CRIMINAL PROCEDURE

POLICE IMMUNITY FROM CIVIL SUIT—
MALLEY v. BRIGGS

*I'll Huff, and I'll Puff, and I'll Blow the Door Down . . .*

INTRODUCTION

More than seventy years ago, the United States Supreme Court invented a remedy for individuals who were victims of an illegal police search and seizure of property.1 Termed the "exclusionary rule," the doctrine became the exclusive remedy for persons whose fourth amendment rights had been violated by a warrantless search and seizure.2 Since its inception, the exclusionary rule has been attacked by several commentators3 and Supreme Court Justices.4 These crit-

1. Weeks v. United States, 232 U.S. 383, 398 (1914). The exclusionary rule, first articulated in Weeks, states that whenever evidence is obtained in violation of the fourth amendment of the United States Constitution, that evidence must be excluded from trial. See Wolf v. Colorado, 338 U.S. 25, 28 (1949). See generally Boyd v. United States, 116 U.S. 616, 633 (1886) (expressing the need for such a rule). This rule was further developed through application to the states by incorporating the rule into the fourteenth amendment due process clause. Mapp v. Ohio, 367 U.S. 643, 656-57 (1961).

2. See supra note 1. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. See 4 J. WIGMORE, WIGMORE ON EVIDENCE § 2184, at 632-39 (2d ed. 1923). Wigmere characterized the inadequacy of the rule with the following hypothetical in which an illegal search and seizure was performed by "Constable Flavius":

Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for the crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.

Id. § 2184, at 639. Wigmere further asserted: "Some day, no doubt, we shall emerge
ics allege the inefficacy of the rule's purported function as a deterrent to future police misconduct. In addition, critics argue that the rule is not a workable solution to the problem judges have in keeping their hands clean when allowing illegally obtained evidence into court. However, even if these criticisms are invalid, the exclusionary rule is still defective as a remedy, because the rule does not provide relief for victims of an unconstitutional search that has produced no evidence to be excluded from a trial. Consequently, in 

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, the Court held that the victims of a warrantless search could sue federal investigators for money damages when the investigators had violated the victims' fourth amendment rights, and when the exclusionary rule did not provide a remedy. Hence, the Court created a new remedy for fourth amendment violations: suing for civil damages under 42 U.S.C. § 1983.

from this quaint method of enforcing the law... It will be abandoned only as the judiciary rises into a more appropriate conception of its powers and a less mechanical idea of justice." Id. See also W. Mertens & S. Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 366 (1981) (providing an in-depth historical analysis of the exclusionary rule); Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 667-757 (1970) (critiquing the deterrence theory of the exclusionary rule).

4. See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bur. of Narcotics, 403 U.S. 388, 411-31 (1971) (Burger, C.J., dissenting) (criticizing the exclusionary rule's rationale); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (asserting that the exclusionary rule is an absurdity when "the criminal is to go free because the constable has blundered"). See generally Comment, I Come Not to Praise the Exclusionary Rule But to Bury It, 18 Creighton L. Rev. 819, 823-75 (1984) (analyzing both the rationale underlying the exclusionary rule and critiques of the rule).

5. See supra notes 3-4 and accompanying text.

6. Bivens, 403 U.S. at 414-15 (Burger, C.J., dissenting). Chief Justice Burger criticized the rationale underlying the exclusionary rule which recognized that the government must "play the game fairly" and cannot be allowed to profit from the illegal acts of its officers. Id. (citing Terry v. Ohio, 392 U.S. 1, 13 (1968); Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); Id. at 471 (Brandeis, J., dissenting)).


9. Id. at 396-98. The Court however, did not consider the issue of a federal agent's sovereign immunity from liability, because the issue had not been addressed by the lower court. Id.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, or 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 proceedings for redress. 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.
This Note analyzes court decisions which have provided similar alternative remedies for victims of unconstitutional police conduct, and traces the growth of the good faith immunity doctrine as applied to police misconduct suits under § 1983. Specifically, this Note examines the Supreme Court's recent decision in *Malley v. Briggs.* *Malley* concerned police immunity to civil suits under § 1983, when an arrest has been held unconstitutional due to lack of probable cause. First, this Note explores the history of the "objective reasonableness test" used to determine the scope of officer immunity which underpins the Court's holding in *Malley.* Second, this Note examines how the federal circuit courts have ruled on the issue of police immunity for illegal arrest warrants. Finally, this Note analyzes arguments both proposing increased immunity for police officers and noting that the Supreme Court has been inconsistent in applying its own objective reasonableness test in police officer immunity cases.

**FACTS AND HOLDING**

In the dark hours just before dawn on March 19, 1981, James and Louisa Briggs were pulled from their beds, handcuffed, and hauled to a police station where they were booked, held for several hours in a police bunker, arraigned, and finally released. The Briggses were prominent members of their community, and, as a result, local and statewide newspapers published stories about their arrest. The charges against the Briggses, however, were subsequently dropped by the grand jury due to a lack of evidence. Thereafter, the Briggses brought suit in the United States District Court for the District of Rhode Island claiming civil damages under 42 U.S.C. § 1983. Corporal Malley and the State of Rhode Island were both named in the suit for allegedly violating the Briggs' fourth and fourteenth amendment rights. In addition, the Briggses filed state law claims of malicious prosecution, false imprisonment, and defamation against the same de-
In February, 1984, the district court directed a verdict for the defendants based on the theory that both the officer and the State were absolutely immune from suit under § 1983. The Briggses appealed only the dismissal of their suit against Corporal Malley.

The district court supported its verdict by relying on two cases decided by the First Circuit Court of Appeals which concerned immunity for police officers who, due to lack of probable cause, were found to have negligently requested arrest warrants. In deciding both cases, the First Circuit had held that a plaintiff must prove malice on the part of an officer before that officer could be held liable for civil damages.

On appeal to the First Circuit, the following facts were determined to be undisputed. Mr. and Mrs. Briggs were arrested based on information obtained from a court-authorized wire tap in conjunction with a narcotics investigation of Paul Driscoll, a friend of the Briggs' daughter. On December 20, 1980, a call on Driscoll's telephone from an unknown individual who identified himself as "Dr. Shogun" had been intercepted by Malley’s partner. The police logsheet summarized the call as follows: "General conversation re. a party they went to last night — caller says I can’t believe I was token [sic] in front of Jimmy Briggs — caller states he passed it to Louisa... Paul says Nancy was sitting in his lap rolling her thing." Another telephone call intercepted the same day indicated that the events mentioned in the previous conversation had occurred at the Briggs' home. On the basis of these two phone calls, Malley had felony complaints drawn, charging that the Briggses "unlawfully conspire[d] to violate the uniform controlled substance act of the State of Rhode Island by having [marihuana] in their possession." After the wiretap was terminated on Driscoll's telephone, Malley presented the complaints against the Briggses and twenty others to a state district

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23. Malley, 106 S. Ct. at 1095.
24. Id. The complaint against the State of Rhode Island was dropped due to eleventh amendment immunity for suits against states. Id. at 1095 n.1.
25. Malley, 748 F.2d at 721.
27. Malley, 748 F.2d at 721. On appeal, the First Circuit specifically overruled both Stadium Films, Inc. and Madison. Id.
28. Id. at 717.
30. Id.
31. Id. (citations omitted).
32. Id.
33. Id.
court judge in February, 1981. Evidence presented with the complaints consisted solely of affidavits signed by Malley describing the two intercepted phone calls and Malley’s interpretation of the calls. The judge signed the warrants, and the Briggses were subsequently arrested.

