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The Emerging Section 1983 Private Party Defense

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INTRODUCTION

Over twenty years ago the Supreme Court, expanding the scope of state action, held that private parties who utilize state attachment procedures with the assistance of public officials are state actors and thus act under color of law for section 1983 liability purposes.[1] Even though this exposed such private parties to section 1983 damages liability,[2] the Court subsequently ruled[3] that, unlike public officials who are also state actors, such private parties are not protected by qualified immunity,[4] an objective standard which is essentially an immunity from

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1 Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

2 42 U.S.C. § 1983 (2000) reads as follows:

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

This statute is the subject of the author's two volume treatise, SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 1997, 2004).

3 Wyatt v. Cole, 504 U.S. 158 (1992).

4 Qualified immunity, an affirmative defense, protects state and local government officials from section 1983 damages liability when their allegedly unconstitutional conduct was objectively reasonable in light of then-existing law. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982). Qualified immunity was originally intended to protect against liability but has to a considerable extent been transformed by the Supreme Court into the functional equivalent of absolute immunity, which protects against even the need to defend. For example, a defense motion for summary judgment based on qualified immunity typically stops discovery. *Id.* Also, a district court's denial of such a summary judgment motion is immediately appealable if an issue of law is thereby raised. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). Even though qualified immunity remains less protective than absolute immunity, both share a primarily instrumental

suit and the need to defend. This was followed by yet another case, which held that even those private parties employed by a private entity that exercises delegated governmental functions are not protected by qualified immunity.[5] In all three cases, various Justices insisted that, at the very least, private parties acting under color of law for section 1983 liability purposes could still avail themselves of what these Justices called a good faith defense, one that contained both subjective and objective elements.[6] Indeed, following such Supreme Court dicta, several circuits have applied a good faith defense in section 1983 private individual liability cases.[7]

The emergence of such a good faith defense for private parties[8] raises several questions on which I want to comment briefly. First, how did it originate? Second, is the foundation of the good faith defense different from that of qualified immunity? Finally, what is the relation between the good faith defense and a private person's duty to know constitutional law?

I suggest that the foundation of the good faith defense is fault (which is narrower than wrongful conduct).[9] It is thus very different from the primarily instrumental foundation of qualified immunity. Also, the possibility of section 1983 damages liability of private parties has created situations in which private parties are required to know constitutional law, which at first blush appears inconsistent with the federalism and autonomy functions of the state action doctrine. To the extent that the growth of the privatization movement results in increasing findings of state action, private parties will increasingly be required to know and comply with constitutional norms.

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nature because both are designed to minimize the costs of defending regardless of the constitutional harm caused the plaintiff by the defendant. *See generally* NAHMOD, *supra* note 2, at ch. 8.

[5] Richardson v. McKnight, 521 U.S. 399 (1997).

[6] There has as of yet been no express ruling by the Court on this point.

[7] *E.g.*, Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994) (instructing district court to apply a good faith defense); Wyatt v. Cole, 994 F.2d 1113 (5th Cir. 1993) (applying good faith defense on remand from Supreme Court).

[8] By "private parties" I mean private *individuals* sued for damages under section 1983. In this Article I do not discuss private *entity* liability, although cases such as *Richardson* may be relevant to the question whether private entities which are found to be state actors should be protected by qualified immunity.

[9] *See* discussion *infra* Part II.B.

I. THE STATE ACTION/COLOR OF LAW ORIGINS OF THE GOOD FAITH DEFENSE

A. *The Colloquy in* Lugar

In *Lugar v. Edmondson Oil Co.*,[10] the plaintiff alleged that private party debt claimants in a state court action, in violation of procedural due process, had maliciously used state prejudgment attachment procedures that resulted in the wrongful seizure of his property under a levy later set aside. Reversing the Fourth Circuit, which had ruled that color of law was absent, the Supreme Court, in an opinion by Justice White, disagreed. The Court first stated that "the under-color-of-state-law requirement [of section 1983] does not add anything not already included within the state action requirement of the Fourteenth Amendment."[11] Next, on the state action/color of law merits, the Court ruled that in a due process challenge to state attachment procedures, "invoking the aid of state officials to take advantage of state created attachment procedures . . . is sufficient when the state has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute."[12] Because the plaintiff was challenging the constitutionality of these procedures and not merely alleging their misuse or abuse, the plaintiff was allegedly deprived of his property through state action and the private defendants therefore acted under color of law.[13]

Justice Powell dissented from the Court's state action/color of law ruling and argued that it was fundamentally unjust to expose a private party defendant to section 1983 damages liability.[14] Justice White responded that Justice Powell's criticism was misguided because it conflated the prima facie case state action question, which is constitutional, and the availability of an affirmative defense, which is statutory. Justice White then suggested that Justice Powell's concern

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10 457 U.S. 922 (1982).

