for qualified immunity until the seminal case of *Harlow v. Fitzgerald*.[122] In *Harlow*, the Court departed from its past immunity jurisprudence and completely reformulated the qualified immunity doctrine.[123] *Harlow* set the standard which the Court currently applies.[124] While the Court narrowed the class of public officials entitled to invoke absolute immunity, it broadened protection under qualified immunity.[125]

In *Harlow*, the respondent Fitzgerald brought a *Bivens* action[126] against two aides of then-President Nixon.[127] In his suit, Fitzgerald alleged that petitioners

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119. 449 U.S. 24 (1980). In *Dennis*, the private party § 1983 defendant was sued for having allegedly conspired with a state judge to obtain an illegal injunction which prevented petitioner from producing minerals at its oil lease sites. *Id.* at 25-26. After the injunction was invalidated by a state appellate court, the petitioner filed a § 1983 claim against the judge who issued the injunction and against the party who conspired with the judge to obtain the injunction. *Id.* The petitioner claimed that he had been deprived of property without due process of law. *Id.* at 26. The district court dismissed the action, holding that the judge was immune from suit because the injunction was a judicial act within the jurisdiction of the state court, and with the dismissal of the judge from the action, the private defendant could not have been said to have acted under color of state law within the ambit of § 1983. *Id.* The court of appeals agreed with the district court with respect to the judge, but reversed with respect to the private party. *Id.* The court of appeals held that there was no legal, policy, or logical reason to dismiss the private party from the action simply because the immune judge was dismissed from the action. *Id.* at 27. The Supreme Court held that private persons are amenable to suit for conspiring with state officials, and acting under color of state law for § 1983 purposes. *Id.* at 29.

120. *Id.* at 30.

121. *Id.* at 31-32.

122. 457 U.S. 800 (1982). Until *Harlow*, the Court continued to apply *Wood*'s objective-subjective test for qualified immunity in a variety of contexts: Butz v. Economou, 438 U.S. 478 (1978) (presidential aides); Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (superintendent of state mental hospital). In *Procunier*, the Court extended qualified immunity to state prison officials without undertaking a historical analysis of qualified immunity: "Furthermore, without purporting to overrule or modify *Wood*, *Procunier* radically enlarged the circumstances under which an official would be deemed to satisfy the objective test of qualified immunity." Gildin, *supra* note 108, at 373. *See also* NAHMOD, *supra* note 74, at §§ 8.04, 8.09.

123. *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice . . . with an objective inquiry into the legal reasonableness of the official action." Anderson v. Creighton, 483 U.S. 635, 645 (1987).

124. The *Harlow* Court refined the qualified immunity standard in two important aspects. First, as the Court in *Scheuer* had done, the *Harlow* Court further narrowed the class of public officials entitled to invoke absolute immunity. Second, the Court departed from *Wood*'s objective-subjective standard for qualified immunity, and announced a purely objective standard. *See* Kirby, *supra* note 99, at 474.

125. *See* Gildin, *supra* note 108, at 374.

126. *Bivens* actions are the § 1983 analog in suits against federal officials. The name is derived from the case of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that a plaintiff may sue federal officials for direct violations of their Fourth Amendment rights. *Id.* at 397.

Since *Bivens* was decided, the Court has expanded its holding to allow plaintiffs to sue for other constitutional violations. *See* Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment); Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment).

127. Harlow v. Fitzgerald, 457 U.S. 800, 802 (1982).

entered into a conspiracy to have him dismissed from the Navy.[128] Petitioner Harlow claimed that no conspiracy existed and that all of his actions were taken in good faith.[129] The district court denied petitioner's motion to dismiss, and the court of appeals affirmed.[130] Quoting *Butz v. Economou*,[131] the Court held that " 'federal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.' "[132] Further, the Court held that "in general our cases have followed a 'functional' approach to immunity law. We have recognized that the judicial, prosecutorial, and legislative functions require absolute immunity. *But this protection has extended no further than its justification would warrant.*"[133]

The *Harlow* Court recognized that claims against public officials are often baseless and hurt not only the public official defendant, but also society by deterring qualified persons from accepting public office and by diverting public officials from their duties.[134] According to the Court, such suits also carry a danger of " 'dampen[ing] the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' "[135]

The Court cited *Butz v. Economou*[136] and *Scheuer v. Rhodes*[137] in recognizing that the existing standard for qualified immunity—objective-subjective—was intended to allow for summary disposition of insubstantial claims.[138] It was for this reason, the desire for summary disposition of insubstantial claims, that the *Harlow* Court abandoned the subjective element of the test.[139] Inquiry into an official's subjective intent, the Court stated, "may entail broad-ranging discovery and

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128. *Id.* at 802-04. Fitzgerald claimed that the respondents conspired to have him dismissed after it was learned that he planned to blow the whistle on questionable purchasing practices. *Id.* at 804.

129. *Id.*

130. *Id.* at 806.

131. 438 U.S. 478 (1978).

132. Harlow v. Fitzgerald, 457 U.S. 800, 808 (1982) (quoting *Butz*, 438 U.S. at 506).

133. *Id.* at 810-11 (emphasis added).

134. *Id.* at 814.

135. *Id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). This rationale for qualified immunity would come to weigh heavily in the Court's denial of qualified immunity to the private defendants in *Wyatt*.

136. 438 U.S. 506 (1978).

137. 416 U.S. 232, 245-48 (1974).

138. Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

139. *Id.* at 815-16. Justice Powell, writing for the majority, stated that the subjective element has often proven to be

> incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

Id. (footnotes omitted).

the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government."[140]

The Court reasoned that an objective standard of conduct would better fulfill the dual objectives of qualified immunity: avoiding disruption of government and allowing summary disposition of insubstantial claims.[141]

The *Harlow* Court took a two step approach to qualified immunity.[142] First, the Court stated that the defendant, prior to successfully asserting qualified immunity, must establish that he or she did not violate a constitutional or statutory right which was clearly established at the time of the alleged violation.[143] Second, the inquiry turns to whether a reasonable person would have known of the clearly established right, which involves an objective inquiry into the public official defendant's actions.[144] If the constitutional or statutory right was not clearly established at the time of the alleged violation, or if the right was clearly established but a reasonable person in the public official's position would not have known this, then the defendant official may sucessfully assert qualified immunity and avoid liability.

Additionally, the Court retained some vestiges of the subjective prong, notwithstanding its adoption of a pure objective standard.[145] This subjective element retained by the *Harlow* Court was referred to in the opinion as "extraordinary circumstances."[146] "Nevertheless, if the official pleading the defense claims *extraordinary circumstances* and can prove that *he neither knew* [a subjective determination] nor should have known of the relevant legal standard, the defense should be sustained."[147]

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140. *Id.* at 817. The Court stated:

> "We should not close our eyes to the fact that with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts. Each such suit almost invariably results in these officials and their colleagues being subjected to extensive discovery into traditionally protected areas, such as their deliberations preparatory to the formulation of government policy and their intimate thought processes and communications . . . . Such discover [*sic*] is wide-ranging, time-consuming, and not without considerable cost to the officials involved. It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved. . . . The effect of this development upon the willingness of individuals to serve their country is obvious."

Id. at 817 n.29 (alteration in original) (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided court*, 452 U.S. 713 (1981)).

141. *Id.* For further analysis of *Harlow*, see Gildin, *supra* note 108, at 377-79; Gary W. Herschman, *The D.C. Circuit: Qualified Immunity. Interpreting* Harlow *and its Progeny*, 56 GEO. WASH. L. REV. 1047 (1988); Kirby, *supra* note 99, at 474-76.

142. *Harlow*, 457 U.S. at 817.

143. *Id.* at 818.

144. *Id.*

145. *Id.* at 819.

146. *Id.*

147. *Id.* (emphasis added).

> A reasonable reading seems to be that the official can claim immunity—even for a violation of a clearly established right—if he can prove both that he did not know he was committing that violation, and that due to some unique circumstance he should not reasonably have been expected to know he was committing it.

Kirby, *supra* note 99, at 475 n.99.

