

WHO WILL PROTECT THE POLICE? A NEED FOR TASK SPECIALIZATION IN LOWER COURTS: *MALLEY v. BRIGGS*

Qualified immunity¹ is an affirmative defense available to a public official charged with an unconstitutional deprivation of rights under 42 U.S.C. § 1983.² Federal courts adopted the law of qualified immunity to balance two competing goals: deterring officials from abusing their power in derogation of the Constitution, and shielding officials from the threat of potential liability while performing discretionary duties.³

1. Qualified immunity is one of three types of defenses raised in civil rights litigation: sovereign immunity, which bars suits against the states; absolute immunity, which bars suits against the President, legislators, judges, and prosecutors acting within their official capacities; and qualified immunity, which is available to certain other public officials upon a showing that they have acted in good faith.

2. Enacted by the Forty-Second Congress as Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)). Section 1983 provides in pertinent part: 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.

Section 1983 does not create any substantive rights, rather it only creates a right of action to vindicate those rights already conferred by the Constitution or by federal statute. *See, e.g., Baker v. McCollan*, 443 U.S. 137 (1979). Section 1983 is "not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Id.* at 144 n.3; *see also* P. SCHUCK, *SUING GOVERNMENT* 47-51 (1983) (discusses the historical development of § 1983).

Although Congress originally enacted § 1983 to enforce the provisions of the fourteenth amendment and to protect the constitutional rights of black citizens in the South during the Reconstruction, its remedial function has been expanded to encompass violations of any substantive right secured by the Constitution or federal law. *See Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (recognizing a right of action under § 1983 for a violation of a federal statute). *See also* S. NAHMOD, *CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION* 3-4 (1979).

3. *See Scheuer v. Rhodes*, 416 U.S. 232, 239-42, 245-48 (1974) (pointing out injustice of subjecting to liability officials who must exercise discretion in performing their jobs); *Butz v. Economou*, 438 U.S. 478, 504-07 (1978) (notwithstanding importance of redress for civil rights violations, public policy dictates limited immunity for federal

Presently, qualified immunity will shield a public official only when his alleged misconduct was objectively reasonable.⁴ In *Malley v. Briggs*⁵ the Supreme Court restricted use of the qualified immunity defense. The Court held that a police officer, whose request for a warrant led to an unconstitutional arrest, may be liable under section 1983 unless he proves that his conduct, notwithstanding prior judicial determination of probable cause, was objectively reasonable.⁶

In *Malley v. Briggs* a Rhode Island state trooper, after conducting a narcotics investigation, applied for arrest warrants charging the respondents⁷ with possession of drugs.⁸ A state district court judge

executives); *Harlow v. Fitzgerald*, 457 U.S. 800, 813-15 (1982) (in determining extent of immunity it is necessary to balance need for redress for civil rights violations against cost to society of suits against public officials). See also Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 913-15 (1984); (discussion of policies behind the qualified immunity defense); Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 128 (1985).

4. The Supreme Court developed the standard of "objective reasonableness" in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). See *infra* notes 39-42 and accompanying text. A number of articles address the effect of *Harlow's* adoption of a purely objective standard of qualified immunity. See Comment, *supra* note 3 (analyzing how courts should apply the objective standard); Comment, *Rejecting Absolute Immunity for Federal Officials*, 71 CALIF. L. REV. 1707 (1983) (proposing that courts extend the *Harlow* qualified immunity standard to all government officials to promote uniform treatment); Comment, *Entity and Official Immunities Under 42 U.S.C. Section 1983: The Supreme Court Adopts a Solely Objective Test*, 28 S.D.L. REV. 337 (1983) (discussing how *Harlow* modified the basic nature of the qualified immunity defense); Note, *supra* note 3 (arguing that *Harlow* standard inquiry should be restructured to enable courts to resolve legal and factual questions of an official's immunity separately).

5. 106 S. Ct. 1092 (1986).

6. *Id.* at 1099.

7. The respondents herein, James and Louisa Briggs, were a prominent couple in their Rhode Island community. *Id.* at 1095.

