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Damned If You Do...The Supreme Court Denies Qualified Immunity to Section 1983 Private Party Defendants in Wyatt v. Cole

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NOTES

Damned if You Do . . . The Supreme Court Denies Qualified Immunity to Section 1983 Private Party Defendants in *Wyatt v. Cole*

According to a well-known maxim, ignorance of a law is no excuse to liability for a violation of that law.[1] The requirement that citizens be held responsible for their transgressions of the law is necessary for the effectiveness and consistency of our legal system. The practical result in a heavily legislated society, however, is that one faces numerous behavioral restrictions and potential liabilities. It would therefore seem just and logical to hold that one should not be held liable for following a course of conduct explicitly prescribed by statute.[2] In 1981, however, the United States Supreme Court held that a private citizen could be liable under 42 U.S.C. § 1983[3] for invoking a state attachment statute, if that

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1. The Latin is *ignorantia legis neminem excusat. See* LATIN WORDS & PHRASES FOR LAWYERS 110 (R.S. Vasan ed., 1980). Other formulations of this truism include: "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him," QUOTE IT! MEMORABLE LEGAL QUOTATIONS 262 (Eugene C. Gerhart ed., 1969) (quoting JOHN SELDON, THE TABLE TALK OF JOHN SELDON 99 (Samuel H. Reynolds ed., 1892)), and "[L]awyers are the only persons in whom ignorance of the law is not punished." Wolfe D. Goodman, Q.C., *Sole Practice, Partnership or Merger*, 9 CAN. B.J. 195, 195 (1966).

2. It is true that one will not be held accountable under the criminal law for statutorily prescribed activity should that activity later be deemed improper. U.S. CONST. art. I, § 9, cl. 3 ("No bill of attainder or *ex post facto* law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any bill of attainder [or] *ex post facto* law."). The constitutional guarantee that a citizen will be free from *ex post facto* determinations of criminal behavior does not apply, however, to the civil law, unless the civil statute is clearly penal rather than compensatory in nature. *See* DeVeau v. Braisted, 363 U.S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts."); Burgess v. Salmon, 97 U.S. 381, 385 (1878) ("[T]he *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."); Louis Vuitton S.A. v. Spencer Handbags Corp., 765 F.2d 966, 972 (2d Cir. 1985) (contrasting "potential *ex post facto* problem" of treble punitive damages provision "intended to penalize" with former, constitutionally valid provision "intended only to compensate victims").

3. Section 1983 provides:

> 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.

42 U.S.C. § 1983 (1988).

statute was later held unconstitutional.[4] Recognizing the possible injustice in holding a private party accountable for the mistakes of a legislature, the Supreme Court suggested, but did not decide, that a citizen invoking such a law would be entitled to a good-faith immunity or defense.[5] The decision left to individual federal courts the task of interpreting private defendants' rights under § 1983.

Eleven years later in *Wyatt v. Cole*,[6] the Supreme Court set out to resolve the resulting conflict among the circuits[7] and rejected qualified immunity for private defendants who reasonably rely upon a valid state replevin or attachment statute.[8] Restricting its inquiry to the issue of objective qualified immunity, the Court did not otherwise rule on the relevance of subjective good faith or objective reasonableness to the cause of action.[9] As a result, the *Wyatt* Court left undetermined an essential element of a § 1983 claim against a private defendant who relies upon an unconstitutional statutory procedure, thereby perpetuating an inconsistent circuit-by-circuit interpretation of an important statute.

This Note recounts the Court's holding in *Wyatt*, emphasizing the distinctions between the majority and concurring opinions.[10] The Note then examines the developments of private party liability and qualified immunity for public officials under § 1983, focusing on the impact of *Lugar v. Edmondson Oil Company* on private defendants and the dramatic shift in the doctrine of qualified immunity effectuated by the Court in *Harlow v. Fitzgerald*.[11] Additionally, the Note critiques the Court's

4. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982). For a discussion of *Lugar*, see *infra* notes 76-97 and accompanying text.

5. *Lugar*, 457 U.S. at 942 n.23. The Court's implied distinction between an immunity and a defense is misleading. Qualified immunity is defined as an "[a]ffirmative defense which shields public officials performing discretionary functions from civil damages." BLACK'S LAW DICTIONARY 752 (6th ed. 1990). The Court has recognized the lack of substantive distinction between the two, stating that "*qualified immunity is a defense*, [and] the burden of pleading it rests with the defendant." Gomez v. Toledo, 446 U.S. 635, 640 (1980) (emphasis added). An affirmative defense, unlike a denial, is a "matter asserted by defendant which, assuming the [plaintiff's] complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY, *supra*, at 60. Examples of other affirmative defenses include assumption of risk, accord and satisfaction, contributory negligence, and estoppel. *Id.* Immunity differs conceptually from other affirmative defenses in that a party claiming immunity acknowledges his wrongful conduct, but asserts that he is not responsible for compensating the injured party. *See infra* notes 48, 159 and accompanying text. Procedurally and substantively, however, qualified immunity is indistinguishable from any other affirmative defense.

6. 112 S. Ct. 1827 (1992).

7. *See infra* notes 123-26 and accompanying text. For a discussion of the development of qualified immunity under § 1983, see *infra* notes 98-122 and accompanying text.

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

9. *Id.* at 1834.

10. *See infra* notes 32-54 and accompanying text.

11. 457 U.S. 800 (1982); *see infra* notes 55-126 and accompanying text.

immunity analysis in *Wyatt*, questioning in particular the Court's failure to assess the significance of its historical inquiry.[12] The Note agrees with the concurrence that, although the majority correctly applied precedent to decide the narrow question ruled upon, it failed to address the underlying issues of the case or to resolve the split among the circuit courts.[13] Finally, this Note recommends, based upon both the history and policy tests traditionally employed by the Court, that private parties be granted common-law good-faith immunity when invoking a valid state statute.[14]

In July 1986, Bill Cole and Howard Wyatt had a disagreement about their business partnership.[15] Cole wanted to dissolve the partnership, but the two parties could not agree on terms.[16] Seeking to recover a share of the partnership property, Cole employed an attorney, John Robbins, II, who filed an action in replevin[17] in Mississippi state court.[18] Cole posted a bond and received a writ of replevin,[19] which he presented to the court.[20] As required under the existing Mississippi statute,[21] the judge then signed an execution order, instructing the sheriff to take from Wyatt "[twenty-four] head of cattle, a tractor and certain other personal property" and deliver the same to Cole.[22] In July 1987, Wyatt filed a § 1983 action against Cole and Robbins in federal court,[23] charging that the Mississippi replevin statute was unconstitutional.[24] The district court

12. *See infra* notes 131-51 and accompanying text.

13. *See infra* notes 161-62 and accompanying text.

14. *See infra* notes 163-66 and accompanying text.

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

16. *Id.*

17. "An action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY, *supra* note 5, at 1299.

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

19. "A provisional remedy that is an incident of a replevin action which allows the plaintiff at any time before judgment to take the disputed property from the defendant and hold the property pendente lite." BLACK'S LAW DICTIONARY, *supra* note 5, at 1299.

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

21. The Mississippi replevin statute provided that if a party posted a bond and filed an oath claiming ownership of property wrongfully detained by another, upon presentment of the declaration to a judge, "such judge *shall* issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said declaration." MISS. CODE ANN. § 11-37-101 (Supp. 1988) (amended 1990) (emphasis added).

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

23. *Id.* Wyatt also named as defendants the sheriff and deputies who enforced the replevin order. The district court dismissed these claims, holding that, as public officials, the sheriff and deputies were entitled to qualified immunity. *Id.* Wyatt later named Mississippi's Attorney General a defendant in his official capacity as a representative of the state. Wyatt v. Cole, 928 F.2d 718, 720 (5th Cir. 1991), *rev'd and remanded*, 112 S. Ct. 1827 (1992).

24. *Wyatt*, 928 F.2d at 720.

issued two separate memorandum opinions. The first found the statutory procedure constitutionally infirm and violative of Wyatt's right to due process.[25] The second opinion held that Cole and Robbins, like public officials, were protected by qualified immunity under § 1983 for liability based upon actions taken before the statute was found unconstitutional.[26]

The United States Court of Appeals for the Fifth Circuit affirmed the private defendants' right to assert qualified immunity.[27] In granting immunity, the court relied on the reasoning of an earlier Fifth Circuit opinion that awarded qualified immunity to a § 1983 private party defendant.[28] In his appeal, Wyatt argued that the defendants' use of the statute was unreasonable because the Fifth Circuit had recently invalidated a similar Georgia statute in *Johnson v. American Credit Co.*[29] The

25. Wyatt v. Cole, 710 F. Supp. 180, 183 (S.D. Miss. 1989) (finding that the statute as written gave "no discretion to the judge to deny a writ of replevin on presentment of a complaint in the statutory form"), *aff'd*, 928 F.2d 718 (5th Cir. 1991), *rev'd and remanded*, 112 S. Ct. 1827 (1992).

26. *Wyatt*, 112 S. Ct. at 1829 (citing *Wyatt*, No. 17 App. 18 (S.D. Miss. April 13, 1989)).

27. *Wyatt*, 928 F.2d at 721-22.

28. The court of appeals adopted the rationale developed in Folsom Investment Co. v. Moore, 681 F.2d 1032 (5th Cir. 1982), which established that "a § 1983 defendant who has invoked an attachment statute is entitled to an immunity from monetary liability so long as he neither knew nor reasonably should have known that the statute was unconstitutional." *Wyatt*, 928 F.2d at 721-22 (quoting *Folsom*, 681 F.2d at 1037).

The *Folsom* court offered a two-step justification for the immunity. First, it pointed out that the most closely analogous common law torts—malicious prosecution and abuse of process—afforded the defendant a defense of good faith and probable cause. In fact, the defense of good faith and probable cause is implicit in the elements of these causes of action. To sustain an action for malicious prosecution, a plaintiff must show that the defendant, without probable cause and with malice, initiated (and lost) a civil action against the plaintiff. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889-95 (5th ed. 1984). While the malice requirement of the tort action is less strict than in criminal law, the plaintiff must show that defendant had an "improper purpose" in bringing the suit. *Id.* at 895. Abuse of process, by contrast, exists where a party initiates "a legal procedure . . . in proper form, with probable cause, and even with ultimate success, but nevertheless has [done so] . . . to accomplish an ulterior purpose for which it was not designed." *Id.* § 121, at 897. Thus, the necessity of an "ulterior purpose" provides a bad-faith requirement for a finding of abuse of process and, by definition, creates a defense of good faith to the action.