11 *Id.* at 935 n.18.

12 *Id.* at 942.

13 The Court used a two-part test for state action:

> First, the deprivation must 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 . . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, or because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id. at 937.

14 Justice Powell was joined by Justices Rehnquist and O'Connor. Chief Justice Burger also dissented, arguing that the private defendants' use of the state attachment procedures was not conduct attributable to the State. However, he agreed with the Court that the state action and color of law inquiries were essentially the same.

with unfairness could be addressed separately in connection with the availability of some kind of affirmative defense.[15] Not surprisingly, Justice Powell had little difficulty in agreeing with the suggestion that there should at least be an affirmative good faith defense where a private party is found to have acted under color of law.[16]

B. *The Dictum in* Wyatt

The circuits picked up on the *Lugar* colloquy and began to confront the question of the availability of some kind of affirmative defense.[17] Eventually, the Court decided *Wyatt v. Cole*,[18] which

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[15] *Lugar*, 457 U.S. at 942 n.23.

[16] *Id.* at 956 n.14.

[17] The pre-*Wyatt* question in the circuits was whether such private parties should be protected by qualified immunity or by no immunity at all. To the extent that qualified immunity is designed to encourage independent government decision making, it could be argued that it should be inapplicable to private defendants. *See* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1006 n.55 (1990) ("If I am correct that qualified immunity reflects a policy of promoting independent decisionmaking by government officials, then it should follow that qualified immunity does not protect private defendants who act under color of law."). On the other hand, it could also be argued that under a functional approach, the determination that certain private conduct is state action and action under color of law is the equivalent of a finding that governmental decision making is in effect implicated, especially where a private party performs a function acknowledged to be governmental. *But see* Richardson v. McKnight, 521 U.S. 399 (1997) (rejecting this position); *infra* Part I.C. Moreover, to the extent that qualified immunity is also designed to promote fairness to *all* section 1983 defendants (who by definition act under color of law) on the ground that they should not be expected to predict constitutional law developments accurately on pain of damages liability, then perhaps it should govern private defendants as well. As it turned out, at least until the Court's 1992 decision in *Wyatt*, the latter position was the prevailing one in the circuits where private persons were sued in connection with their use of allegedly unconstitutional state garnishment or prejudgment attachment statutes. However, as noted below, the Sixth Circuit disagreed on this point, a position ultimately adopted by the Court in *Wyatt*.

Thus, in *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982), an influential pre-*Wyatt* Fifth Circuit case, the court held that a private party who invoked a presumptively valid state attachment statute later held to be unconstitutional was entitled to what the court termed a good faith *immunity* from monetary liability under section 1983. The test was whether the private defendant knew or should have known that the statute was unconstitutional, the same objective test made applicable by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), to state officials performing discretionary functions.

The Fifth Circuit in *Folsom* relied on the following considerations: (1) the public interest in permitting ordinary citizens to rely on presumptively valid state law and in protecting them from damages liability when the state statute is later held to be unconstitutional; (2) the public interest in protecting private citizens from damages liability when their role in unconstitutional action is marginal; and (3) the existence of a common law defense of probable cause to malicious prosecution actions which "'convinces us that Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process.'" 681 F.2d at 1037-38. However, the court cautioned that it was not holding that a private defendant's degree of knowledge is always the same as that attributed to a public official. *Id.* at 1037.

There are other pre-*Wyatt* attachment cases also holding that the private defendants were protected by qualified immunity. *See* Buller v. Buechler, 706 F.2d 844 (8th Cir. 1983);

addressed the question whether "private defendants charged with [section 1983] liability for invoking state replevin, garnishment, and attachment statutes later declared unconstitutional are entitled to qualified immunity from suit." In an opinion by Justice O'Connor, the Court, holding that qualified immunity was not available, rejected two major arguments of the private defendants. The defendants' first argument was that inasmuch as private defendants at common law could defeat a malicious prosecution action by proving probable cause, it would follow that Congress did not intend to abrogate such a defense when it enacted section 1983. The Court countered that even if private defendants were entitled to some sort of good faith defense at common law, it did not necessarily follow that they were entitled to the qualified immunity conferred on government officials and employees.

The second argument of the private defendants was that "principles of equality and fairness . . . suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do

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Watertown Equip. Co. v. Norwest Bank Watertown, N.A., 830 F.2d 1487, 1490 (8th Cir. 1987).

The position of the Fifth and Eighth Circuits was adopted by the Eleventh Circuit en banc—again, pre-*Wyatt*—in a comparable attachment setting. Jones v. Preuit & Malden, 851 F.2d 1321 (11th Cir. 1988) (en banc), *vacated on other grounds*, 489 U.S. 1002 (1989). Judge Vance and Judges Johnson, Kravitch, Hatchett, and Clark dissented, *id.* at 1335, 1341, arguing that private defendants should not be allowed to assert a qualified immunity defense. They maintained that none of the policy considerations underlying qualified immunity protection for government officials applied to private defendants.

