READERS OF TEA-LEAVES: A COMMON SENSE GOOD-FAITH DEFENSE FOR PRIVATE PARTY SECTION 1983 DEFENDANTS IN THE SEVENTH CIRCUIT

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For better or worse, private actors have an increasingly prominent hand in providing historically governmental services in the United States. The privatization of public function is perhaps most apparent in prisons.[1] Private citizens in many prisons are now charged with overseeing prison operations, providing security as guards, and offering medical services to inmates.[2] Government service providers face the prospect of civil liability under 42 U.S.C. § 1983 by acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[3] Despite the threat of litigation, public officials are generally able to perform their public functions without fear thanks to the qualified or absolute immunities inherent in the functions they perform.[4] In contrast, private citizens performing identical functions do not benefit from those immunity doctrines.[5] The United States Supreme Court, in *Wyatt v. Cole,* (*Wyatt I*), held policies favoring the immunity doctrines for public officials do not apply with equal force to private parties.[6] The Court found "principles of equality and fairness" favored qualified immunity for private actors performing public functions, but did not, alone, justify that extension.[7] Without immunity, private citizens, accountable under § 1983 for acting under color of law when providing government services, are potentially liable if a law they relied on when providing those services is later deemed

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1. *Government Privatization: History, Examples, and Issues*, ILL. COMM'N ON GOV'T FORECASTING & ACCOUNTABILITY, at 14 (2006), https://cgfa.ilga.gov/Upload/2006Gov_Privatization_Rprt.pdf [https://perma.cc/DX4S-2U5A] [hereinafter *Commission Report*] ("Privatization in corrections has occurred at all levels of government. Services provided include the design, build, finance, operation, and maintenance of prisons. Beyond that, corrections officials have outsourced such services as food service, health service, and mental health services in prisons that are run by the public. In 2005, thirty-five states housed prisoners in privately owned or operated prisons.").

2. *Id.*

3. 42 U.S.C. § 1983 (1994).

4. *See* Owen v. City of Independence, 445 U.S. 622, 637 (1980); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

5. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 169 (1992).

6. *Id.* at 168-69 ("Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (holding immunity is intended to prevent "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service") (quoting *Harlow*, 457 U.S. at 826).

7. *Wyatt I,* 504 U.S. at 168.

unconstitutional.

The Court, however, did not foreclose the prospect of an affirmative "good-faith defense"[8] to § 1983 liability.[9] Specifically, the Court intentionally left open the possibility that a private party, performing a public function and therefore susceptible to liability under § 1983, could affirmatively raise good-faith reliance on state or federal law as a defense to liability.[10] On remand, the U.S. Court of Appeals for the Fifth Circuit held a private § 1983 defendant could raise the good-faith defense and cited support in the concurring and dissenting Justices' opinions.[11] Since 1993, every Circuit Court to address the issue has similarly ruled in favor of the good-faith defense.[12] Most recently, the Seventh Circuit approved the good-faith defense for private actors liable under § 1983 torts committed while "acting under Color of State law."[13] The Seventh Circuit noted that the defense was justified because private § 1983 defendants had to "abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future."[14]

It remains to be seen how this defense will take shape in the Seventh Circuit, either in theory or in practice. This article will examine the distinction between qualified immunity and a good-faith defense in § 1983 litigation. Then, it will analyze how the good-faith defense has been implemented in other circuits, especially in light of the policy concerns the defense is intended to address. Further, it will suggest how the defense can be practically utilized while

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8. Good-faith defense in a § 1983 suit is distinct from and not to be confused with the good-faith defense against fraud. In a fraud case, the state has the burden to show that the defendant intended to defraud another party – by showing that he or she did not have the requisite intent to defraud, a defendant can defeat the charge. *See, e.g.*, United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985).

9. *Wyatt I,* 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 or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens.") (internal citation omitted).

10. *Id.*

11. Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1118-19 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993) ("We accordingly hold that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only 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.").

12. *See* Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994); Vector Rsch., Inc. v. Howard & Howard Att'y P.C., 76 F.3d 692, 699 (6th Cir. 1996); Clement v. City of Glendale, 518 F.3d 1090, 1096-97 (9th Cir. 2008); Jarvis v. Cuomo, 660 F. App'x 72, 75 (2d Cir. 2016); Janus v. Am. Fed'n of State, 942 F.3d 352, 363 (7th Cir. 2019).

13. *Janus*, 942 F.3d at 367.

14. *Id.* at 366 (emphasis in original); *accord with* Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1091 (S.D. Ohio 2019) ("In short, it is patently unfair to expect private actors to be able to predict the future of constitutional law.").

advancing the policy principles underlying its creation. Lastly, this article will recommend steps Seventh Circuit courts can take to ensure its viability as an affirmative defense while defining its contours and how states can promote its effective usage through statutory schemes. It also bears noting that, although this article is an academic paper, its authors recognize the fact that the law does not exist in a vacuum. With that in mind, this article will consider the implications of the good-faith defense as it concerns real world litigation, throughout. After all, the good-faith defense is worthy of in-depth study, careful analysis, and thoughtful suggestion precisely because of its considerable impact on judges, litigators, and the parties themselves.

I. THE DISTINCTION BETWEEN QUALIFIED IMMUNITY AND GOOD-FAITH DEFENSE

Before examining the modern doctrine of qualified immunity and its distinction from a good-faith defense, it is important to understand the legal context in which this immunity is asserted. Typically, a government employee will assert qualified immunity when he or she is named as a defendant in either a 42 U.S.C. § 1983, or a *Bivens*[15] suit. Section 1983 allows a private party to assert a claim against a state actor for a violation of a federally guaranteed right, while a *Bivens* action allows the same against federal employees. Section 1983 is a brief but potent statute:

> 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.[16]

Once a plaintiff alleges the government official has violated a federally guaranteed right, the state or federal employee may assert either absolute or qualified immunity as an affirmative defense against civil suits.[17] Absolute

15. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

16. 42 U.S.C. § 1983.

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

immunity is reserved for legislators,[18] judges,[19] and certain members of the executive branch, like judges[20] and the U.S. President.[21] Qualified immunity, in contrast, protects state and federal executive officials who did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[22] Whether absolute or qualified immunity applies is a question of function, not position.[23] For example, a government employee performing a legislative function will be protected by absolute immunity for that act, but the same official will only receive qualified immunity for a discretionary executive function.[24] A private party serving a public function, regardless of the nature of that function, cannot assert absolute or qualified immunity.[25]

Qualified immunity is immunity from suit, not merely damages.[26] A defendant must assert qualified immunity as an affirmative defense at the pleading stage, and it will be decided by a judge as a question of law.[27] If a court holds the alleged violation was of a clearly established law, then the defendant is not protected by qualified immunity.[28] What is "clearly established law" is a very narrow question, and lower courts often struggle to strike the proper degree of specificity between the facts of the case and binding precedent.[29] Generally, to be clearly established, a court of binding authority in that jurisdiction must have decided a case based on similar facts, such that a reasonable official in the defendant's position would be on notice "that the alleged conduct 'was unlawful

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18. *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975).

19. *See* Stump v. Sparkman, 435 U.S. 349 (1978).

20. Butz v. Economou, 438 U.S. 478, 508-12 (1978).

21. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982).

22. *Harlow*, 457 U.S. at 818.

23. *Id.* at 810. ("Moreover, in general our cases have followed a 'functional' approach to immunity law."); *see, e.g.,* Gravel v. United States, 408 U.S. 606, 624-25 (1972) (holding only those acts "legislative in nature" are protected by absolute immunity).

24. *See Harlow*, 457 U.S. at 810-11.

25. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

26. *See* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (defining qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation").

27. *See* Saucier v. Katz, 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.").

28. *See Harlow*, 457 U.S. at 818.

29. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741-43 (2011); s*ee also, e.g.*, White v. Pauly, 137 S. Ct. 548, 552 (2017) ("Today, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'"); Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (finding that defendants were entitled to qualified immunity); City & Cty. of San Francisco, Calif. v. Sheehan, 575 U.S. 600, 610-13 (2015) (reversing the Ninth Circuit's denial of qualified immunity to police officer defendants); *Saucier*, 533 U.S. at 209 ("[P]etitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.").

in the situation he confronted.'"[30] As such, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[31] A defendant denied qualified immunity can immediately appeal that decision.[32] If, however, a court holds the defendant is protected by qualified immunity, then the case against that defendant is immediately dismissed.[33]

The strength of qualified immunity as a shield from suit is informed by the policy concerns underlying it. The U.S. Supreme Court held qualified immunity is necessary to prevent "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[34] Although private defendants serve the same functions as their public official equivalents, these policy concerns do not implicate them to the same degree.[35] The primary difference between a private party and public official who performs the same function is the cost to the public should they be named as a defendant.[36] When a private party is named a defendant, the public is largely unaffected.[37] Conversely, when public officials are haled into court, they are distracted from performing their duties, discouraged from acting "forcefully and decisively in their jobs" or engaging in public service at all, thus harming the public at-large.[38] Ultimately, qualified immunity "acts to safeguard government, and thereby to protect the public at large," and the public officials who enjoy it are merely incidental beneficiaries.[39]

A good-faith defense, on the other hand, is available to private defendants and does not prevent a suit from proceeding to trial. Good faith is a question of fact, not law, and therefore cannot always be determined by a judge early in proceedings. Additionally, private defendants cannot merely assert a lack of "clearly established law," but rather must cite a state or federal law that justified

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30. *Ziglar*, 137 S. Ct. at 1867 (quoting *Saucier*, 533 U.S. at 202).