In the second step of its analysis, the *Folsom* court reasoned that because these analogous torts allowed a good-faith defense at common law, "Congress in enacting § 1983 could not have intended to subject to liability those who in good faith resorted to legal process. We have merely transformed a common law defense extant at the time of § 1983's passage into an immunity." *Folsom*, 681 F.2d at 1038. A further and "most important" justification for the immunity, the court of appeals explained, was that public policy favored allowing citizens recourse to legally sanctioned methods of dispute resolution without fear of monetary liability should that method later be held unconstitutional. *Id.* at 1038. The court concluded by noting that where a defendant merely invokes a statute, the defendant's "role in any unconstitutional action is marginal." *Id.* at 1037.

29. 581 F.2d 526 (5th Cir. 1978).

court disagreed, holding that private citizens are not as accountable for recognizing unconstitutional law or action as are public officials:

> We need not conclude that a private actor is entitled to rely on any statutory relic, regardless of its current absurdity, in order to conclude that Cole and Robbins, as non-governmental actors, were entitled to rely on [the replevin statute] until the district court declared it unconstitutional. Rather, we say only that liability on these facts would undercut the purpose of the immunity, promoting lawfulness by allowing citizens the reasonable sanctuary of the law. It is true that the statutory scheme was in legal jeopardy. It is also true that Cole and Robbins acted with the assistance of government officials who were giving full force and effect to the statutory procedure. The presence of these officials contributed to the reasonableness of the private actors' conformity to the statutory procedures. In sum, the question is close, but on balance we are persuaded that reliance upon the statute by the private parties was not an act of unreasonable ignorance . . . . 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.[30]

The United States Supreme Court granted certiorari[31] and reversed.

Writing for a majority of the Court,[32] Justice O'Connor initially noted that in *Lugar v. Edmondson Oil Co.*,[33] the case that first established § 1983 liability for private parties utilizing a valid, but constitutionally infirm, state attachment statute, the Court had explicitly "left open" the issue of immunity.[34] The majority acknowledged further that the Court's eleven-year reticence on the question had engendered a three-way split of opinion among the federal circuits.[35]

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30. *Wyatt*, 928 F.2d at 721-22.

31. 112 S. Ct. 47 (1991).

32. Justices White, Blackmun, Stevens, Scalia, and Kennedy joined in Justice O'Connor's opinion. *Wyatt*, 112 S. Ct. at 1829-34. Justice Kennedy wrote a concurrence, in which Justice Scalia joined. *Id.* at 1834-37 (Kennedy, J., concurring). Chief Justice Rehnquist filed a dissenting opinion joined by Justices Souter and Thomas. *Id.* at 1837-40 (Rehnquist, C.J., dissenting).

33. 457 U.S. 922 (1982).

34. *Wyatt*, 112 S. Ct. at 1829 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982)). It is interesting to note that Justice O'Connor joined with Justices Powell and Rehnquist in dissent in *Lugar*. *Lugar*, 457 U.S. at 944-65 (Powell, J., dissenting).

35. *Wyatt*, 112 S. Ct. at 1829-30. Justice O'Connor stated that the Fifth, Eighth, and Eleventh circuits had granted private defendants qualified immunity when invoking a valid but constitutionally infirm statute. *Id.* at 1829. She noted by contrast that the First and Ninth Circuits had ruled against qualified immunity for private § 1983 defendants "in certain cir-

Justice O'Connor's opinion reviewed the precedential justifications for holding Cole liable under § 1983. The majority stated that the historical purpose of § 1983 was "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."[36] The Court noted that, under *Lugar*, a private party using an attachment, garnishment, or replevin statute is acting "under color of state law" within the contemplation of § 1983 if his taking of property from another party involves conduct "fairly attributable to the State."[37] Following the *Lugar* analysis, Justice O'Connor accepted the district court's finding that Cole was potentially liable under § 1983 based upon his use of the replevin statute.[38]

Justice O'Connor next rejected the reasoning advanced by the court of appeals. Although the Court agreed that the immunity analysis should engage both historical and policy factors, the majority framed the issue before the Court more specifically: whether private parties are to be afforded the same qualified immunity enjoyed by public officials under § 1983.[39] Justice O'Connor maintained that, due to unique policy concerns implicated by potential tort liability for public officials, the Court had "completely reformulated qualified immunity along principles not at all embodied in the common law."[40] Justice O'Connor acknowledged that fairness and policy considerations might justify extending some form

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cumstances." *Id.* at 1829-30. Finally, Justice O'Connor mentioned the Sixth Circuit, which had adopted a good-faith defense for private defendants rather than qualified immunity. *Id.* at 1830.

For discussion of the federal circuit cases on this issue, see *infra* notes 123-26 and accompanying text.

36. *Wyatt*, 112 S. Ct. at 1830 (citing Carey v. Piphus, 435 U.S. 247, 254-57 (1978)).

37. *Id.* at 1830 (quoting *Lugar*, 457 U.S. at 937). The fair attribution test involves two inquiries:

> First, the deprivation [to the plaintiff] must be caused by the [defendant's] exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.

Lugar, 457 U.S. at 937. It seems clear under this test that Cole, in following a procedure prescribed by statute and enlisting the aid of the sheriff's department, acted "under color of state law" for the purposes of § 1983.

38. *See Wyatt*, 112 S. Ct. at 1830. Because both lower courts found the parties entitled to immunity, neither the district court nor the court of appeals determined whether Robbins was also liable as an attorney under § 1983. *Id.* at 1834. In addition, the court of appeals did not rule on Cole's liability, basing its holding instead upon a finding of immunity. *Id.*

39. *Id.* at 1834.

40. *Id.* at 1832 (quoting Anderson v. Creighton, 483 U.S. 635, 645 (1989)). For a discus-

of protection to defendants "who rely unsuspectingly on state laws they did not create,"[41] but found such considerations insufficiently related to the policy underpinnings of modern qualified immunity doctrine to warrant its expansion.[42]

In his concurring opinion, Justice Kennedy agreed that modern qualified immunity should not be expanded to include private § 1983 defendants,[43] but he believed that the Court misdirected its focus in addressing such immunity only.[44] Justice Kennedy explained that there was no need for private party immunity once the elements of the cause of action were defined properly.[45] While Justice O'Connor focused on the policy concerns unique to defendant public officials, Justice Kennedy suggested that these concerns merely justified the Court's prior transformation of common-law defenses into an anomalous, objectively determined, immediately appealable immunity.[46] That this transformation of a good-faith defense into an objectively determined immunity was inappropriate in the case of private parties should not end the inquiry, Justice Kennedy maintained.[47] Rather than creating an immunity from suit for private defendants, he reasoned, the common-law analogues and public policy compelled the Court to identify precisely what private conduct was to be considered tortious under § 1983.[48] Justice Kennedy inter-

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sion of the development of qualified immunity under § 1983, see *infra* notes 98-122 and accompanying text.

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

42. *Id.* Justice O'Connor stated:

> [P]rivate parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good. Accordingly, extending . . . qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service.

Id.

43. *Id.* at 1834 (Kennedy, J., concurring).

44. *Id.* at 1836-37 (Kennedy, J., concurring).

45. *Id.* at 1835-36 (Kennedy, J., concurring).

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

47. *Id.* at 1834 (Kennedy, J., concurring).

48. *Id.* at 1836 (Kennedy, J., concurring). Justice Kennedy noted incisively that "it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with the essential elements of the tort." *Id.* at 1835-36 (Kennedy, J., concurring). Justice Kennedy pointed out the awkwardness of using immunities to define the scope of liability:

> At common law the action [for malicious prosecution and abuse of process] lay because the essence of the wrong was an injury caused by a suit or prosecution commenced without probable cause or with knowledge that it was baseless . . . .
>
> . . . By casting the rule as an immunity, we imply 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.

preted common law and policy considerations to require that § 1983 liability for private parties be confined to instances in which they rely on the constitutionality of a statute unreasonably or in bad faith.[49]

Writing for the dissent, Chief Justice Rehnquist maintained that both history and public policy bespoke a private defendant's entitlement to qualified immunity when invoking a valid state statute.[50] The Chief Justice noted that the Court granted many public officials qualified immunity based upon the availability of a good-faith defense at common law for analogous torts.[51] Concerning public policy, Chief Justice Rehnquist challenged what he perceived as being the majority's circular reasoning: because the Court had used certain public policy reasons unique to public officials to justify immunity for those officials, only such policy considerations would justify a finding of qualified immunity.[52] This analysis, the dissent argued, merely begged the question—"whether similar (or even completely unrelated) reasons of public policy would warrant immunity for private parties as well."[53] Not surprisingly, the Chief Justice found convincing the policy arguments in favor of granting immunity to private defendants who rely on valid statutes to resolve property disputes.[54]

In order to understand and evaluate the Court's analysis in *Wyatt*, it is necessary to explore the modern development of both private party liability and public official qualified immunity under § 1983. As defined by statute, a claim of tort liability under § 1983 turns upon two elements. First, the plaintiff must show that the defendant deprived her of a right

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Id. at 1836 (Kennedy, J., concurring).

49. *Id.* at 1837 (Kennedy, J., concurring). Justice Kennedy suggested that objective reasonableness may be irrelevant to the issue of liability, given the "support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law." *Id.* (Kennedy, J., concurring) (citing Birdsall v. Smith, 158 Mich. 390, 394, 122 N.W. 626, 627 (1909)). Justice Kennedy proposed that the cause of action require the plaintiff to prove that Cole or Robbins invoked the replevin statute unreasonably or with knowledge of its constitutional infirmity, but that liability ultimately hinge upon a subjective test:

> [O]n remand it ought to be open to [Wyatt] at least in theory to argue that the defendant's bad faith eliminates any reliance on the statute, just as it ought to be open to the defendant to show good faith even if some construct of a reasonable man in the defendant's position would have acted in a different way.