The First Circuit reversed the district court’s directed verdict for Corporal Malley. In the opinion, the court overruled its previous decisions concerning police vulnerability to suit in arrest warrant cases, because both of the First Circuit’s prior decisions had adopted the subjective test which required proof that the police officer had acted with a malicious intention. The Supreme Court’s holding in Harlow v. Fitzgerald provided support for the First Circuit’s decision. In Harlow, the Supreme Court had applied an objective reasonableness test as the standard of review in unconstitutional search warrant cases. The First Circuit reasoned that the objective reasonableness test was also applicable in unconstitutional arrest warrant cases. This test merely entitles the police officer to a qualified or good faith immunity based on what a reasonable officer under the circumstances would do. The court concluded that “where the officer should have known that the facts recited in the affidavit did not constitute probable cause, [liability would] attach.”

Malley’s appeal to the Supreme Court asserted absolute immunity from suits under § 1983 for warrants issued negligently or for cases in which no malice was proved. The Supreme Court, however, agreed with all the findings of the First Circuit in affirming the judgment against Malley and in holding that police officers are only entitled to qualified immunity in civil suits concerning the issuance

34. Id. at 1094-95.
35. Id. at 1095.
36. Id.
37. Malley, 748 F.2d at 721.
38. Id.
39. Id. at 718.
41. Malley, 748 F.2d at 718-19. The First Circuit reached its conclusion by referring to the “new Harlow standard.” Id. at 718.
42. Harlow, 457 U.S. at 813-20.
43. Malley, 748 F.2d at 720. The First Circuit drew this conclusion based on a footnote in Justice Stevens’ concurring opinion in United States v. Leon, in which Justice Stevens asserted that the objective reasonableness test, used only in exclusionary rule cases prior to Leon, could now be applied to officers sued under § 1983. United States v. Leon, 104 S. Ct. 3405, 3456 n.35 (1984) (Stevens, J., concurring).
44. Malley, 748 F.2d at 721.
45. Id.
46. Malley, 106 S. Ct. at 1095.
47. Id. at 1099.
of an unconstitutional arrest warrant. The Supreme Court determined that the standard of review in such cases is the objective reasonableness test, which provides:

[Whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest.]

After determining that the degree of immunity for police officers is not absolute, and that the standard of review is objective, the Court remanded the case for a determination of whether Malley was immune to the Briggs' suit because he had acted reasonably in obtaining the warrant.

BACKGROUND
DEFINING AND SHAPING THE OBJECTIVE REASONABLENESS TEST

Originally titled the "Ku Klux Klan Act," 42 U.S.C. § 1983 was derived from section 1 of the Civil Rights Act of 1871. The purpose of § 1983 was to create a right of action in federal court against uncooperative local government officials in civil rights cases. On its face, § 1983 affords no immunities, stating that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, violates another person's civil rights is amenable to civil suit." However, be-

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48. *Id.* at 1097.
49. *Id.* at 1098.
50. *Id.* at 1097.
51. *Id.* at 1098.
52. *Id.* at 1099.


. . . .

*Second*, it provided a remedy where state law was inadequate.

. . . .

*Third*, the third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.

. . . .

It was not the unavailability of state remedies, but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this "force bill."

*Id.*
56. *Id.*
cause at common law valid public policy reasons existed for affording immunity to certain persons in the prosecutory process, the Court interpreted § 1983 to include some of these immunities. Yet, since prior to the enactment of § 1983, police officers were never granted absolute immunity to civil suit except in instances where the police officer was acting as a witness in a trial, police officers have been afforded only qualified immunity. Before Malley, the kind of qualified immunity given to police officers had been an almost impenetrable defense to civil suits. As a result, victims of an unconstitutional arrest had been left without a remedy.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics was the first case in which the Supreme Court provided a remedy for victims of an unconstitutional search and seizure when there was no trial from which evidence could be excluded. The essence of the Bivens opinion rested on Chief Justice Marshall's admonition in Marbury v. Madison, which stated that where there is a

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57. Pierson v. Ray, 386 U.S. 547, 553-55 (1967). The Court recognized that "few doctrines were more solidly established at common law" than that of absolute immunity from civil suit for judges acting in their official capacity. Id. at 553-54. The Pierson Court supported its public policy rationale by emphasizing that the public has an interest in making certain that judges are at liberty to exercise their duties without fear of the consequences. This immunity, asserted the Court, is necessary because controversies can "arouse the most intense feelings in litigants," and unsatisfied litigants should not be allowed to hound the judge with civil suits. Id. at 554 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 349-50 (1872)).

58. Pierson, 386 U.S. at 555.

59. See Briscoe v. LaHue, 460 U.S. 325, 326 (1983) (holding that an officer was immune from civil suit as a witness even for perjured testimony).

60. Pierson, 386 U.S. at 555.

61. See, e.g., Smith v. Gonzales, 670 F.2d 522, 526 (5th Cir. 1982) (finding that a warrant was properly issued); Rodriguez v. Ritchey, 556 F.2d 1185, 1190-93 (5th Cir. 1977) (finding that an indictment was properly rendered by the grand jury). Smith and Rodríguez stood for the proposition that grand jury indictments and warrants that were properly issued by neutral judges were prima facie evidence of probable cause. In the presence of probable cause, immunity arose and precluded a civil suit against an officer. Because judges are also immune from civil suit, no remedy existed for alleged victims of unconstitutional arrest warrants. See infra notes 131-54 and accompanying text.

62. See infra notes 131-54 and accompanying text.

63. 403 U.S. 388 (1971).

64. Id. at 397. The Bivens Court indicated that the ability of a victim to sue government officials for money damages was not new. Id. at 394-97. Indeed, the Court had specifically stated that such damages had been awarded for "over two hundred years:" Nixon v. Herndon, 273 U.S. 536, 540 (1927). The Bivens Court further stated that even though the fourth amendment does not specifically provide for money damages when the amendment has been violated, "it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such an invasion, federal courts may use any available remedy to make good the wrong done." Bivens, 403 U.S. at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

65. 5 U.S. (1 Cranch) 137 (1803).
right there must be a remedy.⁶⁶ Although Bivens was a case of first impression, the issue of the availability of monetary damages as a remedy against federal agents acting unconstitutionally appeared to be well settled by a majority of the Court.⁶⁷ The Bivens decision instead, revolved around the question of whether the victim of federal agent misconduct had a cause of action directly under the Constitution when there was no federal statute similar to 42 U.S.C. § 1983 under which to sue federal officials.⁶⁸ After the Bivens Court answered this question affirmatively,⁶⁹ the notion of suing federal or state officials for money damages in a civil suit became commonplace.⁷⁰ The only task remaining for the Supreme Court was to develop a test to apply when determining whether an official could be civilly sued for the wrong alleged by the victim.