8. *Id.* at 1094. In December 1980, the Rhode Island State Police conducted a court-authorized wiretap on the telephone of Paul Driscoll, a friend of the Briggs' daughter. *Id.*

At 5:30 p.m. on December 20, 1980, Paul Driscoll received a call from a male identified by the name "Dr. Shogun." *Id.* The officers recorded a general conversation about a party the conversants had attended the previous night, which contained in pertinent part the following: "This is Dr. Shogun . . . I can't believe I was toking in front of Jimmy Briggs. . . ." *Id.* The caller also stated that he "passed it to Louisa." *Id.* Paul Driscoll stated later in the conversation, "Nancy was sitting in his lap rolling her thing." *Id.* The police recorded a second call received by Paul Driscoll at 5:56 p.m. the same evening. The caller and Paul Driscoll talked about a party they were going to attend that night at the Briggs' home. *Id.* at 1099. The state trooper inferred from the log that the Briggs were hosting a marijuana party. *Id.* at 1094.

signed the warrants and the state trooper arrested the respondents.⁹ When the grand jury did not return an indictment, the State subsequently dropped the charges.¹⁰ Thereafter, the respondents instituted an action under 42 U.S.C. § 1983, alleging that the state trooper violated their fourth and fourteenth amendment rights in applying for the arrest warrants.¹¹ The District Court for the District of Rhode Island held that the judicially authorized arrest warrant served to insulate the officer from liability.¹² The First Circuit Court of Appeals reversed.¹³ On writ of certiorari, the Supreme Court affirmed, holding that judicial approval¹⁴ of an arrest warrant did not serve as an absolute bar to the

9. *Id.* at 1095. The state trooper prepared felony complaints charging the Briggs with possession of marijuana. *Id.* The officer presented the complaints to a state district court judge, accompanied by unsigned arrest warrants for each respondent's arrest and supporting affidavits describing the two intercepted phone calls and the state trooper's interpretation of the calls. *Id.* Malley included a statement that he thought the conversation referred to a marijuana cigarette being passed around and additional marijuana cigarettes being rolled for further consumption by Dr. Shogun, Paul Driscoll, and Louisa Briggs. *Id.* at 1099 n.2.

The police arrested the Briggs' at 6:00 a.m. on March 19, 1981. *Id.* at 1095. The police took the Briggs' to the police station where they were booked, held for several hours, arraigned, and released. *Id.* Local and statewide newspapers learned of the Briggs' arrest and published the fact that the prominent Rhode Island couple had been arrested and charged with possession of drugs. *Id.*

10. *Id.* The state police successfully sought 20 additional arrest warrants in connection with the narcotics investigation. The record before the Court, however, did not disclose how many of those warrants resulted in indictments. *Id.* at 1099 n.1.

11. 105 S. Ct. at 1095. See *supra* note 2 for a discussion of the scope of § 1983. Both Louisa and James Briggs sought one million dollars in compensatory damages and one million dollars in punitive damages. *Id.* at 1100 n.3.

12. 106 S. Ct. at 1095. At the close of the Briggs' evidence, the court granted Trooper Malley a directed verdict. *Id.* The district court reasoned that the judge's authorization and issuance of the warrant broke the causal chain between Trooper Malley's filing of a complaint and the Briggs' arrest. *Id.* The district court applied the *Harlow* standard of objective reasonableness and found that Malley, by believing that the facts alleged in his affidavit were true and submitting them to a neutral magistrate, was entitled to immunity. *Id.*

13. *Id.* The court of appeals reversed and remanded for a new trial. The court held that immunity did not extend to officers who seek arrest warrants unless they have an objectively reasonable basis for believing that the facts alleged in the supporting affidavit are sufficient to establish probable cause. *Id.* See *Briggs v. Malley*, 748 F.2d 715 (1st Cir. 1984).

14. Court opinions use the words "magistrate" and "judicial officer" interchangeably. 106 S. Ct. at 1101 n.5. For purposes of this Comment, "magistrate" and "judicial officer" will be used interchangeably, and will refer to the court official who issues arrest warrants and search warrants.

civil rights liability of the police officer who obtained the warrant.¹⁵

Congress enacted section 1983 to provide a right of action for parties deprived of their constitutional or federal statutory rights by actions taken "under color of" state law.¹⁶ Section 1983, therefore, holds public officials who violate an individual's fourteenth amendment rights liable for that violation.¹⁷ On its face, section 1983 does not provide for either qualified or absolute immunity.¹⁸ In an effort to curb the increase in section 1983 litigation, however, courts have construed the statute to incorporate traditional common law immunities.¹⁹ Qualified immunity thus developed as an affirmative defense available to public officials in section 1983 cases.²⁰

15. *Id.* at 1099.

