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]

THE CHIEF JUSTICE, with whom JUSTICE SOUTER and JUSTICE THOMAS join, dissenting.

The Court notes that we have recognized an immunity in the §1983 context in two circumstances. The first is when a similarly situated defendant would have enjoyed an immunity at common law at the time §1983 was adopted (*ante,* at 5). The second is when important public policy concerns suggest the need for an immunity (*ante*, at 8–9). Because I believe that both requirements, as explained in our prior decisions, are satisfied here, I dissent.

First, I think it is clear that at the time §1983 was adopted, there generally was available to private parties a good-faith defense to the torts of malicious prosecution and abuse of process.[1] See authorities cited *ante,* at 6; *Malley* v. *Briggs*, 475 U. S. 335, 340–341 (1986) (noting that the generally accepted rule at common law was that a person would be held liable if ``the complaint was made maliciously and without

[1]Describing the common law as providing a ``defense'' is something of a misnomer—under the common law it was plaintiff's burden to establish as elements of the tort both that the defendant acted with malice *and* without probable cause. T. Cooley, Law of Torts 184–185 (1879); J. Bishop, Commentaries on Non-Contract Law §225, p. 90 (1889). Referring to the defendant as having a good-faith defense is a useful shorthand for capturing plaintiff's burden and the related notion that a defendant could avoid liability by establishing *either* a lack of malice or the presence of probable cause.

probable cause''); *Pierson* v. *Ray,* 386 U. S. 547, 555 (1967) (noting that at common law a police officer sued for false arrest can rely on his own goodfaith in making the arrest). And while the Court is willing to assume as much (*ante*, at 7), it thinks this insufficient to sustain respondents' claim to an immunity because the ``qualified immunity'' respondents' seek is not equivalent to such a ``defense'' (*ante*, at 7–8).

But I think the Court errs in suggesting that the availability of a good-faith common law defense at the time of §1983's adoption is not sufficient to support their claim to immunity. The case on which respondents principally rely, *Pierson*, considered whether a police officer sued under §1983 for false arrest could rely on a showing of good-faith in order to escape liability. And while this Court concluded that the officer could rely on his own goodfaith, based in large part on the fact that a good-faith defense had been available at common law, the Court was at best ambiguous as to whether it was recognizing a ``defense'' or an ``immunity.'' Compare 386 U. S., at 556 (criticizing Court of Appeals for concluding that no ``immunity'' was available) with *id.*, at 557 (recognizing a good-faith ``defense''). Any initial ambiguity, however, has certainly been eliminated by subsequent cases; there can be no doubt that it is a qualified immunity to which the officer is entitled. See, *Malley*, *supra,* at 340. Similarly, in *Wood* v. *Strickland*, 420 U. S. 308, 318 (1975), we recognized that, ``[a]lthough there have been differing emphases and formulations of the common-law immunity,'' the general recognition under state law that public officers are entitled to a good-faith defense was sufficient to support the recognition of a §1983 immunity.

Thus, unlike the Court, I think our prior precedent establishes that a demonstration that a good-faith defense was available at the time §1983 was adopted does, in fact, provide substantial support for a contemporary defendant claiming that he is entitled to qualified immunity in the analogous §1983 context. While we refuse to recognize a common law immunity if §1983's history or purpose counsel against applying it, *ante*, at 6, I see no such history or purpose that would so counsel here.

Indeed, I am at a loss to understand what is accomplished by today's decision—other than a needlessly

fastidious adherence to nomenclature—given that the Court acknowledges that a good-faith defense will be available for respondents to assert on remand. Respondents presumably will be required to show the traditional elements of a good-faith defense—either that they acted without malice *or* that they acted with probable cause. See n.1, *supra; Stewart* v. *Sonneborn,* 98 U. S. 187, 194 (1879); W. Prosser, Handbook of the *Law of Torts* §120, p.854 (4th ed. 1971). The first element, ``maliciousness,'' encompasses an inquiry into subjective intent for bringing the suit. *Stewart, supra,* at 192–193; Prosser, *supra,* §120, p.855. This quite often includes an inquiry into the defendant's subjective belief as to whether he believed success was likely. See, *e.g.,* 2 C. Addison, Law of Torts §1, ¶854 (1876) (``[P]roof of the absence of belief in the truth of the charge by the person making it . . . is almost always involved in the proof of malice''). But the second element, ``probable cause,'' focuses principally on *objective* reasonableness. *Stewart, supra,* at 194; Prosser, *supra,* §120, p.854. Thus, respondents can successfully defend this suit simply by establishing that their reliance on the attachment statute was objectively reasonable for someone with their knowledge of the circumstances. But this is precisely the showing that entitles a public official to immunity. *Harlow* v. *Fitzgerald,* 457 U. S. 800, 818 (1982) (official must show his action did not ``violate clearly established statutory or constitutional rights of which a reasonable person would have known'').[2] Nor do I