31. *Id.* (quoting Malley v. Briggs, 475 U. S. 335, 341 (1986)).

32. *See Harlow*, 457 U.S. at 807, n.11 (holding denial of qualified immunity is an appealable issue under the collateral order doctrine); *see also* Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.").

33. *See Saucier*, 533 U.S. at 209 ("[P]etitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.").

34. *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 826).

35. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 167-68 (1992).

36. The validity of the assertion that the public is protected by a public official's use of the qualified immunity, but not by a private party's use of the same for performing a similar or identical function is debatable, but ultimately beyond the scope of this Article.

37. *Wyatt I*, 504 U.S. at 168 ("[U]nlike…government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial to resolve their legal disputes.").

38. *Id.*

39. *Id.*

their actions.[40] Namely, a private defendant is shielded from liability only if he or she relied in good-faith on a statute that was valid at the time and authorized the defendant's allegedly tortious conduct.[41] That the statute was later ruled unconstitutional is of no consequence, so long as the private defendant neither "knew nor should have known that the statute upon which they relied was unconstitutional."[42] At least one circuit has discarded the objective component of the defense, instead embracing a purely subjective good-faith standard.[43] Under the subjective standard, a defendant must prove merely that she relied in good-faith on a presumptively valid law, not that her reliance was reasonable.[44]

These distinctions separate qualified immunity from a good-faith defense. Qualified immunity is not available to private parties and a decision denying qualified immunity can be appealed immediately.[45] Further, although qualified immunity is never presumed, it is easier to argue because it merely requires a "lack of clearly established law," as opposed to a reliance on a specific statute. The good-faith defense standard contains objective and subjective components in some jurisdictions,[46] or a purely subjective showing in others.[47] Qualified immunity is always based on an objective, reasonable person standard.[48] In its decision denying qualified immunity to private parties, the U.S. Supreme Court noted policy concerns justified the immunity in regards to public officials but did not apply with equal force to private parties.[49] Overall, qualified immunity represents the more powerful defensive tool, because it shields defendants from

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40. Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993).

41. *Id.*

42. *Id.*

43. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994) ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.").

44. *Id.*

45. Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (holding denial of qualified immunity is an appealable issue under the collateral order doctrine).

46. *Wyatt II*, 994 F.2d at 1120, 114 S. Ct. at 470.

47. *See, e.g.*, *Jordan*, 20 F.3d at 1277 ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.").

48. Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

49. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 167 (1992) ("Accordingly, we have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (holding immunity is intended to prevent "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service") (quoting *Harlow*, 457 U.S. at 816).

a suit entirely, instead of mere liability. Further, as a question of fact, the merits of a good-faith defense argument must sometimes be left to a jury at the verdict stage of trial, rather than by a judge during pleadings or following discovery.

II. IMPLEMENTATION OF THE GOOD-FAITH DEFENSE

A. Policy Concerns Informing the Good-Faith Defense

Although the good-faith defense does not exist for so lofty a purpose as to "protect the public at large,"[50] it still serves worthwhile principles. Namely, a good-faith defense to § 1983 suits prevents verdicts that would otherwise run counter to "principles of equality and fairness."[51] At its core, the defense is a commonsense doctrine, nearly rising to the level of truism – an individual should not be held civilly liable for following the law, absent some malicious intent. Lacking qualified immunity, private defendants "who innocently make use of seemingly valid state or federal laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions."[52] The good-faith defense is intended to prevent this seemingly unjust, and arguably absurd, result.

The good-faith defense for private defendants in § 1983 suits should serve "principles of equality and fairness"[53] by protecting those who act in good-faith reliance on a statute.[54] The reliance element is important to the good-faith defense. A private defendant who knew that a statute was unconstitutional will not be protected by the good-faith defense, because doing so would not serve "principles of equality and fairness."[55] In fact, shielding a bad-faith actor would not only work against the purpose of the good-faith defense, but produce an unjust result. Similarly, in many jurisdictions, a private defendant cannot hide behind ignorance of a law's defects, if the law is obviously unconstitutional.[56] Although a defendant in such a case would lack malicious intent, allowing unreasonable ignorance to defeat a seemingly valid claim would arguably work an injustice against the otherwise meritorious plaintiff. Some have questioned this objective element, however, noting that reliance on a presumptively valid law is

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50. *Wyatt I*, 504 U.S. at 168.

51. *Id*.

52. Lugar v. Edmondson Oil Co., 457 U.S. 922, 942, n.23 (1982).

53. *Wyatt I,* 504 U.S. at 168.

54. Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993) ("We accordingly hold that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only 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.").

55. *Wyatt I*, 504 U.S. at 168.

56. Janus v. Am. Fed'n of State, 942 F.3d 352, 363 (7th Cir. 2019) (quoting *Wyatt II*, 994 F.2d at 1118, 114 S. Ct. at 470).

reasonable "as a matter of law."[57]

It is also important to note what policy concerns are addressed from the § 1983 plaintiff's perspective. While qualified immunity protects "all [public officials] but the plainly incompetent or those who knowingly violate the law,"[58] the good-faith defense will only shield private defendants who acted in good-faith reliance on a state or federal law.[59] This significantly narrows the scope of the defense, compared to qualified immunity. As such, plaintiffs with meritorious claims against culpable defendants, either by virtue of actual awareness of a law's unconstitutionality or unreasonable ignorance, will still receive favorable judgments. Relying on a law, even one deemed unconstitutional, is not generally considered culpable behavior absent an element of malice. As punitive damages are intended "to punish wrongdoers and deter wrongful conduct,"[60] this defense prevents an illogical result, namely, punishment of a non-culpable party.

Unfortunately, plaintiffs with meritorious claims against non-culpable defendants will also lose out on compensatory damages. Compensatory damages are intended to compensate victims, not punish tortious behavior like punitive damages.[61] Some might argue that non-culpable defendants should still be liable for compensatory damages, to avoid an unjust result for the plaintiff. This argument is not without merit, but is ultimately fallacious. Compensatory damages are not intended to punish wrongful conduct but are only justified when rooted in wrongful conduct.[62] Misfortune plagues all and sundry, but in tort law, liability only attaches when the source of that misfortune was defendant's culpable conduct.[63]

In addition to equality and fairness, the good-faith defense arguably serves the same policies underlying qualified immunity. Qualified immunity is intended to protect the public at large by preventing public officials from being distracted from their public service, discouraged from efficiently exercising their own discretion, or deterred from public service altogether.[64] The U.S. Supreme Court held extending qualified immunity to private defendants performing public

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57. *Wyatt I*, 504 U.S. at 174 (Kennedy, J., concurring) ("[T]here is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law.").

58. Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

59. *Wyatt II*, 994 F.2d at 1118, 114 S. Ct. at 470.

60. RESTATEMENT (SECOND) OF TORTS § 901(c) (1979).

61. RESTATEMENT (SECOND) OF TORTS § 901(a) cmt. a (1979) ("[T]he law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.").

62. Palsgraf v. Long Island R. Co., 248 N.Y. 339, 346 (N.Y. 1928) ("The question of liability is always anterior to the question of the measure of the consequences that go with liability. If there is no tort to be redressed, there is no occasion to consider what damage might be recovered if there were a finding of a tort.").

63. *Id.* at 346-47.

64. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

functions would not serve the public good, as it does in regards to public officials.[65] That being said, the public good may be served by allowing nonculpable private defendants to assert good-faith as a defense. There is a continuing modern trend towards privatization of government functions.[66] As a result, private citizens now perform identical functions to public officials and have even replaced them in some fields.[67] For example, some state governments have outsourced the operation of toll roads,[68] utilities,[69] prisons,[70] lotteries,[71] student loans,[72] airports,[73] and other services.[74]

Private citizens performing public functions may serve the public good by providing equal, or even superior service, at a reduced cost. Local and state governments hire private citizens to perform government functions because, it least in theory, it is a cost-effective means to fulfill their purpose.[75] Additionally, governments may privatize services to displace risk, increase revenue, and provide a higher level of service from more experienced providers.[76] If successful, the public benefits by receiving the same or higher quality government services at a reduced burden to the taxpayers.[77] Litigation involving private defendants can, however, raise the cost of privatizing government services, not directly through indemnification, but indirectly by making the jobs less appealing and therefore, more difficult to attract qualified candidates. Hedonistic calculus[78]

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65. *Id.* at 167-68.

