Wyatt v. Cole and Qualified Immunity for Private Parties in Section 1983 Suits

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I. INTRODUCTION

On March 23, 1871, President Grant asked the Forty-second Congress to enact emergency legislation to control widespread violence in the occupied South. Congress responded with the Civil Rights Act of 1871. The Forty-second Congress, concerned that lawlessness went unpunished primarily because Ku Klux Klan sympathizers influenced-state criminal justice systems, intended to ameliorate "the insecurity of life and property in the South."

Section 1 of the Civil Rights Act of 1871 is currently codified

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1 President Grant warned that:

[a] condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for the present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.


2 Congress established that:

any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States . . .

Civil Rights Act of 1871, § 1, 17 Stat. 13 (1871).

3 See Briscoe v. LaHue, 460 U.S. 325, 337 (1983).

4 See District of Columbia v. Carter, 409 U.S. 418, 425 (1973). Congressional testimony documented civil strife by citing acts that included "arson, robbery, whipping, shootings, murders, and other forms of violence and intimidation—often committed in disguise and under the cover of night." Briscoe, 460 U.S. at 337.
at 42 U.S.C. 1983. It is the product of three legislative goals: overriding certain state laws, providing a federal remedy where state law did not, and providing a federal remedy where the state remedy, though adequate in theory, was not available in practice. The text of the statute confirms the first goal. The second and third goals are documented in the statute's legislative history, which reflects the era's civil unrest. Although commonly known as the Ku Klux Klan Act, the name was misleading in the sense that the legislative history reveals that Congress did not intend to create a remedy against private parties, such as the Klan, but against public officials reluctant to enforce remedies already on the books. Section 1 of the Civil Rights Act of 1871 was "not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law." The Forty-second Congress intended to create a federal remedy that "prevent[ed] state officials from using the cloak of their authority under state law to violate rights pro-

5 The statute reads:

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


7 Since § 1983 holds liable any person who acts under the color of "any statute, ordinance, regulation, custom, or usage, of any state" and deprives the constitutional rights of others, it allows federal courts to overturn unconstitutional state laws. See Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 HARV. L. REV. 1486, 1489 (1969).

8 Id.


10 Id. The 1871 act was titled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." 17 Stat. 13 (1871); see also MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES § 1.3 (2d ed. 1991).

tected against state infringement by the Fourteenth Amend-
ment.\textsuperscript{12}

Congress passed section 1 of the Civil Rights Act of 1871 “for
the express purpose of ‘enforc[ing] the Provisions of the Four-
teenth Amendment.’”\textsuperscript{13} Since the Fourteenth Amendment pro-
tects individual liberties against state action,\textsuperscript{14} section 1983 ad-
dresses only state action. But not all acts undertaken by private
parties fall outside the scope of section 1983. In \textit{Lugar v.
Edmondson Oil Company},\textsuperscript{15} the Supreme Court held that private
defendants who relied on an attachment statute later found to
violate the Due Process Clause of the Fourteenth Amendment
engaged in state action because their acts were “fairly attribu-
table to the state.”\textsuperscript{16} The Court left open the crucial question of wheth-
er these private defendants were protected by the qualified immu-
nity extended to public officials who reasonably relied on such
statutes.\textsuperscript{17}

The courts of appeals have split into three camps over the
extension of qualified immunity to private defendants. The Fifth,\textsuperscript{18}\nEighth,\textsuperscript{19} Tenth,\textsuperscript{20} and Eleventh\textsuperscript{21} Circuits have
extended qualified immunity to private parties.\textsuperscript{22} The First\textsuperscript{23} and

(interpreting Monroe v. Pape).
\textsuperscript{13} 17 Stat. 13 (1871).
\textsuperscript{14} “[A]ction inhibited by the first section of the Fourteenth Amendment is only
such action as may fairly be said to be that of the States.” Shelley v. Kraemer, 334 U.S.
1, 13 (1948). “That Amendment erects no shield against merely private conduct, however
discriminatory or wrongful.” \textit{Id}.
\textsuperscript{15} 457 U.S. 922 (1982).
\textsuperscript{16} Id. at 937. The Court considered that any act satisfying the state action require-
ment simultaneously met the under color of law requirement in § 1983 actions. \textit{Id}.
at 935. Private acts are fairly attributable if, first, the deprivation was a result of “the exer-
cise 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” and if, second, the private
party “acted together with or . . . obtained significant aid from state officials.” \textit{Id}.
at 937.
\textsuperscript{17} Id. at 942 n.23.
\textsuperscript{18} Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. Unit A 1982) (extending
good-faith immunity to private defendants).
\textsuperscript{19} Buller v. Buechler, 706 F.2d 844, 850-52 (8th Cir. 1983).
\textsuperscript{20} DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714 (10th Cir. 1988), cert.
\textsuperscript{21} Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-25 (11th Cir. 1988) (en banc),
\textsuperscript{22} \textit{See generally} Allison Hartwell Eid, \textit{Note. Private Party Immunities to Section 1983 Suits,
57 U. CHI. L. REV. 1323 (1990)}.
\textsuperscript{23} Downs v. Sawtelle, 574 F.2d 1, 15-16 (1st Cir.), \textit{cert. denied sub nom.} Hagan v.
Ninth Circuits have denied qualified immunity to individuals under certain circumstances. The Sixth Circuit has rejected qualified immunity, which it also terms good-faith immunity, while allowing a good-faith affirmative defense. The Second, Third, Fourth, Seventh, and D.C. Circuits have not addressed the issue.

The Supreme Court recently addressed the private-party immunity issue in *Wyatt v. Cole*. This Note analyzes some of the issues left unresolved by the decision and how these problems resurface in federal judges' disparate and often divergent responses to *Wyatt*. Part II traces the development of and relationship between public-official immunity and private-party immunity before *Wyatt*. Parts III and IV review and critique the *Wyatt* decision. Part V examines the circuit split that has resurfaced since the Court decided *Wyatt*. Part VI concludes that the resurgent split among the circuits would be best resolved by extending to private parties the qualified immunity defined in *Wood v. Strickland*.

II. THE ROAD TO *WYATT*

This Note discusses three means to avoid liability under section 1983: absolute immunity, qualified immunity, and a good faith defense. Denials of immunity are subject to interlocutory appeal. In theory, post-*Harlow* immunity claims are assessed before trial against objective standards, although this may not be

24 Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983) (asserting "there is no good faith immunity under section 1983 for private parties"). *But see* Thorne v. City of El Segundo, 802 F.2d 1131, 1140 n.8 (9th Cir. 1986) (retreating from the absolute Howerton position). *See also* Conner v. City of Santa Ana, 897 F.2d 1487, 1489 n.9 (9th Cir.), *cert. denied*, 498 U.S. 816 (1990).

25 Duncan v. Peck, 844 F.2d 1261 (6th Cir. 1988). Until Harlow v. Fitzgerald, 457 U.S. 800 (1982), the affirmative defense of good faith and probable cause was known interchangeably as "qualified immunity." It had to be pled and proven by the accused and was, in a sense, no immunity at all. *Harlow*, 457 U.S. at 815 (citing Gomez v. Toledo, 446 U.S. 635 (1980)).

The Sixth Circuit interpreted footnote 23 in *Lugar*, which left open the possibility of a good faith defense, as "offer[ing] the possibility of some sort of defense from liability for private individuals, and does not necessarily suggest the specific defense of immunity." *Duncan*, 844 F.2d at 1265.


29 *Erwin Chemerinsky, Federal Jurisdiction § 8.6.3 (Supp. 1992).*

true in practice. Absolute immunity requires the defendant only to invoke his status and establish that the acts in question fall within the scope of that status.\textsuperscript{31} The presence or absence of malice is irrelevant. Qualified immunity is an affirmative defense, the extent of which depends on the scope of authority vested in the public official being sued.\textsuperscript{32} The good faith defense is alluded to by the \textit{Wyatt} majority. Like qualified immunity, it must be pled and proven by the defendant. Unlike qualified immunity, however, it may be appealable only after adjudication on the merits.\textsuperscript{33} The good faith defense emphasizes a subjective inquiry into the state of mind of the accused. The exact contours of the defense remain uncertain, but the idea appears to command at least five votes on the Court.\textsuperscript{34}

The Supreme Court’s denial of qualified immunity to private parties in \textit{Wyatt v. Cole} has its roots in two lines of cases. The first line of cases documents how the Supreme Court insulates all public officials from their discretionary acts by extending some form of immunity from liability under section 1983. The second line depends upon the first, analogizing that we should extend public-official immunity to private parties who qualify as state actors by cooperating with government officials.

\section*{A. Immunity for Public Officials}

This first line of cases can be viewed as an attempt to reconcile the public good which results from an unfettered exercise of discretion by public officials with the equitable notion that one should be held accountable for his acts.