Objective Reasonableness Test: Objective Element

In Wood v. Strickland,⁷¹ the Supreme Court first articulated a specific test to determine government official liability — the “objective reasonableness” test.⁷² In developing this test, the Wood Court relied on three previous Supreme Court cases: Scheuer v. Rhodes,⁷³ Pierson v. Ray,⁷⁴ and Tenney v. Brandhove.⁷⁵ Wood concerned a suit under § 1983 against school board members who allegedly violated the civil rights of several high school students by expelling them for a breach of a school regulation concerning the consumption of intoxi-

⁶⁶. Id. at 163. See also Bivens, 403 U.S. at 397.
⁶⁷. Bivens, 403 U.S. at 397. Concurring, Justice Harlan stated: “The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies implied from statutory schemes; i.e., that a court of law vested with jurisdiction over the subject matter of a suit has the power -- and therefore the duty -- to make principled choices among traditional judicial remedies.” Id. at 408 (Harlan, J., concurring). See also supra note 64 and accompanying text.
⁶⁸. Id. at 395-97.
⁶⁹. Id. at 392-93.
⁷². Id. at 321-23. The Court did not use the phrase “objective reasonableness test” in Wood. Subsequent decisions, however, have recognized that the Wood Court’s development was the first articulation of the test. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 815 n.24 (1982) (recognizing the Wood opinion as “the general statement of the qualified immunity standard”); Procunier v. Navarette, 434 U.S. 555, 562-63 (1978) (labeling the test “the Wood v. Strickland rule”).
⁷⁴. 386 U.S. 547 (1967). See infra notes 82-89, 105 and accompanying text.
cating beverages at school functions.\textsuperscript{76} \textit{Wood} was the first case in which the Supreme Court had addressed the issue of good faith immunity for school administrators. It was not, however, the first time the Court had addressed the issue of the scope of immunity that protects other types of government officials from liability for damages under § 1983.\textsuperscript{77} Holding that school administrators were only protected by a qualified immunity, the \textit{Wood} Court articulated the full good faith immunity standard, which included both subjective and objective elements.\textsuperscript{78} The Court held:

[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause the deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.\textsuperscript{79}

The "knew or reasonably should have known" language from the \textit{Wood} opinion has been quoted in subsequent Supreme Court decisions as being the objective element of the qualified immunity test.\textsuperscript{80} The subjective element of the test articulated in \textit{Wood} (the "impermissible motivation" language) is the malice standard which the Court derived from its decision in \textit{Pierson v. Ray}.\textsuperscript{81}

\textbf{Objective Reasonableness Test: Subjective Element}

\textit{Pierson} concerned the arrest of black and white Episcopal ministers while they were attempting to use the "whites only" facilities at a bus terminal in Jackson, Mississippi.\textsuperscript{82} The ministers were convicted of violating section 2087.5 of the Mississippi Code, which made

\begin{itemize}
\item \textsuperscript{76} \textit{Wood}, 420 U.S. at 309-10.
\item \textsuperscript{77} See, e.g., \textit{Scheuer}, 416 U.S. at 248 (holding that the governor of a state, the senior and subordinate officers of the state's National Guard, and the president of a state-controlled university were not absolutely immune from liability under § 1983); \textit{Pierson}, 386 U.S. at 554 (holding that absolute judicial immunity survived § 1983 cases); \textit{Tenney}, 341 U.S. at 376 (involving traditional immunity of legislators from civil liability for activities within their sphere of legislative action). \textit{Scheuer} and \textit{Pierson} discuss the public policy reasons for not allowing absolute immunity. See infra notes 82-107 and accompanying text.
\item \textsuperscript{78} \textit{Wood}, 420 U.S. at 321-22.
\item \textsuperscript{79} Id. at 322 (emphasis added).
\item \textsuperscript{80} See \textit{Harlow}, 457 U.S. at 815 n.24; \textit{Procunier}, 434 U.S. at 562.
\item \textsuperscript{81} 386 U.S. 547, 556-57 (1967).
\item \textsuperscript{82} \textit{Pierson}, 386 U.S. at 549.
\end{itemize}
congregation of persons in a public place a misdemeanor if violence might ensue. The ministers were convicted, but the conviction was reversed on the grounds that between the time of the conviction and the time of the appeal, section 2087.5 had been declared unconstitutional by the Supreme Court.

The first issue considered by the Court was whether the ministers could file a suit under § 1983 although the ministers had acted with the intent to be unconstitutionally arrested. While resolving this issue, the Pierson Court discussed the degree of immunity available to police officers sued under § 1983. The Court held that if the officers acted without malice or in good faith, the complaint against the officers must be dropped. The Court stated that this "malice standard" was applicable even in instances where the statute under which the complainant had been convicted was found to be unconstitutional. Pierson, therefore, established the subjective portion of the good faith immunity test that was subsequently applied in Wood v. Strickland.

Another of the three cases relied on by the Supreme Court in Wood, Scheuer v. Rhodes, concerned the Kent State University killings of four students by the Ohio National Guard. The district court originally dismissed the complaint upon determining that, although the named defendants were the governor and members of the National Guard, the real party being sued was the state. Consequently, the court held that the suit was barred by the eleventh amendment. However, following Ex Parte Young, which held that the eleventh amendment would not bar suit against a state official who, acting under state law, had deprived an individual of a federal right, the Supreme Court held that the dismissal of Scheuer's

83. Id.
84. Id. at 550 (citing Thomas v. Mississippi, 380 U.S. 524, 524 (1965)).
85. Id. at 551. The Court determined that there was not enough evidence to prove that the clergyman had acted with the intent to be arrested. Id. at 558. A second issue was whether the judge who convicted the ministers was absolutely immune from suit. Id. at 553-54. The Court had no difficulty in holding that the judge was immune based on common law immunity and well established precedent. Id.
86. Id. at 554-55.
87. Id. at 557.
88. Id.
90. Id. at 318.
92. Id. at 235.
93. Id. at 234.
94. Id. at 233-34.
95. 209 U.S. 123 (1908).
96. Id. at 155-56.
suit was improper and remanded the case.\textsuperscript{97} Although \textit{Ex Parte Young} concerned injunctive relief,\textsuperscript{98} the \textit{Scheuer} Court had no difficulty expanding the \textit{Young} holding to include suits for monetary damages, provided that such damages were paid by the individual officers and not by the state.\textsuperscript{99} The \textit{Scheuer} opinion traced the history of public official immunity and articulated the public policy reasoning underpinning the immunity.\textsuperscript{100} The Court recognized that "[t]he concept of immunity assumes [that the official may err] and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."\textsuperscript{101}

One of the issues resolved by \textit{Scheuer} was whether state officials had an absolute or qualified immunity to suit under § 1983.\textsuperscript{102} Because precedent clearly indicated a standard of qualified immunity,\textsuperscript{103} the Court held that most government officials were only entitled to a qualified immunity.\textsuperscript{104} The Court relied on \textit{Pierson}, in which the Court determined that "the defense of good faith and probable cause . . . [originally] available to . . . officers in the common law action for false arrest and imprisonment, is also available to them in [an] action under § 1983."\textsuperscript{105} Regarding the governor and the national guardsmen involved in the \textit{Scheuer} suit, the Court held:

\begin{quote}
[A] qualified immunity is available to officers of the executive branch of government . . . dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with [a] good-
\end{quote}

\textsuperscript{97} \textit{Scheuer}, 416 U.S. at 250.
\textsuperscript{98} \textit{Young}, 209 U.S. at 134-35.
\textsuperscript{99} \textit{Scheuer}, 416 U.S. at 237-38.
\textsuperscript{100} \textit{Id.} at 239-42. \textit{See infra} notes 197-217 and accompanying text.
\textsuperscript{101} \textit{Id.} at 242.
\textsuperscript{102} \textit{Id.} at 238-39.
\textsuperscript{103} \textit{Id.} at 240-50. One case relied on by the Court was \textit{Monroe v. Pape}, 365 U.S. 167 (1961), in which 13 Chicago police officers brutalized a family in the dead of night by entering their home without a search warrant, strip searching the parents and six small children, taking the father to the police station, and detaining him on open charges without an opportunity to call his lawyer or to be heard before an available magistrate. The officers involved attempted to escape civil liability under § 1983 with the argument that their actions were so patently illegal, that they could not possibly have come under the color of state law. The Court rejected this argument by recognizing that without the blanket of authority granted them by virtue of their official position, respondents would not have been able to perpetrate such an atrocity. \textit{Id.} at 187.
\textsuperscript{104} \textit{Scheuer}, 416 U.S. at 240-50. The Court also noted that the legislative history of § 1983 indicated that there was no absolute immunity for government officials. \textit{Id.} at 243.
\textsuperscript{105} \textit{Id.} at 245 (quoting \textit{Pierson}, 366 U.S. at 557).
faith belief that affords a basis for qualified immunity. ... 106