As a procedural matter, qualified immunity is an affirmative defense which must be affirmatively pled by the public official defendant.[148] In *Siegert v. Gilley*,[149] the Court held that once a defendant has asserted qualified immunity in a motion for summary judgment, the judge may inquire into the law of the substantive counts of the plaintiff's claim and determine " 'whether the law was clearly established at the time an action occurred . . . . Until this threshold immunity question is resolved, discovery should not be allowed.' "[150] This is consistent with the Court's admonition that insubstantial claims should not proceed to trial.[151]

With the objective standard for qualified immunity in place, the Court embarked on a new line of qualified immunity cases under the *Harlow* standard. These cases applied the *Harlow* standard to § 1983 actions.[152]

The Court applied the *Harlow* objective test for qualified immunity to a § 1983 action in *Davis v. Scherer*.[153] In *Davis*, the Court stated *Harlow* had rejected the notion that an inquiry into the state of mind of the defendant was a requisite to pleading a prima facie case under § 1983 and that instead the focus should be placed on the objective reasonableness of the defendant's actions.[154] In *Malley v. Briggs*,[155] a § 1983 action,[156] the Court denied a police officer's assertion of

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148. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635 (1980); FED. R. CIV. P. 8(c).

149. 111 S. Ct. 1789 (1991).

150. *Id.* at 1793 (quoting *Harlow*, 457 U.S. at 818).

151. *Harlow*, 457 U.S. at 814 (citing Butz v. Economou, 438 U.S. 506, 507-08 (1978); Hanrahan v. Hampton, 446 U.S. 754, 765 (1980) (Powell, J., concurring in part and dissenting in part)).

152. *Harlow* was a *Bivens* action. *See supra* note 126. The Court left the door open to the application of the new objective test to state officials sued in § 1983 actions in footnote 30 of the opinion:

> This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 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 § 1983 and suits brought directly under the Constitution against federal officials [*Bivens* actions]."

Harlow, 457 U.S. at 818 n.30 (quoting *Butz*, 438 U.S. at 504).

153. 468 U.S. 183 (1984). With this holding, the Court followed its reasoning in footnote 30 of *Harlow* where the Court stated that, for purposes of immunity law, there is no distinction between *Bivens* actions brought against federal officials and § 1983 suits brought against state officials. *See Harlow*, 457 U.S. at 819 n.30 (quoting *Butz*, 438 U.S. at 504).

154. *Davis*, 468 U.S. at 191.

155. 475 U.S. 335 (1986).

156. While *Harlow* was a suit against federal and not state officials, the *Malley* Court held that "as we stated in deciding the case [*Harlow*], it is 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' " *Id.* at 340 n.2 (quoting *Harlow*, 457 U.S. at 818 n.30 (quoting *Butz*, 438 U.S. at 504)).

absolute immunity but instead allowed the officer to assert *Harlow's* objectively determined qualified immunity.[157]

In *Mitchell v. Forsyth*,[158] the Supreme Court further shaped the contours of qualified immunity.[159] The *Mitchell* Court held that qualified immunity is *immunity from suit* and not a defense.[160] Citing *Harlow's* admonition that insubstantial claims should not proceed to trial, the Court in *Mitchell* held that qualified immunity is "effectively lost if a case is erroneously permitted to go to trial."[161] With this, the Court also held that a denial of a public official's motion for summary judgment, based on an assertion of qualified immunity, should be immediately reviewable[162] through an interlocutory appeal.[163]

Mitchell is significant in one other respect. The Court held that for qualified immunity to be successfully asserted, the public official must not have violated rights that were *clearly established* at the time of the alleged violation.[164]

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157. *Id.* at 342. The Court noted that an allegation of subjective bad faith – malice – will not defeat a defendant's assertion of qualified immunity so long as the defendant acted as a reasonable person would have. *Id.* at 343.

One commentator is critical of the Court's extension of qualified immunity to state officials sued under § 1983. Gildin, *supra* note 108, at 383. "Apart from the flawed logic that underlies the Court's application of *Harlow* to section 1983, extension of the new immunity contravenes the Court's settled holdings that immunity under section 1983 is founded in the common law." Gildin, *supra* note 108, at 383; *see also* Matasar, *supra* note 99, at 786-87. Professor Matasar is critical of the Court having adopted qualified immunity from the common law in *Pierson* in the first instance. He states that such an adoption "treat[s] the broadly expansionist views of the Reconstruction Congress as irrelevant to the question of the availability of immunities, and . . . disregard[s] actual statements of legislators who believed immunities had been abrogated." *Matasar*, *supra* note 99, at 786. Professor Matasar asserts that the Court's adoption of qualified immunity is not only historically unfounded in the common law, but is a "mask for its policymaking." *Matasar*, *supra* note 99, at 744.

158. 472 U.S. 511 (1985). The plaintiff in *Mitchell* brought a *Bivens* action against former United States Attorney General John Mitchell for a warrantless wiretapping of the plaintiff's phone. *Id.* at 513.

159. *Id.* at 526-27.

160. *Id.* at 526.

161. *Id.*

162. *Id.* at 526-27. The courts of appeals are conferred with jurisdiction over interlocutory appeals under 28 U.S.C. §§ 1291, 1292.

163. *Id.* at 527. As support for holding that a denial of qualified immunity at the summary judgment stage of litigation should be immediately appealable, the Court noted that the reasons for allowing interlocutory appeals are compatible with the purposes of qualified immunity. *Id.* (citations omitted). The opinion states: "An appealable interlocutory decision must satisfy two . . . criteria: it must 'conclusively determine the disputed question,' and that question must involve a 'clai[m] of right . . . collateral to, rights asserted in the action.' " *Id.* (citations omitted) (alteration in original).

An assertion of qualified immunity, if successful, will "conclusively determine[] the disputed question" and is "a claim of rights . . . collateral to" the plaintiff's civil rights action. Qualified immunity is thus cast in terms of immunity from suit. "[Q]ualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Id.* at 527-28. The Court further stated that if the plaintiff's claim is erroneously allowed to go to trial against a valid assertion of qualified immunity, the defendant's qualified immunity is effectively lost. *Id.*

164. *Id.* at 530. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). This harkens back to *Pierson v. Ray* in which the Court held that the defendant police officers should not be held liable for violating the plaintiffs' constitutional rights where the right *was not clearly established* at the time of the violation. Pierson v. Ray, 386 U.S. 547, 555 (1962).

In *Anderson v. Creighton*,[165] the Court recognized its departure from the common law with respect to qualified immunity.[166] Justice Scalia stated:

> [W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court *completely reformulated qualified immunity along principles not at all embodied in the common law* . . . .[167]

With *Anderson*, the Court's qualified immunity standard was firmly embedded in both policy and the common law.

B. The Split in the Circuit Courts of Appeal on the Availability of Qualified Immunity to Private Party § 1983 Defendants

1. Qualified Immunity Held Available to Private § 1983 Defendants: The Fifth, Eighth, Tenth, and Eleventh Circuits

In *Folsom Investment Co. v. Moore*,[168] the Fifth Circuit Court of Appeals faced the question of whether a private defendant, facing § 1983 litigation, may invoke qualified immunity.[169] *Folsom* arose from a disputed real estate transaction.[170] Plaintiff Moore initiated a state court attachment proceeding against property held by Folsom Investment Company.[171] After the writ of attachment was issued, Folsom moved to have the writ dissolved alleging that it had been illegally obtained.[172] Upon completion of the state court proceedings, Folsom filed claims in federal district court against Moore alleging that Moore had acted under color of law in wrongfully attaching Folsom's property.[173]

The Fifth Circuit, sua sponte, directed the parties' attention to *Lugar v. Edmondson Oil Co.*,[174] which was pending before the Supreme Court.[175] After *Lugar* was decided by the Supreme Court, the Fifth Circuit held that under *Lugar*, Folsom had pled a prima facie case under § 1983 "insofar as Folsom . . . alleged that the Louisiana attachment scheme is violative of the Constitution, the private parties who set that scheme in motion acted under color of state law."[176] As such,

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165. 483 U.S. 635 (1987). *Anderson* was a *Bivens* claim against an FBI agent for searching the plaintiff's home without a warrant. *Id.* at 637.

