NOTE

MAKING SECTION 1983 MALICIOUS-PROSECUTION SUITS WORK

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The Supreme Court can't seem to get over Section 1983 malicious prosecution. Thirty years and three significant cases into its project, however, the lower courts look about the same as they did in the early 1990s. The problem is not lack of effort, but lack of proper focus. The Court first endeavored to identify the proper constitutional source of a malicious-prosecution right, all the while failing to consider the more practical problems that make Section 1983 malicious-prosecution claims nearly impossible to win.

The Court seemed to reverse its course in Thompson v. Clark*, eschewing big constitutional questions in favor of a narrow, practical one. This Note applauds that turn in spirit. But it seems that the Court overcorrected by choosing too small of a question. This Note contributes the first postmortem of* Thompson *and finds that a year later, the lower courts look like nothing ever happened: almost every Section 1983 malicious-prosecution case since has been dismissed for reasons unrelated to* Thompson*'s favorable-termination rule.*

What if instead of asking questions too big to be practically impactful, or too small to do much work on their own, we found the questions that are "just right"? This Note identifies these questions by analyzing remaining splits in the lower courts and where those splits overlap with the issues killing otherwise meritorious Section 1983 malicious-prosecution claims. By asking and answering the right questions, this

* J.D., University of Virginia School of Law, 2023. Jonathan Goldberg, Caroline Hardie, Delaney Herndon, Julia Mroz, and Catherine Ward provided helpful comments. This Note would not have been possible without Thomas Frampton, who advised me at every stage of the writing process. Thanks to the terrific editors of the *Virginia Law Review* for their care on this piece, especially Madeline Killen, Ella Jenak, and Harrison Gordon.

Note constructs a version of Section 1983 malicious prosecution that could work in real life.

INTRODUCTION

How do you define a right if you aren't sure it exists? The right to be free from malicious prosecution has remained elusive despite decades of judicial and scholarly attention. Some still debate whether it even exists, and many more argue that it should not. The constitutional malicious-prosecution claim often brought under Section 1983 is something of an enigma—despite the name, the claims generally are not brought against prosecutors, and they rarely involve malice in an ordinary sense. Rather, they are part of the family of constitutional torts aimed at addressing police misconduct—here, for initiating criminal prosecutions without probable cause.

These lawsuits serve two critical roles. First, they provide redress for the harms uniquely associated with enduring a criminal prosecution,

namely, being deprived of rights "to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place."[1] And second, because malicious-prosecution claims are not ripe until favorable termination—which occurs when a prosecution ends without a conviction[2]—they may extend the timeframe to bring civil-rights suits. Because companion constitutional torts generally accrue much earlier,[3] malicious-prosecution suits give a person more time to vindicate at least some of their rights.[4]

But regardless of how important they are in theory, in practice, these suits rarely succeed. Despite significant debate over the proper constitutional home of malicious prosecution,[5] there is little clarity on its

[1] Albright v. Oliver, 510 U.S. 266, 294 (1994) (Stevens, J., dissenting).

[2] Thompson v. Clark, 142 S. Ct. 1332, 1335 (2022).

[3] If a person was unlawfully arrested and then fought charges resulting from the false arrest for two years (and thus was procedurally barred from raising the claim, see Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (holding that a damages suit challenging the constitutionality of an imprisonment or conviction "is not cognizable under § 1983" unless plaintiff can demonstrate favorable termination of underlying criminal matter)), for example, the statute of limitations on that false-arrest claim might expire while the harm of the officer's misconduct was still ongoing. Federal courts also generally abstain from hearing cases challenging state prosecutions while they are ongoing. See Younger v. Harris, 401 U.S. 37, 53 (1971) (reaffirming this principle); see also Brief for Federal Courts Scholars as Amicus Curiae Supporting Petitioner, *Thompson*, 142 S. Ct. 1332 (No. 20-659) (clarifying that these doctrines and their underlying federalism rationales have little force after favorable termination).

[4] Compare Manuel v. City of Joliet, 590 F. App'x 641, 643 (7th Cir. 2015) (rejecting unlawful-arrest claim as time barred), with Manuel v. City of Joliet, 580 U.S. 357, 360 (2017) (finding malicious-prosecution claim did not accrue until prosecution ended, thus extending time to file by about two months).

[5] See, e.g., Eric J. Wunsch, Note, Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and 1983: Is There a Constitutional Violation Remediable Under Section 1983?, 85 J. Crim. L. & Criminology 878, 878 (1995) (arguing that malicious prosecutions violate the Procedural Due Process Clause); John T. Ryan, Note, Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?, 64 Geo. Wash. L. Rev. 776, 778 (1996) (favoring due process framework and disputing that *Albright* forecloses it); Esther M. Schonfeld, Malicious Prosecution as a Constitutional Tort, 15 Touro L. Rev. 1681, 1682 (1999) (describing *Albright* as a failed effort); Jacques L. Schillaci, Note, Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine, 97 Nw. U. L. Rev. 439, 443 (2002) (supporting "divorce" between malicious prosecution and Section 1983); Jacob Paul Goldstein, Note, From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions, 106 Colum. L. Rev. 643, 657 (2006) (describing "a Fourth Amendment right to be free from malicious prosecution" but suggesting that current version is not functional); Lyle Kossis, Note, Malicious Prosecution Claims in Section 1983 Lawsuits, 99 Va. L. Rev. 1635, 1637 (2013) (suggesting the Fifth and Fourteenth Amendments as better homes); Erin E. McMannon, Note, The Demise of § 1983 Malicious Prosecution: Separating Tort Law From the Fourth Amendment, 94 Notre Dame L. Rev. 1479, 1498–99 (2019)

practicalities: after thirty years of effort, an "embarrassing diversity of judicial opinion" remains.[6] In *Albright v. Oliver*,[7] and again nearly twenty-five years later in *Manuel v. City of Joliet*,[8] the U.S. Supreme Court made its first error: by focusing only on whether malicious prosecution is properly housed in the Fourth or Fourteenth Amendment, the Court twice missed its chance to intervene in any practical sense. Both decisions had shockingly little real-world impact.[9] But two years ago, in *Thompson v. Clark*,[10] the Court made a new kind of error: by failing to address the most important problems in Section 1983 malicious-prosecution litigation, the Court issued an ostensibly good decision that, as this Note discovers, also failed to make much of a difference.[11] At each turn, the Court has failed to identify the sources of malicious prosecution's challenges and thus has failed to provide solutions tailored to those core problems. This Note fills that gap.

By exploring for the first time how the U.S. Courts of Appeals have responded to *Thompson*, this Note identifies two primary issues. First, in the wake of *Thompson*, the high-level disagreement that Judge Posner called "embarrassing"[12] endures.[13] Here, "[v]aried interpretation of federal constitutional law raises . . . troubling[] questions," and nonuniformity has had tangible consequences.[14] The details of these claims diverge wildly depending on the circuit, and even within circuits, so plaintiffs—many of whom are not represented by counsel[15]—have

(arguing that no constitutional right to be free from malicious prosecution exists); Timothy Tymkovich & Hayley Stillwell, Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution, 20 Geo. J.L. & Pub. Pol'y 225, 228 (2022) (describing substantive due process as a "superior doctrinal account of malicious prosecution").

[6] Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992) (Posner, J.).

[7] 510 U.S. 266 (1994) (plurality opinion).

[8] 580 U.S. 357 (2017).

[9] See, e.g., Kossis, supra note 5, at 1646–48 (describing post-*Albright* circuit splits); McMannon, supra note 5, at 1493 (same post-*Manuel*).

[10] 142 S. Ct. 1332 (2022).

[11] See infra Section II.C.

[12] Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992).

[13] See infra Section II.C for discussion of the many differences between the circuits, and even within them, on the basic elements of a Section 1983 malicious-prosecution claim.

[14] See Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1569 n.5 (2008) (suggesting that uniformity may be important where nonuniformity has tangible consequences or where questions of federal constitutional law are at stake).

[15] See Joanna C. Schwartz, Civil Rights Without Representation, 64 Wm. & Mary L. Rev 641, 650–52 (2023) (discussing difficulties securing counsel in civil-rights cases).

little chance of figuring it out. Specifically, there is significant disagreement on the two usual elements of a Section 1983 malicious-prosecution claim that most often prove fatal: probable cause and malice. The initiation of criminal charges without probable cause is the "gravamen" of malicious prosecution,[16] but there is little clarity on *what* probable cause is relevant.[17] Because malicious-prosecution defendants are typically police officers or investigators, and not those directly responsible for decisions to prosecute,[18] it can be hard to parse whose decisions—and which of those decisions—matter. Lack of malice, while not always even an element of malicious prosecution, can serve as a nearly insurmountable barrier to plaintiffs.

Second, because the Court has never directly considered what the "seizure" in a malicious prosecution is, some lower courts have artificially narrowed Section 1983 malicious-prosecution claims to encompass only suits where the plaintiff was detained. This misunderstands the harm of a malicious prosecution and closes courthouse doors to individuals whose constitutional rights have been violated. Although we more often think of trans-substantive doctrines like qualified immunity as limitations on the availability of damages remedies, here we see remedial access limited through a restrictive framing of the substantive right itself.[19]

Answering these questions the right way could produce the result the Court's repeated efforts would suggest it desires—a settled doctrinal framework for malicious-prosecution claims brought under Section 1983. And more importantly, clarifying the scope of malicious-prosecution claims should cure the notice issues and inconsistencies that make them

[16] Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022).

[17] There is little guidance, generally, on what courts are supposed to make of probable cause. See Andrew Manuel Crespo, Probable Cause Pluralism, 129 Yale L.J. 1276, 1370 (2020) ("[I]n an effort to make probable cause mean everything at once, those entrusted with its enforcement have made it so vague as to mean almost nothing at all."). As Professor Crespo has argued, existing probable-cause doctrine fails "to guide the judge through that decision—and to help everyone else predict how a judge might rule." Id. at 1280.

[18] See Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (holding that prosecutors have absolute immunity from Section 1983 malicious-prosecution suits).

[19] See John C. Jeffries, Jr., Pamela S. Karlan, Peter W. Low & George A. Rutherglen, Civil Rights Actions: Enforcing the Constitution 255 (5th ed. 2022); see also Richard H. Fallon, Jr., The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights, 92 Va. L. Rev. 633, 637 (2006) ("[W]hen the Court dislikes an outcome or pattern of outcomes, it will often be equally possible for the Justices to reformulate applicable justiciability doctrine, substantive doctrine, or remedial doctrine.").

harder to win than they should be. Maybe the fourth time could be the charm?

