

NOTES

FROM THE EXCLUSIONARY RULE TO A CONSTITUTIONAL TORT FOR MALICIOUS PROSECUTIONS

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Long after the Supreme Court addressed the issue in Albright v. Oliver, circuit courts remain divided over the availability of § 1983 relief for malicious prosecutions commenced by state officials. Faced with a constitutional tort claim of malicious prosecution, some circuits focus their analysis on the tort law aspects, while others emphasize the constitutional requirements. This Note argues that the elements of a common law malicious prosecution claim constitute in themselves a violation of the Fourth Amendment. Moreover, this Note points out that courts already recognize such official misconduct as a Fourth Amendment violation when the relief asked for is the suppression of evidence. Section 1983 liability is simply the tort remedy equivalent of the exclusionary rule remedy afforded by the Franks v. Delaware line of cases. This Note responds to constitutional and tort law criticisms of the proposed Fourth Amendment remedy and concludes that § 1983 relief is appropriate in this context.

INTRODUCTION

In 1940, then-Attorney General Robert Jackson described the “most dangerous power of the prosecutor” as the power to pick people that he thinks he should get, rather than pick cases that need to be prosecuted. . . . [I]t is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. . . . [I]t is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.¹

Criminal prosecutions are afforded enormous freedom from oversight and review.²

1. Robert H. Jackson, U.S. Att’y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. Am. Judicature Soc’y 18, 19 (1940); see also *Morrison v. Olson*, 487 U.S. 654, 727–29 (1988) (Scalia, J., dissenting) (quoting Jackson’s speech to illustrate “the vast power and the immense discretion that are placed in the hands of a prosecutor”).

2. See, e.g., *Morrison*, 487 U.S. at 728 (Scalia, J., dissenting) (“[T]he primary check against prosecutorial abuse is a political one.”); *United States v. Batchelder*, 442 U.S. 114, 123–26 (1979) (holding that prosecutorial discretion includes power to decide which of two statutory prohibitions of same conduct, but with different sentencing consequences, shall be charged); see also David Margolick, Law Professor to Administer Courts in State,

But the immense power of the prosecutor has not gone completely unchecked. “[O]ne of the securities to the innocent against hasty, malicious and oppressive public prosecutions,” as Chief Justice Shaw of the Massachusetts Supreme Judicial Court put it in 1857, is the probable cause requirement of a grand jury indictment—“one of the ancient immunities and privileges of English liberty.”³

A tort suit for malicious prosecution remains another ancient security to the innocent. But the availability of that remedy against state officials in federal court is a matter of debate. The first section of the Ku Klux Klan Act of 1871, 42 U.S.C. § 1983, provides for federal relief when state officials violate an individual’s constitutional rights. The issue is whether malicious prosecution violates any constitutional right.

This Note argues that malicious prosecution by state officials violates the Fourth Amendment and that § 1983 liability is an appropriate remedy. Part I outlines the common law history of malicious prosecution before reviewing the Supreme Court’s evaluation of the claim as a constitutional tort in *Albright v. Oliver*.⁴ Rather than settling the matter, however, *Albright* avoided deciding whether malicious prosecution violates the Fourth Amendment. This silence perpetuated a split among the courts of appeals over how the tort elements should inform the definition of a § 1983 malicious prosecution claim. Part II points out that the tort elements closely track the requirements of a claim under the *Franks v. Delaware*⁵ line of cases, part of the exclusionary rule jurisprudence. This establishes that the tort elements themselves constitute a Fourth Amendment violation, even though relief has generally been limited to the suppression of evidence. The parallel between *Franks* suppression claims and § 1983 malicious prosecution claims is not fully appreciated. But, as Part II shows, § 1983 liability for malicious prosecution is simply a tort remedy equivalent of the application of the exclusionary rule under *Franks*. This Fourth Amendment right is then distinguished, on the one hand, from an overly broad Fifth Amendment right guaranteeing probable cause for the initiation of prosecutions and, on the other hand, from an overly narrow Fourth Amendment false arrest constitutional tort. Finally, Part III addresses significant implications of treating malicious prosecution as a constitutional tort. After discussing the scope of the Fourth Amendment and substantive due process, this Part responds to federalism and tort-based critiques of a damages remedy for the violation of the constitutional right against malicious prosecution.

N.Y. Times, Feb. 1, 1985, at B2 (quoting Chief Judge Sol Wachtler quipping that prosecutors can get grand juries to “indict a ham sandwich”); Jeffrey Toobin, *Killer Instincts: Did a Famous Prosecutor Put the Wrong Man on Death Row?*, *The New Yorker*, Jan. 17, 2005, at 54 (describing Pima County, Arizona, prosecutor Kenneth Peasley as first American prosecutor to be “disbarred for intentionally presenting false evidence in death-penalty cases”).

3. Jones v. Robbins, 74 Mass. (8 Gray) 329, 344 (1857).

4. 510 U.S. 266 (1994).

5. 438 U.S. 154 (1978).

I. THE HISTORY AND CONSTITUTIONAL STATUS OF MALICIOUS PROSECUTION

This Part examines the history of the tort of malicious prosecution and surveys the availability of federal relief under § 1983. After reviewing the opinions issued in *Albright*, this Part assesses the current circuit split on the status of malicious prosecution as a constitutional tort.

A. *Traditional Remedy*

Anglo-American law has long recognized a tort remedy for malicious prosecution.⁶ The interests jeopardized by malicious prosecution have been described as “the plinths upon which the English Law has been reared—reputation, personal security, and property.”⁷ In 1698, Lord Holt recognized “three sorts of damages, any of which would be sufficient ground to support this action”:

(1) The damage to a man’s fame, as if the matter whereof he is accused be scandalous. . . . (2) [Damages] done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action (3) [Damages] to a man’s property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused⁸

On American shores, Chief Justice Taney remarked that the tort “was originally applied to criminal proceedings; to cases where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offence of which he was not guilty.”⁹

6. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §§ 119–121 (5th ed. 1984) (providing overview of malicious prosecution in American tort law and its extension to malicious civil claims); cf. Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 *Yale L.J.* 1218, 1221–32 (1979) (discussing history of malicious civil claims, not criminal prosecutions, in Anglo-American law).

7. Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure* 129 (1921), quoted in Esther M. Schonfeld, *Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty*, 15 *Touro L. Rev.* 1681, 1704 n.142 (1999); see also Fowler V. Harper, *Malicious Prosecution, False Imprisonment and Defamation*, 15 *Tex. L. Rev.* 157, 160 (1937) (noting “at least three important interests which receive protection, the interest in reputation, the interest in bodily freedom, and a financial interest”). But note that Blackstone’s “three ‘absolute rights of every Englishman’” were property, liberty, and personal security, with liberty meaning only freedom of movement, while personal security included “‘reputation.’” Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 *Cornell L. Rev.* 405, 411–12 (1977) [hereinafter *Monaghan, Liberty*] (quoting 1 William Blackstone, *Commentaries* *127–*129).

8. *Savile v. Roberts*, (1698) 91 *Eng. Rep.* 1147, 1149–50 (K.B.), quoted in Harper, *supra* note 7, at 160.

9. *Dinsman v. Wilkes*, 53 *U.S.* (12 *How.*) 390, 402 (1851). Chief Justice Taney also mentioned the tort’s extension to maliciously initiated civil cases. *Id.*; see also Keeton et al., *supra* note 6, § 120, at 889. The tort of wrongful civil proceedings lies outside the scope of this Note.

As a matter of state law, the tort claim typically consists of four elements:

- 1) A criminal proceeding instituted or continued by the defendant against the plaintiff.
- 2) Termination of the proceeding in favor of the accused.
- 3) Absence of probable cause for the proceeding.
- 4) "Malice," or a primary purpose other than that of bringing an offender to justice.¹⁰

Although the name of the claim suggests that prosecutors are the primary defendants,¹¹ police officers are also subject to liability for malicious prosecution because they play a major role in the pretrial phase, including the securing of arrest warrants, conduct which qualifies as the initiation of legal process required by the first element.¹² The requirement of a favorable termination and the defense that the plaintiff was actually guilty of the crime charged¹³ distinguish this tort from the related claims of abuse of process¹⁴ and selective prosecution.¹⁵

Tort claims are typically matters of state law, raising no federal question. However, the conduct complained of may also violate the Federal

10. Keeton et al., *supra* note 6, § 119, at 871. Compare this with the definition of the tort in Restatement (Second) of Torts § 653 (1977):

A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

- (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and
- (b) the proceedings have terminated in favor of the accused.

11. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 279 n.5 (1994) (Ginsburg, J., concurring) (describing prosecutor as "the star player" and police officer as "the supporting actor").

12. See, e.g., *Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003); *Castellano v. Fragozo*, 311 F.3d 689, 723 n.5 (5th Cir. 2002), *reh'g en banc* granted, 321 F.3d 1203 (5th Cir. 2003), *rev'd en banc*, 352 F.3d 939 (5th Cir. 2003), *cert. denied*, 543 U.S. 808 (2004); *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001); *Porterfield v. Lott*, 156 F.3d 563, 568 (4th Cir. 1998); *Donovan v. Thames*, 105 F.3d 291, 297 n.7 (6th Cir. 1997); *Whiting v. Traylor*, 85 F.3d 581, 585 (11th Cir. 1996); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995).

13. See Keeton et al., *supra* note 6, § 119, at 885 ("[I]t is always open to the defendant to escape liability by showing in the malicious prosecution suit itself that the plaintiff was in fact guilty of the offense with which he was charged.").

14. See *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994) ("The gravamen of [abuse of process] is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends."); Keeton et al., *supra* note 6, § 121, at 897-98 ("[I]f the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process.").

15. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.' The claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1984))).

Constitution.¹⁶ In such a case, relief may be available in a federal court under § 1983, which authorizes “constitutional torts” by creating private rights of action against any person who, “under color of [state law],” causes injuries by violating an individual’s federal constitutional or statutory rights.¹⁷ Section 1983, however, “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”¹⁸ Therefore, in order to bring a malicious prosecution claim under § 1983, malicious prosecution must be deemed a deprivation of a right “secured by the Constitution.”¹⁹ This Note argues that a malicious prosecution violates the Fourth Amendment right to be free from “unreasonable searches and seizures.”²⁰

This constitutional claim should not be affected by any parallel state prohibition of malicious prosecutions.²¹ The Court flatly rejected the argument that conduct contrary to state law cannot be characterized as

16. See Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 Colum. L. Rev. 979, 992–93 (1986) [hereinafter Monaghan, *State Law Wrongs*] (“[M]any state-caused constitutional violations necessarily retain much of the substance of common law torts.”).

17. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2000); see also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (“[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law”). But see *City of Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1458 (2005) (“The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983.”).

Monetary damages may be similarly available in a suit against persons acting under color of federal law. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391–97 (1971) (holding that Fourth Amendment includes right of action against federal officials). But see *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68–70 (2001) (“In 30 years of *Bivens* jurisprudence we have extended its holding only twice [W]e have consistently rejected invitations to extend *Bivens*”); *id.* at 75 (Scalia, J., concurring) (characterizing *Bivens* as “a relic” and limiting it to its precise facts); Erwin Chemerinsky, *Federal Jurisdiction* § 9.1.2, at 595–96 (4th ed. 2003) (“[A] reconsideration of *Bivens* may occur as the composition of the Court changes.”); Richard H. Fallon, Jr. et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 816–21 (5th ed. 2003) [hereinafter *Hart & Wechsler*] (discussing “retrenchment” of *Bivens* doctrine); Matthew G. Mazefsky, Casenote, *Correctional Services Corporation v. Malesko*: Unmasking the Implied Damage Remedy, 37 U. Rich. L. Rev. 639, 654–55 (2003) (discussing whether *Bivens* is dead).

18. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

19. 42 U.S.C. § 1983.

20. U.S. Const. amend. IV; see also discussion *infra* Part II.

21. See discussion *infra* Part III.A.3.

“under color of” state law in *Monroe v. Pape*,²² which confirmed the seminal holding of *Home Telephone and Telegraph Co. v. City of Los Angeles* that official conduct constitutes state action for purposes of the Fourteenth Amendment whether or not the conduct also violates state law.²³ In *Monroe*, the Court held that official conduct in violation of state law is “under color of [state law]” for purposes of § 1983 and, moreover, “[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”²⁴

However, long after *Monroe*, the availability of relief in both state and federal courts continues to present problems.²⁵ The Court’s rulings in *Parratt v. Taylor*²⁶ and its progeny²⁷ reflect a hostility to § 1983 claims where predeprivation process would be impracticable and the state provides adequate postdeprivation relief. This limitation, along with narrower definitions of “liberty” and “property,”²⁸ helps the Court rebuff what some view disparagingly as the attempts of “aggressive and inventive [§ 1983] lawyers . . . to ‘constitutionalize’ the realm of state and local government”²⁹ and operates to “keep the lower federal courts out of the business of monitoring the routine day-to-day administration of state government in areas that only marginally implicate constitutional values.”³⁰

However laudable *Parratt*’s function,³¹ *Parratt*’s domain has been confined so as not to reach § 1983 claims for deprivation of substantive due process rights. That is, “regardless of any state-tort remedy,” federal relief is available under § 1983 for violations of the specific protections of

22. 365 U.S. 167, 171–72 (1961).

23. 227 U.S. 278, 287–96 (1913).

24. 365 U.S. at 172–87.

25. See Christina Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 9–10 (1980) (“Ambivalence about the creation of a dual system of remedies has plagued section 1983 damage litigation since *Monroe*.”).

26. 451 U.S. 527, 543 (1981) (holding that no due process deprivation has occurred if State provides adequate postdeprivation process to remedy random, unauthorized acts of state officers).

27. See *Zinerman v. Burch*, 494 U.S. 113, 130 (1990) (applying *Parratt* to deprivations of liberty, but, significantly, not to substantive due process claims); *Daniels v. Williams*, 474 U.S. 327, 329–30 (1986) (partially overruling *Parratt* by holding that merely negligent acts do not amount to a deprivation under Due Process Clause); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (extending *Parratt* to intentional deprivations of property).

28. See Monaghan, *Liberty*, *supra* note 7, at 420–44 (discussing due process cases “narrow[ing] the content of ‘liberty’” or finding no “property” interest implicated); see also *Albright v. Oliver*, 975 F.2d 343, 346 (7th Cir. 1992) (Posner, J.) (“[T]he concept of constitutional ‘liberty’ is used as a gatekeeper to limit access to the federal courts by persons complaining of the pettier sort of official outrage.”).

29. Monaghan, *Liberty*, *supra* note 7, at 408; see also *Albright*, 975 F.2d at 347 (“The multiplication of remedies for identical wrongs, while gratifying for plaintiffs and their lawyers, is not always in the best interest of the legal system or the nation.”); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 646–50 (1987) (describing judicial responses to “perceived explosion of section 1983 litigation”).

30. Monaghan, *State Law Wrongs*, *supra* note 16, at 978–80.

31. See *infra* text accompanying note 218.

the Bill of Rights incorporated by the Fourteenth Amendment's Due Process Clause and for violations of the Clause's "substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'"³²

Therefore, the significance of state tort law depends on the answer to the initial question of what constitutional provision prohibits malicious prosecutions. If the right to be free from malicious prosecutions emerges from the Fourth Amendment or the substantive aspect of the Due Process Clause, then—unlike procedural due process claims—it should be shielded from *Parratt's* reach.

B. *Albright v. Oliver*

The Supreme Court faced these issues more than ten years ago but failed to reach consensus on much of anything other than dismissal of the complaint.

In *Albright v. Oliver*, the Court addressed the viability of a § 1983 malicious prosecution claim against the City of Macomb, Illinois, and Roger Oliver, a Macomb police detective.³³ Oliver attested to a criminal information and obtained a warrant for Kevin Albright's arrest for selling "a look-alike substance." Albright turned himself in, denied his guilt, and was released after posting bond, a condition of which was that he not leave Illinois without the court's permission. At the preliminary hearing, Oliver "testified that [Albright] sold the look-alike substance to [Oliver's informant], and the court found probable cause to bind petitioner over for trial."³⁴ Eight months after Albright's arrest, the information against him was dismissed for failure to state an offense under Illinois law.³⁵

Oliver omitted a few details about his criminal investigation from the information and his testimony against Albright. A month before Oliver filled out the information against Kevin Albright, Oliver had "secured an indictment against a first suspect, John Albright, Jr.,"—Kevin's father—

32. *Zinermon*, 494 U.S. at 125 (quoting *Daniels*, 474 U.S. at 331); see also Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 345–52 (1993) (recasting *Parratt* "as an abstention case," but one that would not apply "when another constitutional provision provides a standard for defining the contours of a liberty or property right under the Due Process Clause"); Monaghan, *State Law Wrongs*, supra note 16, at 990 ("With respect to fundamental rights, the Court continues to assert, as it did in *Monroe v. Pape*, that section 1983 'makes a deprivation . . . actionable independently of state law.'" (quoting *Paul v. Davis*, 424 U.S. 693, 711 n.5 (1976))); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 Colum. L. Rev. 833, 875–77 (2003) ("The provision of postdeprivation procedure thus cannot have implications for whether an allegation of a deprivation of life, liberty, or property states a substantive due process claim.").

33. 510 U.S. 266 (1994).

34. *Id.* at 269 (Rehnquist, C.J., plurality opinion).

