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A CIRCUMSTANTIAL DEFENSE: DETERMINING THE APPLICABILITY OF THE GOOD FAITH DEFENSE FOR CAMPUS SECURITY IN § 1983 CASES

I. INTRODUCTION

As suits against universities become more prevalent, university officials are finding themselves facing liability in their individual capacities.¹ University officials are sometimes named in the same suit along with the university, but they may be left facing liability even after the university has been dismissed from the suit, particularly in civil rights lawsuits.² In lawsuits stemming from 42 U.S.C. § 1983 for constitutional rights violations, campus police and campus security may not be entitled to qualified immunity, like they would be if they were working directly for law enforcement.³ The affirmative defense of good faith may provide an alternative for these defendants, but may only apply if certain circumstances exist.⁴

II. § 1983: FROM THE CIVIL WAR TO CIVIL RIGHTS

If a citizen has been deprived of his or her constitutional rights by a government official or any person acting under the color of law, § 1983 allows the citizen to bring an action against the “state actor.”⁵ The statute

¹ See *infra* note 58.

² See *infra* note 58.

³ See *infra* note 14, 63.

⁴ See *infra* notes 14-15.

⁵ See 42 U.S.C. § 1983 (2006). The statute allows for civil liability when a person acting under the color of law causes “any citizen of the United States or other person within the jurisdiction thereof to [be deprived] of any rights, privileges, or immunities secured by the Constitution and laws” 42 U.S.C. § 1983; see also *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (defining state action requirements). The *Lugar* case broadly defines a state actor as someone who 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. The Supreme Court also held that the actions must be “fairly attributable to the State.” *Id.*; see also *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (listing state actor tests). *Wolotsky* examined three tests for determining if an individual is a state actor – the public function test, the state compulsion test, and the nexus test. See *Wolotsky*, 960 F.2d at 1335. Under the public function test, an individual is a state actor if he acts in a role “traditionally exclusively reserved to the State, such as holding elections, or eminent domain.” *Id.* (citations omitted). The state compulsion test requires that the State “exercise such coercive power or provide such significant encouragement,

arose out of the Civil Rights Act of 1871, in response to violence in the South following the Civil War.⁶ Although violence in the Reconstruction-era South was a catalyst for the Act, another purpose of the Act was to control the actions of state officials throughout the Union, who were not assuring equal protection for all.⁷ In creating the Civil Rights Act of 1871, Congress hoped to restore peace and justice by providing a remedy for the violation of civil rights.⁸ § 1983 actions were rarely brought until 1961, when the Supreme Court decided *Monroe v. Pape*.⁹ *Monroe* was decided at a time when the courts began enforcing civil rights and developing substantive constitutional rights.¹⁰ The *Monroe* Court reasoned that § 1983 was meant to protect citizens' constitutional rights from abuses by government officials.¹¹ The Court "revived" § 1983 following *Monroe*, but faced

either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Id.* The third test for determining if a private party is a state actor requires a nexus or "symbiotic relationship," which means there is a "sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* The *Wolotsky* court explained that a business subjected to state regulation would be insufficiently related to the state in order to be deemed a state actor under the nexus test. *See id.*

⁶ See *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (explaining Ku Klux Klan violence in South denied citizens civil rights); see also *Dist. of Columbia v. Carter*, 409 U.S. 418, 423, 425-30 (1973) (discussing historical origins of § 1983). *Carter* explained the South was increasingly violent after the Civil War ended, resulting from the emergence of the Ku Klux Klan and murders and assaults on both African-Americans and Union sympathizers. See *Carter*, 409 U.S. at 425. Due to rising instability in the South, President Ulysses S. Grant requested the 42nd Congress enact legislation to curb the violence, because state governments were incapable of handling the problem. *Id.* at 425-26.

⁷ See *Carter*, 409 U.S. at 427 ("Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection."); see also *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) ("[Section 1 of Act] was not a remedy against [the Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.").

⁸ See *Wilson*, 471 U.S. at 277; see also H.R. Con. Res. 3343, 96th Cong. (1979) (enacted). Congressman Mazzoli noted, "[§] 1983 was designed to allow citizens a neutral Federal forum to hear their complaints against local officials back in the 19th century." H.R. Con. Res. 3343; see also 42 U.S.C. § 1983. The Act was later codified as 42 U.S.C. § 1983. 42 U.S.C. § 1983, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title42/html/USCODE-2011-title42-chap21.htm> (stating "R.S. Sec. 1979 derived from act Apr. 20, 1871, ch. 22, Sec. 1, 17 Stat. 13.").

⁹ See William Hawkins, Note, *Section 1983: A Basic Understanding*, 12 AM. J. TRIAL ADVOC. 355, 356 (1988) (stating few § 1983 cases were brought before *Monroe v. Pape*).

¹⁰ See John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 802-04 (2003) (explaining effect of *Monroe v. Pape*). After *Monroe*, Congress revived 42 U.S.C. §§ 1982, 1985(2), and 1981, which "had been dormant for decades." *Id.* at 802.

¹¹ See *Monroe*, 365 U.S. at 197-99; see also 96 CONG. REC. 11,175 (1979) (statement of Congressman Mazzoli). During a debate over House Bill 3343, Congressman Mazzoli stated, "[u]nder current law, [§] 1983 of title 42, United States Code provides the basic remedy for civil suits against persons, States, or territories who abridge the constitutional freedoms of others while

criticism for “participating” in the civil rights movement, rather than letting Congress lead the revival of the Reconstruction statutes.¹² In recent times, § 1983 litigation has evolved to include a wide array of civil rights issues.¹³

A. *Origins and Evolution of § 1983 Defenses*

Following *Monroe v. Pape* and the explosion of § 1983 cases, defendants began asserting good faith immunity in such cases.¹⁴ The foundation of good faith immunity in § 1983 cases was a good faith reasonable belief that one’s actions were constitutional.¹⁵ The Supreme Court later explained qualified immunity emerged from the good faith immunity allowed in *Pierson*.¹⁶ Although the courts had allowed defendants to assert good faith immunity in § 1983 cases, the standard for asserting the immunity was unclear.¹⁷ The Supreme Court clarified good faith immunity re-

acting under color of local law.” 96 CONG. REC. 11,175; see also *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (denying qualified immunity to private citizen in replevin action). The Supreme Court found § 1983 was meant to “deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights.” *Wyatt*, 504 U.S. at 161 (citing *Carey v. Phipps*, 435 U.S. 247, 254-57 (1978)).

¹² White, *supra* note 10, at 802-3. Some thought the Court was “using the statutes as mere pretext for [its] participation” in the civil rights movement. *Id.* at 802. White explains, this criticism “was buttressed by the fact that Congress did respond in almost every area [in] which the Court revived Reconstruction-era statutes.” *Id.* at 804.

¹³ See *Wilson*, 471 U.S. at 273 (listing constitutional claims brought under § 1983). The *Wilson* opinion listed the wide variety of § 1983 claims courts heard following *Monroe*: “discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard . . .” *Id.* These claims seem to stretch beyond what Congress imagined when it enacted § 1983. See *id.* at 275.

¹⁴ See *Pierson v. Ray*, 386 U.S. 547, 557 (1967) (stating verdict should be for officers, if jury found officers acted with reasonable belief).

¹⁵ See *Pierson*, 386 U.S. at 555. When a police chief in Jackson, Missouri asserted good faith as a defense to arresting Caucasian and African-American clergymen who attempted to use segregated facilities, the Court reasoned, “A policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.” *Id.* Further, the Court determined good faith is implicit in tort liability. See *id.* at 556-57.

¹⁶ See *Wyatt*, 504 U.S. at 170. (Kennedy, J., concurring) (explaining origins of qualified immunity); see also *Pierson*, 386 U.S. at 554-55 (commenting congressional record does not indicate intent to abolish all immunities in such cases). The *Pierson* Court further explained that the common law neither granted police officers absolute immunity nor were the officers seeking absolute immunity. See *id.* at 555; see also *Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (acknowledging qualified immunity for executive branch officers).

¹⁷ See *Wood v. Strickland*, 420 U.S. 308, 315 (1975) (discussing lack of clarity in good faith immunity standards). The Court noted there was consistent acknowledgment of good faith immunity, but explained that courts disagreed about the factors of the immunity “or have not given specific content to the good-faith standard.” *Id.*

quired both subjective and objective elements.¹⁸ Later, the Court's focus shifted purely to the objective element, which served as the foundation for the elements of qualified immunity.¹⁹

With the evolution of good faith immunity to qualified immunity, the Supreme Court began fashioning a test for determining if immunity existed.²⁰ The test that the Court set forth for qualified immunity looked to the reasonableness of the defendant's actions under the circumstances.²¹ The Court also continued to look to historical origins and policy arguments when deciding whether qualified immunity existed for private defendants in § 1983 cases.²²

The primary focus of qualified immunity is establishing reasonableness of the action taken by requiring a showing that the right was clearly established.²³ The actions of the government actor must be objectively rea-

¹⁸ See John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1300 (2012) (noting *Wood* and *Scheuer* employed both objective and subjective requirements but differed as to application).