This Note explores these questions through three Parts. Part I will discuss the Court's historical efforts to determine where a right to be free from malicious prosecution is located in the Constitution, a project that failed to yield doctrinal stability. Part II will provide the first postmortem of *Thompson*—a case that, promisingly, addressed a narrow, technical aspect of Section 1983 litigation—and explore its (limited) impacts on the lower courts. Part III will answer the questions at the root of Section 1983 malicious prosecution's problems—those identified in Part II. This Note thus has two primary contributions: first, it provides a descriptive account of the lower courts after *Thompson*, which both makes evident the Court's failure in problem identification and identifies the right problems to address next; and second, through answering the questions left open after *Thompson*, it provides the first account of malicious prosecution that solves the meaningful practical problems that have, until now, gone unaddressed. The goal of this Note is simple: to make Section 1983 malicious-prosecution suits work.

I. FROM *ALBRIGHT* TO *MANUEL*

The long-enduring confusion surrounding Section 1983 malicious prosecution is not for lack of trying to resolve it: the Supreme Court has heard three significant cases on Section 1983 malicious prosecution since 1994.[20] This Part will discuss the two cases—*Albright v. Oliver* and *Manuel v. City of Joliet*—that invoke the Court's first approach to Section 1983 malicious prosecution. These cases produced interesting fodder for scholarly debates, but few practical takeaways. In addition, their facts help us draw the boundaries of the Court's elusive malicious-prosecution right, and to understand what the harm of a malicious prosecution is in practice.[21]

[20] See Albright v. Oliver, 510 U.S. 266 (1994); Manuel v. City of Joliet, 580 U.S. 357 (2017); Thompson v. Clark, 142 S. Ct. 1332 (2022). Although they are sometimes considered within the same bucket as the malicious-prosecution cases, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (retaliatory arrest claims require lack of probable cause), and *McDonough v. Smith*, 139 S. Ct. 2149, 2154–55 (2019) (fabricated-evidence claims accrue on favorable termination), are ultimately a distinct family of cases regarding improperly brought prosecutions. Like the pure malicious-prosecution cases, neither engages with the practical contours of a Section 1983 malicious-prosecution claim.

[21] History tends to sanitize the facts of these cases. The current Oyez description for *Albright*, for example, says only that "Illinois police obtained a warrant to arrest Kevin

A. Albright v. Oliver

Kevin Albright never had cocaine. A paid informant—whose "false accusations led to aborted and dismissed prosecutions" "on more than 50 occasions"[22]—identified Albright's elderly father John as a cocaine dealer to Officer Roger Oliver.[23] But face-to-face with the elder Albright, Oliver thought it unlikely he had the right person[24] and instead sought an arrest warrant for Kevin, who turned himself in and was released after posting bond.[25] At Kevin's preliminary hearing, "Oliver testified that [Kevin] sold the look-alike substance to" the paid informant, and the court found probable cause.[26] The court later dismissed the charges.[27]

Albright filed suit under Section 1983, alleging that Oliver had violated his Fourteenth Amendment "liberty interest . . . to be free from criminal prosecution except upon probable cause."[28] His complaint was dismissed for failure to state a claim under Section 1983, and the U.S. Court of Appeals for the Seventh Circuit affirmed.[29] The Supreme Court granted certiorari and affirmed, holding that the Fourteenth Amendment's Due Process Clause did not provide a proper basis for a Section 1983 malicious-prosecution claim, and offering the Fourth Amendment as a potential alternative.[30]

History remembers *Albright* as a definitive statement of malicious prosecution's home in the Fourth Amendment. But a kick to its tires reveals that its holding is far less satisfying than the three decades of subsequent case law and scholarship suggest. The plurality found only that "it is the Fourth Amendment, and not substantive due process, under

Albright after he was seen selling a substance which looked like an illegal drug." *Albright v. Oliver*, Oyez, https://www.oyez.org/cases/1993/92-833 [https://perma.cc/MLW7-GQFT] (last visited Oct. 24, 2023). That is not just an understatement, but a total misstatement of what actually happened.

[22] *Albright*, 510 U.S. at 292 (Stevens, J., dissenting).

[23] Id. at 292 & n.3.

[24] Albright v. Oliver, 975 F.2d 343, 344 (7th Cir. 1992), *aff'd*, 510 U.S. 266.

[25] *Albright*, 510 U.S. at 268 (plurality opinion). While the record does not make clear exactly what Albright's conditions of pretrial release were, he was at least barred from leaving Illinois without permission. Id. The record does not suggest that he spent any time behind bars. See id.

[26] Id. at 269.

[27] Id.

[28] Id. at 268–69 (internal quotation marks omitted).

[29] *Albright*, 975 F.2d at 347 (speculating that malicious prosecution might be a constitutional tort, but only in a case involving allegations of "incarceration or other palpable consequences").

[30] *Albright*, 510 U.S. at 268, 271 (plurality opinion).

which petitioner Albright's claim must be judged."[31] But it notably declined to adjudge Albright's claim under the Fourth Amendment, or provide any opinion on the viability of such a claim. The plurality's narrow holding seems largely a product of skepticism toward substantive due process[32] and did not leave a Fourth Amendment malicious-prosecution claim much firm ground to stand on.

The four concurring Justices provided different rationales for rejecting Albright's claim, including the existence of an adequate state law remedy;[33] the fact that the Fourteenth Amendment's Due Process Clause does not "guarantee[] certain (unspecified) liberties";[34] and the theory that pre-arrest harms belonged under the Fourteenth Amendment, but post-arrest harms belonged under the Fourth.[35] Justice Ginsburg was the only Justice to formally endorse a Fourth Amendment-based claim.[36]

Justice Stevens, the sole dissenter, noted that Fourteenth Amendment malicious-prosecution claims were nothing new—nearly every circuit had recognized them for years.[37] Justice Stevens suggested that malicious-prosecution suits should be brought under the Fifth Amendment's Grand Jury Clause instead of the Fourth Amendment's prohibition on unreasonable seizures.[38]

Albright's six opinions "failed to provide meaningful guidance."[39] By leaving open practically important questions, *Albright* left lower courts inventing the specifics as claims arose.[40] The *Albright* Court's debates over which amendment malicious-prosecution claims stem from contributed little to the project of creating a coherent doctrinal landscape.

[31] Id. at 271.

[32] Id. at 273 ("Where a particular amendment provides an explicit textual source of constitutional protection[,] . . . that amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [it]." (internal quotation marks omitted) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989))).

[33] Id. at 284–86 (Kennedy, J., concurring in the judgment).

[34] Id. at 275 (Scalia, J., concurring).

[35] Id. at 287–88 (Souter, J., concurring in the judgment).

[36] Id. at 278 (Ginsburg, J., concurring).

[37] Id. at 311 (Stevens, J., dissenting) (collecting cases).

[38] Id. at 302. The Grand Jury Clause had not—and still has not—been incorporated against the states. See Robert W. Frey, Note, Incorporation, Fundamental Rights, and the Grand Jury: *Hurtado v. California* Reconsidered, 108 Va. L. Rev. 1613, 1615 (2022).

[39] Kossis, supra note 5, at 1636.

[40] Ryan, supra note 5, at 803. Several circuits continued to recognize Fourteenth Amendment claims. Id. at 803–04; see also Kossis, supra note 5, at 1646 (collecting cases that demonstrate how "[t]he Courts of Appeals are just as confused post-*Albright* as they were before the Court weighed in").

Ten years ago, the complex splits in the lower courts "ha[d] reached the point where they [were] unlikely to resolve . . . on their own."[41] And they did not.

B. Manuel v. City of Joliet

At a traffic stop, officers found a bottle of vitamins in Elijah Manuel's car.[42] Despite a negative field test, the officers arrested him for possession of a controlled substance.[43] A lab technician ran another (negative) test at the Joliet police station, but the officers nevertheless made sworn statements that the substance in the vitamin bottle was ecstasy.[44] A court found probable cause and Manuel spent forty-eight days in jail before another test proved that he was innocent.[45]

Just over two years after his arrest,[46] Manuel filed suit under Section 1983, asserting that the officers had violated his Fourth Amendment rights by arresting and detaining him based on "entirely . . . made-up evidence."[47] His suit was dismissed because the statute of limitations for the unlawful-arrest claim had expired, and circuit precedent foreclosed a Fourth Amendment seizure claim.[48] The Seventh Circuit affirmed,[49] and the Supreme Court granted certiorari and reversed, holding that Manuel could challenge his pretrial detention under the Fourth Amendment.[50]

Justice Kagan's majority opinion refers to *Albright* as having settled constitutional malicious-prosecution claims—and, seemingly, all claims arising out of the "deprivations of liberty . . . that go hand in hand with criminal prosecutions"—in the Fourth Amendment.[51] True, by 2017, ten circuits had recognized a Fourth Amendment malicious-prosecution

[41] Kossis, supra note 5, at 1648.
[42] Manuel v. City of Joliet, 580 U.S. 357, 360 (2017).
[43] Id.
[44] Id. at 361.
[45] Id. at 361–62.
[46] Manuel was arrested on March 18, 2011; charges were dropped on May 4, 2011; and he filed suit on April 22, 2013. Id. at 360–62.
[47] Id. at 362.
[48] Id.
[49] Manuel v. City of Joliet, 590 F. App'x 641, 643–44 (7th Cir. 2015), *rev'd*, 580 U.S. 357.
[50] *Manuel*, 580 U.S. at 369.
[51] Id. at 366 (quoting Albright v. Oliver, 510 U.S. 266, 274 (1994) (plurality opinion)); see also Ann Woolhandler, Jonathan Remy Nash & Michael G. Collins, Bad Faith Prosecution, 109 Va. L. Rev. 835, 878 (2023) (mentioning "*Manuel*'s Fourth Amendment theory").

claim,[52] making *Manuel* more an opportunity to admonish the renegade Seventh Circuit and to nudge the silent Eighth than one to upend twenty years of consensus,[53] and the majority was right to frame the relevant constitutional offense as a seizure without probable cause.[54] But it seemed to cabin its holding to cases involving pretrial detention,[55] ignoring that actual detention is not required in malicious-prosecution cases.[56] Maybe, because Manuel was detained, this is a case of bad facts making bad law.