35. *Albright v. Oliver*, 975 F.2d 343, 344 (7th Cir. 1992) (Posner, J.).

for the same crime.³⁶ When Oliver discovered that this Albright “was an elderly, respectable, inoffensive gentleman unlikely to have committed the offense,”³⁷ he altered the warrant so as to name John David Albright—Kevin’s brother—only to discover that this Albright had not been in Macomb at the time of the offense. Moreover, Oliver’s informant had been a cocaine addict, whom he hired to work undercover in exchange for “protection and some pay,” with no great effect: “[O]f fifty persons she reported to Oliver as trafficking in drugs, none was successfully prosecuted for any crime.”³⁸

The Seventh Circuit, per Judge Posner, affirmed the District Court’s dismissal of Albright’s § 1983 malicious prosecution claim.³⁹ The Supreme Court affirmed, with seven Justices issuing five opinions, none for a majority; two Justices dissented.

Chief Justice Rehnquist’s plurality opinion, joined by Justice O’Connor, Justice Scalia, and Justice Ginsburg, declared that Albright had no substantive due process claim.⁴⁰ The plurality read Albright’s complaint as presenting the narrow question of whether the defendants “infringed his substantive due process right to be free of prosecution without probable cause,” but not a claim on either procedural due process or Fourth Amendment grounds.⁴¹

The plurality invoked *Graham v. Connor*’s preemption rule,⁴² which holds that “an explicit textual source of constitutional protection against” government conduct preempts analysis of that conduct under “the more generalized notion of ‘substantive due process.’”⁴³ The decision became quite simple once the plurality determined that “the matter of pretrial deprivations of liberty” is addressed by the Fourth Amendment.⁴⁴ Since this “particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of “substantive due process,” must be the guide for analyzing these claims.’”⁴⁵ The plurality thus dismissed Albright’s substantive due process claim without expressing any view on the viability of a Fourth Amendment claim.⁴⁶

Justice Scalia wrote separately to note that—regardless of his objections to substantive due process aside from the incorporation of “certain

36. 510 U.S. at 293 n.4 (Stevens, J., dissenting).

37. 975 F.2d at 344.

38. *Id.* at 344–45.

39. *Id.* at 348.

40. 510 U.S. at 275 (Rehnquist, C.J., plurality opinion).

41. *Id.* at 271.

42. *Id.* at 273.

43. 490 U.S. 386, 395 (1989); cf. Rubin, *supra* note 32, at 853–54 (citing *Albright* as example of Court’s broad view that *Graham* blocks substantive due process claims even when claims under particular provisions would fail).

44. 510 U.S. at 274 (Rehnquist, C.J., plurality opinion).

45. *Id.* at 273 (quoting *Graham*, 490 U.S. at 395).

46. See *id.* at 275.

explicit substantive protections of the Bill of Rights”⁴⁷—the Court’s jurisprudence confines substantive claims such that the procedural requirements of the Fifth and Sixth Amendments relating to pretrial and trial itself “are not to be supplemented through the device of ‘substantive due process.’”⁴⁸

Justice Ginsburg concurred with the plurality’s preference that the Fourth Amendment, not substantive due process, guide the analysis, but wrote separately to express her thoughts on the scope of the Fourth Amendment’s protections.⁴⁹ Appealing to the common law, Justice Ginsburg propounded the concept of “continuing seizure” whereby suspects released pretrial are still considered “seized” for trial even though they enjoy greater freedom than pretrial detainees.⁵⁰ Released suspects are still subject to “the state’s control” in a number of ways: They are obligated to appear in court and cannot travel without court permission. They may also suffer reputational and emotional harm, employment troubles, and financial strain.⁵¹

After observing the effects of “seizure” on the suspect, Justice Ginsburg noted the implications of the continuing seizure theory for law enforcement: “[T]he vitality of the Fourth Amendment depends upon its *constant* observance by police officers.”⁵² The continuing seizure concept will thus help curb police misconduct throughout an officer’s participation in the criminal process by compelling compliance with the Fourth Amendment even after a suspect has been released.⁵³

Justice Kennedy, joined by Justice Thomas, concurred in the judgment⁵⁴ and took the opportunity to express a radically expansive interpretation of *Parratt v. Taylor*.⁵⁵ After conceding that due process rights may be broader than the specific provisions of the Bill of Rights,⁵⁶ he argued that the traditional, fundamental principles of justice relating “to the initiation of charges” are mirrored in the guarantees of the Fifth and Sixth Amendments.⁵⁷ He then dismissed as superfluous the idea that due process requires “a standard for the initiation of a criminal prosecution.”⁵⁸

47. *Id.* (Scalia, J., concurring).

48. *Id.* at 276.

49. *Id.* (Ginsburg, J., concurring).

50. *Id.* at 277–79.

51. *Id.* at 278.

52. *Id.* at 279 (emphasis added).

53. *Id.*

54. *Id.* at 281 (Kennedy, J., concurring in the judgment).

55. 451 U.S. 527 (1981). For an assessment of Justice Kennedy’s opinion in *Albright* as “troubling,” see Rubin, *supra* note 32, at 878–81.

56. 510 U.S. at 282 (Kennedy, J., concurring in the judgment) (citing *Medina v. California*, 505 U.S. 437, 445 (1992)).

57. *Id.*

58. *Id.* at 283.