Id. (Kennedy, J., concurring).

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

51. *Id.* at 1838 (Rehnquist, C.J., dissenting) (citing Malley v. Briggs, 475 U.S. 335, 340-41 (1986) and Pierson v. Ray, 386 U.S. 547, 555 (1967)).

52. *Id.* at 1839 (Rehnquist, C.J., dissenting).

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

54. *Id.* at 1839-40 (Rehnquist, C.J., dissenting); *see infra* note 142.

"secured by the Constitution and laws" of the United States.[55] Many constitutional rights—such as due process and equal protection—only guarantee protection from abuses by the state and its representatives.[56] It follows, therefore, that the first element of a § 1983 action for a violation of due process contains an inherent requirement of state action. Second, the plaintiff must allege and prove that the defendant deprived her of her rights while acting "under color" of state law.[57] When the defendant to an action under § 1983 is a public official, the dividing line between these two elements disappears;[58] the plaintiff is obliged to show simply that the defendant public official violated her constitutional rights.[59] It is when the defendant is a private party acting in tandem with representatives of the state that the distinction—and confusion—arises.[60]

Although the statutory scheme of § 1983 was based upon the Civil Rights Act of 1871,[61] the Court did not recognize a cause of action against a private party for damages thereunder until 1970 in *Adickes v. S.H. Kress & Co.*[62] In *Adickes*, a restaurant denied service to a white school teacher because she was accompanied by six black students.[63] When she left the restaurant, a police officer who had followed the group inside confronted her and arrested her for vagrancy.[64] Adickes brought suit against Kress, the resturant owner, under § 1983, alleging that he had conspired with the Hattiesburg police to violate her constitutional rights under the Fourteenth Amendment.[65]

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55. 42 U.S.C. § 1983 (1988). For the text of § 1983, see *supra* note 3.

56. Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1981). The constitutional language of these provisions plainly applies only to governmental violations: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

57. 42 U.S.C. § 1983 (1988); *see supra* note 3.

58. *Lugar*, 457 U.S. at 929. This presumes that the defendant is acting in his capacity as a public official.

59. *See id.* at 928 n.8.

60. *See id.* at 928-35.

61. *Id.* at 934.

62. 398 U.S. 144, 152 (1970); *see* Allison H. Eid, Comment, *Private Party Immunities to Section 1983 Suits*, 57 U. CHI. L. REV. 1323, 1329 (1990).

63. *Adickes*, 398 U.S. at 149.

64. *Id.* Adickes initially took her students to the Hattiesburg Public Library in Hattiesburg, Mississippi. *Id.* The librarian would not allow the black students to use the library, insisting that they leave. *Id.* When they refused, the chief of police was called, and he forced them to exit the library. *Id.* Adickes and the students then entered the defendant's restaurant. The arresting officer arrived shortly thereafter. *Id.*

65. *Id.* at 149-50. Specifically, Adickes alleged a conspiracy (1) to deny her an equal right to be served in a "place of public accommodation," and (2) to have her arrested "on the false charge of vagrancy." *Id.*

The *Adickes* Court recognized § 1983's requirement of a dual showing by the plaintiff of a violation and state action by the plaintiff to create a cause of action under the statute.[66] The Court found that the allegations of collusion between a private party and a public official satisfied the two-part test of § 1983.[67] Addressing specifically the requirement of state action, the Court concluded that the participation by the police in the deprivation of plaintiff's rights brought the injury within the ambit of Fourteenth Amendment safeguards.[68] In determining whether a restaurant owner could be said to act "under color of law," the Court looked to its earlier holdings[69] and concluded that Kress would be accountable if he willfully conspired with the policeman to deprive Adickes of her constitutional rights.[70]

The conspiracy or willfulness requirement[71] necessary to hold a pri-

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66. The Court stated:

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that . . . the defendant acted "under color of law."

Id. at 150 (quoting 42 U.S.C. § 1983 (1970) (amended 1988)).

67. *Id.* at 152.

68. *Id.*

69. *Id.* The Court relied on two cases. In United States v. Price, 383 U.S. 787 (1966), the Court interpreted "under color of law" as used in 18 U.S.C. § 242, the criminal law equivalent of § 1983. *Id.* at 794 n.7. The *Price* Court in turn relied upon Monroe v. Pape, 365 U.S. 167 (1961), which extensively examined the legislative histories of §§ 242 and 1983 and concluded that "under color of law" was given the same meaning by Congress in both statutes. *Id.* at 185. Based upon reenactments of these statutes subsequent to the Court's interpreting the phrase, the *Monroe* Court held that Congress used "under color of law" to denote "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 184 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

70. *Adickes*, 398 U.S. at 152. The Court explicitly stated that § 1983 required a showing of more than the plaintiff's acting in concert with the police. To act "under color of law," the private party must have "reached an understanding" with the public official:

> [A] private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983 . . . . "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in the joint activity with the State or its agents."

Id. (quoting United States v. Price, 383 U.S. 787, 794 (1966)).

71. Admittedly, it is difficult to appreciate how the phrase "under color of law" suggests a conspiratorial element. The authority and legitimacy brought to bear upon citizen A by a public official acting on behalf of, or in concert with, citizen B will leave citizen A subject to the risks of constitutional infringements whether or not an actual conspiracy is involved. The need for redress exists in either case because the plaintiff endured an injury that he would not otherwise have suffered, and the defendant secured an advantage to which he was not entitled, based upon the defendant's association with the government. If one views the law of torts not as a vehicle through which retribution is enacted upon one party for the wrongs committed

vate party liable under § 1983 as a joint participant with a public official was reaffirmed by the Court in *Dennis v. Sparks*.[72] In *Sparks*, plaintiff brought suit under § 1983 against a private party who had obtained an injunction against him.[73] The plaintiff alleged that the defendant had bribed a judge in order to obtain the injunction, which was issued in violation of defendant's due process rights.[74] The Court emphasized that the conspiracy with the judge, not merely the plaintiff's initiating a constitutionally infirm proceeding and benefitting therefrom, gave rise to the defendant's liability under § 1983.[75]

One year after its decision in *Sparks*, the Court handed down its ruling in *Lugar v. Edmondson Oil Co.*,[76] which eliminated the requirement of willfulness or conspiracy for § 1983 actions against private parties who act jointly with public officials in depriving plaintiffs of

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against another, but as the framework through which we apportion losses equitably, certainly it can be argued that, as between a wrongfully injured party and the party who—albeit without malice—caused the injury, the party who caused the injury should pay. Nevertheless, most torts, including § 1983 torts involving public officials, require some degree of culpability, be it intent, recklessness, or negligence.

Requiring willfulness or conspiracy for a showing of action "under color of law" can, therefore, be justified as consistent with tort law in general. It is possible to view the function of a § 1983 tort against private parties as redressing instances in which a private party usurps for himself the power of governmental legitimacy, using the authority of the state to a degree to which a citizen is not lawfully entitled or for a purpose for which it was not intended. In such a circumstance, the public official becomes a powerful and potentially dangerous surrogate for the defendant. Thus, acting "under color of law" may denote the exertion of an individual's will in the (pre-legitimated) guise of the will of the State.

72. 449 U.S. 24 (1980).

73. *Id.* at 25. The injunction halted the plaintiff's removal of oil from certain property pursuant to an oil lease. The injunction remained in force for two years before being quashed by an appellate court. *Id.*

74. *Id.* at 26. The Court granted the judge absolute immunity. *Id.* at 27. The defendant argued unsuccessfully that because the judge was not chargeable with a § 1983 offense, the defendant's act of conspiring with the judge could not be said to be action "under color of law" within the meaning of the statute. *Id.*

75. *Id.* at 28-29. The Court stated:

> [M]erely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law . . . within the meaning of § 1983 as it has been construed in our prior cases.

Id. (citations omitted) (footnote omitted).

76. 457 U.S. 922 (1982). For contemporaneous assessments of the *Lugar* decision, see Rowland L. Young, *Supreme Court Report*, 68 A.B.A. J. 1659, 1659-60 (1982) (summarizing Court's formulation of state action and color of law analysis), and Rowland L. Young, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 1, 241-46 (1982) (proposing that the *Lugar* Court narrowed, rather than expanded, § 1983 liability for private parties by requiring that the public official who acts jointly with the private party defendant act in accordance with a state policy).

constitutionally protected rights.[77] The Court recast private defendant liability in the context of a statutory attachment procedure.[78] Edmondson filed suit in state court to collect certain debts owed by Lugar and also requested a prejudgment attachment of Lugar's property.[79] Virginia law required only that Edmondson file a petition indicating his concern that Lugar might dispose of the property in order to render himself judgment proof.[80] Based upon the petition, a court clerk issued a writ, and the sheriff enforced it.[81] More than a month later, the attachment order was dismissed at a postseizure hearing. Lugar then sued under § 1983, on the theory that Edmondson "acted jointly with the State to deprive him of his property without due process of law."[82]

The Court removed the conspiracy requirement for joint actors by eliminating the two-prong test for liability under § 1983.[83] The Court's reasoning was simple. Prior case law indicated that a plaintiff could challenge the constitutionality of an attachment statute in an action brought solely against a private defendant;[84] because the Constitution

77. The Court stated specifically, "The Court of Appeals erred in holding that in this context 'joint participation' required something more than invoking the aid of state officials to take advantage of state-created attachment procedures." *Lugar*, 457 U.S. at 942.

78. *Id.* at 924. The Court apparently limited its holding to such statutes without offering any basis for doing so. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 925.

83. *Id.* at 932 & n.15. For a catalog of important case law prior to *Lugar* developing the separate state action and "under color of law" requirements, see Pamela C. Walker, *Color of State Law and State Action: What are They and What is their Relationship?*, *in* RECENT DEVELOPMENTS IN SECTION 1983 CIVIL RIGHTS LITIGATION 391, 391-405 (George C. Pratt et al. eds., 1984).