This holding was yet another version of the objective element of the
qualified immunity test which formed the basis for the holding in Wood.107

DISMEMBERING THE TWO-PRONG TEST

Whereas Wood was the culmination of precedent resulting in
one coherent two-prong test to determine the scope of public official
immunity, Harlow v. Fitzgerald108 became the case that severed the
subjective prong from the test.109

Harlow involved a suit between an Air Force Financial Management
Office employee and a United States presidential aide.110 Fitzgerald, the employee, sued Harlow, the aide, for allegedly
participating in a conspiracy to fire Fitzgerald.111 Fitzgerald claimed
that the conspiracy constituted a violation of his constitutional
rights.112 The issue before the Court was whether members of the
executive branch, excluding the President of the United States, could
be held liable for civil damages for actions taken pursuant to their
positions.113 The Court held that presidential aides were only enti-
tled to a qualified immunity.114

As in previous cases, the Harlow Court discussed the history and
public policy reasons supporting qualified immunity as opposed to ab-
solute immunity when applied to any government official.115 The
Court also recognized the Wood two-part test in determining the ex-
tent of qualified immunity.116 The Harlow Court, however, de-em-
phasized the subjective portion of the test because “[t]he subjective

106. Id. at 247-48.
109. Id. at 817-18. There were many cases decided between the Wood and Harlow
qualified immunity to municipalities); Butz v. Economou, 438 U.S. 478, 485 (1978) (ap-
plying qualified immunity to federal executive officials); Imbler v. Pachtman, 424 U.S.
409, 410 (1979) (applying absolute immunity to prosecuting attorneys).
110. Harlow, 457 U.S. 802-03.
111. Id. Harlow held various cabinet level offices during the period of the alleged
conspiracy, but he was generally regarded as a presidential aide. Id. at 803 n.2.
112. Id. at 802.
113. Id. The question as to the immunity of the President had been addressed, the
Court holding that the President was entitled to absolute immunity. Nixon v. Fitzger-
114. Harlow, 457 U.S. at 818.
115. Id. at 813-19. The Court articulated one such public policy consideration as
“the need to protect officials who are required to exercise their discretion and the re-
lated public interest in encouraging the vigorous exercise of official authority.” Id. at
807 (quoting Butz, 438 U.S. at 506).
116. Id. at 806-17.
element of the good-faith defense frequently has proved incompatible with [the policy] that insubstantial claims should not proceed to trial." In addition, the Court asserted that litigation challenging the subjective good faith of government officials involved substantial costs. Based on these policy considerations, the Court concluded that "allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." The Court further held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Thus, the Harlow decision created a new standard of review in immunity cases — the objective reasonableness test. Thereafter, in United States v. Leon, due to an allegedly unconstitutional search warrant, the Court applied the new Harlow test in a case which involved the application of the exclusionary rule. In accordance with Harlow, the court applied the objective reasonableness test when it determined that if the officers acted in reasonable reliance on a search warrant subsequently found to be invalid, the evidence need not be excluded from trial. Leon was the first decision in which the Court had applied the objective reasonableness standard to

117. Id. at 815-16.
118. Id. The reason for this assertion is that subjective good faith is always a question of fact for determination by a jury. A suit under § 1983 that relies on subjective good faith as a defense cannot be dismissed by summary judgment. More suits involving subjective good faith, therefore, are admitted before the court than are allowed under a more objective standard of review. Applying a more objective standard would permit a judge to decide such a suit on a motion for summary judgment without requiring the costly aid of a jury. Among the costs listed were "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Id.
119. Id. at 817-18.
120. Id. at 818 (citing Procunier, 434 U.S. at 565; Wood, 420 U.S. at 322). In addition, the Harlow Court noted:

This case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U.S.C. § 1983. We have found previously, however, that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials."

Harlow, 457 U.S. at 819 n.30 (quoting Butz, 438 U.S. at 504).
121. Harlow, 457 U.S. at 818.
122. 104 S. Ct. 3405 (1984). Leon concerned the search of automobiles and homes belonging to an alleged drug ring and the subsequent seizure of drugs. Id. at 3410-11. Leon and his alleged co-conspirators claimed that the search was in violation of their fourth amendment rights. Id.
123. Id. at 3421.
124. Id.
an unconstitutional search and seizure case instead of indiscriminately applying the exclusionary rule as a remedy.\textsuperscript{125}

Through its decisions in \textit{Bivens},\textsuperscript{126} \textit{Wood},\textsuperscript{127} \textit{Harlow}\textsuperscript{128} and \textit{Leon},\textsuperscript{129} the Court defined and shaped the objective reasonableness test. In just thirteen years, a doctrine evolved which currently enables persons in unconstitutional search and seizure cases to sue government officials for civil damages, regardless of an ultimate finding that malice is the motivating factor behind the official's conduct.\textsuperscript{130}

\textbf{THE CIRCUIT COURTS' INTERPRETATION OF COMMON LAW IMMUNITIES UNDER SECTION 1983}

Section 1983 was originally "enacted to provide a measure of Federal control over state and territorial officials who were reluctant to enforce state laws against persons who violated the rights of newly freed slaves and union sympathizers."\textsuperscript{131} Since its inception, § 1983 has been broadly invoked as a remedy for victims of a variety of unconstitutional police conduct.\textsuperscript{132} The cases discussed below are exam-

\begin{itemize}
\item \textsuperscript{125} Id. at 3413. Indeed, in choosing not to apply the exclusionary rule, the Court specifically stated that "[i]ndiscriminate application of the exclusionary rule . . . may well 'generat[ ]e disrespect for the law and [the] administration of justice.'" \textit{Id.} (quoting \textit{Stone v. Powell}, 428 U.S. 465, 491 (1976)).
\item \textsuperscript{126} \textit{See supra} notes 8, 63-70 and accompanying text.
\item \textsuperscript{127} \textit{See supra} notes 71-79 and accompanying text.
\item \textsuperscript{128} \textit{See supra} notes 40-42 and accompanying text.
\item \textsuperscript{129} \textit{See supra} notes 122-25 and accompanying text. \textit{Leon} is important in the area of police immunity to civil suits because the exclusionary rule has been viewed by the current Supreme Court as merely one remedy in a plethora of remedies for victims of unconstitutional search and seizures, and not as a constitutional doctrine to be upheld as law. \textit{See supra} notes 1-6 and accompanying text. The exclusionary rule is, therefore, analogous to a damage suit under § 1983, as both are remedies for victims of police misconduct. The Court, in deciding \textit{Leon}, asserted this type of analogy in a footnote:
\item In \textit{Harlow}, we eliminated the subjective component of the qualified immunity public officials enjoy in suits seeking damages for alleged deprivations of constitutional rights. The situations are not perfectly analogous, but we also eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant. Although we have suggested that "[o]n occasion, the motive with which the officer conducts the illegal search may have some relevance in determining the propriety of applying the exclusionary rule" . . . we believe that "[s]ending state and federal courts into the minds of police officers would produce a grave and fruitless mis-allocation of judicial resources."
\item \textit{Leon}, 104 S. Ct. at 3421 n.23 (quoting \textit{Scott v. United States}, 436 U.S. 128, 139, n.13 (1978)); \textit{Massachusetts v. Painten}, 389 U.S. 560, 565 (1968) (White, J., dissenting)). In addition, Justice Stevens indicated that "as the majority recognizes, in all cases in which the 'good faith' exception to the exclusionary rule would operate, there will also be immunity from civil damages." \textit{Id.} at 3436, n.35.
\item \textsuperscript{130} \textit{See supra} notes 71-125 and accompanying text.
\item \textsuperscript{131} \textit{H. R. REP. NO. 96-548, 96TH CONG., 1ST SESS. 3, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS} 2609, 2809.
\item \textsuperscript{132} \textit{See Eisenberg, Section 1983: Doctrinal Foundations and Empirical Study, 67 CORNELL L. REV.} 482, 550-51 (1982) (indicating that of 176 complaints filed by non-pris-
amples of circuit court decisions which interpret the common law immunities granted under § 1983 for police officer misconduct. Typically, the cases involve police officers who negligently handle their assignments or exhibit outright malice by withholding evidence or lying to the judge, magistrate or grand jury when requesting arrest warrants.