¹⁹ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The *Harlow* decision rationalized the Court's focus on the objective standard for immunity by explaining that if an official was held to an objective standard, "he should be made to hesitate." *Id.* at 819. Conversely, if a right is not clearly established, the objective standard would allow the official to perform his duties freely, which would ultimately serve the public interest. *Id.*

²⁰ See *Saucier v. Katz*, 533 U.S. 194, 207-08 (2001) (discussing qualified immunity test).

²¹ See *Saucier*, 533 U.S. at 207-08 (determining qualified immunity standard). Qualified immunity requires a determination, first, that the conduct did not violate a clearly established right, and second, that a reasonable person in the position of the government official would have been aware of the existence of the right. See *id.* Later, the Court retreated from the requirement that the prongs for the qualified immunity test be conducted in sequential order. See *Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009) (withdrawing from mandate set forth in *Saucier*); Karen M. Blum, *Qualified Immunity: Further Developments in the Post-Pearson Era*, 27 *TOURO L. REV.* 243, 244 (2011) ("*Pearson* does not abolish the two-step approach, but rather makes it discretionary.") (emphasis added). Professor Blum notes, "the Court has left it to the lower court judges to decide....what 'order of decisionmaking will best facilitate the fair and efficient disposition of each case.'" Blum, *supra*, at 244 (quoting *Pearson*, 555 U.S. at 243). Some courts follow the original sequential order by determining if a plaintiff has asserted a violation of a constitutional right. See *id.* at 246. After *Pearson*, however, many courts have turned first to the reasonableness prong, which looks to the merits of the case. See *id.* at 248-49, 255.

²² See *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (following reasoning of historical precedent when deciding qualified immunity issue); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981) ("Indeed, because the 1871 Act was designed to expose state and local officials to a new form of liability, it would defeat the promise of the statute to recognize any preexisting immunity without determining both the policies that it serves and its compatibility with the purposes of § 1983."); see also *Mejia v. City of New York*, 119 F. Supp. 2d 232, 269 (E.D.N.Y. 2000) (holding private actors likely entitled to qualified immunity if policy and history were only factors). The *Mejia* court then reviewed the objective reasonableness factor to determine qualified immunity. See *Mejia*, 119 F. Supp. 2d at 285; see generally *Private Party Immunity from Section 1983 Suits*, 123 *HARV. L. REV.* 1266, 1267-71 (2010) (discussing qualified immunity standards).

²³ See generally John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV.

sonable, or the actor will not be granted immunity.²⁴ Unlike an affirmative defense, qualified immunity provides immunity from suit.²⁵ Moreover, defendants who successfully assert qualified immunity are “shielded” from discovery and trial.²⁶ However, there is wide judicial discretion regarding qualified immunity because the Supreme Court has not defined “clearly established.”²⁷ Further, even if the defendant has qualified immunity, a plaintiff may still prevail on injunctive relief, because qualified immunity only shields a defendant from monetary damages.²⁸

As citizens began to bring more § 1983 cases before the courts, the Supreme Court demonstrated reluctance to extend qualified immunity to private citizens.²⁹ The Court has only granted qualified immunity to pri-

1295, 1302-07 (2012) (discussing establishing reasonableness for qualified immunity).

²⁴ See *Liebowitz v. City of Mineola*, 660 F. Supp. 2d 775, 788 (E.D. Tex. 2009) (explaining government officials will not be subject to liability for objectively reasonable actions).

²⁵ *Id.*; see *Williams*, *supra* note 23, at 1298 (clarifying dismissal of defendant from suit if either prong of two-prong test not met).

²⁶ See *Williams*, *supra* note 18, at 1298 (explaining qualified immunity has developed so as to shield defendants from discovery and trial); see also *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (discussing availability of immediate interlocutory appeal for denial of qualified immunity in federal courts). The *Fankell* court explained qualified immunity provides other advantages to defendants. See *Fankell*, 502 U.S. at 915. For example, officials are shielded from damages if qualified immunity is “found applicable at any stage of the proceedings.” *Id.* The defendant also gains an advantage if the plaintiff’s “complaint fails to allege a violation of clearly established law or when discovery fails to uncover evidence sufficient to create a genuine issue whether the defendant committed such a violation.” *Id.*

²⁷ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (warning courts not to define “clearly established” law at high level of generality). Justice Scalia, writing for the majority, admonished the lower courts: “The Court of Appeals also found clearly established law lurking in the broad ‘history and purposes of the Fourth Amendment.’ We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.” *Id.* (citation omitted).

²⁸ See *Williams*, *supra* note 18, at 1299.

²⁹ See *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (holding private parties in replevin action were not entitled to qualified immunity). Under Mississippi’s law at the time, an individual “could obtain a court order for seizure of property possessed by another by posting a bond and swearing to a state court that the applicant was entitled to that property and that the adversary ‘wrongfully took and detain[ed] or wrongfully detain[ed]’ the property” and judges had no authority “to deny a writ of replevin.” *Id.* at 160 (alteration in original) (citation omitted). In this case, the lower court granted an order to the county sheriff to seize his property from Wyatt on behalf of his former business partner. *Id.* Wyatt then brought suit seeking injunctive relief and damages from Cole, the sheriff, and the deputies involved. *Id.* The *Wyatt* Court reasoned that the qualified immunity allowed in *Harlow* was based on reasons that “were based not simply on the existence of a good faith defense at common law, but on the special policy concerns in suing government officials.” *Id.* at 167. Such policy concerns included “excessive disruption of government” and ensuring high-quality candidates for government employment were not discouraged by threat of suit. *Id.* at 166-67. But see *id.* at 177 (Rehnquist, C.J., dissenting) (arguing common-law defense of good faith at time of § 1983 adoption suggests qualified immunity).

vate citizens in rare circumstances.³⁰ In denying qualified immunity to private citizens, the Court has focused predominantly on the different systems in which government employees and private employees act.³¹ Additionally, the Court also emphasized the differences between qualified immunity and other legal defenses.³² However, while the Court ruled on qualified immunity issues, it continued to decline to address the affirmative defense of good faith.³³ It remains unclear whether the Court will allow defendants

³⁰ See *Richardson v. McKnight*, 521 U.S. 399, 404 (1997) (holding qualified immunity does not apply to private prison guards). The Court explained the history and purposes of the statute should determine if a private individual is entitled to qualified immunity. *Id.* at 412; see also Barbara Kritchevsky, Symposium, *Private Parties as Defendants in Civil Rights Litigation: Civil Rights Liability of Private Entities*, 26 CARDOZO L. REV. 35, 66-67 (2004) (noting *Richardson* reasoning applied to other cases of private entities in § 1983 cases). Kritchevsky explains the lower courts have not applied *Richardson* uniformly, citing examples of the defendants working closely with the State or “are enlisted by law enforcement officials to assist in making an arrest.” Kritchevsky, *supra*, at 67. However, the majority of lower courts “often apply the Supreme Court’s history and policy analysis,” taking an approach that recognizes “the distinction between government and private defendants may be more important for § 1983 purposes than the distinction between individual and entity.” *Id.* at 67-68; see also *Mejia v. City of New York*, 119 F. Supp. 2d 232, 262 (E.D.N.Y. 2000) (analyzing history of private citizens’ immunity when assisting law enforcement). The court reasoned while “there was a firmly rooted tradition” of private citizens assisting law enforcement by 1871, it is unclear how these individuals were treated at common law; although, at that time, it was common for citizens to be penalized for not providing aid to the sheriff. *Mejia*, 119 F. Supp. 2d at 262.

³¹ *Richardson*, 521 U.S. at 410. The *Richardson* court described the different challenges faced by government systems and private systems:

They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees.

Id. at 410-11. However, performance of a governmental function does not support immunity for a private person and “correctional functions have never been exclusively public.” *Id.* at 406, 408-09.

³² *Id.* at 403 (explaining differences between qualified immunity and other defenses). While other defenses focus on “the essence of the wrong,” qualified immunity is freedom from suit “whether or not [the defendant] acted wrongly.” *Id.* (citing *Wyatt v. Cole*, 504 U.S. 158, 171-72 (1992) (Kennedy, J., concurring)). In explaining the differences, the Court relied on Justice Kennedy’s concurrence in *Wyatt*. *Id.* Justice Kennedy explained immunity “impl[ies] that a wrong was committed but that it cannot be redressed.” *Wyatt v. Cole*, 504 U.S. 158, 173 (1992). Defenses to analogous torts like malicious prosecution and abuse of process, however, focus on whether or not the plaintiff has proven the actual elements of the torts. See *id.* at 172; see also *Gregg v. Ham*, 678 F.3d 333, 339-40 (4th Cir. 2012) (reiterating qualified immunity requirements).