66. Dan Weiss, Note, *Privatization and Its Discontents: The Troubling Record of Privatized Prison Health Care*, 86 U. COLO. L. REV. 725, 733-34 (2015) ("America's recent bipartisan infatuation with the privatization of core government services began in the late 1970s and continues to the present day. This privatization revolution has remade the American regulatory landscape.") (internal quotations omitted).

67. Whether the privatization of governmental services is desirable exceeds the scope of this Article but is comprehensively addressed in other works. It will suffice to say such privatization is a reality in the modern United States and many support such a trend. It is the position of this Article that if and until that course is reversed, the workings of civil law must take this reality into account in order to reach fair and equitable outcomes.

68. *Commission Report*, *supra* note 1, at 9-11.

69. *Id.* at 12-13.

70. *Id.* at 14.

71. *Id.* at 15.

72. *Id.* at 16.

73. *Id.* at 16-17.

74. *Id.* at 17-19.

75. *Id.* at 4.

76. *Id.* at 5-6.

77. *Id.* at 6.

78. Also known as "felicific calculus," hedonistic calculus was theorized by philosopher Jeremy Bentham in his 1789 book, *Introduction to the Principles of Morals and Legislation*. At its core, hedonistic calculus is a method of calculating the expected benefits and detriments (or pleasure and pain) of any given action. When an act's detriments are expected to outweigh its benefits, the actor will more likely refrain from completing the act, compared to when the expected

predicts that higher risk of personal liability requires a higher salary to justify that risk. Just as litigation can distract, discourage, and deter public officials from performing their duties, so too can it distract, discourage, and deter private citizens from performing the same tasks. The good-faith defense can and should provide some measure of protection from liability, not just because it prevents unfair and inequitable outcomes, but because it will serve the public good in those areas where private service providers have replaced public officials as the source of government services.

B. The Emergence of Good-Faith as a Defense to Liability

1. The Fifth Circuit's Objective Good-Faith Standard

The first court to find in favor of the good-faith defense for a private § 1983 defendant was the United States Court of Appeals for the Fifth Circuit in *Wyatt v. Cole* (*Wyatt II*).[79] In that case, Howard Wyatt and Bill Cole, two business partners, had a falling out.[80] Cole sought and acquired a writ of replevin against Wyatt in a Mississippi state court.[81] The county sheriff executed the writ, seizing "24 heads of cattle, a tractor, and other property from Wyatt on July 29 and 30, 1986." [82] The writ of replevin was not served on Wyatt until the following day, July 31, 1986.[83] At a post-seizure hearing, a circuit judge dismissed Cole's complaint and ordered him to return the seized property.[84] In July of 1987, Wyatt filed suit against Cole in the U.S. District Court for the Southern District of Mississippi under § 1983 and several state provisions, alleging the seizure without notice violated his right to Due Process.[85] The district court agreed with Wyatt and "declared the state replevin statute unconstitutional."[86] Despite that, the court found Wyatt could not recover damages because Cole, a private citizen, was entitled to qualified immunity.[87]

Wyatt eventually appealed his way up to the U.S. Supreme Court. As discussed previously, the Court found private defendants, like Cole, could not benefit from qualified immunity because such an extension of the immunity doctrine was not justified by the policies supporting it.[88] The Court remanded the case to the Fifth Circuit to determine whether Cole was liable under § 1983, and

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benefits outweigh associated detriments.

79. Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1113 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993).

80. *Id.* at 1115, 114 S. Ct. at 470.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 167-68 (1992).

if so, entitled to "any affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."[89]

The Fifth Circuit addressed each issue, in turn.[90] First, as Cole had used "procedures prescribed by the [state] statute itself," he had acted under color of state law and was liable under § 1983.[91] The court then moved on to the issue of whether Cole could affirmatively assert a defense based on good-faith.[92,93,94] The defense also required defendant's reliance on the statute.[95] The Fifth Circuit found that Wyatt presented no evidence Cole had known the state replevin statute was unconstitutional at the time he invoked it, nor that he had relied unreasonably it.[96] Consequently, Cole was entitled to the good-faith defense against liability.[97] Surprisingly, since the holding in *Wyatt*, the good-faith defense has seen very little use in the Fifth Circuit.

The Second Circuit first brushed against the good-faith defense in 1996, in *Pinsky v. Duncan*.[98] There, the court suggested the existence of the good-faith defense but framed the issue as a failure of the plaintiff to prove a required element of his case.[99] A little more than twenty years later, the Second Circuit would more definitively find for the good-faith defense.[100] In *Jarvis v. Cuomo*, the court affirmed a district court's judgment for a private party § 1983 defendant, based on the good-faith affirmative defense.[101] There, the court found for the defendant because it was "objectively reasonable for [defendant] to act on the basis of a statute not yet held invalid."[102] Based on *Jarvis*, the Second Circuit adopted the Fifth Circuit's objective good-faith standard for the defense.

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89. *Id.* at 169.

90. *Wyatt II*, 994 F.2d at 1117, 114 S. Ct. at 470.

91. *Id.* at 1118, 114 S. Ct. at 470.

92. *Id.* at 1120 ("[W]e think that private defendants, at least those involving ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity."), 114 S. Ct. at 470.

93. *Id.*

94. *Id.* at 1121, 114 S. Ct. at 470.

95. *Id.*

96. *Id.*

97. *Id.* at 1115, 114 S. Ct. at 470.

98. *See* Pinsky v. Duncan, 79 F.3d 306 (2d Cir. 1996).

99. *Id.* at 312-13 ("We think that malicious prosecution is the most closely analogous tort and look to it for the elements that must be established in order for Doehr to prevail on his § 1983 damages claim. Accordingly, having established that Di Giovanni's attachment proceeding ended in failure, it remains for Doehr to demonstrate want of probable cause, malice and damages. The burden of proof is, of course, upon the plaintiff.").

100. Jarvis v. Cuomo, 660 F. App'x 72, 75 (2d Cir. 2016).

101. *Id.* ("[T]he district court did not err in concluding that a good faith defense was available to a private defendant sued under § 1983 for a First Amendment violation.").

102. *Id.* at 76 (quoting *Pinsky*, 79 F.3d at 313) (internal quotes omitted).

In 2008, the Ninth Circuit also adopted the good-faith defense in *Clement v. City of Glendale*.[103] Like the Sixth Circuit,[104] the Ninth Circuit did not define the contours of the good-faith defense. Later, however, the court did affirm a grant of summary judgment in favor of a defendant in a § 1983 suit because the plaintiff failed to show defendant's conduct was "unreasonable."[105] The Ninth Circuit good-faith defense requires, at a minimum, a showing of reasonable reliance on a statute. This likely includes a subjective good-faith belief that the statute is valid, because any reliance on a statute is unreasonable if the defendant actually knew it was unconstitutional. This is supported by the circuit's lower courts' application of the defense.[106] As such, it most closely resembles the Fifth Circuit's approach.

2. The Third Circuit's Subjective Good-Faith Standard

The Third Circuit also found in favor of the existence of good-faith as a defense, in the context of a due process violation with private § 1983 defendants, in *Jordan v. Fox, Rothschild, O'Brien & Frankel*.[107] The Third Circuit, however, diverged from the Fifth Circuit's objective good-faith approach. In Third Circuit courts, a private § 1983 defendant is "entitled to a defense of subjective good faith."[108] The Third Circuit does not require a defendant's reliance on the law be objectively reasonable, but rather that it is merely subjectively genuine.[109] This standard is less demanding, and therefore more frequently successful, as it does not require a defendant to show that reliance on a statute was objectively

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103. Clement v. City of Glendale, 518 F.3d 1090, 1097 (9th Cir. 2008) ("Having acted on instructions from the Glendale Police Department that specifically called for the tow, [defendant] is entitled to invoke the good faith defense.").

104. *See infra* notes 113-14 and accompanying text.

105. Weldon v. Conlee, 684 F. App'x 612, 612 (9th Cir. 2017) ("The district court properly granted summary judgment on Weldon's unlawful seizure claims because Weldon failed to raise a genuine dispute of material fact as to whether the impounding of his vehicle was unreasonable.").

