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PRISON PRIVATIZATION AND THE DEVELOPMENT OF "GOOD FAITH" DEFENSE FOR PRIVATE-PARTY DEFENDANTS TO 42 U.S.C. § 1983 ACTIONS

Mark N. Ohrenberger*

INTRODUCTION

States seeking to cut costs in their budgets frequently turn to privatization as a more economical alternative to directly executing governmental objectives.¹ The underlying theory is that private corporations are often able to provide services more efficiently than the government.² One particular area where states are relying increasingly on public/private cooperation is correctional services.³ Part of this increase in dependence on private prison firms may be the result of an explosion in prison populations, and the resultant overcrowding of state prison facilities.⁴ There has been a particularly sharp rise in the degree to which states contract prison management to private companies over the past decade and a half.⁵ As a result,

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¹ See Van R. Johnston, *Privatization of Prisons: Management, Productivity, and Governance Concerns*, 14 PUB. PRODUCTIVITY & MGMT. REV. 189, 189-90 (1990).

² See *id.* For example, one author noted that under a contract with the United States Marshall Service, the private prison management firm, the Corrections Corporation of America, was able to construct a prison for the federal government for thirty percent less than the cost of the average public prison. See Scott Vath, *Prison Privatization Proves a Profitable Tool for Locking Up Prisoners*, AM. CITY & COUNTY, Mar. 1993, at 32D.

An additional factor that makes the privatization of corrections of particular interest for states is that "prisoner litigation constitutes a large percentage of the civil rights litigation in district courts . . . [and] contracting prison management to private firms will relieve the government of the burden of defending the multitude of individual and class-wide civil rights actions." Susan L. Kay, *The Implications of Prison Privatization on the Conduct of Prisoner Litigation Under 42 U.S.C. Section 1983*, 40 VAND. L. REV. 867, 868 (1987).

³ Johnston, *supra* note 1, at 199.

⁴ See Kerry L. Pyle, Note, *Prison Employment: A Long-Term Solution to the Overcrowding Crisis*, 77 B.U. L. REV. 151, 152 (1997) (noting that the prison population tripled between 1980 and 1995, thus forcing states to seek alternative solutions for housing inmates).

⁵ See Oliver Barber, Recent Decision, *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), 71 TEMP. L. REV. 417, 417-18 (1998) ("This has added a new element to governments' criminal justice policies in the last decade: private companies vying to build, manage, and, in most cases, profit from prisons.").

private prison management has become a formidable industry.⁶

One reason states may choose privatization of correctional facilities over other available alternatives is that "private corrections concerns offer states an attractive cost savings of ten to twenty percent over state-run prisons."⁷ Regardless of why states are investing substantially more money in prison privatization, this trend in increased private control over correctional functions has caused the emergence of two important legal questions: 1) will private parties involved in the provision of correctional services be subject to liability for deprivations of constitutional rights under 42 U.S.C. § 1983,⁸ and if so, 2) what defenses will be available to private prison official defendants as compared to their governmental counterparts? The first of these questions has been answered clearly in the affirmative.⁹ The second question, however, has yet to be fully resolved.

In *Richardson v. McKnight*,¹⁰ the Supreme Court held that private prison officials are not entitled to the protection of qualified immunity when faced with the potential for § 1983 liability despite the fact that public prison officials would be entitled to this immunity.¹¹ The holding in *Richardson*, however, left open the possibility that private prison officials may be able to assert a "good faith" defense.¹² It is this denial of qualified immunity to private prison officials in § 1983 actions that makes the question of a good faith defense for those officials working in the private sector such an important issue. If the trend of prison privatization continues, it is essential that the position of private prison officials within the scheme of § 1983 litigation be clearly defined.

This Note explores the need for and implications of formal recognition by the Supreme Court of the existence of a good faith defense for private prison official defendants in § 1983 actions. This Note also explores the possible contours of such a defense and provides a comparison between this defense and the qualified immunity from suit enjoyed by public prison officials. This Note concludes with recommendations for how the Court might define a good faith defense, and thus

⁶ See *id.* at 418. As of 1998, there existed "twenty-one companies [that] generate[d] more than \$250 million in annual revenues, and manage[d] eighty-eight prisons under government contracts." *Id.*

⁷ *Id.* at 417.

⁸ 42 U.S.C. § 1983 (2000).

⁹ See *Richardson v. McKnight*, 521 U.S. 399, 403, 413 (1997) (confirming the proposition that private defendants may be liable in § 1983 actions, and permitting such an action to go forward against correctional officers employed by a private prison facility).

¹⁰ 521 U.S. 399 (1997).

¹¹ *Id.* at 412 (stating that because "private actors are not *automatically* immune (i.e., § 1983 immunity does not automatically follow § 1983 liability), . . . private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case").

¹² *Id.* at 413–14. How exactly the Court might define a good faith defense, and how such a defense might function is discussed at length in the subsequent portions of this Note. See *infra* Parts III–IV.

clarify a significant question in modern § 1983 jurisprudence.

Before addressing the possibilities for a good faith defense, this Note presents a description and analysis of § 1983 jurisprudence, particularly with respect to prison privatization, from both a historical and modern perspective. This discussion frames the proper context for an evaluation of the possibilities the concept of a good faith defense presents. After establishing a foundation in the prison privatization trend as it relates to § 1983 jurisprudence, an exploration of the need for, implications of, and possible contours of a good faith defense follows.

I. SECTION 1983 JURISPRUDENCE LEADING TO THE NEED FOR A GOOD FAITH DEFENSE

Before discussing the affirmative defenses available to public and private prison official defendants, it is necessary to discuss the development of the liability such defenses are designed to circumvent. In 1871, Congress enacted what would ultimately be codified as 42 U.S.C. § 1983, enabling private citizens to bring actions in federal court against individuals acting “under color of” state law for violations of constitutional rights.¹³

Lori DaCosse concisely describes what a successful § 1983 plaintiff must prove:

In order to state a valid § 1983 claim to impose personal liability, a potential plaintiff must establish the following: (1) the action at issue was committed under color of law, (2) a person acting under the badge of state authority perpetrated the action, and (3) a causal link between the actions and a deprivation of constitutionally or federally protected rights.¹⁴

¹³ 42 U.S.C. § 1983 (2000). 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

Id. Section 1983 was originally part of the Ku Klux Klan Act of April 20, 1871. “Its purpose [was] plain from the title of the legislation, ‘An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.’” *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *overruled by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). More recently, the Court has stated that the “purpose of § 1983 [is] 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.” *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

¹⁴ Lori DaCosse, Note, *Richardson v. McKnight: Barring Qualified Immunity from 42 U.S.C. § 1983 for Private Jailers*, 26 PEPP. L. REV. 149, 151 (1998).

A. Private Prison Officials as "State Actors" Under § 1983 Analysis

Prison officials are classic examples of individuals who might be exposed to § 1983 liability for violating a citizen's constitutional rights while acting "under color of" law.¹⁵ While on the surface it may appear that this statute extends liability primarily to officers and employees of the state, private actors are also routinely exposed to liability under § 1983 when acting in concert with state officials.¹⁶ "[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"¹⁷ As an obvious extension of this rule, private prison officials have thus been held subject to suit in § 1983 actions as "state actors."¹⁸

¹⁵ See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978) (allowing a state inmate to proceed in a § 1983 action against prison officials for failing or refusing to send his outgoing mail).