However, the Sixth Circuit strongly disagreed with the prevailing pre-*Wyatt* position in an ultimately correct (that is, consistent with *Wyatt*) decision in which the plaintiff sued private defendants for their use of allegedly unconstitutional state procedures for prejudgment attachment, default judgment and sheriff's sale. Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988). The court, noting that there was a split in the circuits on the issue, held that the defendants were not eligible for qualified immunity because they were private. *Id.* at 1264. First, the common law never extended such immunity to private persons. *Id.* Second, the public policy goals of preventing injustice to an official who is required to exercise discretion, and of deterring his or her willingness to exercise independent judgment, would not be furthered by extending qualified immunity to private defendants. *Id.* The Sixth Circuit went on to criticize the Fifth, Eighth, and Eleventh Circuits for improperly confusing qualified immunity with a good faith defense. *Id.* at 1265-67. Only the latter, which included subjective factors, was relevant in § 1983 cases of the kind involved here: malicious prosecution and wrongful attachment. *Id.* at 1266. The court reasoned:

> Thus, if we were to endorse qualified immunity for private parties . . . 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. at 1267. The Sixth Circuit then observed that the good faith defense protected private parties "who, in good faith, rely on the advice of their attorneys, and invoke presumptively valid state statutes." *Id.* Finally, the court ruled that the private defendants in this case were entitled to prevail on summary judgment because they introduced evidence showing their good faith reliance on the advice of counsel. *Id.* at 1268.

[18] 504 U.S. 158 (1992).

their government counterparts . . . ."[19] The Court responded that the primary rationale of qualified immunity—safeguarding the government, and thus the public, and not the agents of government as such—was not transferable to private defendants. "[P]rivate parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good."[20] The Court concluded: "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity."[21]

What is noteworthy for present purposes is that while the Court in *Wyatt* rejected qualified immunity, it picked up on the suggestion in *Lugar* that the common law background of malicious prosecution and abuse of process, together with "principles of equality and fairness," might justify a good faith defense for private parties accused of unconstitutionally using state attachment procedures.[22] At the same time it made clear that this issue was not really before it. The Court further observed that it was not clear whether such a good faith "defense" should be part of the plaintiff's burden of making out a prima facie case or whether it should be a true affirmative defense.[23] Significantly, no Justice disagreed with the availability of some kind of good faith defense, including, not surprisingly, the dissenting Justices who would have conferred qualified immunity protection on private party defendants generally.

Following *Wyatt*, the circuits began to distinguish between those private persons using attachment statutes who, under *Wyatt*, were not protected by qualified immunity, and those private persons acting pursuant to government contract, government request or court order who, despite *Wyatt*, were found to be protected by qualified immunity.[24]

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19 *Id.* at 168.

20 *Id.*

21 *Id.*

22 *Id.* at 168-69.

23 *Id.* at 169.

24 Thus, in a post-*Wyatt* Seventh Circuit case, the plaintiff sued a private psychiatric center, a police officer and others for allegedly acting unconstitutionally in connection with his emergency involuntary detention and treatment as a mentally ill and dangerous person. Sherman v. Four County Counseling Ctr, 987 F.2d 397 (7th Cir. 1993). After an extensive discussion of *Wyatt* and other case law, the Seventh Circuit held that the private psychiatric center was entitled to assert a qualified immunity defense. *Id.* at 406. It emphasized that the feature that distinguished the case before it from *Wyatt* was that here the center accepted and treated the plaintiff *pursuant to court order*. *Id.* at 405. The center did not act with improper motives or to further its own pecuniary interests, unlike private co-conspirators. *Id.* at 406. In addition, an important purpose of qualified immunity was to avoid discouraging public service. *Id.* at 406. Thus, "[t]he policy justifications which underlie the doctrine of qualified immunity for government officials apply with full force to Four County's activities here. Although it is a private hospital, Four County accepted and cared for a state mental patient committed on an emergency basis." *Id.* at 405-06. The Seventh Circuit then went on to conclude that the center was protected by qualified immunity for its conduct in 1989. *Id.* at 406.

These courts emphasized that such private defendants did not act for improper motives or to further their own pecuniary interests; that an important purpose of qualified immunity was to avoid discouraging public service; and that it was unfair and made little sense to provide qualified immunity protection to government officials who requested that private parties act in certain ways but to deny qualified immunity to those private parties themselves.