106. *See, e.g.*, Gollub v. City of Sausalito, No. 18-cv-07386, 2019 U.S. Dist. LEXIS 162259, at *8 (N.D. Cal. Sept. 17, 2019) ("Yet Butler may be entitled to a good-faith defense, provided that he was *unaware* that he was helping the City violate the Gollubs' constitutional rights.") (emphasis added); Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n, 400 F. Supp. 3d 998, 1000-1003 (E.D. Cal. 2019) (granting a motion to dismiss because defendants "did [their] best [to] follow the law and had no reason to suspect that there would be a constitutional challenge to [their] actions") (first and third alterations in original) (quoting Hernandez v. AFSCME California, 386 F. Supp. 3d 1300, 1304 (E.D. Cal. 2019)).

107. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994) ("[W]e believe private actors are entitled to a defense of subjective good faith.").

108. *Id.; see also* Oliver v. Serv. Emps. Int'l Union Loc. 668, 415 F. Supp. 3d 602 (E.D. Pa. 2019).

109. *Jordan*, 20 F.3d at 1277 ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.").

reasonable.[110] The Third Circuit's subjective good-faith defense has been asserted with greater frequency than other circuits' objective good-faith standard.[111]

The Sixth Circuit followed suit in 1996 when it decided *Vector Research v. Howard & Howard Attorneys P.C.*[112] The court, however, did not define how the good-faith defense would be applied in that circuit.[113] Consequently, a district court in *Ogle* adopted, in name, the Fifth Circuit's objective good-faith standard.[114] The court, however, arguably lessened a defendant's burden when it found that the "reliance on a statute establishes good faith as a matter of law."[115] In addressing the apparent contradiction of ruling on a defendant's subjective state of mind as a matter of law, the court favorably cited Justice Kennedy's concurring opinion in *Wyatt*:

> [T]ypically, subjective states of mind are shown through discovery. *Vector*, 76 F.3d at 699 ("Any good faith defense must, however, be resolved on remand and not on this Rule 12 motion to dismiss."). *See also Duncan*, 844 F.2d at 1266 ("A good faith defense, on the other hand, 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"). However, it is, as a matter of law, reasonable to rely on a presumptively valid statute. *Wyatt*, 504 U.S. 158, 174, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) (J. Kennedy, concurring) ("there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a

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110. Diamond v. Pa. State Educ. Ass'n, 399 F. Supp. 3d 361, 401 (W.D. Penn. 2019) ("By establishing objective reasonableness as a matter of law, Union Defendants have met the less demanding subjective standard articulated by the Third Circuit in *Jordan*.") (emphasis in original).

111. *See, e.g.*, Egervary v. Young, 366 F.3d 238, 246 (3d Cir. 2004) (noting defendants had asserted good-faith as a defense, but resolving the appeal on different grounds); *see also*, *Oliver*, 415 F. Supp. 3d at 602 (holding a defendant was entitled to good-faith as a defense); *Diamond*, 399 F. Supp. 3d at 401 (granting summary judgment in favor of defendant on the basis of good-faith defense); Foster v. City of Phila., No. 12-5851, 2014 U.S. Dist. LEXIS 143107, at *64 (E.D. Pa. Oct. 8, 2014) (denying summary judgment based on good-faith because there was a material dispute regarding defendant's subjective state of mind); Customers Bank v. Mun. of Norristown, 942 F. Supp. 2d 534, 540 (E.D. Pa. 2013) (dismissing a complaint for failing to state a claim but noting that defendants might be entitled to a good-faith defense); Benn v. Universal Health Sys., No. 99-CV-6526, 2001 U.S. Dist. LEXIS 17121, at *21-23 (E.D. Pa. July 27, 2001) (noting the defendants were entitled to a good-faith defense); Doby v. Decrescenzo, No. 94-3991, 1996 U.S. Dist. LEXIS 13175, at *65-66 (E.D. Pa. Sept. 9, 1996) (granting summary judgment in favor of defendant on the basis of good-faith defense).

112. Vector Rsch., Inc. v. Howard & Howard Att'y P.C., 76 F.3d 692, 699 (6th Cir. 1996).

113. Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1086 (S.D. Ohio 2019) ("[T]he Sixth Circuit has not supplied further guidance on the specific contours of the defense.").

114. *Id.* at 1087.

115. *Id.* at 1091.

> judicial determination of unconstitutionality, is considered reasonable as a matter of law"). It would be unreasonable to expose [defendant] to discovery when discovery would not change the fact that [defendant] was simply following the existing law.[116]

This formulation of the good-faith defense has not yet been approved at the circuit court level, but it has not been disapproved either. Although this test follows the Fifth Circuit test in name, it more closely aligns with the Third Circuit's subjective good-faith test. Under this quasi-objective test, reasonableness is assumed so long as the defendant subjectively relied on the validity of the law.[117] The Sixth Circuit has not seen prevalent use of the good-faith defense in § 1983 litigation, but one district court, interestingly, opined that a medical healthcare professional in a prison setting would be able to use good-faith to successfully defend against an Eighth Amendment deliberate indifference claim.[118]

3. The Seventh Circuit Approves the Good-Faith Defense

In *Janus v. Am. Fed'n of State*, the Seventh Circuit held a private § 1983 defendant was entitled to defend "on the ground that it proceeded in good faith."[119] By that point, three standards for the good-faith defense had arguably emerged since the U.S. Supreme Court remanded *Wyatt I*.[120] The Seventh Circuit quoted both the Fifth and Third Circuits in its *Janus* decision, without appearing to embrace either approach:

> The [Fifth Circuit] accordingly held "that private defendants sued on the basis of *Lugar* may be held liable for damages under § 1983 only 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." [Wyatt v. Cole, 994 F.2d 1113, 1118 (5th Cir. 1992), cert. denied, 126 L. Ed. 2d 421, 114 S. Ct. 470 (1993).]
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> Other circuits followed suit. In *Jordan*, the Third Circuit noted "the [Supreme Court's] statement [in *Wyatt I*] that persons asserting section

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116. *Id.* at 1092.

117. *Id.*

118. Cuco v. Fed. Med. Ctr.-Lexington, No. 05-CV-232, 2006 U.S. Dist. LEXIS 49711, at *121 (E.D. Ky. June 9, 2006) ("Because Dr. Schneider is not a federal employee, the qualified immunity defense is not available to her, even with respect to work performed for the federal government. She may employ, however, a 'good faith' defense.'").

119. Janus v. Am. Fed'n of State, 942 F.3d 352, 364 (7th Cir. 2019).

120. *Cf.* Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1115 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993) (objective good-faith); *with* Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994) (subjective good-faith); *and* Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1092 (S.D. Ohio 2019) (a quasi-objective good-faith test, where reasonableness is assumed).

> 1983 claims against private parties could be required to carry additional burdens, and the statements in *Lugar* which warn us [that] a too facile extension of section 1983 to private parties could obliterate the Fourteenth Amendment's limitation to state actions that deprive a person of constitutional rights and the statutory limitation of section 1983 actions to claims against persons acting under color of law." 20 F.3d at 1277 (cleaned up). Those considerations, the court said, lead to the conclusion that "'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity."[121]

Without explicitly adopting the objective or the subjective approach, the court did offer at least two clues as to its intentions:

> Like our sister circuits, we read the Court's language in *Wyatt I* and *Lugar*, supplemented by Justice Kennedy's opinion concurring in *Wyatt I*, as a strong signal that the Court intended (when the time was right) to recognize a good-faith defense in section 1983 actions when the defendant reasonably relies on established law.[122]

By acknowledging the objective reasonableness element, the Seventh Circuit seemed inclined towards the Fifth Circuit's objective good-faith standard.[123] The court also, however, paid special note to Justice Kennedy's concurrence in *Wyatt*.[124] In that concurrence, Justice Kennedy showed strong support for a subjective good-faith defense by noting that "the existence of a statute thought valid ought to allow a defendant to argue that he acted in subjective good faith and is entitled to exoneration no matter what the objective test is."[125] Justice Kennedy went on to say that:

> [T]here is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can only be shown through proof of subjective bad faith.[126]

This is the same text cited by a district court in the Sixth Circuit when it articulated its quasi-objective good-faith defense standard.[127] Unfortunately, the court went on to seemingly narrow the defense's applicability.[128] The court noted,

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121. *Janus*, 942 F.3d at 363.

122. *Id.* at 366.

123. *Id.* at 365.

124. *Id.* at 366.

125. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 174 (1992) (Kennedy, J., concurring).

126. *Id.* (citing Birdsall v. Smith, 122 N.W. 626 (Mich. 1909)).

127. Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1092 n. 15 (S.D. Ohio 2019).

128. *Janus*, 942 F.3d at 367 ("[T]he good-faith defense to section 1983 liability is narrow.").

somewhat axiomatically, that not "every defendant that deprives any person of any constitutional right" would be protected by the good-faith defense.[129] The Seventh Circuit unduly limited the scope of the good-faith defense to those private parties who had "relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute."[130] This formulation is problematic for two reasons.