Justice Kennedy next evaluated Albright's substantive due process claim, noting that "the Due Process Clause protects interests other than the interest in freedom from physical restraint" and that malicious prosecution, like defamation, "can cause unjustified torment and anguish."⁵⁹ Justice Kennedy assumed arguendo that the Due Process Clause protects such interests, but then invoked *Parratt* to relegate such claims to state tort law.⁶⁰ Citing a reluctance to make the Fourteenth Amendment via § 1983 "a font of tort law to be superimposed upon whatever systems may already be administered by the States"⁶¹ and seeking to "respect[] the delicate balance between state and federal courts" in accord with § 1983, Justice Kennedy encouraged federal judges to be less hesitant to use *Parratt* to strike down claims.⁶²

Following the path set out in Ninth Circuit opinions by Judge Sneed,⁶³ which advocate extending *Parratt* to deny federal relief for all constitutional injuries other than those resulting from "state law, policy, procedure, pattern, or practice,"⁶⁴ Justice Kennedy concurred in the dismissal of Albright's claim on the basis of the tort remedy offered under Illinois law.⁶⁵

Justice Souter, after noting his objection to *Graham* preemption when due process "would [not] have duplicated protection that a more specific constitutional provision already bestowed,"⁶⁶ expressed "pragmatic" reluctance to invoke substantive due process where doing so might subject "government actors to two (potentially inconsistent) standards for the same conduct" and force judges to reconcile Fourth and Eighth Amendment jurisprudence with this "novel due process right."⁶⁷ In contrast to Justice Kennedy,⁶⁸ Justice Souter viewed Albright's complaint as claiming injuries from false arrest, not from "the mere initiation of prosecution."⁶⁹ Although "rules of recovery for such harms have naturally coa-

59. *Id.*

60. *Id.* at 283–84.

61. *Id.* at 284 (quoting *Parratt v. Taylor*, 451 U.S. 527, 544 (1981) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976))).

62. *Id.* at 284–85.

63. See *Taylor v. Knapp*, 871 F.2d 803, 807 (9th Cir. 1989) (Sneed, J., concurring); *Mann v. Tucson*, 782 F.2d 790, 794 (9th Cir. 1986) (Sneed, J., concurring).

64. *Taylor*, 871 F.2d at 807 (quoting *Mann*, 782 F.2d at 798).

65. 510 U.S. at 285–86 (Kennedy, J., concurring in the judgment). For the argument that this broad view of *Parratt* would transform "the state-federal balance," overrule *Monroe v. Pape*, 365 U.S. 167 (1961), and *Home Telephone & Telegraph Co. v. City of L.A.*, 227 U.S. 278 (1913), and "essentially undo the doctrine of incorporation," see Rubín, *supra* note 32, at 885–87.

66. 510 U.S. at 286–88 & n.2 (Souter, J., concurring in the judgment); accord *id.* at 305 (Stevens, J., dissenting) (noting that *Graham* preempts only "what would in any event be redundant reliance on a more general conception of liberty").

67. *Id.* at 287–88 (Souter, J., concurring in the judgment).

68. See Rubín, *supra* note 32, at 878 ("The Court divided on whether Albright's objection was to his arrest or his prosecution.").

69. 510 U.S. at 289 (Souter, J., concurring in the judgment).

lesced under the Fourth Amendment,”⁷⁰ Albright “disclaim[ed] any reliance on the Fourth Amendment,”⁷¹ and so Justice Souter concurred with the dismissal of his complaint.

Justice Stevens, joined by Justice Blackmun, dissented on the ground that the Fourteenth Amendment’s Due Process Clause imposes a probable cause requirement on state prosecutions.⁷² The initiation of a criminal prosecution “constitutes a deprivation of liberty worthy of constitutional protection.”⁷³ However adequate state procedures may be generally, Albright was challenging the substantively invalid determination of probable cause in his case due to the unreliable evidence and the “disregard or suppression of facts bearing on [its] reliability.”⁷⁴ The Due Process Clause, argued Justice Stevens, is “not coextensive with the specific provisions of the first eight Amendments.”⁷⁵

C. *Post-Albright Circuit Split*

If there was “an embarrassing diversity of judicial opinion” on the status of malicious prosecution as a constitutional tort prior to *Albright*,⁷⁶ the various opinions issued in *Albright* did little to help. Despite holding “that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright’s claim must be judged,”⁷⁷ the Justices said next to nothing about what such a Fourth Amendment claim should look like.

Several courts of appeals judges have commented on the lack of guidance from above: *Albright* “spawned controversy and confusion in the lower courts,”⁷⁸ “created great uncertainty in the law,”⁷⁹ engendered “considerable confusion,”⁸⁰ and “muddied the waters rather than clarified them”;⁸¹ a “remarkable divergence of opinion”⁸² remains; facing this

70. *Id.* at 290.

71. *Id.* at 289.

72. *Id.* at 291–92, 302 (Stevens, J., dissenting) (“[T]he pretrial deprivation of liberty at issue in this case is addressed by a particular Amendment, but not the Fourth; rather, it is addressed by the Grand Jury Clause of the Fifth Amendment.”).

73. *Id.* at 307.

74. *Id.* at 298.

75. *Id.* at 303–05 (noting Court’s “repudiation” of Justice Black’s jot for jot incorporation); see also Toni M. Massaro, Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process, 73 N.Y.U. L. Rev. 1086, 1093–95, 1115–19, 1121 (1998) (describing use of *Graham v. Connor*, 490 U.S. 386 (1989), in *Albright*, and arguing that *Graham* “implicitly revives Hugo Black’s jot for jot, and ‘not a jot more’ account of substantive due process”).

76. *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992) (citing *Brummett v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991) (describing different positions and concluding that “[t]he Supreme Court may have to decide this question someday”).

77. *Albright*, 510 U.S. at 271 (Rehnquist, C.J., plurality opinion).

78. *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (Jones, J., specially concurring).

79. *Gallo v. City of Phila.*, 161 F.3d 217, 222 (3d Cir. 1998).

80. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1070 n.4 (9th Cir. 2004).

81. *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

82. *Uboh v. Reno*, 141 F.3d 1000, 1002 (11th Cir. 1998).

“minefield,”⁸³ “circuits have traveled uneven paths . . . , and numerous approaches have developed.”⁸⁴

The significance of the elements of a state law malicious prosecution claim for the definition of the § 1983 constitutional tort forms the major fault line splitting the circuits.⁸⁵ When confronting a § 1983 claim for malicious prosecution, some circuits emphasize the tort law aspects, while others emphasize the constitutional elements. Both sides of the split, however, fail to recognize that the tort elements have already been held to constitute a Fourth Amendment violation, at least in the context of suppression hearings.⁸⁶

The First, Second, and Eleventh Circuits compose the “Tort Circuits,” wherein plaintiffs pleading malicious prosecution claims under § 1983 must satisfy the common law elements of the claim in addition to proving a constitutional violation.⁸⁷ The “Constitutional Circuits”—the Fourth, Fifth, Seventh, and Tenth—concentrate on whether a constitutional violation exists.⁸⁸

83. *Reed v. City of Chi.*, 77 F.3d 1049, 1053 (7th Cir. 1996).