In \textit{Tenney v. Brandhove},\textsuperscript{35} the Supreme Court extended absolute immunity to legislators who act within the scope of legitimate legislative activity. Brandhove filed his action after he was sanctioned for refusing to testify before the California Senate Fact-

\textsuperscript{34} Justices Kennedy and Scalia endorse the idea. \textit{Id.} at 1837. Justices Thomas, Souter, and Rehnquist dissented, advocating the extension of qualified immunity. \textit{Id.}
\textsuperscript{35} 341 U.S. 367 (1951).
Finding Committee on Un-American Activities. Although the district court dismissed the complaint without an opinion, the Ninth Circuit, finding that Brandhove stated a cause of action, reversed. The Supreme Court then reinstated the district court decision.

Justice Frankfurter, writing for the majority, required defendants who request absolute immunity first to establish their status as legislators, and second to demonstrate that the act in question was within "the sphere of legitimate legislative activity." After considering both history and public policy, the Court concluded that the investigative hearings conducted by the Committee on Un-American Activities were legitimate legislative acts. The Court's policy arguments focused on advancing the public good by preserving the vigorous exercise of discretion by public officials. When conducting its historical inquiry, the Court marshalled support from the Speech and Debate Clause, state constitutions, and English common law. It did not rely on the legislative history of the Civil Rights Act of 1871, which contained no mention of immunity and, therefore, offered no help. This method of evaluating immunity claims by examining history and public policy was passed on to the Wyatt Court.


37 Brandhove v. Tenney, 183 F.2d 121 (9th Cir. 1950), rev'd, 341 U.S. 367 (1951).

38 341 U.S. at 376. Cf Imbler v. Pachtman, 424 U.S. 409 (1976) (limiting the absolute immunity given prosecutors to activities intimately associated with the judicial phase of the criminal process).

39 341 U.S. at 376-79.

40 The Court drew upon founding father James Wilson, a draftsman of the Speech and Debate Clause:

[in order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense.]

Id. at 373 (quoting II WORKS OF JAMES WILSON 38 (Andrews ed. 1896)). This "chilling effect" argument resurfaces in later cases.

41 Id. at 373-76.

The absence of debates by Congress concerning immunity while enacting the Civil Rights Act of 1871 led the Tenney Court to rely on other historical sources. The broad issue of personhood was before the Court in Monroe v. Pape, allowing it to lean upon the legislative history to support its conclusions. The Court further relied on legislative history in an immunity case, Pierson v. Ray, which grew out of the Freedom Rides that galvanized the nation in the spring of 1961. The Court granted absolute immunity to judges exercising discretion within the scope of the judicial process, while holding that the police officers accused of violating section 1983 merited only the affirmative defense of good faith and probable cause available to them at common law. When faced with the silence from the Forty-second Congress on immunity, the Pierson Court did not turn to other sources, as it had in Tenney. Instead, it enlisted the aid of the mute legislative history, stating that “we presume that Congress would have specifically so provided had it wished to abolish the [common law] doctrine” of

45 After Robert L. Pierson and 14 other Episcopal ministers used segregated facilities at an interstate bus terminal, three policemen arrested and a police justice convicted the clergymen of congregating in a public place and threatening a breach of the peace in violation of Mississippi Code § 2087.5 (1942). 386 U.S. at 549-50. After their convictions were either overturned or dismissed, the ministers brought a § 1983 suit in the United States District Court for the Southern District of Mississippi, alleging false imprisonment and human rights violations on the part of police captain (later deputy chief) J.L. Ray, officers Griffith and Nichols, and Police Justice and Ex-Officio Justice of the Peace Spencer. Pierson v. Ray, 352 F.2d 213 (5th Cir. 1965), cert. granted, 384 U.S. 938 (1966), aff’d in part and rev’d in part, 386 U.S. 547 (1967).

After the jury found for the respondents, the Fifth Circuit reversed and remanded because of prejudicial error. Speaking for the majority, Circuit Judge Blackmun dismissed Spencer as immune from acts within the scope of judicial duty. Id. at 217. While acknowledging that the defense of good faith and probable cause was available to police officers accused of false arrest and imprisonment at common law, the court interpreted Monroe v. Pape, 365 U.S. 167 (1961), to “necessarily impl[y] rejection of such a defense.” 352 F.2d at 218.

46 The Pierson majority stressed public policy, explaining that absolute judicial immunity was “not for the protection or benefit of a malicious or corrupt judge, but for the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.” 386 U.S. at 554.

47 The Supreme Court held that the affirmative defense of good faith and probable cause applies to police officers in § 1983 actions. Id. at 557. Although it recognized that “[t]he common law has never granted police officers an absolute and unqualified immunity,” the Court warned against placing any officer in a position where “he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.” Id. at 555.
absolute judicial immunity. Once the Court equated Congressional silence with an endorsement of common law immunities, it looked again to the common law to assess immunity for the police defendants.

The Court retained "the defense of good faith and probable cause" available at common law to police officers in false imprisonment claims. First, the Court must have meant good faith or probable cause, since any other reading would expose officers to civil liability every time a court invalidated an arrest for lack of probable cause. Second, while it spoke in terms of defenses, the Court actually conferred a qualified immunity requiring the absence of malice. The officers would be exonerated at trial if they could convince the fact-finder that the arrests were either constitutional or that the officers thought they were at the time. Had the officers asserted either that the statute was constitutional or that no reasonable jurors could disagree that it was constitutional, their qualified immunity claim would be reduced to questions of law, and the matter could have been resolved on a motion for summary judgment.

After Pierson established absolute and qualified immunity as the two means of avoiding liability, the task of classifying which public officials merited what level of protection began. High-level state executives secured qualified immunity in Scheuer v. Rhodes, in which the Governor of Ohio and the Adjutant Gener-

48 Id.

Common law traditions need not circumscribe modern civil rights standards. Under the common law, police officers who, with probable cause, arrest a suspect who is later acquitted, are protected from liability in a false arrest suits. Pierson expanded this protection to officers who reasonably rely in good faith on a valid law which was later held unconstitutional. See Laura Oren, Immunity and Accountability in Civil Rights Litigation: Who Should Pay?, 50 U. Pitt. L. Rev. 935, 947 n.48 (1989).
50 386 U.S. at 567.
51 Id. at 557.
53 416 U.S. 232 (1974). After the Ohio national guard shot and killed four students at Kent State University in May 1970, estate representatives for three of the deceased filed a § 1983 suit against James Rhodes, who was the Governor of Ohio and Adjutant
al of the Ohio National Guard were sued for their involvement in the Kent State shootings. The Scheuer Court denied absolute immunity to high-level state executives who “carry a badge of authority of a State,” since any other result would erode section 1983 and the Supremacy Clause by conferring to executive commands “the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.” The Court stated that the objective and subjective elements of qualified immunity protected state executives

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

This functional approach established an objective standard for state executives more involved than the probable cause requirement applicable to the police officers in Pierson. It allows the inference that all officials merit some form of immunity in the absence of malice.

Federal judges continued to apply qualified immunity unevenly after Scheuer. This discord persisted in part because the Supreme Court did not tie the relevance of legal knowledge to the good faith standard. While federal courts recognized the existence of a “good faith” immunity, they “either emphasized different factors as elements of good faith or [did] not give[] specific content to the

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54 The Civil Rights Act of 1871 was enacted “to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity.” Id. at 243 (quoting Monroe v. Pape, 365 U.S. 167, 172 (1961)). See infra Part IV.A.2 (discussing the scope of the Fourteenth Amendment).

55 416 U.S. at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)).

56 Id. at 248-49.

57 CHEMERINSKY, supra note 29, § 8.6.1.
Justice White elaborated on the objective component of qualified immunity in *Wood v. Strickland*. This case arose after three high school students were expelled for spiking the punch with malt liquor at a school sponsored event. The students brought a section 1983 action against school-board members and administrators, both individually and in their official capacities, alleging that the defendants acted with malice to violate due process guarantees. The district court instructed the jury that they must find malice in order to convict, then dismissed the hung jury, declared a mistrial, and granted defendants' motions for a directed verdict. The Eighth Circuit remanded, holding that plaintiffs need only prove the absence of good faith under an objective standard.

The Supreme Court vacated the Eighth Circuit decision and remanded. After acknowledging the qualified good-faith immunity afforded school-board members at common law, the Court stated that "ignorance or disregard of settled, indisputable law" fell short of good faith, which required a working "knowledge of reasonably knew or should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."

61 348 F. Supp. at 246.
62 Id. at 248.
63 Id. at 247, 254.
64 485 F.2d at 191.

reasonably knew or should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id. at 322.
66 Id. at 318. "[S]tate courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith nonmalicious action taken to fulfill their official duties." Id.