84. *Lugar*, 457 U.S. at 927. The *Lugar* Court cited several cases to support this contention: North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). None of the cited cases involved the issue of monetary tort liability for private defendants based upon the unconstitutionality of a statutory procedure. Moreover, of these cases, only *Fuentes* was an action under § 1983.

Margarita Fuentes purchased a stove and stereo from Firestone under an installment sales contract. *Fuentes*, 407 U.S. at 70. With $200 due on the contract, Fuentes and Firestone became embroiled in a dispute regarding Firestone's obligation to service the stove. Firestone sued to repossess the merchandise. *Id.* Firestone received a writ of replevin requiring the sheriff to seize the property. *Id.* To obtain the writ under Florida law, "Firestone had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small claims court." *Id.* at 70-71.

Two elements of *Fuentes* call the Court's reasoning into question. First, Fuentes brought suit against both the state Attorney General and a private citizen under § 1983. More significantly, although she invoked jurisdiction of the federal courts under § 1983, Fuentes sought only declaratory and injunctive relief seeking to invalidate the statutory prejudgment replevin procedures. *Id.* at 71 & n.3.

protects parties only against *governmental* violations of constitutional rights, it necessarily follows that, if a defendant's use of a statute is found unconstitutional, the defendant's invocation of that statute constitutes a state action.[85] According to the Court, given that the purpose of § 1983 is to vindicate fully the plaintiff's constitutional rights, "under color of law" could not have been intended to restrict the applicability of § 1983 once a constitutional deprivation was found.[86] Thus, whenever a private party invokes an attachment or replevin statute and obtains enforcement thereof from a public official, he participates in state action and acts "under color of" the statute relied upon.[87]

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85. *Lugar*, 457 U.S. at 933.

86. *Id.* at 934.

87. *Id.* The Court concluded that no distinction existed between "state action" and action "under color of law" under § 1983. *Id.* at 935. The Court found no historical justification for the theory that Congress intended "under color of law" to limit the scope of § 1983's reach. Indeed, the Court found that "[t]he history of [§ 1983] is replete with statements indicating that Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords the individual." *Id.* Therefore, Justice White, writing for the majority, reasoned that the ability of a plaintiff to challenge the constitutionality of a statute or procedure in an action against a private defendant delimited the reach of that defendant's liability under § 1983:

> If a defendant debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state-court plaintiff should not provide a cause of action under § 1983. If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

Id. at 934.

Such an analysis turns the *Adickes* and *Sparks* conceptualization of private party liability on its head. Whereas, under a conspiracy requirement a defendant is liable for intentionally using a governmental agent to do his bidding upon an unsuspecting plaintiff, under *Lugar*, liability is thrust upon the unsuspecting private party defendant by the government, which induces the private party to activate its preordained, unconstitutional procedures. As mentioned previously, however, this criticism assumes that culpability is relevant to a finding of § 1983 liability. *See* discussion *supra* note 71.

There is a more fundamental problem with the Court's reasoning. Even though the plaintiff's contesting of the constitutionality of a statutory procedure may occur in the context of an action against the private party defendant, it does not necessarily follow that the private defendant's actions are at issue. What is being challenged is the action of the legislature in passing an unconstitutional statute, or the action of an executive officer in enforcing a statute in an unconstitutional manner. To view the defendant's behavior as being on trial is unsound. As Justice White recognized, "While private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme *created by the statute* obviously is the product of state action." *Lugar*, 457 U.S. at 941 (emphasis added). During any legal proceeding the constitutionality of the legal system and its procedures as applied to the parties may be said to be on trial. It is another matter entirely to claim that a private citizen is somehow responsible for the legal system upon which she relies.

In merging "under color of law" into the requirement of state action, the *Lugar* Court reduced the analysis for § 1983 liability to whether a constitutional violation has in fact occurred. Under *Lugar*, a plaintiff need only show that the "conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."[88] In a somewhat revisionist evocation of *Adickes*, Justice White, writing for the majority in *Lugar*, relied upon this earlier holding to support a finding of § 1983 liability where the plaintiff obtained assistance from the clerk of court and the sheriff in executing and enforcing the attachment order.[89]

Two dissenting Justices decried the *Lugar* holding. According to then Chief Justice Burger, by misreading the "under color of law" requirement, the Court had erased the distinction between private and public behavior, conflating the private action of filing a lawsuit with the subsequent conduct of the State.[90] Relying on *Dennis v. Sparks*,[91] Chief Justice Burger maintained, "Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private

88. *Lugar*, 457 U.S. at 937. For a discussion of the fair attribution test, see *supra* note 37. This test ensures only that the injurious conduct involved is properly described as state action, which by definition is a requirement for showing a due process violation. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law.").

89. *Lugar*, 457 U.S. at 941. Justice White apparently interpreted *Adickes* so that the conspiratorial element was not central to the holding. Although quoting the language of *Adickes* requiring "willful participa[tion]" by the private party, he seemed to construe "willful" as denoting something akin to the element of general intent in an intentional tort. "Willfulness" in its legal sense signifies "the specific intent to do something the law forbids," and in the tort context indicates "intent or purpose to injure." BLACK'S LAW DICTIONARY, *supra* note 5, at 1599-1600. By contrast, just as an action in trespass requires a finding merely that the defendant intended to come onto the property in question (even if he believed it to be his own), so Justice White construed *Adickes* to require merely that a defendant intentionally resorted to a statutory remedy:

> [W]e have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a state actor for purposes of the Fourteenth Amendment . . . . The Court of Appeals erred in holding that in this context "joint participation" required something more than invoking the aid of state officials to take advantage of state-created attachment procedures . . . . Whatever may be true in other contexts, this is sufficient when the State has created a system whereby state officials will attach property on the *ex parte* application of one party to a private dispute.

Lugar, 457 U.S. at 941-42. Responding to the dissent's claim that the Court's holding would render private parties liable under § 1983 for invoking any state procedure which resulted in a constitutional violation (for example, if plaintiff invoked and subsequently gained personal jurisdiction over a nonresident by means of a constitutionally infirm long-arm statute, or if defendant sought the aid of a police officer, who subsequently arrested plaintiff without cause), Justice White somewhat arbitrarily "limited [the holding] to the particular context of prejudgment attachment." *Id.* at 939 n.21.

90. *Lugar*, 457 U.S. at 943 (Burger, C.J., dissenting).

91. 449 U.S. 24 (1980).

conduct into actions of the State."[92] Justice Powell[93] also criticized the Court's abandonment of a separate "under color of law" requirement.[94] While agreeing that a showing of "joint participation" under *Adickes* provided the requisite showing for liability, Justice Powell insisted that *Adickes* demanded a finding of a private party conspiracy[95] with a state officer before § 1983 liability would lie.[96]

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92. *Lugar*, 457 U.S. at 943 (Burger, C.J., dissenting).

93. Justices Rehnquist and O'Connor joined Justice Powell's opinion. *Id.* at 944 (Powell, J., dissenting). It is interesting to note that Justice O'Connor, the author of the majority opinion in *Wyatt*, originally argued against finding any liability under § 1983 for a private party who invokes a presumptively valid state statute. In fact, it was the *Lugar* majority's response to the concerns raised in Justice Powell's dissent that set the stage for *Wyatt*:

> Justice Powell is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials. We need not reach the question of the availability of such a defense to private individuals at this juncture.

Id. at 942 n.23.

94. *Id.* at 947-49 (Powell, J., dissenting). Justice Powell, like Chief Justice Burger, believed that the case involved two distinct sets of acts—the purely private acts of filing a lawsuit and attachment petition, and the public acts of the sheriff and clerk of court. *Id.* (Powell, J., dissenting). Because the private party was not a state actor, he could be found liable only upon a showing that he acted under color of law. *Id.* (Powell, J., dissenting).

95. Such a finding is apparently still required by the Court outside the context of attachment, garnishment, or replevin procedures. In NCAA v. Tarkanian, 488 U.S. 179 (1988), the Court rejected the argument by the University of Nevada, Las Vegas (UNLV) basketball coach that the National Collegiate Athletic Association (NCAA), a private party, had acted jointly with the state university officials who suspended him from coaching in violation of his due process rights. *Id.* at 196 & n.16. The NCAA conducted hearings and investigations and established the rules upon which UNLV based its decision to suspend Tarkanian. *Id.* at 183-86. The Supreme Court of Nevada held that the use of these hearings as grounds for a suspension did not afford Tarkanian procedural due process. *Id.* at 189. Moreover, it was the NCAA who called for Tarkanian's suspension; UNLV acquiesced pursuant to its membership agreement with the NCAA. *Id.* at 186-87. Despite finding constitutional violations, the Supreme Court found no joint participation, basing its holding on the absence of an unlawful conspiracy:

> In Dennis v. Sparks, 449 U.S. 24 (1980), . . . the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy . . . . Under these allegations, the private parties conspiring with the judge were acting under color of state law. In this case there is no suggestion of any impropriety respecting the agreement between the NCAA and UNLV.

Id. at 197 n.17 (citing *Dennis*, 449 U.S. at 28).

96. *Lugar*, 457 U.S. at 954-55 (Powell, J., dissenting). Justice Powell argued:

> *Adickes* establishes that a private party acts under color of law when he conspires with state officials to secure the application of a state law so plainly unconstitutional as to enjoy no presumption of validity. In such a context, the private party could be characterized as hiding behind the authority of law and as engaging in "joint participation" with the State in the deprivation of constitutional rights. Here, however,

By removing the requirement of conspiratorial intent for a finding of joint participation under § 1983, the holding in *Lugar* created the potential for private parties to be held liable for using statutory procedures reasonably and in good faith.[97] In the span of a decade, the court had transformed § 1983 from a statute that addressed only the actions of state officials into a scheme imposing liability on private parties who rely upon the procedures created by the state. Whereas the private party's culpability in using state power was central to a finding of liability under *Adickes* and *Sparks*, *Lugar* called into question the relevance of such culpability to a § 1983 tort, and with it the very contours of the tort. Thus, *Lugar* announced a revolution in the § 1983 action against private defendants, but left important aspects of the new tort undetermined.