The dissent would instead "hold that the Fourth Amendment cannot house" a malicious-prosecution claim and that "[i]f a malicious prosecution claim may be brought under the Constitution, it must find some other home, presumably the Due Process Clause."[57] But this feigned uncertainty about malicious prosecution's constitutional home belies a transparent desire to evict the claim from constitutional cognizance altogether.[58]

After *Manuel*, the chaotic landscape of the *Albright* era was no smoother.[59] The long-enduring hunt for proper constitutional real estate left practical questions unanswered—questions concerned with how malicious prosecution works. The next Part discusses *Thompson v. Clark*, where the Court first took a very different approach.

[52] See *Manuel*, 580 U.S. at 363 ("The Seventh Circuit recognized that its position makes it an outlier . . . .").

[53] See McMannon, supra note 5, at 1487.

[54] *Manuel*, 580 U.S. at 367.

[55] Id. at 366–67 (noting that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process").

[56] Kevin Albright, for example, was never detained. See supra note 25.

[57] *Manuel*, 580 U.S. at 374 (Alito, J., dissenting). But cf. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (2022) (Alito, J.) (criticizing substantive due process doctrine and suggesting it should be contracted, rather than expanded).

[58] The dissent also raised a few important critiques of the majority, which would later resurface in *Thompson*. Namely, that it seemed odd for Manuel's claim—which stemmed from police officers falsifying evidence—to accrue on favorable termination when it was based on the (mis)conduct of officers who "lack the authority to initiate or dismiss a prosecution." *Manuel*, 580 U.S. at 378 (Alito, J., dissenting). The dissent also worried that a "severe mismatch between the[] elements [of malicious prosecution] and the Fourth Amendment" had created an over- and underinclusive scheme where some valid Fourth Amendment claims might be defeated for a lack of malice, and some cases with clear malice might be excused by objective reasonableness. Id. at 378–79. But see text accompanying infra note 211 (rebutting this critique).

[59] See McMannon, supra note 5, at 1493–94.

II. *THOMPSON V. CLARK*

When Larry Thompson's daughter was a week old, his soon-to-be sister-in-law, who suffered from a mental illness, called 911 and reported signs of child abuse.[60] When EMTs showed up at the Thompson home later that day, Thompson asked them to leave.[61] They returned with four armed police officers.[62] Thompson refused to let the officers in without a warrant.[63] "The officers rushed in, pushing Thompson to the floor and handcuffing him."[64] The officers alleged that Thompson "resisted arrest by flailing his arm[,] preventing the officers from placing handcuffs on him."[65] Thompson, by contrast, recalled that "he did not resist arrest, but that [an] [o]fficer . . . threw him to the ground and began to choke him, while the other officers kicked and punched him."[66] The *Thompson* majority would describe this as "a brief scuffle."[67]

Soon after, EMTs took the baby to the hospital, where they would discover no signs of abuse, only diaper rash.[68] After Thompson was released from the hospital (where he was treated for neck injuries[69]), he was charged with second-degree obstruction of governmental administration and resisting arrest and held in custody for two days before being released on his own recognizance.[70] Three months later, the Brooklyn District Attorney requested the charges be dismissed "in the interest of justice" during a hearing that lasted about a minute.[71] No other justification was ever provided.[72]

Thompson filed suit under Section 1983, alleging that police officers had violated his Fourth Amendment rights by "maliciously prosecut[ing]" him and "subject[ing] him to an unlawful, illegal and excessive detention."[73] The district court found for the officers based on the Second

[60] Thompson v. Clark, 364 F. Supp. 3d 178, 182–83 (E.D.N.Y. 2019) (Weinstein, J.).
[61] Id.
[62] Id. at 183.
[63] Id.
[64] Id.
[65] Id.
[66] Id.
[67] Thompson v. Clark, 142 S. Ct. 1332, 1336 (2022). It is notable in itself how different the descriptions of these facts were in the district court's opinion and the Supreme Court's.
[68] *Thompson*, 364 F. Supp. 3d at 183.
[69] Id.
[70] Id. at 184.
[71] Id. at 184–85.
[72] Id. at 185.
[73] Thompson v. Clark, 142 S. Ct. 1332, 1336 (2022).

Circuit's then-governing rule that a "plaintiff asserting a malicious prosecution claim under § 1983 must . . . show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence,"[74] but opined that the law should change because it "erect[ed] an unnecessary barrier to justice."[75] The Second Circuit affirmed.[76] The Supreme Court granted certiorari and reversed, holding that "[t]o demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under § 1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction."[77]

Thompson presented a different approach to Section 1983 malicious prosecution. In stark contrast with the approaches it had taken in *Albright* and *Manuel*, the Court endeavored only to answer the technical question of what "favorable termination" means. But to solve the question it had asked, the Court found itself awkwardly stumbling over uneven doctrinal terrain, forced to assume away questions more important in practice than the one it had taken on.

A. The Thompson *Majority*

The *Thompson* majority started from two assumptions: first, that *Albright* and *Manuel* had settled the existence of a Fourth Amendment claim for malicious prosecution; and second, that such a claim universally looked like an 1871 common law malicious-prosecution claim,[78] with the added requirement of a seizure.[79] Neither of these assumptions was right. That is not to say that *Thompson* is a bad decision. Quite the opposite—Justice Kavanaugh's majority found that 1871 common law commanded an expansive definition of favorable termination,[80] which has led to a few more surviving Section 1983 malicious-prosecution suits.[81] But the faulty assumptions the majority made to get there have led this (very good) new rule to apply strangely (or not at all) in practice. If *Thompson* had been

[74] *Thompson*, 364 F. Supp. 3d at 195 (quoting Lanning v. City of Glens Falls, 908 F.3d 19, 22 (2d Cir. 2018)).
[75] Id. at 181.
[76] Thompson v. Clark, 794 F. App'x 140, 142 (2d Cir. 2020), *rev'd*, 142 S. Ct. 1332.
[77] *Thompson*, 142 S. Ct. at 1335.
[78] Id. at 1337.
[79] Id. at 1337 n.2.
[80] Id. at 1338–39; see also *Thompson*, 364 F. Supp. 3d at 181, 196–97 (opining that the Second Circuit's prior, more restrictive rule "can and should be changed").
[81] See infra Section II.C.

decided in a world where the doctrine was otherwise coherent, it could have been great, not just good.

The majority started by looking to the common law elements of malicious prosecution, "the most analogous tort as of 1871 when § 1983 was enacted."[82] It assumed that Section 1983 malicious-prosecution claims stemmed from the Fourth Amendment, noting that the lower courts had almost uniformly recognized such a claim.[83] The majority highlighted that "the gravamen of the Fourth Amendment claim for malicious prosecution . . . is the wrongful initiation of charges without probable cause" and "the wrongful initiation of charges without probable cause is likewise the gravamen of the tort of malicious prosecution."[84] "Because this claim is housed in the Fourth Amendment," the Court mentioned in a footnote, "the plaintiff also has to prove that the malicious prosecution resulted in a seizure of the plaintiff."[85] In another footnote, the majority declined to decide "whether a plaintiff bringing a Fourth Amendment claim under § 1983 for malicious prosecution must establish malice (or some other *mens rea*) in addition to the absence of probable cause."[86]

The Court then looked back to nineteenth-century common law to justify its central holding: "[b]ecause the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence," the modern Section 1983 claim should not bear such a requirement either.[87] "[T]he individual's ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed."[88]

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[82] *Thompson*, 142 S. Ct. at 1337.

[83] Id. (collecting cases).

[84] Id. at 1337–38.

[85] Id. at 1337 n.2 (citing Manuel v. City of Joliet, 580 U.S. 357, 365–66 (2017)). This citation to *Manuel*—which seems to limit the seizure associated with malicious prosecution to actual detention, see supra Section I.B—is worrying. The majority does not express any view on whether Thompson was seized.

[86] *Thompson*, 142 S. Ct. at 1338 n.3.

[87] Id. at 1340.

[88] Id. ("[R]equiring the plaintiff to show that his prosecution ended with an affirmative indication of innocence would paradoxically foreclose a § 1983 claim when the government's case was weaker and dismissed without explanation before trial, but allow a claim when the government's evidence was substantial enough to proceed to trial. That would make little sense.").

B. Justice Alito's Dissent

The dissent—authored by Justice Alito and joined by Justices Thomas and Gorsuch—asked and answered entirely different questions,[89] insisting that the Court "should simply hold that a malicious-prosecution claim may not be brought under the Fourth Amendment."[90] Instead of continuing to sort out the details of a Fourth Amendment malicious-prosecution claim, the dissent argued that we should direct our energy toward other types of Section 1983 claims better suited to handle police misconduct.[91] Or, even better, leave malicious prosecution (and those other constitutional torts) to state law.[92]

The dissent, too, based its opinion on a faulty assumption: that the majority's Fourth Amendment malicious-prosecution claim was some sort of "mythical chimera" plucked out of thin air.[93] Heavily influenced by Justice Alito's narrow view of the *Albright* holding,[94] the dissent argued that no Fourth Amendment malicious-prosecution claim stemmed from any case law,[95] and even if it did, the claim the majority recognized made no sense because the Fourth Amendment and malicious prosecution are wholly unrelated.[96] Even if the dissent was right that the Fourth

[89] Justices Alito, Thomas, and Gorsuch led a chorus of questions about "defining a claim that might not exist" at argument. See, e.g., Transcript of Oral Argument at 5:14–19, *Thompson*, 142 S. Ct. 1332 (No. 20-659) (statement of Thomas, J.) ("[B]efore we get to the termination issue . . . , don't we have to address whether or not there actually can be a malicious prosecution case or claim based upon a Fourth Amendment seizure?"); id. at 8:13–14 (statement of Thomas, J.) ("I just want you to identify exactly where the seizure is . . . ."); id. at 37:1–4 (statement of Gorsuch, J.) ("How are we supposed to decide what the elements of a malicious prosecution claim are under the Fourth Amendment if we're not sure such a thing exists?").

[90] *Thompson*, 142 S. Ct. at 1347 (Alito, J., dissenting).

[91] Id. The dissent is careful to note that Thompson already lost all of those other claims (excessive force, false arrest, and unlawful entry). Id.

[92] Id.

[93] Id. at 1341 ("Today, the Court creates a chimera of a constitutional tort by stitching together elements taken from two very different claims: a Fourth Amendment unreasonable seizure claim and a common-law malicious-prosecution claim.").

[94] Id. at 1344–45 ("This Court affirmed the dismissal of Albright's substantive due process claim, and while no opinion gained majority approval, both the four Justices who joined the plurality opinion and the three [J]ustices who concurred in the judgment agreed that substantive due process does not include the right to be free from prosecution without probable cause. That is all that *Albright* actually decided." (citations omitted)).