³³ See *Richardson*, 521 U.S. at 413 (declining to rule on good faith defense because issue not before Court). But see Mark N. Ohrenberger, Note, *Prison Privatization and the Development of a “Good Faith” Defense for Private-Party Defendants to 42 U.S.C. § 1983 Actions*, 13 WM. &

to assert an affirmative good faith defense, as the Court has declined to address the issue.³⁴ Lower courts, however, have been amenable to allowing the defense.³⁵

B. Pushing the Door to Qualified Immunity Ajar: The Filarsky Decision

The Supreme Court has limited the availability of qualified immunity for private individuals, but recently permitted a private citizen to use the immunity.³⁶ While the Court's rulings seemed to change direction, its reasoning did not – the Court again looked to the history and purposes of the statute to determine the availability of qualified immunity for a defendant in certain circumstances.³⁷ By eliminating the distinction between those working full-time for the government and those working on some other basis, such as part-time or on a particular project, state actors would be able to anticipate when their actions may subject them to §1983 liability.³⁸ Alt-

MARY BILL OF RTS. J. 1035, 1038 (2005) (advocating for good faith defense for private prison guards).

³⁴ See *Wyatt*, 504 U.S. at 169 (“[W]e do not foreclose the possibility that private defendants faced with § 1983 liability under *Lugar v. Edmondson Oil Co.* could be entitled to an affirmative defense based on good faith and/or probable cause” (citation omitted)). On remand, the Fifth Circuit reasoned that good faith is particularly important for private actors, because the standard for qualified immunity is more demanding. *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993) (reasoning good faith more important for private actors). The lower *Wyatt* court reasoned good faith was so important because qualified immunity requires public officials to have heightened knowledge of the law. See *id.* at 1120.

³⁵ See *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3rd Cir. 1994) (finding good faith defense available to private actors); see also *Wyatt*, 994 F.2d at 1115 (affirming ruling for defendant because plaintiff did not show defendant failed to act in good faith).

³⁶ See *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012) (granting qualified immunity to private lawyer retained by City for personnel investigation).

³⁷ See *id.* at 1658. The Court reasoned private citizens were often engaged in public work at the time of the Civil Rights Act of 1871. *Id.* In discussing the nature of private lawyers working closely with the government when the Civil Rights Act of 1871 was enacted, Chief Justice Roberts invoked the memory of Abraham Lincoln, who was appointed prosecutor in a rape case in 1853. See *id.* at 1663-64. Public policy reasoning was also determinative to widening the availability of qualified immunity for private defendants, such as *Filarsky*. *Id.* at 1665-66. Allowing qualified immunity protects against the threat of suit deterring talented candidates from entering into government work. *Id.* “The government’s need to attract talented individuals is not limited to full-time public employees[.]” especially when there is a need for specialized knowledge or talent requiring the government to “look outside its permanent workforce to secure the services of private individuals.” *Id.* at 1665-66. Additionally, “Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag.” *Id.* at 1666.

³⁸ See *Filarsky*, 132 S. Ct. at 1666. Nonetheless, Justice Sotomayor clarified in her concurring opinion qualified immunity does not necessarily apply to every private individual who works for the government “in some capacity,” because individuals would still need to fulfill the standard

though the *Filarsky* court's narrow holding pushed the door for qualified immunity ajar, uncertainty remained as to where the line is drawn with regard to private actors who work with the government.³⁹

C. *The Good Faith Defense: A Defense Rooted in Fairness*

The good faith defense appears to be rooted in fairness – particularly where a public official may be granted qualified immunity, but a private defendant would not be entitled to qualified immunity – because it provides an alternate defense for a private actor.⁴⁰ Good faith is an affirmative defense, but is less beneficial to the defendant than qualified immunity.⁴¹ However, the elements of the affirmative defense of good faith are similar to those required when the Supreme Court allowed defendants in § 1983 cases to assert good faith immunity, which also focused on reasonableness.⁴² Even though the Supreme Court has not affirmed the good faith defense, defendants are typically required to show both the subjective and objective element of the defense.⁴³ Unlike defendants who successfully as-

requirements for asserting qualified immunity. *Id.* at 1669 (Sotomayor, J., concurring).

³⁹ See *id.* at 1666.

⁴⁰ See *Franklin v. Fox*, No. C 97-2443 CRB, 2001 WL 114438, at *5 (N.D. Cal. Jan. 23, 2001) (finding unfairness where state actor allowed qualified immunity but not private actor).

⁴¹ See Sheldon Nahmod, *The Emerging Section 1983 Private Party Defense*, 26 CARDOZO L. REV. 81, 88, n. 34 (2004) (noting good faith defense is compromise). The defense was a compromise of sorts between those who supported qualified immunity for private defendants and those who did not. *Id.* Compare *Johnson v. Fankell*, 520 U.S. 911, 915 (clarifying defendant is entitled to immediate interlocutory appeal of qualified immunity denial in federal courts), with *Palmer v. Garuti*, No. 3:06-CV-795 (RNC), 2009 WL 413129, at *7 (D. Conn. Feb. 17, 2009) (explaining good faith defense denial does not allow interlocutory appeal).

⁴² See *Wood v. Strickland*, 420 U.S. 308, 321 (1975) (finding both subjective and objective elements of good faith immunity); see also *Duncan v. Peck*, 844 F.2d 1261, 1266-67 (6th Cir. 1988) (describing good faith defense as both subjective and objective elements of good faith immunity).

⁴³ See *Duncan*, 844 F.2d at 1266-67 (discussing both elements); see also *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (finding defendant could assert good faith defense because both objective and subjective elements existed); see also Nahmod, *supra* note 41, at 95 (“The defense appears to have both a subjective part and an objective part, although at least one circuit has applied the defense erroneously by using only a subjective test.”). The *Clement* court determined that the actions of the towing company who seized the plaintiff's car were objectively reasonable because the towing company would not have been aware of the “constitutional defect,” which was “a lack of notice to the car's owner.” *Clement*, 518 F.3d at 1097. Further, the court reasoned, the surrounding facts and circumstances gave the defendant-towing company no reason to know of the constitutional defect. *Id.*; see also *Lewis v. McCracken*, 782 F. Supp. 2d 702, 715 (S.D. Ind. 2011) (denying good faith defense for defendant because he failed to demonstrate good faith elements); *Palmer*, 2009 WL 413129, at *7 (determining ambulance-defendants' belief that patient needed to be transported was subjectively and objectively reasonable). But see *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3rd Cir. 1994) (holding “private actors are entitled to a defense of subjective good faith . . .”); *J.M. v. Henderson*, No. 2:09-

sert qualified immunity, defendants who successfully assert the good faith defense must be able to show that they subjectively believed their actions were reasonable, due to the fault-based nature of the defense.⁴⁴ Although § 1983 actions are civil actions, the subjective belief element of the good faith defense seems akin to the mens rea requirement of many criminal offenses.⁴⁵

Additionally, there are many procedural differences between qualified immunity and the good faith defense.⁴⁶ Unlike qualified immunity, the good faith defense allows a case to move forward and proceed with discovery.⁴⁷ However, the defendant must raise the defense; the defendant also carries the burden of proving the elements of good faith.⁴⁸ Thus, a § 1983

cv-855, 2011 WL 4572007, at *5 (S.D. Ohio, Sept. 30, 2011) (allowing defendant to assert good faith defense). The *Henderson* court did not conduct an objective and a subjective element analysis; rather, the court concluded the individual acted in good faith because he relied on a court order. *Id.*; see also *Trujillo v. City of Ontario*, 428 F. Supp. 2d 1094, 1115-16 (C.D. Cal. 2006) (reasoning good faith defense never explicitly adopted by Supreme Court or Ninth Circuit). The *Trujillo* court noted that even if it were to accept the defense of good faith, the private defendant had not fulfilled the objective element of the defense. *Id.* at 1117.

⁴⁴ *Palmer*, 2009 WL 413129, at *6-7 (“Good faith is a normative defense clothed in principles of fault.”); see also Nahmod, *supra* note 43, at 91-92 (“For Justice Kennedy, the successful assertion of an immunity (either absolute or qualified) from both suit and the need to defend is not necessarily inconsistent with a determination of unconstitutionality and the wrongfulness of a defendant’s conduct, while the successful assertion of a defense such as an affirmative good faith defense for private defendants does have implications for the wrongfulness of the allegedly unconstitutional conduct. In Justice Kennedy’s view, a private defendant who prevails on the basis of the good faith defense has not necessarily acted wrongfully.”). However, Professor Nahmod cautions the idea of wrongfulness in § 1983 cases as “both different from and more complicated than what Justice Kennedy implies.” Nahmod, *supra* note 41, at 92. Professor Nahmod argues this is in part because “tort norms are expected to govern private conduct, while constitutional norms ordinarily govern official rather than private conduct, except in those cases where private parties are state actors and act under color of law.” *Id.*

⁴⁵ See 21 AM. JUR. 2D *Criminal Law* § 117 (2013) (defining mens rea). “‘Mens rea’ refers to a mental state, often an element of the offense, which expresses the intent necessary for a particular act to constitute a crime.” *Id.* Like the mens rea element of a criminal offense, the good faith defense’s subjective belief element looks to the defendant’s mental state in regard to the alleged violation. See *Clement*, 518 F.3d at 1097 (finding defendant had no reason to know of “constitutional defect”). But see *Jordan*, 20 F.3d at 1277 (suggesting § 1983 has no mens rea requirement). Any mens rea requirement has “been read . . . into it” by the Supreme Court. *Id.*

⁴⁶ See Nahmod, *supra* note 41, at 96 (explaining procedural advantages of qualified immunity).