16. *See supra* note 2 for a discussion of § 1983. The phrase "under color of" covers actions authorized by state law and by abuses of power made while the wrongdoer is clothed with the authority of state law. *See, e.g.,* *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965), *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381 (5th Cir. 1985).

17. *See supra* note 2 for a discussion of § 1983. *See generally* *Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131 (1972) (types of § 1983 suits allowed despite municipal immunity).

18. *See supra* note 2.

19. *See supra* note 1 for the three categories of common law immunities. Although the language of § 1983 does not provide immunities, the Supreme Court did not hesitate to find that Congress did not intend to eviscerate traditionally recognized immunities. "The Supreme Court has read § 1983 as incorporating common law immunities when it finds that the 'same considerations of public policy that underlie the common law rule likewise countenance [the] immunity under § 1983.'" *Bertot v. School Dist. No. 1*, 613 F.2d 245, 248 (10th Cir. 1979) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976)). *See generally* Note, *Federalism, Section 1983 and State Law Remedies: Curtailing the Federal Civil Rights Docket by Restricting the Underlying Right*, 43 U. PITT. L. REV. 1035 (1982) (analysis of the Supreme Court's efforts to limit use of § 1983); Comment, *supra* note 3, at 902 n.3.

20. A government official is personally responsible for suits against him in his individual capacity. In an effort to protect officials from such liability, the Court afforded them various immunities. *See, e.g.,* *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges absolutely immune when acting within their jurisdiction); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors held absolutely immune when advocating for the state); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges absolutely immune when acting within their jurisdictions); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislator's statement qualifies as privileged information in a legislative proceeding).

The Court has accorded to various other officials a qualified "good faith" immunity. *See* *Butz v. Economou*, 438 U.S. 478 (1978) (federal officials accorded qualified immunity even when acting outside the scope of their authority); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials who acted negligently accorded qualified immunity). *But see* *Owen v. City of Independence*, 445 U.S. 622 (1979) (municipality has no immunity from § 1983 liability flowing from its constitutional violations); Comment, *Owen v.*

In *Pierson v. Ray*²¹ the Supreme Court held that a public official, sued under section 1983 but unable to claim absolute immunity, could claim qualified immunity as a defense.²² The Court concluded that Congress did not intend to annul the common law immunities traditionally granted to public officials, and permitted the policemen²³ to raise the common law defense of good faith and probable cause.²⁴ Although *Pierson* acknowledged the qualified immunity defense, it did not define the components of that defense.²⁵

The Supreme Court extended its *Pierson* holding in *Scheuer v. Rhodes*²⁶ and attempted to define the elements of the good faith immunity defense from section 1983 liability for high ranking officials.²⁷ The Court concluded that availability of the immunity defense would depend upon the official's role and the circumstances surrounding his alleged misconduct.²⁸ Although the Court did not define the extent of the immunity available to state officials, the Court's language suggested that the contents of the immunity analysis would encompass both objective and subjective factors.²⁹

City of Independence: The Demise of Municipal Immunity, 21 URB. L. ANN. 241 (1981).

21. 386 U.S. 547 (1967).

22. *Id.* at 557.

23. In *Pierson* the Court considered the immunity claims of Mississippi police officers charged with unlawfully arresting a group of black and white clergymen who attempted to use segregated facilities in a bus station. *Id.* at 549.

24. The term "probable cause" for an arrest generally means probable cause to believe that the person to be arrested has committed or is committing a felony. Prior to issuance of an arrest warrant, a magistrate or judge must review the warrant application and determine whether probable cause for arrest exists. Ultimately, issuance of a warrant is dependent upon his determination of probable cause. *See, e.g., Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560 (1971).

25. In lieu of ruling on the issue, the Court remanded for the lower court to determine whether the policemen could have reasonably believed the statute under which they arrested the clergymen could have been valid. 386 U.S. at 557-58.

26. 416 U.S. 232 (1974).

27. *Id.* at 234. In *Scheuer* the Governor of Ohio claimed that absolute immunity protected him from liability for the deaths of four students at Kent State University when he called in the National Guard to combat student demonstrations. *Id.*

28. *Id.* at 247-48.