---

[2]There is perhaps one small difference between the historic common law inquiry and the modern qualified immunity inquiry. At common law, a plaintiff can show the lack of probable cause either by showing that the actual facts did not amount to probable cause (an objective inquiry) or by showing that the defendant lacked a sincere belief that probable cause

see any reason that this ``defense'' may not be asserted early in the proceedings on a motion for summary judgment, just as a claim to qualified immunity may be. Provided that the historical facts are not in dispute, the presence or absence of ``probable cause'' has long been acknowledged to be a question of law. *Stewart, supra,* at 193–194; 2 Addison, *supra,* §1, ¶853, n.(p); J. Bishop, Commentaries on Non-Contract Law §240, p.95 (1889). And so I see no reason that the trial judge may not resolve a summary judgment motion premised on such a good-faith defense, just as we have encouraged trial judges to do with respect to qualified immunity claims. *Harlow, supra,* at 818. Thus, private defendants who have invoked a state attachment law are put in the same position whether we recognize that they are entitled to qualified immunity or if we instead recognize a good-faith defense. Perhaps the Court believes that the ``defense'' will be less amenable to summary disposition than will the ``immunity;'' perhaps it believes the defense will be an issue that must be submitted to the jury (see *ante*, at 11, referring to cases such as this ``proceed[ing] to trial''). While I can see no reason why this would be so (given that probable cause is a legal question), if it is true, today's decision will only manage to increase litigation costs needlessly for hapless defendants.

---

existed (a subjective inquiry). J. Bishop, Commentaries on Non-Contract Law §239, p.95. But relying on the subjective belief, rather than on an objective lack of probable cause, is clearly exceptional. See *Stewart* v. *Sonneborn,* 98 U. S. 187, 194 (1879) (describing subjective basis for finding lack of probable cause as exception to general rule). I see no reason to base our decision whether to extend a contemporary, objectivelybased qualified immunity on the exceptional common law case.

This, in turn, leads to the second basis on which we have previously recognized a qualified immunity—reasons of public policy. Assuming that some practical difference will result from recognizing a defense but not an immunity, I think such a step is neither dictated by our prior decisions nor desirable. It is true, as the Court points out, that in abandoning a strictly historical approach to §1983 immunities we have often explained our decision to recognize an immunity in terms of the special needs of public officials. But those cases simply do not answer—because the question was not at issue—whether similar (or even completely unrelated) reasons of public policy would warrant immunity for private parties as well.

I believe there are such reasons. The normal presumption that attaches to any law is that society will be benefitted if private parties rely on that law to provide them a remedy, rather than turning to some form of private, and perhaps lawless, relief. In denying immunity to those who reasonably rely on presumptively valid state law, and thereby discouraging such reliance, the Court expresses confidence that today's decision will not ``unduly impai[r],'' *ibid.,* the public interest. I do not share that confidence. I would have thought it beyond peradventure that there is strong public interest in encouraging private citizens to rely on valid state laws of which they have no reason to doubt the validity. *Buller* v. *Buechler,* 706 F. 2d 844, 851 (CA8 1983); *Folsom Investment Co.* v. *Moore,* 681 F. 2d 1032, 1037–1038 (CA5 1982).

Second, as with the police officer making an arrest, I believe the private plaintiff's lot is ``not so unhappy'' that he must forgo recovery of property he believes to be properly recoverable through available legal processes or to be ``mulcted in damages'' *Pierson,* 386 U S., at 555, if his belief turns out to be mistaken. For as one Court of Appeals has pointed

out, it is at least passing strange to conclude that private individuals are acting ``under color of law'' because they invoke a state garnishment statute and the aid of state officers, see *Lugar* v. *Edmonson Oil Co.,* 457 U. S. 922 (1982), but yet deny them the immunity to which those same state officers are entitled, simply because the private parties are not state employees. *Buller, supra,* at 851. While some of the strangeness may be laid at the doorstep of our decision in *Lugar*, see 457 U. S., at 943 (Burger, C. J., dissenting); and *id.,* at 944–956 (Powell, J., dissenting), there is no reason to proceed still further down this path. Our §1983 jurisprudence has gone very far afield indeed, when it subjects private parties to greater risk than their public counterparts, despite the fact that §1983's historic purpose was ``to prevent *state officials* from using the cloak of their authority under state law to violate rights protected against state infringement.'' *Id.*, at 948 (emphasis added). See also, *Monroe* v. *Pape*, 365 U. S. 167, 175–176 (1961).

Because I find today's decision dictated neither by our own precedent nor by any sound considerations of public policy, I dissent.