First, it seemingly requires "substantial" reliance.[131] The court did not elaborate on what separates substantial reliance from insubstantial or incidental reliance. Even if the distinction were clear, the court did not specify why a private party who *insubstantially* relied on a law was more culpable than a private party who *substantially* relied on the same law. This peculiarity suggests that two private party defendants who acted identically could face incongruent judgments, based on nothing more than their degree of reliance on a law that was presumptively valid at the time of their actions. The distinction fails to further policy principles of "equality and fairness," which underlie the good-faith defense.[132] It also conflicts with Justice Kennedy's concurring opinion in *Wyatt I*, which the Seventh Circuit favorably cited as a source informing its decision to adopt the good-faith defense.[133]

Further, the Seventh Circuit seemed to imply the defense would only protect a private party defendant from liability if the U.S. Supreme Court had unambiguously validated the statute.[134] This turns Justice Kennedy's point on its head. In *Wyatt I*, Justice Kennedy voiced support for the proposition that reliance on a law was presumptively valid "prior to a judicial determination of unconstitutionality."[135] The Seventh Circuit inverted that principle, and now possibly requires judicial approval of a law, from the highest Court in the land no less, before reliance on that law is considered reasonable.[136] This standard, perplexingly, requires private parties to maintain a higher degree of legal awareness than their public official counterpart. A public official will benefit from qualified immunity so long as their conduct did not violate a "clearly

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129. *Id.*

130. *Id.* (emphasis in original).

131. *Id.* at 365.

132. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

133. *Cf. Janus*, 942 F.3d at 367 (holding for the good-faith defense of a party that "relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute") *with Wyatt I*, 504 U.S. at 174 (Kennedy, J., concurring) (noting there is support in common for the proposition that reliance on any statute, prior to its judicial invalidation, is reasonable as a matter of law) *and Janus*, 942 F.3d at 366 ("[W]e read the Court's language in *Wyatt I* and *Lugar*, supplemented by Justice Kennedy's opinion concurring in *Wyatt I*, as a strong signal that the Court intended (when the time was right) to recognize a good-faith defense in section 1983 actions when the defendant reasonably relies on established law.").

134. *Janus*, 942 F.3d at 364.

135. *Wyatt I*, 504 U.S. at 174 (Kennedy, J., concurring).

136. *Janus*, 942 F.3d at 367.

established" law, regardless of his subjective awareness[137] but a private party defendant in the Seventh Circuit cannot rely on a law until it has been validated by the U.S. Supreme Court.[138] This confusing dichotomy runs counter to the court's opinion earlier in *Janus*, when it noted that "[t]he Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future."[139] By the end of the *Janus* decision, it was left unclear whether private parties are able to rely on a presumptively valid statute, or instead must wait until the U.S. Supreme Court affirmatively validates it.[140]

III. EFFECTIVENESS OF THE GOOD-FAITH DEFENSE BASED ON POLICY CONCERNS

At present, six U.S. Courts of Appeals have explicitly found for the existence of the good-faith defense for private party § 1983 defendants.[141] The Fifth Circuit was the first Court of Appeals to approve its use in 1993.[142] The Seventh Circuit is the most recent court to adopt it in 2019.[143] Consequently, the Seventh Circuit stands to profit from the lessons learned in other circuits. The effectiveness of the good-faith defense can only be measured in light of the policy concerns the defense is intended to address. Notably, the defense serves "principles of equality and fairness" by protecting private defendants who relied on a valid law from § 1983 liability.[144] When used appropriately, this results in "equal" and "fair" treatment of private § 1983 defendants when compared to public officials susceptible to § 1983 suits for identical conduct.

A. Which Approach Best Serves the Policies Underlying the Good-Faith Defense

It is a tenet of American law that severity of punishment is tied to degree of criminal or civil culpability.[145] By logical extension, equal culpability will lead to equal liability. All things being equal, if two defendants, one private party and one public official, engaged in identical conduct without malice, their culpability

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137. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

138. *Janus*, 942 F.3d at 367.

139. *Id.* at 366 (emphasis in original).

140. *Id.* at 367.

141. *See* Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994); Vector Rsch., Inc. v. Howard & Howard Att'y P.C., 76 F.3d 692, 699 (6th Cir. 1996); Clement v. City of Glendale, 518 F.3d 1090, 1096-97 (9th Cir. 2008); Jarvis v. Cuomo, 660 Fed. Appx. 72, 75 (2d Cir. 2016); and *Janus*, 942 F.3d at 364.

142. *Wyatt II*, 994 F.2d at 1121, 114 S. Ct. at 470.

143. *Janus*, 942 F.3d at 364.

144. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

145. Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender.").

levels would be the same. The public official defendant could avoid the suit by successfully claiming qualified immunity, if he or she did not violate clearly established law, under *Harlow*.[146] On the other hand, the private party defendant could defend against liability by presenting the affirmative good-faith defense. The private party § 1983 defendant's defense would take a different form, but ultimately lead to the same favorable outcome as the public official. In light of their respective degrees of culpability, this would be an equitable outcome.

The defense also intends to serve the principle of fairness.[147] Ideally, it does so by holding private § 1983 defendants not liable for acts they committed in reliance on a valid-at-the-time statute. This is fair because private parties are not "readers of tea-leaves" who might predict what laws will be upheld or struck down in the future[148] The difference between the objective and the subjective good-faith standards is best examined in light of the differing views on how best to serve the principle of fairness. Under the objective view, fairness is best served only if a private party § 1983 defendant reasonably relies on a law.[149] In other words, it would be unfair to a plaintiff with a meritorious claim to allow a defendant to avoid liability based on unreasonable reliance. This view is not without merit but fails to account for the obvious question: when is reliance on a valid law's validity ever unreasonable? It is presumably unreasonable to rely on a law that flagrantly and obviously contravened the U.S. Constitution, but such laws are hardly abundant. As a practical matter, for reliance to be unreasonable, the law upon which the defendant relied would have to have been so obviously unconstitutional that even a layperson without legal training would recognize it as such.

Under the subjective good-faith standard, on the other hand, fairness is served by protecting defendants who actually relied on a valid law.[150] Fairness is served in this regard by preventing liability from attaching to the ignorant, but not malicious, defendant who violated another's federal rights in reliance on a law that was later invalidated.[151] The subjective approach more congruently serves fairness because it would be unfair to expect laypersons to predict the constitutionality of the very laws they must rely on to perform their myriad of

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146. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

147. *Wyatt I*, 504 U.S. at 168.

148. *Janus*, 942 F.3d at 366 (emphasis in original); *accord* Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1091 (S.D. Ohio 2019) ("In short, it is patently unfair to expect private actors to be able to predict the future of constitutional law.").

149. *See, e.g.*, Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1121 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993).

150. *See, e.g.*, Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994) ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.").

151. *See, e.g.*, *Ogle*, 397 F. Supp. 3d at 1091 ("In short, it is patently unfair to expect private actors to be able to predict the future of constitutional law.").

professional tasks.[152]

Both approaches serve equality by preventing disparate outcomes for similarly culpable § 1983 defendants, but the subjective approach better addresses the principle of fairness. Consequently, the subjective good-faith standard is the better approach. Further, equality and fairness are best served if the defense is liberally applied. Defendants should assert the good-faith defense in every case where it might apply, and courts should assess those assertions in light of the principles of fairness and equality.

Without liberal application of the good-faith defense, liability will continue to turn merely on the defendant's employer (a private company or government agency). A public official can claim qualified immunity and defeat not only liability but avoid trial altogether, while the private § 1983 defendant is left mired in litigation and potential liability. Equality militates towards an early determination of whether the good-faith defense precludes liability, while fairness requires that a court seriously consider the availability and appropriateness of the good-faith defense in every § 1983 suit in which it is asserted.

B. Suggestions on Successful Implementation

The subjective good-faith standard is more in line with the policies supporting the defense, and therefore, superior. The Fifth, Second, and Ninth Circuits all presently utilize an objective standard.[153] Without adopting the subjective standard, these circuits can allow more effective use of the good-faith defense by finding that reliance on a valid law is presumptively reasonable as a matter of law, as the district court in *Ogle* did.[154] As a presumption, it would weigh in favor of a private § 1983 defendant, but not unreasonably so. A plaintiff could overcome the presumption by offering evidence that a defendant's reliance on the law in question was unreasonable. This approach would preserve the objective element of the good-faith defense while also acknowledging the extreme rarity of *un*reasonable reliance on a valid law.