29. *Id.* The terms "objective" and "subjective" are used frequently in qualified immunity discussions, but their meanings are often confused. One commentator has characterized the "objective" inquiry as whether the defendant had "reasonable grounds for . . . belief in the legality of the challenged conduct" and "subjective" inquiry as to whether the defendant had "good faith in fact." *See S. NAHMOD, supra* note 3, at 231. The Supreme Court has defined the "objective" component as a "presumptive knowl-

Responding to confusion in the lower federal courts regarding the scope of the immunity articulated in *Scheuer*,³⁰ the Court attempted in *Wood v. Strickland*³¹ to further clarify the standard against which courts should measure an official's conduct. This revised version of the immunity standard, however, only added to the confusion by incorporating both objective and subjective factors.³² The objective prong of the *Wood* standard required courts to focus upon whether the disputed law was sufficiently clear that an officer knew or should have known his conduct violated that law.³³ The subjective prong required courts to examine the official's motives and intentions.³⁴ Usually, determinations of whether an official had malicious intentions required full discovery and a complete trial.³⁵ This factual inquiry undermined the

edge of and respect for 'basic unquestioned constitutional rights.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1981) (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The Court defined the subjective element as referring to "permissible intentions." *Id.*

The Supreme Court eliminated the subjective element of immunity analysis, so courts currently rely only on the objective reasonableness of an official's conduct in determining § 1983 liability. *Id.* at 817-18. See *infra* notes 37-42 and accompanying text for a discussion of *Harlow*.

30. See Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 511-12 (1977) (discussing *Scheuer* and the ambiguities it left). "Did 'good faith' mean that the government officials acted without malice or an evil intent, that they affirmatively believed that they were acting within the law or the limits of their authority, or that they were following what they thought were lawful orders of their superiors?" *Id.*

31. 420 U.S. 308 (1975). Petitioners in *Wood* were school board members claiming immunity from a § 1983 suit by students expelled for violating certain regulations that prohibited use or possession of alcohol at school or school activities. *Id.* at 309-11.

32. The Court ruled that good faith "necessarily contains elements of both" the subjective and objective tests. *Id.* at 321.

33. *Id.* at 322. *Wood's* objective test differed significantly from the fact-oriented test articulated in *Scheuer*. Under the *Scheuer* test, courts examined an official's reasonableness within the light of the facts and their circumstances surrounding each case. 416 U.S. at 249-50. Under the *Wood* test, the Court sought to measure an officials' reasonableness against the degree to which the law in question was knowable. 420 U.S. at 322. See Comment, *supra* note 3, at 909-12; see also *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 219-25 (1975) (comparing *Wood* and *Scheuer*).

34. 420 U.S. at 322.

35. This was a factual inquiry. FED. R. CIV. P. 56 dictates that a motion for summary judgment may be granted only if "there is no question of any material fact . . . and the moving party is entitled to summary judgment as a matter of law." The determination of an official's subjective intent often involves questions of fact, thus the granting of summary judgment is rare. *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1981); *Halpern v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979), *aff'd*, 452 U.S. 713 (1981).

original purpose of the qualified immunity doctrine, which was to decrease the federal caseload and protect public officials from frivolous litigation brought under section 1983.³⁶

In the landmark case of *Harlow v. Fitzgerald*³⁷ the Supreme Court reformulated the good faith immunity standard by eliminating the subjective element of the test.³⁸ The Court noted that courts can rarely decide questions of subjective intent by summary judgment.³⁹ Furthermore, the Court held that an official, performing discretionary duties, is immune from liability unless the official's conduct violated clearly established statutory or constitutional rights of which a reasonable officer would have known.⁴⁰ Under the *Harlow* standard, immunity is lost when no reasonably competent officer would have concluded that a warrant should issue.⁴¹ Although the Court specified that the threshold

36. See *supra* note 20 and accompanying text. See generally Comment, *supra* note 3, at 913-15 (discussion of policies underlying the qualified immunity defense). Although the facts of *Wood* limited its holding specifically to the context of school discipline, subsequent cases quoted the *Wood* test as the general standard of qualified immunity. See, e.g., *Baker v. McCollan*, 443 U.S. 137, 139 (1979); *Procunier v. Navarette*, 434 U.S. 555, 562-66 (1978); *Butz v. Economou*, 438 U.S. 478, 484 (1978).