C. *The Good Faith Defense Left Open in* Richardson

Unexpectedly, however, the Court, in *Richardson v. McKnight*[25] rejected what appeared to be a sound distinction between private defendants using state attachment procedures and those acting pursuant to government contract and otherwise, and held that "prison guards who are employees of a private prison management firm are [not] entitled to a qualified immunity from suit by prisoners charging a violation of [section 1983]."[26] Justice Breyer, for the Court, stated at the outset that the Court's precedents, including *Wyatt*, required it to look both to history and to the purposes underlying qualified immunity for government employees. After an extensive discussion of the history of the private management of prisons, he declared: "we have found no conclusive evidence of a historical tradition of immunity for private parties carrying out [prison management] functions." Thus, history did not provide significant support for "any . . . general immunity that might have applied to private individuals working for profit."[27]

Next, rejecting the relevance in this case of the Court's functional approach to immunities,[28] Justice Breyer went on to address the

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Similarly, in *Warner v. Grand County*, 57 F.3d 962, 963 (10th Cir. 1995), the female plaintiffs sued police officers and the female director of a crisis center for violating their constitutional rights in connection with strip searches incident to their arrest. Ruling that the crisis center director, a private person, was protected by qualified immunity, the Tenth Circuit first determined that she acted under color of law because she conducted the strip search at the request of one of the police officers: this was a search power traditionally reserved to the states. *Id.* at 964. It then held that the defendant was protected by qualified immunity because she performed a unique governmental function at the request of a government official who was himself protected by qualified immunity. *Id.* at 965. The Tenth Circuit reasoned that *Wyatt* was not only distinguishable but that its reasoning, which emphasized the private benefit to those using state attachment statutes, did not apply here. *Id.* "Instead, she followed the ostensibly legitimate orders of a state official for the mere purpose of assisting the state with its investigatory powers." *Id.* at 965. The court expressly approved of the reasoning of the Seventh Circuit in *Sherman*. *Id.* at 966-67; *see also* Eagon v. City of Elk City, Oklahoma, 72 F.3d 1480, 1489-90 (10th Cir. 1996) (applying *Warner*).

25 521 U.S. 399 (1997).

26 *Id.* at 401.

27 *Id.* at 407.

28 He observed that the Court had never held "that the mere performance of a governmental function could make the difference between unlimited § 1983 liability and qualified immunity."

purposes of qualified immunity for government employees and found them inapplicable in this kind of case. First, the qualified immunity concern with over-deterring government employees was not applicable here because, unlike in the government setting, "marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance."[29] Second, privatization itself helped to generate talented and undeterred candidates by virtue of the comprehensive insurance-coverage arrangements typically provided.[30] Finally, even though section 1983 lawsuits might constitute distractions, this was not enough, standing alone to justify qualified immunity.

Justice Breyer concluded by noting that the Court's holding did not necessarily apply to cases that "involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision."[31] Rather, *Richardson* was limited to cases "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."[32] Equally important for present purposes, the decision expressly left open the question whether the private prison guards could assert a good faith defense at trial.[33]

As observed earlier, the common law background of malicious prosecution and abuse of process might explain the availability of a good faith defense in *Lugar* and *Wyatt*. However, this common law background, extant in 1871 when section 1983 was enacted, cannot plausibly explain the availability of a good faith defense in *Richardson*, where the private defendant performed a government function. Rather, its availability to *Richardson*-type defendants (as well as *Lugar*-type defendants) can be explained[34] as reflecting a normative judicial intuition in section 1983 private party cases that damages liability be based on fault.[35] This intuition, which is related to corrective justice,[36]

Id. at 408.

29 *Id.* at 410.

30 *Id.* at 411.

31 *Id.* at 413.

32 *Id.*

33 *Id.* at 413-14. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, dissented on the immunity issue. *Id.* at 414. He disagreed not only with the Court's historical assessment but also argued that the Court's functional approach ought to govern here. He further questioned the Court's description of the market pressures where private firms were hired to manage prisons. *Id.*

34 I recognize, of course, that the affirmative good faith defense arose historically because those Justices reluctant to approve qualified immunity for private defendants and those supportive of qualified immunity for private defendants could all agree on this compromise position. However, my primary concern in this Article is the justification of the good faith defense.

35 By "fault" in this section 1983 setting I mean a blameworthy state of mind related to what

implicates a private person's duty to know constitutional law in appropriate circumstances. In contrast, the Court has frankly acknowledged that its qualified immunity doctrines, from *Harlow* on, are based neither on section 1983's common law background nor on fault, as in *Pierson v. Ray*,[37] but rather on instrumental policy concerns with promoting independent decision-making by government officials by not over-deterring them.[38] For the Court, qualified immunity is

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the private actor actually knew subjectively and should have known objectively about the constitutionality of the challenged conduct at the time it occurred. The objective element of fault is related to the adequacy of the notice to the private defendant of the unconstitutionality of the challenged conduct.