166. *Id.* at 646 (emphasis added). This portion of the *Anderson* opinion is inconsistent with other Courts' rationale: "Section 1983 immunities are *'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law . . . .'* " Tower v. Glover, 467 U.S. 914, 920 (1984) (emphasis added) (quoting Imbler v. Pachtman, 424 U.S. 409, 421 (1976); Pulliam v. Allen, 466 U.S. 522, 529 (1984)). *See also supra* note 157.

167. *Anderson*, 483 U.S. at 645 (emphasis added).

168. 681 F.2d 1032 (5th Cir. 1982).

169. *Id.* at 1037.

170. *Id.* at 1033.

171. *Id.*

172. *Id.* at 1036.

173. Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1034 (5th Cir. 1982).

174. 457 U.S. 922 (1982).

175. *Folsom*, 681 F.2d at 1033.

176. *Id.* at 1037.

the Fifth Circuit held that Moore had acted under color of law for purposes of § 1983.[177] However, the *Folsom* court also noted that in footnote twenty-three of *Lugar*, the Supreme Court left the door open for a private § 1983 defendant to invoke a good faith or qualified immunity.[178]

The court seized the opportunity to allow Folsom to invoke qualified immunity on remand.[179] The court reasoned:

> The reasons for conferring such an immunity are obvious. The Louisiana legislature, in enacting the attachment legislation at issue here, conferred a commonly-granted statutory right on qualified litigants. To hold that a private party may be subject to constitutional tort damages for invoking in good faith presumptively valid legislation later held to be unconstitutional would be to visit the effects of unconstitutional action by the legislature on innocent citizens.[180]

The court then proceeded to recognize the proper immunity standard to be that enunciated in *Harlow*.[181] In adopting qualified immunity for private parties facing § 1983 litigation, the court undertook a historical analysis of the common law defense of probable cause to the torts of malicious prosecution and wrongful attachment.[182] "The most important justification [for a probable cause defense] is that a citizen should not be penalized for resorting to the courts to vindicate rights he in good faith has probable cause to believe are his."[183] The court justified its finding that qualified immunity should be available to Folsom by noting that the probable cause defense, as it existed at common law, was transformed by Congress into an immunity with § 1983's passage.[184]

In *Jones v. Preuit & Mauldin*,[185] the Eleventh Circuit addressed the issue of the availability of qualified immunity to private party § 1983 defendants. In *Jones*, the plaintiff contracted with Preuit & Mauldin to repair farm equipment.[186] After Jones failed to pay for the repairs, Preuit & Mauldin filed a mechanic's lien and writ of attachment on Jones' farm equipment.[187] Jones then filed a § 1983 suit challenging the constitutionality of the prejudgment attachment procedure.[188] The district court held that Preuit & Mauldin had acted in good faith reliance on the attachment statute as the statute was not clearly unconstitutional.[189] Citing *Anderson v. Creighton*,[190] the court held that so long as Preuit & Mauldin had

177. *Id.* at 1036-37.
178. *Id.* at 1037 (citing *Lugar*, 457 U.S. at 942 n.23). For the text of footnote 23, see *supra* note 6.
179. *Folsom*, 681 F.2d at 1038.
180. *Id.* at 1037.
181. *Id.* at 1037. *See supra* notes 122-47 and accompanying text.
182. *Folsom*, 681 F.2d at 1038.
183. *Id.*
184. *Id.*
185. 851 F.2d 1321 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989).
186. *Id.* at 1322.
187. *Id.*
188. *Id.* at 1323.
189. *Id.*
190. 483 U.S. 635 (1987); *see supra* note 165.

reasonably and in good faith relied on a statute they could not have known to be unconstitutional, they were entitled to invoke qualified immunity.[191]

Following the Supreme Court's lead, the *Jones* court analyzed the history of the common law to find qualified immunity available to Preuit & Mauldin.[192] The court found that the existence of the good faith and probable cause defenses to the common law action of wrongful attachment at the time of § 1983's passage justified extending qualified immunity to Preuit & Mauldin.[193] The court also outlined the policy reasons for affording qualified immunity to the private party defendant.[194] "When a citizen undertakes in good faith to utilize a proceeding at law provided by his state legislature, he should do so with confidence that he need not fear liability resulting from the legislature's constitutional error of which he was unaware."[195] Finally, the court traced the Supreme Court's cases dealing with wrongful attachment, replevin, and garnishment in light of *Harlow* in justifying their extension of qualified immunity to a private party.[196] The *Jones* court began this discussion by noting footnote twenty-three of *Lugar*.[197] The court felt that the Supreme Court had *strongly* implied in *Lugar* that qualified immunity should be available to private defendants.[198] The court cited *Sniadach v. Family Finance Corp.*,[199] *Fuentes v. Shevin*,[200] *Mitchell v. W. T. Grant Co.*,[201] and *North Georgia Finishing Co. v. Di-Chem, Inc.*,[202] – Supreme Court attachment, replevin, and garnishment cases – in concluding that Preuit & Mauldin had no reason to know that it was "violating any clearly established constitutional rights."[203] Thus, the court

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191. Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-24 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989).

192. *Id.* at 1324-25.

193. *Id.*

194. *Id.* at 1327.

195. *Id.*

196. *Id.* at 1325-27. The *Jones* court cited Supreme Court decisions in which the Court had struck down state attachment, replevin, and garnishment statutes as being violative of due process. *Id. See* North Ga. Finishing v. Di-Chem, Inc., 419 U.S. 601 (1975) (Georgia prejudgment attachment statute); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974) (prejudgment attachment statute); Fuentes v. Shevin, 407 U.S. 67 (1972) (Florida and Pennsylvania replevin statutes); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (Wisconsin prejudgment garnishment statute). In each of these cases, the Supreme Court held that the party sued under § 1983 had relied on statutes that they could reasonably have presumed valid. Jones v. Preuit & Mauldin, 851 F.2d 1321, 1327-28 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989). This reasonable reliance, the court held, entitled Preuit & Mauldin to invoke qualified immunity. *Id.* at 1328.

It is interesting to note that Judge Tjoflat, in a concurring opinion, stated:

> I perceive no . . . way to explain satisfactorily the case law concerning section 1983 immunities. . . . The Supreme Court's pronouncements on immunities law in section 1983 context, I submit, show an interest not in slavishly following common law immunity doctrines, but in preserving the balance of interests that those doctrines struck.

Id. at 1334-35 (Tjoflat, J., specially concurring) (footnotes omitted).

197. *Jones*, 851 F.2d at 1325 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23 (1982)).

198. *Id.*

199. 395 U.S. 337 (1969).

200. 407 U.S. 67 (1972).

201. 416 U.S. 600 (1974).

202. 419 U.S. 601 (1975).

203. Jones v. Preuit & Mauldin, 851 F.2d 1321, 1327 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989).

found that Preuit & Mauldin could successfully assert *Harlow's* objectively determined qualified immunity.[204]

In *Buller v. Buechler*,[205] the Eighth Circuit found qualified immunity available to a private § 1983 defendant.[206] The court's opinion stated that qualified immunity for private defendants had roots in the common law.[207] Citing the Fifth Circuit's opinion in *Folsom Investment Co. v. Moore*, the court extended *Harlow* objective immunity to a private party sued under § 1983 for invoking a state garnishment procedure declared unconstitutional by a federal district court.[208] The court reasoned that public policy dictated allowing citizens to rely on presumptively valid state statutes without fear of being subjected to constitutional tort liability.[209]

In *DeVargas v. Mason & Hanger-Silas Mason Co.*,[210] the Tenth Circuit held that where a private defendant was merely acting pursuant to contractual obligations and is sued for those actions under § 1983, the defendant is entitled to invoke qualified immunity.[211] To deny such a defendant qualified immunity, the court held, would be to place the defendant "between Scylla and Charybdis."[212] The defendant is faced with either performing under the contract, thus facing constitutional litigation, or facing a breach of contract action in order to avoid the constitutional litigation.[213]

2. Qualified Immunity Held Unavailable to Private Defendants in § 1983 Litigation: The First and Ninth Circuits

In *Downs v. Sawtelle*,[214] the First Circuit considered extending qualified immunity to a private defendant in a § 1983 action.[215] *Downs* involved a § 1983 action for damages by the appellant Downs, a deaf mute mother of two, against her guardian Sawtelle, who also happened to be her sister.[216] In her complaint, Downs alleged that Sawtelle and a defendant hospital had conspired to "sterilize her against her will, to delay her marriage to her present husband, and to remove her second child from her custody, all in violation of her constitutional rights."[217] The

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204. *Id.*

205. 706 F.2d 844 (8th Cir. 1983).