**The Strict Causation Rule**

In addressing police immunity, the Fifth Circuit has articulated a strict causation rule. The rule absolves the requesting officer from liability for an unconstitutional arrest warrant if the officer is not the direct causal link between the warrant and the subsequent arrest. A police officer, however, can never be the direct link between the request for the warrant and the actual arrest, because the officer must request a warrant from a judicial officer or a grand jury. Consequently, the police officer will always be immune from suit under the strict causation rule.

The strict causation rule is illustrated by *Rodriguez v. Ritchey*. In *Rodriguez*, the combination of investigative misadventure, mechanical failure, and incredibly bad luck culminated in the arrest of a Tampa beautician for the violation of federal gambling laws. 

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1. *See infra* notes 135-81 and accompanying text. There are no immunities allowed under § 1983. Any immunities that the Supreme Court has found have been an expansion of the common law. *See Wood*, 420 U.S. at 316-17.

2. *See infra* notes 139-40, 144-47 and accompanying text.


5. *Id*. The *Rodriguez* Court stated that "If the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain." *Id*. See FED. R. CRIM. P. 41.

6. *See infra* notes 139-54 and accompanying text.


8. *Rodriguez*, 556 F.2d at 1187-88. First, the pen register placed on a known gambler's phone in conjunction with a wiretap malfunctioned and incorrectly noted a number called by the gambler as 935-9024, instead of 935-0024. *Id*. at 1187. Second, the investigator called a security officer of the General Telephone Company in Tampa and requested the name of the subscriber to the number 935-9024. The officer identified the subscriber as Ms. Rodriguez, but in fact the number belonged to a pay telephone. Third, a detective of the Tampa police department informed the investigator that a Margaret Rodriguez was currently facing gambling charges; however, no investigation was directed to discover whether this woman was the same Ms. Rodriguez. Subsequent testimony revealed that she was not. Finally, the investigator called Ms. Rodriguez to do a voice comparison, although the investigator had never listened to the
Though ultimately found innocent, Ms. Rodriguez' initial indictment by a grand jury forced the court to hold that she did not have a cause of action, because "indictment by a properly constituted grand jury conclusively determines the existence of probable cause and provides the authority for an arrest warrant to issue." Therefore, even though the charges against Ms. Rodriguez were subsequently dropped, she could not sue for civil damages because the indictment served as proof of probable cause for issuing the arrest warrant.

The analysis in Rodriguez was affirmed in Smith v. Gonzales. In Smith, the court addressed the issue of a police officer's liability under § 1983 when that officer had lied to a prospective witness under a fictional incest charge in order to procure damaging evidence against the suspect, the witness' own father. A grand jury returned an indictment for Smith, but Smith was acquitted of all charges at trial. Prior to acquittal, Smith had also been committed to a mental institution for an undisclosed number of days. When Smith brought a § 1983 civil suit against the police officers involved in his arrest and detention, the court relied on its Rodriguez decision in finding that Smith had not asserted a cause of action. The court articulated an analysis previously applied in Baker v. McCollan, in which the Supreme Court stated: "[T]he first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' If there has been no such deprivation, the state of mind of the defendant is wholly immaterial." The Fifth Circuit asserted that under the strict causation rule, in the presence of probable cause, there will never be liability on the part of an officer who acts maliciously in procuring a warrant. In dicta, the court discussed the malice element as a possible defense to a claim of

original taped telephone conversation and therefore could not do a voice comparison. In addition, the investigator did not call the number on the pen register, which would have revealed that the telephone number was not Ms. Rodriguez'. Rather, the investigator used Ms. Rodriguez' number from the telephone book. None of these facts were revealed until the trial a year after the investigation.  

141.  Id. at 1191.  
142.  Id.  
143.  670 F.2d 522, 526 (5th Cir. 1982).  
144.  Id. at 524.  
145.  Id. at 525.  
146.  Id. The facts indicate he was detained for less than two weeks. Id.  
147.  Id.  
148.  Id. at 525-26.  
150.  Id. at 140 (footnote omitted).  
151.  Smith, 670 F.2d at 526. The court stated: "[A] bad faith motive to 'get' a suspect is irrelevant if the arrest is supported by a properly issued warrant or by the existence of probable cause." Id. (citation omitted).
POLICE IMMUNITY FROM CIVIL SUIT

qualified immunity. The court determined, however, that because a court first had to determine whether the petitioner has a constitutional claim, the malice portion of the analysis would never be reached. Such a claim, the court concluded, would seldom be found when applying the strict causation rule.

According to the Fifth Circuit, then, the strict causation rule will absolve a police officer from liability for what is determined to be an unconstitutional arrest warrant, if probable cause for the warrant is proved. Probable cause is proved by an intermediate's decision, such as a grand jury handing down an indictment or a judge issuing a warrant.

The Malice Standard

The third Fifth Circuit case, Garris v. Rowland, was decided on the subjective prong of the qualified immunity test. In Garris, a fourth amendment violation was found based on a lack of probable cause on which to issue a warrant for Garris' arrest. The court interpreted the subjective prong of the good faith immunity test as requiring malice on the part of the police officer before liability would attach for his requesting an unconstitutional warrant. In addition, the court followed Rodriguez and Smith, asserting that "the magistrate's determination of probable cause breaks the chain of causation and insulates the initiating party from liability." In Garris, the police officer took the affidavit to the district attorney's office for review and approval. This fact, coupled with the lack of malice on Officer Rowland's part, absolved him of liability.