As discussed in the text, "fault" is a narrower concept than wrongful conduct in the section 1983 setting: when a private defendant (or even a government actor) is found to have violated a constitutional norm, that constitutes wrongful conduct even absent fault; that is, where the defendant neither knew nor should have known of the unconstitutionality of that conduct. *See* Nahmod, *supra* note 17. Under the view set out here, fault becomes relevant to the question of damages liability for the harm caused by the wrongful conduct. *See* Barbara Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583 (1998) (arguing that section 1983 damages liability has a "moral blaming function" analogous to criminal prosecution).

For extensive discussion of analogous issues in criminal law, see Mitchell N. Berman, *Justification and Excuse: Law and Morality*, 53 DUKE L.J. 1, 2 (2003) (arguing that a justified action is not criminal, while an excused action, though criminal, is not punishable).

[36] "Corrective justice," sometimes called "rectificatory justice," is considered by many to be Aristotelian in origin and refers to remedying the harm wrongfully caused by one person to another. *See* 2 Aristotle, *Nichomachean Ethics*, bk 5, ch 3, *in* THE COMPLETE WORKS OF ARISTOTLE 1131a10-1131b24, 1131b26-1132b18 (W.D. Ross & J.O. Urmson trans., Jonathan Barnes ed., 1984). The basic moral premise of corrective justice is the equal dignity of persons. To put this in Kantian terms: "[A] person . . . is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity . . . by which he exacts respect for himself from all other rational beings in the world." IMMANUEL KANT, THE METAPHYSICS OF MORALS 434-435 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797). For a very useful discussion, see Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859 (2000). Much has been written about corrective justice in connection with tort law. *See generally* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995), *Symposium: Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992). *See also* Ernest Weinrib, *Causation and Wrongdoing*, 63 CHI-KENT L. REV. 407 (1987), *Symposium on Causation in the Law of Torts*, 63 CHI-KENT L. Rev. 397 (1987). Weinrib's views are especially useful. Weinrib, whose goal is to "vindicate . . . tort law as the expression of a single normative [noninstrumental] conception integrating the plaintiff's injury and the defendant's negligence," focuses on tort law in general and on negligence in particular when he discusses the moral need for both negligence and causation. In his view, both are normatively required for tort law compensation because causation explains why *this plaintiff* is entitled to recover and negligence explains why *this defendant* is obligated to compensate. As I previously argued elsewhere, "[t]he law of section 1983 compensatory damages liability comfortably can be fit into Weinrib's normative model. Causation explains why *this plaintiff* is entitled to recover and unconstitutional conduct explains why *this defendant* is obligated to compensate." Nahmod, *supra* note 17, at 1011. I distinguished sharply there, as I do here, between wrongful conduct, which does not necessarily imply a blameworthy state of mind, and fault, which does. I also discuss later why wrongful conduct may be necessary for private party section 1983 damages liability but is not sufficient. Rather, fault is also required. *See* discussion *supra* note 35.

[37] 386 U.S. 547 (1967).

[38] As the Court emphasized in *Harlow v. Fitzgerald*:

Where an official could be expected to know that certain conduct would violate

primarily an immunity from suit rather than a fault-based defense against liability.

II. QUALIFIED IMMUNITY, FAULT, KNOWLEDGE OF CONSTITUTIONAL LAW AND THE GOOD FAITH DEFENSE

A. *Qualified Immunity as Primarily Instrumental Post-*Harlow

The normative considerations underlying the fault-based affirmative good faith defense are very different from the primarily instrumental considerations underlying qualified immunity. Qualified immunity originally had two parts, subjective and objective, as set out long ago in *Pierson v. Ray*[39] and thereafter in *Wood v. Strickland*.[40] As so constituted, qualified immunity primarily functioned normatively. It functioned normatively in its subjective part because a defendant's honest belief in the constitutionality of his conduct, even if the conduct turned out to be unconstitutional, went to that defendant's fault. And even though, with post-*Harlow* hindsight, the objective part could be said to have functioned instrumentally in its objective part because it provided a margin for error for government officials who may have acted unconstitutionally but still reasonably, pre-*Harlow* the Court regularly emphasized that the objective part functioned normatively by setting out a standard of care of reasonableness which went to fault, specifically the adequacy of the notice of the unconstitutionality of the challenged conduct.[41] In contrast, however, *Harlow* and its progeny,

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> statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, *the public interest may be better served by action taken "with independence and without fear of consequences*."

Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982) (emphasis added).

[39] 386 U.S. 547 (1967). Indeed, the Court in *Pierson* referred to the defense as "good faith and probable cause." *Id.*

[40] 420 U.S. 308 (1975).

[41] In *Pierson* the Court explained:

> 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. Although the matter is not entirely free from doubt, the same consideration would seem to require excusing him from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional, on its face or as applied.