⁴⁷ See Nahmod, *supra* note 43, at 96 (“Discovery is typically deferred until the defendant’s qualified immunity summary judgment motion is addressed by the court.”); see also *Franklin v. Fox*, No. C 97-2443 CRB, 2001 WL 114438, at *5 (N.D. Cal. Jan. 22, 2001) (explaining plaintiffs are allowed to conduct discovery investigating defendant’s subjective intent for good faith defense).

⁴⁸ See *Palmer*, 2009 WL 413129, at *6 (finding ambulance workers established good faith defense elements sufficient for judgment as matter of law); Nahmod, *supra* note 43, at 95 (describing good faith as an affirmative defense). The burden is then on the defendant, who must prove the elements of the defense by a preponderance of the evidence, which is determined by the

claim is likely to proceed further when the defendant asserts the good faith defense, unlike when the defendant successfully asserts qualified immunity.⁴⁹

III. FACTS

A. Establishing § 1983 Claim

To establish a claim under 42 U.S.C. § 1983, one must show that each defendant acted under color of state law and that they caused the plaintiff to be deprived of a right secured by the Constitution and the laws of the United States.⁵⁰ It may appear that employees of private higher education institutions are nearly free from § 1983 liability under the various color of law tests.⁵¹ However, where campus police officers and security guards have been granted statutory powers, they may be subject to § 1983 liability if they are considered state actors or are performing state action.⁵²

jury, rather than the judge. Nahmod, *supra* note 41, at 95; *see also* Ohrenberger, *supra* note 33, at 1058 (detailing defendant's burden when establishing good faith defense).

⁴⁹ Nahmod, *supra* note 43, at 96 (stating denial of good faith defense does not stop trial if defendant files interlocutory appeal); Ohrenberger, *supra* note 33, at 1058 (explaining courts are unclear as to when to rule on good faith defense).

⁵⁰ Howerton v. Gabica, 708 F.2d 380, 382 (9th Cir. 1983) (explaining burden of establishing § 1983 claim). *See generally* Lugar v. Edmondson Oil Co., 457 U.S. 922, 931, 939 (listing "under color of law" tests: "public function," "state compulsion," "nexus," and "joint action").

⁵¹ *See* Rinsky v. Trustees of Boston Univ., No. 10cv10779-NG, 2010 WL 5437289, at *3 (D. Mass. Dec. 27, 2010) ("[P]rivate institutions meet the state action requirements 'only in rare circumstances.'" (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1130 (11th Cir. 1992))). *But see* *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (finding public middle school official entitled to qualified immunity for violation of student's constitutional rights).

⁵² *See* *Boyle v. Torres*, 756 F. Supp. 2d 983, 993, 995 (N.D. Ill. 2010) (holding University of Chicago police officers are state actors with full police powers). A state statute conferred full police power to private university peace officers. *Id.* at 995. Defendants relied on *Wade v. Byles*, wherein the Seventh Circuit determined that a security guard working for a private company was not a state actor, but the *Boyle* court found this case was "easily distinguished" because the guard in *Boyle* had far less authority than the UCPD Officers, while the UCPD had authority to "detain individuals for criminal activity of all kinds," rather than merely reporting it to the local police department and had a broader territory to police than the security guard. *See* *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996); *Id.* In regard to state exclusivity, the *Boyle* court noted "it is doubtful that any function has ever been exclusively performed by the state." *Id.* at 995; *see also* *Severson v. Bd. of Trs. of Purdue Univ.*, 777 N.E.2d 1181, 1194 (Ind. Ct. App. 2002) (ruling campus police officers were "persons" amenable to suit under § 1983). In *Severson*, while the court found Purdue University's employees to be amenable to suit as individuals, the court found Purdue University as an entity was not amenable to suit because it was not a "person." *Id.* at 1193; *see also* *Scott v. Northwestern Univ. Sch. of Law*, No. 98C6614, 1999 WL 134059, at *6 (W.D. Ill. Mar. 8, 1999) (holding statute authorizing university's police powers also confers responsibility to protect constitutional rights). The court also noted that the Supreme Court "has explicitly left open the question of whether 'private police forces' may be considered state actors." *Id.* at *3 (citing

Other courts have held that private police forces must exercise plenary police powers, rather than powers that are “merely police-like” to act under the color of law.⁵³

Therefore, a plaintiff’s first hurdle in bringing a § 1983 suit against private campus police or security officers is establishing that the violation was in fact state action.⁵⁴ The state action requirement may prove to be a significant hurdle for plaintiffs who wish to bring suit against these private actors.⁵⁵ When a plaintiff is able to successfully establish a § 1983 claim against private campus police or security, the court’s reluctance to allow qualified immunity for private actors inadvertently creates an injustice because the public university counterparts would likely be granted qualified immunity.⁵⁶ However, despite this potential for injustice, private campus police and security guards should not be granted qualified immunity because the same policy concerns for granting the immunity to government employees do not apply to private officers.⁵⁷

B. § 1983 Suits and Universities

Although plaintiffs face challenges in asserting § 1983 claims against campus safety officers, these officers are nevertheless becoming exposed to § 1983 suits through their positions, similar to traditional police officers.⁵⁸ Recent cases indicate that students are beginning to assert civil

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 163 (1978)); *see also* Johnson v. Univ. of San Diego, No. 10CV0504-LAB NCS, 2011 WL 4345842, at *7 (S.D. Cal. Sept. 16, 2011) (“Public safety officers are the quintessential public-private actors whose conduct can expose them to liability under § 1983.”); Bradley Silverman, *Under Color of Law: What Rights Do College Students Have Against Campus Police?* WASHINGTON MONTHLY (January 6, 2012, 12:28 PM) http://www.washingtonmonthly.com/college_guide/blog/under_color_of_law_what_rights.php?page=all (“Brown [University] police may be constitutionally liable for actions . . . if they are found to be the legal equivalent of police officers.”). *But see* Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of District of Columbia v. Heller and McDonald v. City of Chicago*, 19 VA. J. SOC. POL’Y & L. 1, 49-50 (2011) (suggesting college officials would not be liable for Second Amendment violations because of qualified immunity).

⁵³ *See* Durante v. Fairlane Town Ctr., 201 F. Appx. 338, 341 (6th Cir. 2006) (distinguishing between private and state action turns on whether action is “merely police-like” or plenary). The court elaborated that “the private actor must perform a public function which has traditionally and exclusively been reserved to the State.” *Id.* (emphasis in original).

⁵⁴ *See supra* note 50 and accompanying text (explaining how to establish § 1983 claim).

⁵⁵ *See generally* Lugar, 457 U.S. at 931, 939 (describing color of law tests plaintiffs need to satisfy).

⁵⁶ *See supra* note 40 and accompanying text.

⁵⁷ *See infra* note 89 and accompanying text.

⁵⁸ *See* Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *1 (S.D. Cal. Sept. 16, 2012) (noting student filed suit against university and a university public safety officer); Bean v. Ind. Univ., 855 F. Supp. 2d 857, 859-60 (S.D. Ind. 2012) (showing plain-

claims against campus security officers under § 1983.⁵⁹ Unlike traditional police officers who are considered state actors, state laws do not always identify campus police and security officers as state actors, even though state statutes often grant traditional police powers to them.⁶⁰ However, there are divisions among campus police and security guards that blur the line between who may be entitled to qualified immunity, good faith, or may not even be subject to § 1983 liability.⁶¹ Even on individual campuses,

tiff filed claim against university and university police officers); *Klunder v. Brown Univ.*, C.A. No. 10-410 ML, 2011 WL 2790178, at *1 (D. R.I. Jul. 13, 2011) (detailing how Brown University student sued public safety officer in his individual capacity). *But see* *Akins v. San Diego Cmty. Coll. Dist.*, No. 12CV00576, 2012 WL 1299262, at *1 (S.D. Cal. Apr. 16, 2012) (indicating *pro se* plaintiff would not name campus police as defendants because he “could not and will not implicate the officers for doing their job”); *see also* *Morse v. Regents of Univ. of Cal.*, 821 F. Supp. 2d 1112, 1119 (showing plaintiff-journalist sued university police chief in his individual capacity); Complaint for Damages for Violation of Civil Rights with Supplemental Claims for Violation of the California State Constitution and Statutes at 2, *Baker v. Katehi*, No. 12-CV-0040-JAM-EFB (E.D. Cal. Feb. 22, 2012) (detailing suit filed against university and its police officers for civil rights violations). The suit was brought against the university as well as the lieutenant of the University of California at Davis police department in his individual capacity, under another civil rights statute: 42 U.S.C. § 1367. *See* Complaint for Damages for Violation of Civil Rights with Supplemental Claims for Violation of the California State Constitution and Statutes, *supra*; *see also* Brett A. Sokolow, W. Scott Lewis, James A. Keller & Audrey Daly, *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319, 321-33 (2008) (listing and detailing potential causes of action against universities for violence on campus). Public colleges and universities, however, can assert sovereign immunity for on-campus violence committed by third parties. *See* Sokolow, Lewis, Keller & Daly, *supra*, at 347.