[95] See id. at 1344.

[96] Id. at 1342 ("A comparison of the elements of the malicious-prosecution tort with the elements of a Fourth Amendment unreasonable-seizure claim shows that there is no

Amendment is the wrong home for malicious prosecution, and even if *Albright* has been misread, it probably does short shrift to thirty years of doctrinal development to credit the *Thompson* majority with inventing a "new tort."[97]

The dissent was undoubtedly colored by its opposition to the existence of a constitutional malicious-prosecution claim, but it nevertheless raised important flaws in the majority opinion. First, the dissent raised issues with the probable-cause requirement, noting that different facts might support (or negate) probable cause at different stages, and that it makes little sense to hold police officers responsible for prosecutors' conduct if it is out of their control.[98] Next, the dissent noted that the majority's external seizure requirement effectively inserted a requirement of detention into malicious prosecution when "prosecution can be very damaging even if the victim is never detained."[99] Or, in other words, the majority artificially limited the harm of a malicious prosecution—which includes damage to one's "person by imprisonment, . . . reputation by the scandal, or . . . property by the expense"[100]—by requiring a seizure. Finally, the dissent expressed concern with the majority's footnote description of a malice requirement, criticizing it as collapsing malice and a lack of probable cause.[101]

C. Thompson *in Real Life*

Despite its markedly different approach, *Thompson* failed to resolve the bewildering array of disagreements between the circuits just as *Albright* and *Manuel* did. The eleven circuits that have issued decisions in Section 1983 malicious-prosecution cases since *Thompson* have

overlap."). The dissent forgets that both inquiries center on probable cause. See infra Subsection III.A.2.

[97] *Thompson*, 142 S. Ct. at 1347 (Alito, J., dissenting). Panels in two circuits have shared Justice Alito's view that *Thompson* recognized a novel Fourth Amendment malicious-prosecution claim. See Klein v. Steinkamp, 44 F.4th 1111, 1115 (8th Cir. 2022); Payton v. Town of Maringouin, No. 21-30440, 2022 WL 3097846, at *3 (5th Cir. Aug. 3, 2022).

[98] *Thompson*, 142 S. Ct. at 1346–47 (Alito, J., dissenting) ("[I]t is not clear whether both the arrest and the prosecution must have been done without probable cause and without a legitimate law enforcement purpose.").

[99] Id. at 1346.

[100] Id. (quoting Melville M. Bigelow, Leading Cases on the Law of Torts Determined by the Courts of America and England 204 (1875)).

[101] Id. at 1347.

employed wildly different frameworks.[102] The Eighth Circuit takes the 1871 elements *Thompson* lays out as binding precedent, and thus overturned its prior system (or lack thereof).[103] The First,[104] Third,[105] Fifth,[106] Sixth,[107] and Tenth[108] Circuits have maintained their previous circuit-specific elements and supplemented them with the Court's definition of favorable termination. The Second[109] and Ninth[110] Circuits have done almost the same thing, but using relevant state common law instead of circuit-specific common law. The Fourth Circuit appends a

[102] Since *Thompson* was announced on April 4, 2022, as of the writing of this Note, eleven circuit courts have issued decisions related to Section 1983 malicious-prosecution claims.

[103] Klein v. Steinkamp, 44 F.4th 1111, 1115 (8th Cir. 2022).

[104] Charron v. County of York, 49 F.4th 608, 618 (1st Cir. 2022) ("[T]he defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." (quoting Hernandez-Cuevas v. Taylor, 723 F.3d 91, 101 (1st Cir. 2013))). Strangely, the First Circuit seems to think of malicious prosecution as a procedural due process claim. Id. at 618 n.14.

[105] Demaske v. Bonin, No. 21-2513, 2022 WL 1551837, at *1 (3d Cir. May 17, 2022) (identifying five elements to a malicious-prosecution claim, including (1) officer-initiated proceedings that (2) end in the plaintiff's favor, (3) involve a "sufficient deprivation of liberty," (4) lack probable cause, and (5) were brought maliciously or purposefully for a reason other than "bringing the plaintiff to justice").

[106] Payton v. Town of Maringouin, No. 21-30440, 2022 WL 3097846, at *3 (5th Cir. Aug. 3, 2022) (maintaining prior circuit precedent that limited Section 1983 malicious-prosecution suits to a narrow conception of the Fourth Amendment, but nevertheless applying *Thompson* to define favorable termination).

[107] Caskey v. Fenton, No. 22-3100, 2022 WL 16964963, at *8–9 (6th Cir. Nov. 16, 2022) ("There are four elements to a malicious prosecution claim under § 1983: (1) a criminal prosecution was initiated against the plaintiff and the defendant 'made, influenced, or participated in the decision to prosecute'; (2) there was a lack of probable cause for the criminal prosecution; (3) as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor." (quoting Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010))).

[108] Moses-EL v. City of Denver, No. 20-1102, 2022 WL 1741944, at *8 (10th Cir. May 31, 2022) ("A plaintiff must show that '(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages.'" (quoting Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008))).

[109] Cornelio v. Connecticut, 32 F.4th 160, 178 (2d Cir. 2022) ("To state a § 1983 malicious prosecution claim a plaintiff 'must show a violation of his rights under the Fourth Amendment and must establish the elements of a malicious prosecution claim under state law.'" (quoting Manganiello v. City of New York, 612 F.3d 149, 160–61 (2d Cir. 2010))).

[110] Luke v. City of Tacoma, No. 21-35440, 2022 WL 2168938, at *1 (9th Cir. June 16, 2022) (importing Washington common law, but not reaching favorable-termination issue).

favorable-termination rule to a Fourth Amendment seizure inquiry.[111] The Eleventh Circuit, discussed in depth *infra*, at different moments seems to adopt several of these approaches. The Seventh Circuit has only reopened a case as ordered by the Supreme Court on remand[112] and rejected a *Thompson*-based motion as procedurally defaulted.[113] The D.C. Circuit has yet to weigh in.

Thompson's practical impact is limited to favorable termination—for example, in *Coello v. DiLeo*, the Third Circuit cited *Thompson* as "abrogat[ing]" prior circuit precedent and "streamlin[ing] . . . favorable-termination analysis"[114] to allow a previously non-viable suit to survive.[115] Every circuit that passed on the issue now applies *Thompson*'s favorable-termination rule, which they've all found need not have been clearly established at the time of the conduct to apply.[116] The rule has been used to reinstate several cases that had been previously dismissed for failure to demonstrate affirmative indications of innocence.[117] Also of note, the Fifth Circuit did not recognize a Fourth Amendment malicious-prosecution claim at all until *Thompson*, and cites *Thompson* as having held that they exist for the first time.[118]

Consistency between the circuits largely ends there. While the circuit-specific rules applied by the First, Third, Fifth, Sixth, and Tenth Circuits

[111] MacDonald v. Anderson County, No. 21-6225, 2022 WL 4376083, at *1 (4th Cir. Sept. 22, 2022) ("To state a malicious prosecution claim under § 1983, a plaintiff must establish that (1) the defendant seized the plaintiff 'pursuant to legal process that was not supported by probable cause,' and (2) the criminal proceedings terminated in the plaintiff's favor." (quoting Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012))).

[112] Smith v. City of Chicago, No. 19-2725, 2022 WL 2752603, at *1–2 (7th Cir. July 14, 2022).

[113] Towne v. Donnelly, 44 F.4th 666, 668 (7th Cir. 2022).

[114] Coello v. DiLeo, 43 F.4th 346, 354–55 (3d Cir. 2022); see also Shrum v. Cooke, 60 F.4th 1304, 1311 (10th Cir. 2023) ("[O]ur precedents applying the favorable termination element are no longer good law.").

[115] *Coello*, 43 F.4th at 355.

[116] See, e.g., Caskey v. Fenton, No. 22-3100, 2022 WL 16964963, at *10 (6th Cir. Nov. 16, 2022) (finding that the *Thompson* rule "did not need to be 'clearly established' at the time of wrongful conduct in order to support a malicious prosecution claim because it does not relate to a government actor's *conduct* subject to qualified immunity protections").

[117] *Coello*, 43 F.4th at 354–55 (reopening suit dismissed before *Thompson*); Handy v. Dobbin, No. 21-1418, 2022 WL 5067710, at *3 (10th Cir. Oct. 5, 2022) (same); Bledsoe v. Carreno, 53 F.4th 589, 617 (10th Cir. 2022) (same); *Smith*, 2022 WL 2752603, at *1 (same as ordered by *Smith v. City of Chicago*, 142 S. Ct. 1665 (2022)); Gilliam v. Cavallaro, No. 22-1458, 2023 WL 2182371, at *3 (3d Cir. Feb. 23, 2023) (remanding for reconsideration in light of *Thompson*, and to correct an incorrect application of New Jersey's malice definition).

[118] Armstrong v. Ashley, 60 F.4th 262, 267 (5th Cir. 2023).

and the state law versions imported by the Second and Ninth Circuits all have a lot in common with each other, and with the 1871 framework from *Thompson* the Eighth Circuit now uses, they are not identical. The circuits diverge on the specifics of every other element of a Section 1983 malicious-prosecution claim, and many append extraneous elements. This Section will break down those other elements and explain the different approaches to them.

1. Probable Cause

Most malicious-prosecution inquiries "begin and end . . . with th[e probable-cause] requirement."[119] But there is little consensus on what that probable-cause inquiry should look like. The Third Circuit, for example, has found that "probable cause need only exist as to *any* offense that could be charged under the factual circumstances" to defeat a malicious-prosecution claim if the arrest and prosecution were "totally intertwined."[120] The Second Circuit presumes the existence of probable cause if a grand jury indicted the plaintiff, a presumption that seems nearly impossible to overcome.[121] The Tenth Circuit is the only one to clarify that probable-cause determinations for arrest, prosecution, and confinement are all relevant.[122] In most cases, probable-cause analysis for false arrest and malicious prosecution is collapsed.[123] Analysis is rarely detailed.

Some circuits, relatedly, have implemented additional causation requirements to insulate police officers from being held liable for the harms a prosecution causes. The Ninth Circuit now applies a "presumption of prosecutorial independence" to "insulate[] the individual [police officer] defendants from liability."[124] The Ninth Circuit is explicit about what it is doing with this element: officers are completely insulated from liability, and prosecutors are protected by absolute immunity, so litigants are left without any remedy at all. The Sixth Circuit asks as a threshold question whether "officers participated in or influenced the

[119] Charron v. County of York, 49 F.4th 608, 618–19 (1st Cir. 2022).