37. 457 U.S. 800 (1982). In *Harlow* petitioner A. Ernest Fitzgerald alleged unlawful discharge from employment with the Department of Air Force. *Id.* at 802. Petitioner accused respondents, White House aides to former President Nixon, with conspiracy to violate petitioner's constitutional rights and brought suit under § 1983. *Id.*

38. *Id.* at 815-18. *Harlow* was a triumph for § 1983 defendants and is considered a landmark case because it held that the state of mind of the defendant is irrelevant with respect to qualified immunity. *Id.* Thus, a defendant could commit a malicious act against a plaintiff and still enjoy qualified immunity provided no established constitutional right that the official should have known applied to the misconduct existed. See *supra* note 4 for a discussion of the objective element in qualified immunity.

39. 457 U.S. at 818. See *supra* note 35 and accompanying text.

40. 457 U.S. at 818-19. In *Harlow* the § 1983 qualified immunity analysis focused on the law as of the time of the alleged constitutional violation. *Id.* at 818.

41. *Id.* at 815-19. The *Harlow* opinion explicitly pointed out that the reason for the new qualified immunity doctrine is to foster the resolution of § 1983 cases by way of motions to dismiss, and obviate the necessity for discovery. *Id.* at 817-18. According to the *Harlow* Court, this will result in less pressure on government officials and will prevent § 1983 from intimidating governmental decision-making. *Id.* at 819.

Several circuits, nonetheless, have held that pretrial orders denying qualified immunity could not be appealed immediately by defendant public officials. These courts asserted that the immunity issue was a factual inquiry that was inseparable from the merits of a plaintiff's actions. See *Kenyatta v. Moore*, 744 F.2d 1179, 1184 (5th Cir. 1984). But see *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1981) ("[W]e believe that appellate review of a denial of a motion for summary disposition must be available to ensure that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity.").

immunity question is an inquiry into the objective reasonableness of the officer's conduct, the Court gave little guidance to district courts on how to conduct such an examination.⁴²

Applying the *Harlow* standard in *United States v. Leon*,⁴³ the Supreme Court set forth guidelines for the lower courts and articulated what constitutes objectively reasonable behavior.⁴⁴ In defining the parameters of reasonable behavior, the Court examined the respective roles of a police officer and a magistrate in the warrant issuing process.⁴⁵ While acknowledging faults in the magistrate's performance of his administrative duties, the Court nonetheless focused on police mis-

42. The *Harlow* Court refused to rule on the defendant's motion for summary judgment and instead remanded the case for further factual findings regarding whether a constitutional basis for plaintiff's dismissal existed. 457 U.S. at 819-20. Because the Court remanded, it never applied its new standard and, therefore, the lower courts had no guidance on how to apply that standard. See *supra* note 4 for a discussion of the *Harlow* standard.

43. 468 U.S. 897 (1984). In *Leon* police officers executed a search warrant based upon informant and surveillance information and found large quantities of drugs and other evidence. *Id.* at 901-02. The district court granted defendant Leon's motion to suppress the evidence obtained pursuant to the warrant, concluding that the affidavit was insufficient to establish probable cause. *Id.* at 903. The court of appeals affirmed. *Id.* at 904. The Supreme Court reversed. *Id.* at 926. The Court held that the exclusionary rule should not bar the use of evidence at trial obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be invalid. *Id.* at 913-23.

Although *Leon* concerns search warrants, not arrest warrants, the procedure for obtaining a search warrant is more or less the equivalent to the procedure for obtaining an arrest warrant. An officer must obtain judicial or magisterial authorization supporting probable cause and that the warrant should issue. See *supra* note 24 for a discussion of probable cause.

44. 468 U.S. at 925-26.

45. *Id.* at 913-25. The *Leon* Court stressed the great importance of magisterial review of search warrants to determine whether the probable cause exists. *Id.* at 914. The Court stated that the need for magisterial authorization of a search warrant stems from the superior knowledge of a magistrate regarding when probable cause exists, and fourth amendment law in general. *Id.* at 913-16. The Court further stated that magisterial review of warrants is necessary due to the hurried and pressured nature of an investigating police officer. *Id.* at 914. The Court explained that an officer does not always have the time to reflect fully on his evidence to determine whether his evidence is sufficient to establish probable cause. *Id.* at 913-14. More significantly, the *Leon* Court pointed out the importance that a magistrate perform his neutral and discretionary duties to the best of his ability, so he does not just serve as merely a "rubber-stamp" for police. *Id.* at 914. See generally Note, *The Implications of Leon in the Aftermath of Gates: the Good Faith Exception in Cases Involving Reliance on Warrants Issued on the Basis of Hearsay Information*, 49 ALBANY L. REV. 1032 (1985); McCoy, *The Good-Faith Warrant Cases—What Price Judge Shopping?*, 21 CRIM. L. BULL. 53 (1985). See, e.g., Steagald v. United States, 451 U.S. 204 (1981); Arkansas v. Sanders, 442 U.S. 753