Moreover, two cases that rest on the malice standard in determining liability for police misconduct in arrest warrant cases were re-

152. Id. at 526-27.
153. Id.
154. Id. at 527.
155. See supra notes 135-57 and accompanying text.
156. Smith, 670 F.2d at 526. See supra notes 135-54 and accompanying text.
157. 678 F.2d 1264 (5th Cir. 1982).
158. Id. at 1271.
159. Id. Garris testified at trial "that when released to his wife at the jail, Officer Rowland stated that their investigation found him to be 'disgustingly clean.'" Id. at 1269.
160. Id. at 1271-73. In describing this prong of the test, the court asserted that "[t]he subjective component of the test requires that a plaintiff show that the official's action ... falls on the actual intent side ... rather than on the side of simple negligence." Id. at 1271-72 (quoting Bogard v. Cook, 586 F.2d 399, 412 (5th Cir. 1978)).
161. See supra notes 139-54 and accompanying text.
162. See supra notes 143-54 and accompanying text.
163. Garris, 678 F.2d at 1273 n.6.
164. Id. at 1273.
165. Id. at 1273-74.
lied on by the District Court for the District of Rhode Island in the original Briggs v. Malley\(^\text{166}\) proceedings.\(^\text{167}\) First, in Madison v. Manter,\(^\text{168}\) the court articulated the public policy rationale for requiring a finding of malice on the part of the police officer before liability would attach, because the officer obtained an allegedly invalid arrest warrant.\(^\text{169}\) The court stated:

A police officer has a much larger public to protect than the individual who, in good faith, he suspects of a crime. He, too, may be discouraged from seeking warrants if the cost is a suit for negligence. The individual who is the object of a warrant has a more single-minded protector — the official whose duty it is to screen the application before issuing the warrant. This is the very purpose of the warrant procedure. It must be enough.\(^\text{170}\)

Within this policy statement is the argument that the police officer is immune from suit by reason of the strict causation rule.\(^\text{171}\) This rule provides that the “official whose duty it is to screen the application [for a] warrant,”\(^\text{172}\) the judicial officer or grand jury, breaks the causal chain and absolves the police officer from liability.\(^\text{173}\)

The second case relied on by the Briggs court, Stadium Films, Inc. v. Baillargeon,\(^\text{174}\) depended on Madison for its reasoning.\(^\text{175}\) In deciding Stadium Films, Inc., the court held that negligence was not a cause of action in damages cases,\(^\text{176}\) asserting that “a mistake of [law] in relying on a magistrate’s approval of a search [warrant] can be considered virtually per se reasonable.”\(^\text{177}\)

These two cases represented the line of authority in the First Circuit when the Brigges brought suit against Officer Malley for the alleged violation of their constitutional rights under 42 U.S.C. § 1983.\(^\text{178}\) The standard of review applied in the circuit courts had be-

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\(^{166}\) Briggs v. Malley, 748 F.2d 715 (1st cir. 1984), aff’d, 106 S. Ct. 1092 (1986).

\(^{167}\) Id. at 716-17.

\(^{168}\) 441 F.2d 537 (1st Cir. 1971). In Madison, the complaint against the police officer alleged not only an illegal search of a car and an illegal seizure of a marijuana pipe, but also lack of probable cause in issuing the arrest warrant. Id.

\(^{169}\) Id. at 538-39.

\(^{170}\) Id.

\(^{171}\) Id. at 539.

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) 524 F.2d 577 (1st Cir. 1976). This case concerned an allegedly unconstitutional search of a theater and seizure of allegedly obscene films in violation of the fourth amendment, as well as a lack of probable cause for the arrest warrant. Id. at 578.

\(^{175}\) Id.

\(^{176}\) Id. The court explained: “Under the prevailing view in this country, a peace officer may not be held liable on damages for making negligent errors of law in seeking or executing a search warrant.” Id.

\(^{177}\) Id.

\(^{178}\) Malley, 748 F.2d at 716-17.
come a combination of the strict causation rule and the two-pronged
good faith immunity test.\textsuperscript{179} As previously discussed, in applying this
combination the courts emphasized the subjective prong (or malice
requirement) when determining liability.\textsuperscript{180} In a § 1983 suit in the
federal circuit courts, therefore, the plaintiffs had the burden of
proving not only malice on the part of the police officer, but also that
no intervening cause existed between the police officer’s request for a
warrant and the actual arrest.\textsuperscript{181} Consequently, prior to Malley, no
vehicle existed which would enable a person to sue a police officer
under § 1983 for violating that person’s constitutional right to be free
from arrest without probable cause, because there is always someone
from whom the officer must request a warrant.

\textbf{ANALYSIS}

The Court’s holding in \textit{Malley v. Briggs}\textsuperscript{182} is based on two lines
of reasoning. First, the \textit{Malley} Court adopted the explanation of the
\textit{Harlow v. Fitzgerald}\textsuperscript{183} holding\textsuperscript{184} as interpreted by \textit{United States v.
Leon}.\textsuperscript{185} \textit{Leon} eliminated the subjective component of the qualified
immunity test.\textsuperscript{186} By eliminating the subjective component, \textit{Leon} jet-
tisoned the requirement that a police officer must have acted with
malice before liability could attach.\textsuperscript{187} Second, the standard of review
applied by the \textit{Malley} Court to determine the extent of officer liabil-
ity is predicated on the objective reasonableness test used in \textit{Harlow}
and \textit{Leon}.\textsuperscript{188} The \textit{Malley} holding, therefore, stands for the notion
that a police officer will be liable for civil damages if the plaintiff can
prove that the officer knew or should have known that the warrant
was requested without probable cause.\textsuperscript{189} The test is not what a par-
ticular officer knew, but rather what a reasonable officer would have
known under the circumstances.\textsuperscript{190}

\textsuperscript{179} See supra notes 131-65 and accompanying text.
\textsuperscript{180} See supra notes 157-70 and accompanying text.
\textsuperscript{181} See supra notes 157-77 and accompanying text.
\textsuperscript{182} 106 S. Ct. 1092 (1986), affg 748 F.2d 715 (1st Cir. 1984).
\textsuperscript{183} Harlow v. Fitzgerald, 457 U.S. 800 (1982).
\textsuperscript{184} Id.
\textsuperscript{185} Leon, 104 S. Ct. at 3421 & n.23.
\textsuperscript{186} Id. at 3421 n.23.
\textsuperscript{187} Id.
\textsuperscript{188} Malley, 106 S. Ct. at 1096. The Court described the test by stating: “Defend-
ants will not be immune if, on an objective basis, it is obvious that no reasonably com-
petent officer would have concluded that a warrant should issue; but if officers of
reasonable competence could disagree on this issue, immunity should be recognized.”
\textit{Id.}
\textsuperscript{189} Id. at 1098.
\textsuperscript{190} Id. See also Harlow, 457 U.S. at 818-19 (indicating that the immunity defense
would fail if a reasonably competent public officer should know the law governing his
conduct).
The objective reasonableness standard applied in Malley provides limited immunity for police officers. However, some persuasive arguments can be made that police officers, due to their special function, should be afforded more immunity than is currently available. First, it can be argued that the job of a police officer in bringing a complaint to a judge is analogous to a prosecuting attorney bringing a complaint to a neutral magistrate. In such instances, the common law has always afforded prosecutors absolute immunity. Similarly, police officers should be afforded the same immunity. Second, there are strong public policy reasons supporting the argument that absolute immunity, rather than the qualified immunity currently granted under Malley, should be granted to public officers who are merely mistaken when requesting an arrest warrant. The third argument for allowing greater immunity to police officers is that the qualified immunity test has been diluted to the point of inefficacy by the Supreme Court's attempt to simultaneously protect public officials from suit and to compensate victims of police misconduct. A final argument can be made that the Court, by reinterpreting its prior decisions, has taken the teeth out of public official immunity and left those officials wide open to frivolous suits. The following analysis addresses these arguments.