84. *Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (en banc), cert. denied, 543 U.S. 808 (2004).

85. See *id.* at 949–53 (describing circuits as split into “two broad approaches”).

86. See discussion *infra* Part IIA.

87. See *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003) (“To establish a federal malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable *seizures* in addition to the elements of the common law tort of malicious prosecution.”); *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001) (“[M]ore [than the common law elements] is needed to transform malicious prosecution into a claim cognizable under section 1983. . . . [T]he plaintiff also must show a deprivation of a federally-protected right.”); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) (“[T]he court must engage in two inquiries: whether the defendant’s conduct was tortious; and whether plaintiff’s injuries were caused by the deprivation of liberty guaranteed by the Fourth Amendment.”).

88. See *Pierce v. Gilchrist*, 359 F.3d 1279, 1290 (10th Cir. 2004) (“We . . . reject[] the view that a plaintiff does not state a claim actionable under § 1983 unless he satisfies the requirements of an analogous common law tort.”); *Castellano*, 352 F.3d at 953–54 (“The initiation of criminal charges without probable cause may set in force events that run afoul of explicit constitutional protection [S]ome such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion.”); *Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001) (“[M]alicious prosecution is not tenable as an independent constitutional theory”); *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) (“[T]here is no such thing as a ‘§ 1983 malicious prosecution’ claim. . . . [I]t is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution It is not an independent cause of action.” (citation omitted)).

However, since the Seventh Circuit has adopted Justice Kennedy’s *Albright* opinion as “the effective holding of the Court,” *Newsome*, 256 F.3d at 751, it acknowledges that there could be a constitutional malicious prosecution claim if the state fails to offer a remedy. See *Gauger v. Hendle*, 349 F.3d 354, 359 (7th Cir. 2003) (Posner, J.) (distinguishing existence of state remedy for malicious prosecution from “whether and in what circumstances a case . . . might be actionable under the Fourth Amendment as an unreasonable seizure”).

Although sister circuits have categorized the Third Circuit as a Tort Circuit,⁸⁹ the Third Circuit has more recently acknowledged that “[o]ur law on this issue is unclear”; however, it continues to encourage plaintiffs to address each common law element.⁹⁰ Similarly, the Sixth Circuit has avoided defining the required elements of a claim, although it appears to recognize a Fourth Amendment right against malicious prosecution and continued detention without probable cause.⁹¹ The Ninth Circuit lies on both sides of the divide, allowing plaintiffs to focus on the direct constitutional violation or to plead a malicious prosecution claim, in which case the plaintiff must prove, in addition to the state law elements, that the defendant acted “with the intent to deprive him of specific constitutional rights.”⁹²

While it is fair to say that “two broad approaches” have developed,⁹³ multiple minor variations have also emerged, leading to fewer substantial differences than such a split might otherwise suggest.⁹⁴ For example, the Second, Third, and Fourth Circuits seem to agree that, whatever the requirements of the common law, a § 1983 claim need not prove malice because Fourth Amendment analysis is typically objective,⁹⁵ making the police officer’s subjective intent irrelevant.⁹⁶ Similarly, the common law favorable termination requirement has been incorporated by some of the Constitutional Circuits.⁹⁷

The courts of appeals are also divided over which constitutional provision a malicious prosecution claim might implicate. The Second, Fourth, Sixth, and Eleventh Circuits require that a malicious prosecution claim be grounded in a Fourth Amendment violation.⁹⁸ The Third,

89. See *Pierce*, 359 F.3d at 1290 n.8; *Castellano*, 352 F.3d at 949–51.

90. *Backof v. N.J. State Police*, 92 F. App’x 852, 856–58 (3d Cir. 2004).

91. See *Thacker v. City of Columbus*, 328 F.3d 244, 258–59 (6th Cir. 2003) (citing *Spurlock v. Satterfield*, 167 F.3d 995, 1005–07 (6th Cir. 1999)).

92. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069–72 (9th Cir. 2004).

93. *Castellano*, 352 F.3d at 949.

94. See *Awabdy*, 368 F.3d at 1070 n.4 (“The differences among the various approaches are often less significant than may appear, however.”); *Castellano*, 352 F.3d at 951 (indicating “the subtlety of the difference between the two approaches”).

95. See, e.g., *Devenpeck v. Alford*, 125 S. Ct. 588, 593–94 (2004) (rejecting “closely related offense” rule as inconsistent with Fourth Amendment’s objective standard); *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

96. See *Lambert v. Williams*, 223 F.3d 257, 262 n.2 (4th Cir. 2000) (citing *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996)); *Gallo v. City of Phila.*, 161 F.3d 217, 222 n.6 (3d Cir. 1998); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995); see also *Martin A. Schwartz & John E. Kirklín*, [1A] Section 1983 Litigation: Claims and Defenses 325–26 (3d ed. 1997) (discussing *Singer*).

97. See, e.g., *Castellano*, 352 F.3d at 959 (noting “federal common law footing” of favorable termination requirement); *Lambert*, 223 F.3d at 262 (noting that malicious prosecution claim “incorporates . . . the requirement that the prior proceeding terminate favorably to the plaintiff” (citing *Brooks*, 85 F.3d at 183)).