conduct.⁴⁶ The Court conceded that a warrant issued by a magistrate normally suffices to establish that the officer acted reasonably and in good faith in requesting for a search warrant.⁴⁷ Citing *Harlow*, however, the Court remarked that the officer's reliance on the magistrate's probable cause determination must be objectively reasonable.⁴⁸ The Court concluded that the appropriate inquiry in evaluating an officer's conduct is whether a well-trained police officer, as well as the magistrate, had an objectively reasonable belief that probable cause to conduct a search existed.⁴⁹

In *Malley v. Briggs*⁵⁰ the Supreme Court concluded that a police officer who improperly applies for an arrest warrant is not immune from liability under section 1983 even though the judge issuing the warrant has determined that probable cause exists.⁵¹ Justice White, writing the majority opinion, discussed the applicability not only of qualified, but of absolute immunity for defendant police officers in section 1983 suits.⁵²

The Court initially addressed the state trooper's contention that the Court should grant a police officer absolute immunity from liability for damages because his role in seeking arrest warrants is similar to that of a prosecutor.⁵³ Rejecting this argument, the Court noted that its previ-

(1979); *Baker v. McCollan*, 443 U.S. 137 (1979); *United States v. United States District Court*, 407 U.S. 297 (1972); *United States v. Ventresca*, 380 U.S. 102 (1965).

46. For a critical analysis of how the *Leon* Court artfully glossed over the issue of magisterial misconduct, see generally McCoy, *supra* note 45, at 56. McCoy criticized the *Leon* Court as having "judicial tunnel vision" regarding the laxity with which fellow judges issue warrants. *Id.* He suggested that task specialization in local courts would be a remedy to deficiencies in the warrant issuing process. *Id.* at 65.

47. 468 U.S. at 922 (quoting *United States v. Ross*, 456 U.S. 798, 823, n.32 (1982)).

48. *Id.* at 922-23. The Court further clarified the parameters of the *Harlow* "objective reasonableness" test.

49. *Id.* at 926.

50. 106 S. Ct. 1092 (1986).

51. *Id.* at 1099.

52. The Court discussed the origins of both qualified and absolute immunity in response to Malley's assertions that he was entitled to absolute immunity. *Id.* at 1095-96.

53. Officer Malley urged that his role as police officer requesting a warrant is similar to the role of a prosecutor asking a grand jury to indict a suspect. *Id.* at 1096. A prosecutor has absolute immunity, and Malley asserted he too should receive the same degree of immunity. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (granting absolute immunity to prosecutors).

The state trooper also contended that he was entitled to absolute immunity because his role in seeking arrest warrants is similar to that of a complaining witness. 106 S. Ct. at 1096. Rejecting this argument, the Court reasoned that it looks to common law

ous interpretations of section 1983 gave absolute immunity only to functions intimately associated with the judicial phase of the criminal process.⁵⁴ Thus, the majority distinguished between a police officer and a prosecutor or a judge, asserting that liability would impair the performance of the latter two, while not impairing an officer's performance.⁵⁵ The majority reasoned that the judicial system would benefit from a rule of qualified rather than absolute immunity for police officers by prompting more thoughtful reflection prior to application for a warrant.⁵⁶

The Court next turned to the officer's contention that he was entitled to qualified immunity because applying to a magistrate for authorization of an arrest warrant is per se objectively reasonable.⁵⁷ Extending its *Leon*⁵⁸ holding, the Court stated that the pertinent question is whether a reasonably well-trained officer would have known that his affidavit failed to establish probable cause, despite the magistrate's authorization.⁵⁹ The majority reasoned that an officer should not rely on the magistrate's determinations because a magistrate may fail to perform competently due to docket pressures.⁶⁰ The Court concluded that if a magistrate inappropriately issues a warrant, an officer cannot excuse his own default by pointing to the greater incompetence of the

counterparts to determine the extent of immunity, if any, that an official will receive. *Id.* The Court pointed out that a complaining witness is not absolutely immune at common law and, therefore, neither is the state trooper. *Id.* The Court explained that policy considerations do not require absolute immunity for officers applying for warrants, because the qualified immunity doctrine has developed to provide ample protection for all but the most unreasonable officers. *Id.*

54. *Id.* at 1097.

