CIVIL RIGHTS

MALLEY V. BRIGGS: APPLICATION OF THE *HARLOW* OBJECTIVE REASONABLENESS TEST TO SECTION 1983 LIABILITY FOR POLICE OFFICERS

In recent years the United States Supreme Court has modified the qualified immunity defense for government officials. In an attempt to fashion a more defined and useful standard, the Court instituted a strictly objective test. In *Malley v. Briggs*,[1] the standard was applied to police officers.

The Court in *Malley* concluded that a police officer who presents a judicial officer with a complaint and supporting affidavit that fail to establish probable cause cannot avoid liability[2] under 42 U.S.C. section 1983[3] for the resulting unconstitutional arrest. In reaching this decision, the Court applied the test set out in *Harlow v. Fitzgerald*.[4] The *Harlow* standard states that government officials performing discretionary functions are protected from liability for civil damages only when the official's conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[5] The goal of the Court in *Harlow* was to resolve many insubstantial claims against government officials by doing away with the subjective good faith element, and relying on the "objective reasonableness" of the official's conduct which is measured by reference to clearly established law.[6]

This Comment examines the reasoning of *Malley v. Briggs* and analyzes the application of the *Harlow* standard to probable cause cases. It will also assess *Malley*'s potential impact on the scope of police liability under section 1983.

FACTUAL BACKGROUND OF *MALLEY*

In December of 1980, the Rhode Island State Police placed a court-authorized wiretap on the telephone of Paul Driscoll in connection with a

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1. 106 S. Ct. 1092 (1986).
2. *Id.* at 1098-99.
3. § 1983 states:
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 proceeding for redress. . . .
4. 457 U.S. 800 (1982).
5. *Id.* at 818. In *Harlow*, the Court was concerned with the issue of whether presidential aides were entitled to absolute immunity. In holding that the aides were qualifiedly immune, the Court redefined the defense of qualified immunity by eliminating the subjective element of good faith.
6. *Id.*

narcotics investigation. Driscoll was an acquaintance of the Briggs' daughter. The wiretap intercepted two calls referring to a party at the plaintiffs' house during which marijuana was allegedly used in the presence of the Briggs. On the basis of the calls, Officer Malley drew up complaints accompanied by supporting affidavits charging both James and Louisa Briggs with conspiracy to possess marijuana. Malley then appeared before a judge of the Rhode Island District Court who issued warrants for the arrest of the plaintiffs based on the affidavits and complaints. The Briggs were arrested, held for several hours, arraigned, and then released. Charges were dropped when the grand jury failed to return an indictment.[7]

The plaintiffs brought an action under 42 U.S.C. section 1983, charging that Officer Malley violated their rights under the Fourth and Fourteenth Amendments. Specifically, they alleged that because the facts set forth in the affidavits did not establish probable cause, the arrest warrants were constitutionally deficient and Malley unlawfully arrested and imprisoned them. At the close of the plaintiffs' evidence, the defendant moved for a directed verdict. The district court granted the motion based on the finding that the magistrate's independent finding of probable cause "broke the causal chain" between the application for the warrant and the arrest.[8] The court founded its reasoning on Fifth Circuit precedent which holds, where the facts supporting an arrest are put before a magistrate, that magistrate's decision to issue an arrest warrant removes any causal connection between the acts of the police officer and any damage suffered by the plaintiffs.[9]

The Briggs appealed to the First Circuit Court of Appeals which reversed the district court holding and applied the standard set forth in *Harlow v. Fitzgerald*.[10] The *Harlow* standard requires the reasonableness of an official's conduct to be measured objectively by reference to "clearly established law."[11] Applying this standard, the First Circuit held that liability will attach only where the officer should have known that there was no objectively reasonable basis to believe the facts in the affidavit constituted probable cause.[12] The United States Supreme Court affirmed the First Circuit application of the "objective reasonableness" standard.[13]

THE STATUS OF QUALIFIED IMMUNITY LAW PRIOR TO *MALLEY*

42 U.S.C. section 1983 provides a right of action for private citizens who are deprived of their constitutional rights by the actions of government officials.[14] The statute itself does not set forth any immunities,[15] but the