¹⁶ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) ("[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."). In *Lugar*, the Court held that a private creditor invoking a state attachment statute could be liable for Fourteenth Amendment deprivations of property without due process as a "state actor" in a § 1983 action. The Court explained that "[t]o act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *Id.* (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

¹⁷ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)) (finding state action on the part of a private athletic association in promulgating rules governing recruitment of athletes to association member schools, and thus permitting the § 1983 suit against a private defendant); see also *West v. Atkins*, 487 U.S. 42 (1988) (finding state action sufficient to support a § 1983 action on the part of a private physician who provided medical services to inmates housed in North Carolina state prisons pursuant to a government contract). One author used the decision in *West* to explain that "[b]ecause private prisons serve the same function as public prisons, they qualify as 'state actors' and thus are subject to the same panoply of constitutional restrictions." Robert G. Schaffer, Note, *The Public Interest in Private Party Immunity: Extending Qualified Immunity from 42 U.S.C. § 1983 to Private Prisons*, 45 DUKE L.J. 1049, 1051 (1996).

¹⁸ See generally *Richardson v. McKnight*, 521 U.S. 399 (1997) (permitting a § 1983 action to proceed against private prison guards accused of injuring an inmate by utilizing excessively tight restraints). Furthering the argument that private prison officials act under color of law, a number of states have adopted statutes expressly permitting private companies to provide state correctional services on a contract basis with the state. See, e.g., TENN. CODE ANN. §§ 41-24-101 to 41-24-117 (2003); see also Pyle, *supra* note 4, at 166-68 & nn. 125-44 (discussing the passage of state statutes authorizing private prison operation to alleviate state prison overcrowding and to provide employment for inmates).

B. Recognition of Qualified Immunity for Public Prison Officials

While addressing the question of whether the passage of § 1983 abrogated the common law tradition of legislative immunity from suit, the Supreme Court, in *Tenney v. Brandhove*,¹⁹ ruled that Congress did not intend to abrogate common law immunities in passing § 1983.²⁰ This reasoning was reaffirmed in *Imbler v. Pachtman*,²¹ in which the Court addressed the issue of prosecutorial immunity.²² As this theory of immunities has developed, the Court has held with regard to specific immunities that it “infer[s] from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law.”²³ Further, the Court has found that “[f]or executive officials in general . . . qualified immunity represents the norm.”²⁴

Specifically, qualified immunity was first extended to public prison officials in *Procunier v. Navarette*.²⁵ In *Procunier*, a state prisoner brought a § 1983 action against officials of the state prison where he was housed for the officials’ “wrongful interference with [his] outgoing mail.”²⁶ The *Procunier* Court allowed the defendant prison guards to prevail on a qualified immunity defense because the prisoner’s constitutional rights in his mail were not clearly established at the time of the underlying facts of the case.²⁷ Despite the Court’s dedication to upholding common law immunities for public officials in § 1983 actions, it has been largely unwilling to extend such immunities to private parties that become the subjects of § 1983 litigation.²⁸

C. Denial of Qualified Immunity for Private Prison Officials

Due to the trend of increasing privatization of government services and the extension of § 1983 liability to the private actors performing these services, the

¹⁹ 341 U.S. 367 (1951).

²⁰ *Id.* at 376 (“We cannot believe that Congress — itself a staunch advocate of legislative freedom — would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”).

²¹ 424 U.S. 409 (1976).

²² *Id.* at 424 (acknowledging the existence of prosecutorial immunity as an extension of the common law immunity doctrine).

²³ *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (refusing to extend qualified immunity to a private defendant who violated the plaintiff’s constitutional rights by executing a writ of replevin pursuant to an unconstitutional state law).

²⁴ *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

²⁵ 434 U.S. 555 (1978).

²⁶ *Id.* at 557.

²⁷ *Id.* at 565.

²⁸ See *infra* Part I.C (discussing the availability of qualified immunity to private-party § 1983 defendants).

logical question arose of which defenses might be available to these defendants. Specifically, could private defendants invoke qualified immunity in § 1983 actions?

The line of cases leading to the ultimate determination in *Richardson v. McKnight* that private prison officials are not entitled to a qualified immunity defense²⁹ began with the Supreme Court's decision in *Wyatt v. Cole*.³⁰ Wyatt, a former member of a cattle partnership, brought a § 1983 action against the other partner, Cole, for the deprivation of property rights in the partnership assets.³¹ As the result of a dispute among the parties following the dissolution of their partnership, Cole obtained a writ of replevin to seize twenty-four head of cattle.³² The state replevin statute was subsequently declared unconstitutional, and the seized property ordered to be returned to Wyatt.³³ Cole refused to return the seized property, and Wyatt instituted the lawsuit.³⁴

Prior to *Wyatt*, the U.S. circuit courts of appeals were divided over which defenses were available to private-party § 1983 defendants.³⁵ To determine whether Cole was entitled to qualified immunity, the Supreme Court began its analysis by inquiring as to whether an immunity would have existed at common law for a similar action in tort.³⁶ Because this case involved the alleged misuse of the Mississippi replevin statute, the Court considered "malicious prosecution and abuse of process" as the "most closely analogous torts," and determined that private defendants did not receive immunity from such actions at common law.³⁷ In response to the defendant's arguments that he would have had a defense at common law for acting without malice and in good faith, the Court carefully distinguished a standard defense, requiring a decision as to the defendant's good faith or lack of

²⁹ *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

³⁰ 504 U.S. 158 (1992).

³¹ *Id.* at 159–60.

³² *Id.* at 160.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 161. The Supreme Court "granted certiorari to resolve a conflict among the Courts of Appeals over whether private defendants threatened with 42 U.S.C. § 1983 liability are, like certain government officials, entitled to qualified immunity from suit." *Id.* (citation omitted). The Court went on to cite to various appellate court decisions, and noted that the Fifth, Eighth and Eleventh Circuits had permitted private defendants to exert qualified immunity, while the First and Ninth Circuits had refused to extend qualified immunity to private parties. *Id.* The Court also noted the compromise decision reached by the Sixth Circuit, prohibiting qualified immunity, but permitting a good faith defense. *Id.* (citing *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988)). *Duncan* is instructive in predicting what might constitute a good faith defense to be recognized by the Supreme Court and is discussed *infra* Part II.A.

³⁶ *Wyatt*, 504 U.S. at 164.

³⁷ *Id.* at 164–65.

malice, from an immunity.³⁸

The Court continued its qualified immunity analysis by considering the policy underlying the existence of qualified immunity.³⁹ In the end, it decided that the interests of private parties “are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion [of the qualified immunity doctrine].”⁴⁰ Despite the Court’s determination of the qualified immunity issue in *Wyatt*, the Court concluded with two significant qualifying remarks. First, the Court narrowed its holding to encompass only those “private persons[] who conspire with state officials to violate constitutional rights.”⁴¹ Second, and most importantly, the Court left open the possibility that private defendants to § 1983 actions are entitled to a good faith defense.⁴²

It was against the backdrop of the *Wyatt* opinion that the Court addressed the specific question of the availability of qualified immunity for private prison officials in *Richardson v. McKnight*.⁴³ The plaintiff in *Richardson* was an inmate at a privately owned correctional facility.⁴⁴ When guards injured the plaintiff by placing “extremely tight physical restraints” on him, the inmate brought a § 1983 action against the guards who caused his injuries.⁴⁵ Although employed by a private prison management firm, rather than by the State of Tennessee, the guards advanced the affirmative defense of qualified immunity.⁴⁶ The availability of the qualified

³⁸ *Id.* at 165. This is a subtle, yet important distinction to make. The Court in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), noted that “[u]nless the plaintiff’s allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal *before the commencement of discovery*.” *Id.* at 526 (emphasis added). The possibility of dismissing lawsuits at this early stage in the litigation process makes qualified immunity an exceptionally potent defense.

³⁹ *Wyatt*, 504 U.S. at 167–68 (“In short, the qualified immunity recognized in *Harlow* acts to safeguard government, and thereby to protect the public at large, not to benefit its agents.”).

⁴⁰ *Id.* at 168.

⁴¹ *Id.* (quoting Petition for Writ of Certiorari at i, *Wyatt* (No. 91-126)).