386 U.S. at 555 (citations omitted).

Similarly, in *Wood v. Strickland*, 420 U.S. 308 (1975), the Court, in an opinion by Justice White, elaborated on the then-applicable two-part qualified immunity standard where school officials were sued for damages under section 1983 for expelling students in alleged violation of procedural and substantive due process. Emphasizing the requirement of some fault for liability, the Court said:

which were frankly motivated by a concern with over-deterrence, transformed qualified immunity into a defense that is solely objective and primarily instrumental in nature, a defense that is in reality an immunity from suit and only incidentally a defense against liability. To put this instrumental point another way: the interest of a plaintiff who is harmed by the constitutional violation of a defendant protected by qualified immunity is sacrificed for the greater good of the community, namely the community's interest in avoiding over-deterrence of its government officials.

Had qualified immunity retained the two part test of *Pierson* and *Wood*, it would have looked remarkably like the affirmative good faith defense addressed in this Article and thus would have been primarily fault based. But this is not what has happened historically to qualified immunity and the liability of public officials. In contrast, in the private party section 1983 damages setting, the Justices who speak of this good faith defense, as well as the circuits that have applied it, were, and are, concerned with the unfairness of imposing damages liability on private defendants whose honest and reasonable belief in the constitutionality of their conduct turns out later to have been mistaken. Indeed, as mentioned earlier, the case for fault is so strong that even though the malicious prosecution/abuse of process analogy is not readily available in a *Richardson*-type case, these Justices and the circuits nevertheless consider this good faith defense to be appropriate there as well.

B. *Fault and Wrongful Conduct*

Fault plays an important role in the distinction between the affirmative good faith defense and qualified immunity. Consider the suggestion made by Justice Kennedy in his concurring opinion in *Wyatt* that a defendant who is protected by qualified immunity may well have acted unconstitutionally and thus wrongfully.[42] For Justice Kennedy, the successful assertion of an immunity (either absolute or qualified)

> The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice . . . . 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 . . . . A compensatory [damages] award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.

Id. at 321-22.

[42] Wyatt v. Cole, 504 U.S. 158, 169-75 (1992).

from both suit and the need to defend is not necessarily inconsistent with a determination of unconstitutionality and the wrongfulness of a defendant's conduct, while the successful assertion of a defense such as an affirmative good faith defense for private defendants does have implications for the wrongfulness of the allegedly unconstitutional conduct.[43] In Justice Kennedy's view, a private defendant who prevails on the basis of the good faith defense has not necessarily acted wrongfully.

However, the relationship between the concepts of wrongful conduct and fault in the section 1983 setting is both different from and more complicated than what Justice Kennedy implies. Wrongful conduct inheres in the departure from the constitutional norm.[44] Such a departure is necessary, under the principles of corrective justice, for damages liability. But where private party section 1983 damages liability is involved, it turns out that wrongful conduct is not sufficient. Fault, in the sense of a blameworthy state of mind, is also necessary. If that is correct, then contrary to Justice Kennedy, wrongful conduct can be present even where a private defendant is ultimately protected against liability by an affirmative good faith defense. The question is why the absence of fault, as I have defined it, should constitute an affirmative defense in the private party section 1983 damages setting.

In the common law negligence setting, once a defendant is shown to have departed from the accepted norm of reasonable conduct and thereby caused physical harm, the absence of further fault, in the sense of blameworthy state of mind, is irrelevant. We expect people to understand and live up to the social norm of reasonable conduct, even if they honestly believed at the time that they acted reasonably. However, constitutional norms are very different from tort norms in several respects. Tort norms change relatively slowly, when they change at all. In contrast, constitutional norms are much more dynamic. In addition, tort norms are expected to govern private conduct, while constitutional norms ordinarily govern official rather than private conduct, except in those cases where private parties are state actors and act under color of law. Thus, expectations are quite different.[45] For such reasons, as

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[43] *Id.* at 172-73.

[44] *See supra* note 35.

[45] But see *McCulloch v. Maryland*, 17 U.S. 316 (1819), where Chief Justice Marshall declared that the framers of the Constitution intended that the Constitution be understood by the private sector as well as the public sector:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public . . . . [T]his idea was entertained by the framers of the American constitution . . . . [W]e must never forget, that it is a *constitution* we are expounding.

Id. at 407 (emphasis added). Of course, *McCulloch* dealt with the powers of Congress and not as

elaborated next, it is normatively sound to allow private defendants sued for damages under section 1983 to defend on the basis of an affirmative good faith defense.

