Roger Williams University Law Review

Volume 6 | Issue 1 Article 9

Fall 2000

Media in the Spotlight: Private Parties Liable for Violating The Fourth Amendment

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Notes and Comments

Media In The Spotlight: Private Parties Liable For Violating The Fourth Amendment

I. INTRODUCTION

The media plays an important role in our society. The media gathers information and disseminates it to the public. The public relies on the media to keep it up to date on current events and world affairs. However, with the advent of the paparazzi and "reality based" television programs, the focus has shifted from the news to the media itself.

During the past few years there has been a dramatic increase in the number of television programs that depict the activities of law enforcement officers.[1] In an effort to promote realism, as well as to satiate the public's desire for entertainment, the media has become more aggressive and intrusive in its newsgathering techniques.[2] Not only have television scenes of police officers apprehending suspects become commonplace, such scenes have become

1. *See* Elsa Y. Ransom, *Home: No Place for "Law Enforcement Theatricals"—The Outlawing of Police/Media Home Invasions in* Ayeni v. Mottola, 16 Loy. L.A. Ent. L.J. 325 (1995) (stating that at the meeting of the National Association of Television Program Executives in 1995, fifteen new reality-based entertainment programs were unveiled.); *see also* Kevin E. Lunday, *Permitting Media Participation in Federal Searches: Exploring the Consequences for the United States Following Ayeni v. Mottola and a Framework for Analysis*, 65 Geo. Wash. L. Rev. 278, 308 nn.3 & 5 (1997) (defining "reality" television as programs featuring actual video footage of police during performance of their duties and "reality-based" programs as programs that recreate police incidents).

2. *See* Ransom, *supra* note 1, at 325 (indicating that the public has a voracious appetite for this type of entertainment–and producers are eager to satisfy); *see also* Brad M. Johnston, *The Media's Presence During The Execution Of A Search Warrant: A Per Se Violation Of The Fourth Amendment*, 58 Ohio St. L.J. 1499, 1500 (1997).

more intrusive as the media crew now follow the police into the home in order to provide full coverage.[3]

Imagine that it is the middle of the night and you are sleeping in your bed. You are awakened by noises coming from your living room. Still in your pajamas, you get out of bed to investigate. You are greeted by men with drawn guns; flashbulbs go off in your face. Through the chaos, you learn that the police are in your home executing a search warrant. This is not a nightmare–this is real, and it is a violation of your Fourth Amendment rights.[4]

42 U.S.C. § 1983 provides a redress for this infringement of your Constitutional right; however, until recently, 42 U.S.C. § 1983 was only used against the police in this scenario. The media, as a private entity, could not be held liable for infringing upon your Constitutional rights.[5] Recently, however, plaintiffs have been suing the media, as well as the government actors, under § 1983 and the courts appear willing to entertain this cause of action against private parties in certain circumstances. Part II of this Comment will briefly review the background of the 42 U.S.C. § 1983 cause of action and how it may apply to private actors. Part III will examine recent court cases that have deemed the media state actors for purposes of *Bivens v. Six Unknown Named Agents*[6] and 42 U.S.C. § 1983 actions, as well as those cases that have not held the media to be a state actor. By comparing these cases, we can determine what action by the media will be deemed state action. Part IV will explore whether the media, deemed a state actor, is entitled to qualified immunity. Part V will discuss whether the media, deemed a state actor, is entitled to a good faith defense. Finally, Part VI will look at the reasons why a plaintiff would bring forth

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3. *See* Ransom, *supra* note 1, at 325.

4. *See* Wilson v. Layne, 526 U.S. 603, 614 (1999) (holding that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant").

5. The purpose of 42 U.S.C. § 1983 is to deter state actors from using the badge of authority to deprive individuals of federally guaranteed rights. *See* Wyatt v. Cole, 504 U.S. 158, 161 (1992).

6. 403 U.S. 388 (1971) (holding that the plaintiff was entitled to damages for injuries sustained due to the federal agent's violation of the plaintiff's Fourth Amendment rights). *Bivens* applies to federal actors, whereas 42 U.S.C. § 1983 applies to state actors. *See id.* Hereinafter, only 42 U.S.C. § 1983 will be mentioned.

a 42 U.S.C. § 1983 action when a common law tort action is available.

II. 42 U.S.C. § 1983 LIABILITY FOR PRIVATE ACTORS

42 U.S.C. § 1983 allows a plaintiff to seek money damages from government officials who have violated his or her Constitutional rights.[7] Historically, government actors were the only parties that could be held liable under this statute. Today, however, private parties may also be liable under this section if they are deemed to have acted under color of law.[8]

In *Lugar v. Edmondson Oil Co.*,[9] the United States Supreme Court set forth a two-part test for determining whether a private individual acted under color of state law.[10] The first prong requires that the claimed deprivation result from the exercise of a right or privilege having its source in state authority.[11] In other words, the deprivation must be caused by the exercise of some right or privilege created by the state, by a rule of conduct imposed

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7. Section 1983 of 42 U.S.C. states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994 & Supp. II 1996).

8. *See, e.g.*, Howerton v. Gabica, 708 F.2d 477 (9th Cir. 1976) (owners who obtained police assistance in evicting tenants were deemed joint actors with the police).

9. 457 U.S. 922 (1982).

10. Plaintiff brought this action under an 1871 civil rights statute against a corporate creditor, alleging that the defendants, by attaching his property before judgment, had acted jointly with the state to deprive him of his property without due process of law. The complaint was dismissed by the District Court. The Court of Appeals affirmed. The Supreme Court held that the plaintiff was deprived of his property through state action. The defendants acted under color of state law in participating in that deprivation, and the plaintiff presented a valid cause of action insofar as he challenged the constitutionality of the Virginia statute. *See id.* at 925-42.

11. *See id.* at 939.

by the state or by a person for whom the state is responsible.[12] The second prong requires that the party charged be a "state actor."[13] This latter prong does not require that the accused be an officer of the state, but rather it is enough that he is a willful participant in joint activity with the state or its agents.[14] In deciding whether private party conduct amounts to being a "state actor," courts engage in a highly factual inquiry.[15]

III. Is the Media a Person Acting Under Color of Law for Purposes of § 1983?

There has been very little consensus on whether or not members of the media can be deemed government actors for purposes of 42 U.S.C. § 1983. However, courts have deemed the media government actors when certain factors are present. This section of the Comment takes a look at cases that have dealt with media liability under § 1983 in order to determine what those factors are.

There is a trend toward holding media liable for a civil rights violation when there is a close relationship between the media and the government agents during the action in question. This will require a factual determination in each case. It is clear that the courts will look for some type of an agreement between the media and the government agency–be it oral or written–that provides the media with some special privilege to which other private parties are not entitled. For example, in *Berger v. Hanlon,*[16] the Ninth

12. *See id.* at 937.

13. *See id.* at 939.

14. *See id.* at 941.