THE ARGUMENT FOR ABSOLUTE IMMUNITY

In Malley, the Court stated that "[o]ur initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." In response, petitioner Malley analogized the function of a police officer to that of a prosecuting attorney. Malley argued that because a police officer decides to bring charges in a manner similar to that of a prosecuting attorney, and because the officer confronts the same threat of retaliatory lawsuits that a prosecutor confronts, an officer should be enti-
POLICE IMMUNITY FROM CIVIL SUIT

In his brief, Malley supported this proposition by reasoning: "Because police officers are on the "front line" and often are more open to public exposure and criticism than even judges and prosecutors, their decisions regarding seeking arrest warrants are even more likely to arouse emotions and to erupt into retaliatory litigation than the decisions of [judges or prosecutors]." In addition, the petitioner argued that an officer's function is to make a judgment based on the evidence before the officer. The threat of a retaliatory lawsuit could have the chilling effect of causing the officer to make a decision which would not have been made had the officer been immune to such a suit. Based on these arguments, Malley urged the Court to analyze his actions in light of the function of his role as a police officer, as the Court had done in previous cases concerning government officials rather than looking to the officer's position in the governmental hierarchy when determining the proper test to apply to a police officer's actions.

The Court, however, did not accept the argument that a police officer should be afforded the same immunity as a prosecuting attorney. While admitting that the argument had some force, the Court asserted that Malley overlooked the proposition that the prosecutor's request for an indictment was merely "the first step in the process of seeking a conviction." Allowing a prosecutor to be sued for only the first step in the entire process could chill the performance of the prosecutor's overall function.

While the danger of a chilling effect may be the basis for a persuasive argument for absolute prosecutor immunity, the reasoning does not support the Court's opinion that a police officer doing a similar job should not be accorded similar immunity. The argument actually supports Malley's argument. Exposing a police officer to liability for the initial phase of police work might have an equally

201. Malley, 106 S. Ct. at 1096.
202. Id. at 1097.
203. The Supreme Court has consistently held that some officials have a special function which requires a full exemption from liability. Brisco v. LaHue, 460 U.S. 325, 329-46 (1983) (analyzing the function of a police officer acting as a witness); Butz, 438 U.S. at 485-517 (analyzing the function of a governmental department head); Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (analyzing the function of a prosecuting attorney); Pierson v. Ray, 386 U.S. 547, 554 (1967) (analyzing the functions of judges).
204. Brief of Petitioner at 18, Malley.
205. Malley, 106 S. Ct. at 1097.
206. Id.
207. Id.
chilling effect on that officer's performance. The filing of an affidavit and the subsequent request by the officer for an arrest warrant are the first steps in the process of seeking a conviction. By performing these two functions, a police officer appears to be "a central actor in the judicial process," because without the exercise of those functions, a conviction attempt could never begin. The police officer, therefore, should be afforded the same immunity for the same functions.

Without specifying any justifications, the Malley Court asserted that in its "judgment . . . the judicial process [would] on the whole benefit from a rule of qualified rather than absolute immunity." The Court reasoned:

The organized bar's development and enforcement of professional standards for prosecutors also lessens the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in Imbler, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenablebility to professional discipline by an association of his peers."

The argument that the organized bar will prevent prosecutorial misconduct is an extremely weak argument with which to support the assertion that prosecutors should be immune, whereas police officers should not. There are no guarantees that the American Bar Association can or will protect a victim of unconstitutional prosecutorial misconduct absent legislative or common law rules.

Additional support for the argument that police officers should be afforded absolute immunity centers around the notion that application of the Harlow standard causes the officer to be liable for a magistrate's mistakes when the officer seeks an arrest warrant. Historically, it has been the magistrate's, not the complaining officer's, duty to determine probable cause. Yet, in the event that a court

208. Malley, 106 S. Ct. at 1097.
209. Id.
210. Id. at 1097 n.5 (quoting Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (footnote omitted)).
211. United States v. Leon, 104 S. Ct. 3405, 3420 (1984) (stating that "it is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant"). See also United States v. United States Dist. Court, 407 U.S. 297 (1972). The Court stated:

[A] governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises of conversation. . . . The . . . requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

Id. at 316.
finds that a warrant has been issued without the required probable
cause, it is the officer, not the magistrate, against whom the suit is
brought, because the magistrate is absolutely immune from civil
suit.212 The objective reasonableness test is thus at odds with the es-
tablished policy of requiring officers to obtain a neutral magistrate's
permission before an arrest warrant would issue.

The Court has recognized that there is a division of functions be-
tween officers and magistrates.213 In fact, the Court has, on at least
one occasion, specifically stated that there is a "reasonable division of
functions . . . entirely consistent with 'due process of law.' "214 The
reason for dividing the duties of police officers and magistrates is
based upon the general belief that the magistrate is more qualified,
dispassionate and objective than the officer who is caught up in the
chase.215 In light of the magistrate's neutrality and detachment, the
magistrate is "capable of determining whether probable cause exists
for the requested arrest or search."216 The Court has reasoned that
because a magistrate has been required to meet the two standards of
detachment and capability, obtaining magistrate review of the factual
justification for an arrest could assure "the maximum protection of
individual rights."217

Thus, through its holding in Malley,218 the Court has severely
undermined the above-stated public policy reasons for providing ab-
solute immunity to certain government officials who perform certain
functions. First, because the decision to request an arrest warrant is
a discretionary function similar to the prosecutor's decision whether
to issue an indictment, the arresting officer should be afforded the

212. Pierson v. Ray, 386 U.S. 547, 554 (1967). The Pierson Court indicated that
"[f]ew doctrines were more solidly established at common law than the immunity of
judges from liability for damages for acts committed within their judicial jurisdic-
tion. . . . We do not believe that this settled principle of law was abolished by
§ 1983. . . ." Id. at 553-54.
nying text.
214. Id.
215. Shadwick v. City of Tampa, 407 U.S. 345, 349 (1972) (stating that a magistrate
must be "neutral and detached"). See also Johnson v. United States, 333 U.S. 10 (1948),
in which the Court stated:
[The] informed and deliberate determinations of magistrates empowered to is-
sue warrants as to what searches and seizures are permissible under the Con-
stitution are to be preferred over the hurried action of officers and others who
may happen to make arrests. Security against unlawful searches is more
likely to be attained by resort to search warrants than by reliance upon the
cautions and sagacity of petty officers while acting under the excitement that
attends the capture of persons accused of crime.
Id. at 14 n.3 (quoting United States v. Lefkowitz, 285 U.S. 452, 464 (1932)).
218. Malley, 106 S. Ct. at 1098.
same immunity. Second, requiring the officer to determine if the requested warrant is supportable is tantamount to requiring the officer to be both constable and judge. The argument has been made that "if the police officer is required . . . to perform the magistrate's function even more accurately than the magistrate is required to do, then the police officer should be granted the absolute immunity protection that is granted to an official performing such a judicial function." This argument is in line with the Fifth Circuit Court of Appeals' decisions in Rodriguez v. Ritchey and Smith v. Gonzales, both of which held that a neutral judge's decision to issue an arrest warrant was a superceding intervening cause in the alleged violation of a victim's constitutional rights. This argument, however, is directly contrary to the Malley decision. The Court, in deciding Malley, not only upheld traditional judicial immunity, but also made the arresting officer liable for the magistrate's mistake in determining probable cause. If after the warrant is issued, a court determines that there is no probable cause, then it is the officer who is liable for civil damages, not the magistrate.