[120] Eaton v. Figaski, No. 21-3094, 2022 WL 17831444, at *2 (3d Cir. Dec. 21, 2022).

[121] Norales v. Acevedo, No. 21-549, 2022 WL 17958450, at *3 (2d Cir. Dec. 27, 2022).

[122] Moses-EL v. City of Denver, No. 20-1102, 2022 WL 1741944, at *8 (10th Cir. May 31, 2022).

[123] See, e.g., *Charron*, 49 F.4th at 619.

[124] Luke v. City of Tacoma, No. 21-35440, 2022 WL 2168938, at *1 (9th Cir. June 16, 2022).

decision to criminally prosecute" the victim.[125] But the *Novak v. City of Parma* panel was careful to note that "[a] prosecutor's . . . charging decision typically breaks the causal chain for malicious-prosecution purposes."[126] The Sixth Circuit thus seems to limit officers' liability for malicious prosecution to cases involving false statements, excluding most reckless conduct.[127] This is a significant shift—it would exclude, for example, cases like Thompson's.

Probable cause, and related causation issues, are the easiest ways to dispose of malicious-prosecution claims. In part because probable-cause doctrine itself is so murky,[128] it is unsurprising that there are so many approaches to it in this context, and that none of them seem especially clear.

2. Seizure

There remains confusion, too, on whether Section 1983 malicious-prosecution claims require proof of a separate seizure at all, and if so, what that seizure is. The Third Circuit requires proof of a "deprivation of liberty," which seems distinct from a seizure.[129] The Sixth Circuit requires a "deprivation of liberty apart from the initial seizure" (i.e., the arrest).[130] The Eleventh Circuit requires a seizure *after* indictment or arraignment, implying that the prosecution itself is not a seizure without a "significant, ongoing deprivation of liberty."[131] The Second Circuit requires proof of a Fourth Amendment violation—presumably a seizure—in addition to the elements of malicious prosecution.[132] The Fourth Circuit requires a seizure "pursuant to legal process,"[133] as does the First.[134] The other circuits don't require proof of a seizure at all. The current circuit

[125] Novak v. City of Parma, 33 F.4th 296, 307 (6th Cir. 2022).

[126] Id.

[127] See id.

[128] See Crespo, supra note 17, at 1276 (describing current probable-cause doctrine as, inter alia, "open-textured," "undertheorized," "stunted," and a "haphazard collection of disparate ideas").

[129] Demaske v. Bonin, No. 21-2513, 2022 WL 1551837, at *1 & n.2 (3d Cir. May 17, 2022) (finding payment of a $15,000 bond sufficient deprivation of liberty).

[130] Caskey v. Fenton, No. 22-3100, 2022 WL 16964963, at *8 (6th Cir. Nov. 16, 2022).

[131] Yancey v. Tillman, No. 22-10867, 2022 WL 5071153, at *4 (11th Cir. Oct. 5, 2022) (quoting Kingsland v. City of Miami, 382 F.3d 1220, 1236 (11th Cir. 2004)).

[132] Cornelio v. Connecticut, 32 F.4th 160, 178 (2d Cir. 2022).

[133] MacDonald v. Anderson County, No. 21-6225, 2022 WL 4376083, at *1 (4th Cir. Sept. 22, 2022).

[134] Charron v. County of York, 49 F.4th 608, 618 (1st Cir. 2022).

approaches thus range from a *Manuel*-style detention-only approach[135] to the "continuous seizure approach" Justice Ginsburg embraced in *Albright*.[136] The immense diversity on this issue reflects underlying disagreement over what the scope of the right against malicious prosecution is.

3. Malice

Only some circuits have any malice requirement, and those malice requirements come in a variety of forms. The Second Circuit requires "actual malice."[137] The Sixth Circuit says that "[d]espite the name, 'malice' is not required to show malicious prosecution under § 1983."[138] The Tenth Circuit finds malice if there is not "arguable probable cause."[139] The Fourth Circuit requires that officers acted "deliberately or with a reckless disregard for the truth."[140] The Third Circuit looks to state law to define malice, and thus does not have its own consistent test.[141] The other circuits do not seem to apply any malice requirement distinct from probable-cause analysis. Because *Thompson* left open what "malice" means in malicious-prosecution cases, the circuits remain free to apply it (a) not at all; (b) as a functional equivalent of probable cause; or (c) as a subjective-bad-faith requirement.

4. The Enigmatic Eleventh Circuit

The Eleventh Circuit is the most puzzling of all. In the Section 1983 malicious-prosecution cases it has decided since *Thompson*, it has articulated two different tests (within 48 hours),[142] and even within the

[135] See supra note 55.

[136] See Albright v. Oliver, 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring) (arguing that a person is "'seized' in the constitutionally relevant sense" until the conclusion of a prosecution).

[137] Biton v. City of New York, No. 21-23, 2022 WL 1448207, at *1 (2d Cir. May 9, 2022).

[138] Caskey v. Fenton, No. 22-3100, 2022 WL 16964963, at *8 (6th Cir. Nov. 16, 2022).

[139] Bledsoe v. Carreno, 53 F.4th 589, 615 (10th Cir. 2022) (quoting Stonecipher v. Valles, 759 F.3d 1134, 1146 (10th Cir. 2014)).

[140] Wolfe v. City of North Charleston, No. 21-7335, 2022 WL 2752362, at *3 (4th Cir. July 14, 2022) (quoting Miller v. Prince George's County, 475 F.3d 621, 627 (4th Cir. 2007)).

[141] Gilliam v. Cavallaro, No. 22-1458, 2023 WL 2182371, at *3 (3d Cir. Feb. 23, 2023) (applying New Jersey common law definition of malice, which is "the intentional doing of a wrongful act without just cause or excuse" (citation omitted)).

[142] Compare Mathis v. Eslinger, No. 20-13761, 2022 WL 16849124, at *8 (11th Cir. Nov. 10, 2022) (holding that plaintiff must demonstrate "(1) that the defendant violated his Fourth Amendment right to be free from seizures pursuant to legal process and (2) that the criminal

(seemingly) dominant of those tests,[143] panels have used different common law reference points. In *Luke v. Gulley*, a panel found that a "district court errs when it relies on modern tort law or the law of the forum state . . . to resolve a claim of unreasonable seizure pursuant to legal process under section 1983," because of the Supreme Court's instructions in *Manuel* and *Thompson*, and instructed the district court to apply Eleventh Circuit precedent.[144] Two days later, another panel applied the 1871 common law elements laid out in *Thompson*.[145] By the next week, in *Boyette v. Adams*, yet another panel was using modern Alabama tort law.[146]

Because these are all unpublished opinions (even beyond the Eleventh Circuit, published opinions are few and far between), the Eleventh Circuit is not failing to abide by its precedents, or doing anything strictly impermissible under circuit rules. But that is almost worse—the opinions don't tell a litigant anything at all about how a court will evaluate their claim. This intra-circuit divergence is concerning in itself: claims probably shouldn't look different in the same circuit depending on the day. But it also reflects the broader inconsistencies between the circuits, all of which are permissible because the Supreme Court has only offered very broad or very narrow guidance.

* * *

This Note embraces the idea that uniformity has little independent value.[147] Here, though, the chaotic landscape of the lower courts is not

proceedings against him terminated in his favor" (quoting Luke v. Gulley, 50 F.4th 90, 95 (11th Cir. 2022))), with May v. Pritchett, No. 22-10147, 2022 WL 16753599, at *4 (11th Cir. Nov. 8, 2022) (requiring proof of "'a violation of [plaintiff's] Fourth Amendment right to be free of unreasonable seizures' and 'the elements of the common law tort of malicious prosecution'" (quoting Paez v. Mulvey, 915 F.3d 1276, 1285 (11th Cir. 2019))).

[143] See, e.g., Boyette v. Adams, No. 22-10288, 2022 WL 7296567, at *6 (11th Cir. Oct. 13, 2022) (applying same test as *May*, 2022 WL 16753599, at *4); Yancey v. Tillman, No. 22-10867, 2022 WL 5071153, at *3 n.3 (11th Cir. Oct. 5, 2022) (same); Crider v. Williams, No. 21-13797, 2022 WL 3867541, at *6–7 (11th Cir. Aug. 30, 2022) (same, citing *Thompson v. Clark*, 142 S. Ct. 1332, 1338 (2022), for favorable-termination rule); Rhodes v. Robbins, No. 21-11436, 2022 WL 1311558, at *1 (11th Cir. May 2, 2022) (same). Only *Parker v. Thurman*, No. 21-12998, 2022 WL 1184403, at *3 (11th Cir. Apr. 21, 2022), and *Griffin v. Ventriere*, No. 22-11197, 2022 WL 17972224, at *3 (11th Cir. Dec. 28, 2022), have used the *Mathis* framework.

[144] *Luke*, 50 F.4th at 96–97.

[145] *Yancey*, 2022 WL 5071153, at *3 n.3.

[146] 2022 WL 7296567, at *6.

[147] See generally Frost, supra note 14 (arguing that the uniformity of federal law is over-emphasized where nonuniformity is not causing problems).

merely a threat to abstract principles; it reflects the rocky path litigants face when trying to vindicate their rights. As Professor Joanna Schwartz has studied, a large portion of Section 1983 suits are litigated *pro se*, and those lawsuits fail at an alarmingly high rate.[148] To put it bluntly: this Note does not cite a single Section 1983 malicious-prosecution case where the plaintiff won.[149] These inconsistencies and disagreements reflect the issues that are killing these claims and thus making the right against malicious prosecution that the Court has recognized nearly impossible to vindicate. The Court's repeated failures to correctly identify and solve malicious prosecution's problems have left this right without a working remedy.

This Part has identified three primary reasons why Section 1983 malicious-prosecution claims fail.[150] First, most claims are dead on arrival because officers can demonstrate that they had probable cause at some point along the way. Next, many claims not involving pretrial detention fail for lack of a seizure. Finally, although it applies the least frequently, in the jurisdictions that require proof of subjective malice, plaintiffs rarely succeed in proving that officers had an improper purpose. True enough, before *Thompson*, favorable termination was probably the fourth category of "why malicious-prosecution claims fail." It was probably most similar to the malice requirement, though: problematic in a couple circuits, but not all of them, and not the first inquiry a court would conduct.