15. *See* Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997). Four tests have been developed to answer this question: the governmental nexus test (courts must consider whether there is a sufficiently close nexus between the state and the action of the regulated entity so that the latter may be fairly treated as that of the state); the public function test (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state); the state compulsion test (a state can be held responsible for a private act only when it has exercised coercive power or has provided such significant encouragement that the choice must be deemed to be that of the state); and the joint action test (private actors can be considered government actors if they are willful participants in joint action with the government or its agents). The joint action test was the appropriate test in this case. *See id.* at 514. The Supreme Court has said that the joint action test is satisfied when the plaintiff establishes an agreement or conspiracy between a government actor and a private party. *See* Dennis v. Sparks, 449 U.S. 24, 27-28 (1980).

16. 129 F.3d 505 (9th Cir. 1997).

Circuit held that Cable News Network (CNN) agents were government actors for purposes of a civil rights claim.[17] The Ninth Circuit found that there was not only a verbal, but a written agreement between the government and the media to engage jointly in an enterprise that only the government could lawfully institute–the execution of a search warrant.[18] In *Barrett v. Outlet Broadcasting Inc.*,[19] the children of a suicide victim brought a § 1983 action against a city and members of its police department, alleging that police employees permitted a news crew to enter the victim's home, film the scene of a suicide and broadcast those pictures on television.[20] The District Court of Ohio held that the news crew acted under color of state law and could thus be held liable under § 1983. In doing so, the court found that there was an agreement between the police and the media that granted "special privileges" to the media.[21] These

17. In this case, former employees of the Bergers told the United States Fish and Wildlife Service (USFWS) that they had seen Mr. Berger poison and/or shoot eagles a few years prior. Cable News Network (CNN) heard about the investigation and asked agents of the USFWS if they could work out a deal where CNN could get footage for their programs. The Assistant U.S. Attorney and CNN's correspondent executed an agreement that allowed CNN to accompany USFWS agents as they executed the search warrant. A judge issued a search warrant for the Berger's ranch, which did not include the Bergers' home. The judge issuing the warrant was unaware of CNN's participation. *See id.* at 505-09.

18. *See id.* at 515.

19. 22 F. Supp. 2d 726 (S.D. Ohio 1997).

20. This action arose out of the ride-along policy of the Columbus Police Department (CPD). This policy allowed observers to accompany police officers while the officers perform their public duties. The defendant, a reporter for a news station owned by defendant Outlet Broadcasting, contacted the CPD and asked permission to ride along with the Homicide Squad. The reporter explained his desire to do a local news program that would tie into the premiere of the national program "Homicide: Life on the Streets." The reporter explained to CPD that in order to do the story correctly, he would need to have "unrestricted access." CPD claims that it gave the defendant permission to ride with homicide detectives, but that it only gave him two special privileges: first, to ride to crime scenes with the homicide detectives, and second to enter the restricted area of the Detective Bureau. CPD also alleges that the defendant was told that when he arrived at a crime scene, he would be treated like any other reporter. This, he claimed, meant that the defendant would not be allowed inside the police tape. CPD claims that the defendant agreed to the conditions. The defendant claims that CPD never set these restrictions. The defendant believed that he was authorized to follow the homicide detectives wherever they went. *See id.* at 730-31.

21. *See id.* at 735.

privileges included access to the home as well as to the suicide scene.[22]

Courts will also inquire into whether or not the media and the government are acting to help one another achieve the other's goal. For example, in *Lauro v. New York,*[23] the plaintiff brought a § 1983 action against the city and a city police officer, alleging that the plaintiff was deprived of his constitutional rights when he was arrested and forced to take part in a "perp walk."[24] Although the question was not before the court, the court stated that Fox 5 News could also be held liable for this constitutional violation.[25] In a footnote, the court said that holding Fox 5 liable as a state actor "would not be farfetched in this case given that Fox 5 News appears to have encouraged, and participated in, the perp walk conducted by [the police]."[26] The court said that the police assisted the media in sensationalizing the facts of the case and that it was unlikely that the police would have conducted the perp walk without the participation and encouragement of the media.[27]

Also, in *Berger,* the court found that the government agents and the media acted "for the mutual benefit of the media and the government officials' interest in publicity."[28] The Ninth Circuit stated that the record in the case suggested that the government officers planned and executed the search in a manner designed to

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22. *See id.* (stating that without the collusion of the state actors, the media defendants would not have been able to gain access to the home and residence of the victim).

23. 39 F. Supp. 2d 351 (S.D.N.Y. 1999).

24. The plaintiff was taken to the Nineteenth precinct in New York City where he remained for several hours. Detectives questioned plaintiff with regard to several thefts at the building in which he worked. Plaintiff disputes that he was read his Miranda rights at this point. After two hours of questioning, the detective received a call from the Police Department's Office of the Deputy Commissioner of Public Information informing him that the media was interested in plaintiff's case, and that plaintiff should be taken on a "perp walk." A "perp walk" is a Police Department term that refers to walking an arrestee outside the precinct pursuant to a request from the media. The plaintiff was handcuffed, escorted out the front door, and outside of the precinct; the plaintiff was then placed into an unmarked car, driven around the block, and walked back into the precinct. The plaintiff was filmed by a television crew from Fox 5 News outside the precinct building during this procedure. The footage from this "perp walk" was shown on the Fox 5 News. *See id.* at 357.

25. *See id.* at 365.

26. *Id.*

27. *See id.*

28. *Berger,* 129 F.3d at 515.

enhance its entertainment value rather than its law enforcement value.[29] In coming to this conclusion, the court viewed those conversations between the officers and the plaintiff, whose purpose was to provide interesting soundbites, as well as to portray the officers as tough, caring investigators, rather than to further the investigation.[30] In *Barrett*, the court found that the police assisted the media by conducting a staged interview with a witness, as well as by pretending not to know who the victim was while searching the victim's purse in order to find identification, thus enhancing the entertainment value.[31] The court said that there was no question that the media could not have engaged in this unconstitutional action without the authority and cooperation of the police.[32] Also, in *Ayeni v. CBS, Inc.*,[33] agents, accompanied by a television crew, executed a search warrant at the plaintiff's home to search for fraudulently obtained credit cards.[34] The District Court did not expressly hold that CBS was acting under color of law; however, the court concluded that CBS violated a clearly established Fourth Amendment right and denied CBS qualified immunity since it was

29. The day before the execution of the search warrant, the agents and CNN held a pre-search briefing at which the agents shared the contents of the search warrant. On the morning of the search, the agents and CNN held a briefing to discuss the execution of the warrant. This event was videotaped by CNN. Media cameras were placed on the outside and inside of the government vehicles, which documented the agents' every move. A special agent was wired with a hidden microphone which transmitted live audio to the CNN crew. The agents met Mr. Berger on the road leading to the ranch. They asked him for his consent to enter his home. He consented. The conversations that took place in the home were transmitted to CNN via the hidden microphone. The Bergers were not informed that the agent was wearing a microphone or that the cameras belonged to CNN. CNN recorded more than eight hours of footage and broadcasted the video and recordings. *See id.* at 509.

30. *See id.* at 515.

31. *See Barrett*, 22 F. Supp. 2d at 736.

32. *See id.* at 735.

33. 848 F. Supp. 362 (E.D.N.Y. 1994).