The development of qualified immunity[98] under § 1983 occurred in the context of the liability of public officials. In creating immunities, the Court attempted to strike an appropriate balance between the competing policy goals of protecting constitutional rights and allowing for the inevitable mistakes made by human agents carrying out governmental functions in the absence of clearly delineated constitutional ground rules.[99] Since tensions similar to those created by § 1983 were present in the common law, the Court looked to the common law to fashion immunities

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petitioner has alleged no conspiracy. Nor has he even alleged that respondent was invoking the aid of a law he should have known to be constitutionally invalid.

Id. (Powell, J., dissenting).

97. *See supra* note 93. As scholars have noted, there is no apparent principled basis for confining *Lugar* to attachment proceedings. *See, e.g.*, MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES AND FEES § 5.13, at 110-11 (1986) ("It is unclear, however, why *Lugar* should not apply to the invocation of legal procedures other than prejudgment attachment that require the participation of public officials for their enforcement.").

98. The common law distinguished qualified immunity from absolute immunity in both purpose and procedural effect. Qualified immunity, which was typically enjoyed by low-level public officials, ensured that those who acted in good faith would not be held monetarily liable for errors they made in carrying out their official duties. Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 944-45 (1989). Procedurally, qualified immunity was a good-faith defense which the defendant official had the burden of pleading. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Implicit in this formulation was the requirement that the official demonstrate to a court or jury that he acted in good faith before the immunity would be triggered. By contrast, the doctrine of absolute immunity bestowed complete protection from suit; it was crafted to protect officials whose duties included wide-ranging discretionary activity and required freedom from distractions. Oren, *supra*, at 944. The policy justification for complete immunity to suit is the belief that "certain officials could not perform their special functions unless they were insulated *from litigation itself.* In this narrow category, the public interest justified the loss of the individual's remedy." *Id.* at 976 (emphasis added).

99. *See* Oren, *supra* note 98, at 942-43 (discussing the importation of common-law concepts of immunity into civil rights law based upon similarities of policy concerns).

under the civil rights statutes.[100]

The Court first found a good-faith immunity for public officials under § 1983 in *Pierson v. Ray*.[101] *Pierson* involved an arrest made by a police officer pursuant to a state statute that was later found unconstitutional.[102] The defendant averred that he acted in good-faith reliance on the validity of the statute and with probable cause to believe that the statute had been violated.[103] The Court thus confronted the issue of whether § 1983, which did not explicitly confer any defenses or immunities to liability,[104] allowed the police to exercise their duties in good faith without fear of incurring monetary damages.[105] In a critical determination, the Court decided that Congress drafted § 1983 mindful of immunities and defenses as they then existed under the common law.[106] In light of its original interpretation of § 1983,[107] the Court looked to the com-

100. *Id.* The common law responded to this give and take between protecting citizens from governmental abuses and allowing the government to perform its functions expeditiously by creating grades of immunity based on the functions performed by the public official in question. *Id.* at 943-44.

101. 386 U.S. 547 (1967).

102. *Id.* at 549-50.

103. *Id.* at 555.

104. Imbler v. Pachtman, 424 U.S. 409, 417 (1975).

105. *Pierson*, 386 U.S. at 551-52.

106. *Id.* at 554-55. The Court suggested that the common-law immunities were well-established, reasoned responses to the significant policy concerns surrounding the actions of public officials. *Id.* at 555. In interpreting § 1983, it was necessary to read Congress's intent as either abrogating all immunities under the common law, or incorporating them into the statutory tort scheme. The Court concluded that Congress meant to preserve the common-law framework:

> We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities . . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Id. at 554-55. Besides upholding the good-faith immunity of police officers, the Court recognized the absolute immunity from civil liability of judges acting within the scope of their office. *Id.* at 554.

107. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PENN. L. REV. 23, 35-37 (1989). Professor Rudovsky criticizes the full-scale reenactment of common-law immunities after § 1983's enactment as undermining the obvious purpose of Congress in passing the statute. He finds no support in the Constitution or the statute for the blanket immunities afforded public officials under § 1983, attributing them instead to "the Court's own policy judgment that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs." *Id.* at 36.

Regardless of how one views the desirability of immunities under remedial civil rights statutes, after *Pierson*, the *Lugar* Court's assertion that Congress intended § 1983 to afford relief to the full extent provided by the Constitution is directly contradicted by the existence of

mon law of torts of 1871, the year in which Congress enacted the historical antecedent of § 1983. Based upon the common-law defense to the tort of false arrest, the Court stated that the police officer should be held immune from § 1983 liability if he acted in good faith and with probable cause.[108]

The Court subsequently expanded qualified immunity under § 1983 to benefit other public officials[109] and refined the requirement for a finding of immunity into a clear, two-pronged test.[110] Such a standard, the Court reasoned, best balanced all competing policy interests represented within the objectives of § 1983.[111] The Court specifically cautioned against further encroachment upon a civil rights plaintiff's opportunity for a statutory remedy. Justice White, writing for the majority in *Wood v. Strickland*,[112] held that this dual inquiry based on objective reasonableness and subjective good faith was the minimally acceptable test for awarding immunity. "Any lesser standard," Justice White believed, "would deny much of the promise of § 1983."[113]

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immunities. *Pierson* and its progeny establish that Congress intended to limit monetary liability under the statute in light of common-law defenses and immunities. The Court held as early as Monroe v. Pape, 365 U.S. 167 (1961), that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. As the *Pierson* Court noted, "Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause." *Pierson*, 368 U.S. at 556-57.

108. *Pierson*, 368 U.S. at 557.

109. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635 (1980) (holding Superintendent of Police immune); Wood v. Strickland, 420 U.S. 308 (1975) (granting immunity to high school administrators); Scheuer v. Rhodes, 416 U.S. 232 (1974) (holding immune from liability Ohio Governor, Adjutant General of the Ohio National Guard, and the President of Kent State University). *But see* Owen v. City of Independence, 445 U.S. 622, 638 (1980) (denying immunity to municipality due to Court's finding of "no [common-law] tradition of immunity for municipal corporations").

110. *See Gomez*, 446 U.S. at 635; *Wood*, 420 U.S. at 321; *Scheuer*, 416 U.S. at 247-48 ("It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with the good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.").

The *Wood* Court's opinion firmly established the nature of the two-prong test:

> The disagreement . . . over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating . . . constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law . . . than by the presence of actual malice.

Wood, 420 U.S. at 321.

111. *Wood*, 420 U.S. at 322.

112. 420 U.S. 308 (1975).

113. *Id.* at 322.

In *Harlow v. Fitzgerald*[114] the Court "completely reformulated qualified immunity along principles not at all embodied in the common law,"[115] abrogating the subjective good-faith requirement for official immunity under § 1983.[116] Under *Harlow*, a public official is immune from suit if his conduct is adjudged reasonable "as measured by reference to clearly established law."[117] Good faith is simply not an issue.[118] The Court found convincing the defendants' argument that the public policy concerns justifying qualified immunity for public officials require a standard of immunity that would assure dismissal of groundless suits before permitting discovery and without resort to trial.[119] The Court argued

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114. 457 U.S. 800 (1982). In *Harlow*, A. Ernest Fitzgerald alleged that senior White House aides in the Nixon administration conspired to terminate his employment at the Department of the Air Force because he threatened to expose abuses in procurement by the Department. *Id.* at 802, 804. Fitzgerald brought a civil action pursuant to the First Amendment and two federal statutes. *Id.* at 805 & n.10. The aides, Bryce Harlow and Alexander Butterfield, argued that they were entitled to absolute immunity from suit "as an incident to their offices as Presidential aides." *Id.* at 808. In the alternative, they requested and were granted "an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial." *Id.* at 813. To ensure pre-trial dismissal of weak claims, the Court jettisoned the requirement of subjective good faith from public-official qualified immunity. *Id.* at 817-19.

115. Anderson v. Creighton, 483 U.S. 635, 645 (1987). Prior to *Harlow*, of course, the Court had modified and expanded common-law immunities somewhat in order to protect a wide array of pubic actors. The most significant change before *Harlow*, however, consisted of the elimination of degrees of qualified immunity according to the amount of discretionary power afforded different officials. As Justice Scalia observed, "[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Id.* at 643.

116. *Harlow*, 457 U.S. at 819.

117. *Id.* at 818. *Harlow* actually goes further, providing an immunity to a public official who violates clearly established constitutional standards if he can show "extraordinary circumstances" which justify his ignorance of the law. *Id.* at 819. This test, too, would be measured by an objective standard. *Id.*

118. Justice Brennan read the case as imposing liability when an official acts reasonably, but in bad faith. "This standard," he concluded, "would not allow the official who *actually knows* that he was violating the law to escape liability." *Id.* at 821 (Brennan, J., concurring). This reading is not based in the language of the Court's holding. The Court explicitly rejected the inclusion of a subjective element on the grounds that its inclusion would frustrate the purpose of the immunity: "Judicial inquiry into the subjective motivation . . . may entail broad-ranging discovery . . . . Inquiries of this kind can be peculiarly disruptive of effective government." *Id.* at 817 (footnote omitted). Subsequent case law has affirmed the Court's intent to abandon the subjective inquiry of qualified immunity for public officials under § 1983. *See, e.g., Anderson*, 483 U.S. at 641 (observing that "[t]his does not reintroduce into qualified immunity analysis the inquiry into subjective intent that *Harlow* sought to minimize"); Mitchell v. Forsyth, 472 U.S. 511, 517 (1984) (noting that *Harlow* "purged qualified immunity doctrine of its subjective components").

119. *Harlow*, 457 U.S. at 813. The Court reasoned that because the subjective test required a factual determination into the defendant's state of mind, under the common-law formulation, "bare allegations of malice . . . suffice to subject government officials . . . to the costs of trial

that the "social costs" of insubstantial civil rights claims compelled its shift to a purely objective test, which a judge could decide as a matter of law at summary judgment.[120] With *Mitchell v. Forsyth*,[121] in which the Court held that a denial of qualified immunity was subject to immediate interlocutory appeal, the Court completed the dramatic restructuring of qualified immunity.[122] This finding offered officials further protection from discovery and trial.