7. *Malley*, 106 S. Ct. at 1094-95.
8. *Id.* at 1095.
9. Smith v. Gonzales, 670 F.2d 522 (5th Cir. 1982), *cert. denied*, 459 U.S. 1005 (1982); Rodriquez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).
10. 457 U.S. 800 (1982).
11. *Id.* at 818.
12. Briggs v. Malley, 748 F.2d 715, 721 (1984).
13. *Malley*, 106 S. Ct. at 1098-99.
14. Section 1983 was originally enacted as part of the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. The original purpose was to protect the constitutional rights of black citizens in the South following the Civil War, but federal courts have broadly interpreted the remedial function of § 1983 to extend to any violation of substantive rights under the Constitution or federal law. *See generally* P. SCHUCK, SUING GOVERNMENT 47-51 (1983) (historical evolution of § 1983).

court generally reads it in a manner consistent with common law principles of tort immunities and defenses.[16] The court focuses first on the existence of a common law privilege. If such an immunity existed for the official at the time the Civil Rights Act was enacted in 1871, the court then decides if that immunity should be granted under section 1983.[17]

DEVELOPMENT OF QUALIFIED IMMUNITY UNDER SECTION 1983

Section 1983 affords government officials varying degrees of immunity from personal liability. The statute is interpreted as granting judges, prosecutors, legislators and the President of the United States absolute immunity,[18] while certain other government officials are protected by qualified immunity.[19]

The law of qualified immunity is an attempt to reconcile three competing objectives: to provide effective redress for constitutional violations by government officials; to deter officials from abusing their positions; and to protect against liability and any adverse effect such threat may have on the official's decision-making capacity.[20]

The statute itself, however, grants no immunities. Likewise the text of the United States Constitution offers no basis for immunity. The law of qualified immunity as a defense for officials charged with constitutional violations is judicially created.[21]

In 1967 the Court, in *Pierson v. Ray*,[22] considered for the first time whether a police officer could raise the defense of qualified immunity when sued under section 1983.[23] The Court applied the approach set forth in *Monroe v. Pape*[24] which is based on the concept that section 1983 "should be read against the background of tort liability that makes a man responsible

15. The text of 42 U.S.C. § 1983 does not specify any exceptions to the rule of liability for constitutional violations. *See* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 492-93 (1982).

16. Imbler v. Pachtman, 424 U.S. 409, 418 (1976).

17. *Malley*, 106 S. Ct. at 1095.

18. *See* Nixon v. Fitzgerald, 457 U.S. 731 (1982) (presidential immunity); Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutorial immunity); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (legislative immunity).

19. *See* Harlow v. Fitzgerald, 457 U.S. 800, 813 (1982) (presidential aides); Procunier v. Navarette, 434 U.S. 555, 561 (1978) (state executives); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (mental hospital administrators); Wood v. Strickland, 420 U.S. 308, 321-22 (1975) (school board members); Pierson v. Ray, 386 U.S. 547, 557 (1967) (police officers).

20. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 128 (1985); Comment, *Immunity: Eliminating the Subjective Element from the Qualified Immunity Standard in Actions Brought Against Government Officials*, 22 WASHBURN L.J. 577, 580 (1983). *See also* Butz v. Economou, 438 U.S. 478 (1978).

21. Balcerzak, *supra* note 20, at 129.

22. 386 U.S. 547 (1967).

23. The Supreme Court, in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), recognized an implied cause of action for damages against a federal officer for constitutional violations. In Butz v. Economou, 438 U.S. 478 (1978), the Court held the same standard of qualified immunity recognized in *Bivens* applied to a § 1983 suit against a state official. *Id.* at 485. The Court deemed it "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." *Id.* at 504.

24. 365 U.S. 167 (1961).

for the natural consequences of his actions."[25] The *Pierson* Court held, in the case of a police officer making an arrest, the officer could assert a defense of good faith and probable cause which were available to officers in a common-law action for false arrest and imprisonment.[26] The Court, however, did not define the content of the defense.