34. A government agent obtained a search warrant based upon information regarding Mr. Ayeni's involvement in a credit card fraud operation. The warrant authorized agents to enter the plaintiff's apartment and to search for evidence of credit card fraud. The plaintiff, Ms. Ayeni, was not under investigation for any illegal activity. The plaintiff and her son were home alone when the search was conducted. Ms. Ayeni was wearing only a dressing gown. The agents never identified the camera crew as CBS employees. Ms. Ayeni believed that the CBS camera crew and defendant were part of the team executing the warrant. Ms. Ayeni objected to the camera. She repeatedly requested that her picture not be taken and attempted to cover her face and that of her son. The CBS crew followed and taped the agents as they searched the apartment. *See id.* at 364-65.

not a government official.[35] Although the court did not go through the color of law analysis, it seems that CBS presumed it was acting under color of law and argued for qualified immunity. The court also alluded to the fact that CBS might have acted under color of law when the court said: "at the very least, the plaintiffs are entitled to discovery in order to determine whether there was any justification for this intrusion of CBS into their home *with the aid of a government official*."[36] Once the court denied CBS qualified immunity, CBS settled the case.

In essence, the courts will determine whether or not the government was acting independently of the media. The Ninth Circuit said that the media in *Berger* "collaborated with the government in order to conduct a search for its own benefit–there was nothing passive about the government's involvement with the media in this case."[37] In fact, the court noted that that the federal agents shared confidential information with the media.[38] Although the defendants relied on previous cases where the courts have held that the media was not acting under color of law,[39] the Berger Court distinguished these cases on the grounds that they involved private entities acting independently of the government.

The cases where defendants have not been deemed state actors seem to turn on whether or not the media acted independently of the government official. For example, in *Parker v. Boyer*,[40] members of the St. Louis Police Department's Mobile Reserve Unit entered the home of Sandra and Dana Parker to execute a search warrant for cocaine, heroin, weapons, currency and drug transaction records.[41] Accompanying the police officers were a television

35. *See id.* at 368.

36. *Id.* at 364 (emphasis added).

37. *Berger*, 129 F.3d at 515.

38. *See id.*

39. *See* United States v. Miller, 688 F.2d 652 (9th Cir. 1982) (noting that although a police officer accompanied a theft victim to the defendant's property and kept watch while the victim took pictures, the officer took no active part in the search); *see also* United States v. Jennings, 653 F.2d 107 (4th Cir. 1981) (indicating that a search of an airline package, while Drug Enforcement Administration Agent looked on, did not implicate the Fourth Amendment because the security manager acted for his own benefit rather than as a surrogate for the government).

40. 93 F.3d 445 (8th Cir. 1996).

41. A reporter from KSDK contacted the St. Louis police and told them that he was interested in putting together a television news story about police efforts to eliminate illegal weapons. The police told the reporter that a weapons investigation was in progress, which he might consider covering. The investigation cen-

reporter and a camera person from multimedia KSDK, who rode to the scene in a police unit.[42] The court held that the news media was not acting under color of state law when it entered the home and, therefore, could not be held liable in a civil rights action suit brought by the homeowner.[43] In reaching this conclusion, the court said that the media acted independently of the police, and that neither the police nor the media assisted the other.[44] The court relied on the facts that KSDK did not execute the search warrant, that they entered the house after the police did, that they were there for reasons of their own, and that they were engaged in a mission entirely distinct from the one that brought the police to the house.[45] The court stated that, "*at most*, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law."[46] The court did not attempt to reconcile the fact that KSDK rode to the scene in a police unit with its conclusion that neither the police nor the media assisted the other. The dissent in *Parker* argued that the media should be liable under § 1983 because they could not have entered the home but for the assistance of the police.[47] The dissenting justice reasoned:

> In my view, the news crew acted in concert with the police in entering the Parkers' home. The news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted.[48]

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tered on Travis Martin, who lived with Sandra and Dana Parker. The police did not give KSDK any instructions, nor impose any limitations on their conduct, before the search. The KSDK personnel rode to the scene in a police car with the police officers who executed the search warrant. The KSDK personnel followed the police into the house. KSDK broadcast the tapes that it made at the Parkers' home on several news programs. KSDK personnel did not seek nor obtain the Parkers' permission to videotape the search or broadcast the footage. The district court also noted that the chief of police testified that the department's policy was to require the media to obtain permission to videotape from the people whose houses were being searched. If such permission had not been obtained, the supervising officer on the scene was not to allow the media to enter the residence because such an entry would constitute a trespass. *See id.* at 446-47.

42. *See id.* at 446.
43. *See id.* at 448.
44. *See id.*
45. *See id.*
46. *Parker*, 93 F.3d at 448 (emphasis added).
47. *See id.* at 449 (Arnold, J., dissenting).
48. *Id.*

Similarly, in *Jones v. Taibbi*,[49] Jones brought a § 1983 action against a Boston newscaster.[50] The newscaster had inside information regarding the plaintiff. In exchange for a promise to film the arrest of the plaintiff, the newscaster promised not to publicize what he knew about the case.[51] The court held that the newscaster was not acting under color of law because there was no "symbiotic relationship" between the police and the newscaster.[52] There was merely a "coincidence of interest, but no concert of involvement."[53] According to the court, the police did not play any role in determining what the newscaster would film, the newscaster had no part in the determination of whether or not the plaintiff would be arrested and their respective motives were completely different from one another.[54]

From the above decisions, it is clear that the courts are willing to deem the media a state actor for purposes of § 1983. Before doing so, however, the courts will examine the facts surrounding each case in order to determine the relationship between the media and the government actors involved. It is unlikely that the courts will go as far as to say, as did the dissent in *Parker,* that the media's entry onto searched premises by virtue of government authority would alone be sufficient to constitute joint action.[55] However, the

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49. 508 F. Supp. 1069 (D. Mass. 1981).

50. This case centers around the "Hillside Stranglings" of 1977. During this period, the defendant Taibbi was employed as an investigative reporter for defendant Channel 5. In 1978, Taibbi learned that a prison inmate named George Shamshak had some connection with the Hillside murders. Shamshak's story was that plaintiff Jones had committed two or three of the murders. William Bergin, a Massachusetts state trooper, learned of Shamshak's allegations and communicated them to the LAPD. That prompted Taibbi to contact the LAPD's Strangler Investigation Squad. Taibbi and the LAPD struck a bargain where Taibbi agreed not to publicize what he knew about Jones' alleged involvement. In return, the LAPD promised to allow Taibbi to film the arrest of Jones. When the arrest was made, Taibbi was there with a camera crew to film the arrest. Police held Jones on suspicion of involvement in the Hillside murders. Channel 5 aired the videotape of the arrest. Ultimately, the LAPD found that Jones had an alibi and set him free. One year later, Jones brought this action claiming $3.45 million in damages for, among other things, a violation of civil rights. *See id.* at 1071-72.

51. *See id.* at 1073.

52. *See id.*

53. *Id.*

54. *See id.* (stating that Taibbi exercised responsible restraint). Taibbi agreed to defer telecasting what was known to him until the LAPD felt it was warranted in seeking an arrest. On these facts, there was no delegation of an essential public function by the state to a private party.

55. *See Parker*, 93 F.3d at 448 (Arnold, J., dissenting).

courts are willing to deem the media to have acted under color of law when there is an agreement between the media and the government actor, as well as evidence that the two worked in conjunction with each other in order to achieve their own ends.