In the wake of *Harlow*, circuit courts prior to *Wyatt* developed a variety of responses to the issue of qualified immunity for private party defendants under § 1983. The Ninth Circuit consistently held that private parties merited no qualified immunity under § 1983.[123] Several cir-

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[and] the burdens of broad-reaching discovery." *Id.* at 817-18. One commentator maintained that the shift made in *Harlow* was due at least in part to the defendants' status as high-ranking federal officials. Oren, *supra* note 98, at 969-73. *Harlow* was a *Bivens* action (an action, deriving its name from Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), brought against federal officials directly under the Constitution, rather than under a remedial statute such as § 1983) against senior White House aides who were accused of conspiring to violate the plaintiff's constitutional rights. *Harlow*, 457 U.S. at 802. The Court, although recognizing at least conceptually that "high officials require greater protection than those with less complex discretionary responsibilities," *id.* at 807, declined to extend absolute immunity to a broad range of executive officials. *Id.* at 809. Because the same immunity standards apply to federal and state officials in civil rights suits, the benefits of the "federal influence" of the *Harlow* defendants on the Court's decision accrued to all public officials afforded qualified immunity under § 1983.

In viewing qualified immunity as a means to dismiss lawsuits before trial, the Court superimposed the theoretical objectives, and thereby many of the benefits, of absolute immunity onto qualified immunity: "The only difference [between *Harlow* qualified immunity and absolute immunity] is that some possibility remained that where a constitutional right is clearly established enough, however that may be defined, a plaintiff can proceed with the litigation." Oren, *supra* note 98, at 981. For a discussion of the procedural implications of the *Harlow* decision, see Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 634-42 (1989) (noting that *Harlow* retained the *Gomez* procedural posture of requiring the defendant to bear the burden of pleading and proof).

120. *Harlow*, 457 U.S. at 814, 818. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

121. 472 U.S. 511 (1984).

122. *Id.* at 530.

123. *See, e.g.*, Conner v. City of Santa Ana, 897 F.2d 1487, 1489, 1492 n.9 (9th Cir. 1990) (finding no qualified immunity for private towing company assisting police in removing cars pursuant to a municipal ordinance); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1319 (9th Cir. 1989) (denying immunity to private contractor for actions required under terms of government contract); Howerton v. Gabica, 708 F.2d 380, 381, 385 (9th Cir. 1983) (refusing qualified immunity to private party who used police officer to serve eviction notice); Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1341-44 (9th Cir. 1977) (denying immunity to towing company working at behest of police and under municipal ordinance).

cuits conferred upon such defendants the objective, immediately appealable immunity from suit created by the Court in *Harlow* and *Mitchell*.[124] The First and Sixth Circuits applied to private § 1983 defendants an immunity based upon a showing of good faith and probable cause.[125] Finally, the Eighth Circuit, purporting to adopt the *Harlow* immunity test but retaining the good-faith requirement, either misinterpreted *Harlow* or purposefully mitigated its broad-brush immunity for defendants whose actions, although objectively reasonable, were made in bad faith.[126]

The Court's consideration of *Wyatt* provided an opportunity to resolve the conflict among the circuits and to clarify its position set out in *Lugar* with respect to liability under § 1983 for private citizens who rely on statutorily prescribed methods of recovering property from other parties. Five Justices on the Court[127] explicitly stated that the holding in *Lugar* should be corrected,[128] at least to the extent that it conferred liability on those invoking a statute and receiving aid from public officers reasonably and in good faith. Moreover, the majority opinion intimated that while the *Lugar* decision was at least incomplete,[129] the Court's

124. *See* Wyatt v. Cole, 928 F.2d 718, 721-22 (5th Cir. 1991) (deciding immunity as a matter of law under *Harlow*), *rev'd*, 112 S. Ct. 1827 (1992); Jones v. Preuit & Maulding, 851 F.2d 1321, 1323-25 (11th Cir. 1988) (*en banc*) (awarding *Harlow* immunity to creditor in wrongful attachment suit), *vacated on other grounds*, 489 U.S. 1002 (1989); DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 717, 720 (10th Cir. 1988) (granting private party complying with agency guidelines under a government contract the same immunity afforded public officials under *Harlow*), *cert. denied*, 111 S. Ct. 799 (1991); Watertown Equip. Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1490, 1494 (8th Cir. 1987) (applying objective *Harlow* qualified immunity test to private party, but finding party's conduct unreasonable), *cert. denied*, 486 U.S. 1001 (1988); Shipley v. First Fed. S. & L. Ass'n., 703 F. Supp. 1122, 1125, 1134 (D. Del. 1988) (granting immunity under *Harlow* to mortgagor using court rule providing constitutionally insufficient process requirements for foreclosure action), *aff'd without opinion*, 877 F.2d 57 (3d Cir. 1989), *cert. denied*, 496 U.S. 938 (1990); Carman v. City of Eden Prarie, 622 F. Supp. 963, 964-66 (D. Minn. 1985) (bestowing *Harlow* immunity to private, state-licensed detoxification center working in conjunction with police and using discretionary power granted by state statute).

125. *See* Duncan v. Peck, 844 F.2d 1261, 1262, 1267-68 (6th Cir. 1988) (rejecting explicitly *Harlow* standard in favor of common-law qualified immunity for creditor who followed rule of court for attachment proceedings); Downs v. Sawtelle, 574 F.2d 1, 3, 11 (1st Cir. 1978) (recognizing, before either *Harlow* or *Lugar*, common-law qualified immunity for doctor who performed non-consensual sterilization of patient at community hospital), *cert. denied*, 439 U.S. 910 (1978).

126. *See* Buller v. Buechler, 706 F.2d 844, 851-52 (8th Cir. 1983) (claiming a private party entitlement to *Harlow* immunity when invoking state garnishment statute, but applying "knew or should have known" standard and basing determination upon findings of fact).

127. Chief Justice Rehnquist, and Justices Kennedy, Scalia, Souter, and Thomas argued for some limitation of *Lugar* liability. *Wyatt*, 112 S. Ct. at 1834, 1837.

128. *See id.* at 1836-37 (Kennedy, J., concurring); *id.* at 1839-40 (Rehnquist, C.J., dissenting).

129. *Id.* at 1834. Justice O'Connor observed:

holding was limited to rejecting one inappropriate method of repair. The five Justices willing to act could not agree on the judicial theory upon which to base the correction. As a result, the lowest common denominator prevailed, with *Wyatt* establishing only that *Harlow* immunity did not present the appropriate answer for the questions left open in *Lugar*.[130]

At first blush, the Court's decision is startling, given the factual and historical similarities between the conduct in *Pierson*[131] and that in *Wyatt*. Justice O'Connor's framing of the issue in *Wyatt*, however, is telling: "whether qualified immunity *as enunciated in* Harlow, is available for private defendants faced with § 1983 liability for invoking a state replevin statute."[132] While common-law immunities afford some protections from liability, they were neither intended nor designed to accomplish the far-reaching immunization from suit itself that *Harlow* created. *Harlow* immunity resembles nothing so much as common-law absolute immunity. In fact, *Harlow*'s objective test renders moot the factual determination that defined the scope of the immunity at common law: the defendant's subjective intent.[133] Because the *Wyatt* Court grounded the radical change brought about by *Harlow* in modern policy concerns rather than history,[134] the Court had to reassess the import of

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> [W]e do not foreclose the possibility that private defendants faced with § 1983 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. Because these issues are not fairly before us, however, we leave them for another day.

Id. This last statement is puzzling given that both petitioner and respondent briefed the court on the issue of the availability of good-faith immunity under common law. *See* Brief for Respondent at 6-8, *Wyatt* (No. 91-126); Brief for Petitioner at 7-9, *Wyatt* (No. 91-126).

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

131. For a discussion of *Pierson*, see *supra* notes 101-08 and accompanying text.

132. *Wyatt*, 112 S. Ct. at 1834 (emphasis added). In fact, the Court framed the issue in two ways in the same paragraph. "The question on which we granted certiorari," Justice O'Connor wrote, was "whether private persons, who conspire with state officials to violate constitutional rights have available the good faith immunity applicable to public officials." *Id.* (quoting Petition for Certiorari at i, *Wyatt* (No. 91-126)). Even under the loosest standards of interpretation, this issue formulation asks two distinct questions. First, the immunity now available to public officials can in no way be said to constitute a good-faith immunity, since the actor's good faith is irrelevant. Second, the act of "conspir[ing] with state officials" is very different indeed from the mere "invo[cation of] a state replevin, garnishment or attachment statute." *Id.* It is surprising that Justice O'Connor would view these two acts—conspiracy and the invocation of a statute—as equivalents, given that she sided with the dissent in *Lugar*. It is also curious that Justice O'Connor raised the possibility of a good-faith immunity in one issue statement, but failed even to consider good-faith immunity in the opinion. Unquestionably, the Court recognized that *Harlow* immunity is not good-faith immunity. *See id.* at 1832-33. Perhaps the Court reasoned that because, after *Harlow*, good-faith immunity no longer exists under § 1983, it was forced to rephrase the issue accordingly.

133. *See supra* note 118 and accompanying text.

134. *See supra* notes 119-20 and accompanying text.

its inquiry into the common law.

While unwilling to state as much expressly, the Court chose to abandon the historical immunity test rather than expand *Harlow* immunity based upon the existence of a dissimilar subjective immunity at common law.[135] The Court created a dynamic between history and policy[136] in which a showing of a historical entitlement to immunity served merely as a passageway through which the party seeking immunity reached the Court's all-determinative public policy test. The result is an all-or-nothing standard, under which a defendant is granted either an immediately appealable, objective immunity or no immunity at all.[137] Given this restrictive framework, the Court faced a difficult task: how to rationalize a denial of immunity without overtly renouncing the utility of the historical test in favor of "freewheeling policy choice[s]."[138] Justice O'Connor recognized that a private party at common law enjoyed the same good-faith protection from liability for initiating litigation as did the police officer in *Pierson*,[139] but found this similarity "of no avail" to a party asking for an immunity that is substantially different from that awarded in *Pierson*.[140] In order to deserve *Harlow* immunity, wrote Justice O'Connor, Cole had to demonstrate that the "rationales mandating qualified immunity for public officials are . . . applicable to private parties."[141] Justice O'Connor concluded that these rationales were not applicable to private parties.[142]

Although this dual analysis is suspect, it was necessary to stem the further erosion of § 1983. The Court seemingly conducted its historical analysis to lend a methodological validity to its opinion, but cast the re-

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135. By contrast, Chief Justice Rehnquist viewed the historical inquiry as still controlling immunity awards under § 1983 after *Harlow*. *Wyatt*, 112 S. Ct. at 1838 (Rehnquist, C.J., dissenting).