206. *Id.* at 850.

207. *Id.* at 850-51.

208. *Id.* (citing Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. 1982)).

209. *Id.* at 851. The Eighth Circuit affirmed its holding in *Buller* in Watertown Equipment Co. v. Norwest Bank Watertown, 830 F.2d 1487 (8th Cir. 1987).

210. 844 F.2d 714 (10th Cir. 1988), *cert. denied*, 498 U.S. 1074 (1991).

211. *Id.* at 717.

212. Scylla and Charybdis are based on Greek mythology and mean to be placed in a position where avoidance of one danger exposes one to destruction by another. WEBSTER'S NEW COLLEGIATE DICTIONARY 1057 (Scylla) (1988).

213. *DeVargas*, 844 F.2d at 722.

214. 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978). *Downs* was a pre-*Lugar*, pre-*Harlow* case.

215. *Id.* at 10.

216. *Id.* at 3-4.

217. *Id.* at 3.

court refused to recognize qualified immunity in such a context.[218] After reviewing the Supreme Court's historical and policy reasons for extending qualified immunity, the court held that "[t]o place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by [§ 1983]."[219]

The court further noted that the rationale for extending qualified immunity to public officials is simply not applicable to private defendants.[220] "Private parties simply are not confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors, and other public officials."[221] With this, the court held that the fairness of affording qualified immunity is outweighed by the intent of § 1983 – providing a remedy to those who have had their constitutional rights violated.[222]

The Ninth Circuit had occasion to address the issue of qualified immunity in a private party § 1983 context in *Howerton v. Gabica*.[223] The court in *Howerton* dismissed qualified immunity in a private party context in a footnote.[224] "[T]here 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."[225]

The Ninth Circuit revisited the question in *Conner v. Santa Ana*.[226] Again, in a footnote, the Ninth Circuit disposed of an assertion of qualified immunity by a private party in a § 1983 action.[227]

3. The Sixth Circuit's Different Approach

In *Duncan v. Peck*,[228] the Sixth Circuit neither adopted nor rejected qualified immunity, but instead set forth a good faith defense distinct from the Supreme Court's *Harlow* standard.[229] In *Duncan*, Peck sued Duncan under § 1983 for attaching Peck's property under an Ohio statute later declared unconstitutional by the Ohio Supreme Court.[230] Citing footnote twenty-three of the Supreme Court's opinion in *Lugar*,[231] the court stated:

> [A] close examination of the Supreme Court's language offers the possibility of some sort of defense from liability to private individuals, and does not necessarily suggest the specific defense of immunity. In any case, *Lugar* did not change the Supreme

218. *Id.* at 15.
219. *Id.*
220. *Id.* at 15.
221. *Id.*
222. *Id.* at 15-16.
223. 708 F.2d 380 (9th Cir. 1983).
224. *Id.* at 380 n.10 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23 (1982)).
225. *Id.*
226. 897 F.2d 1487 (9th Cir. 1990), *cert. denied*, 498 U.S. 816 (1990).
227. *Id.* at 1492 n.9. "[P]rivate parties . . . are not entitled to the qualified immunity defense." *Id.*
228. 844 F.2d 1261 (6th Cir. 1988).
229. *Id.* at 1267-68.
230. *Id.* at 1262.
231. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

Court's requirement that defendants must show both a historical basis, and strong policy reasons to be eligible for good faith immunity.[232]

Further, the court stated that the Supreme Court's opinion in *Forrester v. White*[233] supported denying qualified immunity to private § 1983 defendants.[234] "As the *Forrester* Court points out, the law does not immunize other private parties from suit, no matter how frivolous the claim may be."[235] According to the *Duncan* court, the circuits affording private defendants qualified immunity have confused immunities with defenses.[236] The opinion stated that an immunity is based on an objective standard, while a good faith defense has subjective elements.[237]

After expounding on the inconsistencies of the other courts of appeals' immunity jurisprudence, the *Duncan* court eschewed the *Harlow* standard and instead found a subjective good faith defense to be the appropriate defense for private § 1983 defendants.[238] The *Duncan* court held that such a defense would protect private parties who in good faith rely on advice of counsel in invoking presumptively valid state statutes.[239] Accordingly, to overcome such a subjective good faith defense, a plaintiff must show that the defendant acted with malice and without probable cause.[240]

III. *Wyatt v. Cole*

By the time *Wyatt v. Cole* was decided, the Court's immunity jurisprudence had developed a wholly objective standard for qualified immunity.[241] Until *Wyatt* was decided, however, the Court had yet to address the issue of the availability of qualified immunity to private individuals facing § 1983 litigation.

Writing for a six-to-three majority, Justice O'Connor held that *qualified immunity is not available to private § 1983 defendants*.[242] Justice O'Connor began the opinion by noting the split among the circuit courts of appeal on the issue.[243]

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232. *Duncan*, 844 F.2d at 1265 (citing *Lugar*, 457 U.S. at 942 n.23).

233. 484 U.S. 219 (1988).

234. *Duncan*, 844 F.2d at 1264 (citing *Forrester*, 484 U.S. at 219).

235. *Id.* at 1265.

236. *Id.* at 1266.

237. *Id.*

238. *Id.* at 1267.

> [I]f we were to endorse qualified immunity for private parties, and to apply the immunity as the Supreme Court instructed in *Harlow*, not only would we be improperly extending the immunity doctrine far beyond its underlying rationales, but we would also be significantly distorting the common law defenses to malicious prosecution and wrongful attachment torts by substituting an objective test for good faith for the common law's subjective standard.

Id.

239. *Id.*

240. *Id.*

241. *See supra* notes 122-47 and accompanying text.

242. Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992).

243. *See id.* at 1829-30; *see also supra* notes 168-240 and accompanying text.

The Court's opinion quoted the language of § 1983, the statute under which *Wyatt* arose.[244] Citing *Lugar*,[245] Justice O'Connor then approved the district court's findings that respondents Cole and Robbins had acted under color of state law within the contemplation of § 1983.[246] Justice O'Connor noted that the *Lugar* Court had held that "private parties who attached a debtor's assets pursuant to a state attachment statute were subject to § 1983 liability if the statute was constitutionally infirm."[247] Based on the holding in *Lugar*, the district court had held that "Cole, by invoking the state statute, had acted under color of state law within the meaning of § 1983, and was therefore liable for damages for the deprivation of Wyatt's due process rights."[248] Justice O'Connor noted that both the district court and the Fifth Circuit had held that both Cole and Robbins were nonetheless entitled to qualified immunity despite the deprivation of Wyatt's due process rights.[249]

Justice O'Connor briefly reviewed the Supreme Court's immunity jurisprudence.[250] Justice O'Connor noted that there was insufficient common law support to extend qualified immunity to Cole and Robbins.[251]

Wyatt, in a departure from prior Supreme Court immunity cases' emphasis on common law history, focused more on the policy considerations in denying Cole and Robbins qualified immunity.[252] Cole and Robbins had argued that the common law supported extension of qualified immunity to a private party context.[253] They also argued that policy considerations strongly supported their assertion of immunity.[254] Justice O'Connor rejected these arguments under the rationale that the policy reasons for extending qualified immunity to public officials simply did not have a sufficient nexus to justify extending qualified immunity to private

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244. *Wyatt*, 112 S. Ct. at 1830. *See supra* note 5 for the text of § 1983.

245. *See supra* notes 57-72 and accompanying text.

246. *Wyatt*, 112 S. Ct. at 1830. See also the district court opinion reported at 710 F. Supp. 180 (S.D. Miss. 1989).

247. *Wyatt*, 112 S. Ct. at 1830.

248. *Id. See supra* notes 19-20.

249. *Wyatt*, 112 S. Ct. at 1830.

250. *Id.* at 1831-34. *See also supra* notes 241-48 and accompanying text.

251. *Wyatt*, 112 S. Ct. at 1832.