Subsequent cases have attempted to clarify and define the limits of qualified immunity for various government officials under section 1983. In *Wood v. Strickland*,[27] the Supreme Court set forth a two-pronged analysis containing an objective and a subjective element.[28] The subjective element focuses on the defendant's state of mind, necessitating an inquiry into the defendant's actual knowledge of applicable law and the intent of his actions, whether malicious or sincere. The objective element focuses on the clarity and settled nature of the law and requires the defendant to know "basic, unquestioned constitutional rights."[29]

The subjective prong proved to be problematic because it came into effect only when the relevant constitutional right was not clearly established. Because an official cannot be expected to foresee future developments in constitutional law,[30] the reasonableness of the official's conduct was contingent upon whether the defendant acted with malicious intent. Some courts held that whether an official acted with malicious intent was a question of fact necessitating resolution by a jury.[31] Requiring a jury determination defeats the purpose of *Butz v. Economou*,[32] which is to dismiss insubstantial damage suits on summary judgment.[33]

QUALIFIED IMMUNITY UNDER *HARLOW*

In 1982, the Supreme Court, in *Harlow v. Fitzgerald*,[34] set out to alleviate the problems that had arisen under the subjective element of *Wood*. The Court eliminated the subjective element and established a purely objective standard. The *Harlow* Court believed this departure from prior law was necessary to increase the protection afforded an official to avoid disruption in the operation of government.[35] Officials performing discretionary functions

25. *Id.* at 187.
26. *Pierson*, 386 U.S. at 557.
27. 420 U.S. 308 (1975). Although application of the standard was specifically limited to school board members, the tests set forth were adopted by the courts as applying to other public officials as well. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 229-34 (1979); *Harlow*, 457 U.S. at 815 n.25 ("Subsequent cases . . . have quoted the *Wood* formulation as a general statement of the qualified immunity standard.").
28. The Court stated:

> [An official] is not immune from liability . . . 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 [individual] affected, or it he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . .

Wood v. Strickland, 420 U.S. at 322.
29. *Id.* at 321-22.
30. Pierson v. Ray, 386 U.S. 547, 557 (1967).
31. *Harlow*, 457 U.S. at 816 n.27.
32. 438 U.S. 478 (1978).
33. *Id.* at 507-08.
34. 457 U.S. 800 (1982).
35. *Id.* at 816-18.

are shielded from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[36] The Court did not define the phrase "clearly established," but the language of *Harlow* implies that the facts of relevant case law should be sufficiently similar to the facts in the case under consideration such that the official knows his conduct is unlawful and is therefore not objectively reasonable.[37] Reliance on an objective standard precludes a factual inquiry into the defendant's state of mind, and makes qualified immunity an issue of law allowing the defense to defeat insubstantial claims on a motion for summary judgment.

Following *Harlow*, only a small number of cases presented the issue of police liability for a negligently obtained warrant. Most of the courts addressing the issue have applied the objective reasonableness standard. The First Circuit has consistently applied the *Harlow* standard.[38] The Eleventh Circuit held, in *Clark v. Beville*,[39] that a defendant officer would lose his qualified immunity if the jury found that a "reasonable officer under similar circumstances would [not] have had probable cause to believe that [plaintiff] committed the offense. . . ."[40] Similarly, the Seventh Circuit observed that a number of jurisdictions have embraced the principle that a facially valid warrant will immunize only the officer who acted in an objectively reasonable manner in securing it.[41]

Prior to *Malley*, the Supreme Court had not applied the *Harlow* standard to section 1983 liability of police officers. However, the Court applied this standard in *United States v. Leon*[42] to determine the good faith of a police officer's conduct in the context of a suppression hearing. This application was an indication that the Court might also apply it in section 1983 suits.[43]

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36. *Id.* at 818. The motive of the Court was clear. By fashioning a purely objective standard the Court believed that the district courts could better comply with the "admonition in *Butz* that insubstantial claims should not proceed to trial." *Id.* at 815-16.

The Court was explicit in setting forth the policy reasons for the strictly objective standard. In reference to claims against officials, Justice Powell wrote:

> [C]laims frequently run against the innocent as well as the guilty—at a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.

Id. at 814.