⁴² *Id.* at 169. This qualification on the *Wyatt* holding will be discussed at length in the following sections of this Note, and has the potential for drastically altering § 1983 litigation where private parties are involved. See *infra* Parts II–III.

⁴³ 521 U.S. 399 (1997). One commentator noted that through its analysis of immunity with respect to private prison guards, the Court did little more than “ask[] questions already answered by the Court.” Greg E. Harris, Case Comment, *Richardson v. McKnight*, 117 S. Ct. 2100 (1997), 32 SUFFOLK U. L. REV. 341, 346 (1998). Other authors noted that there was more reason to debate the possibilities of qualified immunity for private prison officials “because a private prison guard serves almost exactly the same function as a governmental prison guard.” David J. DelFiandra, Comment, *The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983*, 38 DUQ. L. REV. 591, 610 (2000).

⁴⁴ *Richardson*, 521 U.S. at 401.

⁴⁵ *Id.*

⁴⁶ *Id.* at 402.

immunity defense to the privately employed prison guards became the issue the Court took for determination.⁴⁷ Ultimately, the Court decided that the private prison officials were not entitled to qualified immunity.⁴⁸ In reaching this conclusion, the Court relied heavily on its decision in *Wyatt*.⁴⁹ The *Richardson* Court took as instructive the *Wyatt* Court's method for deciding when qualified immunity is applicable to private defendants faced with § 1983 liability: "look both to *history* and to the *purposes* that underlie government employee immunity in order to find the answer."⁵⁰ The Court ruled that history did not support the extension of qualified immunity to employees of private companies performing correctional functions on a contract basis with the government.⁵¹ Likewise, the Court found that the purposes for which state employees are endowed with qualified immunity do not translate for their private counterparts in the context of employees of private companies that compete for government contracts.⁵² The Court concluded its opinion, however, with three caveats, each of which left unanswered questions with regard to § 1983 liability for private defendants.⁵³

The first of these caveats was that the decision did not address whether the private defendants, under the facts before the Court, could even be liable for damages under § 1983.⁵⁴ Next, the Court narrowed its holding to the facts before it: defendants from a private, for-profit company, competing with similar companies, for government contracts to perform major government tasks, with limited direct governmental supervision.⁵⁵ Finally, the Court's third caveat recounted the possibility it had left open in *Wyatt*: that private defendants in § 1983 actions might have available to them a good faith defense.⁵⁶ As it had done in *Wyatt*, however, the Court again declined to rule on this defense because the specific issue was not properly before it.⁵⁷ This possibility of a good faith defense could become incredibly

⁴⁷ *Id.* at 401 ("The issue before us is whether prison guards who are employees of a private prison management firm are entitled to a qualified immunity from suit by prisoners charging a violation of 42 U.S.C. § 1983.").

⁴⁸ *Id.*

⁴⁹ *Id.* at 402.

⁵⁰ *Id.* at 404 (emphasis added) (citation omitted).

⁵¹ *Id.* at 404–07. *But see id.* at 414–18 (Scalia, J., dissenting) (finding that history does support the extension of qualified immunity to the private defendants in question, and that function, rather than status as a state or private employee, should be determinative with regard to the qualified immunity analysis).

⁵² *Id.* at 407–12.

⁵³ *See id.* at 413–14.

⁵⁴ *Id.* at 413.

⁵⁵ *Id.* (distinguishing these defendants from private individuals having brief associations with governmental entities, and serving an essentially governmental function or acting with close government supervision).

⁵⁶ *Id.* at 413–14.

⁵⁷ *Id.*

important to private defendants in § 1983 litigation in the post-*Richardson* era.

The denial of qualified immunity to private correctional officer defendants is particularly significant given the potency of modern qualified immunity. In *Harlow v. Fitzgerald*,⁵⁸ the Supreme Court redefined the qualified immunity standard by eliminating the previously required subjective component of the qualified immunity analysis.⁵⁹ Qualified immunity, as redefined under *Harlow*, made this particular defense a powerful tool for public officials in defending against § 1983 actions. The *Harlow* Court explained:

Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.⁶⁰

As a result of the Court's denial of this defense to private prison officials in *Richardson*,⁶¹ an exploration of alternative and potentially comparable defenses available to such parties is imperative.

⁵⁸ 457 U.S. 800 (1981).

⁵⁹ Compare *Harlow*, 457 U.S. at 818 ("We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."), and *id.* at 819 ("But again, the defense would turn primarily on objective factors."), with *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (including a subjective, as well as an objective, component as part of the qualified immunity analysis). The Court in *Wood* explained:

[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.

Id.

⁶⁰ *Harlow*, 457 U.S. at 818.

⁶¹ See *supra* notes 43–52 and accompanying text.

II. EXPLORING A GOOD FAITH DEFENSE: AVAILABILITY AND APPLICATION OF A GOOD FAITH DEFENSE BEFORE AND AFTER *RICHARDSON*

Although when the Court decided *Richardson* the affirmative defense of good faith for private § 1983 defendants had not been clearly established or defined, a few courts had already allowed private defendants to prevail on some version of this defense.⁶² Challenged to determine exactly how this defense might function, modern courts may gain some insight from the earlier cases. However, given the modern trend toward increased prison privatization, and after the definitive statement in *Richardson* that private prison officials may not avail themselves of a qualified immunity defense, the evolution of the good faith defense has become particularly important for this category of § 1983 jurisprudence. This Part will address how different courts handled the good faith defense before *Richardson* and how lower courts have handled this defense since *Richardson*. The trends discussed in this Part will serve as a basis for suggestions to be offered in Part III as to how the Supreme Court might settle the issues relating to the good faith defense for private § 1983 defendants.

A. *Good Faith Defense Before Richardson*

In its denial of qualified immunity to private § 1983 defendants in *Wyatt*, the Court evaluated the various approaches used by the circuit courts of appeals.⁶³ At that time, the Sixth Circuit had already begun to experiment with a defense of good faith for private § 1983 defendants.⁶⁴

In *Duncan v. Peck*, the U.S. Court of Appeals for the Sixth Circuit was faced with a situation that was, in many ways, similar to the factual scenario the Supreme Court would later address in *Wyatt*.⁶⁵ In a contract suit, the plaintiff obtained a prejudgment attachment order for stock owned by the defendant, and after the entry of a default judgment against the defendant, purchased the stock at a sheriff's sale.⁶⁶ The state attachment statute was subsequently declared unconstitutional, and the defendant in the original matter brought a § 1983 action against the plaintiff, a private party, for the deprivation of his property interest in the stock.⁶⁷

After deciding qualified immunity was not available for the private defendant because the extension of such immunity was not supported by the history and policy

⁶² See *infra* Part II.A.

⁶³ 504 U.S. at 161.

⁶⁴ See generally *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988); see also *Wyatt*, 504 U.S. at 161.

⁶⁵ See *Duncan*, 844 F.2d at 1262–63; see also *supra* notes 31–34 and accompanying text.

⁶⁶ *Duncan*, 844 F.2d at 1262.