The theme arguing that public officials need to be free to exercise discretion within the scope of their authority resurfaced, along with the notion that law should not discourage the best and brightest from entering public service. Id. at 319-20.
67 Id. at 321-22.
the basic, unquestioned constitutional rights."\textsuperscript{68} It coupled the good faith standard with a subjective inquiry to determine if a school-board member "took the action with the malicious intention to cause deprivation of constitutional rights or other injury to the student."\textsuperscript{69}

Seven years later, a pro-defendant Supreme Court curtailed the subjective element of qualified immunity in \textit{Harlow v. Fitzgerald}.\textsuperscript{70} After Fitzgerald was fired from his cabinet-level position as Counselor to the President,\textsuperscript{71} he filed suit alleging that he was wrongfully discharged from the Air Force by White House aides Bryce Harlow and Alexander Butterfield in retaliation for whistleblowing.\textsuperscript{72} The aides claimed that absolute immunity derived from the Presidential immunity. However, the Court granted only qualified "good faith" immunity,\textsuperscript{73} in part because federal officials merited no more insulation from liability than their state

\textsuperscript{68} Id. at 322. The Court awakened echoes of \textit{Monroe}, arguing that "any lesser standard would deny much of the promise of § 1983." Id.

In dissent, Justice Powell criticized the majority view imposing a duty to know settled and indisputable laws, arguing that often lawyers and legal scholars have difficulty describing "unquestioned" constitutional rights. Id. at 329. His arguments may not have considered that school officials have access to legal advice, the costs of which are usually and properly borne by taxpayers who have an important interest in the efficient and lawful conduct of their schools. \textit{See Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983} § 8.02, at 452 n.14 (2d ed. 1986); \textit{see also Goss v. Lopez}, 419 U.S. 595 (1975) (holding that procedural due process guarantees apply to short-term student suspensions).

\textsuperscript{69} 420 U.S. at 322.


\textsuperscript{71} 457 U.S. at 802 n.1.

\textsuperscript{72} \textit{Id.} at 802-05. The relevant facts are shared with \textit{Nixon v. Fitzgerald}, 457 U.S. 731 (1981), which conferred absolute immunity upon the President in the absence of contrary congressional acts. \textit{Id.} at 749-50.

\textsuperscript{73} 457 U.S. at 813-14. Four years earlier, in \textit{Butz v. Economou}, 438 U.S. 478 (1978), the Court dismissed the Secretary of Agriculture's claim to absolute immunity, leaving only the affirmative defense of good-faith immunity to "encourag[e] the vigorous exercise of official authority." \textit{Id.} at 506.

No statutory claims were before the Court in \textit{Harlow} when it stated that "Presidential aides, like Members of the Cabinet, generally are entitled only a qualified immunity." \textit{Harlow}, 457 U.S. at 809. The conclusion relied heavily on the unanimous conclusion of the Federal Courts of Appeals that "federal officials should receive no greater protection from constitutional claims than their counterparts in state government." \textit{Butz}, 438 U.S. at 498.
counterparts.\textsuperscript{74} The \textit{Harlow} majority focused on the absence of safeguards to prevent insubstantial civil-rights claims from proceeding to trial.\textsuperscript{75} The Court expressed concern that unsubstantiated claims would stifle public officials, upon whom the public depended to exercise discretion. The costs to the judiciary and the public of retaining subjective criteria for qualified immunity were considered prohibitive.\textsuperscript{76} This point of view produced a Court that viewed qualified immunity through a single objective lens.

The Court also treated public officials better than private parties by excusing from liability public officials who failed to meet the objective standard but pleaded "extraordinary circumstances" under which they "neither knew or should have known of the relevant legal standard."\textsuperscript{77} This disparate treatment undermined the fiction by which the Court considers private parties to be state actors because it treats differently what are alleged to be functional equivalents. These changes, made in the name of efficiency, also blurred the distinction between those who manipulate statutes and those who rely upon them.

As it turned out, this distinction need not have been clouded. The Supreme Court solved the "vigorous exercise of discretion" problem four years later in \textit{Celotex Corporation v. Catrett}.\textsuperscript{78} The

\textsuperscript{74} \textit{Harlow}, 457 U.S. at 809 (citing \textit{Buts}, 438 U.S. at 504).

\textsuperscript{75} The Court recognized that summary judgment may not remedy insubstantial civil rights suits because courts had treated an official's subjective good faith, in many cases, as a question of fact. \textit{Id.} at 816. \textit{See also Butz}, 438 U.S. at 507-08 (promising that federal executives relying upon qualified immunity can also seek haven from frivolous litigation through summary judgment).

An increased willingness to affirm grants of summary judgment has ameliorated the unsupported claims problem by culling unsubstantiated allegations of subjective bad faith in the earliest stages of litigation. \textit{See Wyatt v. Cole}, 112 S. Ct. at 1835 (Kennedy, J., concurring) (citing \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 322 (1986)).

\textsuperscript{76} The Court asserted that:

substantial costs attend the litigation of the subjective good faith of government officials . . . the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service . . . . Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be particularly disruptive to effective government.

457 U.S. at 816-17.

\textsuperscript{77} \textit{Id.} at 819.

Celotex decision rendered objective qualified immunity obsolete. The Court ruled that summary judgments were a proper remedy whenever the defendant's state of mind was at issue. It held summary judgment appropriate against any "party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." The Court decided Anderson v. Liberty Lobby, Inc. in the same year as Celotex. In Anderson, the Court stated that the nonmoving party "may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." When taken in concert, Celotex and Anderson protect official discretion without losing focus on the difference between reliance on laws and manipulation of them.

B. Immunity for Private Parties

All section 1983 suits must clear the state action hurdle because Congress enacted the statute to enforce the Fourteenth Amendment, which limits only state action. But the state action requirement does not exempt all private parties from liability under section 1983. This section reviews how the courts include within the scope of section 1983 private parties who actively conspire with government officials. It then documents how the Court abandoned the active conspiracy requirement in Lugar v. Edmondson Oil Company. Finally, this section argues that after the Court committed itself to the fiction of treating private parties like state actors because they acted like state actors, it could not abandon the active conspiracy requirement without yielding uneven results.

In 1966, the Supreme Court stated that "[i]n cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." It further stated that "[t]o act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the

79 Id. at 322.
81 Id. at 256.
82 See supra note 14.
State or its agents. "

Ninety-nine years after the enactment of the Civil Rights Act of 1871, the Supreme Court stated explicitly for the first time that private parties could act under color of law. The Adickes case arose after Freedom School teacher Sandra Adickes was refused service at an S.H. Kress lunch counter in Hattiesburg, Mississippi, allegedly because she tried to eat with black students. The Supreme Court reversed the summary dismissals below and remanded. The Court reasoned that Adickes could state a section 1983 claim against Kress by showing the "existence of state-enforced custom of segregation..." that Kress' refusal to serve her was motivated by that state-enforced custom. The Adickes Court saved for another day "whether there are any defenses available to [private persons] in § 1983 actions."

In Dennis v. Sparks, the Court expanded the active conspiracy category to include private citizens who bribed judges. After affirming the absolute civil immunity afforded judges, the Court held that the individuals who bribe judges act under color of law and merit no immunity.

85 Id. at 794.
After she brought suit under sections 1983 and 2000a, the district court ruled for Kress because of Adickes' failure to prove that Hattiesburg harbored an official custom favoring the refusal of service to whites who accompanied blacks. Id. The court of appeals affirmed. Adickes v. S.H. Kress & Co., 409 F.2d 121 (2d Cir. 1968), rev'd, 398 U.S. 144 (1970).
88 398 U.S. at 174.
89 Id. at 174-75.
90 Id. at 174 n.44.
The Supreme Court followed the tradition, stretching back at least three decades to Tenney, of considering "[t]he immunities of state officials that we have recognized for the purposes of § 1983 are the equivalents of those that were recognized at common law." 449 U.S. at 29 (citing Owen v. City of Independence, 445 U.S. 622 (1980)). The Court also relied a familiar public-policy argument:

[j]udicial immunity arose because it was in the public interest to have judges who were at liberty to exercise their independent judgment about the merits of the case without fear of being mulcted for damages.

Id. at 31; This idea resurfaces in Wyatt.
93 Id. at 27-28.
In *Lugar v. Edmondson Oil Company*, the Supreme Court abandoned the active conspiracy requirement. Here, instead of an active conspiracy between private individuals and public officials, the Court dealt with a single company that invoked an attachment statute later judged unconstitutional. The Supreme Court ruled that the act of applying for the writ of attachment rose to the level of state action, allowing Edmondson Oil to be treated as if it was a state actor.