55. *Id.*

56. *Id.* The Court expressed that the threat of liability would encourage maximum reflection by an officer before he applied for a warrant. *Id.*

57. *Id.* at 1098. Officer Malley asserted that applying to a magistrate for authorization of an arrest warrant was per se objectively reasonable provided that he truly believed the facts alleged in his affidavit to be true. *Id.*

58. *Leon*, 468 U.S. at 897. See *supra* notes 43-49 and accompanying text.

59. 106 S. Ct. at 1098-99. The Court applied the reasoning found in *Leon* with respect to the issuance of search warrants. *Id.* at 1098. The Court noted that the basic principles underlying the search warrant procedure are the same as the arrest warrant procedure. *Id.* The Court stated that application for a warrant is unreasonable only when it is so lacking in indicia of probable cause as to render the officer's belief in its existence unreasonable. *Id.*

60. The Court implied that requiring higher standards for police officers applying for warrants would help balance deficiencies in the magisterial review system. *Id.* at 1098-99.

magistrate.⁶¹ Thus, the majority determined that the evidence must establish whether the state trooper's conduct was in fact objectively reasonable independent of the magistrate's authorization of the warrant.⁶²

Justice Powell dissented in part.⁶³ Powell argued that in light of the judge's determination of probable cause and the evidence of illegal activity, the state trooper should be immune from damages.⁶⁴ Although Powell agreed with the majority that the *Harlow* standard of objective reasonableness applied, he disagreed with the Court's method of using that standard.⁶⁵ Initially, Powell contended that the Court erroneously failed to recognize that the officer's conduct met the requisite standard of reasonableness.⁶⁶ Stating that a reasonably competent officer could have believed that a warrant should issue, Powell asserted that the state trooper had satisfactorily met the *Harlow* standard.⁶⁷ Powell's strongest dissention was that the Court misconstrued the respective roles of, and the relationship between, the police officer and the magistrate in the issuance of a warrant.⁶⁸ Noting that the Court consistently afforded great evidentiary weight to a magistrate's determination of probable cause, Powell inferred that the Court ignored its precedent.⁶⁹ Finally, Powell suggested that closer supervision or removal of magistrates, rather than personal liability for police officers, provides a more effective remedy for section 1983 violations.⁷⁰

61. *Id.* at 1099 n.9.

62. *Id.* at 1098.

63. *Id.* at 1099. Justice Powell, joined by Justice Rehnquist, wrote a separate opinion concurring in part and dissenting in part.

64. *Id.*

65. *Id.*

66. Justice Powell stated that the Court did not correctly evaluate the facts of the case with respect to the *Harlow* standard of reasonableness. *Id.* at 1100-01. Justice Powell asserted that the recorded conversations and Officer Malley's affidavit were sufficient evidence that Officer Malley's request for an arrest warrant was in fact reasonable. *Id.*

67. *Id.* See *supra* note 40 and accompanying text.

68. *Id.* at 1101-02.

69. *Id.* Justice Powell pointed out that the Supreme Court has consistently emphasized the importance of a magistrate's determination of probable cause in search and arrest warrant cases. *Id.* The majority in *Malley*, Powell concludes, seems to denigrate the relevance of the judge's determination of probable cause and his role in the issuance of a warrant. *Id.* at 1102-03. See *supra* text accompanying note 47.

70. *Id.* at 1101 n.6. Quoting *Leon*, Justice Powell declared that if a magistrate serves merely as a "rubber stamp" for police officers and is incapable of exercising ma-

Although the Supreme Court in *Malley* briefly touched the issue of magisterial misconduct, neither the majority nor the dissent fully explored the implications of ignoring the deficiencies in the warrant issuing process. The *Malley* court declared that imposing the cost of an unconstitutional arrest directly on the officer responsible will serve to decrease the risk of unreasonable warrant requests.⁷¹ The present scheme of absolute judicial immunity,⁷² however, offers the magistrate little incentive to carefully evaluate each warrant application.⁷³