⁶⁷ *Id.* at 1262–63.

behind the qualified immunity defense,⁶⁸ the court turned instead to examine a similar defense of good faith.⁶⁹ The *Duncan* court distinguished the good faith defense from qualified or good faith immunity, where lawsuits are commonly dismissed even before discovery, by explaining that “[a] good faith defense . . . is likely to be based in large part on the facts of the case, with the suit only being dismissed after trial, or on summary judgment if the defendant can show that there is no material dispute as to the facts.”⁷⁰ The court further distinguished the two defenses by explaining that “good faith immunity is based on an *objective* analysis, while a good faith defense includes *subjective* factors.”⁷¹

To decide whether the defendant in *Duncan* was entitled to a defense of good faith, and at what stage in the litigation process this defense might cause the suit to be dismissed, the court turned for guidance to the good faith defense available at common law to defendants in “a suit for malicious prosecution or wrongful attachment.”⁷² In such cases, if the plaintiff could not produce evidence that the defendant had acted maliciously and without probable cause, the defendant would prevail on the affirmative defense of good faith.⁷³ A defendant would also be protected by the defense where he had relied in good faith on the advice of his attorney.⁷⁴ As the court found that there was no dispute of material fact, and the defendant had relied in good faith on the advice of his attorney, the court was willing to dismiss the case at the summary judgment phase.⁷⁵

Although *Duncan* addressed the good faith defense with regard to private defendants invoking attachment statutes, rather than employees of private firms executing government functions, the *Duncan* opinion may be instructive for courts grappling

⁶⁸ *Id.* at 1263–64. History and policy were also the reasons later relied upon by the *Wyatt* Court in barring the extension of qualified immunity to a private defendant. *See supra* notes 36–40 and accompanying text.

⁶⁹ *See Duncan*, 844 F.2d at 1266 (“We believe that the courts who endorsed the concept of good faith immunity for private individuals improperly confused good faith immunity with a good faith defense.”).

⁷⁰ *Id.*

⁷¹ *Id.* (emphasis added). It should be noted, however, that while the analysis of the common law defense of good faith or probable cause includes a subjective component, Chief Justice Rehnquist has suggested that an analysis of this defense may alternatively be resolved on the basis of an objective inquiry. *See Wyatt*, 504 U.S. at 177 (Rehnquist, C.J., dissenting). The Chief Justice observed that “[r]espondents presumably will be required to show the traditional elements of a good-faith defense — either that they acted without malice or that they acted with probable cause.” *Id.* (noting that a party claiming the good faith defense could prevail by demonstrating they met one of the two components: the subjective component, action without malice, or the objective component, action with probable cause).

⁷² *Duncan*, 844 F.2d at 1267.

⁷³ *Id.*

⁷⁴ *Id.* at 1267–68.

⁷⁵ *Id.* at 1268.

to define the nebulous good faith defense to § 1983 liability. The clear lesson from *Duncan* was to look to the related common law causes of action and defenses.⁷⁶

The *Duncan* opinion is significant in another way as well. As discussed above, the opinion made clear the distinction between the good faith defense and good faith or qualified immunity.⁷⁷ A number of courts have confused these two affirmative defenses.⁷⁸ Such confusion, however, is unsurprising because qualified immunity, much like the modern good faith defense to § 1983 actions, finds its origin in the earlier common law defenses of good faith and probable cause.⁷⁹ Justice Kennedy's concurrence in *Wyatt* noted, "[t]he good-faith and probable-cause defense evolved into our modern qualified-immunity doctrine."⁸⁰ Confusing these propositions could be a huge impediment to the development of the good faith defense.

B. Good Faith Defense After Richardson

The *Richardson* decision marked a turning point for § 1983 jurisprudence as it relates to prison privatization. *Richardson* made it unmistakably clear that employees of private prison firms would be unable to avail themselves of a qualified immunity defense when confronted with a § 1983 action despite the availability of this powerful defense for their counterparts employed by the state.⁸¹ The *Richardson* Court's decision, however, to leave open the possibility of a similar good faith defense could have a tremendous impact on the future of prison privatization.⁸²

⁷⁶ See *id.* at 1264, 1267.

⁷⁷ See *supra* notes 69–70 and accompanying text.

⁷⁸ Chief Justice Rehnquist, dissenting in *Wyatt*, noted that as far back as the Court's ruling in *Pierson v. Ray*, 386 U.S. 547 (1967) (holding that the common law availability of a defense of good faith and probable cause to police officers in false arrest and false imprisonment cases applied as well in § 1983 actions), the Court was unclear as to whether it was establishing a good faith immunity or a good faith defense. *Wyatt*, 504 U.S. at 176–77 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist's dissent also added to the confusion of the good faith defense and qualified immunity because, in his view, the showing required by a private party to establish the good faith defense is practically indistinguishable from that required of a public official to establish qualified immunity. See *id.* at 178 ("Thus, respondents can successfully defend this suit simply by establishing that their reliance on the replevin statute was objectively reasonable for someone with their knowledge of the circumstances. But this is precisely the showing that entitles a public official to immunity."). But see *id.* at 178 n.2 (acknowledging that there exists some subtle difference between the common law good faith defense and qualified immunity).

⁷⁹ See generally *Duncan*, 844 F.2d 1261 (good faith defense); see also *Wyatt*, 504 U.S. at 170 (Kennedy, J. concurring) (qualified immunity).

⁸⁰ *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring).

⁸¹ *Richardson v. McKnight*, 521 U.S. 399, 412 (1997).

⁸² See *id.* at 413–14; see also DeFiandra, *supra* note 43, at 614–15 (recognizing the significance of the currently open possibility that private prison guards, as § 1983 defendants, may be able to assert a good faith defense).

1. Cases Mentioning but Not Ruling on the Good Faith Defense

While some similarities exist in the way courts have handled the good faith defense in § 1983 actions since *Richardson*, there have also been differences. A few courts have followed the pattern of *Wyatt* and *Richardson* in that they have been careful not to decide the good faith defense question where it had not been raised by the defendant. In *Jensen v. Lane County*,⁸³ the U.S. Court of Appeals for the Ninth Circuit conducted a full qualified immunity analysis in a § 1983 action for unlawful arrest and restraint against a private doctor who had signed a commitment order to admit the plaintiff into a county psychiatric hospital.⁸⁴ Relying on *Richardson*, the *Jensen* court concluded that the private doctor, who was associated with an organization of psychiatrists that regularly worked on a contract basis with the government, was not entitled to qualified immunity from § 1983 liability.⁸⁵ After its extensive qualified immunity analysis, the *Jensen* court opted not to directly address the defendant's prospects for success on a good faith defense, but instead attached a footnote explicitly indicating that it made no ruling with regard to a possible defense of good faith.⁸⁶

Similarly, in *Ace Beverage Co. v. Lockheed Information Management Services*,⁸⁷ the U.S. Court of Appeals for the Ninth Circuit once again addressed the qualified immunity issue and declined to make any judgment with regard to a good faith defense.⁸⁸ In *Ace Beverage*, the § 1983 defendant was "a private corporation that processes parking tickets for the City of Los Angeles."⁸⁹ The court determined that the defendant was properly classified among the category of defendants covered by the *Richardson* opinion, and denied qualified immunity.⁹⁰ At the conclusion of its opinion, the court mentioned, almost as an aside, that like the Supreme Court in *Wyatt* and *Richardson*, it made no ruling on the issue of a good faith defense.⁹¹

The Ninth Circuit's brief treatment of the good faith defense in *Jensen* and *Ace Beverage* is significant. In both cases, the issue before the court appeared to be a narrow one: is this private defendant entitled to qualified immunity?⁹² The question of a good faith defense is obviously a closely related issue but is not necessarily implicated by the qualified immunity analysis. Perhaps the court's choice to include

⁸³ 222 F.3d 570 (9th Cir. 2000).

⁸⁴ See *id.* at 572–73.

⁸⁵ *Id.* at 579.

⁸⁶ *Id.* at 580 n.5.

⁸⁷ 144 F.3d 1218 (9th Cir. 1998).

⁸⁸ See *id.*

⁸⁹ *Id.* at 1219.

⁹⁰ *Id.* at 1219–20.

⁹¹ *Id.* at 1220.

⁹² See *Jensen*, 222 F.3d at 572; *Ace Beverage*, 144 F.3d at 1219.

a brief reference to the good faith defense reflects an affirmative effort to preserve this issue for the trial court. The inclusion of the good faith defense reference may also indicate a signal or reminder to the defendant who was denied qualified immunity or to the trial court that good faith is a defense that ought to be addressed.