The Forty-second Congress may have recognized the difference between filling out forms in good faith and either bribing a judge or conspiring with police to deny constitutional rights. Justice Powell saw this and, in his dissent, argued for protecting private individuals who “invoke a presumptively valid judicial process in pursuit only of legitimate private ends.” Although the Court mentioned the private-party immunity issue, it left the matter unresolved, declining to consider whether private parties deserved

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94 457 U.S. 922 (1982). After Edmondson Oil Company attached his property without bond and prior to judgment, debtor Giles Lugar brought this § 1983 action with pendant malicious prosecution claims, alleging that the creditor company acted jointly with the state to deprive him of his property without due process of law. *Lugar v. Edmondson Oil Co.*, 639 F.2d 1058, 1061 (4th Cir. 1981), cert. granted, 452 U.S. 937 (1981), *aff’d in part and rev’d in part*, 457 U.S. 922 (1982). The district court failed to find state action and summarily dismissed the suit. *Id.* Although the Fourth Circuit found that state action was present, it did not think that the invocation of the attachment statute by Edmondson Oil, in and of itself, amounted to acting “under color of law.” *Id.* at 1067-68. Accordingly, the court affirmed the grant of summary judgment below. *Id.* at 1069-70.

After granting certiorari, the Supreme Court clarified that the requirements of both state action and under color of law were identical for § 1983 suits brought against state officials. *Lugar*, 457 U.S. at 928 (citing *Price*, 383 U.S. at 794 n.7); *see also Chester J. Antineau, 1 Federal Civil Rights Acts § 56 (2d ed. 1980).* The Court held that Lugar stated a cause of action under § 1983 insofar as he challenged the constitutionality of the Virginia prejudgment attachment statute, but did not meet state action in alleging abuse under the statute. *Id.* at 942. The court reasoned that “[c]areful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal juridical power.” *Id.* at 936.

95 *See Eid, supra note 22, at 1329-30 (discussing the relaxation of the active conspiracy requirement).*

96 *Lugar*, 457 U.S. at 941.

97 *Id.* at 948 (Powell, J., dissenting). Justice Powell found it “implausible” that “filing a petition in state court, in the effort to secure payment of a private debt” amounted to state action. *Id.* at 946. He argued for separate inquiries into state action and under color of law.
common-law immunities under section 1983.\textsuperscript{98} Ten years later, the issue resurfaced in \textit{Wyatt v. Cole}.\textsuperscript{99}

III. THE \textit{WYATT} DECISION

Howard Wyatt and William Cole were partners in a cattle business that soured. After their partnership collapsed, Cole filed a complaint in replevin against Wyatt for a tractor and twenty-four cattle, and also posted bond.\textsuperscript{100} A deputy to the clerk of court issued a writ of replevin; a Mississippi circuit court judge ordered execution; and a sheriff seized the property. The writ was served on Wyatt the day after seizure. Two months later, the same judge entered an order dismissing the writ, affirmed the bond, and ordered Cole to restore Wyatt's property or provide restitution.\textsuperscript{101}

Wyatt filed a section 1983 action in the Southern District of Mississippi against Cole, his attorney, various state officials, and the officers who seized the contested property. The district court held that Mississippi's replevin under bond statute\textsuperscript{102} violated the Due

\textsuperscript{98} In response to Justice Powell's dissent, the majority hinted at the possibility of qualified immunity:

this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture.

\textit{Id.} at 942 n.23.

The majority backed away, just as it had in \textit{Adickes}:

We intimate no views concerning the relief that might be appropriate if a violation is shown . . . . Nor do we mean to determine at this juncture whether there are any defenses available to defendants in § 1983 actions like the one at hand.

\textit{Id.} (quoting \textit{Adickes}, 398 U.S. at 174 n.44).

\textsuperscript{99} 112 S. Ct. 1827 (1992). The lower courts in both \textit{Lugar} and \textit{Wyatt} had concerned themselves only with examining motions for summary judgment. Since the Supreme Court granted certiorari before any court had adjudicated the merits of the case, liability had not been established, and discussion of appropriate remedies remained unripe.


\textsuperscript{101} Wyatt v. Cole, 928 F.2d 718, 720 (5th Cir. 1991).

\textsuperscript{102} Under Mississippi's replevin under bond statute:

[i]f any person, his agent or attorney, shall file a declaration under oath setting forth:

(a) [a] description of any personal property;
(b) [t]he value, thereof, giving the value of each separate article and the value of the total of all articles;
(c) [t]he plaintiff is entitled to the immediate possession thereof, setting forth
Process Clause because it precluded the exercise of judicial discretion prior to seizure.\textsuperscript{103} The Court granted Wyatt's motion for summary judgment as to the declaration that the statute was unconstitutional.\textsuperscript{104} In keeping with the Fifth Circuit rule granting to private defendants the good-faith affirmative defense version of "qualified immunity,"\textsuperscript{105} the Court directed Cole to "present memoranda containing any pertinent defenses."\textsuperscript{106}

Wyatt appealed,\textsuperscript{107} seeking damages from Cole and Robbins, and attorney's fees from private defendants and the state of Mississippi.\textsuperscript{108} Like the district court, the Fifth Circuit spoke in terms of an affirmative good faith defense but treated the issue as a question of law.\textsuperscript{109} It focused on the "important public interest in permitting ordinary citizens to rely on presumptively valid state..."

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\textsuperscript{103} Wyatt. 710 F. Supp. at 181.

\textsuperscript{105} 710 F. Supp. at 182.

\textsuperscript{106} The Fifth Circuit previously held that:

\textquotedblright

a § 1983 defendant who had invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional.

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\textsuperscript{107} See 112 S. Ct. at 1836 (Kennedy, J., concurring).
laws." The Court extended to Cole and Robbins the good faith affirmative defense of qualified immunity, barring damages resulting from the acts of private parties prior to the statute being declared unconstitutional.

The Supreme Court granted certiorari to determine "whether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials." The Court reversed on a narrower issue, holding that defendants charged under section 1983 for invoking state replevin, garnishment and attachment statutes later found to be unconstitutional are not protected by objective qualified immunity.

The Supreme Court built its decision, as it had since Tenney v. Brandhove, on the twin pillars of history and public policy. The Court analyzed history the same way it had since Owen v. City of Independence, inferring from the silence of the Forty-second Congress that the legislators intended section 1983 to be subject only to those immunities "so firmly rooted in the common law and supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the

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110 928 F.2d at 721. The Fifth Circuit stated what it considered to be a source of private party immunity:

[id]he private party who invokes a presumptively valid attachment law is not entitled to immunity because the officer executing it is. Rather, quite independently, the private party is entitled to immunity because of the important public interest permitting ordinary citizens to rely on presumptively valid state laws, in shielding citizens from monetary damages when they reasonably resort to the legal process later held to be unconstitutional, and in protecting a private citizen from liability when his role in any unconstitutional action is marginal.

Id.

The Court explained that the responsibility for unconstitutional laws:

rests [first] with the legislative body enacting the statute. The next line of responsibility rests with enforcing officials. When the legislature has not repealed, and executive and judicial officials are still enforcing a statute, it is not unreasonable for private actors to fail to quickly comprehend a developing body of doctrine that portends trouble for its constitutionality.

Id. at 722.

111 Id.

112 112 S. Ct. at 1834.

113 "[W]hether qualified immunity, as enunciated by Harlow . . . is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment or attachment statute." Id.

114 Id.


The Court considered Wyatt’s section 1983 claim most analogous to the 1871 torts of malicious prosecution and abuse of process. Since these torts allowed no immunities for private defendants at common law, the Wyatt Court denied immunity to Cole and Robbins.

The Court based its policy arguments, as it had in Harlow, on society’s interest in freeing public officials to discharge their duties vigorously without fear of reprisal. Since this interest was not a concern with private parties, the immediately-appealable qualified immunity granted public officials in Harlow was denied to private parties. Since Harlow changed the good faith affirmative defense to an immunity, the Court restricted itself to granting either an objective and immediately appealable immunity or nothing. Because the rationales mandating qualified immunity for public officials were not found applicable to private parties, the Court granted nothing. It did, however, preserve the possibility that Cole and Robbins could rely on an affirmative defense of good faith, stating that it “did not foreclose the possibility” that private parties facing liability under Lugar could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.

