SUPREME COURT OF THE UNITED STATES

No. 91–126

HOWARD WYATT, PETITIONER *v.* BILL COLE AND JOHN ROBBINS, II

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[May 18, 1992]

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I join the opinion of the Court but find that a further and separate statement of my views is required.

I agree with what THE CHIEF JUSTICE writes in dissent respecting the historical origins of our qualified immunity jurisprudence but submit that the question presented to us requires that we reverse the judgment, as the majority holds. Indeed, the result reached by the Court is quite consistent, in my view, with a proper application of the history THE CHIEF JUSTICE relates.

Both the Court and the dissent recognize that our original decisions recognizing defenses and immunities to suits brought under 42 U. S. C. §1983 rely on analogous limitations existing in the common law when §1983 was enacted. See *ante*, at 5–6; *post*, at 1–2. In *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951) we held that §1983 had not eradicated the absolute immunity granted legislators under the common law. And in *Pierson* v. *Ray*, 386 U. S. 547, 555–557 (1967), we recognized that under §1983 police officers sued for false arrest had available what we described as a "defense of good faith and probable cause," based on their reasonable belief that the statute under which they acted was constitutional. *Id*., at 557. *Pierson* allowed the defense because with respect to the analogous

common-law tort, the Court decided that officers had available to them a similar defense. The good faith and probable cause defense evolved into our modern qualified-immunity doctrine. *Ante*, at 7–8.

Our immunity doctrine is rooted in historical analogy, based on the existence of common-law rules in 1871, rather than in "freewheeling policy choice[s]." *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986). In cases involving absolute immunity we adhere to that view, granting immunity to the extent consistent with historical practice. *Id*.; *Burns* v. *Reed*, 500 U. S. ___, ___ (1991) (slip op., at 7); *Hafer* v. *Melo*, 502 U. S. ___, ___ (1991) (slip op., at 7). In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards. In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), we "completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common law with an objective inquiry into the legal reasonableness of the official action." *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987). The transformation was justified by the special policy concerns arising from public officials' exposure to repeated suits. *Harlow*, *supra*, at 813–814; *ante*, at 7–8. The dissent in today's case argues that similar considerations justify a transformation of common-law standards in the context of private-party defendants. *Post*, at 4–5. With this I cannot agree.

We need not decide whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy, reshaping immunity doctrines in light of those policy considerations. But I would not extend that approach to other contexts. *Harlow* was decided at a time when the standards applicable to summary judgment made it difficult for a defendant to secure summary judgment regarding a factual question such as

subjective intent, even when the plaintiff bore the burden of proof on the question; and in *Harlow* we relied on that fact in adopting an objective standard for qualified immunity. 457 U. S., at 815–819. However, subsequent clarifications to summary-judgment law have alleviated that problem, by allowing summary judgment to be entered against a nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U. S. 317, 322 (1986). Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith can be tested at the summary-judgment stage.

It must be remembered that unlike the common-law judges whose doctrines we adopt, we are devising limitations to a remedial statute, enacted by the Congress, which "on its face does not provide for *any* immunities." *Malley*, *supra*, at 342 (emphasis in original). We have imported common-law doctrines in the past because of our conclusion that the Congress which enacted §1983 acted in light of existing legal principles. *Owen* v. *City of Independence*, 445 U. S. 622, 637–638 (1980). That suggests, however, that we may not transform what existed at common law based on our notions of policy or efficiency.

My conclusions are a mere consequence of the historical principles described in the opinion of THE CHIEF JUSTICE. The common-law tort actions most analogous to the action commenced here were malicious prosecution and abuse of process. *Post*, at 1. In both of the common-law actions, it was essential for the plaintiff to prove that the wrong doer acted with malice and without probable cause. *Post*, at 1, n. 1. As THE CHIEF JUSTICE states, it is something of a misnomer to describe the common law as creating a good faith *defense*; we are in fact concerned with the essence of the wrong itself, with

the essential elements of the tort. The malice element required the plaintiff to show that the challenged action was undertaken with an unlawful purpose, though it did not require a showing of ill will towards the plaintiff. J. Bishop, Commentaries on Non-Contract Law §232, p. 92 (1889). To establish the absence of probable cause, a plaintiff was required to prove that a reasonable person, knowing what the defendant did, would not have believed that the prosecution or suit was well-grounded, or that the defendant had in fact acted with the belief that the suit or prosecution in question was without probable cause. *Id.*, §239, at 95. Our cases on the subject, beginning with *Harlow* v. *Fitzgerald*, diverge from the common law in two ways. First, as THE CHIEF JUSTICE acknowledges, modern qualified immunity does not turn upon the subjective belief of the defendant. *Post*, at 3–4, n. 2. Second, the immunity diverges from the common-law model by requiring the defendant, not the plaintiff, to bear the burden of proof on the probable cause issue. *Supra*, at 3.