2. Cases Deciding the Proper Stage in the Litigation Process to Resolve the Good Faith Question

Other cases since *Richardson* have given the good faith defense question more substantial treatment. Considering some of these cases, one commentator noted:

A good faith defense will require that the plaintiff show that the defendant had a subjective appreciation that his or her acts deprived the plaintiff of his or her constitutional rights. Since this requires a factual inquiry, the defendant cannot have the case dismissed as quickly as someone who is entitled to qualified immunity.⁹³

This case law reveals that in some situations an evaluation of the good faith defense may require a greater degree of fact finding than others.

Courts have been conflicted as to *when* during the litigation process it should rule on the good faith defense. In *Wolfe v. Horn*,⁹⁴ for example, the U.S. District Court for the Eastern District of Pennsylvania denied the defendant's motion for summary judgment based on a good faith defense.⁹⁵ In *Wolfe*, a male to female pre-operative transsexual inmate in Pennsylvania's state correctional system brought a § 1983 action against medical personnel who treated her while she was incarcerated.⁹⁶ These medical personnel refused to prescribe hormones for the plaintiff and failed to provide other forms of therapy she desired to aid in her struggle with her transsexuality and related psychological ailments.⁹⁷ The court first rejected any claim of the private medical defendants to the protection of qualified immunity.⁹⁸ The court then concluded that, "assuming the 'good-faith' defense applies in this context, the defendants' subjective state of mind cannot be evaluated without weighing the evidence and determining credibility."⁹⁹ The court, thus, denied the defendants' motion for summary judgment on the basis of their good faith

⁹³ Sheila M. Lombardi, Note, *Media in the Spotlight: Private Parties Liable for Violating the Fourth Amendment*, 6 ROGER WILLIAMS U. L. REV. 393, 412–13 (2000).

⁹⁴ 130 F. Supp. 2d 648 (E.D. Pa. 2001).

⁹⁵ *Id.* at 659.

⁹⁶ *Id.* at 650–51.

⁹⁷ *Id.*

⁹⁸ *Id.* at 656 (citing *Richardson* and supporting decisions from lower courts).

⁹⁹ *Id.* at 659.

defense.¹⁰⁰

In *Egervary v. Rooney*,¹⁰¹ the U.S. District Court for the Eastern District of Pennsylvania denied a plaintiff's motion for summary judgment because the defendants raised, and had the potential to prevail on, a good faith defense at trial.¹⁰² In *Egervary*, private attorneys petitioned a federal district court for return of a child who had allegedly been abducted from his mother who lived in Hungary.¹⁰³ The attorneys' petition was granted following an ex parte hearing about which the child's father had been given no notice or opportunity to participate.¹⁰⁴ The father sued the attorneys, claiming that they had violated his Fourteenth Amendment due process rights. The defendants argued that they were entitled to a good faith defense,¹⁰⁵ and the plaintiff moved for summary judgment.

The court briefly discussed that some confusion existed as to the exact standard to be applied to the good faith defense, but nonetheless concluded that regardless of the standard applied, the good faith question, in this case, was one that should be resolved by a jury.¹⁰⁶ The court noted that a determination of good faith was not possible until further discovery had been conducted.¹⁰⁷ Finally, it concluded that, "1) defendants will be entitled to assert a good faith defense at trial; and 2) the question of whether that defense fails as a matter of law is best determined at that time."¹⁰⁸

As yet another example of courts attempting to determine the proper point at which to rule on the good faith defense, the U.S. District Court for the District of Maryland included a brief discussion of this matter in *Sallie v. Tax Sale Investors, Inc.*¹⁰⁹ In *Sallie*, the plaintiffs were evicted from their rented home after their landlord defaulted on property tax.¹¹⁰ The plaintiffs brought a § 1983 action against the Director of Finance for the City of Baltimore and the Sheriff of Baltimore to challenge the constitutionality of the statutory scheme pursuant to which the tax sale

¹⁰⁰ *Id.*

¹⁰¹ *Egervary v. Rooney*, No. 96-3039, 2000 U.S. Dist. LEXIS 11654 (E.D. Pa. Aug. 15, 2000), *aff'd sub nom.*, *Egervary v. Young*, 366 F.3d 238 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 868 (2005). Because this case involved private defendants acting in conjunction with federal, rather than state, agents, it was brought as a *Bivens* action rather than as a § 1983 action. *See id.* at *2. This distinction does not appear to have affected the court's analysis of the good faith defense. *See id.* at *20–22.

¹⁰² *See id.* at *20–22.

¹⁰³ *Id.* at *1–3.

¹⁰⁴ *Id.* at *2–3.

¹⁰⁵ *Id.* at *20.

¹⁰⁶ *Id.* at *20–21 (discussing the possible standards for the good faith defense listed in *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250 (3d Cir. 1994)).

¹⁰⁷ *Id.* at *21–22.

¹⁰⁸ *Id.* at *22.

¹⁰⁹ 998 F. Supp. 612 (D. Md. 1998).

¹¹⁰ *Id.* at 613.

of the home had been conducted, and against the private corporation that purchased it and evicted the plaintiffs.¹¹¹ In addressing the availability of the good faith defense to the private corporation, the court refused to decide the matter before the plaintiffs had some opportunity for discovery.¹¹² The language employed by the court, however, appears to indicate that under a different factual scenario the court might be inclined to enter summary judgment in favor of private § 1983 defendants prior to discovery.¹¹³

Well before the *Richardson* decision, in his dissenting opinion in *Wyatt*, Chief Justice Rehnquist described some of the similarities that exist between qualified immunity and the way a good faith defense could be applied.¹¹⁴ One such similarity, Chief Justice Rehnquist noted, was that courts would be able to dispose of some cases at the earliest phases of litigation, regardless of whether their defense was premised on qualified immunity or on a good faith defense.¹¹⁵ The Chief Justice explained:

Nor do I see any reason that this "defense" may not be asserted early in the proceedings on a motion for summary judgment, just as a claim to qualified immunity may be. Provided that the historical facts are not in dispute, the presence or absence of "probable cause" has long been acknowledged to be a question of law. And so I see no reason that the trial judge may not resolve a summary judgment motion premised on such a good-faith defense, just as we have encouraged trial judges to do with respect to qualified immunity claims. Thus, private defendants who have invoked a state attachment law are put in the same position whether we recognize that they are entitled to qualified immunity or if we instead recognize a good-faith defense.¹¹⁶

¹¹¹ *Id.*

¹¹² *Id.* at 621–22. The court also noted the private defendant's confused expression of this defense in its brief where the court described the defendant's claim that "it is entitled to a 'qualified, good faith immunity' defense." *Id.* at 621 (quoting Tax Sale Investor, Inc.'s Opposition to Plaintiffs' Motion for Preliminary Injunction at 4, *Sallie* (No. 97-2922)).

¹¹³ *See id.* at 621–22. The court concluded that, "[a]s to the good faith defense, it is manifest that the defendant has failed to offer a basis at this stage of the case upon which it might be concluded as a matter of law that it is entitled to the affirmative defense of good faith." *Id.* This language could be interpreted to indicate that had the defendant produced sufficient evidence that it had, in fact, acted in good faith, dismissal of the action prior to extensive discovery might be appropriate.

¹¹⁴ *Wyatt v. Cole*, 504 U.S. 158, 176–79 (1992) (Rehnquist, C.J., dissenting).

¹¹⁵ *Id.* at 178–79.

¹¹⁶ *Id.* (citations omitted). The Chief Justice further anticipated the divergence among courts with regard to treatment of this defense: "Perhaps the Court believes that the 'defense'

3. Resolving Who Will Have the Burden

Another point of contention among courts ruling on a good faith defense for private § 1983 defendants is determining where to place the evidentiary burdens.¹¹⁷ Resolution of this particular issue could have a significant impact on the future of the good faith defense. If the burden remains with the plaintiff, dismissal of cases at summary judgment will be much more likely for private § 1983 defendants. On the other hand, if defendants are required to carry the burden of proving their subjective good faith, this defense becomes considerably less powerful.