136. *Id.* at 1833.

137. Justice O'Connor and Chief Justice Rehnquist, although differing in their conclusions, agreed in their conceptualization of the case as an all-or-nothing choice between *Harlow* or no immunity. *See id.* at 1832; *id.* at 1838 (Rehnquist, C.J., dissenting).

138. Malley v. Briggs, 475 U.S. 335, 342 (1986).

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

140. *Id.*

141. *Id.* at 1833.

142. *Id.* In dissent, Chief Justice Rehnquist asserted that denying immunity to private parties who faced liability for relying upon a statute contained its own equally compelling social costs:

> The normal presumption that attaches to any law is that society will be benefited if private parties rely on that law to provide them a remedy, rather than turning to some form of 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 (Rehnquist, C.J., dissenting).

sults of this analysis as a mere remnant of the pre-*Harlow* dialogue between § 1983 and the common law of tort. Justice O'Connor's pithy dismissal of the similarity between *Pierson* and *Wyatt* cleared the way for an open-ended discussion of policy, but left unvindicated the historical parallels between public and private qualified immunity.[143] While paying only lip service to the common law may appear disingenuous, it is a necessary result if the Court is to assess the propriety of granting a *Harlow*-type immunity which has no direct parallel at common law. Rather than proceeding with the demise of § 1983, applying *Harlow* qualified immunity as if it were merely a modern-day equivalent of good-faith immunity, the *Wyatt* Court confronted this historical anomaly head-on, thereby halting *Harlow*'s further encroachment into the rights of civil rights plaintiffs.

It is difficult to evaluate the Court's weighing of various public policies in the abstract.[144] The theme of the *Wyatt* Court's policy analysis is that private party immunity benefits the defendant primarily, while shielding public officials with immunity presumably benefits society as a whole (excluding, of course, those who suffer uncompensated injuries at the hands of these officials).[145] Yet, it is clear that Justice O'Connor's

143. This inconsistency owes itself to *Harlow*'s dramatic alteration in qualified immunity. While ostensibly modifying history based on policy, the *Harlow* Court in fact substituted policy for history. *See supra* notes 114-20 and accompanying text. The problem with using policy concerns to alter fundamentally the protections afforded public officials at common law when § 1983 was enacted is that such an alteration is logically incompatible with the Court's own declaration that Congress intended to limit liability according to the policy determinations incorporated into the common law. It seems inescapable that the policy concerns the Court used to justify the strengthening of immunities for public officials in *Harlow* already existed at common law and were factored into the common law's determination of the type of immunity appropriate for governmental actors. To assert that these same policy concerns somehow demand transformation of the common law is ultimately to substitute the Court's policy choices for those of history and of Congress, which purportedly created § 1983 intending no immunities other than those inuring to defendants at common law.

144. It proved a challenging task to the Court as well. Chief Justice Rehnquist, and Justices Souter and Thomas believed that the policies implicated by *Wyatt* were sufficient to uphold a finding of qualified immunity under *Harlow*. *Wyatt*, 112 S. Ct. at 1839 (Rehnquist, C.J., dissenting). At least one commentator has agreed, asserting that "[a]lthough the policy justifications underlying official immunity do not precisely mirror those underlying private immunity, they do take aim at a similar target." Eid, *supra* note 62, at 1348. For various federal courts' views on the relative equivalence of the policy considerations, see *supra* notes 123-26 and accompanying text.

145. *Wyatt*, 112 S. Ct. at 1833. Justice O'Connor made the additional point that while a public official committing a tortious act is pursuing public ends, a private party invoking a replevin statute is pursuing a private goal. *See id.* at 1833-34. Chief Justice Rehnquist countered that there is an inherent public benefit in a citizen's use of the legal process rather than self-help. *Id.* at 1839 (Rehnquist, C.J., dissenting). More fundamentally, however, the Chief Justice questioned the fairness of the distinction between public and private objectives, given that the private defendant is being held liable as a state actor for the purposes of the statute:

framing of the analysis weighed against the private party defendants inasmuch as it required the defendants to demonstrate that "the special concerns involved in suing government officials" also applied to private parties.[146] Given that the *Wyatt* Court chose to frame the issue in terms of defendants' entitlement to the extraordinary protection of *Harlow* immunity rather than to any immunity, however, the rigid adherence to the *Harlow* standard is merited.

Rather than viewing *Harlow* as an exception to its traditional use of the common law to provide immunities under § 1983, the *Wyatt* Court apparently believed that *Harlow* completely supplanted good-faith immunity. Rejecting the notion of a two-tiered qualified immunity—good-faith immunity for private parties and objectively determined immunity for certain public officials—Justice O'Connor avoided any analysis of the defendant's entitlement to the qualified immunity described in *Pierson*, *Scheuer*, and *Gomez* by means of a semantic sleight of hand, referring to this protection from liability as a "good-faith defense."[147] Leaving aside this manipulation of diction, there remains an unresolved contradiction between the Court's unwillingness to conduct a tort-by-tort approach to immunity standards[148] and its singling out, in *Lugar* and *Wyatt*, of the invocation of an attachment, garnishment, or replevin statute as being uniquely devoid of a conspiracy requirement under the joint participation doctrine of § 1983. Be that as it may, because the issue before the court was entitlement to immunity and not to a defense, the Court failed to consider the common-law alternative of *Pierson*.

While agreeing with Justice O'Connor that further proliferation of objective qualified immunity was undesirable, Justice Kennedy differed fundamentally from the majority in his belief that the historical inquiry

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> [I]t is at least passing strange to conclude that private individuals are acting "under color of law" because they invoke a state garnishment statute and the aid of state officers, . . . but yet deny them the immunity to which those same state officers are entitled, simply because the private parties are not state employees.

Id. at 1840 (Rehnquist, C.J., dissenting) (citation omitted).

146. *Id.* at 1833.

147. *Id.* at 1832. This distinction is all but meaningless, given that qualified immunity itself is a defense. *See* discussion *supra* note 5.

148. *See* Anderson v. Creighton, 483 U.S. 635, 645 (1987). In *Anderson* the plaintiff asserted that *Harlow* objective immunity could not possibly apply to § 1983 actions alleging a violation of the Fourth Amendment protection from unreasonable searches and seizures. The plaintiff maintained, in essence, that it was impossible reasonably to act unreasonably, and that *Harlow* therefore was inapposite. *Id.* at 643. The Court rejected the plaintiff's call for a separate immunity standard for Fourth Amendment cases, arguing that to do so would "introduce into qualified immunity analysis a complexity rivaling that which we found sufficiently daunting to deter us from tailoring the doctrine to the nature of officials' duties or of the rights allegedly violated." *Id.* at 645.

carried continued relevance in shaping the contours of § 1983 liability.[149] Unlike the dissent, however, Justice Kennedy did not visualize the historical analysis as determining a party's entitlement to *Harlow* immunity.[150] Rather, the role of the historical inquiry remained the same as it had been before *Harlow*: to provide the court with a model upon which to pattern the elements of a tort and the defenses thereto under § 1983.[151] While *Lugar* appeared to the majority and dissent to determine, for better or worse, that good-faith private actors are tortfeasors under § 1983,[152] Justice Kennedy perceived an opportunity in the *Lugar* Court's invitation to construct defenses and immunities to define and set forth precisely what private party action pursuant to a state statute should be considered tortious.[153] Justice Kennedy recognized that a cause of action is not truly delimited by the Court until a determination is made as to what the plaintiff and defendant must plead and prove respectively in order to prevail.[154] While he agreed that to bestow qualified immunity upon private actors was improper, Justice Kennedy believed that it was also unnecessary, given that the Court was acting within the decision-making authority, to provide details not divulged in *Lugar*.[155] What was not within the Court's proper authority, however, was to abandon the importance of the common law to § 1983 and focus solely on *Harlow*.[156] The concurrence thus continued to regard *Harlow* as the exception to the proper rule for interpreting § 1983, despite *Harlow*'s having been applied uniformly to a variety of public officials.[157]

149. *Wyatt*, 112 S. Ct. at 1834 (Kennedy, J., concurring).

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

151. *Id.* at 1835-37 (Kennedy, J., concurring).

152. Although the majority recognized that the Court could (but did not) provide good-faith and probable-cause defenses to private defendants, or could shift the burden of pleading or proof on various issues, the Court did not appear to view this power as that of determining what conduct would be considered a tort under § 1983. *Id.* at 1834. The split of opinion among the circuits as to what behavior creates liability attests to the fact that this power was available to the Court under *Lugar*.

153. *Id.* at 1836-37 (Kennedy, J., concurring).

154. *Id.* at 1836 (Kennedy, J., concurring).

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

156. Justice Kennedy not only claimed that the alternatives available under the common law were still available after *Harlow*, he claimed that the Court could not correctly apply § 1983 without resorting to them:

> [W]e are devising limitations to a remedial statute . . . which "on its face does not provide for *any* immunities." . . . We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted § 1983 acted in light of existing legal principles . . . . That suggests, however, that we may not transform what existed at common law based on our notions of policy or efficiency.

Id. (Kennedy, J., concurring) (quoting Malley v. Briggs, 475 U.S. 335, 342 (1986)).