IV. ARE MEDIA DEFENDANTS ENTITLED TO QUALIFIED IMMUNITY?

If the media is deemed to be a state actor, the question of liability arises. This section of the Comment explores the possibility of avoiding liability through the concept of qualified immunity. It is clear from the historical justification for qualified immunity, as well as from current case law, that it would not apply to the media.

Although not specifically stated in the statute, the creation of the immunity defense began when the United States Supreme Court read § 1983 as incorporating common law immunities that were in place at the time the statute was passed.[56] The immunity defense was based on the Court's sense that it would be unfair to hold individual government officials personally liable when they acted in good faith, but were later determined to have violated someone's constitutional rights.[57] Through time, the immunity defense was developed and refined.[58] In 1982, the United States Supreme Court set forth a new test for qualified immunity.[59] This test provides that federal agents are entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights.[60]

In 1992, the United States Supreme Court addressed whether or not private individuals might be afforded qualified immunity for a § 1983 violation in *Wyatt v. Cole*.[61] The Court, deciding whether or not private defendants were entitled to immunity, set forth a two-part test: first, courts need to look at history to determine if

56. Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 Mo. L. Rev. 123, 125 (1999).

57. *See id.*

58. The court removed the subjective component of the defense. Because the subjective component of the defense required resolution of factual issues, it was difficult for a defendant to have a claim dismissed prior to trial based on qualified immunity. This delay in the resolution of the lawsuit was thought to be unfair to defendants because it involved them in potentially meritless litigation. *See id.* at 127.

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

60. *See id.* at 818.

61. 504 U.S. 158 (1992).

there has a been a tradition of immunity for a particular class of defendants, and second, courts need to look at the policy concerns involved in suing government officials to see if they apply to the private actor.[62] In holding that private individuals are not entitled to qualified immunity, the Court limited its holding to private defendants "faced with a § 1983 liability for invoking a state replevin, garnishment, or attachment statute."[63] Therefore, the answer to the question of qualified immunity for all private individuals facing § 1983 liability would have to wait for another day. The answer came in 1997.

In *Richardson v. McKnight*,[64] the Supreme Court found that qualified immunity did not apply to privately employed prison guards operating under a contract with the state.[65] The Court, relying on *Wyatt*, came to this conclusion by examining the history as well as the rationale of the qualified immunity defense.[66] First, the Court found that history did not reveal a "firmly rooted" tradition of immunity applicable to privately employed prison guards.[67] Second, in examining the rationale for granting immunity, the Court relied on *Wyatt's* articulation of the doctrine's purposes: protecting the government's ability to perform its traditional functions by providing immunity where necessary to preserve the ability of government officials "to serve the public good or to ensure that tal-

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62. *See id.* at 167.

63. *Id.* at 168-69.

64. 521 U.S. 399 (1997).

65. Ronnie Lee McKnight, a prisoner in a Tennessee prison, brought a federal constitutional tort action against two prison guards. He claims the guards injured him by placing him in extremely tight physical restraints, thereby subjecting him to the deprivation of a federal constitutional right. The defendants asserted a qualified immunity from § 1983 lawsuits and moved to dismiss the action. The District Court noted that Tennessee had "privatized" the management of its correctional facilities, and therefore a private firm, not the state, employed the guards. The court held that the law did not grant the guards immunity from suit. The guards appealed to the Sixth Circuit, where the lower court's decision was affirmed. *See id.* at 401-02.

66. *See id.* at 402.

67. *See id.* at 404 (commenting that the correctional system in the United States has undergone various transformations). Government-employed prison guards may have enjoyed a type of immunity arising out of their status as public employees at common law. However, correctional functions have never been exclusively public. Private contractors were heavily involved in prison management during the 19th century. There is no conclusive evidence of a tradition of immunity for private parties carrying out these functions. History, therefore, does not provide support for the immunity claim.

ented candidates were not deterred by the threat of damages suits by entering public service."[68] In holding that private prison guards were not entitled to qualified immunity, the Court stated that the most important special government immunity producing concern–unwarranted timidity–is less present when a private company, subject to competitive market pressures, operates a prison.[69] Marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous and unduly fearful job performance.[70] Also, to ensure that talented candidates are not deterred from entering public service by the threat of damages suits, the Court stated that privatization, not immunity, meets this need.[71] Private firms, unlike a government department, can offset any increased employee liability risk with higher pay, extra benefits or indemnification.[72]

The *Richardson* ruling, however, was narrowly limited to the specific facts presented: "the context is one in which a private firm, systematically organized to assume a major lengthy administrative task [managing an institution] with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms."[73] The Court went on to suggest that immunity might apply to a private person "briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision."[74]

Defendants facing liability under § 1983 have attempted to distinguish *Richardson* and use the above language in order to receive qualified immunity. Those defendants that have tried to distinguish themselves from the security guards in *Richardson*, however, have had little luck. Courts have usually found that the defendants fell squarely within *Richardson*'s reach and were not distinguishable at all. In doing so, the courts looked at the working relationship between the private party defendant and the state. For example, in *Ace Beverage Co. v. Lockheed Information*

68. *Id.* at 408.
69. *See Richardson*, 521 U.S. at 409.
70. *See id.* at 410.
71. *See id.* at 411.
72. *See id.*
73. *Id.* at 413.
74. *Id.*

Mgmt. Serv.,[75] the defendant, a private corporation that processed parking tickets for the city of Los Angeles, argued that it fell outside of *Richardson*'s holding because it was under the close supervision of the city. The contract between the city of Los Angeles and Lockheed provided that Lockheed had the responsibility of general oversight while the city would set policy and monitor performance.[76] The Ninth Circuit, however, held that the corporation was not entitled to qualified immunity.[77] The court stated that Lockheed was a private firm assuming an administrative task with limited direct supervision by the government.[78] This, the court said, is exactly what the Supreme Court found to be inadequate to confer qualified immunity in *Richardson*.[79]

Also illustrative of this point is *McDuffie v. Hopper*.[80] In that case, the son of a prisoner who committed suicide while in custody of the state department of corrections and under the care of Correctional Medical Services, Inc. (CMS), sued CMS doctors and health care providers under § 1983 alleging cruel and unusual punishment.[81] The defendants argued that *Richardson*'s narrow holding left the door open for the District Court to distinguish them from

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75. 144 F.3d 1218 (9th Cir. 1997).

76. Lockheed Information Management Services is a private corporation that processes parking tickets for the City of Los Angeles. Ace Beverage Company hired a law firm to challenge their parking tickets. In retaliation, Lockheed heightened the requirements applicable to the law firm's clients for setting ticket disputes for trial. The law firm sued Lockheed and others pursuant to 42 U.S.C. § 1983. *See id.* at 1219.

77. *See id.* at 1220.

78. *See id.*

79. *See id.*

80. 982 F. Supp. 817 (M.D. Ala. 1997).