Because judicial evaluation of probable cause is the essential check between the government and the citizen,⁷⁴ the magistrate plays the pivotal role in the warrant issuing process. The irony in *Malley* is that while the Court mentioned the problem of lax magisterial review of warrant applications, the Court used that fault in the judicial system to justify imposing more stringent requirements on police officers.⁷⁵ The *Malley* standard dictates that in order to protect themselves from section 1983 liability, police officers should receive a legal education to acquire the magistrate's skill of determining probable cause. The infeasibility of this proposition necessitates a hard look at task specialization in local courts.⁷⁶ If one of the causes of unconstitutional arrests is an overloaded docket,⁷⁷ state legislatures should consider creating a magisterial position uniquely for evaluation of warrant applications.⁷⁸

ture judgment, then the appropriate remedy is closer supervision or removal of the magistrate instead of holding the police officer personally liable for the magistrate's poor performance. *Id.*

71. *Id.* at 1099.

72. *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978) (judges absolutely immune when acting within their jurisdiction).

73. The judicial officers evaluating warrant applications are protected by a cloak of immunity and, therefore, do not have to worry about the possible consequences of their occasional carelessness. *See generally McCoy, supra* note 45, at 56-65.

74. 106 S. Ct. at 1102 (Powell, J., concurring in part and dissenting in part) (quoting *Steagald v. United States*, 451 U.S. 204, 212 (1981)). *See supra* notes 68-70 and accompanying text for a discussion of the magistrate's duties.

75. *See* 106 S. Ct. at 1099. *See supra* note 60 and accompanying text.

76. *See generally McCoy, supra* note 45 (discussing possible benefits of a specialized system in which a judicial officer is appointed expressly for evaluating warrant applications).

77. *See supra* note 60 and accompanying text.

78. *See McCoy, supra* note 45, at 64-65. In most state courts, warrant-issuing magistrates are also trial judges. Thus, a magistrate's time is divided up between pending cases and warrant applications. This causes a delay in the warrant-issuing process and increases the possibility of careless evaluation of warrant applications. *See id.* at 65.

This magistrate would have no trial powers and could devote his time to evaluating warrant applications and reviewing pending arrests with police and prosecutors.⁷⁹ Moreover, he would have the time and incentive to become an expert on fourth and fourteenth amendment law.⁸⁰

The *Malley* Court failed to recognize that the imposition of such stringent standards could potentially deter police officers from making arrests even in justified circumstances. In view of tort liability principles that spread the cost of injury to the public at large through centralized liability,⁸¹ the majority's ruling seems unjustified. To remedy this disparity, Congress could adopt a system that would hold the governmental entity commanding the police officer liable for unconstitutional arrests.⁸² Municipal liability might best insure against further section 1983 violations because the threat of liability would increase the care with which government officials supervise their subordinates.⁸³ This option, however, would expose municipalities to damage liability for the civil rights violations of their employees. This liability, in turn, could seriously deplete the financial resources that municipalities would otherwise use for public improvement.⁸⁴

Whereas holding a municipality liable for the civil rights violations of its employees will protect the employee and provide incentives for cautious governmental administration, specialization in the courts will best prevent violations of individuals' civil rights from occurring. Con-

79. Some European court systems already have task specialization of the type recommended herein. A *juge d'instruction dossier*, an "investigating magistrate," is a courthouse worker who has almost exclusive responsibility for reviewing police evidence and developing investigative files for pending arrests. This "investigating magistrate" is also responsible for testing cases for their adherence to constitutional norms. *Id.* at 65 n.36.

80. *See id.* at 65.

81. *See* Comment, *supra* note 20, at 253 ("public policy dictates that the entity which causes the loss should bear the loss"). The governmental entity behind the police officer is better able to pay the costs of a § 1983 violation than the police officer, or even the victim himself. Kates & Kouba, *supra* note 17, at 138.

82. Kates & Kouba, *supra* note 17, at 138 (strict municipal liability in § 1983 actions would encourage municipalities to prevent such actions by enforcing tightened municipal operating procedure).

83. *See* Owen v. City of Independence, 445 U.S. 622, at 652 n.36 (1979).

84. *See id.* at 650-53 (Powell, J., dissenting) (municipal liability may paralyze governmental action and render municipalities bankrupt). *See also* Kates & Kouba, *supra* note 17, at 167.

sequently, legislatures should vigorously promote task specialization in the issuance of arrest and search warrants.

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