In every circuit where the good-faith defense is recognized, district courts should consider the defense early in litigation. As an issue of fact, some courts might wish to err on the side of caution by allowing a jury to decide the issue. The court in *Ogle* contemplated this approach, but ultimately rejected it.[155] Once asserted by a private § 1983 defendant, a plaintiff must overcome that defense by showing the defendant did not subjectively rely on a valid law, or that reliance was unreasonable (in circuits employing the objective good-faith standard). There are situations, especially in subjective good-faith jurisdictions, where no amount of discovery could defeat reliance on a valid law as a good-faith defense. In situations where discovery cannot bear on the issue, and defendant is entitled to

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152. *See Janus*, 942 F.3d at 366.

153. *See Wyatt II*, 994 F.2d at 1121, 114 S. Ct. at 470; Clement v. City of Glendale, 518 F.3d 1090, 1097 (9th Cir. 2008); Jarvis v. Cuomo, 660 F. App'x 72 (2d Cir. 2016).

154. *Ogle*, 397 F. Supp. 3d at 1091.

155. *Id.* at 1092.

judgment as a matter of law based on good-faith reliance on a valid law, a court should spare the parties the needless and wasteful expense of discovery by dismissing the case.

This would most likely take the form of a defendant's Motion to Dismiss under Federal Rule 12(c).[156] A defendant should assert the affirmative defense of good-faith in his or her answer, and then file the 12(c) Motion to Dismiss with the court. If at that point, based on the pleadings and taking all facts alleged by the plaintiff as true, the defendant is entitled to the good-faith defense as a matter of law, the case should be dismissed. If, however, the good-faith defense's applicability remains unclear, the court must allow the case to move forward to discovery.

Following discovery, a defendant may again move to dismiss the case by filing a Motion for Summary Judgment.[157] At that point, the court should consider whether plaintiff has collected any evidence, regardless of credibility, that would allow a reasonable jury to find the defendant is not entitled to the good-faith defense. If plaintiff cannot produce such evidence, the court should grant the Motion for Summary Judgment in favor of the defendant who is entitled to the good-faith defense.[158] If a genuine dispute of material fact regarding whether defendant relied in good-faith on the law, then the issue should be left for the jury to decide.

C. The Practical Implications of Efficient Implementation of the Good-Faith Defense

By considering the good-faith defense early and applying it liberally, courts will better serve the policies informing its utility – equality and fairness.[159] Equality is served by allowing a nonculpable private § 1983 defendant to avoid a trial, similar to how an identically-situated public official will avoid trial by asserting qualified immunity. Fairness is served by allowing nonculpable defendants to not only defeat liability, but to avoid the long and arduous process of trial. Whether the good-faith defense applies is a matter of fact, not law, but that does not prevent courts from potentially deciding it early, as the court in *Ogle* did.[160] A meritorious plaintiff, however, can defeat the good-faith defense by producing evidence that the defendant did not objectively or subjectively, depending on jurisdiction, rely in good-faith on a valid law at the summary judgment stage. This strikes the proper balance between preserving judicial economy and serving the policies underlying the good-faith defense, while also

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156. FED. R. CIV. P. 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.").

157. FED. R. CIV. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.").

158. *Id.* ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

159. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

160. *Ogle*, 397 F. Supp. 3d at 1092.

permitting meritorious plaintiffs to vindicate their federal rights.

Without the good-faith defense, the distinction between public officials and private citizens produces inequitable outcomes. As qualified immunity is available only to public officials, liability for a constitutional tort may turn on employer status. As such, two equally culpable defendants can be subjected to two divergent verdicts. The public official will be immune to suit, while the private citizen is liable for compensatory and possibly punitive damages. This discrepancy is further exacerbated in light of the practical reality of how liability, if eventually assessed, impacts the two distinct classes of defendants. Private citizens may be insured in case of liability, but such insurance rarely covers punitive damages.[161] Conversely, many states indemnify public employees for all damages, in addition to funding legal expenses and attorney's fees.[162] The Federal Rules of Evidence generally preclude consideration of indemnification or liability insurance as evidence of liability,[163] but that does not stop some courts from considering them in light of which party might be better positioned to finance the cost of litigation. For example, the famous jurist Judge Posner of the Seventh Circuit once opined in dicta that defendants of § 1983 suits were better-positioned to cover the costs of expert witnesses because their defenses were generally financed through liability insurance or indemnification agreements.[164] Even disregarding the benefits of qualified immunity, public officials still have an advantage over private defendants because indemnification agreements between state employers and their employers are often more comprehensive than the liability insurance of their private citizen counterpart. Proper use of the good-faith defense helps to ameliorate these inequitable circumstances by permitting the private defendant to affirmatively defend against liability.

Section 1983 plaintiffs will argue against the early and liberal use of the good-faith defense as a means to efficiently adjudicate some cases. Plaintiffs with

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161. Alan I. Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 VILL. L. REV. 455, 460 n.11 (1994) ("When courts award punitive damages as the result of a tortious act, liability insurance coverage may be unavailable because: (1) there are terms in the applicable insurance policy setting forth an exclusion for punitive damages; (2) legislative provisions prohibit such coverage; or (3) such coverage violates state public policy established by judicial decision.").

162. *See, e.g.,* 5 ILL. COMP. STAT. 350/2(d) (2017) ("[T]he State shall indemnify the State employee for any damages awarded and court costs and attorneys' fees assessed as part of any final and unreversed judgment, or shall pay such judgment.").

163. FED. R. EVID. 411 ("Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.").

164. Rowe v. Gibson, 798 F.3d 622, 634 (7th Cir. 2015) ("In addition, an expert's fee, if any, would in a case such as this, with its numerous defendants, be split many ways or, more likely, be paid for by the Indiana Department of Correction, the State of Indiana, Corizon or its liability insurer, or individual defendants' malpractice insurance (depending on the contractual arrangements between Corizon and the state, as well as the parties' insurance arrangements), or some combination of these well-heeled entities.").

seemingly meritorious claims should not be denied access to a jury, but rather allowed to present their evidence and argument to a jury to decide the issues of fact. This is an inherently appealing argument, but ultimately counter-intuitive. The good-faith defense, especially in subjective jurisdictions, will simply defeat all claims of constitutional violations as a matter of law. In circuits that recognize the good-faith defense, this is an unavoidable possibility. Allowing a plaintiff to move forward through a trial against a private § 1983 defendant entitled to the good-faith defense, merely to allow a jury to conclude the defense applies, does an injustice to that defendant by needlessly forcing him or her to bear the costs of discovery and litigation. This also burdens the judicial system by futilely trying cases where plaintiffs, as a matter of law, cannot prevail. In an overtaxed judicial system plagued by extended delays and substantial expense, wise use and adjudication of the good-faith defense will help diminish backlogged cases, prevent delay, and reduce costs to the parties.

IV. RECOMMENDATIONS ON PRACTICAL APPLICATION IN THE SEVENTH CIRCUIT

A. Seventh Circuit Courts Should Liberally Apply the Good-Faith Defense

The Seventh Circuit's language in *Janus* seemingly precluded liberal application of the good-faith defense by restricting its applicability to defendants who substantially relied on a valid law which had been affirmatively and unambiguously approved by the U.S. Supreme Court.[165] That, however, may not necessarily be true. The Seventh Circuit, in keeping with the judicial requirement of deciding only live cases or controversies,[166] ruled on the case before it. In *Janus*, the private party defendant had substantially relied on a valid-at-the-time law, which had been unambiguously validated by the U.S. Supreme Court.[167] The *Janus* court was asked whether a defendant, under those conditions, was entitled to the good-faith defense,[168] and it based its decision on the narrow set of facts.

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165. Janus v. Am. Fed'n of State, 942 F.3d 352, 367 (7th Cir. 2019) ("We predict that only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute.").

166. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

167. *Janus*, 942 F.3d at 356-57.

168. *Id.* at 362 ("We must decide whether a union may raise any such defense against its liability for the fair-share fees it collected before [Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2461 (2018)].").

It did not decide whether a private § 1983 defendant could claim good faith as a defense when he or she had relied on a law that had not been affirmatively and unambiguously validated by the U.S. Supreme Court because that was not at issue in the case. In fact, the Seventh Circuit arguably could not have decided that without issuing an advisory opinion.[169] As such, courts in the Seventh Circuit may rightfully consider that the class of defendants who may claim good faith as an affirmative defense has not been conclusively defined.