⁵⁹ *See, e.g.*, *Goodnight v. Lester*, No. CIV-11-691-D, 2012 WL 4062808, at *1 (W.D. Okla. Sept. 14, 2012) (indicating plaintiff filed suit against both university and campus police for § 1983 violation); *Johnson*, 2011 WL 4345842, at *1 (detailing plaintiff’s § 1983 claims); *Klunder*, 2011 WL 2790178, at *1 (noting suit brought against university and individuals associated with university); Silverman, *supra* note 52 (quoting law Professor Nahmod regarding *Klunder*’s importance because of potential for private university security officers’ liability). *See generally* Joel Epstein, *Breaking the Code of Silence: Bystanders to Campus Violence and the Law of College and University Safety*, 32 STETSON L. REV. 91, 105-115 (2002) (exploring campus safety laws); Lewis M. Wasserman, *Gun Control on College and University Campuses in the Wake of District of Columbia v. Heller and McDonald v. City of Chicago*, 19 VA. J. SOC. POL’Y & L. 1, 48-57 (2011) (detailing potential for Second Amendment lawsuits against universities and employees).

⁶⁰ *See Klunder*, 2011 WL 2790178 at *4-6 (reviewing state action requirements for private actors). *But see* *Commonwealth v. Carr*, 918 N.E.2d 847, 852 (Mass. App. Ct. 2009) (stating that “private function affects the constitutionality of [campus police officers’] conduct . . .”). *See, e.g.*, S.C. CODE ANN. § 40-18-110 (2013) (granting security officers the same arrest power and authority as sheriff’s deputies); *Henderson v. Fisher*, 631 F.2d 1115, 1118-19 (3rd Cir. 1980) (finding university police to be acting under color of law); 5 MARY G. LEARY, N.C. INDEX COLLEGES AND UNIVERSITIES § 23 (4th ed. 2013) (describing North Carolina statutes and case law regarding campus police). In North Carolina, law enforcement authority may be granted to campus police of private universities if the institution’s governing body enters into a joint agreement with local governments and the sheriff consents to extending authority. *See* Leary, *supra*.

⁶¹ *See infra* note 84; *cf.* Stephen W. Miller, Note, *Rethinking Prisoner Litigation: Shifting From Qualified Immunity to a Good Faith Defense in § 1983 Prisoner Lawsuits*, 84 NOTRE DAME L. REV. 929, 930 (2009) (describing inconsistency in prisoner § 1983 litigation). In the

there may be divisions of authority between campus police and security guards: the campus police may derive authority, including traditional police-like powers, from the state, while the security guards' authority is to enforce the rules and regulations of the school.⁶² Therefore, some campus police officers and security guards may be entitled to qualified immunity, while others may be able to assert the good faith defense, which is still undecided by the Supreme Court and the Ninth Circuit.⁶³ While the Court may have demonstrated a willingness to increase the availability of qualified immunity in § 1983 cases, it is unlikely the Court would be willing to extend total qualified immunity to campus security, who, as noted, work in various capacities for both public and private institutions.⁶⁴

IV. ANALYSIS

To be subject to liability under 42 U.S.C. § 1983, one must be "acting under the color of law."⁶⁵ Campus police and security officers fall into the distinctive category of actors who may be performing functions of the

context of prisoner § 1983 litigation, a plaintiff's success depends, in part, on whether the defendant-guard is employed by a state prison or a private prison. *See Miller, supra*, at 930. If a guard is employed by a state prison, then he or she is likely to be able to assert qualified immunity following *Richardson v. McKnight*, thereby diminishing plaintiff's chances of prevailing. *Id.* Further, a privately-employed guard may still be able to assert the good faith defense. *Id.*

⁶² *See generally Department of Public Safety: About the Department*, BROWN UNIVERSITY, http://www.brown.edu/Administration/Public_Safety/about/ (last visited Dec. 2, 2013) [hereinafter *Department of Public Safety*] (explaining differences between university's safety officers); Sarah Lawrence College, *Campus Security Personnel and Their Relationship with Local Law Enforcement*, SARAH LAWRENCE COLLEGE, <http://www.slc.edu/offices-services/security/relationship%20to%20local%20law%20enforcement.html> (last visited Apr. 4, 2013) [hereinafter *Campus Security Personnel*] (noting campus safety officers do not have law enforcement authority). At Brown, distinct groups of officers exist: police officers and security officers. *See Department of Public Safety, supra*. Brown's "sworn police officers are required to attend a state certified police academy and are also licensed as RI Special State Police Officers." *Id.* The webpage goes on to explain that these sworn police officers, who are all armed, are "authorized to enforce state statutes and University rules and regulations." *Id.* Brown's security officers, however, appear to be authorized only to enforce the University rules and regulations. *See id.* Sarah Lawrence College's website notes the College works with the local police department, which has "primary law enforcement jurisdiction" on the campus. *Campus Security Personnel, supra*.

⁶³ *See Richardson v. McKnight*, 521 U.S. 399, 413-14 (1997) (finding no need to rule on good faith defense, because it was not before the Court); *see also Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (refusing to rule on issue because not before Court). The Supreme Court declined to rule on good faith in *Wyatt* because the issue of affirmative defense of good faith in the § 1983 action was not squarely before the Court. *Wyatt*, 504 U.S. at 169; *see also Jensen v. Lane County*, 222 F.3d 570, 580 n.5 (9th Cir. 2000) ("We do not foreclose the possibility that [defendant] may be able to assert an affirmative good faith defense.").

⁶⁴ *See infra* note 84.

⁶⁵ *See supra* note 50 (listing color of law tests). *See generally* 42 U.S.C. § 1983 (2006).

state and of a private employer.⁶⁶ Once it is determined that an actor is indeed acting under the color of the law, the question turns to what immunities and defenses they may be entitled to.

A. Determining If Campus Safety Actor Is Subject to § 1983 Liability

Although the Supreme Court has never explicitly decided whether private police forces can be considered state actors, jurisdictions have taken a variety of approaches in determining if campus security officers are state actors.⁶⁷ In Illinois, for example, “peace officers” employed by private universities are deemed state actors because a state statute confers full police powers to the peace officers and they perform essentially the same functions as traditional police officers.⁶⁸ Yet, courts have also ruled that private institutions rarely satisfy the requirements of state action.⁶⁹ While campus security may be granted arrest power or similar powers under a state law, they may also be acting in furtherance of the goals of their employer—often, a private institution.⁷⁰

Campus safety officials may all appear to be the same type of actor: they wear the same uniforms and seem to be working toward the same goal of maintaining a safe campus environment; however, there may be separate categories of campus safety officials.⁷¹ These actors may truly have different goals – while they may all be working toward safety, some actors may also be focused on protecting the interests of the private university.⁷² Campus police and security officers are in a unique position – some officers may automatically be deemed state actors based on the type of institution they work for, while others may not be deemed a state actor at all.⁷³ Within public institutions it is likely that campus security officers

⁶⁶ See *Klunder v. Brown Univ.*, No. 10-410 ML, 2011 WL 2790178, at *7 (D. R.I. Jul. 13, 2011) (considering whether private police forces can act under color of law).

⁶⁷ See *supra* note 62 and accompanying text.

⁶⁸ See *Boyle v. Torres*, 756 F. Supp. 2d 983, 993, 995 (N.D. Ill. 2010). But see *Johnson v. Univ. of San Diego*, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *7 (S.D. Cal. Sept. 16, 2011) (finding insufficient nexus to attribute campus safety officer’s action to “the State itself”).

⁶⁹ See *Rinsky v. Trs. of Bos. Univ.*, No. 10cv10779-NG, 2010 WL 5437289, at *3 (D. Mass. Dec. 27, 2010) (holding plaintiff’s § 1983 claim failed).

⁷⁰ See *id.* (discussing test for when private parties may be considered state actors); *supra* note 60 and accompanying text (highlighting different jurisdictions’ determinations regarding whether campus security forces act under color of state law).

⁷¹ See *supra* note 62 and accompanying text.

⁷² See *supra* notes 62, 71 and accompanying text; *infra* notes 74, 75 and accompanying text.