252. *Id.* at 1833. Justice O'Connor stated that "private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good." *Id.*

253. Respondents' Brief at 9-11, *Wyatt* (No. 91-126). In their brief, Cole and Robbins argued that a historical inquiry into the common law has been made unnecessary by the Supreme Court. *Id.* at 9. "Justice Scalia wrote . . . 'we have never suggested that the precise contours of immunity can and should be slavishly derived from the often arcane rules of the common law.'" *Id.* (citation omitted). In the alternative Cole and Robbins argued that the common law supported their assertion of immunity. *Id.* at 9-11. They further argued that the common law defense of good faith to malicious prosecution and wrongful attachment, which at common law could be asserted by private defendants, is analogous to qualified immunity. *Id.*

254. *Id.* at 11-15. Citing the Eleventh Circuit's opinion in *Jones v. Preuit & Mauldin*, Cole and Robbins argued that a citizen should be able to invoke presumptively valid state statutes without fear of suit for using those statutes. *Id.* at 11-12. *See* Jones v. Preuit & Mauldin, 851 F.2d 1321, 1325 (11th Cir. 1988), *vacated on other grounds*, 489 U.S. 1002 (1989); *see also* notes 185-204 and accompanying text.

individuals.[255] Citing *Butz v. Economou*[256] and *Wood v. Strickland*,[257] Justice O'Connor stated that private parties hold no public office requiring them to make discretionary decisions in furthering the public good.[258] Further, Justice O'Connor held that the public good would not be impaired if private individuals are denied immediately appealable, objectively determined qualified immunity.[259]

Justice O'Connor also stated that history counseled against extending qualified immunity to private parties:

> Even if there were sufficient common law support to conclude that respondents, like the police officers in *Pierson*, should be entitled to a good-faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials under *Harlow v. Fitzgerald*.[260]

After setting forth the Court's holding, Justice O'Connor, in dicta, stated:

> In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.[261]

Justice Kennedy wrote a concurring opinion in which Justice Scalia joined.[262] Justice Kennedy took a historical approach in reaching the conclusion that the common law offered no support for extending qualified immunity in a private party context.[263] "Both the Court and the dissent recognize that our original decisions recognizing defenses and immunities to suits brought under 42 U.S.C. § 1983 rely on analogous limitations existing in the common law when § 1983 was enacted."[264]

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255. *Wyatt*, 112 S. Ct. at 1833. Speaking of the rationale for extending qualified immunity to public officials, Justice O'Connor stated:

> These rationales are not transferable to private parties. Although principles of equality and fairness may suggest, as respondents argue, 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.

Id.

256. 438 U.S. 478 (1978); *see supra* note 131 and accompanying text.

257. 420 U.S. 308 (1975); *see supra* notes 109-15 and accompanying text.

258. *Wyatt*, 112 S. Ct. at 1833 (citing Butz v. Economou, 438 U.S. 478, 506 (1978); Wood v. Strickland, 420 U.S. 308, 319 (1975)).

259. *Wyatt*, 112 S. Ct. at 1833-34.

260. *Id.* at 1832 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).

261. *Id.* at 1834 (citation omitted).

262. *Id.* (Kennedy, J., concurring).

263. *Id.*

264. *Id.* at 1835. "Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in 'freewheeling policy choice[s]' " *Id.* (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

Citing *Harlow*, the concurring opinion noted that the transformation from a subjective-objective standard to an objective test for qualified immunity was "justified by the special policy concerns arising from public officials' exposure to repeated suits."[265] Justice Kennedy disagreed with the Chief Justice's argument in dissent that the similar policy considerations dictated extending qualified immunity to private defendants.[266]

Noting the aim of the objective test for qualified immunity,[267] Justice Kennedy stated that since the burden of proof on the defendant's knowledge of the invalidity of a statute rests with the plaintiff, the "question may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred."[268]

Moreover, the concurring opinion in *Wyatt* stated that a § 1983 defendant should be able to argue that he acted in subjective good faith reliance on a statute, regardless of whether a reasonable person would have so relied.[269]

Justice Kennedy stated that by casting the defense as an immunity, the implication is that the conduct giving rise to a suit under § 1983 was unlawful but that the defendant should be exonerated nonetheless if he acted as a reasonable person.[270] This, Justice Kennedy wrote, is inconsistent "where a private citizen may have acted in good-faith reliance on a statute."[271] Justice Kennedy further noted that subjective good faith may be difficult to prove in the face of a showing that no reasonable person would have acted as the defendant did.[272]

Noting the distinction in the common law action of malicious prosecution between subjective and objective bad faith, Justice Kennedy's concurrence stated that "private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith."[273]

Significantly, Justice Kennedy stated:

> Though it might later be determined that there is not a triable issue of fact to save the plaintiff's case . . . on remand it ought to be open to him at least in theory to argue that the defendant's bad faith eliminates any reliance on the statute, *just as it ought to*

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265. Wyatt v. Cole, 112 S. Ct. 1827, 1835 (1992) (Kennedy, J., concurring) (citing Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982)).

266. *Id.*

267. The objective criteria was adopted in *Harlow* so that insubstantial claims would not proceed to trial. The subjective element dismissed in *Harlow* raised factual questions not testable at the summary judgment stage of litigation.

Citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Justice Kennedy stated that subjective bad faith may now be tested on a motion for summary judgment. *Wyatt*, 112 S. Ct. at 1835 (Kennedy, J., concurring).

268. *Id.* at 1837.

269. *Id.*

270. *Id.* at 1836.

271. *Id.*

272. *Id.*

273. *Id.* at 1837 (citation omitted).

be open to the defendant to show good faith even if some construct of a reasonable man in the defendant's position would have acted in a different way.[274]

Chief Justice Rehnquist was joined in dissent by Justices Souter and Thomas.[275] The Chief Justice stated that the two requirements for qualified immunity in § 1983 actions, as announced by the Court in previous decisions, were satisfied by the facts of *Wyatt*.[276]

The dissent stated that the majority erroneously found that a good faith defense was not available to private parties at common law at the time § 1983 was adopted.[277] Moreover, the Chief Justice stated that the availability of such a good faith defense at common law supported extending qualified immunity to private defendants in § 1983 actions.[278] "I am at a loss to understand what is accomplished by today's decision – other than a needlessly fastidious adherence to nomenclature – given that the Court acknowledges that a good-faith defense will be available for respondents to assert on remand."[279]

The dissent further argued that this is logically inconsistent since probable cause – respondents' reliance on the replevin statute – is an objective inquiry – precisely the standard for qualified immunity established by *Harlow*.[280] Accordingly, Chief Justice Rehnquist argued that since probable cause – the common law defense which the Chief Justice argued supported the extension of qualified immunity to private parties – is an objective inquiry and ordinarily a question of law, the defense of subjective good-faith should be an appropriate inquiry for summary judgment.[281]

Further, Chief Justice Rehnquist's dissenting opinion argued that public policy dictated extending qualified immunity to the respondents.[282] "In denying immunity to those who reasonably rely on presumptively valid state law, and thereby discouraging such reliance, the Court expresses confidence that today's decision will not 'unduly impai[r]' the public interest."[283]

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274. *Id.* (emphasis added).

275. *Id.* (Rehnquist, C.J., dissenting).

276. *Id.* Chief Justice Rehnquist noted that the Court has extended qualified immunity in two circumstances. *Id.* "The first is when a similarly situated defendant would have enjoyed an immunity at common law at the time § 1983 was adopted. The second is when important public policy concerns suggest the need for an immunity." *Id.*

277. *Id.* at 1838 (citing Malley v. Briggs, 475 U.S. 335, 340 (1986); Wood v. Strickland, 420 U.S. 308, 318(1975)).

278. *Id.*

279. *Id.* "Respondents presumably will be required to show the traditional elements of a good-faith defense – either that they acted without malice *or* that they acted with probable cause." *Id.* (citations omitted).

280. *Id.* at 1839.

281. *Id.*

> Nor do I see any reason that this "defense" [subjective good faith defense] may not be asserted early in the proceedings on a motion for summary judgment, just as a claim to qualified immunity may be. Provided that the historical facts are not in dispute, the presence or absence of "probable cause" has long been acknowledged to be a question of law.

Id. (citations omitted).

282. *Id.*

283. *Id.* at 1839-40.