37. *Id.* at 818. (A defendant may not "fairly be said to 'know' that the law forbade conduct" if that conduct had "not [been] previously identified as unlawful.").

38. B.C.R. Transport Co., Inc. v. Fontaine, 727 F.2d 7 (1st Cir. 1984) (presence of probable cause was an issue of officer's reasonableness under *Harlow*). The court in *B.C.R.* rejected the argument that judicial approval of the warrant prevented a jury from determining if probable cause existed. "[T]his judicial imprimatur is [not] an impregnable shield against any attack on the sufficiency of the underlying affidavit." *Id.* at 10 n.1; Briggs v. Malley, 748 F.2d 715 (1st Cir. 1984) (*only* where an officer is "constitutionally negligent," that is, where the officer should have know that the facts recited in the affidavit did not constitute probable cause, will liability attach); Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985) (applied the *Harlow* standard to a good faith defense in probable caus cases).

39. 730 F.2d 739 (11th Cir. 1984).

40. *Id.* at 740.

41. Olson v. Tyler, 771 F.2d 277 (7th Cir. 1985).

42. 468 U.S. 897 (1984).

43. Briggs v. Malley, 748 F.2d 715, 718, 718 n.2 (1st Cir. 1984).

REJECTION OF AN ABSOLUTE IMMUNITY DEFENSE FOR POLICE OFFICERS IN A SECTION 1983 LIABILITY SUIT

The Supreme Court established, in *Pierson v. Ray*,[44] that "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ."[45] The Circuit Courts of Appeal have followed the *Pierson* precedent, holding that qualified immunity is the level of protection afforded police officers for constitutional violations.[46]

Despite the Court's holding in *Pierson*, the petitioner in *Malley* argued that he should be accorded absolute immunity based on two functional analogies. First, the function of a complaining witness is the same as that of a police officer because both bring the facts before a judge for an independent finding of whether probable cause exists and a warrant should issue. From this analogy the petitioner reasoned that he should be absolutely immune. The Court rejected this argument because complaining witnesses were themselves never accorded absolute immunity at common law.[47]

The second analogy compared the function of the police officer in deciding to seek an arrest warrant to that of a prosecutor deciding to initiate criminal prosecution. The petitioner argued that because both are major decisions in determining whether an individual will face criminal charges, the police officer, like the prosecutor, should be absolutely immune. The Court found the petitioner's analogy untenable. The Court had previously accorded absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process."[48] Since the application for a warrant is further removed from the judicial phase of criminal proceedings than the seeking of an indictment by a prosecutor, the function does not require the same level of protection given a prosecutor.

The *Malley* Court determined that qualified immunity for police officers would best serve the competing policy interests of allowing remedies for constitutional violations by government officials, deterring abuse of an official's position, and allowing the official to act without intimidation and harassment. In rejecting the petitioner's claim that officers would become "unduly cautious," Justice White concluded that contemplation over the reasonableness of the warrant application is not only possible, but desirable.[49] Further,

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44. 386 U.S. 547 (1967).

45. *Id.* at 555. The Court had long recognized that police officers were not accorded absolute immunity. In Wolf v. Colorado, 338 U.S. 25 (1949), the Court noted that common law remedies were available "against the searching officer . . . [,] against one who procures the issuance of a warrant maliciously and without probable cause, . . . against a magistrate who has acted without jurisdiction in issuing a warrant, . . . and against persons assisting in the execution of an illegal search. . . ." *Id.* at 30 n.1.

46. Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); Beard v. Udall, 698 F.2d 1264 (9th Cir. 1981); Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom.*, District of Columbia v. Carter, 409 U.S. 418 (1973); Guido v. City of Schenectady, 404 F.2d 728 (2nd Cir. 1968), *cert. denied*, 395 U.S. 962 (1969).

47. *Malley*, 106 S. Ct. at 1096.

48. *Id.* at 1097 (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976).

Current common law principles do not extend absolute immunity to police officers. RESTATEMENT (SECOND) OF TORTS § 656 comment d (1977), expressly limits the section's application to prosecutors. The rule does not provide immunity to a police officer who mistakenly believes another is guilty of an offense and obtains a warrant based on that belief.