⁷³ See *supra* note 68 and accompanying text; see also *Filarsky v. Delia*, 132 S. Ct. 1657, 1660 (2011) (discussing Filarsky’s role as private actor). Although Filarsky was a private actor, he was actually hired by the city, so he was working in a direct capacity for the State. *Id.*

and campus police officers will be deemed state actors; this conclusion may sometimes be based not on the officers' roles, but on the type of institution itself.⁷⁴

Private institutions present a more complex analysis of determining which officers may be deemed a state actor.⁷⁵ First, at some schools, there may be different types of officers, such as a campus police department as well as campus security guards.⁷⁶ Although these officers may appear to be one in the same to students, for example, they may actually have different duties and varying limitations on their authority.⁷⁷ The nature of campus police officers' positions and training would likely render them state actors, although their conduct may sometimes be in furtherance of the university's goals, rather than those of the state.⁷⁸ Campus security guards,

⁷⁴ See *Henderson v. Fisher*, 631 F.2d 1115, 1118-19 (3rd Cir. 1980) (holding lower court erred in ruling campus police did not satisfy state action requirement). The *Henderson* court reasoned that the University of Pittsburgh became an "instrumentality of the Commonwealth to serve as a State related institution," through a statute. *Id.* at 1118. Therefore, the university "lost its wholly private character." *Id.* While the court reasoned the statutory authority would be sufficient to deem campus police state actors, it further reasoned that the university police's powers were identical to those of the Pittsburgh municipal police, so there was a sufficient nexus to deem the university police state actors. *Id.* By deriving their powers from a branch of the government, the campus police were essentially agents of the government. See *id.*; see also *Downs v. Sawtelle*, 574 F.2d 1, 9-10 (1st Cir. 1978) (finding private hospital doctors potentially liable under § 1983 because state and hospital are "intertwined").

⁷⁵ Compare *Boyle v. Torres*, 756 F. Supp. 2d 983, 993-94, 997-98 (N.D. Ill. 2010) (noting private university actors were deemed state actors by state statute), with *Johnson v. Univ. of San Diego*, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *5 (S.D. Cal. Sept. 16, 2011) (finding plaintiff failed to show private university public safety officer was state actor), and *Klunder*, 2011 WL 2790178, at *7 (finding insufficient evidence for determining whether private university's police force was state actor).

⁷⁶ See *Department of Public Safety*, *supra* note 62 (detailing Brown's security and police forces).

⁷⁷ See *supra* note 75 and accompanying text.

⁷⁸ See *supra* note 5 and accompanying text (explaining criteria for determining when individual is state actor). Campus police would likely be deemed state actors under the state compulsion test, because of the training they receive or how they derive their authority. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); see also *Boyle v. Torres*, 756 F. Supp. 2d 983, 993-96 (N.D. Ill. 2010) (analyzing roles of private university campus police). For example, the campus police at Brown University are licensed as special Rhode Island police officers—a clear indicator that the state provides significant encouragement. See *Department of Public Safety*, *supra* note 62 (describing licensing process). The defendant-officers relied "on the assumption that private police or security forces do not exercise full police powers, and thus are not state actors . . ." *Boyle*, 756 F. Supp. 2d at 994. The court rejected this argument, and found that the University of Chicago police officers were state actors because their roles were "traditionally . . . the 'exclusive prerogative' of the state" because the officers carried guns, wore police uniforms, and used squad cars for patrols. *Id.* at 995. The *Boyle* court distinguished the University of Chicago officers' situation from that of private security guards in another case, *Wade v. Byles*, who "were responsible for controlling access to the buildings by monitoring people coming and going." *Id.* (citing *Wade v. Byles*, 83 F.3d 902, 903 (7th Cir. 1996)). The University of Chicago officers,

peace officers, and other safety officers may not always be deemed state actors; while it may depend on the act, security guards generally have less state-derived authority.⁷⁹ However, some states have granted security guards certain powers—such as arrest powers—by statute, so certain acts may satisfy the state action requirement of § 1983.⁸⁰ However, other acts committed by private university security may be entirely on behalf of their private employer.⁸¹ An act entirely on behalf of a private employer would not create state action, so the plaintiff's § 1983 claim may be invalid, as the purpose of the law is to protect citizens against infringement of their civil rights by state actors.⁸²

B. Determining If Qualified Immunity Is Fully Available to All Campus Police and Security

Even if an actor is found to be a state actor subject to § 1983 liability, qualified immunity is not automatically conferred.⁸³ Also, while a private actor may satisfy the state action requirement of § 1983, there is a strong presumption against allowing private defendants to assert qualified

however, had authority that “far exceed[ed] that of the security guards in *Wade*” because the guards “presumably would have had to call police” or 911 if a crime occurred on the property. *Id.* at 996. *But see* *Commonwealth v. Carr*, 918 N.E.2d 847, 854 (Mass. App. Ct. 2009) (explaining search of dorm room was conducted in furtherance of school policy). The *Carr* court noted that Boston College’s policies authorized the campus police officers’ search and seizure of contraband found in a college-owned dormitory room. *See Carr*, 918 N.E.2d at 854. The actions were taken in furtherance of the private employer’s interests—that is, the private college—and the officers were acting under the College’s control. *See id.* at 855. The case was later reversed on grounds that the Commonwealth failed to prove that the consent was voluntary, so the court affirmed the order allowing suppression of the seized evidence. *See Commonwealth v. Carr*, 936 N.E.2d 883, 890 (Mass. 2010).

⁷⁹ *See* cases cited *supra* note 68 (discussing differences of interpretation with regard to power of various campus safety officials). If there is not a sufficient nexus between the guard “and the City of San Diego such that his action ‘may be fairly treated as that of the State itself’” then it is unlikely that a court would deem a security guard a state actor. *Johnson*, 2011 WL 4345842, at *7 (citations omitted).

⁸⁰ *See* S.C. CODE ANN. § 40-18-110 (2013) (explaining South Carolina, for example, authorizes security guards to make arrests under state statutory powers); *see also* Kritchevsky, *supra* note 30, at 67 (discussing defendants assisting law enforcement with arrests).

⁸¹ *See* cases cited *supra* note 75 and accompanying text (discussing when campus police and security guards are state actors). Some campus security guards and safety officers may be authorized primarily to carry out the rules and regulations of the university. *See Department of Public Safety*, *supra* note 62.

⁸² *See* *Dist. of Columbia v. Carter*, 409 U.S. 418, 427 (1973) (explaining purpose of § 1983).

⁸³ *See* *Gregg v. Ham*, 678 F.3d 333, 338-39 (4th Cir. 2012) (finding actors are not entitled to assert qualified immunity defense and must satisfy it test); *see also supra* note 21 and accompanying text (explaining criteria for qualified immunity test).

immunity in these cases.⁸⁴ Cases that have expanded the availability of qualified immunity for private citizens have done so in a limited manner.⁸⁵

It is unlikely that the Supreme Court would allow qualified immunity for *all* campus police and security guards working for private colleges and university.⁸⁶ Just as some types of campus safety officials may be deemed state actors, only certain types may be granted qualified immunity.⁸⁷ Where campus police and security guards are employed by public institutions they will likely be entitled to qualified immunity.⁸⁸ But it is unclear if private actors would be granted qualified immunity where campus security and police have been granted powers by statute.⁸⁹

The historical origins and purpose of 42 U.S.C. § 1983 must be taken into account when determining if a defendant should be granted qualified immunity.⁹⁰ To students, or others on a college campus, the school

⁸⁴ See *Clement*, 518 F.3d at 1096 (denying qualified immunity for private towing company). The Ninth Circuit reasoned, “[the] defense [of qualified immunity] is generally not available to private defendants in [§] 1983 lawsuits.” *Id.* “Qualified immunity is not available to a private defendant sued under § 1983 unless it is firmly rooted in common law and supported by strong policy reasons.” *Palmer*, 2009 WL 413129, at *6; see also *Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) (finding qualified immunity by applying “a straightforward application of the rule”). In light of the recent ruling in *Filarsky*, it seems that the Supreme Court’s trend is to expand qualified immunity only in very limited circumstances. See *Filarsky*, 132 S. Ct. at 1667.

⁸⁵ See *id.* at 1666 (discussing need for qualified immunity for those working with government actors). The *Filarsky* holding focused on those working in some capacity for the government, who are fulfilling a role that the government may not be able to fill without outside assistance. See *id.*

⁸⁶ See *id.* at 1658 (reasoning no distinction at common law between full-time government employees and others working for government).

⁸⁷ See *supra* note 75 and accompanying text.

⁸⁸ See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (expanding qualified immunity). *Safford* allowed qualified immunity for public middle school administrators in § 1983 cases. *Id.* Although *Safford* involved middle school officials, qualified immunity would likely be granted to public university and college campus security and police officers due to the public nature of the institution. See *id.*

⁸⁹ See *Filarsky*, 132 S. Ct. at 1665-66 (reasoning government may need private individuals to work in some capacity for government). *Filarsky* explains that the lawyer was granted qualified immunity because he was working directly for the government, albeit not in a full-time capacity. *Id.* at 1668; see also *Richardson v. McKnight*, 521 U.S. 399, 413 (1997) (denying qualified immunity for private prison guards). Private prison guards may be akin to campus security in that they both perform public functions for private employers. See *Gregg v. Ham*, 678 F.3d 333, 341, n.6 (2012) (explaining bail bondsman was “not ‘an arm of the court’”). The court found the bondsman acted in his “own financial self-interest” in determining state actor status. *Id.* The court further explained that the bondsman was not employed by the Sheriff’s Department, nor did he report to law enforcement. See *id.* at 341; see also *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1271 (noting seven circuits have denied private actors qualified immunity based on *Richardson* test). But see *Miller*, *supra* note 61, at 931 (advocating abandonment of qualified immunity for prison litigation in favor of good faith defense).