Justice Kennedy concurred but, like the dissent, believed that the Court should focus more on the “historical analogy, based on the existence of common-law rules in 1871” than on the policy concerns unique to government officials. He did not wish to extend Harlow, which:

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117 112 S. Ct. at 1831 (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).
118 Id.
119 Id. at 1832. This Note criticizes the Court’s historical analysis. See infra Part IV.A.
121 112 S. Ct. at 1832-33.
122 Id. at 1832.
123 The Court recognized qualified immunity for government officials “where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public services.” Id. at 1833. The Court did not find this rationale transferable to private parties, but failed to consider if other equally important public policies existed that are specific to private parties. See infra Part IV.B.
124 Id. at 1834.
125 Id. at 1835 (Kennedy, J., concurring).
completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice . . . with the objective inquiry into the legal reasonableness of the official action.\textsuperscript{126}

Kennedy did not find sufficient evidence in the common law to support an extension of qualified immunity to private parties.\textsuperscript{127}

Justices Rehnquist, Souter, and Thomas dissented. Chief Justice Rehnquist, analyzing history, rejected the majority's characterization of the common law as providing a defense because in 1871 the plaintiff carried the burden of proving that the defendant accused of malicious prosecution or abuse of process acted with malice and without probable cause.\textsuperscript{128} The Chief Justice interpreted precedent as establishing a good faith defense for public officers at common law, and saw no historical basis for denying objective immunity to private parties.\textsuperscript{129}

He argued that public policy concerns favor the extension of objective qualified immunity to private individuals who rely on state statutes. The Chief Justice dissented because the majority punished "private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid."\textsuperscript{130} He considered it axiomatic that "society will be benefitted if private parties rely on [ ] law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief."\textsuperscript{131}

IV. CRITICISMS OF THE \textit{WYATT} RATIONALE

The \textit{Wyatt} Court rested its refusal to extend good-faith immunity to private individuals on the twin pillars of historical analysis

\begin{footnotesize}
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  \item \textsuperscript{126} \textit{Id.} (quoting \textit{Anderson v. Creighton}, 483 U.S. 635, 645 (1987)).
  \item \textsuperscript{127} Justice Kennedy warned that "[b]y casting the rule as an immunity, [the court] impl[iest] that the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute." \textit{Id.}
  \item \textsuperscript{128} \textit{Id.} at 1838 n.1 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{129} Chief Justice Rehnquist thought that "the general recognition under state law that public officers were entitled to a good faith defense was sufficient to support the recognition of a § 1983 immunity" should be extended to include private citizens in the absence of compelling historical or policy concerns. \textit{Id.} at 1838.
  \item \textsuperscript{130} \textit{Id.} at 1838. Circuit judges agree with Rehnquist after \textit{Wyatt}. \textit{See infra} Part V.
  \item \textsuperscript{131} \textit{Id.} at 1839.
\end{itemize}
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and public policy. This Part criticizes the Wyatt majority’s consideration of these two factors. It argues that the decision produces inequitable results by holding private parties to a higher standard of care than their government counterparts.

A. Historical Arguments

1. Old Tort Law

The Wyatt Court denied private parties good-faith immunity in part by arguing that, since the Forty-second Congress did not discuss immunity issues while enacting the Civil Rights Act of 1871, judges could consider only those immunities “so firmly rooted in the common law and [ ] supported by such strong policy reasons that ‘Congress would have specifically so provided had it wished to abolish the doctrine.’” Then the Court left open the possibility that private parties could escape liability with “an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.” Although this possibility would provide relief to private parties who rely on laws in good faith and with probable cause, it would force these defendants to prove what had been elements of the offense to be pled and proven by the plaintiff in 1871. The Wyatt majority did not justify this shift in the burden of proof.

Before reversing, the Supreme Court responded to the Fifth Circuit’s reasons for extending qualified immunity to Cole.

132 The Court found that “the reasons for recognizing an immunity [are] based not simply on the basis of a good-faith defense at common law, but on special policy concerns involved in suing government officials.” Id. at 1832. In addition, Rehnquist noted that the Court recognized immunity in two circumstances: when common law provide immunities at the time the Civil Rights Act of 1871 was adopted and when important public policies suggested a need for an immunity. Id. at 1837; see also PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 203-04 (1983).

133 Owen v. City of Independence, 445 U.S. 622, 637 (1980) (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)). See also Wyatt, 112 S. Ct. at 1831 (repeating that “we infer from legislative silence that Congress did not wish to abrogate such immunities”).

134 Id. at 1834. On remand, the Fifth Circuit held that, absent a showing of malice, private parties are not accountable for acts prior to a declaration that the ex parte pre-judgment statute invoked was unconstitutional. Wyatt v. Cole, 994 F.2d 1113, 1121 (5th Cir.), cert. denied, 114 S. Ct. 470 (1993).

The Court called on the circuits to flesh out the contours of the new good faith affirmative defense. Id. at 1834, 1837, 1838; see also CHEMERINSKY, supra note 29, § 8.6.

135 See infra notes 140-44 and accompanying text.

The two courts agreed that Cole's invocation of Mississippi's attachment statute most closely corresponded to the 1871 torts of abuse of process and malicious prosecution. But the Supreme Court disagreed with the Fifth Circuit on two grounds. First, it denied that a court could "transform a common law defense extant at the time of § 1983's passage into an immunity." Second, it rejected the Fifth Circuit's assertion that "Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process."

Although reasonable minds could differ on these two issues, the Supreme Court erred in characterizing probable cause and the absence of malice as defenses in 1871. When the Forty-second Congress enacted the Civil Rights Act in 1871, both malice and the absence of probable cause were considered elements of the torts of malicious prosecution and abuse of process which had to be pled and proven by the plaintiff. Justice O'Connor, writing for the majority, cited treatises by Thomas Cooley and Joel Bishop to support her historical analysis.

But both Bishop and Cooley classified malice and the absence of probable cause as

137 Compare Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1037 (5th Cir. Unit A 1982) with Wyatt, 112 S. Ct. at 1831.
138 112 S. Ct. at 1831 (quoting Folsom Inv. Co., 681 F.2d at 1038).
139 Id. In dissent, Chief Justice Rehnquist recorded the views he shared with the Fifth Circuit, but which failed to carry the day:

[I]t is normal presumption that attaches to any law is that society will be benefited if private parties rely on the law to provide them a remedy, rather than turning to some private, and perhaps lawless, relief .... I would have thought it beyond peradventure that there is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.

Id. at 1839-40.
140 Id. at 1831 (citing THOMAS M. COOLEY, LAW OF TORTS 187-90 (1879); JOEL P. BISHOP, COMMENTARIES ON NON-CONTRACT LAW §§ 228-250, § 490 (1889)).
141 Bishop wrote:

Malicious prosecution is the putting in motion of any process of the law, and the carrying of it forward until it terminates in favor of the one prosecuted, maliciously and without reasonable or probable cause, to his injury, in respect to either of personal security or property.

JOEL PRENTISS BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 221 (1889). Bishop characterizes a malicious prosecution action as the proper remedy for abuse of process claims. Id. § 224. "There must be malice and the want of probable cause combining. And these must be affirmatively shown by the plaintiff." Id. § 225.
142 Cooley similarly thought malicious prosecution actions required the plaintiff to show that:

1. A suit or proceeding has been instituted without probable cause therefor.
elements of the offense. Other prominent legal commentators agree, including James Barr Ames and Francis Hilliard. The majority recognized that:

[o]ne could reasonably infer from the fact that a plaintiff's malicious prosecution or abuse of process action failed if she could not affirmatively establish both malice and want of probable cause that plaintiffs bringing an analogous suit under § 1983 should be required to make a similar showing to sustain a § 1983 cause of action.

This is precisely what the Wyatt majority should have inferred if they valued history as a genuine concern. The Court did not state that elements of the offense resemble absolute immunity more than either qualified immunity or the new good faith defense. Late nineteenth century tort law dictates a choice between absolute and qualified immunity, not one between qualified immunity and the good faith defense which, presumably, would not be open to interlocutory appeal.

The Court may have conducted a less than rigorous historical inquiry because it felt bound by Harlow. As already explained, the Harlow Court removed the subjective component of qualified immunity for public officials operating within the scope of their authority defense because it consumed too many judicial resources, hindered the vigorous exercise of discretion by government officials, and was inconsistent with the notion that "insubstantial claims should not proceed to trial." Although these public policies do not transfer to private parties, different public policies

2. The motive in instituting it was malicious.
3. The prosecution has terminated in the acquittal or discharge of the accused.

THOMAS M. COOLEY, LAW OF TORTS 181 (1880).

Like Bishop, Cooley thought that a plaintiff must prove both a subjective and objective standard. Id. at 184-85. He asserted that "suing out an attachment for an amount greatly in excess of the debt" qualified as abuse of process. Id. at 189.

143 JAMES BARR AMES & JEREMIAH SMITH, A SELECTION OF CASES ON THE LAW OF TORTS 548-61, 568-71 (2d ed. 1893).
144 "[T]he plaintiff must allege and prove . . . that [the prosecution] was instituted maliciously, and without probable cause, not merely falsely." FRANCIS HILLIARD, 1 LAW OF TORTS 437 (1874).

Hilliard asserted that "[i]f an attorney, from malicious motives procure from justices of the peace an unauthorized order of attachment, operating injuriously upon the defendant's rights, he is liable as well as his client." Id. at 439.

146 See Lagos, supra note 27, at 873-78.
support immunity for private parties, rendering the choice between granting either objective qualified immunity or nothing a false dichotomy. The Wyatt Court should have applied to private parties the scrutiny it undertook on behalf of public officials before arriving at its decision in Harlow. Had it done so, the Court may have realized that although these policies do not apply to private parties, others did, and granted qualified immunity to private parties.

2. The Scope of the Fourteenth Amendment

The Civil Rights Act of 1871148 was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment.'"149 The Court has long recognized that the Fourteenth Amendment offers no shield against private conduct, "'however discriminatory or wrongful.'"150 Private-party defendants in section 1983 suits should face no more liability than their public counterparts would in similar actions.