81. CMS is a Missouri corporation that contracts with the State of Alabama to provide mental care to the state's prisoners. Roberts was an inmate in an Alabama prison from 1978 until his death in 1995. Throughout his imprisonment, Roberts suffered severe psychiatric illness. On many occasions, Roberts informed medical staff that he was hallucinating and contemplating suicide. Roberts tried to commit suicide at least four times. During his years in prison, Roberts was receiving large doses of a psychotropic drug. Despite reports of suicidal thoughts by Roberts, doctors, employed by CMS, decided to discontinue his medication. The plaintiffs alleged that this was part of a cost cutting policy of CMS. There is evidence that Roberts was not properly treated after the medicine was discontinued. Roberts complained about the discontinuation of the medicine, but was not visited by the medical defendants. On September 24, 1995, Roberts committed suicide by hanging himself with a bedsheet tied to the bars of his isolation cell. *See id.* at 820-21.

the prison guards in *Richardson*.[82] In holding that the private party doctors were not entitled to qualified immunity, the court stated that the *Richardson* holding was not as narrow as the defendants thought.[83] The private party doctors were well within *Richardson*'s reach because CMS took on the management of the medical services for all of the prisoners in Alabama prisons, and the defendants could not show that they were strictly supervised by the state.[84] In essence, the defendants could not show the court that either CMS or its employees were "merely briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision."[85]

Even if a court were to decide that a defendant did not fit within *Richardson*'s holding, the court would apply the two-part test set forth in *Wyatt*. After doing so, the defendants were clearly not entitled to qualified immunity. For example, in *Malinowski v. DeLuca*,[86] apartment building owners sued local officials and the employees of a private property inspection agency, asserting federal civil rights claims in connection with a search of their building pursuant to a special inspection warrant.[87] Without discussing

82. *See id.* at 823.
83. *See id.* at 824.
84. *See id.*
85. *Id.*
86. 177 F.3d 623 (7th Cir. 1999).
87. In 1983, the Malinowskis purchased a four-unit apartment building in the Village of Twin Lakes ("the Village"). From 1983 to 1987, the Malinowskis made improvements, without the proper permits, to convert the building from a four-unit to a six-unit apartment complex. In 1992, the Village became aware that the Malinowskis had converted the property without the required permits. The Village informed the Malinowskis that they were in violation of the Village's building codes. The Village's building inspector was employed by a private company, Independent Inspections, Ltd. An anonymous complaint was lodged with the Village by a resident of the apartment building concerning alleged safety code violations at the converted apartments. The defendant-appellant DeLuca, who was employed by Independent Inspections, Ltd., began researching the property. DeLuca attempted to inspect the inside of the apartment building on two occasions. After two failed attempts, DeLuca obtained a special inspection warrant to inspect the premises, pursuant to Wis. Stat. § 66.122. The inspectors, along with two Village police officers, were allowed onto the premises without objection. The inspection revealed numerous code violations. The Malinowskis filed suit, alleging that DeLuca and others violated the Malinowskis' civil rights under 42 U.S.C. § 1983 in executing the special inspection warrant. The Malinowskis alleged that during the search they were seized and that excessive force was used during the seizure. *See id.* at 624-25.

Richardson's holding specifically, the Seventh Circuit discussed the two-part test set forth by the Court in *Wyatt*: the origins of the immunity doctrine and the rationale for granting the immunity.[88] The court stated that the defendants did not meet the first prong of the test because they failed to cite any cases or evidence to lend support to the notion that private building inspectors have historically been granted qualified immunity.[89] The court also said that the second prong was not met because the defendants failed to establish anything special enough about the job or its organizational structure to warrant an extension of governmental immunity.[90]

Also, in *Rodriquez v. McLoughlin*,[91] a foster parent sued a child placement service seeking damages for the temporary removal of a foster child from her home in violation of her procedural due process rights.[92] In holding that the employees of the agency were not entitled to qualified immunity, the court reviewed *Wyatt's* two-part test. According to the court, "neither consideration compels a grant of qualified immunity to the individual defendants in this case."[93] There was no evidence that there was a tradition of governmental immunity for private parties engaged in foster care[94] and the agency was subject to competitive market pressures operating pursuant to a contract with the city.[95] Therefore, the

88. *See id.* at 626.

89. *See id.* at 627.

90. *See id.*

91. 49 F. Supp. 2d 186 (S.D.N.Y. 1999).

92. This action arose out of Cardinal McCloskey Children's and Family Services' removal of a former foster child, Les Andrew Kelly, from the home of his former foster, now adoptive, mother, Sylvia Rodriguez, on March 18, 1994. Ms. Rodriguez was the foster mother for Andrew and for Thomas Green, who was three years old. Ms. Rodriguez's grandson, Edwin who was 12 years old, was also living with her. When Mr. Monplaisir, employee of McCloskey, arrived at Ms. Rodriquez's home for a visit, he found only Edwin supervising Andrew and Thomas. Edwin appeared to be to be overwhelmed. Mr. Monplaisir left the apartment and called his supervisor. He was instructed to return to the apartment and stay with the children. After returning to the apartment, Mr. Monplaisir was instructed, by his supervisor, to remove Andrew and Thomas from Ms. Rodriguez's home. *See id.* at 188-91.

93. *Id.* at 207.

94. *See id.* The care of foster children was not traditionally the exclusive prerogative of the state, and foster care workers employed by the government were not necessarily entitled to qualified immunity. Although one court found that qualified immunity would be appropriate for private foster care workers, the decisions upon which it relied, predated *Richardson*. *See id.*

95. *See id.* Because the McCloskey agency was subject to competitive market pressures, operating pursuant to a contract with the city, the agency had an incen-

court stated that the McClosky agency was similar, although not identical, to the entity in *Richardson*.[96]

In rare instances, courts have allowed qualified immunity for private parties because they fell outside of *Richardson*'s holding *and* they satisfied *Wyatt*'s two-part test. For example, in *Raby v. Baptist Medical Center*,[97] the plaintiff sued a medical center, its supervisors and its police officers for violation of § 1983 by using excessive force in apprehending the plaintiff.[98] The *Raby* court stated that *Richardson*'s holding was narrow and, since the facts of the case did not include a contract with the government for performance of a lengthy administrative task, the case was outside of *Richardson*'s reach.[99] However, the court looked to the history of qualified immunity and the purposes that underlie qualified immunity to determine if the private actor was entitled to qualified immunity.[100] Although the majority found that police officers have traditionally been protected by at least some form of immunity, the *Raby* court recognized that *Richardson* made clear that "historical information regarding police officers does not speak to the exis-

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tive not to be unduly timid in protecting the children under its care. The court indicated that the agency had an incentive to discharge its duties responsibly, so that its contract with the city would be renewed. Thus a significant justification for qualified immunity, to insure responsible job performance by governmental employees, was not present in this case. *See id.*

96. *See id.* at 208.

97. 21 F. Supp. 2d 1341 (M.D. Ala. 1998).

98. Jeffery Raby brought claims based on events that occurred when he was arrested by Baptist Medical Center police officers. Although the Baptist Medical Center is a private organization, the Alabama Legislature has passed a law by which Baptist Medical Center is given the authority to appoint police officers. Raby's car was parked in the parking lot of Montgomery Cardiovascular Institute. Raby entered the Center and while he was inside, defendant, a Baptist Medical Center police officer, noted the license number on Raby's car. When Raby emerged from the Center, the officer asked for identification and Raby complied. The officer radioed the information in and was told that Raby should be arrested for trespassing because of a court order stemming from a prior trespassing conviction. When the officer attempted to arrest Raby, Raby got into his car and locked the doors. The officer placed his arm in the window and demanded that Raby exit the vehicle. Another Baptist Medical Center police officer then arrived on the scene. The second officer attempted to break the car window with his baton while the first officer attempted to unlock the passenger-side door. What happened next is contested. The second officer moved either directly in front of or to the side of Raby's car and shot him through the windshield, either as or before Raby drove off. The officers then chased Raby to the Center where they and an additional officer pinned him on the floor and handcuffed him. *See id.* at 1345.