⁹⁰ See *Richardson*, 521 U.S. at 404 (considering both history and purpose of 42 U.S.C. § 1983); see also *Kritchevsky*, *supra* note 30, at 67-69 (discussing how lower courts generally fol-

security and police forces may very well appear to be acting with full authority of the law and may look indistinguishable from local law enforcement—even though their authority may be derived from the school, rather than the law.⁹¹ Like bail bondsmen, private campus security are not always entrusted with a public function – although they may be deemed state actors at times, they are not solely entrusted with protecting the public, even if their powers are sometimes derived from the government.⁹² Private campus police and security guards are unlikely to receive qualified immunity, because it seems as though an unlimited grant of qualified immunity to these private actors would leave an entire class of citizens—generally, students—without recourse for constitutional rights violations, which goes against the historical origins of § 1983.⁹³

Qualified immunity is also based in part on the policy concerns of suing government officials—the same policy concerns do not apply to private campus security.⁹⁴ For example, qualified immunity is intended to en-

low Supreme Court’s two-prong analysis for qualified immunity). Although lower courts have not uniformly applied qualified immunity, the lower courts have consistently followed the two-prong approach and looked to both historical and policy rationales. *Id.* But see *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1270 (arguing standard “uncertain” because of limited holdings in *Wyatt* and *Richardson*). The article specifically notes the lack of clarity in *Richardson*, which takes an “unclear” approach to history and is “also confusing” with regard to policy determination. *Id.*

⁹¹ See cases cited *supra* note 52 (discussing campus safety officials at different schools).

⁹² See *Gregg*, 678 F.3d at 340 (finding bail bondsmen not entitled to qualified immunity). The Fourth Circuit also indicated that bail bondsmen are not entitled to qualified immunity because “they are not entrusted with a public function” and “fueled primarily by a strong profit motive.” *Id.* at 340-41.

⁹³ See *supra* notes 7-11 and accompanying text (detailing how § 1983 was created to provide forum for citizens against officials); see also *Wood v. Strickland*, 420 U.S. 308, 319 (1975) (describing historical origins of 42 U.S.C. § 1983). The historical purpose of the statute was to deter state actors from infringing on the constitutional rights of citizens. See *supra* notes 7-11 and accompanying text. Congressman Hoar’s remarks show that the intent of the statute was to protect citizens from officers infringing on their constitutional rights. See *supra* note 7 and accompanying text. Allowing qualified immunity for private school security officers may not provide the protection of constitutional rights from infringement by state actors, as originally intended by the statute. See *Wood*, 420 U.S. at 319; see also *Mejia v. City of New York*, 119 F. Supp. 2d 232, 269 (2000) (holding assisting in arrest not sufficient for qualified immunity). Even where law enforcement requested the assistance in arrest, the *Mejia* court found this to be insufficient to grant the private citizen qualified immunity, because doing so “would thwart §1983’s purpose of preventing the abuse of official authority.” *Mejia*, 119 F. Supp. 2d at 269.

⁹⁴ See *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 813, 816, 819 (1982)) (explaining policy concerns). The policy concerns that support qualified immunity for government officials include doing so “where it was necessary to preserve [the government officials’] ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.” *Id.* But see *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1273 (discussing cases that challenged policy notions of qualified immunity). In examining qualified immunity for private medical professionals, *Jensen v. Lane County* found that “governmental supervision is not by itself determinative,”

sure that there is no excessive disruption of government and to ensure that highly-skilled candidates are not deterred from government employment by the threat of suit.⁹⁵ Private campus police and security guards would likely need to show that their statuses as private actors, rather than government actors, subject them to similar policy concerns because otherwise, their bid for qualified immunity will be weakened.⁹⁶ The strongest policy argument in favor of granting qualified immunity to private campus police and security is that they may be entrusted with protecting the public at times.⁹⁷ However, this argument may be overcome by the notion that these private actors are not only working on behalf of the public – but that they are working on behalf of the interests of private employers.⁹⁸

In order to successfully assert qualified immunity, the right which was allegedly violated must be “clearly established,” which means that if a reasonable government actor would clearly know that his actions were unlawful.⁹⁹ While this requirement may be understandable when looking to

while *Chauncey v. Evans* “challenged *Wyatt*’s notion that private actors are not concerned with the public good.” *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1273 (emphasis added) (citing *Jensen v. Lane Cnty.*, 222 F.3d 570, 575 (9th Cir. 2000) and *Chauncey v. Evans*, No. 2:01-CV-0445, 2003 WL 21730580, at *2 (N.D. Tex. Feb. 11, 2003)).

⁹⁵ See *Wyatt*, 504 U.S. at 167 (discussing policy behind qualified immunity).

⁹⁶ See *Richardson v. McKnight*, 521 U.S. 399, 409 (1997) (finding policy concerns did not apply to private prison guards). In denying qualified immunity to private prison guards, the Court reasoned that marketplace pressures would overcome policy concerns. *Id.* These pressures included organization for profit, performance of a task relatively independent from direct state supervision, requirement of the company to buy insurance, competition from other companies, and employees’ contract provisions. *Id.*; see also *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1271-72 (distinguishing certain private actors from private prison guards). The author explains that medical personnel, lawyers, and “private individuals acting pursuant to government orders” differ from private prison guards. *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1271. These actors may or may not be subject to supervision or “not motivated purely by profit.” *Id.* at 1271-72. The author indicates that each of these groups may have other motivations for acting in a certain way, such as doctors who may be influenced by marketplace factors such as insurance, which should be taken into account when reviewing whether or not the private actor is entitled to qualified immunity. *Id.* Similarly, campus security guards may be acting in a particular manner because of the directives of the university. See *id.* Based on the precedent discussing doctors and other private actors, the influence of marketplace factors would not entitle campus security guard to qualified immunity. See *id.*

⁹⁷ See 71 PA. CONS. STAT. § 646.1 (2013) (indicating campus police jurisdiction extends beyond university campus at times); *case cited supra* note 50 (discussing good faith defense for private actors).

⁹⁸ See *Commonwealth v. Carr*, 918 N.E.2d 847, 854 (Mass. App. Ct. 2009) (explaining instance where private actors work in furtherance of private employer’s goals). As noted in *Carr*, at times, private university police and security forces are acting in the interest of the university-employer, rather than simply the interest of the public. *Id.* at 848.

⁹⁹ See *Saucier v. Katz*, 533 U.S. 194, 202 (2001); see also *Ohrenberger*, *supra* note 33, at 1057 (discussing qualified immunity inquiry for public prison official). Following *Harlow*, a qualified immunity inquiry for public prison officials “asks only the objective question of wheth-

government employees or campus police officers who have had extensive training, a campus security officer may not be as likely to know when his actors are unlawful, due to less rigorous training.¹⁰⁰ Thus, the varying nature of private campus safety officials' training provides little, if any, policy support for qualified immunity.¹⁰¹ Further, qualified immunity should not be available to these private actors, because in their roles as private university employees, they lack the stringent political oversight that is inherent in public sector employment.¹⁰²

Additionally, any government interruption that campus security may face is minimal, because while they may, at times, perform functions similar to law enforcement, these types of duties are not exclusive to campus security and local law enforcement would typically be available if needed.¹⁰³ Working alongside local law enforcement raises the issue of whether campus security forces "left holding the bag" when they work alongside government actors?¹⁰⁴ *Filarsky* may anticipate the potential for unfairness in allowing qualified immunity for government officials but not for those working with them, but the aforementioned policy concerns illus-

er the official violated a clearly established constitutional right of which the official reasonably should have known." Ohrenberger, *supra* note 33, at 1057.

¹⁰⁰ See *supra* note 62 and accompanying text (detailing Brown University's campus police officers' training). Brown's campus police attend a police academy, but there is no indication that the university's security officers have the same level of training. *Id.*; see also *Mejia*, 119 F. Supp. 2d at 270 (recognizing private citizens making arrests have less training). In *Mejia*, the court reasoned in regards to arrest,

Probable cause, strictly construed, is a concept that often confounds even professional law enforcement officials, who have received (one hopes) at least rudimentary training on the applicable rules of law. The typical private citizen has had no such training and, therefore, cannot fairly be held to the same standard as professionals in the field.

Id. at 269-70. But the court also acknowledged that a private citizen "untrained in the niceties of probable cause" could understand when an arrest is unjustifiable or "patently abusive." *Id.* at 270.

¹⁰¹ See *supra* note 62 and accompanying text.

¹⁰² See *supra* note 62 (describing differences between Brown University police and campus safety officers).

¹⁰³ See *supra* note 62 and accompanying text (detailing Sarah Lawrence College's relationship with local law enforcement).