The Lugar Court stated two prerequisites to ensure that acts by private parties were "fairly attributable" to the state.151 First, the deprivation in question must be caused by some right created by the state, some rule imposed by the state, or some person for whom the state is responsible.152 Second, the private party must be fairly said to be a state actor because he acted together with or obtained significant aid from state officials, or his conduct is otherwise attributable to the state.153 The Court imposed these re-

150 Drawing upon The Civil Rights Cases, 109 U.S. 3 (1883), the Supreme Court highlighted:

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
152 Id.
153 Id.
quirements to keep private parties from "fac[ing] constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them."\textsuperscript{154} As it had in \textit{Lugar}, the Court should have balanced the purpose of section 1983 with the limited scope of the Fourteenth Amendment.\textsuperscript{155}

By freeing only government officials from insubstantial section 1983 suits on summary judgment, the \textit{Wyatt} Court declared, in effect, that innocent private parties who rely on presumptively valid statutes should be held accountable to a higher level of expertise than the government officers who create and enforce the statutes.\textsuperscript{156} Holding private parties to a higher level of expertise than public officials runs counter to section 1983, which was intended to uphold individual rights from state actions, not the acts of other individuals.\textsuperscript{157} Granting qualified immunity to private individuals who act in good faith and in the absence of malice would eliminate this injustice, while at the same distinguishing between those who rely unsuspectingly on laws later judged unconstitutional and those who manipulate them.

\textbf{B. Public Policy Analysis}

In addition to its odd reading of history, the \textit{Wyatt} Court selected biased policy arguments. When it held that qualified immunity should not be extended to private parties, it included in its analysis only those public policies unique to public officials.\textsuperscript{158} The Court shied away from private-party immunity in part because the public policies entitling government officials to qualified immunity in \textit{Harlow} were not applicable to private individuals.\textsuperscript{159}

\begin{itemize}
\item \textsuperscript{154} \textit{Id}.
\item \textsuperscript{155} The historic purpose of § 1983 was to prevent state officials from using the cloak of their authority under state law to violate rights protected by the Fourteenth Amendment. Monroe v. Pape, 365 U.S. 167, 172 (1961), overruled by Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).
\item \textsuperscript{156} It is remarkable that Justice O'Connor, who wrote the majority opinion in \textit{Wyatt}, previously joined the \textit{Lugar} dissent in arguing that § 1983 private liability under the two-part test went beyond the scope of the Fourteenth Amendment. \textit{Lugar}, 457 U.S. at 947.
\item \textsuperscript{158} 112 S.Ct. 1827, 1839 (1992) (Rehnquist, C.J., dissenting).
\item \textsuperscript{159} When considering immunity for public officials, the Court struck a familiar chord. It repeated that:
\begin{itemize}
\item where it is necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits
\end{itemize}
\end{itemize}
This reasoning is flawed. Just because those public policies unique to public officials do not apply to private parties, it does not follow that no equally compelling public policies exist favoring a grant of qualified immunity to private individuals. The Court should have considered policies supporting qualified immunity for private citizens. These policies include supporting a citizen's right to rely on laws, reducing litigation costs, and promoting the performance of quasi-public duties.

1. The Right to Rely on Laws

A citizen's right to rely on the validity of their laws is inherent in the concept of an ordered society. Chief Justice Rehnquist and the Fifth Circuit argued for that right to no avail. While it is true that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative," the right to rely should be weighed in the balance, as Justice Powell argued in Lugar. The Wyatt majority ignored this basic right. Just as society benefits when government officials perform their legitimate duties without fear of suit, so, too, should private citizens and businesses be able to rely on presumptively valid laws.

Restricting immunity to public officials creates disincentives by making lawless self-help more attractive in the sense that private citizens can escape section 1983 liability by avoiding the legal system. Although the Wyatt Court asserted that its decision from entering the public service.

Id. at 1833.

160 Id. The Wyatt majority thought it faced a choice between objective Harlow immunity or nothing. Instead, it should have "balance[d] the evils inevitable in any available alternative." Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982).


162 As the Fifth Circuit stated:

The private party who invokes a presumptively valid attachment law is not entitled to immunity because the officer executing it is. Rather, quite independently, the private party is entitled to immunity because of the important public interest permitting ordinary citizens to rely on presumptively valid state laws . . . and in protecting a private citizen from liability when his role in any unconstitutional action is marginal.

Wyatt v. Cole, 928 F.2d at 721; see also 112 S. Ct. at 1839-40 (Rehnquist, C.J., dissenting).

163 Harlow, 457 U.S. at 813-14. The Wyatt majority realized that "[q]ualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting the government's ability to perform traditional functions." Wyatt, 112 S. Ct. at 1833.

164 Id.
would not unduly impair public policy,\textsuperscript{165} it undermined the presumption that "society will be benefitted if private parties rely on that law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief."\textsuperscript{166} \textit{Wyatt} admonishes private citizens who invoke the legal system that they act at their peril.

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 their government counterparts."\textsuperscript{167} While finding this argument unpersuasive in \textit{Wyatt},\textsuperscript{168} the Court applied these principles in \textit{Lugar},\textsuperscript{169} noting that it "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed."\textsuperscript{170} Courts should not deny private parties the same immunity as public officials "simply because the private parties are not [government] employees."\textsuperscript{171} In part, private parties should have the same protection as their government counterparts because no deterrence results from punishing individuals who are unaware that their acts were wrongful.\textsuperscript{172}

\begin{flushleft}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} Chief Justice Rehnquist argued that:
\begin{quote}
The normal presumption that attaches to any law is that society will be benefitted if private parties rely on the law to provide them a remedy, rather than turning to some private, and perhaps lawless, relief . . . I would have thought it beyond peradventure that there is a strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity.
\end{quote}
\textit{Id.} at 1839-40.
\textsuperscript{167} \textit{Id.} at 1833. \textit{See} \textit{Jones v. Preuit & Mauldin}, 851 F.2d 1321, 1325 (11th Cir. 1988) (en banc) (asserting that when a citizen utilizes state law, "he should do so with confidence that he need not fear liability resulting from the legislature's constitutional error"), \textit{vacated on other grounds}, 489 U.S. 1002 (1989); \textit{Folsom Inv. Co., Inc. v. Moore}, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982) (stating that public policy justifications for immunity protecting a private citizen who relies on presumptively valid state statute "alone justify an immunity").
\textsuperscript{168} 112 S. Ct. at 1833.
\textsuperscript{169} \textit{Lugar v. Edmondson Oil Co.}, 457 U.S. 923, 936 (1982).
\textsuperscript{170} 112 S. Ct. at 1840 (Rehnquist, C.J., dissenting).
\textsuperscript{171} As the Eleventh Circuit stated:
\begin{quote}
[qualified immunity] preserves the full deterrent force of section 1983 by excluding from liability only those who could not reasonably have known that their conduct violated the federal constitution. No additional deterrence can be achieved by punishing individuals who could not reasonably have known that their actions were improper.
\end{quote}
\textit{Preuit & Mauldin}, 851 F.2d at 1325.
\end{flushleft}
2. Litigation Costs

By refusing to extend qualified immunity to private defendants, *Wyatt* increases litigation costs for private parties who are unaware that the statutes upon which they rely will later be declared unconstitutional. The Supreme Court has long recognized that litigation costs present a significant public policy concern. The good-faith affirmative defense requires the absence of malice and, therefore, must be submitted to a fact-finder. Post-*Harlow* qualified immunity, on the other hand, involves only the objective standard of probable cause, which is a question of law amenable to summary disposition. The *Wyatt* Court thought early dismissals were less important to private defendants than their public counterparts, who exercised discretion. Both the promotion of quasi-public duties and a citizen's right to rely on laws oppose the Court's view.

Private parties generally have less access to costly legal resources than their public counterparts. The *Wyatt* Court recognized that objective *Harlow* immunity "acts to safeguard government, and thereby protect the public at large, not to benefit its agents." Private taxpayers usually provide some means for public officials to secure legal advice, allowing officials to assess the validity of laws on which they might rely. Citizens do not share this advantage and, therefore, should not be held to a higher standard than their public counterparts. If the Court wants to impose higher litigation costs on private parties in section 1983 actions, it should assert more important public interests to justify the additional burden.

3. Quasi-Public Duties

After summarizing the public policies stated in *Harlow,* the

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172 See supra note 68.
174 112 S. Ct. at 1839 (Rehnquist, C.J., dissenting).
175 Id. at 1833.
176 The *Harlow* court noted the factors to consider before recognizing qualified immunity:

[The resolution of the immunity question inherently requires a balance between the evils inevitable in any available alternative . . . . It cannot be disputed seriously that claims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social]
Wyatt Court repeated that qualified immunity should protect defendants where “necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damage suits from entering public service.” The Wyatt Court’s application of the Harlow rationale fails, however, to allow for situations where private parties are obligated, by contract or otherwise, to perform quasi-public functions indistinguishable from those of their governmental counterparts. The Lugar Court focused on state action, not state employment, as the controlling factor for liability. To be consistent with Lugar, the Wyatt Court should have granted good faith immunity to private individuals.