49. *Malley*, 106 S. Ct. at 1097-98. Justice White identifies three policy considerations. First,

qualified immunity provides "ample protection to all but the plainly incompetent or those who knowingly violate the law."[50]

ACT OF APPLYING FOR WARRANT IS NOT PER SE OBJECTIVELY REASONABLE

The proper interpretation of objective reasonableness is not merely one of procedure which can be satisfied simply by submitting a complaint and supporting affidavit to a magistrate. The concept as developed in *Harlow* and *Leon* is limited to the substantive question concerning what the "reasonably well-trained officer" should have known.[51] The act of appearing before a magistrate cannot insulate the officer from the substantive wrong brought about by presenting an affidavit lacking in probable cause.[52]

The *Malley* Court recognized that occasionally a magistrate might not perform his duties adequately but found it justifiable to require an officer to minimize the danger of a magistrate's error through the exercise of reasonable judgment when applying for a warrant.[53] Justice White rejected the petitioner's view that the standard adopted "requires the police officer to assume a role even more skilled . . . than the magistrate."[54] The officer will not be liable if a judge mistakenly issues a warrant but is still within the realm of judicial competence. But if a reasonably competent police officer would not have requested the warrant, the error does not permit the magistrate's ineptitude to shield the officer from liability.[55]

THE SCOPE OF *MALLEY*

The *Malley* decision will soon have an impact on the district and circuit courts. Although some circuits, most notably the First Circuit, have already held the issuance of a warrant does not create an absolute bar to liability in section 1983 actions, variations of the elements required to defeat immunity exist among district and circuit court jurisdictions.[56] The most recent Ninth Circuit cases originating in Arizona were decided prior to *Harlow* and relied

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the *Harlow* standard will not often discourage an officer from seeking a warrant when there is probable cause though the officer might consider the reasonableness prior to submission. This reflection is "desirable" as it may conserve judicial resources and protect an innocent part from premature arrest. Second, the officer responsible is the one who should bear the cost. Finally, the remedy in a § 1983 action will most likely benefit the victim of police misconduct.

50. *Id.* at 1096.

51. *Id.* at 1098.

52. United States v. Leon, 468 U.S. 897, 923 (1984). *See also* Brown v. Illinois, 422 U.S. 590 (1975) (affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.") *Id.* at 611 (Powell, J., concurring in part).

53. *Malley*, 106 S. Ct. at 1099.

54. *Id.* at 1099 n.9.

55. *Id.*

56. Briggs v. Malley, 748 F.2d 715, 721 (1st Cir. 1984) (liability attaches "*only* where an officer is 'constitutionally negligent', that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause. . . ."); Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985) ("[a]n officer will be held liable for seeking an arrest warrant later found to be without probable cause only if there *clearly* was no probable cause at the time the warrant was requested."). *Cf.* Olson v. Tyler, 771 F.2d 277, 281 (7th Cir. 1985) (officer is immune if he obtains a warrant in good faith, but not immune if statements made were known to be false or would have been known to be false if the truth had not been recklessly disregarded).

on subjective "good faith."[57] The holding in *Malley* precludes any further reliance on that element, and does not permit lower courts to hold the mere act of obtaining a warrant is objectively reasonable.[58]

Malley leaves several important questions unresolved. First, how will the decision affect summary judgment in probable cause cases? *Harlow* and *Butz* clearly articulate the Court's objective of not permitting insubstantial claims to proceed to trial. The *Malley* Court acknowledges this goal, but the question remains whether the objective reasonableness standard is a workable solution for resolving insubstantial claims on summary judgment when dealing with a concept like probable cause which is not easily defined.[59] If the standard proves unworkable, will the courts have to return to a case-by-case analysis?

Secondly, can the subjective state of mind of the defendant official ever enter into the evaluation? When establishing the objective reasonableness test in *Harlow*, the Court did not address this issue. However, Justice Brennan's concurrence noted that one who "actually knows" that he has violated the law cannot evade punishment even if a reasonably competent official would not have known that such conduct was unlawful.[60]

Subjective state of mind could prove relevant in another context. When making a qualified immunity determination, one commentator asserts that, although a court may only look at whether the officer violated "clearly established law," a state of mind inquiry may nevertheless be essential to establish a valid substantive claim.[61] The *Malley* Court did not clarify what role, if any, the defendant's state of mind might play.