But given that almost every circuit still relies on its pre-*Thompson* precedents to define Section 1983 malicious-prosecution claims,[151] and most post-*Thompson* decisions do not even cite the opinion or discuss

[148] See Schwartz, supra note 15, at 700–01 ("[D]ismissals of meritorious cases not only deny relief to the people whose rights have been violated but also disrupt the broader civil rights ecosystem, making it more difficult to overcome qualified immunity, establish municipal liability, and demonstrate entitlement to injunctive relief.").

[149] This is not an unusual phenomenon in Section 1983 cases. See Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2, 46 tbl.12 (2017) (analyzing outcomes in police misconduct cases and finding only ten plaintiffs' victories out of over 1000 cases). True, some of these cases likely settle, and thus we have little information about them. But the point stands—Section 1983 cases rarely result in judgments for plaintiffs.

[150] The other "killer" of these claims—qualified immunity—presents issues beyond the scope of this Note. It is worth mentioning, however, that there are not many otherwise valid Section 1983 malicious-prosecution claims defeated by qualified immunity. This makes some intuitive sense—although it is difficult to prove a constitutionally cognizable malicious-prosecution claim, if a plaintiff can make that out, Supreme Court precedent clearly establishes the unconstitutionality of that conduct. The challenge is more in proving the merits.

[151] The only exception is the Eighth Circuit. See supra note 103. And, to some extent, the Eleventh (an outlier for other reasons).

favorable termination,[152] it looks like the Supreme Court chose the wrong place to start. It is not that *Thompson* got favorable termination wrong, or that the Court shouldn't have answered the core question in *Thompson*, but rather that the Court skipped over more foundational questions: it is hard to figure out the details of a remedy without a clear definition of the scope of the right in play. The *Thompson* decision, too, left most of the critical ambiguities in malicious-prosecution doctrine unresolved.

III. REORIENTING MALICIOUS PROSECUTION

After *Albright*, after *Manuel*, and again after *Thompson*, we have seen the Court's attempts to fix Section 1983 malicious prosecution fall flat. After *Albright*[153] and *Manuel*,[154] the solutions offered were, in short, to answer the questions those cases asked differently.[155] But there is little to gain practically from shoving malicious prosecution into a different amendment. *Thompson* asks a different kind of wrong question, going too far into the weeds without any solid overarching scheme. True, *Thompson* has made a positive difference in at least a few real cases,[156] but it could only do so much work without some broader clarity on what a Section 1983 malicious-prosecution claim is supposed to look like. The problem isn't that the Court is giving the wrong answers, but rather that it's asking the wrong questions.

[152] This is not because the courts of appeals are defying or ignoring *Thompson*, but rather because most malicious-prosecution claims are disposed of on probable cause. It is rarely necessary to reach favorable termination. See, e.g., Jeanty v. Cerminaro, No. 21-1974, 2023 WL 325012, at *6 (2d Cir. Jan. 20, 2023) ("[W]e need not address . . . 'favorable termination' . . . because we conclude that summary judgment is warranted on a separate ground—namely, that [plaintiff] cannot establish the absence of probable cause.").

[153] See, e.g., Kossis, supra note 5, at 1637, 1660–61 (arguing that *Albright* should be overruled and that the Court should recognize a Fourteenth Amendment malicious-prosecution claim); Ryan, supra note 5, at 787–88 (favoring Fourteenth Amendment pathway and insisting that *Albright* does not foreclose it); Goldstein, supra note 5, at 657–59 (proposing broader approach to "seizures" because "[t]he Fourth Amendment's protections can be construed to include the rights protected by substantive due process").

[154] See, e.g., McMannon, supra note 5, at 1479–80 (arguing that the Court should abandon malicious-prosecution and make similar harms cognizable in Fourth Amendment seizure claims).

[155] For a recent defense of the Fourteenth Amendment vehicle, see Tymkovich & Stillwell, supra note 5, at 281 (suggesting that proof of the common law elements of malicious prosecution is sufficient to demonstrate a Fourteenth Amendment violation); id. ("[I]t is no surprise that the Supreme Court's arranged (and forced) marriage between malicious prosecution and the Fourth Amendment has been messy, confusing, and unnatural.").

[156] See supra Section II.C.

By asking the wrong questions, we "miss the gap that separates the abstract enunciation of the law on the books from its concrete implementation in practice."[157] The trouble with the Court's initial approach is that it has done little, if any, of the "mundane work of making law stick to the ground."[158] It is of little use to know what constitutional malicious prosecution *is* if we don't know how it works. But if we fall too far into the mundane, we risk missing the bigger picture and solving the wrong problems.

Learning our lesson from Goldilocks, maybe the key to malicious prosecution is to find questions that aren't too big, or too small, but just right.[159] The purpose of this Part is to identify the middle-ground questions that are sufficiently broad to impact a large number of cases but narrow enough to make a difference in practice. This Part begins by endorsing *Albright* and *Manuel*'s Fourth Amendment malicious-prosecution claim and rejecting arguments calling for a reconsideration of their main takeaways. It then suggests practical solutions to the circuit splits that endure after *Thompson*, culminating in a workable test consistent with the Supreme Court's dicta in *Thompson*. It's worth asking these questions—and getting them right.

A. The Too-Big, Bad Question

In the three decades of debate over malicious prosecution's constitutional home, there have only ever really been two serious contenders—the Fourth Amendment, and the Fourteenth Amendment's Due Process Clause.[160] The Fourth Amendment's main drawback as a constitutional hook is that it requires a seizure. The downside of the Due Process Clause—that the Court is no longer just skeptical of it, but actively contracting it—makes it more a hospice for malicious prosecution than a home. Because the only real reason to relitigate this question is to get rid of constitutional malicious-prosecution claims, we

[157] Aziz Huq, The Collapse of Constitutional Remedies 17 (2021).

[158] Id.

[159] See James Marshall, Goldilocks and the Three Bears (1988).

[160] Mr. Kossis seriously considered the idea of a Fifth Amendment malicious-prosecution claim. Kossis, supra note 5, at 1652–56. As Kossis noted, that would require overruling *Hurtado v. California*, 110 U.S. 516 (1884), and incorporating the Fifth Amendment's Grand Jury Clause. Kossis, supra note 5, at 1652–56. For thoughtful commentary on the modern vitality of *Hurtado*, see generally Frey, supra note 38. This Note assumes the continued precedential force of *Hurtado* and thus excludes the Fifth Amendment's Grand Jury Clause as a potential home for malicious prosecution.

should stop placing "undue weight on the label,"[161] accept the Fourth Amendment as the Supreme Court has already done at least twice, and move on to making it work.

1. Due Process

If there is one area of fairly broad agreement in the Section 1983 malicious-prosecution debate, it is that *Albright* foreclosed substantive due process as a pathway for malicious-prosecution claims.[162] But in a world where "stare decisis is for suckers,"[163] we still should take substantive due process seriously as a potential constitutional home for malicious prosecution. In many ways, as Justice Stevens noted in his *Albright* dissent, the Due Process Clause is the ideal home for a somewhat amorphous insult to liberty.[164] Because substantive due process does not impose the requirements of any particular amendment,[165] it would allow a direct application of the tort elements of malicious prosecution without any tricky external factors.[166] The perk of liberty is its breadth.

The problem is that the Court has devolved from being skeptical of substantive due process to actively hostile to it. Defenders of a substantive due process vehicle have historically rooted their arguments in *Roe v. Wade*'s[167] more capacious understanding of substantive due process,[168] a no-longer-existing justification for a no-longer-existing right.[169] The

[161] Albright v. Oliver, 510 U.S. 266, 301 (1994) (Stevens, J., dissenting).

[162] Of the many Justices and scholars cited in this Note, only Ryan, supra note 5, at 788–89, and Tymkovich & Stillwell, supra note 5, at 259 & n.275, dispute that *Albright* foreclosed a Fourteenth Amendment pathway.

[163] This phrase, popularized by Professor Leah Litman on the podcast *Strict Scrutiny*, stands as shorthand for broader criticisms of the Roberts Court's arguably inconsistent adherence to stare decisis. See, e.g., Richard M. Re, Precedent As Permission, 99 Tex. L. Rev. 907, 909 (2021) ("Not to be outdone, the popular *Strict Scrutiny* podcast is selling shirts, bags, mugs, and sweaters emblazoned with the slogan: 'Stare decisis is for suckers.'"); Christopher J. Baldacci, Note, The Common Law of Interpretation, 108 Va. L. Rev. 1243, 1251–52, 1252 n.50 (2022) (exploring arguments presented by skeptics of the Court's current approach to stare decisis). Beyond these concerns, stare decisis generally has less force in constitutional cases. See Caleb Nelson, Statutory Interpretation 427 (2011).

[164] 510 U.S. at 291 (Stevens, J., dissenting).

[165] See Kossis, supra note 5, at 1660 ("[T]he Due Process Clause is somewhat akin to an empty vessel.").

[166] Id. at 1658 (suggesting that a substantive due process version of malicious prosecution would be identical to the common law tort form).

[167] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[168] See, e.g., Kossis, supra note 5, at 1658.

[169] See *Dobbs*, 142 S. Ct. at 2242 (overruling *Roe* and questioning its underlying reasoning).

Court has made clear that unenumerated rights may only be protected if they are "deeply rooted in [our] history and tradition" and "essential to our Nation's 'scheme of ordered liberty.'"[170] A standalone right against malicious prosecution probably fails that test. Despite malicious prosecution's long history,[171] its role as a tool to fight police misconduct extends back no further than *Monroe v. Pape*'s revival of Section 1983 as a tool to address state officer misconduct.[172] The common law tort, largely confined to civil actions,[173] seems unlikely to support the acknowledgement of a new, free-standing constitutional right.[174] The recognition of new, free-standing rights in general seems like a dying practice.[175] Because of this, revisiting the question from *Albright* is only a useful exercise if the end goal is getting rid of constitutional malicious-prosecution claims.[176]

[170] Id. at 2246 (internal quotation marks omitted) (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)); see also id. ("In interpreting what is meant by 'liberty,' the Court must guard against the natural human tendency to confuse what the Fourteenth Amendment protects with the Court's own ardent views about the liberty that Americans should enjoy.").

[171] Malicious prosecution has roots tracing back to at least tenth-century England. See Ryan, supra note 5, at 778 (noting that in "the tenth and eleventh centuries, . . . the price of losing a civil lawsuit was the forfeiture of one's tongue"); see also William C. Campbell, Note, Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis, 88 Yale L.J. 1218, 1221 & n.1 (1979) (collecting sources dating to the twenty-third century BCE).

[172] 365 U.S. 167, 187 (1961) (recognizing cause of action under Section 1983 for unauthorized violations of federal constitutional rights).