V. A NEW CIRCUIT SPLIT

The Supreme Court granted certiorari in Wyatt to resolve the circuit split over “whether private defendants threatened with 42 U.S.C. § 1983 liability are, like certain government officials, entitled to qualified immunity from suit.” Yet two years after the Wyatt decision, the courts of appeals still differ over its proper breadth and application. This absence of uniformity is understandable. The circuits do not know whether they should

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costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is a danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [government officials], in the unflinching discharge of their duties. In identifying qualified immunity as the best attainable accommodation of competing values we relied on the assumption that this standard would permit “[i]nsubstantial law suits [to] be quickly terminated.”

457 U.S. at 813-14.
177 112 S. Ct. at 1833.
178 See Charles W. Thomas, Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits, 53 LA. L. REV. 449 (1992). After Wyatt, Professor Thomas was concerned that courts may not grant private correctional employees the same immunities as their government counterparts. Id. He urged courts to consider that the government contracted with the private sector for services traditionally provided through public agencies only to devise more efficient and effective means of public service. Id.
181 See supra notes 18-25.
restrict Wyatt to cases involving states replevin, garnishment or attachment statutes, or apply the case to broader issues.183 Far from deciding the immunity issue, Wyatt left another circuit split in its wake. The Fifth,184 Eighth,185 and Ninth186 Circuits applied the Wyatt decision to deny qualified immunity to private parties outside the context of replevin, garnishment, or attachment statutes. The Seventh,187 Tenth,188 and Eleventh189 Circuits have at least considered, either in holdings or dicta, the possibility of extending qualified immunity to private defendants beyond the context of replevin, attachment, or garnishment statutes. The First, Second, Third,190 Sixth,191 and D.C. Circuits have not addressed private-party immunity after Wyatt. The Fourth Circuit has not addressed the private immunity issue beyond a replevin, garnishment

183 The Wyatt majority recognized that certiorari was granted to determine "[w]hether private persons, who conspire with state officials to violate constitutional rights, have available the good faith immunity applicable to public officials." Id. at 1834. In the next sentence, the majority restricts the scope inquiry to "whether qualified immunity, as enunciated by Harlow . . . is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment or attachment statute." Id.

Justice Kennedy defined the issue as "whether private defendants in § 1983 suits are entitled to the same qualified immunity applicable to public officials . . . which of course would be subject to the objective standard of Harlow." Id. at 1837 (Kennedy, J., concurring).

184 Williams v. City of Luling, 802 F. Supp. 1518 (W.D. Tex. 1992), dismissed, 12 F.3d 209 (5th Cir. 1993) (interpreting Wyatt to deny qualified immunity to a private defendant accused of conspiring with police to deny the plaintiff's constitutional right to be free from unlawful arrest). See Wyatt v. Cole, 944 F.2d 1113 (5th Cir.), cert. denied, 114 S. Ct. 470 (1993); see also Batiste v. Colonial Sugars, Inc., 1993 WL 149067, *3 (E.D. La. 1993) (responding to the possibility of a good faith defense by remarking that "the precise parameters of the Wyatt decision are not clear").

185 Dorothy J. v. Little Rock School Dist., 794 F. Supp. 1405 (E.D. Ark. 1992), aff'd, 7 F.3d 729 (8th Cir. 1993) (interpreting Wyatt to deny qualified immunity to a private social service agency accused of depriving the plaintiff of his right to personal integrity and security under the Fourteenth Amendment).

186 Penman v. Korper, 977 F.2d 590, 1992 WL 276462 (9th Cir. 1992) (stating that, after Wyatt, "the law is settled that private parties are not entitled to qualified immunity in [1983] actions").

187 Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) (granting qualified immunity to a private hospital which was ordered by the state court to detain the plaintiff against his will).


189 Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785 (11th Cir.), reh'g denied, 978 F.2d 718 (11th Cir. 1992) (recognizing the possibility of extending qualified immunity for private defendants under contract with the government or under a court order), cert. denied, 113 S. Ct. 1814 (1993).


or attachment situation.\textsuperscript{192}

The \textit{Wyatt} Court failed to account for public policies favoring the extension of qualified immunity to private parties who act in good faith and without malice.\textsuperscript{193} Although it is too soon to determine the full impact of \textit{Wyatt},\textsuperscript{194} the Seventh,\textsuperscript{195} Tenth\textsuperscript{196} and Eleventh\textsuperscript{197} Circuits already have acknowledged policy reasons for extending qualified immunity to private defendants in section 1983 actions.\textsuperscript{198} Society benefits from reducing litigation costs, promoting quasi-public duties, and allowing citizens to rely on duly enacted laws. These public policies persist despite being ignored by the majority in \textit{Wyatt}. They resurface in most post-\textit{Wyatt} cases and, until reckoned with, they will aggravate the resurgent circuit split.

\textit{Burrell v. Board of Trustees of Georgia Military College}\textsuperscript{199} demonstrates the confusion among the circuits over the scope of the \textit{Wyatt} decision. Burrell alleged that she was fired in retaliation for her criticisms of Georgia Military College.\textsuperscript{200} The Eleventh Circuit

\begin{itemize}
\item\textsuperscript{193} \textit{See supra} Parts III and IV.B.
\item\textsuperscript{194} \textit{See supra} Part III.
\item\textsuperscript{195} Sherman v. Four County Counseling Ctr., 987 F.2d 397 (7th Cir. 1993) (extending qualified immunity to a private mental hospital that treated an involuntary mental patient as instructed by a court order).
\item\textsuperscript{196} Moore v. Wyoming Medical Center, 825 F. Supp. 1531 (D. Wyo. 1993) (recognizing the possibility of qualified immunity for private defendants under contract with the government).
\item\textsuperscript{198} \textit{See supra} notes 158-60 and accompanying text.
\item\textsuperscript{199} 970 F.2d 785 (11th Cir. 1992).
\item\textsuperscript{200} Melba Burrell was dismissed from her job as Senior Vice President of First Federal Savings and Loan Association of Milledgeville. She filed a section 1983 and 1985(3) suit against James Baugh, the mayor and chairman of the Board of Trustees, Jacob Goldstein, member of the Board of Trustees and Director of First Federal, Alva Baggarly, Director and C.E.O. of the savings and loan, and the aldermen of Milledgeville, in both their individual and official capacities, alleging that she was fired in retaliation for her criticisms of the Georgia Military College. 970 F.2d at 786.

Baugh, Goldstein, and Baggarly claimed qualified immunity and moved for summary judgment, which the district court denied. \textit{Id.} at 787. The Eleventh Circuit reversed the denial on the § 1983 claim. \textit{Id.} It affirmed the denial as to the § 1985(3) conspiracy claims because public officials cannot claim qualified immunity from § 1985(3) conspiracy violations. \textit{Id.} at 793, 794 n.21. Interestingly, although the case lacked compelling quasi-public duties or a court order, the court acknowledged such duties or mandates as possible factors to be considered. \textit{Id.} at 795-96 (citing Duncan v. Peck, 844 F.2d 1261, 1264
reversed the district court's denial of the trustees' claim to qualified immunity in their official capacities.\textsuperscript{201} Drawing upon Rehnquist's reasoning in the \textit{Wyatt} dissent,\textsuperscript{202} the court held qualified immunity was not available to defendants who, in their individual capacities, "acted in concert with public officials for the sole purpose of violating another's constitutional rights."\textsuperscript{205} When faced with the broader issues upon which the \textit{Wyatt} Court initially granted certiorari,\textsuperscript{204} the Eleventh Circuit read \textit{Wyatt} as narrowly as possible, stating that it "need not diagnose the current vitality of court of appeals decisions\textsuperscript{205} allowing private defendants to assert qualified immunity in non-attachment cases."\textsuperscript{206} This construction would not have been possible if the \textit{Wyatt} Court stuck to its original agenda.

\textit{Sherman v. Four County Counseling Center}\textsuperscript{207} documents that federal judges will continue to grant qualified immunity to private parties who assume quasi-public duties.\textsuperscript{208} Sherman brought a section 1983 action after he was detained and treated against his will by Four County Counseling Center, a private psychiatric hospital

\textsuperscript{201} 970 F.2d at 789 n.10. The court assumed that the defendants were public officials. \textit{Id.} at 789. It cited its earlier reasoning in Parker v. Williams, 862 F.2d 1471, 1476 n.4 (11th Cir. 1989) (stating that "suits against an individual in his or her official capacity are suits against the entity the individual represents"), arguing that since Milledgeville and First Federal were not entitled to either qualified or Eleventh Amendment immunity from \S\ 1983, neither were their representatives. \textit{Id.}

\textsuperscript{202} The Eleventh Circuit cited without question Rehnquist's notion that we should not punish "private citizens who rely unsuspectingly on state laws they did not create and have no reason to believe are invalid." 970 F.2d at 796 (quoting \textit{Wyatt}, 112 S. Ct. at 1833 (Rehnquist, C.J., dissenting)). The extension of qualified immunity to private individuals who act in good faith and in the absence of malice would promote reliance upon laws.