**TAKING THE TEETH OUT OF THE OBJECTIVE REASONABLENESS TEST**

Assuming that absolute immunity for police officers is not supported by public policy, the officer is at least entitled to a strong qualified immunity based on previous Court precedent. In Pierson v. Ray, the Court articulated a qualified immunity standard based on the test of whether the officer acted maliciously. This standard is the subjective prong of the two-prong qualified immunity test articulated in Wood v. Strickland. The other prong, also set forth in Wood, established an objective test of good faith. That test re-

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219. See supra notes 197-209 and accompanying text.
220. Brief of Petitioner at 24, Malley. See also Butz, 438 U.S. at 513-14 (indicating that persons charged with performing both "prosecutorial and investigative functions" could not execute both judiciously).
221. 556 F.2d 1185 (5th Cir. 1977), cert. denied, 438 U.S. 916 (1978). See supra notes 139-42 and accompanying text.
222. 670 F.2d 522 (5th Cir. 1982). See supra notes 143-54 and accompanying text.
223. Rodriguez, 556 F.2d at 1193 (stating that, "the intermediate's decision breaks the causal chain").
224. Malley, 106 S. Ct. at 1099. The Court admitted that the police officer is responsible for the magistrate's mistakes when the Court stated that "[o]urs is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment." Id.
225. 386 U.S. 547 (1967).
226. Id. 557. See supra notes 82-89, 105-07 and accompanying text.
228. Id. at 322.
quires that public officials "be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of [their constituents]."\textsuperscript{229} The essence of this distinction is articulated in \textit{Madison v. Manter},\textsuperscript{230} wherein the First Circuit Court of Appeals asserted that "there is a substantial difference between a claim that the defendants knew that probable cause was lacking and that they should have known."\textsuperscript{231} The \textit{Madison} Court noticed this difference because one test "supports [a] finding of malice; the other simply of negligence."\textsuperscript{232} The original test, then, by requiring that the plaintiff prove malice on the part of the officer, exacted a high level of proof as a prerequisite to recovery under § 1983.\textsuperscript{233}

The Supreme Court, however, did not adhere to the \textit{Pierson} test for determining police officer liability. In the beginning, the test provided a shield of immunity to police officers who were simply operating under a mistaken belief as to the facts or the law regarding a potential arrest; therefore, the officers were found not to have arrested a suspect out of malice.\textsuperscript{234} For example, the \textit{Pierson} court relied on such a malice or subjective good faith standard.\textsuperscript{235} In \textit{Wood v. Strickland},\textsuperscript{236} the Court added an objective portion to the \textit{Pierson} subjective test.\textsuperscript{237} Thus, the test became: if an officer knew or should have known that the requested warrant violated an individual's constitutional rights, or if the officer acted with a malicious intention, then the officer would be liable for civil damages.\textsuperscript{238} The \textit{Wood} test reduced the amount of protection afforded an officer by requiring that a plaintiff prove either recklessness or malice in order for liability to attach, thereby reducing the officer's immunity as it reduced the plaintiff's burden.\textsuperscript{239}

Subsequent to \textit{Wood}, the \textit{Harlow} opinion minimized the importance of the subjective prong of the test,\textsuperscript{240} and \textit{Leon} eliminated it completely.\textsuperscript{241} Whereas in \textit{Leon} the court interpreted its opinion in \textit{Harlow} to be the demise of the malice standard,\textsuperscript{242} the Court in

\begin{itemize}
  \item \textsuperscript{229} \textit{Id.}
  \item \textsuperscript{230} 441 F.2d 537, 538 (1971). \textit{See supra} notes 168-72 and accompanying text.
  \item \textsuperscript{231} \textit{Madison}, 441 F.2d at 538.
  \item \textsuperscript{232} \textit{Id.}
  \item \textsuperscript{233} \textit{Id.}
  \item \textsuperscript{234} \textit{See supra} notes 82-89 and accompanying text.
  \item \textsuperscript{235} \textit{Pierson}, 386 U.S. at 556-58.
  \item \textsuperscript{236} 420 U.S. 308 (1975).
  \item \textsuperscript{237} \textit{Id.} at 321-22.
  \item \textsuperscript{238} \textit{See supra} notes 82-89 and accompanying text.
  \item \textsuperscript{239} \textit{See supra} notes 71-80 and accompanying text.
  \item \textsuperscript{240} \textit{Harlow}, 457 U.S. at 815-17. \textit{See supra} notes 108-21 and accompanying text.
  \item \textsuperscript{241} \textit{Leon}, 104 S. Ct. at 3421 n.23.
  \item \textsuperscript{242} \textit{Id.}
Harlow actually held:

[Q]ualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ."243

The underscored language indicates that the Harlow Court continued to consider the arresting officer's state of mind.244 Therefore, the Leon Court's reliance on Harlow was misplaced when the Court decided to eliminate the subjective portion of the test because the Court in Harlow had actually maintained the entire two-prong test.245 Moreover, because Malley relied on Leon, the Malley test is equally without precedential support.246

Finally, another shortcoming of the Malley decision is that the decision is not clear with regard to what must be objectively reasonable. In Harlow, the Court stated that "compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."247 Yet, in Malley, the Court held that "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost."248 In the Harlow opinion, the focus of the test is on the reasonableness of the official's action in requesting the warrant. In Malley, however, it appears that the issue is the reasonableness of the warrant. Adding to the uncertainty, the First Circuit interpreted Leon to mean that "where a warrant is obtained upon the basis of an affidavit which the obtaining officer had no reasonable ground to believe alleged probable cause," then liability will attach to the officer, indicating that it is the officer's mind state that must be reasonable.249

In light of this confusion, a practitioner wishing to bring a § 1983 suit against a police officer alleging a violation of fourth amendment rights will find characterization of the case difficult. It is unclear whether a complaint should focus on the unreasonableness of the warrant, on the officer's actions in obtaining the warrant, or on the officer's belief in the reasonableness of the request.

244. See id.
245. See supra notes 108-25 and accompanying text.
246. See supra note 125 and accompanying text.
247. Harlow, 457 U.S. at 819 (emphasis added).
248. Malley, 106 S. Ct. at 1098 (citations omitted).
CONCLUSION

The Malley decision appears to be an unlikely product from a Court that has in recent years ruled consistently in favor of prosecutors and police. Yet, the Court had set itself upon an irrevocable course by its decision in Leon. In Leon, the Court had suggested in a footnote that the test to determine the scope of officer immunity to a civil suit brought by reason of an unconstitutional arrest warrant was the same objective reasonableness test which the Harlow Court had applied in civil suits brought by reason of unconstitutional search warrants. Thus, because of the precedent set by a footnote, the Court was forced to limit police officer immunity in arrest warrant cases.

The Malley decision, moreover, is not only contrary to previous Supreme Court policy, but the decision is also contrary to the values that the circuit courts have recognized in providing greater immunity to police officers due to their essential function in the overall prosecutorial process. The Malley Court disregarded the well established federal rule that it is the magistrate's function to determine probable cause, not the police officer's. Yet, the Malley Court admitted that if magistrates do not properly perform their function, it is up to the officer requesting the warrant to make an informed professional judgment as to the sufficiency of probable cause. Hence, if either the magistrate's or the officer's conduct falls below this objective standard of responsibility, it is only the officer who will be liable for civil damages.

In addition, the objective reasonableness test, as articulated in Malley, is inconsistent with previous applications of the test. Consequently, the test is confusing to the practitioner whose client has been victimized by unconstitutional police conduct. Accordingly, the Supreme Court must address whether the subjective element of the test must be proved in order to establish a cause of action for civil damages. Finally, the Court must establish guidelines for magistrates and officers which will assist them in determining probable cause in order to reduce the number of unconstitutional warrants being issued. Once these issues are addressed, the Court may better effectu-

251. Id.
253. See supra notes 211-17 and accompanying text.
255. Id.
ate the twin goals of protecting the public from police misconduct and protecting the police from frivolous civil suits.

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