[173] See Campbell, supra note 171, at 1221 (discussing the mechanics of malicious-prosecution claims for frivolous civil suits). The 1979 piece only discusses anything criminal in the context of criminal sanctions for filing baseless civil suits. Id. at 1218 n.5.

[174] But see Kossis, supra note 5, at 1657 (arguing that malicious prosecution is sufficiently deeply rooted in the common law to count as a fundamental right).

[175] See, e.g., Egbert v. Boule, 142 S. Ct. 1793, 1807 (2022) (stating that "[t]here are many reasons to think that Congress, not the courts, is better suited to authorize" damages suits against federal officers); Vega v. Tekoh, 142 S. Ct. 2095, 2106 (2022) (holding that *Miranda* warnings are a prophylactic remedy rather than a constitutional right).

[176] This Note does not independently consider a procedural due process vehicle. Malicious prosecution is not really about whether the government employed constitutionally effective procedures—e.g., probable-cause hearings—but rather whether there was "an adequate reason" for depriving the person of their liberty, thus making it more of a substantive inquiry. See Erwin Chemerinsky, Constitutional Law: Principles and Policies 597 (6th ed. 2019) (describing this framework). But see Wunsch, supra note 5, at 903 (arguing that malicious prosecution presents procedural, not substantive, due process concerns). And procedural due process claims under Section 1983 come with their own hard-to-surpass barriers—as a general matter, where a person raises a procedural claim for random and unauthorized official conduct, state tort remedies are constitutionally adequate. See Parratt v. Taylor, 451 U.S. 527, 541 (1981).

2. The Fourth Amendment

Beyond the practical reasons to leave *Albright* and *Manuel* alone, however, the Fourth Amendment's prohibition on unreasonable seizures seems to encompass a right against prosecution without probable cause. As much as objective "rightness" exists in hard constitutional questions, it seems like the "right" answer.

The Fourth Amendment is "the core substantive constraint on police power in the United States,"[177] so it makes sense to house malicious prosecution—which is primarily concerned with decisions by police officers—within it. Thinking more specifically, the easiest hook for the Fourth Amendment is probably the one illuminating Justice Kavanaugh's majority opinion in *Thompson*—a malicious-prosecution inquiry and a Fourth Amendment inquiry are both fundamentally based on probable cause (or lack thereof).[178] Critics conveniently forget this,[179] but it seems like an awfully important commonality.

And while a Fourth Amendment claim requires a litigant to prove a search or seizure, it seems fair to call a malicious prosecution a seizure without probable cause. A seizure is a kind of deprivation of liberty. There are not necessarily clean lines, anyway, between the amendments governing criminal proceedings.[180] The differences between them largely come down to timing. Because a malicious prosecution usually starts with an arrest ("quintessentially a seizure"[181]), it makes little sense for it to, without any formal intervening event, become some other thing. When a person is meaningfully deprived of their liberty pretrial, that deprivation is a seizure.

B. Asking the Right Questions

The most frequent causes of death for malicious-prosecution claims are probable cause, its seizure requirement, and its occasional malice

[177] Crespo, supra note 17, at 1279.

[178] Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022).

[179] A common critique of the Fourth Amendment vehicle is that the elements of a malicious-prosecution claim and a Fourth Amendment seizure claim do not overlap. See, e.g., id. at 1342 (Alito, J., dissenting); Tymkovich & Stillwell, supra note 5, at 267 (accusing the Supreme Court of having "jam[med]" malicious prosecution into the Fourth Amendment).

[180] See, e.g., Mitchell v. Doherty, 37 F.4th 1277, 1285–86 (7th Cir. 2022) (discussing line-drawing problems).

[181] Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring)).

requirement. In his *Manuel* and *Thompson* dissents, Justice Alito raised these problems to suggest that a Fourth Amendment malicious-prosecution claim is unworkable or unreasonable.[182] But it is quite the opposite: these questions all seem well suited for further litigation. Fair enough, some of them are not especially well theorized in the lower courts, but they are not exceptionally complex questions. Answering them requires only some creativity, a keen sense of how Section 1983 malicious-prosecution claims work, and constant cognizance of the important constitutional role they fill.

1. Baselines

Even if uniformity for its own sake is overrated,[183] here we have seen tangible negative consequences from excessive disagreements between the courts of appeals.[184] These differences "create significant disruption [and] inequality."[185] Amidst all the chaos, it is hard to track down a successful Section 1983 malicious-prosecution case. It is less that we need uniformity, and more that it seems unlikely that the problems with malicious prosecution will resolve without it. It is a means, not an end in itself.

At base, it seems that while we might have overread *Albright*, the lower courts have underread *Thompson*. The Eighth Circuit approach to *Thompson* (adopting the 1871 elements in full) seems right.[186] We need some preliminary cohesion on where to look for the answers to these questions, and it makes sense to choose the framework that the Supreme Court has already used. It does not completely answer any of these questions, but it provides stable terrain to build from. And, at a minimum, adopting the elements outlined in *Thompson* would mean that individual lower courts could not superimpose additional requirements and would provide far more accessible guideposts for litigants. The rest of this Part will fill the gaps in the *Thompson* framework, culminating in a workable test. We start with this framework:

[182] See supra Sections I.B, II.B.
[183] See Frost, supra note 14, at 1569–71.
[184] Id. at 1574.
[185] Id.
[186] Klein v. Steinkamp, 44 F.4th 1111, 1115 (8th Cir. 2022). As noted *supra*, these elements look quite similar to the ones many of the circuits are already using.

> (i) the suit or proceeding was "instituted without any probable cause"; (ii) the "motive in instituting" the suit "was malicious," which was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice; and (iii) the prosecution "terminated in the acquittal or discharge of the accused."[187]

2. Probable Cause (and Other Causation Issues)

There is more than one moment in a criminal case where a government actor must make a probable-cause determination. The probable cause for conducting a search, making an arrest, initiating a prosecution, and sustaining that prosecution might be different. In a malicious-prosecution case, we're worried about the probable cause for initiating a prosecution. This creates a somewhat uncomfortable tension because it is technically prosecutors who make that call. But this probable-cause determination really has two parts: first, the police officer's determination that they have probable cause to refer the matter; and second, the prosecutor's decision to take up the case. The first causes the second.

Absolute prosecutorial immunity makes malicious prosecution tricky.[188] The doctrine has been reverse engineered, in some ways, because we take the harm of a malicious prosecution seriously, but it is exceedingly difficult to hold all the relevant actors accountable. It might be unfair to hold police officers accountable for conduct that they, very early on, lose control over.[189] But that isn't a problem unique to malicious prosecution; it's how proximate cause works.[190] Defendants can generally be held liable for harms that are "justly attachable" to their failure to exercise the level of care the law demanded of them.[191]

This basic principle helps us define the scope of harm for which officers can be held responsible. It makes sense to hold a police officer responsible for knowingly or recklessly making false or egregiously careless statements that result in the commencement of a criminal

[187] Thompson v. Clark, 142 S. Ct. 1332, 1338 (2022) (quoting Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 181 (1880)).

[188] See Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (holding that prosecutors have absolute immunity from malicious-prosecution suits).

[189] See *Thompson*, 142 S. Ct. at 1346–47 (Alito, J., dissenting).

[190] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 (Am. L. Inst. 2010) ("An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious.").

[191] W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, Prosser and Keeton on the Law of Torts § 42, at 278 (5th ed. 1984).

prosecution. The cutoff point for police officers, like all other tort defendants, is where prosecutors cause harms outside of the scope of the risk of the police officers' conduct.

The contours of absolute and qualified immunity may be helpful here: prosecutors are stripped of absolute immunity when they act in roles that are substantially similar to the traditional duties of a police officer.[192] Put differently, when prosecutors function like police officers in complaining of new crimes, they are protected by only qualified immunity, and thus would become the more appropriate defendants. It's true that, in some cases, prosecutorial misconduct that *is* covered by absolute prosecutorial immunity could break this causal chain—most notably where prosecutors willfully or recklessly charge a person with a crime without any input from police officers. But that unfortunate gap is more a function of the problems with immunity doctrines than of the malicious-prosecution tort itself. The chain is broken, in either case, where prosecutors engage in conduct that itself would seem to at least approximate malicious prosecution.

And even if it seems especially unfair for police officers to be held responsible for damages incurred over a potentially large timeframe over which they have little control, current police department practices insulate individual officers from bearing the associated burdens. As Professor Schwartz has studied, only 0.41% of police officers who are found liable in Section 1983 litigation will ever pay any portion of a settlement or judgment against them.[193] Adverse judgments in civil-rights lawsuits likewise "have little negative impact on police officers' employment."[194] The combination of malicious prosecution's high burdens, indemnification, and qualified immunity mean that few officers will ever face personal consequences. And even taking over-deterrence concerns seriously, it seems exceedingly unlikely that officers would be chilled from performing their official functions by the requirements of probable cause. The requirement imposed by the Constitution dwarfs in comparison to the harm of getting it wrong.

The relevant probable cause determination is the one made by a state actor when they decide to refer a matter for criminal prosecution. The

[192] See Kalina v. Fletcher, 522 U.S. 118, 131 (1997).

[193] Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 912 (2014). Schwartz notes that in many jurisdictions, "officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit." Id. at 914.

[194] Id. at 943.

scope of liability is defined by ordinary principles of proximate cause—broken only by harms outside of the scope of the risk or by favorable termination.

3. Seizure

The seizure in a malicious prosecution is the deprivation of liberty that inherently accompanies a criminal prosecution. Too often, malicious prosecution is reduced to another means of alleging wrongful incarceration. This is probably because, in a common sense, a "seizure" implies some physical taking of a person or thing. It is easy to find a seizure in cases involving detention.[195] And true enough, sometimes a malicious-prosecution suit is the only way to recover for wrongful incarceration.[196] But the law has long recognized that a person out on bail still faces a constitutionally cognizable harm.[197]

Even without detention, the prosecuted person is not free to conduct her life normally—she could be summoned before a court at almost any time, might face stringent restrictions on her conduct, and lives with the reality of invasive government oversight. She is, as Justice Ginsburg put it, "still 'seized' in the constitutionally relevant sense."[198] Enduring criminal prosecution "may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."[199] It hardly seems fair to diminish the impact of these harms by

[195] Cf. Danielle D'Onfro & Daniel Epps, The Fourth Amendment and General Law, 132 Yale L.J. 910, 915 (2023) ("[T]his inquiry is easy . . . when police barge into someone's home or physically restrain someone, [and] there is little doubt that the [Fourth] Amendment's protections apply.").