\textsuperscript{203} \textit{Id.}

\textsuperscript{204} \textit{See supra} note 183.

\textsuperscript{205} \textit{See}, e.g., Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-24 (11th Cir. 1988) (en banc), \textit{vacated on other grounds}, 489 U.S. 1002 (1999); Buller v. Buecher, 706 F.2d 844, 850-53 (8th Cir. 1983); Folsom Inv. Co. v. Moore, 681 F.2d 1032, 1036-38 (5th Cir. Unit A 1982).

\textsuperscript{206} 970 F.2d at 795.

\textsuperscript{207} 987 F.2d 397 (7th Cir. 1993).

\textsuperscript{208} Although the \textit{Wyatt} Court held only that defendants charged with invoking state replevin, garnishment and attachments statutes later found to be unconstitutional are not protected by qualified immunity, Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992), one could read that decision and reasonably conclude that granting qualified immunity to any private party opens the door to a risk of reversal. 987 F.2d at 408-10.
acting under court order. The district court had dismissed Sherman's claims against all defendants based upon absolute or qualified immunity.

The Wyatt majority put the Eleventh Circuit in a bind by arguing that promoting the vigorous exercise of discretion by public officials provided the rationale for extending qualified immunity to public officials while denying it to private parties. The Eleventh Circuit realized that Wyatt produced inequity by treating similar things differently. Under the vigorous exercise rationale, Four County was exposed to liability for complying with a court order, while Logansport State Hospital remained immune for providing substantially similar services. The Sherman court affirmed the extension of qualified immunity to the private hospital, arguing that any other decision would create disincentives:

> We refuse to give private hospitals the Hobson's choice of obeying a court's order directing discretionary medical treatment, and facing liability for the resulting medical judgment, or refusing to make a medical judgment, and exposing hospital staff and patients to the risk of harm posed by a potentially violent mental patient.

Four County Counseling Center served the public by accepting and caring for mental patient committed by the state on an emergency basis. If private hospitals suffered exposure to liability under

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209 After arresting Paul Sherman for criminal harassment, Indiana State Police Officer Gary Boyles filed an application for emergency detention with the Cass County Superior Court. The court authorized officers to take Sherman to the Four County Counseling Center "to be detained, examined and given . . . emergency treatment." Id. at 399. Four County doctors determined that Sherman was a chronic paranoid schizophrenic, detained him, and reported as much to the court. Based on this report, Judge Cox ordered Four County to continue to treat Sherman "as necessary and appropriate, with or without the consent of the respondent." Id. Judge Cox later ordered Four County to transfer Sherman to Logansport State Hospital, where Sherman remained until his preliminary hearing.

At the hearing, Judge Cox determined that Sherman's involuntary commitment was not warranted. Id. Sherman sued Officer Boyles, Judge Cox, Cass County, Four County, and his Public Defender under § 1983, but voluntarily withdrew his claim against Logansport State Hospital. Id.

210 Id.

211 Id. at 405. The court of appeals noted that Sherman never alleged that Four County acted in bad faith or with malice. Id. The court compared private hospitals with school board members. Id. at 406 (citing Wyatt, 112 S. Ct. at 1833-34). See Wood v. Strickland, 420 U.S. 308, 319 (1975) (stating that denial of qualified immunity to school officials "would contribute not to principled and fearless decision-making but to intimidation") (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
section 1983 for accepting involuntary patients, they may refuse these patients in the future, increasing the load for already overburdened state public hospitals.\textsuperscript{213} Aside from these practical concerns, private hospitals should be able to rely on mandates handed down by their judicial system. The \textit{Wyatt} Court placed the Eleventh Circuit in an awkward position by refusing to grant qualified immunity to private parties who rely upon laws and legal mandates in good faith and without malice.

\textit{Sherman} has been distinguished. In the absence of a court order mandating treatment, another federal court denied qualified immunity to a private mental hospital that detained a patient against their will. In \textit{Moore v. Wyoming Medical Center},\textsuperscript{214} the district court denied qualified immunity to the two paramedics who delivered the plaintiff to a mental hospital against her will. The court considered both \textit{Burrell} and \textit{Sherman}, deciding that \textit{Burrell} controlled because the paramedics were not operating under a court order when they detained Moore. This case may have turned more on the paramedics' show of excessive force and calloused indifference than the lack of a court order. The court was also well aware that \textit{Sherman} "raised the specter of qualified immunity."\textsuperscript{215} Wyoming Medical Center performed quasi-public duties under public mandate, since it contracted to perform public functions in its lease with the Natrona County.\textsuperscript{216} A grant of qualified immunity to private parties who act in good faith and without malice, under the standard set forth in \textit{Wood v. Strickland}, would produce an appropriate result here, since the paramedics' immunity claim fails in the presence of malice.

\textsuperscript{213} The court marshalled further support for its decision from the fact that, in many instances, admission to smaller hospitals benefits involuntary patients by allowing the patients to be evaluated close to home and family, minimizing the disruption of their lives. \textit{Id.} It supported the public interest in maximizing the number of facilities available for the detention and treatment of the mentally ill by sheltering private facilities from liability for discretionary medical judgments made while under a court order. \textit{Id.}

\textsuperscript{214} 825 F. Supp. 1531 (D. Wyo. 1993).

Becky Moore, like Paul Sherman, was a schizophrenic forced into treatment at a private hospital under their state's emergency detention statute. \textit{Id.} at 1534-35. Unlike Sherman, Moore challenged the constitutionality of the statute, but without success. \textit{Id.} at 1536-40.

Although Moore denied it, her therapist asserted that she threatened to commit suicide over the phone. \textit{Id.} at 1534-35. It was not disputed that two paramedics entered Moore's house while she showered and brought her to Wyoming Medical Center handcuffed and naked. \textit{Id.}

\textsuperscript{215} \textit{Id.} at 1545 n.8.

\textsuperscript{216} \textit{Id.} at 1544.
The Fifth Circuit minimized the post-Wyatt confusion present in all circuits to varying degrees. It declared Wyatt unclear before applying the decision outside of an attachment context. On remand, in Wyatt v. Cole, the Fifth Circuit focused on the possibility that Cole and Robbins:

could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.

It declined to recognize liability “absent a showing of malice and evidence that [defendants] either knew or should have known of the statute’s constitutional infirmity.” Functionally, this approaches the standard set in Wood, which required both a subjective inquiry to assess malice and an objective good faith that encompassed “knowledge of the basic unquestioned constitutional rights” as set forth in “settled, indisputable law.” This set of objective and subjective hurdles best tests those who wish to escape liability while offering the advantage of providing a uniform standard to both private and public parties.

VII. CONCLUSION

The Supreme Court has not mended the circuit split that emerged after Lugar. The courts of appeals are divided over the scope of the Wyatt decision and its application to private parties threatened with section 1983 liability for assuming quasi-public duties. Sherman illustrates that Wyatt created a reluctance among some federal judges to classify those performing quasi-public duties as private parties. These jurists face the additional dilemma of addressing the undefined scope of the Wyatt decision and fleshing out the contours of the new good faith defense alluded to in Wyatt. The Court could have prevented this uncertainty by

218 Williams v. City of Luling, 802 F. Supp. 1518 (W.D. Tex. 1992), dismissed, 12 F.3d 209 (5th Cir. 1993) (denying qualified immunity to a private defendant accused of conspiring with police to arrest another with malice and without probable cause).
220 Id. at 1115 (quoting Wyatt v. Cole, 112 S. Ct. 1827, 1834 (1992)).
221 Id. at 1120. This approach is historically accurate in that, in 1871, the plaintiff carried the burden of proof for malice in abuse of process and malicious prosecution actions. See supra notes 140-44 and accompanying text.
223 Id. at 321-22.
granting to private parties the qualified immunity defined in Wood.

The Wood Court conferred qualified immunity to state actors who remain within the dictates of settled, undisputed constitutional law in the absence of malice. It provided a uniform standard by which to assess what the Court had earlier purported to be functional equivalents: representatives of the state and those who should be treated as if they represent the state. It distinguished between those who rely in good faith upon laws and those who exploit them. We should return to the Wood standard. Public officials are state actors in a way that private citizens never are. If the Supreme Court decides to expose private parties to civil liability under section 1983, a statute intended to hobble public officials, it should treat private and public parties similarly. The Wyatt decision holds citizens to a higher level of expertise than their better-informed government officials, producing inequitable results. These results have yielded higher litigation costs, lowered the incentives for private parties to assume quasi-public duties, and tested the public's willingness to work within their legal system. A return to pre-Harlow parity would eliminate these problems.

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