99. *See id.* at 1356.

100. *See id.*

tence of immunities for *private persons* employed as police officers."[101] However, the court stated that "whether or not the historical existence of immunities for police officers fits the first *Richardson* prong. . . it does point to the significance of the purpose of immunities within the context of law enforcement."[102]

So, at least as far as this court was concerned, the first prong was satisfied. In finding that the second prong was also satisfied, the court stated that the concerns focused on in *Richardson* were not relevant in this case.[103] In *Raby*, the court stated that the Baptist Medical Center did not have the same competitive pressures that were identified in *Richardson* because the Medical Center was not competing for government contracts, and the defendants were not performing tasks incidental to the entity's main purpose–providing medical services.[104] Therefore, the Center had less of an interest in the way the individuals were performing their jobs.[105] In other words, the policy concerns that had prompted the courts to apply qualified immunity to police officers, also applied to these privatized police officers regardless of the fact that this has not traditionally been the case.[106]

Another case that illustrates this point is *Bartell v. Lohiser*.[107] In *Bartell*, the plaintiff, whose parental rights were terminated, sued numerous defendants including the state, the Michigan Family Independent Agency, state social workers, a private foster care contractor and private social workers, alleging a violation of her civil rights.[108] In holding that the foster care worker was entitled

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101. *Id.* (emphasis added).

102. *Id.*

103. *See Raby*, 21 F. Supp. 2d at 1357. In *Richardson*, the Court reasoned that private employees are different from government employees because a private firm can respond to market pressures via rewards and penalties that operate directly on employees. The Court also reasoned that the private firm's organizational structure is one which is subject to the ordinary competitive pressures that help them adjust their behavior to the incentives that tort suits bring. *See* Richardson, 521 U.S. at 409-10.

104. *See Raby*, 21 F. Supp. 2d at 1357.

105. *See id.*

106. *See id.*

107. 12 F. Supp. 2d 640 (E.D. Mich. 1998).

108. The plaintiffs were the biological parents of William Stanley. The mother sought help from Jackson County FIA in 1988 because of William's aggressive behavior. The FIA responded by providing parent aides. In September, 1992, Jackson County Protective Services began investigating the mother because of complaints that she was abusing her children and engaging in violent fights with

to qualified immunity, the court stated that the facts in this case fell outside *Richardson*'s reach.[109] This case fell into the area that *Richardson* expressly did not address: whether qualified immunity would shield private parties briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision.[110] This is due to the fact that when the state purchases foster care services from an outside agency, the state assigns its own foster care worker to monitor the services provided.[111] The monitor's duties include evaluating the appropriateness of the plans developed, as well as consulting and assisting the caseworker throughout the process.[112] Under these circumstances, the court stated that there was no doubt that the defendants were acting as an adjunct to government in the essential activity of protecting wards of the state.[113] Although the court did not address the first prong of the two-part test–historical use of qualified immunity–the second prong was satisfied because the agency was a non-profit organization and without immunity, the defendants would not be free to make unbiased recommendations without the risk of being

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William's father. Parent aides were then assigned. Defendant Lohiser was the supervisor of the parent aide program. The mother sought treatment for William's problems and voluntarily placed him in the St. Louis Center. The St. Louis Center is a residential facility for mentally disabled and emotionally impaired boys. William stayed in the center for one year until he was discharged due to behavioral problems. Plaintiff mother claims that Lohiser then persuaded her to place William in foster care by assuring her that William would be returned to her once she was able to care for him. Bartell asked to have William returned to her in December 1994. Shortly thereafter, Lohiser filed a petition asking the court to take over jurisdiction of William. The court denied the petition and returned William to his mother. Protective services filed a second petition to place William in temporary custody. A hearing was held and the petition was granted. The judge ruled that removal of the child from the custody of the mother was necessary to protect him from substantial risk of harm. After William was placed under the care of FIA, the agency contracted with LSS to provide foster care services. The FIA supervisor testified that the state purchases foster care services when the state is unable to meet the needs of a particular child. Because the plaintiff had problems controlling William's behavior, her visitation was reduced from unsupervised to supervised. After William had been in foster care through LSS for one year, LSS requested that plaintiff's parental rights be terminated. A hearing was held and the judge terminated the plaintiff's parental rights. *See id.* at 642-44.

109. *See id.* at 645.

110. *See id.*

111. *See id.* at 646.

112. *See id.* at 647.

113. *See Bartell*, 12 F. Supp. 2d at 647.

sued.[114] If private, non-profit foster care agencies were not available to contract with the state, additional burdens would be placed on the state's limited budget.[115]

It is clear from the above cases that media defendants would not fall within the reach of *Richardson*'s holding because they are neither privately operated, systematically organized to assume a major lengthy administrative task with limited direct supervision by the government, nor are they undertaking that task for profit and potentially in competition with other firms. However, as we have seen, media defendants could still be entitled to qualified immunity if they meet the two-part test. This appears unlikely, however, because even if the media could show a firmly rooted tradition of immunity for the media, they would fail on the second prong. Similar to the security guards in *Richardson*, the media are part of private industry and is subject to the ordinary competitive pressures that provide the "industry" with strong incentives to avoid overly timid employee job performance. Talented candidates are not deterred by the threat of damages suits because the media industry can provide indemnification, higher pay and better benefits to offset any risks. In sum, there is nothing special enough about the media or its organizational structure that would warrant providing it with a governmental immunity.

V. Are Media Defendants Entitled to a Good Faith Defense?

Although the courts are unwilling, in most cases, to expand the qualified immunity doctrine to private parties subject to § 1983 liability, they are willing to entertain an affirmative defense of good faith. This section of the Comment analyzes the concept of a good faith defense and its application to private parties. It is clear from the following that a good faith defense is different from qualified immunity in theory; however, it is very similar in its application. A good faith defense will require that the plaintiff show that the defendant had a subjective appreciation that his or her acts deprived the plaintiff of his or her constitutional rights. Since this requires a factual inquiry, the defendant cannot have the case dismissed as quickly as someone who is entitled to qualified immu-

114. *See id.* at 646.
115. *See id.*

nity. Ultimately, the media will be entitled to a good faith defense as long as the plaintiff fails to show that the media acted with subjective appreciation that its actions violated the plaintiff's constitutional rights.