[196] See supra note 3.

[197] See, e.g., Barker v. Wingo, 407 U.S. 514, 527 (1972) ("[A] defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant released on bail but unable to lead a normal life because of community suspicion and his own anxiety.").

[198] Albright v. Oliver, 510 U.S. 266, 278–79 (1994) (Ginsburg, J., concurring) ("A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject, as in this case, to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.").

[199] Id. at 296 (Stevens, J., dissenting).

limiting the scope of a malicious prosecution only to encompass detention.

In her *Albright* concurrence, Justice Ginsburg posited that Kevin Albright's motivation in bringing his malicious-prosecution claim under the Fourteenth Amendment might have been "fear[] that courts would narrowly define the Fourth Amendment's key term 'seizure' so as to deny full scope to his claim."[200] And, specifically, that "he might have anticipated a holding that the 'seizure' of his person ended when he was released from custody on bond."[201] If Kevin Albright really had these concerns, history has proven him right.

The three big Section 1983 malicious-prosecution cases present a kind of spectrum: Manuel served significant jailtime, Thompson was held for a few days, and Albright never saw the inside of a cell. Yet all of them experienced the same kind of rights violation—they were prosecuted without probable cause for crimes that they did not commit. Cases involving detention of any sort, to be clear, are worse.[202] But the differences between these cases seem to be in the magnitude of the harm, not in the origin of it. That goes more to remedies than to whether a seizure occurred—the difference is in what the "palpable consequence[]"[203] was, not whether there was one.

This is undoubtedly a capacious view of a seizure, but it is not inconsistent with the Court's current understanding of the breadth of seizure doctrine[204] or the common law. "At common law, an arrested person's seizure was deemed to continue even after release from official custody."[205] As Justice Ginsburg noted, "[t]he common law . . . seems to have regarded the difference between pretrial incarceration and other

[200] Id. at 277 (Ginsburg, J., concurring).

[201] Id.

[202] Cf. Jacob Schuman, Criminal Violations, 108 Va. L. Rev. 1817, 1823 (2022) (clarifying that we shouldn't be less concerned with rights violations because they happen to result in less prison time, and noting that "even a short prison sentence 'inflicts a grievous loss'" (internal quotation marks omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 482 (1972))).

[203] Albright v. Oliver, 975 F.2d 343, 347 (7th Cir. 1992).

[204] See, e.g., Torres v. Madrid, 141 S. Ct. 989, 992 (2021) (holding that "application of physical force to the body . . . with intent to restrain is a seizure even if the person does not submit and is not subdued"); Brendlin v. California, 551 U.S. 249, 254–55 (2007) (stating that "[a] person is seized" when he is "'not free to leave'" (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980))).

[205] *Albright*, 510 U.S. at 277–78 (Ginsburg, J., concurring) (first citing 2 Matthew Hale, The History of the Pleas of the Crown 124 (Sollom Emlyn ed., 1736); and then citing 4 William Blackstone, Commentaries *297).

ways to secure a defendant's court attendance as a distinction between *methods* of retaining control over a defendant's person, not one between seizure and its opposite."[206] The "seizure" cannot really be over so long as criminal charges hang over the person's head and the government thus maintains significant control over their life.

Thinking of this, and malicious prosecution's accrual upon favorable termination, it makes the most sense for the seizure, too, to end with favorable termination. A person who is criminally prosecuted is "'seized' in the constitutionally relevant sense,"[207] regardless of the conditions accompanying that seizure. Clarifying the scope of this right, although undoubtedly challenging, is a critical step to ensuring that it can be vindicated.

4. Malice

A subjective-bad-faith requirement would pose big problems in Section 1983 malicious-prosecution cases. It is first a huge practical barrier—it seems all but impossible that most civil-rights plaintiffs could find smoking-gun evidence of subjective bad faith. It also fundamentally corrupts what is supposed to be an *objective* reasonableness analysis[208] with *subjective* assessments of motive.[209] In addition, Justice Alito has cited malice as causing over- and underinclusiveness problems.[210]

These problems are real ones, but their proponents misunderstand what the "malice" in malicious prosecution is. The reasonableness of the probable-cause inquiry can almost completely overlap with the presence of probable cause. To understand why Albright's constitutional rights were violated, for example, requires no assessment of what Officer Oliver's *purposes* were: Oliver acted with reckless disregard for

[206] Id. at 278 (emphasis added); see also Seizure, Black's Law Dictionary (11th ed. 2019) ("The act or an instance of taking possession of a person or property by legal right or process; esp[ecially], in constitutional law, a confiscation or arrest that may interfere with a person's reasonable expectation of privacy.").

[207] *Albright*, 510 U.S. at 278–79 (Ginsburg, J., concurring).

[208] Conventional wisdom is that the Fourth Amendment's reasonableness test is an objective one, at least in theory. Professor Orin Kerr has noted that this principle does not always play out in practice. See Orin S. Kerr, The Questionable Objectivity of Fourth Amendment Law, 99 Tex. L. Rev. 447, 448–49 (2021).

[209] See Sofia Yakren, Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform, 50 Harv. C.R.-C.L. L. Rev. 359, 363–64 (2015) (expressing similar concerns).

[210] Manuel v. City of Joliet, 580 U.S. 357, 379 (2017) (Alito, J., dissenting).

Albright's rights by failing to exercise sufficient caution in assessing whether he had probable cause to continue. This sounds much more like an inquiry into whether the officer observed appropriate standards of care—an objective inquiry—than one of good or bad faith. When we ask whether an officer was "malicious" in instituting a prosecution, what we're really concerned with is something like whether a reasonable officer would have done the same thing. Put differently, we're asking whether the probable-cause assessment was objectively reasonable considering the circumstances and relevant professional standards. The inquiry is largely overlapping with, although slightly practically distinct from, probable cause.

And Justice Alito's over- and underinclusion concerns may be overblown. Think of the officer who investigates her neighbor in bad faith but happens to find evidence of some crime. The neighbor would not have a valid Section 1983 malicious-prosecution claim because the officer had probable cause, even if stemming from questionable motives. But that neighbor would not be left without *any* remedy for the officer's misconduct—he might still bring suit for damages from the unreasonable search or seek an exclusionary remedy.[211] And what Justice Alito would think of as over-inclusion—a remedy for an unreasonable act without bad faith—is exactly what malicious-prosecution claims usually look like. Despite the name, they aren't really about malice in the supervillain sense, but *super* unreasonable conduct, like in *Albright*. Thinking of malice this way helps to hone in on what kind of conduct malicious-prosecution suits are supposed to address.

In other areas of the law, too, "malice" is far closer to recklessness or knowledge than subjective ill will. To take examples from very different contexts, in libel cases, "actual malice" requires only "knowledge that [a statement] was false" or "reckless disregard of whether [the statement] was false or not,"[212] and in murder cases, "malice aforethought" refers only to plan and intent to kill, not to any "hatred, grudge, ill-will or spite."[213] Indeed, even in the Eighth Amendment excessive-force context, one of the few remaining areas of law where malice sometimes carries

[211] See Heck v. Humphrey, 512 U.S. 477, 487 n.7 (1994) ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence [of a crime].").

[212] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[213] Rollin M. Perkins, A Re-Examination of Malice Aforethought, 43 Yale L.J. 537, 537 (1934).

(essentially) its ordinary meaning,[214] the Court has greatly narrowed the applicability of the subjective "malicious[] and sadistic[]"[215] standard, favoring more objective criteria.[216] In this context, malice is best defined as knowingly or recklessly violating the victim's right to be free from prosecution without probable cause.

As the Sixth Circuit has noted, "malicious prosecution" is a bit of a misnomer.[217] It's not really about malice in an ordinary sense. The line between lack of probable cause and malice is thin. But as the Court has long recognized, "it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing."[218] Having a malice requirement ensures that we look at both the fact of absent probable cause and the conduct underlying the determination. It is not a total superfluity.

* * *

Now, yet again, the splits between the circuits "[have] reached the point where they are unlikely to resolve . . . on their own."[219] To settle this doctrine once and for all, the Court should finally answer the questions it has assumed away or avoided. To do so, we must ask both what malicious prosecution is and how it works. Asking and answering these questions could create a Section 1983 malicious-prosecution claim that litigants could understand and that courts could apply with some level of predictability. It's worth another try to get it right—and to make the right against malicious prosecution that the Court has recognized something meaningful and enforceable.

The right answers this Note has explored culminate in a relatively simple test:

> To recover for a claim of malicious prosecution under Section 1983, a plaintiff must demonstrate that (1) the matter was referred to prosecutors without probable cause to do so; (2) the person who

[214] See Ann Woolhandler & Michael Collins, Inmate Constitutional Claims and the Scienter Requirement, 98 Wash. U. L. Rev. 645, 650 (2020) (noting that incarcerated people must prove the subjective element of "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm" to state a claim for excessive force (quoting Whitley v. Albers, 475 U.S. 312, 320–21 (1986))).

[215] *Whitley*, 475 U.S. at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[216] See, e.g., Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (replacing "malicious and sadistic" with "objectively unreasonable" standard for pretrial detainees).

[217] Caskey v. Fenton, No. 22-3100, 2022 WL 16964963, at *8–9 (6th Cir. Nov. 16, 2022).

[218] Wheeler v. Nesbitt, 65 U.S. (24 How.) 544, 550 (1860).

[219] Kossis, supra note 5, at 1648.

made that referral recklessly or knowingly violated the victim's right to be free from prosecution without probable cause; and (3) the prosecution terminated without a conviction. Liability for officers is limited to those harms that they proximately caused. Proof of these elements amounts to a seizure without probable cause under the Fourth Amendment.

CONCLUSION

Solving malicious prosecution's problems will not be easy, but it is worth it. The point of these lawsuits is fundamental: if our right to be "secure in [our] persons"[220] means anything at all, it's that we should be able to trust that this kind of thing won't happen to us. Such a right cannot exist without a functional remedy. In the wake of *Thompson*, it is nearly impossible to guess how a court will evaluate a Section 1983 malicious-prosecution claim but nearly certain that any such claim will fail. The only way to make this doctrine work in real life is to understand why it is failing to provide remedies to real people whose rights have been violated. By looking at those cases, we can find the right questions to ask. By actually asking those questions—and getting them right—we can make Section 1983 malicious-prosecution suits work.

[220] U.S. Const. amend. IV; see also Crespo, supra note 17, at 1369–70 ("[O]ne need only briefly to have dwelt and worked among a people . . . deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." (quoting Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting))).