Finally, Chief Justice Rehnquist concluded that the Court's immunity jurisprudence had "gone very far afield" when private parties are exposed to greater risk than public officials when § 1983's "historic purpose was 'to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.' "[284]

IV. ANALYSIS

The Court's immunity jurisprudence has been both erratic and uneven.[285] The Court has often decided immunity cases based on policy rather than precedential considerations.[286] Further, the Court's qualified immunity decisions have often been inextricably linked to the Court's absolute immunity cases.[287]

The holding in *Wyatt* is best understood by viewing it from two perspectives: common law history and public policy.

A. The Wyatt *Court's Historical Analysis of Qualified Immunity*

The *Wyatt* decision was based on two grounds: First, the lack of common law support for extending qualified immunity to a private defendant,[288] and second, the policy considerations militating against extending qualified immunity to private defendants.[289] Justice Kennedy's concurring opinion articulates a more balanced and tenable rationale for denying immunity to private defendants. The Chief Justice's dissent sets forth some of the best policy reasons for extending immunity to private parties facing § 1983 litigation; however, the dissent also makes some questionable inferential leaps from the common law in its opinion.

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284. *Id.* (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 948 (1982)).

285. *Compare* Wood v. Strickland, 420 U.S. 308, 322 (1975) (qualified immunity necessarily contains both subjective and objective criteria), *with* Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (adopting a wholly objective standard).

Compare Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (noting any extension of qualified immunity must be based "upon a considered inquiry into the immunity historically accorded the relevant official at common law . . ."); Tower v. Glover, 467 U.S. 914, 920 (1984) (citing *Imbler*, 424 U.S. at 421 with approval) *with* Anderson v. Creighton, 483 U.S. 635, 645 (1987) ("[W]e have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law. . . .").

286. *See* cases cited at *supra* note 285. In the first case in which the Court recognized a good-faith defense (qualified immunity), Pierson v. Ray, 386 U.S. 547 (1967), the Court was without precedential support for its holding. Instead of relying on precedent, the Court cited public policy and fairness as support for adopting a good faith defense. "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 damages if he does." *Id.* at 555.

In *Harlow*, the Court "completely reformulated qualified immunity along principles not at all embodied in the common law. . . ." Anderson v. Creighton, 483 U.S. 635, 645 (1987).

Harlow was a break from precedent too. "Decisions of this Court have established that the 'good faith' defense has both an 'objective' and 'subjective' aspect. . . . The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 815-16 (citations omitted).

287. *See* Kirby, *supra* note 99, at 472.

288. Wyatt v. Cole, 112 S. Ct. 1827, 1832 (1992).

289. *Id.* at 1833-34.

Justice O'Connor begins her historical analysis in *Wyatt* by reiterating the Court's finding in *Imbler* that "[s]ection 1983 'creates a species of tort liability that on its face admits of no immunities.' "[290] Against this backdrop, the Court then stated that if a defendant were afforded a defense at common law at the time of the enactment of § 1983,[291] the Court will extend the same defense or immunity to similarly situated defendants.[292] Justice O'Connor then stated, however, that "irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions."[293] This, better than any other portion of the opinion, illustrates the Court's convenient and disjointed use of the history in the immunity cases leading up to and culminating with *Wyatt*.

The majority opinion, while reaching the correct conclusion, continues a tradition of form over substance which has been pervasive in the Court's immunity decisions.[294]

Wyatt illustrates the disparate treatment the Court has given qualified immunity. The Court's opinion uses policy considerations in holding that the common law offers no support to respondents' assertion of qualified immunity.[295] Here, the opinion mixes apples and oranges: the common law history used by the Court in first recognizing qualified immunity in *Pierson*, and the policy considerations used by it in subsequent cases to expand the immunity doctrine. In past qualified immunity cases, the Court used both the common law and public policy in evaluating any assertion of qualified immunity; however, the Court treated the two

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290. *Id.* at 1831 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

291. *See supra* note 73 and accompanying text.

292. *Wyatt*, 112 S. Ct. at 1831.

293. *Id.* (citing Tower v. Glover, 467 U.S. 914, 920 (1984); *Imbler*, 424 U.S. at 424-29).

294. One commentator is highly critical of the Court's reliance on history in reaching its immunity decisions. He argues that history should not be dispositive of the question:

> [T]he Court's immunity decisions are not historically compelled; rather, they represent the Court's choice among competing plausible histories . . . .
>
> The Court need not be hesitant to forthrightly announce that history does not determine if immunities are encompassed in section 1983. The Court has ample common law power to define the scope of section 1983. However, if the Court frees itself from its trumped up history-as-congressional-choice methodology, the Court can discuss the relative merits of retaining or abrogating common law immunities.

Matasar, *supra* note 99, at 795 (footnote omitted).

295. Justice O'Connor drew on the distinction between a *defense* available at common law, and an *immunity*:

> Even if there were sufficient common law support to conclude that respondents . . . should be entitled to a good-faith defense, that would still not entitle them to what they sought and obtained in the courts below: the qualified *immunity* from suit accorded government officials under Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Wyatt, 112 S. Ct. at 1832. This illustrates the discordant treatment of the common law by the Court. As was recognized in *Imbler*, § 1983 recognizes no immunities. *Imbler*, 424 U.S. at 417. The Court in *Pierson* first recognized a good faith defense, which later Courts transformed into an immunity. *See supra* notes 80-98 and accompanying text.

Citing the court of appeals' opinion, the *Wyatt* Court rejected respondent's argument: "[A]lthough it acknowledged that a defense is not the same as an immunity, the court maintained it could 'transfor[m] a common law defense extant at the time of § 1983's passage into an immunity.' " *Wyatt*, 112 S. Ct. at 1831 (second alteration in original) (citing the Fifth Circuit's opinion in *Wyatt*, 928 F.2d 718 (5th Cir. 1991) (quoting Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1038 (5th Cir. 1982))).

The Court in *Wyatt* rejected the lower court's transformation, although this is precisely what the Court did in *Pierson* in extending immunity to the police officers in that case. *See supra* notes 80-98.

inquiries as separate. In *Wyatt*, the Court ties history and policy together as if they were but one inquiry. "[A]s our precedents make clear, the reasons for recognizing such an immunity were based not simply on the existence of a good-faith defense at common law, but on the special policy concerns involved in suing government officials."[296]

Justice Kennedy does not rely heavily on a historical analysis in concluding that respondents were not entitled to qualified immunity in the lower courts. Rather, Justice Kennedy uses a policy analysis in reaching his conclusion.

Justice Kennedy's concurring opinion noted the Court's divergence from the common law with respect to qualified immunity:

> Our cases on the subject [of qualified immunity] diverge from the common law in two ways. First as The Chief Justice acknowledges, modern qualified immunity does not turn on the subjective belief of the defendant. Second, the immunity diverges from the common-law model by requiring the defendant, not the plaintiff, to bear the burden of proof on the probable cause issue.[297]

These distinctions weigh heavily in Justice Kennedy's rationale. Presumably, Justice Kennedy recognized that at common law the defenses of good faith and probable cause—the defenses from which qualified immunity in a public official context were derived—turned on the subjective intent of the defendant. With the evolution of qualified immunity, the Court eliminated the subjective inquiry in favor of an objective criteria.[298] Ostensibly, this evolution took qualified immunity out of a pure common-law model and instead placed it in a contemporary context, better suited to meet the stated aims of the doctrine.[299] Under Justice Kennedy's reasoning, however, the subjective good-faith of the common law defenses did not make this transformation in a private party context. "Whether or not it is correct to diverge in these respects from the common-law model when governmental agents are the defendants, we ought not to adopt an automatic rule that the same analysis applies in suits against private persons."[300]

Justice Kennedy concluded his concurring opinion:

> [T]here is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this

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296. *Wyatt*, 112 S. Ct. at 1832-33.

297. *Id.* (citations omitted).

298. *See supra* notes 122-47 and accompanying text.

299. In *Harlow*, the Court articulated the reasons for adopting an objective standard:

> [B]are allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery . . . .
>
> . . . Reliance on the objective reasonableness of an official's conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgement.

Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982).