Few courts have had to address the issue of a good faith defense for private parties. This is due, in part, to the fact that courts were busy addressing the question of immunity for private parties–not the question of an affirmative defense. The Supreme Court first acknowledged the idea of a good faith defense in *Lugar v. Edmondson Oil Co.*[116] Justice Powell, writing for the dissent, was concerned that private individuals who innocently make use of valid state laws would be responsible for the consequences of their actions if the law were subsequently held to be unconstitutional.[117] In the majority's view, however, this problem should be dealt with not by changing the character of the cause of action, but by establishing an affirmative defense.[118]

Realizing that private parties could be held liable under § 1983, and would not receive immunity, courts attempted to figure out what this affirmative defense of good faith would be. In *Duncan v. Peck,*[119] the Sixth Circuit noted that qualified immunity was designed to protect potential defendants from having to defend a suit by dismissing the suit up front;[120] whereas a good faith defense is likely to be based in large part on the facts of the case, with the suit only being dismissed after trial or on summary judgment if the defendant can show that there is no material dispute as to the facts.[121]

The first attempt at setting the parameters of the good faith defense came in *Wyatt v. Cole.*[122] In this case, a rancher brought a § 1983 action against his partner, who had invoked the state replevin statute, and his partner's attorney, challenging the constitu-

116. 457 U.S. 922 (1982).

117. *See id.* at 942 (Powell, J., dissenting).

118. *See id.*

119. 844 F.2d 1261 (6th Cir. 1988).

120. *See generally* Hassel, *supra* note 56 (noting that in theory, by eliminating the subjective element from the qualified immunity test, the determination of whether or not it applies to a defendant can be resolved at the outset of a lawsuit). In reality, the defense of qualified immunity does not quickly resolve a lawsuit. The issues surrounding the case require a fact-finding hearing which makes it difficult to end lawsuits before trial. *See id.* at 149-50.

121. *See* Duncan, 844 F.2d at 1266.

122. 504 U.S. 158 (1992).

tionality of a state replevin statute and seeking injunctive relief and damages.[123] The Supreme Court held that qualified immunity was not available to private defendants charged with § 1983 liability for invoking state replevin, garnishment, or attachment statutes.[124] However, the court stated that "although it may be that private defendants faced with § 1983 liability under *Lugar* could be entitled to an affirmative good faith defense, or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens, those issues are neither before the Court nor decided here."[125] On remand, the Fifth Circuit determined that private defendants sued under § 1983 may be held liable for damages only if they failed to act in good faith in invoking the unconstitutional state procedures.[126] In other words, defendants may be held liable if they acted with malice or either knew or should have known that the statute upon which they relied was unconstitutional.[127]

Since then, other courts have dealt with the issue of an affirmative defense and have attempted to flesh out the defense further.

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123. Respondent Cole sought to dissolve his cattle partnership with petitioner Wyatt. When negotiations failed, Cole and his attorney filed a state court complaint in replevin against Wyatt, accompanied by a replevin bond. At that time, Mississippi law provided that an individual could obtain a court order for seizure of property possessed by another by posting a bond and swearing that the applicant was entitled to that property and that the adversary wrongfully took or wrongfully detained the property. The statute did not give the judge discretion to deny a writ of replevin. The court ordered the county sheriff to seize cattle and certain other personal property from Wyatt. Several months later, the court dismissed Cole's complaint in replevin and ordered that the property be returned to Wyatt. Cole refused to comply with the court order. Wyatt filed suit in Federal District Court challenging the constitutionality of the statute, and seeking injunctive relief and damages. The District Court held that the statute's failure to afford judges discretion to deny writs of replevin violated due process. *See id.* at 159-60.

124. *See id.* at 168-69.

125. *Id.* at 159.

126. *See* Wyatt v. Cole, 994 F.2d 1113, 1119 (5th Cir. 1993) (noting that the Supreme Court has consistently recognized that Congress, in enacting § 1983, legislated against a background of common-law tort liability). The Court has read § 1983 to include general principles of tort immunities and defenses, although § 1983 admits no immunities on its face. In *Wyatt*, the Supreme Court identified malicious prosecution as the common-law cause of action most similar to Wyatt's claim. All of the Supreme Court Justices agreed that plaintiffs seeking to recover on malicious prosecution had to prove that the defendants acted with malice and without probable cause.

127. *See id.* at 1121.

In *Jordan v. Fox, Rothschild, O'Brien & Frankel,*[128] the plaintiff brought a § 1983 action against defendant and defendant's attorneys for depriving the plaintiff of his due process rights.[129] The Third Circuit, referring to the holding in *Wyatt*, agreed with the Fifth Circuit's basic interpretation of a good faith defense; however, the court held that "malice" meant "a subjective appreciation that the [defendant's] acts deprived the [plaintiff] of his constitutional right [to due process]."[130]

The courts have also determined that a good faith defense depends on the defendant's subjective state of mind, which requires a factual inquiry. For example, In *Vector Research, Inc. v. Howard & Howard,*[131] the manufacturer of crash test dummies brought a § 1983 claim against a rival manufacturer and the manufacturer's attorneys arising out of a search and seizure.[132] The Sixth Circuit, affirming the denial of a Rule 12 motion to dismiss, held that the attorney defendants had a good faith defense.[133] However, a good faith defense rested on subjective intent, which required a factual inquiry.[134] Such a factual inquiry could not be resolved on a Rule 12 motion and, therefore, would need to be resolved on remand.[135]

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128. 20 F.3d 1250 (3rd Cir. 1993).

129. This action arises out of a dispute over a commercial lease between the Bermans, commercial landlords who rent office space in Philadelphia, and one of their tenants, Jordan Mitchell, Inc., an architectural firm. The Bermans' attorneys invoked a confession of judgment clause in a form lease executed by the Tenant's predecessor causing the Philadelphia Court of Common Pleas to enter judgment against the Tenant for rents the Bermans claim Jordan Mitchell, Inc. owes. On the judgment, the Sheriff of Philadelphia garnished Jordan Mitchell, Inc.'s checking account without prior notice or hearing. *See id.* at 1253.

130. *Id.* at 1277.

131. 76 F.3d 692 (6th Cir. 1996).

132. First Technology Safety Systems, Inc. (FTSS) asserted that Vector Research, Inc. had violated the Copyright Act, stolen trade secrets, and violated employee confidentiality agreements. FTSS obtained an ex parte order authorizing the seizure of evidence of Vector's alleged wrongful conduct. The court held that the ex parte order was invalid and that its issuance was an abuse of discretion. Vector sued the private participants in the search and seizure in Ohio state court on tort theories. The individual plaintiffs then added *Bivens* federal constitutional claims after the defendants removed the case to federal court. The defendants moved to dismiss the plaintiffs' amended complaint for failure to state a claim upon which relief could be granted, and the district court granted the motion. The plaintiffs appealed. *See id.* at 695.

133. *See id.* at 699.

134. *See id.*

135. *See id.*

The courts have also determined that the plaintiff bore the burden of proof in these cases. For example, in *Robinson v. City of San Bernardino Police Department,*[136] a former state prisoner brought a § 1983 action against city police officers and a certified phlebotomist for injuries he suffered as a result of a sexual examination.[137] The United States District Court of California held that the phlebotomist was entitled to a good faith defense because she conducted the examination at the direction of the police officers and she believed that the police had probable cause–or a search warrant–to perform the exam.[138] Although the court agreed that a good faith defense rests on the subjective state of mind of the defendant, the court granted summary judgment in the defendant's favor because the plaintiff had not submitted any evidence that the defendant had acted in bad faith.[139] In *Jordan*, the Third Circuit also agreed that a good faith defense depends on the defendant's subjective state of mind and that the burden of proof rests with the plaintiff.[140] The court, looking to the language used by the Supreme Court in *Wyatt* and *Lugar*, concluded that "good faith gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity."[141]

In theory, an affirmative good faith defense is different from qualified immunity. However, in practice, it seems that a good faith defense rests upon the same logic as qualified immunity. In order for a person who may be entitled to qualified immunity to

136. 992 F. Supp. 1198 (C.D. Cal. 1998).