157. Justice Kennedy questioned the continued justification for an objectively determined immunity for public officials in light of the changes in the law of summary judgment under

Justice Kennedy's concurrence went further than merely rehabilitating the common-law based immunity of *Pierson*, *Scheuer*, and *Gomez*. Culling an additional principle from common law—that a citizen's reliance upon the validity of a statute that has not yet been adjudged unconstitutional is reasonable *per se*—he fashioned a purely subjective standard for liability to be applied exclusively to *Lugar* defendants.[158] Justice Kennedy based this innovative solution to the problem created in *Lugar* upon his perception that common-law defenses did not protect tortfeasors from liability based on policy, but rather defined what behavior was to be deemed tortious.[159] Renouncing the applicability of these defenses because they are insufficiently related to modern-day immunity thus inhibits the Court's ability to define "the essence of the wrong."[160]

The concurrence embraced portions of both the majority and dissenting opinions, accepting Justice O'Connor's conclusion that the poli-

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Federal Rule of Civil Procedure 56. *Id.* (Kennedy, J., concurring). He explained that the dangers of unfounded allegations of subjective bad faith are avoided by the new standards at summary judgment which "allow[ ] summary judgment to be entered against a nonmoving 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.' " *Id.* (Kennedy, J., concurring) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

158. *Id.* at 1837 (Kennedy, J., concurring) (citing Birdsall v. Smith, 158 Mich. 390, 394, 122 N.W. 626, 627 (1909)).

159. Justice Kennedy's conceptual distinction between immune action and nontortious action is an important one, but at least one commentator argues that this distinction has been blurred, if not abandoned, in the development of the doctrine of immunity. KEETON ET AL., *supra* note 28, § 131, at 1032. Prosser notes:

> [Immunities] have come more and more to resemble the case of privilege or justification, so that *many cases ostensibly decided on immunity may in fact be cases in which the defendant has not acted tortiously at all, as where a governmental officer is given a "qualified immunity" and is protected for good faith decisions.*

Id. (emphasis added). It is perhaps more consistent, therefore, to protect private parties whose behavior is in good faith with an immunity.

160. *Wyatt*, 112 S. Ct. at 1836 (Kennedy, J., concurring). Justice Kennedy's point again is well taken. The Court's attempt in conducting its immunity inquiry to find a historical analog to the § 1983 tort of invoking a valid state statute in good faith illustrates his point. An analogy between a *Wyatt* defendant's § 1983 violation and malicious prosecution is inherently defective. *Lugar* specifically indicated that a private defendant's intentional misapplication of a statutory procedure would not be state action under § 1983; it would be a private abuse. Lugar v. Edmondson Oil Co., 457 U.S. 922, 940 (1982). The problem with the analogy is that it confuses immunity from liability with nontortious conduct. We do not conceptualize the mere assertion of criminal charges as a tortious act, and then create an immunity from liability for those who act in good faith. Rather, the malicious and unfounded subjection of another party to false allegations of criminality is the "essence of the wrong." *Wyatt*, 112 S. Ct. at 1836 (Kennedy, J., concurring). Thus, the *Lugar* Court's historical analysis is false to the extent that it purports to create a tort based upon the common law of tort. A rational argument can be made that a party who deprives another of his constitutionally guaranteed rights should compensate the injured party for the loss. Such an argument cannot be properly founded upon the Court's analogy.

cies implicated were insufficient to trigger the extraordinary *Harlow* immunity, but agreeing with the Chief Justice that the majority had wrongfully expunged history from its analysis. Justice Kennedy's only real divergence from both sides lay in his unwillingness to accept the reflexive logic of a "*Harlow* or bust" treatment of qualified immunity. Avoiding this somewhat myopic constraint allowed him to address the circumstances of a particular class of parties without abandoning a principled analysis that takes into account both history and contemporary policy considerations.

The *Wyatt* decision correctly overturned the Fifth Circuit's use of an objective qualified immunity standard for private parties sued under § 1983 for invoking statutory procedures that are later held to violate the constitutional rights of others. Unfortunately, *Wyatt* left unanswered the significant questions posed in *Lugar*. While the holding in *Wyatt* overturns one solution to *Lugar* adopted by several federal circuits, it perpetuates a split in opinion among the others.[161] The majority's decision ensures that private parties will not escape liability for bad-faith constitutional violations based upon a finding of objective reasonableness. The Court wisely found that upholding constitutional protections codified under § 1983 outweighs the expediency of the summary disposition of weak claims. But the *Wyatt* Court's decision does not go far enough. Lower courts faced with § 1983 private party defendants who relied upon a constitutionally infirm statute may, under *Wyatt*, choose to allow defenses of probable cause or good faith, or both; they may choose to shift burdens of pleading and burdens of proof between the parties; they may choose to afford no protections. They must make these choices, however, without guidance from the United States Supreme Court.

As a result of the Court's decision in *Wyatt*, *Lugar* stands, as does the inconsistent application of § 1983 at the district and appellate levels of the federal courts. The majority's hedging on the issue of private party liability under § 1983 is, at best, overly cautious, and, at worst, irresponsible. As the final arbiter of federal law, the Supreme Court bears the responsibility of defining the parameters of federal statutes, so that one does not face different rights and liabilities depending upon geography.[162]

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161. *See supra* notes 123-26 and accompanying text.

162. It should be emphasized that a call for the Court to resolve a four-way split at the circuit court level in no way denies "the benefit [the Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." United States v. Mendoza, 464 U.S. 154, 160 (1984). The Court waited 11 years before addressing in *Wyatt* the question of private party immunity raised in *Lugar*. Several circuit courts had confronted the issue. The arguments for and against immunity were thoroughly explored and developed by both litigants and scholars. Moreover, 11 years of appellate court decisions had illustrated the practical outcome for the parties under each of four approaches. Justice

The Court's reticence on the issue of the scope of private party liability under § 1983 leaves good-faith actors subject to undeserved potential liability.

Justice Kennedy is correct in his belief that the common law holds the key to a workable § 1983 immunity standard. Why he would discard the objective portion from the common-law formula is less clear. There is no real benefit to be gained from abandoning the objective prong of the qualified immunity test as articulated in *Wood v. Strickland*,[163] perfunctory though it may be where a private party acts pursuant to a statute. Because the Court finds the specialization of immunity by tort repugnant, retaining both steps of the *Wood* standard would allow a uniform application of the immunity to all private defendants without the risk of further damage to § 1983. Granting the limited, common law-based qualified immunity would most effectively protect both plaintiffs and defendants.[164] Furthermore, awarding good-faith immunity to private parties would signify the Court's recognition of the exceptionality of *Harlow* immunity[165] and would affirm the enduring relevance of the historical inquiry into the scope of § 1983 liability.

Certainly, an individual's rights are impinged whether the agent of the injury acts in good faith or bad. Moreover, when a citizen unreasonably or in bad faith uses the potentially awesome power of the state to

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O'Connor herself defined the Court's mission in *Wyatt* as resolving the split of opinion among the circuits. *Wyatt*, 112 S. Ct. at 1829. A definitive resolution of this issue by the Court at this stage could not possibly be viewed as "substantially thwart[ing] the development of [an] important question[ ] of law by freezing the first final decision rendered on a particular legal issue." *Mendoza*, 464 U.S. at 160.

163. 420 U.S. 308 (1975); *see supra* notes 112-13 and accompanying text.

164. Under this approach, a plaintiff could recover under § 1983 if a private party defendant either relied unreasonably upon the constitutionality of a statutory procedure or used the procedure with knowledge of its constitutional infirmity. The plaintiff could also bring a cause of action in state court for malicious prosecution or abuse of process if the defendant resorted to the procedure without a reasonable and good-faith belief in his entitlement to the property seized, or with the intent to use the procedure for an ulterior purpose, such as to harass the plaintiff.

165. Consider the following argument: If *Wyatt* had been decided before *Harlow*, the historical similarities between *Wyatt* and *Pierson* would likely have caused the Court to award Wyatt the qualified immunity formulated in *Pierson*. After *Harlow*, the Court uniformly altered all public official qualified immunity to *Harlow* immunity. What then would the Court have done with private parties? Assuming that private parties are not worthy of objective immunity, the Court would have been forced to choose between retaining the good-faith immunity for private defendants or abrogating their immunity entirely. Obviously, it would have made little sense to eliminate private party immunity merely because the Court had decided for independent policy reasons to grant a greater immunity to the public official counterparts of private parties. Most likely, the Court would have retained the *Pierson* immunity for private parties. Examined from this perspective, the *Wyatt* decision is dependent entirely upon an unfortunate chronology.

violate another's basic rights, he should be held accountable. To the extent that a citizen is relying upon the only procedure available to him under the law to effect his purpose, however, the fault of the injury is not fairly attributable to him. Rather, fault rests with the legislature or the enforcing officers. Because the Court has made a policy-driven determination to exclude public officials from suit under § 1983 in most instances, it does not follow that the sins of an immune legislature should be visited upon private citizens acting according to its edicts. The just solution to uncompensated § 1983 plaintiffs is less immunity for those actually responsible,[166] not the judicial scapegoating of an unwitting citizenry obliged to live according to the dictates of the law.

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166. Chief Justice Rehnquist succinctly noted the irony of the true reach of § 1983 in light of the different immunity standards for public and private parties:

> Our § 1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that § 1983's historic purpose was "to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement."

Wyatt, 112 S. Ct. at 1840 (Rehnquist, C.J., dissenting) (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 948 (1982)) (alteration in original).

One commentator proposes a qualified immunity for public officials modeled upon the "civil retroactivity" doctrine, under which an official would be liable for an unconstitutional act even when such unconstitutionality was not clearly established. Rudovsky, *supra* note 107, at 80. Rudovsky would deny liability for retroactive findings of unconstitutionality only where the decision involved a new legal principle—either a break from precedent or an issue of first impression. *Id.* at 79. In order to protect the public official who acts in good faith, Rudovsky argues for indemnification of the official by the government rather than immunity. *Id.* at 80. Clearly, this scheme would shift the balance more toward compensating those whose constitutional rights are violated. It would also eliminate the need for plaintiffs to seek out a deep-pocket private party.

Other solutions offered to allow § 1983 plaintiffs to recover damages include: (1) eliminating immunity for lower level officials by incorporating blanket indemnification and insurance from the government, and (2) instituting a two-tiered qualified immunity system between lower and upper level government officials. John D. Kirby, *Qualified Immunity*, 75 CORNELL L. REV. 462, 485-94 (1990).