The *Janus* court did note, however, that "the good-faith defense to section 1983 liability is narrow."[170] This explicitly limits applicability of the good-faith defense but does not define its boundaries. Seventh Circuit courts should still recognize that private party § 1983 defendants who relied on a valid-at-the-time law are entitled to the good-faith defense. This finding is not precluded by the court's ruling in *Janus* and well in keeping with the policy principle of fairness. As a follow up to *Janus*, the Seventh Circuit might consider clarifying its holding in that case by more specifically and broadly defining the defense's applicability. As previously addressed, broad applicability of the good-faith defense is advantageous in light of the policy principles of equality and fairness.[171]

The good-faith defense serves several policy principles,[172] but those principles may only be satisfied if the defense is feasible for worthy defendants. At present, the principal obstacle standing in the way of the defense's effective use is the Seventh Circuit's own use of unnecessarily constrictive language when it adopted the good-faith defense.[173] Seventh Circuit district courts should interpret the *Janus* court as ruling only on the facts before it without expressly precluding the good-faith defense from other private § 1983 defendants. The Seventh Circuit itself should clarify its position by addressing the broader applicability of the good-faith defense as soon as an opportunity presents itself.

B. The Good-Faith Affirmative Defense as a Practical Means to Efficiently Resolve Cases

Under the Federal Rules of Civil Procedure, an affirmative defense must be asserted in response to a plaintiff's complaint.[174] Rule 8 allows a party to plead in the alternative, so a defendant may, in her answer, deny performing the

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169. *See, e.g.*, United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) ("As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite.").

170. *Janus*, 942 F.3d at 367.

171. *See supra* notes 144-56 and accompanying text.

172. *See supra* notes 43-71 and accompanying text.

173. *See Janus*, 942 F.3d at 367 ("We predict that only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute."); *see also supra* notes 122-31 and accompanying text.

174. FED. R. CIV. P. 8(c) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.").

allegedly tortious conduct or omission, deny that the conduct amounted to a constitutional violation, and, in the alternative, plead the affirmative defense of good-faith.[175] Whether this is a wise strategy will depend on the facts of the case, the court hearing the case, and, ultimately, the judgment, acumen, and competency of the defense attorney presenting those arguments.

Defendants must always be mindful of how an affirmative defense, as a concept, operates. An affirmative defense is the "defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true."[176] A defendant cannot merely invoke the magic words "good faith" and expect a quick dismissal. To successfully plead the good-faith defense, private § 1983 defendants must raise a series of facts that, if true, defeat plaintiff's claim.[177] The first such fact is the existence of a then-valid law.[178] The law, either state or federal, had to be in effect at the time the defendant allegedly violated plaintiff's rights. Further, defendant must establish a connection between the law and the alleged violation, namely that the law upon which defendant relied authorized the conduct or omission that plaintiff alleges deprived him or her of a federal right.

Second, a defendant must show that she "proceeded in good faith."[179] The Seventh Circuit did not explicitly define how good-faith reliance was to be pled or demonstrated. As a practical matter, a defendant should plead that her course of conduct was guided by the law at the time without a malicious intent to deprive plaintiff of a constitutional right. If defendant did maliciously intend to deprive plaintiff of a constitutional right, then a law permitting such conduct might not excuse the defendant's liability.[180] This subjective intent is a factually sensitive issue, which may preclude dismissal even after discovery.[181] The Seventh Circuit went on to note that the defendant in *Janus* was entitled to the good-faith defense

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175. FED. R. CIV. P. 8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

176. *Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

177. *Id.*

178. *Janus*, 942 F.3d at 366 (finding the existence of a valid-at-the-time law "when [Illinois] adopted a labor relations scheme providing for exclusive representation of public-sector workers and the remit of fair-share fees to the recognized union").

179. *Id.* at 363-64 ("We now join our sister circuits in recognizing that, under appropriate circumstances, a private party that acts under color of law for purposes of section 1983 may defend on the ground that it proceeded in good faith.").

180. This apparent conflict between good-faith reliance on a valid law and malicious intent to deprive a plaintiff of a constitutional right is not well settled and this Article takes no opinion on the preferred outcome. It will suffice to say, however, that defendants who maliciously, but legally (at the time) deprived a plaintiff of a constitutional right may not be able to escape liability through the good-faith defense.

181. FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

because it "relied substantially and in good faith on both a state statute and unambiguous Supreme Court precedent validating that statute."[182] As previously discussed, this language is problematic in what it suggests.[183] If the Seventh Circuit truly intended to limit the good-faith defense's applicability only to those defendants who had substantially relied on a statute that had been unambiguously validated by the U.S. Supreme Court,[184] then the defense is reduced to a paper tiger.[185] No other circuit defined the defense so narrowly.[186] In keeping with the opinions favorably cited by the Seventh Circuit in the *Janus* opinion,[187] a defendant should be successful if she can show she relied in good faith on a law valid at the time of the alleged violation.

In sum, to be successful, a defendant must plead that (1) a valid law authorized defendant's conduct which plaintiff claims deprived him or her of a federal right, and (2) the defendant relied on that law in good faith. Defendant must support these assertions with facts, which if true, "will defeat the plaintiff's […] even if all the allegations in the complaint are true."[188] Whether that can be established as a matter of law at the pleading stage, as the *Ogle* court held,[189] must be determined by the district courts within the Seventh Circuit. On the other hand, to defeat the good-faith affirmative defense at the summary judgment stage, a plaintiff must produce facts sufficient for a reasonable jury to infer that either there was no valid law which authorized defendant's conduct, or defendant did not rely on that law in good faith.

C. States Can Encourage the Robust Use of the Good-Faith Defense Through Legislation

Another roadblock to the defense's effective implementation is a lack of laws regulating areas where private parties perform public functions. After all, a defendant claiming the good-faith defense needs to be able to affirmatively assert

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182. *Janus*, 942 F.3d at 335.

183. *See supra* notes 129-41 and accompanying text.

184. *See supra* notes 166-70 and accompanying text.

185. Merriam-Webster defines a paper tiger as "one that is outwardly powerful or dangerous but inwardly weak or ineffectual." *Paper Tiger*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/paper%20tiger [https://perma.cc/9RGN-BJ9Q] (last visited Dec. 3, 2019).

186. *See generally,* Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1118 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993); Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994); Vector Rsch., Inc. v. Howard & Howard Att'y P.C., 76 F.3d 692, 699 (6th Cir. 1996); Clement v. City of Glendale, 518 F.3d 1090, 1096-97 (9th Cir. 2008); and Jarvis v. Cuomo, 660 Fed. Appx. 72 (2d Cir. 2016).

187. *Janus*, 942 F.3d at 363-64 (favorably citing the Fifth and Third Circuits' decisions adopting the defense, as well as Justice Kennedy's concurring opinion in *Wyatt*).

188. *Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

189. Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1092 (S.D. Ohio 2019) ("[I]t would be unreasonable to expose [defendant] to discovery when discovery would not change the fact that [defendant] was simply following the existing law.").

the existence of a law. By way of example, under the Eighth Amendment, prisoners are entitled to adequate medical treatment during their incarceration.[190] Doctors and nurses who provide healthcare to state prisoners, however, are principally guided by administrative codes, operating procedures, and their own medical training – not statutory schemes defining what treatment is "adequate."[191] While it is important to allow healthcare providers the discretion to treat patients flexibly as situations develop and change,[192] a statutory set of guidelines would provide a framework defining, at least, a minimal level of care necessary to comply with the law.

The area of prisoner healthcare is a superlative area for legislation because "[t]he federal Bureau of Justice Statistics reports that prisoners enter prison with higher rates of health problems than others – higher rates of chronic diseases, more extensive histories of infectious disease"[193] and prison litigation remains prevalent despite the Prison Litigation Reform Act ("PLRA").[194] The convergence

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190. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (concluding "deliberate indifference" to a prisoner's serious medical needs constitutes a violation of the Eighth Amendment).

191. *Cf.* Holger Sonntag, Comment, *Medicine Behind Bars: Regulating and Litigating Prison Healthcare Under State Law Forty Years After Estelle v. Gamble*, 68 CASE W. RSRV. L. REV. 603, 608-09 (2019) ("Some statutes formulate basic requirements for prison healthcare--such as an initial physical and mental examination for all new inmates, or that inmates are required to contribute to healthcare expenditures through co-payments --but then delegate the authority to prescribe more detailed standards for healthcare to the state's department of corrections. Other statutes simply delegate all such decisions to the state agency responsible for running state prisons while setting very general or no parameters."); and Jeffrey Natterman & Pamela Rayne, *The Prisoner in a Private Hospital Setting: What Providers Should Know*, 19 J. HEALTH CARE L. & POL'Y 119, 119 (2017) (Medical providers in a prison setting are expected to "follow ethical clinical practice guidelines established by national medical societies, and base their practices on well-established, evidenced-based metrics."). *See also*, Damon Martin, Comment, *State Prisoners' Rights to Medical Treatment: Merely Elusive or Wholly Illusory*, 8 NAT'L BLACK L.J., 427, 435-36 (1983) ("[T]here are relatively few statutes that require treatment of particular inmate illnesses. The few statutes that directly pertain to prisoner medical treatment are so ambiguous that they provide little practical guidance determining seriousness [of injury or illness]."); Marvin Zalman, *Prisoners' Rights to Medical Care*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 185, 187 (1972) ("Absent a statute, states rely on correctional administrators and medical officers to supply the complex of goods and services which amounts to adequate medical care.").