137. The plaintiff alleged that following his arrest, defendants subjected him to a "sexual examination," which was performed in a manner violative of numerous federal constitutional rights. The examination was conducted by defendant Vielma, while other defendants held plaintiff's legs and arms. Later, the plaintiff began to feel pain and noticed swelling and bruises. He saw a doctor, who discovered that plaintiff's left leg had been squeezed so tightly that the blood clotted. The doctor testified that permanent disfiguration of the skin tissue resulted from the initial pressure applied to the plaintiff's legs. *See id.* at 1201.

138. *See id.* at 1207.

139. *See id.*

140. *See Jordan*, 20 F.3d at 1277-78.

141. *Id.* at 1277 (articulating some of the concerns that the Supreme Court expressed in *Lugar* and *Wyatt*). In particular, the court states that persons asserting § 1983 claims against private parties could be required to carry additional burdens and that *Lugar* warns that an extension of § 1983 to private parties could destroy the Fourteenth Amendment's limitation to state actions depriving a person of constitutional rights.

receive the benefits of the immunity, it must be shown that his or her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[142] In essence, this is what must be found in order for a defendant to be entitled to a good faith defense: the defendant must have had a subjective appreciation that his or her acts deprived the plaintiff of his or her constitutional rights. The former, then, is objective, while the latter is subjective. While one resolves the case up front, the other requires further factual inquiry. One can be dismissed at the outset while the other can only be dismissed after factual findings are made.

So, in the case of the media, does it not follow that if the police or federal agents are entitled to qualified immunity because there was no clearly established law at the time of the offense,[143] then the media–who rely on the fact that police had probable cause, or at least a search warrant–would be entitled to a good faith defense? In other words, if the government agent did not know he or she was violating clearly established law, it should follow that the media defendant did not know either. In any event, it is up to the plaintiffs who are bringing suits against the media under § 1983 to show that the media knew it was violating the plaintiff's constitutional rights. This will be difficult for plaintiffs to do in cases that arose before *Wilson v. Layne*.[144] Going forward, however, the police and the media are on notice.

VI. PLAINTIFF'S REMEDIES UNDER § 1983

Why are constitutional remedies necessary when general tort remedies–trespass or invasion of privacy–are already available? This section attempts to answer this question as well as give some insight behind the remedy of attorney's fees that are available under this statute. In essence, § 1983 offers the plaintiff a more complete and satisfying remedy than would a remedy under common law.

142. *See Harlow*, 457 U.S. at 815-16.

143. *See* Wilson v. Layne, 526 U.S. 603, 617 (1999) (holding that it was not unreasonable for a police officer in April 1992 to have believed that bringing media observers along during the execution of an arrest warrant was lawful).

144. *See id.*

Common law tort actions may "have little, if any, actual bite."[145] As the media's "involvement" in law enforcement activities increased, traditional tort actions against the media increased as well.[146] However, the ability of common law tort actions to protect the plaintiff is questionable.[147] A remedy should be available for what actually occurs—a violation of a constitutional right.[148] It is not a simple trespass or invasion of privacy issue; "it is a state-supported trespass or invasion of privacy which is an abuse of government power."[149] To have a court say that the defendant violated the plaintiff's constitutional rights has more significance to the plaintiff than to have the court say that the defendant trespassed on plaintiff's property or invaded his privacy.

A remedy under 42 U.S.C. § 1983 for a violation of the Fourth Amendment will be more complete because a prevailing plaintiff can recover attorney's fees under 42 U.S.C. § 1988.[150] It is this point that is arguably the most important reason that a plaintiff would seek damages under § 1983. Attorney's fees are important for two reasons. The first, and least glamorous, reason is that at-

145. C. Edwin Baker, *Giving the Audience What It Wants*, 58 Ohio St. L.J. 311, 380 (1997); *see also* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis' Privacy Tort*, 68 Cornell L. Rev. 291, 362 (1983) (articulating that privacy torts have little power).

146. *See* Note, *Privacy, Technology, and the California "Anti-Paparazzi" Statute*, 112 Harv. L. Rev. 1367, 1369 (1999).

147. *See* Eve Klindera, *Qualified Immunity For Cops (And Other Public Officials) With Cameras: Let Common Law Remedies Ensure Press Responsibility*, 67 Geo. Wash. L. Rev. 399, 416 (1999) (explaining that in order to prove invasion of privacy, the plaintiff must show that an intrusion occurred, that he or she had an objectively reasonable expectation of privacy in the place intruded, and that the defendant intruded upon the plaintiff's privacy in a manner highly offensive to a reasonable person). When the intruder is gathering news, courts require a significant showing of offensiveness. In order to prove trespass, a plaintiff must demonstrate an intentional entry upon land that he possesses. Consent is a defense to trespass. The media can defeat a trespass claim by claiming implied or express consent.

148. Johnston, *supra* note 2, at 1527 n.126.

149. *Id.*

150. "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, title VI of the Civil Rights Act of 1964, or section 13981 of this title, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction." 42 U.S.C. § 1988 (1994).

torneys will be more willing to take a civil rights action if they can be assured of attorney's fees–damages may be relatively minor, but fees fully compensate the attorney. The second, and perhaps more important, reason is that Congress felt these actions were so important that they devised a way to ensure that plaintiffs would be encouraged to bring them forth.[151] Attorney's fees, then, give attorneys, as well as plaintiffs, incentive to bring civil rights violations out into the forefront.

VII. CONCLUSION

The media has been placed in the "judicial spotlight." Courts are more willing to hold the media a "state actor" for purposes of § 1983 liability when it is found that the media and the government actor have an agreement and that this agreement is to help one or the other achieve its own end. When this happens, the government actor, in most cases, will receive qualified immunity and the media will not.

For cases brought to trial before *Wilson* and *Hanlon*, the media will be entitled to a good faith defense as long as the plaintiff fails to show that the media acted in bad faith. This should not be an issue considering there was no law prior to *Wilson* and *Hanlon* that clearly established that the media's presence during the execution of a warrant was unconstitutional. However, going forward, there will no longer be a good faith defense for the media now that they are on notice. This conclusion is limited to the media's presence in the execution of a warrant in the plaintiff's home. Other circumstances in which the media is present with the government may have a different result, but the analysis will be the same. Once deemed a state actor, the only defense that the media has to a § 1983 action is an affirmative one–the defense of good faith.

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151. *See* Benavides v. Bureau of Prisons, 993 F.2d 257 (D.C. Cir. 1993) (explaining that the primary purpose of the FOIA attorney fee provision is virtually identical to the purpose underlying section 1988: "the fundamental purpose of [section 1988 is] to facilitate citizen access to the courts to vindicate their statutory rights"); *see also* Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 711 (D.C. Cir. 1977) (quoting S.Rep. No. 93-854, 93d Cong., 2d Sess. (1974), "[t]oo often the barriers presented by court costs and attorneys' fees are insurmountable for the average person requesting information").