Before *Richardson*, the U.S. Court of Appeals for the Third Circuit held unequivocally in *Jordan v. Fox, Rothschild, O'Brien & Frankel*¹¹⁸ that regardless of the specific standard to be applied in a good faith defense inquiry, the burden belonged to the plaintiff.¹¹⁹ Similarly, in *Pinsky v. Duncan*,¹²⁰ the U.S. Court of Appeals for the Second Circuit placed the burden squarely on the plaintiff.¹²¹ One court discussing *Pinsky* noted that “[t]he court held that to prevail against the private

will be less amenable to summary disposition than will the ‘immunity’; perhaps it believes the defense will be an issue that must be submitted to the jury.” *Id.* at 179.

In a district court case decided after *Wyatt*, the court echoed Chief Justice Rehnquist’s proposition that the good faith defense for private § 1983 defendants is in many ways comparable to qualified immunity, but drew attention to the idea that more discovery would be necessary in the context of a good faith defense than with qualified immunity:

A good faith defense fully protects defendants who act in good faith and thus provides them with protections similar to qualified immunity. A good faith defense is also helpful to plaintiffs, however, because it allows them to conduct discovery of the subjective intent of the private defendant. Moreover, even if an “objective” private person in the defendant’s position would not have known that the conduct was unconstitutional, the plaintiff still prevails if the defendant subjectively knew his conduct was unconstitutional.

Franklin v. Fox, No. 97-2443, 2000 U.S. Dist. LEXIS 19651, at *13–14 (N.D. Ca. Dec. 22, 2000).

¹¹⁷ Compare, e.g., *Robinson v. City of San Bernardino Police Dep’t*, 992 F. Supp. 1198 (C.D. Ca. 1998), discussed *infra* notes 123–30 and accompanying text, with *Franklin*, 2000 U.S. Dist. LEXIS 19651, discussed *infra* notes 131–46 and accompanying text.

¹¹⁸ 20 F.3d 1250 (3d Cir. 1994).

¹¹⁹ *Id.* at 1277–78. The court stated:

Therefore, we suggest that the district court should take care not to incorrectly place the burden of proving the defendants’ mens rea on the defendants. We think the need to produce evidence and prove that [the defendants] acted at least recklessly or with gross indifference to [the plaintiff’s] rights always remains on [the plaintiff].

Id. at 1278.

¹²⁰ 79 F.3d 306 (2d Cir. 1996).

¹²¹ *Id.* at 312.

defendant the plaintiff must prove want of probable cause, malice and damages.”¹²² Placement of the burden on the plaintiff continued after *Richardson*.

*Robinson v. City of San Bernardino Police Department*¹²³ serves as an excellent post-*Richardson* example of a court placing the burden in a good faith defense analysis on the plaintiff under a factual scenario analogous to that presented to the Court in *Richardson*. In *Robinson*, under the direction of the San Bernardino Police Department, a private nurse performed a “sex kit” examination on an inmate suspected of rape.¹²⁴ To allow the nurse to conduct the examination, the co-defendant city employees held the plaintiff’s arms and legs.¹²⁵ During the examination, the plaintiff sustained injuries where his legs had been squeezed that included severe pain, swelling, bruising, blood clotting and permanent disfigurement of the skin.¹²⁶ Following this incident, the plaintiff filed a § 1983 action against the private nurse, along with other defendants, claiming the means by which “sex kit” examination had been performed violated his Fourth, Eighth and Thirteenth Amendment rights and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹²⁷

The private nurse moved for summary judgment based on her good faith reliance on the direction of the San Bernardino police officers who ordered the examination.¹²⁸ The court observed that the nurse established that she acted in good faith and that she believed the police officers directing the search had either probable cause or a search warrant.¹²⁹ Nonetheless, the court explained clearly that summary judgment was appropriate because the plaintiff had not met his burden of producing evidence that the private defendant did not act in good faith.¹³⁰

Courts in other cases have taken exactly the opposite approach, placing the burden of demonstrating that the defendant did in fact act in good faith on the defendant. Perhaps the clearest example of a case in which the defendant was left with the burden is in the U.S. District Court for the Northern District of California’s opinion in *Franklin v. Fox*.¹³¹ In *Franklin*, the district court discussed several cases in which the burden of disproving the good faith defense rested with the plaintiff; nevertheless, the court placed the burden on the defendant.¹³²

¹²² *Franklin*, 2000 U.S. Dist. LEXIS 19651, at *12 (citation omitted).

¹²³ 992 F. Supp. 1198 (C.D. Ca. 1998).

¹²⁴ *Id.* at 1203. A “sex kit” examination is a process by which a nurse collects evidence from rape suspects. *Id.* at 1202.

¹²⁵ *Id.* at 1201.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1202.

¹²⁹ *Id.* at 1207.

¹³⁰ *Id.* (“Since the plaintiff has not submitted any evidence from which it may be inferred that she acted in bad faith, defendant [private nurse] is entitled to summary judgment in her favor.”).

¹³¹ *Franklin v. Fox*, No. 97-2443, 2000 U.S. Dist. LEXIS 19651 (N.D. Ca. Dec. 22, 2000).

¹³² *See id.* at *9–21.

Franklin involved a plaintiff who had been convicted of murdering a child. was subsequently exonerated.¹³³ After his arrest, the plaintiff's daughter obtained information as to how to arrange a visit with her father from an official, presumably the prosecutor, involved in her father's case.¹³⁴ The official knew that the daughter's purpose in visiting her father was to encourage him to plead guilty to the murder.¹³⁵ The plaintiff then brought a § 1983 action against his daughter for conspiring to violate his Sixth Amendment right to counsel because she had discussed her visit with officials involved in her father's prosecution when arranging her visit.¹³⁶

In addressing the question of applying the good faith defense to the private defendant, the district court first determined that private § 1983 defendants are entitled to assert a good faith defense.¹³⁷ The court then postulated as to "what must be proven with respect to the defendant's good faith or lack thereof, and who has the burden of proof."¹³⁸ The *Franklin* court noted that the standards previous courts had applied to good faith defense claims were derived from examining the most closely related common law tort claims.¹³⁹

Although in such cases the burden had fallen on the plaintiff to prove that the defendant's conduct did not amount to good faith, the district court suggested that the burden might not belong to the plaintiff in all cases.¹⁴⁰ To support this proposition, the court referred to the language employed by the Supreme Court in *Richardson*.¹⁴¹ That court noted that: "In *Richardson*, for example, majority opinion specifically left unanswered the question of whether the guards have an *affirmative defense* of good faith, or whether a plaintiff might have additional burdens."¹⁴² Unlike prior good faith defense cases, the Sixth Amendment violation claimed in *Franklin* was not closely analogous to the torts of malicious prosecution or abuse of process; therefore, the court found it more difficult to determine who bore the burden of proof.¹⁴³

The district court found that the defendant, under the facts presented, would

¹³³ *Id.* at *1–2.

¹³⁴ *Id.* at *18–19.

¹³⁵ *Id.*

¹³⁶ *Id.* at *3.

¹³⁷ *Id.* at *13–14.

¹³⁸ *Id.* at *14.

¹³⁹ *Id.* at *14–16. In a number of these cases, the Court found that "the most analogous common law torts to the section 1983 claims" involved "malicious prosecution and abuse of process." *See id.* at *15.

¹⁴⁰ *Id.* at *16.

¹⁴¹ *Id.*

¹⁴² *Id.* (citing *Richardson v. McKnight*, 521 U.S. 399, 413 (1997)). Presumably, the inference here is that if good faith is an *affirmative defense*, the defendant would bear the burden of showing good faith.