300. *Wyatt*, 112 S. Ct. at 1836 (Kennedy, J., concurring). Justice Kennedy further stated that since immunity from suit implies that the underlying conduct was wrong, but unredressable if the conduct meets a reasonable person test, application of this standard is inconsistent where a private person may have subjectively and in good faith relied on a presumptively valid statute. *Id.*

case, lack of probable cause can *only* be shown through proof of subjective bad faith.[301]

Justice Kennedy noted his approval of the Chief Justice's historical overview: "My conclusions are a mere consequence of the historical principles described in the opinion of the Chief Justice."[302] However, after reviewing the Chief Justice's historical analysis of qualified immunity, Justice Kennedy stated that common law support alone was not enough to extend qualified immunity to Cole and Robbins.[303]

The dissent relied heavily on the common law in arguing that private § 1983 defendants should be afforded qualified immunity if their conduct was objectively reasonable. "I think it is clear that at the time § 1983 was adopted, there generally was available to private parties a good-faith defense to the torts of malicious prosecution and abuse of process."[304] The Chief Justice argued that the existence of a defense at common law to torts, analogous to the statute alleged to be constitutionally infirm and upon which § 1983 liability was predicated, justified extending qualified immunity to the respondents.[305] Arguing that the common law provides substantial support for respondents' assertion of immunity, Chief Justice Rehnquist singled out the lack of probable cause element to the tort of malicious prosecution which focused on the objective reasonableness of the defendant's actions.[306] "Thus, respondents can successfully defend this suit simply by establishing that their reliance on the attachment statute was objectively reasonable for someone with their knowledge of the circumstances."[307]

The dissent further argued that this objectively determined "defense" should be tested on a motion for summary judgment since at common law probable cause was a question of law.[308] Chief Justice Rehnquist concluded his historical analysis by stating that a good-faith defense placed the respondents in the same position as allowing them to assert qualified immunity would have.[309]

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301. *Id.* at 1837.

302. *Id.* at 1835.

303. *Id.*

304. *Id.* at 1837-38 (Rehnquist, C.J., dissenting).

305. "But I think the Court errs in suggesting the availability of a good-faith common law defense at the time of § 1983's adoption is not sufficient to support [respondent's] claim to immunity." Wyatt v. Cole, 112 S. Ct. 1827, 1838 (1992) (Rehnquist, C.J., dissenting).

306. *Id.* at 1839.

307. *Id.*

308. *Id.* (citations omitted).

309. *Id.*

B. Public Policy Considerations and the Rationale for Denying Cole and Robbins Qualified Immunity

Wyatt was decided on policy grounds.[310] The rationale for the holding is based on a lack of common law support for qualified immunity in a private party context as well as policy considerations. The opinion is, however, best viewed from a policy standpoint. A review of the Court's immunity jurisprudence shows that the Court has used the common law as a vehicle for arriving at policy goals.[311] In *Wyatt*, the Court held that these policy goals simply do not apply to private individuals; thus, the common law vehicle broke down.

After reviewing the Court's prior immunity decisions, Justice O'Connor stated that "we conclude that the rationales mandating qualified immunity for public officials are not applicable to private parties."[312] The opinion further stated that extending qualified immunity to private individuals "would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or whether qualified applicants enter public service."[313] This is inconsistent with the Court's prior justifications for extending or denying qualified immunity.

As Justice Kennedy noted, recognition of qualified immunity in a public official context has often diverged from the common law.[314] This departure from history and the common law was necessitated by the "special policy concerns arising from public officials' exposure to repeated suits."[315]

Chief Justice Rehnquist's rationale for his dissent in *Wyatt* is facially appealing. The Chief Justice stated:

> The normal presumption that attaches to any law is that society will be benefitted if private parties rely on that law to provide them a remedy, rather than turning to some form of private, perhaps lawless, relief. In denying immunity to those who reasonably rely on presumptively valid state law, and thereby discouraging such reliance, the Court expresses confidence that today's decision will not "unduly impai[r]" the public interest. I do not share that confidence. *I would have thought it beyond*

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310. As both Justice O'Connor and Justice Kennedy noted, the policy concerns which supported extending qualified immunity to public officials simply do not support extending qualified immunity to private parties. *See* Wyatt v. Cole, 112 S. Ct. 1827, 1833 (1992) (O'Connor, J., majority); *Id.* at 1835 (Kennedy, J., concurring).

311. For examples of the Court's policy announcements, see *Wyatt*, 112 S. Ct. at 1833 (citing Wood v. Strickland, 420 U.S. 308 (1975)) ("[W]e 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."); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982)) (qualified immunity intended to prevent " 'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service' "); Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982) (inquiries into the subjective intent are disruptive to efficient operation of government); Butz v. Economou, 438 U.S. 478, 506 (1978) (immunity designed to protect public officials who must exercise discretion in exercise of authority in furthering public good); Wood v. Strickland, 420 U.S. 308, 319 (1975) (denying qualified immunity to public officials would lead to intimidation in decision-making).

312. *Wyatt*, 112 S. Ct. at 1833.

313. *Id.*

314. *Id.* at 1835 (Kennedy, J., concurring).

315. *Id.* (citing *Harlow*, 457 U.S. at 813-14).

peradventure that there is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.[316]

Justice O'Connor dismissed this rationale as not having sufficient similarity to the "traditional purpose of qualified immunity to justify such an expansion."[317] As Justice O'Connor correctly points out, the Chief Justice's rationale for extending qualified immunity to private parties would be persuasive but for one significant factor: history and precedent do not support such an extension. The Court's immunity jurisprudence is replete with both policy and historical reasons for extending qualified immunity to public officials. This same body of precedent is devoid of any sound policy or historical reasons for making qualified immunity available to private parties. As Justice O'Connor notes, private parties simply do not face the exigencies of public office,[318] most notably, the threat of being bogged down in constitutional tort litigation for simply performing their job.

C. The Significance of Wyatt v. Cole

Facially, the holding in *Wyatt* might appear to be insignificant, given that the Court's holding is expressly limited to "whether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials."[319] The Court further narrowed the issue: "The precise issue encompassed in this question, and the only issue decided by the lower courts, is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute."[320] Over the last thirty years, a majority of states have had an attachment, garnishment, or replevin statute declared

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316. *Id.* at 1840-41 (Rehnquist, C.J., dissenting) (quoting the majority opinion at 1833) (citations omitted) (emphasis added) (alteration in original).

317. *Id.* at 1833.

318. *Id.*

319. *Id.* at 1834.

320. *Id.*

unconstitutional.[321] There is every reason to believe that such statutes will continue to be declared unconstitutional and that persons relying on these statutes will face constitutional litigation under the Court's holding in *Lugar*. As a result, the holding in *Wyatt* has broader implications than the narrow issue within which it is framed. Section 1983 litigation has grown increasingly common since the enactment of The Civil Rights Attorney's Fees Awards Act of 1976, an amendment to 42 U.S.C § 1988.[322] With this growth, more private persons will undoubtedly find themselves styled as defendants in § 1983 claims. With the abrogation of qualified immunity in a private defendant context, these private defendants must now look for another way to defend these suits. The Court's opinion in *Wyatt* suggests a solution.

D. A Suggested Approach for Private Parties Defending a § 1983 Claim

The Court's holding in *Wyatt*, while foreclosing private defendants from asserting qualified immunity in § 1983 actions, leaves the door open for a good-faith defense, reviewable on a motion for summary judgement. After announcing the Court's holding, Justice O'Connor stated:

> In so holding, however, *we do not foreclose the possibility that private defendants faced with § 1983 liability under Lugar v. Edmonson Oil Co., could be entitled to an affirmative defense based on good faith and/or probable cause* or that § 1983 suits

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321. A judicial determination of unconstitutionality (of state replevin, garnishment, or attachment statute) has been held to be a requirement to bringing a § 1983 action against a private person's invocation of such statutes. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) ("While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute is obviously the product of state action. This is subject to constitutional restraints and properly may be addressed in a § 1983 action . . . .").

What follows is a collection of some, but not all, of the state replevin, garnishment, and attachment statutes that have been declared unconstitutional as violative of due process. *See also supra* note 19.