C. *Constitutional Norms and Private Parties*

With the expansion of state action and color of law in *Lugar*, the scope of potential section 1983 liability has been extended to private parties, a group almost certainly not contemplated by the forty-second Congress when it enacted section 1983 with its color of law requirement.[46] Typically, section 1983 litigation involves the allegedly unconstitutional conduct of state and local government officials as to whom it is appropriate to expect and demand Fourteenth Amendment compliance at the risk of damages liability. After all, we want these officials to comply with the Fourteenth Amendment, which expressly applies to their conduct on its own terms and under the Supremacy Clause. It is consequently fair to ask of these officials that they know constitutional law; indeed, it is part of their job description.[47] In contrast, the Fourteenth Amendment does not typically apply to private parties who, as a result, have the autonomy not to conform their conduct to constitutional norms.[48]

Nevertheless, in *Lugar*-type situations, it is fair to demand of private parties who use the litigation process that they inquire into the constitutionality of the relevant attachment procedures. Typically these private parties have access to attorneys who represent them in the litigation. Also, there is enough time to make the constitutional inquiry at the same time that other legal matters are addressed. Moreover, these

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such with individual rights and related constitutional norms. Still Marshall does suggest, without elaboration, that the framers expected that private parties should have some basic understanding of the Constitution.

[46] Compare 42 U.S.C. § 1981 (2000), with 42 U.S.C. § 1982 (2000), and 42 U.S.C. § 1985(3) (2000), none of which has a state action requirement and all of which apply to private parties. Additionally, the twentieth century expansion of the scope of state action, prompted in part by the growth of extensive governmental regulation, could not have been foreseen by the framers of the Fourteenth Amendment. Indeed, it was only in 1913 that the Supreme Court held that a state official's abuse of power could constitute state action. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[47] *See* Wood v. Strickland, 420 U.S. 308 (1975) (regarding the duty of school board officials to know constitutional law); *supra* note 41.

[48] The state action requirement is thought to promote private autonomy as well as federalism. It promotes private autonomy by freeing private persons and entities from the strictures and costs of constitutional compliance. It also promotes federalism by limiting both the scope of Congressional power under section five of the Fourteenth Amendment and the power of federal courts to enforce the Fourteenth Amendment. For a recent and comprehensive discussion of state action and privatization, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

private parties are acting for themselves and not necessarily for the community. Subjecting them to constitutional norms does not impose an unfair or inappropriate burden on them. At the same time, though, it would be unfair to render them liable for damages without any defense whatsoever for the constitutional harm they cause. Constitutional law is dynamic and ever-changing: where private defendants neither knew nor should have known that they were violating constitutional norms, their conduct is not blameworthy. Apart from not engaging in the conduct at all, they could not have done otherwise. In addition, to deny them an affirmative defense (while also denying them qualified immunity, as *Wyatt* did) would treat them far worse than those state and local government officials enforcing unconstitutional attachment procedures who are protected by qualified immunity. A good faith defense thus strikes the appropriate balance by making private parties who use harm-causing unconstitutional state attachment procedures liable for damages only when they act with fault, that is, without an honest and reasonable belief in the constitutionality of their conduct.

What, however, of the prison guard in *Richardson* who worked for a private prison management firm to whom the state had delegated what was apparently a governmental function? Recall that *Richardson* rejected the applicability of qualified immunity to the prison guard because, according to the Court, marketplace pressures did what qualified immunity is supposed to do: promote independent decision-making by the firm's employees and the firm itself. Along similar lines, the Court reasoned that because privatization can provide insurance and indemnification, talented candidates for employment will not be discouraged by the non-availability of qualified immunity. For these reasons, and also because they and their employers are on notice that they are performing a governmental function, it is fair to ask of such employees that they know the relevant constitutional norms and that they (and their employers) bear the costs of constitutional compliance in appropriate circumstances.[49]

On the other hand, it does not follow that private prison guards should be liable under section 1983 for all departures from constitutional norms without an affirmative good faith defense. Private prison guards perform a governmental function similar, if not identical, to that performed by publicly employed prison guards. They are thus similarly situated with respect to the governmental function performed. They also similarly operate against the background of dynamic and ever-changing constitutional law. Thus, it would be unfair to afford qualified immunity protection amounting to an immunity from suit to

[49] One of the primary purposes of the state/public function test for state action is that governments should not be permitted to end-run the costs of constitutional compliance by delegating various governmental functions to the private sector.

publicly employed prison guards while denying any kind of affirmative defense—even a defense to liability—to private prison guards. Indeed, these state/public function cases normatively call for the availability of a good faith defense even more than *Lugar*-type cases do.

D. *Differences Between the Good Faith Defense and Qualified Immunity in Litigation*

As a theoretical matter, the good faith defense and qualified immunity differ significantly in their grounding. But in light of the facial similarities between the two, what difference does it make in the litigation process itself that a private defendant may be protected only by the good faith defense?