¹⁴³ *Id.*

prevail on a good faith defense regardless of which party had the burden of proof.¹⁴⁴ Consequently, the court treated the burden as though it belonged to the defendant.¹⁴⁵ The court then applied a more stringent standard than most other good faith defense cases, holding that the defendant “bears the burden of proving that she did not know, and should not have known, that her jailhouse visit with her father violated plaintiff’s Sixth Amendment right to counsel.”¹⁴⁶

In *Sallie v. Tax Sale Investors, Inc.*,¹⁴⁷ the U.S. District Court for the District of Maryland was ambiguous as to which party held the burden of proof with regard to the good faith defense. In denying the private defendant’s motion to dismiss, or in the alternative, for summary judgment, the district court noted that the *defendant* had failed “to offer a basis at this stage of the case upon which it might be concluded as a matter of law that it is entitled to the affirmative defense of good faith.”¹⁴⁸ The court found that it was unable to determine “whether a viable claim under 42 U.S.C. § 1983” was presented.¹⁴⁹ The court continued, however, to explain that the *plaintiffs* were entitled to discovery relating to the good faith defense.¹⁵⁰ These two remarks, taken together, beg resolution of who actually has the burden in the context of a good faith defense.

4. Determining the Nature of the Standard

The *Franklin* decision is significant for another reason as well: it added an objective component to the good faith defense standard.¹⁵¹ In most cases, the standard has been presumed to be purely subjective.¹⁵² In *Jordan v. Fox, Rothschild, O’Brien & Frankel*,¹⁵³ the U.S. Court of Appeals for the Third Circuit quoted language from the Fifth Circuit’s opinion in the remand of *Wyatt* that included both a subjective and objective component of the good faith defense,¹⁵⁴ yet determined

¹⁴⁴ *Id.* at *16–17.

¹⁴⁵ *Id.* at *16–18.

¹⁴⁶ *Id.* at *17 (applying a standard that not only places the burden on the defendant, but also requires both a subjective and an objective inquiry).

¹⁴⁷ 998 F. Supp. 612 (D. Md. 1998). See *supra* notes 108–12 and accompanying text for a summary of the facts and disposition in *Sallie*.

¹⁴⁸ *Id.* at 621–22.

¹⁴⁹ *Id.* at 625.

¹⁵⁰ *Id.* at 621–22.

¹⁵¹ See *Franklin*, 2000 U.S. Dist. LEXIS 19651, at *17–18.

¹⁵² See, e.g., Lombardi, *supra* note 93, at 412 (“It is clear from the following that a good faith defense is different from qualified immunity. . . . A good faith defense will require that the plaintiff show that the defendant had a subjective appreciation that his or her acts deprived the plaintiff of his or her constitutional rights.”).

¹⁵³ 20 F.3d 1250 (3d Cir. 1994).

¹⁵⁴ *Id.* at 1276 (quoting *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993), *on remand from* 504 U.S. 158 (1992), *cert. denied*, 510 U.S. 977 (1993)). The remand decision of *Wyatt*

that good faith for private section 1983 defendants “depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.”¹⁵⁵

Despite the tendency of courts to view the good faith defense as a subjective defense, nothing in the language of either *Wyatt* or *Richardson* indicates that the possible defense would be a subjective inquiry.¹⁵⁶ The Supreme Court, in those cases, has left open for interpretation whether the good faith defense would be based on a subjective inquiry, an objective inquiry, or a showing of both subjective and objective good faith.¹⁵⁷ This possibility helps explain Chief Justice Rehnquist’s discussion of the blending of the objective and subjective inquiries found in his dissenting opinion in *Wyatt*.¹⁵⁸

In light of the fact that the Supreme Court has left room for the good faith defense to be molded, Justice Kennedy’s discussion of the evolution of qualified immunity in his concurring opinion in *Wyatt* could potentially foreshadow this evolution of the good faith defense.¹⁵⁹ Just as lower courts have looked to the common law for guidance to define the good faith defense, Justice Kennedy noted that “[t]he good-faith and probable-cause defense evolved into our modern qualified-immunity doctrine.”¹⁶⁰ Justice Kennedy acknowledged that qualified immunity had its origin

used emphatic language to declare that the Supreme Court’s standard for the good faith defense contains both an objective and a subjective component: “all of the Justices agreed that plaintiffs seeking to recover on these theories were required to prove that defendants acted with malice *and* without probable cause.” *Wyatt*, 994 F.2d at 1119. In addition, the Fifth Circuit declared that private § 1983 defendants would only be liable for damages if they “failed to act in good faith in invoking the unconstitutional state procedures, that is, if they either *knew or should have known* that the statute upon which they relied was unconstitutional.” *Id.* at 1118 (emphasis added). This either/or explanation of the cause of action suggests that a good faith defense could be successful by an objective or by a subjective showing of good faith. *See id.* It should be noted, however, that the *Wyatt* remand decision was also careful to declare that the burden of affirmatively showing malice and probable cause belongs to the plaintiff. *Id.* at 1119.

¹⁵⁵ *Jordan*, 20 F.3d at 1277. A Pennsylvania district court, relying on *Jordan*, also concluded good faith applied in cases where the defendant acted with subjective good faith. *See Egervary v. Rooney*, No. 96-3039, 2000 U.S. Dist. LEXIS 11654, at *20–21 (E.D. Pa. Aug. 15, 2000), *aff’d sub nom.*, *Egervary v. Young*, 366 F.3d 238 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 868 (2005).

¹⁵⁶ *See Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (“[W]e do not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on *good faith and/or probable cause*.”) (emphasis added); *see also Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (quoting *Wyatt*, 504 U.S. at 169).

¹⁵⁷ *See Wyatt*, 504 U.S. at 169; *Richardson*, 521 U.S. at 413.

¹⁵⁸ *See Wyatt*, 504 U.S. at 176–78 (Rehnquist, C.J., dissenting); *see also supra* notes 71, 78 and accompanying text.

¹⁵⁹ *See Wyatt*, 504 U.S. at 170–71 (Kennedy, J., concurring).

¹⁶⁰ *Id.* at 170 (Kennedy, J., concurring).

in the common law, but discussed its sharp departure from this original formulation.¹⁶¹

III. RECOMMENDATIONS

Considering the various approaches courts have taken to define the good faith defense, what is needed is a Supreme Court decision defining the parameters of the good faith defense and providing lower courts with direction as to how to adjudicate cases in which this defense arises. This Part discusses possibilities and makes recommendations relating to some of the questions presented in Part II. Specifically, what contours of the good faith defense will best serve the purposes of the defense, and what implications would formal recognition and concrete definition of this defense have on § 1983 litigation?

A. Possible Contours of the Good Faith Defense

Each time the Supreme Court has mentioned the good faith defense in the context of § 1983 litigation, it has passed on the issue, declaring it not properly before the Court.¹⁶² Before the contours of the good faith defense can be defined, a formal recognition by the Court is needed to establish that such a defense does in fact exist and is available to private defendants to § 1983 actions. Once this principle is affirmatively established, the Court can decide the specific reach and function of this defense.

Determining the precise contours of the good faith defense will be a more challenging question. Perhaps a solid definition for this defense will not be possible from a single ruling, but rather will need to be developed by the Court over time. As noted above, the modern qualified immunity standard, the most closely related concept for public officials defending against § 1983 actions, has changed and developed over a series of cases.¹⁶³

This development of the qualified immunity standard may be a source to help sculpt a cogent good faith defense standard for private § 1983 defendants. Before the Court decided *Harlow v. Fitzgerald*,¹⁶⁴ its previous standard had included *both*

¹⁶¹ *Id.* Justice Kennedy observed that, "[i]n the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards." *Id.* To support this proposition, Justice Kennedy quoted language from *Anderson v. Creighton*, 483 U.S. 635, 645 (1987), that described the significance of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in redefining the qualified immunity standard. *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring).