Finally, Justice Powell's concurring and dissenting opinion in *Malley* presents the question of how much evidentiary weight a court should grant the magistrate's finding of probable cause. Powell views the Court's ruling as "denegrat[ing] the relevance of the judge's determination of probable cause."[62] Although the majority appears to preclude any reliance on a judi-

57. Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981); Handverger v. Harvill, 479 F.2d 513 (9th Cir. 1973).

58. For decisions holding that obtaining a warrant is per se objectively reasonable see Smith v. Gonzales, 670 F.2d 522 (5th Cir. 1982), *cert. denied*,. 459 U.S. 1005 (1982) (magistrate's decision to issue warrant breaks the causal chain and insulates the initiating party); Johnson v. Petersen, 563 F. Supp. 672 (W.D. Wis. 1983) (an arresting officer is allowed to rely in good faith on magistrate's decision that probable cause exists); Krohn v. United States, 578 F. Supp. 1441 (D. Mass 1983) (defective nature of warrant will not subject officer to liability if he acts in good faith).

59. Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."); *Leon*, 468 U.S. at 914 ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. . . ."). *But see* Floyd v. Farrell, 765 F.2d 1 (1985) (reversed denial of summary judgment in probable cause case and held officer was immune because facts warranted objectively reasonable belief that plaintiff was committing a crime); Kaltner v. Pebbles, 628 F. Supp. 96 (E.D. Mich. 1986) (granting motion for summary judgment where existence of probable cause was at least arguable).

60. *Harlow*, 457 U.S. at 821. *See also* Nahmod, *supra* note 27, 1985 Supp. at 380-81.

61. Balcerzak, *supra* note 20, at 134-35.

62. *Malley*, 106 S. Ct. at 1101. The Court states, quoting from *Leon*, " 'our good-faith inquiry in *confined* to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization.' " United States v. Leon, 468 U.S. 897, 922 n.23 (1984) (emphasis added).

Justice Powell would hold that the magistrate's finding of probable cause, although not conclusive, should be given substantial evidentiary weight. *Malley*, 106 S. Ct. at 1103. This is based on a "reasonable division of functions." Baker v. McCollan, 443 U.S. 137, 145 (1979).

cial finding of probable cause, Powell reads the Court's ruling as leaving some room for a district court to consider the magistrate's decision.[63]

CONCLUSION

Critics of *Malley* have stated that it is incongruous for the Court to rule that the prosecutor and judge, who are well trained in the law, are immune from responsibility for violation of a citizen's constitutional rights, yet the police officer, who receives only minimal instruction in the law, can be held liable under section 1983.[64] However, the criticism that the officer is being treated unfairly ignores the fact that *Malley* affords more protection than an officer had under *Pierson*.[65] Common law tort principles, on which *Pierson* was based, held that where probable cause was lacking, immunity turned on the issue of malice which was a question of fact for the jury to decide.[66] Conversely, under *Malley*, malice is not enough to defeat immunity if a reasonably well-trained officer would conclude that probable cause existed. In such a case the suit will be disposed of on summary judgment.[67] In applying *Harlow*, the Fifth Circuit discussed the likely parameters of what would be reasonable within the context of an objective standard. The court should address what an officer realistically should or should not know. This standard permits the court to expect an officer to have basic knowledge of the law he is obliged to enforce, but does not require him to have the knowledge of an expert in constitutional law.[68] The holding in *Malley* 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,"[69] indicates that the Court does not require superior knowledge of the law, but more accurately requires a standard to which an officer can realistically adhere.

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63. *Malley*, 106 S. Ct. at 1101-02.
64. Bernstein, *Supreme Court Review* 22 TRIAL, May 1986, at 91-92.
65. 386 U.S. 547 (1967).
66. *Malley*, 106 S. Ct. at 1096.
67. *Id.*
68. Saldana v. Garza, 684 F.2d 1159, 1164-65 (5th Cir. 1982).
69. *Malley*, 106 S. Ct. at 1098.