Attachment statutes: Briere v. Agway Inc., 425 F. Supp. 654 (D. Vt. 1977); McClellan v. Commercial Credit Corp., 350 F. Supp. 1013 (D.R.I.), *aff'd*, 409 U.S. 1120 (1972); Perkins v. McGonagle, 342 A.2d 287 (Me. 1975); Etheredge v. Bradley, 502 P.2d 146 (Alaska 1972); Randone v. Appellate Dept., 488 P.2d 13 (Cal.), *cert. denied*, 407 U.S. 924 (1971).

Garnishment statutes: Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973) (Arizona); Cristiano v. Courts of Justices of Peace, 669 F. Supp. 662 (D. Del. 1987); Jackson v. Galan, 631 F. Supp. 409 (E.D. La. 1986); Reeves v. Motor Contract Co., 324 F. Supp. 1011 (N.D. Ga. 1971); McCallop v. Carberry, 464 P.2d 122 (Cal. 1970); Jones Press Inc. v. Motor Travel Servs., Inc., 176 N.W.2d 87 (Minn. 1970).

Replevin statutes: Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972). *Turner* represents the first of two judicial determinations that Mississippi's replevin statute violated due process. In *Wyatt*, the district court held an amended version to be violative of due process. Wyatt v. Cole, 710 F. Supp. 180, 183 (S.D. Miss. 1989); Williams v. Berry, 492 S.W.2d 731 (Mo. 1973); Sena v. Montoya, 346 F. Supp. 5 (D. N.M. 1972); Mitchell v. Tennessee, 351 F. Supp. 846 (W.D. Tenn. 1972); Dorsey v. Community Stores, 346 F. Supp. 103 (E.D. Wis. 1972); Blair v. Pitchess, 486 P.2d 1242 (Cal. 1971); Massey Ferguson Credit Corp. v. Peterson, 524 P.2d 1066 (Idaho 1974); Throp Credit, Inc. v. Barr, 200 N.W.2d 535 (Iowa), *cert. dismissed*, 410 U.S. 919 (1972); General Elec. Corp. v. Hatch, 443 N.E.2d 1054 (Ohio Ct. App. 1982).

322. The Act provides that "[I]n any action or proceeding to enforce a provision of [42 U.S.C. § 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1988).

According to one commentator, allowance of attorneys fees in § 1983 actions has resulted in "an explosion of litigation in the Supreme Court and the courts of appeal under this Act." NAHMOD, *supra* note 74, at § 1.02.

against private, rather than governmental parties could require plaintiffs to carry additional burdens.[323]

Ostensibly, this good faith/probable cause defense would involve an inquiry into the defendant's subjective intent in invoking the statute in question.

Justice Kennedy's concurrence intimates that such a defense, while turning on the defendant's subjective intent and knowledge, should nonetheless be an appropriate inquiry at the summary judgement stage of litigation. "Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith *can be tested at the summary-judgement stage*."[324] Thus, a private defendant facing a § 1983 claim should be able to assert an affirmative good-faith defense. Further, this affirmative defense should be testable on a motion for summary judgement.

For some indication of what course a private § 1983 defendant might follow, the Sixth Circuit's opinion in *Duncan v. Peck*[325] offers some insight on just what is a subjective good faith affirmative defense. The *Duncan* court's approach to what is an appropriate defense to § 1983 suits for private parties is analogous to the defense that the *Wyatt* Court suggested in dicta.[326] The court in *Duncan* held that a private party should be able to assert that they, in good faith, relied on the advice of counsel in invoking a *presumptively valid* statute.[327] An affirmative good faith defense such as the one in *Duncan* inquires into the subjective intent of the defendant in invoking the statue.[328] Therefore, a private § 1983 defendant should try to establish that he or she subjectively in good faith relied on the statute in question.

V. CONCLUSION

The Court's immunity jurisprudence has often taken inferential leaps. In *Wyatt*, the Court refused to make such a leap. The case, while correctly decided based on the Court's prior policy pronouncements regarding qualified immunity, may indicate the current Court's unwillingness to expand the immunity doctrine beyond current applications. The disparate treatment of qualified immunity in past Supreme Court cases gives no insight into how the Court might decide future cases, including those in which public officials are involved.

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323. Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992) (emphasis added).

324. *Id.* at 1835 (Kennedy, J., concurring) (emphasis added).

325. 844 F.2d 1261 (6th Cir. 1988). *See supra* notes 228-40 and accompanying text.

326. *Wyatt*, 112 S. Ct. at 1834. "In so holding, however, we do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* could be entitled to an affirmative defense based on good faith and/or probable cause. . . ." *Id.* "[I]t ought to be open to the defendant to show good faith. . . ." *Id.* at 1837 (Kennedy, J., concurring).

327. *Duncan*, 844 F.2d at 1267.

328. *Id.*

VI. POSTSCRIPT

Upon remand from the Supreme Court, the Fifth Circuit upheld the district court once again, but on different grounds.[329] The court found both Cole and Robbins to be entitled to a good faith, probable cause-type defense.[330] The court pieced this conclusion together from the concurring opinion of Justice Kennedy[331] and the dissenting opinion of Chief Justice Rehnquist.[332] In this respect, the court stated:

> The five Justices who either concurred or dissented were more forthright in their support of a standard that would relieve private parties who reasonably relied on a state statue of liability. . . . When read together, we believe that the question left open by the majority was largely answered by these separate opinions. We accordingly hold that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 *only if they failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either knew or should have known that the statute upon which they relied was unconstitutional.*[333]

This "knew or should have known" language indicates both subjective and objective inquiries and harkens back to the pre-*Harlow v. Fitzgerald* standard for qualified immunity set out in *Scheuer v. Rhodes*.[334] The *Scheuer* Court held that qualified immunity must be based on a finding of "reasonable grounds for the belief formed at the time and in light of all the circumstances [an objective inquiry], coupled with good faith belief [a subjective inquiry] . . . ."[335]

The court reviewed the Supreme Court's historical and policy analysis and concluded that both Cole and Robbins had acted in subjective good faith based on a lack of any indication of bad faith.[336] Wyatt alleged that Cole acted with malice and had abused the state replevin statute.[337] A finding of malice, however, is only half of the court's analysis. The court held that a plaintiff in a § 1983 action must not only show that the defendant acted with malice under an unconstitutional state

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329. Wyatt v. Cole, 994 F.2d 1113 (5th Cir. 1993), *cert. denied*, No. 93-481, 1993 WL 384202 (Nov. 15, 1993).

330. *Id.* at 1120-21.

331. Wyatt v. Cole, 112 S. Ct. 1827, 1835-37 (1992) (Kennedy, J., joined by Scalia, J., concurring).

332. *Id.* at 1838-39 (Rehnquist, C.J., joined by Souter, J., & Thomas, J., dissenting).

333. *Wyatt*, 994 F.2d at 1118 (citations omitted) (emphasis added).

334. 416 U.S. 232 (1974).

335. *Id.* at 247-48.

336. *Wyatt*, 994 F.2d at 1121.

337. *Id.* Wyatt alleged that Cole threatened to use "political influence" to secure the return of the cattle which were at the center of the dispute, "had no grounds under state law for bringing the action in replevin," and refused to return the cattle after being ordered to by a state court. *Id.* According to Wyatt, these actions by Cole defeated any good faith claim by Cole. The court answered this by noting that "[w]e do not see, however, how these allegations detailing Cole's misuse and abuse of state procedures bear on whether he in fact believed the Mississippi [replevin] statute to be constitutionally infirm." *Id.* In this respect, the court's analysis seems ironic. On the one hand the court seems to acknowledge Cole's malice in invoking the replevin statute, but on the other hand, denies that this malice has anything to do with good faith reliance on a statute.

statute, *but also* that the defendant "either knew or should have known of the statute's constitutional infirmity."[338]

As a result of the Fifth Circuit's opinion in *Wyatt* on remand, a plaintiff in a § 1983 action against a private defendant must plead and prove that: (1) the defendant acted with malice; and (2) that the defendant knew or should have known that the statute they invoked was unconstitutional. Because the court again affirmed the district court's grant of summary judgment, it is implicit in the court's holding that these two issues may be addressed on motion for summary judgment.[339]

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338. *Id.* at 1120.

339. Justice Kennedy suggested this in his concurring opinion. *See* Wyatt v. Cole, 112 S. Ct. 1827, 1834-37 (1992).