¹⁰⁴ *Filarsky*, 132 S. Ct. at 1666 (discussing issue faced by campus security who work alongside government actors); see also *Gregg v. Ham*, 678 F.3d 333, 337 (4th Cir. 2012) (noting bail bondsman worked with sheriff's deputies to apprehend suspect). Although the bondsman worked with the sheriff's deputies for the arrest in question, he was denied qualified immunity. *Gregg*, 678 F.3d at 336-37. After conducting surveillance of the fugitive, the bondsman went to the property of the fugitive's friend with a sheriff's deputy and other bondsmen. *Id.* at 337. The sheriff did not issue a search warrant, but the deputy did enter the home with the bondsman, and later intervened when the bondsman became aggressive with the fugitive's friend. *Id.*

trate the need for qualified immunity for government employees.¹⁰⁵

C. The Good Faith Defense – An Alternative When Qualified Immunity Does Not Apply?

i. Asserting Good Faith

Private campus police and security defendants subjected to liability under 42 U.S.C. § 1983 may not be entirely without recourse, although circuits are split on the good faith defense and what it entails.¹⁰⁶ While the good faith defense has not been explicitly recognized by the Supreme Court in § 1983 cases, emphasizing the fairness of allowing the defense will address concerns the Court has expressed in the past.¹⁰⁷ These concerns about fairness to private parties subjected to § 1983 liability support allowing an affirmative defense for private party defendants, such as campus security.¹⁰⁸ Although it is unlikely, for the aforementioned reasons, that campus security officers would be granted qualified immunity, these § 1983 defendants may find it useful to draw on the arguments the Court has recently used for allowing slight extensions of qualified immunity.¹⁰⁹ For example, if a campus security officer acted in conjunction with local law enforcement to arrest or detain student protestors, the local law enforcement would likely be entitled to qualified immunity.¹¹⁰ Such a scenario

¹⁰⁵ See *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1276 (analyzing qualified immunity status of private citizens acting pursuant to government orders). In *Mejia v. City of New York*, the court followed *Richardson v. McKnight* and provided the policy and historical justifications for the defendants, but ultimately denied qualified immunity because a genuine issue of material fact existed as to objective reasonableness. *Id.*

¹⁰⁶ See *Lewis v. McCracken*, 782 F. Supp. 2d 702, 714-15 (S.D. Ind. 2011) (indicating circuit split on good faith defense and immunity). *Lewis* describes the circuit split, noting that *Downs v. Sawtelle* held good faith immunity did not exist for private defendants, while *Jordan v. Fox, Rothschild, O'Brien & Frankel* did find good faith defense exists for private individuals. *Id.* (citing *Downs v. Sawtelle*, 574 F.2d 1, 16 (1st Cir. 1978) and *Jordan v. Fox, Rothschild, O'Brien, & Frankel*, 20 F.3d 1250, 1276-77 (3rd Cir. 1994)). The court went on to explain that other courts differ as to the elements of the defense – some require only the subjective element, while others require subjective and objective elements. *Id.* at 715; see also *Wyatt v. Cole*, 504 U.S. 158, 169 (1992) (declining to address good faith defense for private defendants).

¹⁰⁷ See *Nahmod*, *supra* note 41, at 83 (explaining Justice Powell's dissent in *Lugar v. Edmondson Oil Co.*). As Nahmod explains, Justice Powell "argued that it was fundamentally unjust to expose a private party defendant to [§] 1983 damages liability." *Id.*

¹⁰⁸ See *id.* Although Justice White felt that Justice Powell's "criticism was misguided," he addressed Powell's concerns by suggesting an affirmative defense with which Powell agreed. *Id.*

¹⁰⁹ See *Filarsky*, 132 S. Ct. at 1666 (expressing concern about private actors working with government actors).

¹¹⁰ See *id.* (questioning who would be "left holding the bag" where private and state actors work together).

brings to mind the Court's concerns in *Filarsky*, which would provide strong support for a campus security officer's position that he should be allowed to assert the good faith defense, if qualified immunity is unavailable to him.¹¹¹ Campus police and security officers may also find themselves "holding the bag" because they may remain vulnerable to suit as individuals while their university-employer is dismissed from suit; this fact may also appeal to the notions of fairness at play in § 1983 cases.¹¹²

Lower courts have allowed private party defendants to assert the affirmative defense, but have required different standards for asserting the defense.¹¹³ Both standards have included the subjective element, meaning that a defendant would need to be able assert that he believed his actions were constitutional.¹¹⁴ While the subjective element is crucial to an assertion of the good faith defense, defendants should also be prepared to assert the objective element of the defense because other courts have required a showing of both elements.¹¹⁵ If a campus security guard could show that he relied on a statute in taking action, for example, this would likely aid him in asserting the objectively reasonable element of the defense.¹¹⁶

ii. Plaintiff's Approach to Good Faith Defense

The good faith defense focuses on fault, by typically requiring both subjective and objective elements to a good faith defense for private party defendants.¹¹⁷ While the good faith defense may be a fair alternative to

¹¹¹ *Id.* (describing concerning scenario where private actors are unfairly subjected to legal action).

¹¹² See *Severson v. Bd. of Trs. of Purdue Univ.*, 777 N.E.2d 1181, 1193 (Ind. Ct. App. 2002) (discussing dismissal of claims against university). Purdue University was dismissed from suit, but the University's employees were still amenable to suit. *Id.* at 1194.

¹¹³ See *Wyatt v. Cole*, 994 F.2d 1113, 1119-20 (5th Cir. 1993) (requiring subjective and objective elements of defense); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1276 (3rd Cir. 1994) (requiring only subjective element of good faith).

¹¹⁴ See *Wyatt*, 994 F.2d at 1120 (finding no malice from defendants); *Jordan*, 20 F.3d at 1277 (discussing good faith defense). The *Jordan* court reasoned that the "good faith [defense] is usually concerned with what a particular actor thinks is all right to do." *Jordan*, 20 F.3d at 1277. However, the court did not find "that good faith indisputably appears" in that case, although did not clearly indicate why good faith was not substantiated. See *id.*

¹¹⁵ See *Wyatt*, 994 F.2d at 1121 (determining if both elements of defense existed); see also *Palmer v. Garuti*, No. 3:06-CV-795(RNC), 2009 WL 413129, at *6-7 (D. Conn. Feb. 17, 2009) (finding defendant's actions were both objectively and subjectively reasonable).

¹¹⁶ See *Wyatt*, 994 F.2d at 1121 (finding actors' reliance on statute to be objectively reasonable). Although the court noted that the statute was "in legal jeopardy," it still found that the actors' reliance on the statute was objectively reasonable. *Id.*

¹¹⁷ See *Nahmod*, *supra* note 41, at 90. *Nahmod* explains that in private party § 1983 cases, "wrongful conduct is not sufficient," because fault is also a required element of this affirmative defense. *Id.*; see also *Ohrenberger*, *supra* note 33, at 1057 (suggesting objective analysis com-

private actors vulnerable to § 1983 liability, the defense could shift the burden to the plaintiff.¹¹⁸ When a plaintiff needs to rebut an affirmative good faith defense, the strongest approach may be to attack the “objective reasonableness” prong of the defense.¹¹⁹ For example, *Clement* found the defendant’s actions to be objectionably reasonable because the plaintiff would not have been aware of the constitutional defect.¹²⁰ In a similar situation, a plaintiff’s strongest counter argument may be to attack the objective reasonableness – he could attempt to show that an objectively reasonable person in the actor’s position *would* have been aware of the constitutional defect.¹²¹

Good faith provides a reasonable alternative to allowing private campus police and security officers to assert qualified immunity.¹²² This solution would provide a defense, but still avoid so-called “patchwork liability,” because it would not be left up to individual Circuit Courts to determine if qualified immunity exists for private campus police and security.¹²³

IV. CONCLUSION

Campus security guards, police officers, and other safety officers may all appear to be the same. But in reality, these actors are likely to face different liabilities due to the complex nature of these actors’ roles, how they derive their authority, and the type of employer they work for. Those working for public institutions are likely to get qualified immunity, but it is unlikely the Supreme Court would extend qualified immunity to all. So that those working alongside public officials are not “left holding the bag,”

bined with subjective component for private prison officials “could function as a burden-shifting approach”). Under a burden-shifting approach, if a student was to assert a claim against a § 1983 claim against a campus security officer, for example, it would be the student’s burden to show that the security guard acted in bad faith. See Ohrenberger, *supra* note 33, at 1057.

¹¹⁸ Ohrenberger, *supra* note 33, at 1057 (explaining burden shifting effect of good faith defense). Some commentators have suggested that the defense functions as a burden-shifting approach as it becomes the plaintiff’s burden to rebut the defense. *Id.*

¹¹⁹ See *supra* note 43 and accompanying text (outlining subjective and objective prongs of test).

¹²⁰ See *supra* note 43 and accompanying text (describing *Clement* case).

¹²¹ See *Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008).

¹²² See generally *Lewis v. McCracken*, 782 F. Supp. 2d 702, 714 (S.D. Ind. 2011) (considering possibility of good faith defense).

¹²³ See *Private Party Immunity from Section 1983 Suits*, *supra* note 22, at 1277 (discussing “patchwork liability” for private actors). Because jurisdictions vary in approaches to qualified immunity, outcomes of cases are “unfair to both defendants and plaintiffs” with regard to constitutional liability. *Id.* at 1277-78. A lack of consistency affects both parties unfairly, and each party incurs additional litigation costs. *Id.* at 1278.

campus police, security officers, and other safety officers at private institutions should be allowed to assert the good faith defense.

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