The defense appears to have both a subjective part and an objective part, although at least one circuit has applied the defense erroneously by using only a subjective test.[50] To the extent that the defense may be modeled on malicious prosecution and abuse of process, it should contain both elements, each of which must be satisfied. But this raises the question of whether it is really a defense or rather a part of the plaintiff's burden. If the common law model were to be followed strictly, then the plaintiff should have to show as part of the prima facie case both subjective bad faith and unreasonable conduct on the part of the private defendant. But this cannot be correct. For one thing, since *Parratt v. Taylor*[51] it has been clear that section 1983 does not have any state of mind requirements for the prima facie case against individuals. Rather, a section 1983 plaintiff has to prove only that the defendant has committed a constitutional violation that caused the plaintiff harm. For another, the discussions of the good faith defense by the various Justices in *Lugar*, *Wyatt*, and *Richardson* regularly and repeatedly refer to it as a *defense*. For a third, the circuits for the most part apply it as a defense. Finally, treating it as an affirmative defense is normatively sound because it becomes relevant only after the plaintiff has made out a prima facie case of wrongful conduct, that is, a constitutional violation.

Since the good faith defense is an affirmative defense, a private defendant must raise it in the answer and has the burden of proving it by a preponderance of the evidence. Also, the private defendant cannot defer discovery until the merits of the good faith defense are addressed by the court. In addition, it is the jury, not the judge, that decides

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[50] Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3d Cir. 1994) ("'[G]ood 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.").

[51] 451 U.S. 527 (1981).

whether the subjective and objective elements of the good faith defense have been proved by the private defendant. Nor can the private defendant whose motion for summary judgment based on the good faith defense is denied stop the trial in its tracks by filing an interlocutory appeal from that denial. All of this is very different, of course, from post-*Harlow*[52] qualified immunity. Discovery is typically deferred until the defendant's qualified immunity summary judgment motion is addressed by the court.[53] Also, because qualified immunity is objective in nature, the qualified immunity issue is for the court, not the jury.[54] Finally, to the extent it turns on issues of law, an interlocutory appeal from a court's denial of the defendant's qualified immunity summary judgment motion is available.[55]

These significant procedural advantages conferred on defendants protected by qualified immunity assure such defendants of maximum protection from the need to defend, unlike the procedures accompanying a private defendant's assertion of a good faith defense, which is treated no differently than any other affirmative defense.

CONCLUSION

It is conventional wisdom that the state action requirement serves several important functions, including federalism and the promotion of private autonomy. These two functions are closely related because, insofar as the federal judiciary and Congress under its section five power can regulate private conduct, both federalism and private autonomy are arguably adversely affected. That state action is present in *Wyatt* and *Richardson* kinds of section 1983 damages actions against private parties means that federalism and private autonomy interests are implicated.

The good faith defense is not necessarily inconsistent with the federalism and private autonomy functions of state action as an instrumental matter. The good faith defense, if proved, means that the private defendant who violates the plaintiff's constitutional rights is protected from damages liability. True, the defendant may have had to go through discovery and summary judgment, and perhaps even the entire trial. Still, at the end there may be no liability imposed by the

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

53 Anderson v. Creighton, 483 U.S. 635 (1987).

54 Hunter v. Bryant, 502 U.S. 224 (1991). Where there are genuine issues of material fact in dispute that will be determinative of qualified immunity, the court decides the qualified immunity issue based on the jury's findings of fact. But the clearly settled law and objective reasonableness parts of the qualified immunity issue are always for the court.

55 Mitchell v. Forsyth, 472 U.S. 511 (1985); Johnson v. Jones, 515 U.S. 304 (1995).

federal judiciary. In addition, state remedies may be available where the conduct unsuccessfully challenged under the Fourteenth Amendment violates state constitutional norms. Moreover, the good faith defense creates a margin for error and hence a sphere of autonomy in which private parties may act without fear of damages liability.

My focus in this Article has been not on state action and federalism but rather on the normative foundation of an emerging good faith defense for private parties. This good faith defense originally arose out of a split among the Justices regarding the applicability of qualified immunity to such private parties. Since qualified immunity was found by a majority of the Court to be inapplicable even to private parties performing a governmental function, a preliminary consensus has emerged that private parties should at least be protected by an affirmative good faith defense that contains both a subjective part and an objective part.

Such a consensus is normatively sound because it is grounded on fault (which, I have argued, is narrower than wrongful conduct) and on the requirements of corrective justice. In addition, the possibility of section 1983 damages liability of private parties has generated situations in which private parties are required to know constitutional law. Furthermore, to the extent that growth of the privatization movement results in increasing findings of state action, private parties will increasingly be required to know constitutional law. All of this is the unexpected result of a remarkable federal statute enacted in 1871 to enforce the Fourteenth Amendment.