192. Jörg Pont et al., *Prison Health Care Governance: Guaranteeing Clinical Independence*, 108 AM. J. PUB. HEALTH 472, 474 (2018) ("Unrestricted clinical independence for health care providers constitutes the bedrock of ethically sound health care for individuals in detention, and is based on the assertion that the sole task of health care professionals is to evaluate, protect, or improve their patients' physical and mental health.").

193. Camille Bennett, *Repairing the Health Care System for Prisoners in Illinois*, AM. CIV. LIBERTIES UNION ILLINOIS (Jan. 10, 2018, 6:00 PM), https://www.aclu-il.org/en/news/repairing-health-care-system-prisoners-illinois [https://perma.cc/85ZW-GLAB].

194. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156-57 (2015) ("Since 2007, filing rates, prison population, and filings have

of generally increased medical necessity, a litigious population, and a lack of protection by qualified immunity places prisoners' private party healthcare providers in an especially precarious position. Factoring in the significant incarceration rates in the United States along with the increased healthcare demands of prisoners makes the lack of a statutory scheme especially harmful for the prisoners themselves.[195] Statutory guidance would help alleviate these concerns and offer a feasible means to defend against liability through the good-faith defense.

That is not to say that prisoner healthcare is entirely unregulated. Virtually every state regulates prisoner healthcare to some degree.[196] Illinois, for example, has codified a few mandates in regards to prisoner healthcare in its compiled statutes.[197] Illinois guarantees prisoners "confidential testing for infection with human immunodeficiency virus (HIV)" and "medical care while incarcerated, counseling, and referrals to support services" if positive for HIV.[198] The statute goes on to permit a chief administrative officer to consent to treatment on a prisoner's behalf in certain life-threatening situations, if that prisoner is unable to consent.[199] Post *Janus*, a private party employed as a chief administrative officer who gives consent to surgical treatment on behalf of a prisoner facing a life-threatening situation but is unable to consent, in good-faith reliance on the Illinois statute, can claim the good-faith defense if that prisoner later alleges a constitutional violation based on that action. This scenario, however, is limited to an extraordinarily narrow set of circumstances because the law relied on applies only to a relatively uncommon situation. By more comprehensively codifying prisoner healthcare requirements and permissible treatment methods, states can broaden the applicability of the good-faith defense.

States should more comprehensively regulate the area of prisoner healthcare by codifying how medical treatment is to be performed. This would provide private party medical service personnel guidance in how treatment is to be applied, offer a fair defense to liability when applicable, and create uniform procedures in how all state prisoners are to be treated. Laws such as these might be a boon to plaintiffs with meritorious claims, as well. A defendant whose conduct violated clear statutory authority could not claim the good-faith defense, and the plaintiff may even be able to offer that violation as evidence of defendant's negligence or malicious intent. In addition to prisoner healthcare, states can benefit from comprehensively regulating numerous areas where private parties perform public functions.[200]

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all plateaued.").

195. *See* Amy Vanheuverzwyn, Note, *The Law and Economics of Prison Health Care: Legal Standards and Financial Burdens,* 13 U. PA. J.L. & SOC. CHANGE 119, 120 (2010) ("The combination of the health care crisis and the incarceration crisis can be deadly.").

196. Sonntag, *supra* at 191.

197. *See* 730 ILL. COMP. STAT. 5/3-6-2 (2019).

198. *Id.* at 5/3-6-2(d-5).

199. *Id.* at 5/3-6-2(e).

200. *See supra* notes 69-75 and accompanying text (discussion on traditionally public

V. CONCLUSION

There is a reason why "every federal appellate court to have decided the question has held" for the existence of the good-faith defense to liability.[201] The good-faith defense simply makes good sense. It is intuitively appealing because it serves universally-regarded principles of "equality and fairness," without allowing culpable defendants to escape consequences.[202] Before the good-faith defense, liability in many § 1983 cases turned on the character of the defendant's employer.[203] Employment status, private or public, is a truly spurious means by which to determine liability and apportion blame. The good-faith defense somewhat corrects that inequity by providing nonculpable private § 1983 defendants a means to defeat liability. After all, private citizens are no more effective "readers of tea-leaves"[204] than public officials when it comes to predicting the future constitutionality of present-day law.

The Fifth Circuit has adopted an objective good-faith defense that requires a defendant show actual and reasonable reliance on a law.[205] The Third Circuit, in contrast, has formulated a subjective good-faith defense where a private defendant need only show actual reliance on the law as a means to defend against § 1983 liability.[206] The Sixth Circuit has not definitively ruled on whether a defendant must objectively or subjectively show good-faith to benefit from the defense, but a Sixth Circuit district court has concluded that reliance on the law is reasonable as a matter of law.[207]

In considering the principles that the defense serves, the subjective good-faith standard is superior. The subjective good-faith standard protects genuinely nonculpable private § 1983 defendants without requiring a showing of reasonable reliance.[208] With that in mind, in circuits where reasonableness remains an

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functions being increasingly performed by private citizens).

201. Janus v. Am. Fed'n of State, 942 F.3d 352, 361-62 (7th Cir. 2019).

202. Wyatt v. Cole (*Wyatt I)*, 504 U.S. 158, 168 (1992).

203. *Id*. at 168-69 (holding qualified immunity was available to public officials but not private citizens performing identical functions).

204. *Janus*, 942 F.3d at 366 ("The Rule of Law requires that parties abide by, and be able to rely on, what the law *is*, rather than what the readers of tea-leaves predict that it might be in the future.") (emphasis in original).

205. Wyatt v. Cole (*Wyatt II*), 994 F.2d 1113, 1120 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 470 (1993).

206. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1277 (3rd Cir. 1994) ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more demanding objective standard of reasonable belief that governs qualified immunity.").

207. Ogle v. Ohio Civ. Serv. Emp. Ass'n, AFSCME, Local 11, 397 F. Supp. 3d 1076, 1092 (S.D. Ohio 2019).

208. *Jordan*, 20 F.3d at 1277 ("These considerations lead us to conclude 'good faith' gives state actors a defense that depends on their subjective state of mind, rather than the more

element of the good-faith defense, the *Ogle* court's approach to objective reasonableness is extremely appealing.[209] In objective good-faith circuits, district courts should consider the line of reasoning proposed by Justice Kennedy in his concurring opinion in *Wyatt*[210] and given effect by the *Ogle* court.[211] Namely, that reliance on a valid statute is presumptively reasonable as a matter of law.

The defense, whether objective or subjective, would most effectively satisfy its underlying policy principles if given meaningful consideration in the earliest stages of § 1983 proceedings. If possible, a court should make a determination of its applicability before the discovery stage of litigation, in order to spare parties the costly expense of discovery. If there remains a genuine factual dispute as to good-faith reliance, the court should allow discovery but revisit the issue prior to trial. Defendants should assert the good-faith defense at each available opportunity. States can support the use of the good-faith defense by private § 1983 defendants by legislating those areas where private citizens have prominently begun to replace public officials in providing government services. This will help reduce inconsistent qualities of service between disparate state institutions while providing private party § 1983 defendants a genuine opportunity to plead the good-faith defense.

The Seventh Circuit, despite its problematic language in *Janus*,[212] is in a position to develop a robust, rational, and meaningful good-faith defense to satisfy the interests of equality and fairness while positively affecting judicial economy. Private party § 1983 defendants cannot benefit from qualified immunity and are subject to a differing standard of liability. The good-faith defense can help alleviate that gross imbalance. Ultimately, the good-faith defense is not a means for culpable parties to escape liability – it is a method by which nonculpable parties are efficiently vindicated. Those are laudable goals and Seventh Circuit courts are now well-positioned to embrace an operative good-faith defense as a means to achieve them.

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demanding objective standard of reasonable belief that governs qualified immunity.").

209. *Ogle*, 397 F. Supp. 3d at 1092.

210. *Wyatt v. Cole (Wyatt I)*, 504 U.S. 158, 174 (1992) (Kennedy, J., concurring) ("[T]here is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law . . . .").

211. *Ogle*, 397 F. Supp. 3d at 1092.

212. Janus v. Am. Fed'n of State, 942 F.3d 352, 367 (7th Cir. 2019) ("Before closing, we emphasize again that the good-faith defense to section 1983 liability is narrow. It is not true, as Mr. Janus charges, that this defense will be available to 'every defendant that deprives any person of any constitutional right.' We predict that only rarely will a party successfully claim to have relied substantially and in good faith on both a state statute *and* unambiguous Supreme Court precedent validating that statute.") (emphasis in original).