The decision to impose these requirements under a rule of immunity has implications, though, well beyond a mere determination that one party or the other is in a better position to bear the burden of proof. It implicates as well the law's definition of the wrong itself. At common law the action lay because the essence of the wrong was an injury caused by a suit or prosecution commenced without probable cause or with knowledge that it was baseless. To cast the issue in terms of immunity, however, is to imply that a wrong was committed but that it cannot be redressed. The difference is fundamental, for at stake is the concept of what society considers proper conduct and what it does not. Beneath the nomenclature lie considerations of substance.

Harlow was cast as an immunity case, involving as it did suit against officers of the Government. And

immunity, as distinct, say, from a defense on the merits or an element of the plaintiff's cause of action, is a legal inquiry, decided by the court rather than a jury, and on which an interlocutory appeal is available to defendants. *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985). Whether or not it is correct to diverge in these respects from the common-law model when governmental agents are the defendants, we ought not to adopt an automatic rule that the same analysis applies in suits against private persons. See *ante*, at 8, n. 2. By casting the rule as an immunity, we imply the underlying conduct was unlawful, a most debatable proposition in a case where a private citizen may have acted in good-faith reliance upon a statute. And as we have defined the immunity, we also eliminate from the case any demonstration of subjective good faith. Under the common law, however, if the plaintiff could prove subjective bad faith on the part of the defendant, he had gone far towards proving both malice and lack of probable cause. Moreover, the question of the defendant's beliefs was almost always one for the jury. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194 (1879).

It is true that good faith may be difficult to establish in the face of a showing that from an objective standpoint no reasonable person could have acted as the defendant did, and in many cases the result would be the same under either test. This is why *Stewart* describes the instances where the probable cause turns on subjective intent as the exceptional case. *Ibid*.; *post*, at 3–4, n. 2. That does not mean, however, that we may deprive plaintiffs of the opportunity to make their case. In some cases eliminating the defense based on subjective good faith can make a real difference, and again the instant case of alleged reliance on a statute deemed valid provides the example. It seems problematic to say that a defendant should be relieved of liability under some automatic rule of immunity if objective

reliance upon a statute is reasonable but the defendant in fact had knowledge of its invalidity. Because the burden of proof on this question is the plaintiff's, the question may be resolved on summary judgment if the plaintiff cannot come forward with facts from which bad faith can be inferred. But the question is a factual one, and a plaintiff may rely on circumstantial rather than direct evidence to make his case. *Siegert* v. *Gilley*, 500 U. S. ___, ___ (1991 (KENNEDY, J., concurring in judgment). The rule of course also works in reverse, for the existence of a statute thought valid ought to allow a defendant to argue that he acted in subjective good faith and is entitled to exoneration no matter what the objective test is.

The distinction I draw is important because there is support in the common law for the proposition that a private individual's reliance on a statute, prior to a judicial determination of unconstitutionality, is considered reasonable as a matter of law; and therefore under the circumstances of this case, lack of probable cause can *only* be shown through proof of subjective bad faith. *Birdsall* v. *Smith*, 158 Mich. 390, 394, 122 N.W. 626, 627 (1909). Thus the subjective element dismissed as exceptional by the dissent may be the rule rather than the exception.

I join the opinion of the Court because I believe there is nothing contrary to what I say in that opinion. See *ante*, at 10–11 ("we do not foreclose the possibility that private defendants faced with §1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that §1983 suits against private . . . parties could require plaintiffs to carry additional burdens"). Though they described the issue before them as "good faith immunity," both the District Court and the Court of Appeals treated the question as one of law. App. 12–14; 928 F. 2d 718, 721–722 (CA5 1991). The Court of Appeals in particular placed heavy reliance on the policy

considerations favoring a rule that citizens may rely on statutes presumed to be valid. *Ibid*. The latter inquiry, as *Birdsall* recognizes however, goes mainly to the question of objective reasonableness. I do not understand either the District Court or the Court of Appeals to make an unequivocal finding that the respondents before us acted with subjective good faith when they filed suit under the Mississippi replevin statute. Furthermore, the question on which we granted certiorari was the narrow one of whether private defendants in §1983 suits are entitled to the same qualified immunity applicable to public officials, *ante*, at 10, which of course would be subject to the objective standard of *Harlow* v. *Fitzgerald*. Under my view the answer to that question is no. Though it might later be determined that there is no triable issue of fact to save the plaintiff's case in the matter now before us, on remand it ought to be open to him at least in theory to argue that the defendant's bad faith eliminates any reliance on the statute, just as it ought to be open to the defendant to show good faith even if some construct of a reasonable man in the defendant's position would have acted in a different way.

So I agree the case must be remanded for further proceedings.