¹⁶² See *Wyatt*, 504 U.S. at 169; *Richardson*, 521 U.S. at 413–14; see also *supra* notes 42, 57 and accompanying text.

¹⁶³ See *supra* Part I.B.

¹⁶⁴ 457 U.S. 800 (1982).

an objective and a subjective component.¹⁶⁵ This standard was later transformed to include only an objective analysis.¹⁶⁶ The defense of good faith has traditionally been a subjective standard.¹⁶⁷ Because a subjective analysis is a fact-based inquiry, courts have been slow to dismiss § 1983 actions on the basis of this defense early in the litigation process.¹⁶⁸ This, however, does not need to be the case.

Chief Justice Rehnquist's dissenting opinion in *Wyatt* offered a description of how the good faith defense might work by incorporating both subjective and objective components.¹⁶⁹ Rehnquist's objective analysis asked whether the defendant had probable cause to bring a replevin action in the prior litigation;¹⁷⁰ and his subjective analysis asked whether the defendant acted without malice in instituting the underlying replevin action.¹⁷¹ Transferring this analysis to the prison context, an objective inquiry might involve determining whether an official reasonably would have known that his action violated the plaintiff's clearly established constitutional rights;¹⁷² and a subjective analysis might inquire as to whether the official in question actually knew his conduct had violated an inmate's constitutional rights.

With regard to a public prison official, a qualified immunity analysis asks only the objective question of whether the official violated a clearly established constitutional right of which the official reasonably should have known.¹⁷³ A good faith defense inquiry for a private prison official might similarly rely on an objective analysis, but blend a subjective component into the legal framework. This could function as a burden-shifting approach.

B. Burden Shifting

A private § 1983 defendant wishing to raise a good faith defense might carry the initial burden of proving his actions objectively not to be in violation of clearly established constitutional rights of which the official should have known. If the defendant can meet this burden of proof, the burden could then shift to the plaintiff to put forth evidence that the defendant subjectively knew that his actions violated the plaintiff's constitutional rights. Under such a scheme, trial courts would be able

¹⁶⁵ See *supra* notes 58–59 and accompanying text.

¹⁶⁶ See *supra* notes 58–59 and accompanying text.

¹⁶⁷ See *Duncan v. Peck*, 844 F.2d 1261, 1266 (6th Cir. 1988) ("In short, good faith immunity is based on an objective analysis, while a good faith defense includes subjective factors.").

¹⁶⁸ See *supra* note 70 and accompanying text.

¹⁶⁹ See *supra* notes 71, 78 and accompanying text.

¹⁷⁰ See *Wyatt v. Cole*, 504 U.S. 158, 178 (1992) (Rehnquist, C.J., dissenting).

¹⁷¹ See *id.* at 177.

¹⁷² See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (announcing the modern qualified immunity standard in terms of an objective question).

¹⁷³ *Id.*

to tailor discovery to allow plaintiffs the opportunity to seek evidence that private officials, subject to § 1983, acted in bad faith in engaging in conduct that violated the plaintiff's constitutional rights. At the same time, however, if the plaintiff is unable to put forth evidence of bad faith, the action could be dismissed at the summary judgment phase.

This structure would both serve the purposes of § 1983 as a tool for avenging constitutional violations, and would provide private § 1983 defendants with greater protections than are currently available to them under the law. Such a system would also promote the values of judicial efficiency. Once the defendant has shown objective good faith, the trial judge could limit discovery to prevent overburdening the defense, while still providing the plaintiff with the opportunity to find and present evidence of bad faith.

C. Interlocutory Appeal

Another characteristic of qualified immunity that might be considered when assessing the contours of the good faith defense is the availability of interlocutory appeal. The *Wyatt* Court highlighted the party's ability to immediately appeal denials of qualified immunity as one of the important characteristics of the doctrine.¹⁷⁴ Qualified immunity provides more than a shield to liability, but also an immunity from having to stand trial.¹⁷⁵ As the *Wyatt* Court pointed out, where qualified immunity is denied in error, the immunity-from-suit aspect of the doctrine is lost.¹⁷⁶

It is important to recognize, however, the distinction between qualified immunity and any proposal for how a good faith defense may be crafted. Although a good faith defense may allow for § 1983 actions to be dismissed during the early stages of the litigation process,¹⁷⁷ the good faith defense is still a defense, not an immunity from suit. The *Wyatt* opinion carefully noted that because of this distinction, regardless of any similarity between qualified immunity and the good faith defense, interlocutory appeal could not be available to private § 1983 defendants asserting the defense.¹⁷⁸ Following such a clear expression from the Supreme Court on this matter, it is clear that a negative court ruling on the issue of the good faith defense cannot be immediately appealed.

¹⁷⁴ See *Wyatt*, 504 U.S. at 166 (citing *Mitchell v. Forsyth*, 472 U.S. 511 (1985)).

¹⁷⁵ See *id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* Part II.A-B.

¹⁷⁸ *Wyatt*, 504 U.S. at 166-67 & n.2; accord *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 n.33 (3d Cir. 1994) ("The policies that permit a government actor who is denied summary judgment on a qualified immunity defense an immediate right to appeal do not clearly apply to a private person's claim of good faith.").

IV. IMPLICATIONS

This Note has considered the good faith defense within the context of the privatization of state prisons because of the relationship of this concern to the facts facing the Supreme Court in *Richardson v. McKnight*,¹⁷⁹ and because of the significance of the trend of states toward privatizing corrections.¹⁸⁰ The question of the availability of the good faith defense for private-party § 1983 defendants, however, extends beyond the private prison context. The work of a number of traditional government services are routinely contracted to private organizations at all levels of government.¹⁸¹ Some such functions are auxiliary to correctional services, such as drug and alcohol treatment programs, while others are services provided to other sectors of the population or to the public more generally, such as emergency medical services, ambulance service and programs for the elderly.¹⁸²

The *Richardson* Court recognized that resolution of issues relating to private prisons could implicate other realms of government privatization as well.¹⁸³ Specifically, the Court listed as examples electricity production, waste disposal, and mail delivery.¹⁸⁴ Section 1983 litigation could easily arise in relation to any of these areas of public-private cooperation to provide public services. Given the potentially far-reaching implications of this matter, resolution of the good faith defense question becomes even more significant.

CONCLUSION

The privatization of government services, particularly state corrections, is a trend that is ever-increasing in significance. As states rely to a greater degree on private sector cooperation and private sector contracting to provide public services, the resolution of legal questions relating to § 1983 liability for private-party defendants becomes ever more important. In both the *Wyatt* and *Richardson* decisions, of 1992 and 1997 respectively, the Supreme Court denied private actors qualified immunity when confronted with § 1983 liability, but, in both cases, the Court also conceded that private defendants might have a defense of good faith available to

¹⁷⁹ 521 U.S. 399 (1997).

¹⁸⁰ See *supra* notes 1–7 and accompanying text.

¹⁸¹ See, e.g., *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (recognizing the privatization of federal prisons); *Richardson*, 521 U.S. 399 (reviewing an action deriving from the privatization of state prisons). In an article published in the *Vanderbilt Law Review*, E.S. Savas enumerated some of these regularly privatized functions. E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 890–93 (1987) (discussing the privatization of prisons and other government functions at the local level).

¹⁸² See Savas, *supra* note 181, at 890–91.

¹⁸³ See *Richardson*, 521 U.S. at 408–09.

¹⁸⁴ *Id.* at 409.

them.¹⁸⁵ What is needed from the Court is a formal recognition of the good faith defense available to private-party § 1983 defendants, and a definition as to the exact contours, burdens and proper resolution of cases in which defendants raise this defense.

¹⁸⁵ See *supra* notes 11–12, 40–57 and accompanying text.