98. See *Washington v. County of Rockland*, 373 F.3d 310, 317 (2d Cir. 2004) (holding that “such claims must, under *Albright* and *Singer*, be premised on a violation of Fourth

Fifth, Seventh, and Ninth Circuits allow such a claim to be grounded in the Fourth Amendment, though they also note the possibility of invoking some other constitutional provision.⁹⁹ This split does not follow the tort/constitutional split described above.¹⁰⁰

There is also disagreement over whether that other constitutional provision can be the Due Process Clause of the Fourteenth Amendment. In *Albright*, the plurality held that “substantive due process may not furnish the constitutional peg on which to hang” a § 1983 malicious prosecution claim.¹⁰¹ And the lower courts have, with some exceptions,¹⁰² followed this rule. The Third Circuit has noted the possibility of a procedural due process basis for such a claim.¹⁰³ More explicitly, the Fifth and Seventh Circuits have acknowledged the due process “fair trial” right potentially at issue in a malicious prosecution claim.¹⁰⁴

Amendment rights”); *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003) (“Thacker cannot demonstrate any seizure in violation of the Fourth Amendment. Thus, we need not attempt to enunciate the other elements of a malicious prosecution claim here.”); *Wood v. Kesler*, 323 F.3d 872, 881 & nn.14–15 (11th Cir. 2003) (“To establish a federal malicious prosecution claim under § 1983, the plaintiff must prove a violation of his Fourth Amendment right to be free from unreasonable seizures . . .”); *Lambert*, 223 F.3d at 260, 262 (“[A] ‘malicious prosecution’ claim . . . is simply a claim founded on a Fourth Amendment seizure . . .”). But see *Singer*, 63 F.3d at 116 n.5 (“It is theoretically possible . . . for a plaintiff to premise a malicious prosecution claim on some other constitutional right.”).

99. See *Awabdy*, 368 F.3d at 1069 (asserting that *Albright* does not hold “that Fourth Amendment violations are the only proper grounds for malicious prosecution claims under § 1983”); *Castellano*, 352 F.3d at 953–54 (holding that initiation of prosecution “without probable cause may set in force events that run afoul of explicit constitutional protection—the Fourth Amendment if the accused is seized and arrested, for example, or other constitutionally secured rights if a case is further pursued”); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) (“[I]f a plaintiff can establish a violation of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory ‘malicious prosecution.’”); *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 792 (3d Cir. 2000) (citing *Torres v. McLaughlin*, 163 F.3d 169, 173 (3d Cir. 1998)) (“[A] section 1983 malicious prosecution claim could be based on a constitutional provision other than the Fourth Amendment, . . . so long as it was not based on substantive due process.”).

100. See *supra* notes 85–88 and accompanying text.

101. 510 U.S. 266, 271 n.4 (1994) (Rehnquist, C.J., plurality opinion).

102. See *Moran v. Clarke*, 296 F.3d 638, 646–47 (8th Cir. 2002) (en banc) (“[W]hen a person is damaged by outrageous police misconduct but the resulting injury does not neatly fit within a specific constitutional remedy, the injured party may, depending on the circumstances, pursue a substantive due process claim under section 1983.”); *Frantz v. Vill. of Bradford*, 245 F.3d 869, 877 (6th Cir. 2001) (“[I]f the plaintiff’s Fourth Amendment rights are not implicated, we believe *Albright* leaves open the question of whether substantive due process may be available to the plaintiff.”). But see *Thacker*, 328 F.3d at 258–59 (noting *Frantz*’s inconsistency with *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999), which binds the circuit).

103. *Torres*, 163 F.3d at 173.

104. See *Castellano*, 352 F.3d at 942 (“[A] state’s manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause, a deprivation of a right not reached by the *Parratt* doctrine.”);

The status of malicious prosecution as a constitutional tort is rife with confusion. The disagreements among the lower courts are just as prevalent today as when the *Albright* Court surveyed them and discovered that “[t]he exact standards announced by the courts escape easy classification.”¹⁰⁵

II. A FOURTH AMENDMENT RIGHT TO BE FREE FROM MALICIOUS PROSECUTION

With hopes of cleaning up “the *Albright* minefield,”¹⁰⁶ eliminating the disparate treatment of § 1983 malicious prosecution claims, and enhancing Fourth Amendment doctrinal integrity, this Part argues that the elements of a malicious prosecution tort claim themselves constitute a violation of the Fourth Amendment. A right to be free from malicious prosecution could emerge from the Fourth Amendment by invoking that Amendment’s resemblances to substantive due process. After outlining the contours of such an approach, this Part employs a more modest method that reaches the same result but with much surer footing. The Fourth Amendment’s exclusionary rule cases already recognize a right to be free from malicious prosecution, albeit without using that label. After detailing the move from the exclusionary rule setting to the tort remedy, this Part distinguishes the right to be free from malicious prosecution from other interpretations of pretrial constitutional rights.

Since the Court in *Albright* explicitly rejected a substantive due process basis for § 1983 malicious prosecution claims,¹⁰⁷ one possible response is simply “to force the square peg of a substantive due process claim into the round hole of” the Fourth Amendment.¹⁰⁸ The two provisions are actually more compatible than this sounds.

The Fourth Amendment’s protections can be construed to include the rights protected by substantive due process. Indeed, Professor Amar has even argued that, “[f]or those who believe in a ‘substantive due process’ approach to the Constitution, the Fourth Amendment . . . seems a far more plausible textual base than the due process clause itself.”¹⁰⁹ Su-

Newsome, 256 F.3d at 752 (noting that § 1983 plaintiff “does have a due process claim in the original sense of that phrase—he did not receive a fair trial if the prosecutors withheld material exculpatory details”).

105. 510 U.S. at 270 n.4 (Rehnquist, C.J., plurality opinion).

106. *Reed v. City of Chi.*, 77 F.3d 1049, 1053 (7th Cir. 1996).

107. 510 U.S. at 273–74 (Rehnquist, C.J., plurality opinion); *id.* at 275–76 (Scalia, J., concurring); *id.* at 281–86 (Kennedy, J., concurring in the judgment); *id.* at 286–91 (Souter, J., concurring in the judgment).

108. Rubin, *supra* note 32, at 834 (describing flaw shared by *Graham v. Connor*, 490 U.S. 386 (1989), and *Parratt v. Taylor*, 451 U.S. 527 (1981)).

109. Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 40 & 197 n.194 (1997) [hereinafter Amar, *Criminal Procedure*] (citing *Cruzan v. Dir.*, Mo. Dep’t of Health, 497 U.S. 261, 288 (1990) (O’Connor, J., concurring); *Winston v. Lee*, 470 U.S. 753, 766–67 (1985); and *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965)); see also Monaghan, *State Law Wrongs*, *supra* note 16, at 991 & n.83 (noting “boundary

preme Court Justices have also recognized the similarities between the two provisions. In her concurrence in *Cruzan v. Director, Missouri Department of Health*, a right-to-die case, Justice O'Connor cited *Rochin v. California*¹¹⁰ for the idea that "state incursions into the body" may violate the Due Process Clause and remarked that "[o]ur Fourth Amendment jurisprudence has echoed this same concern."¹¹¹ And in its explication of substantive due process in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court referred to the Fourth Amendment case *Winston v. Lee*¹¹² for the proposition that it was well established "that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, . . . as well as bodily integrity."¹¹³

This broad, substantive reading also comports with the historical, common law approach to the Fourth Amendment. "Detention, apprehension, bodily harm, disruption of routine, invasion of property rights, embarrassment—these are the kinds of insecurity that the Fourth Amendment was intended to protect against."¹¹⁴ The Fourth Amendment's protection of these interests implies protection against malicious prosecutions. As discussed above, malicious prosecution threatens the major personal interests in "reputation, personal security, and property."¹¹⁵ Malicious prosecution thus fits within the sphere of the Fourth Amendment.

Of course, the guaranteed security is only "against unreasonable searches and seizures."¹¹⁶ Not every impairment of such interests by a state actor—not even the most unreasonable one committed by a state actor—amounts to a Fourth Amendment violation. But an overly narrow focus on false arrests should not constrict the Fourth Amendment's protection of lawful interests from unreasonable intrusions by state officials.¹¹⁷ The round hole of the Fourth Amendment, properly enlarged to accommo-

uncertainty" between Fourth Amendment and substantive due process claims in discussion of scope of *Parratt*).

110. 342 U.S. 165, 172 (1952) (holding that stomach-pumping for evidence "shocks the conscience," in violation of Due Process Clause).

111. 497 U.S. at 287–88 (O'Connor, J., concurring).

112. 470 U.S. at 766–67 (holding that compulsory surgery to remove bullet constitutes unreasonable intrusion in violation of Fourth Amendment).

113. 505 U.S. 833, 849 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) (citations omitted).

114. Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 52 (distinguishing between lawful interests against government intrusion and unprotected, unlawful interest in not being punished for one's crime). Posner lists the protected interests as "both (1) property interests . . . and (2) interests in bodily integrity, mental tranquility, and freedom of movement." *Id.* at 50–51.

115. Winfield, *supra* note 7, at 129; see also *supra* note 7 and accompanying text.

116. U.S. Const. amend. IV (emphasis added).

117. See discussion *infra* Part II.B.2. Nor should the emphasis on the exclusionary rule prevent the granting of § 1983 relief for Fourth Amendment violations. See *infra* text accompanying note 121.

date substantive due process rights, could fairly encompass a right to be free from malicious prosecution.

Although the preceding suggests one analytical approach to defining malicious prosecution as a Fourth Amendment violation, a method with firmer roots in well-established Fourth Amendment doctrine lies at hand.

A. *Analogizing from Exclusion to Liability*

Protection against malicious prosecution has already been recognized as within the scope of the Fourth Amendment. This recognition, however, has been limited to the context of evidentiary suppression hearings, and is not fully acknowledged in § 1983 civil suits. The exclusionary rule prohibits admission of evidence seized in violation of the Fourth Amendment and has been a major focus of Fourth Amendment law, especially since its application to state criminal processes.¹¹⁸ The rule has been hailed as “the only effective deterrent to police misconduct in the criminal context.”¹¹⁹

The emphasis on the suppression remedy in Fourth Amendment jurisprudence helps explain the inadequate treatment of malicious prosecution claims under § 1983. Critics of the exclusionary rule contend that the historically predominant and socially efficient remedy for a Fourth Amendment violation is the tort suit.¹²⁰ These critics suggest that the undeserved “attention lavished on the exclusionary rule” has contributed to the neglect of the tort remedy and a distortion of the Fourth Amendment.¹²¹ It is possible, however, to resurrect this tort remedy by examining the exclusionary rule more closely.

The exclusionary rule cases sparked by *Franks v. Delaware*¹²² present a viable analogue to the malicious prosecution tort remedy. In *Franks*, the Court held that in limited circumstances a criminal defendant may challenge the veracity of search warrant applications, with the remedy being a suppression of the evidence found as a result of the subsequently invalidated warrant.

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reck-

118. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (establishing exclusionary rule in federal prosecutions).

119. *Terry v. Ohio*, 392 U.S. 1, 12 (1968).

120. See Amar, *Criminal Procedure*, supra note 109, at 2, 12, 20–21, 28–29, 154–56; Posner, supra note 114, at 54, 70. Both authors argue that a tort remedy works more efficiently than the exclusionary rule because (1) the criminal does not obtain a windfall at society’s expense; (2) the innocent are more directly rewarded by compensation than general deterrence; and (3) the wrongdoer, not society at large, bears the burden of liability. These advantages were acknowledged by the Court in *Malley v. Briggs*, 475 U.S. 335, 344 (1986), and *Stone v. Powell*, 428 U.S. 465, 490–92 (1976).

121. Amar, *Criminal Procedure*, supra note 109, at 30.

122. 438 U.S. 154 (1978).

less disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.¹²³

Thus, when no probable cause exists and officials act with at least reckless disregard for the truth, they violate the Fourth Amendment. The *Franks* rule applies not just to the inclusion of statements, but also, with various modified standards, to the knowing or reckless omissions of material facts from warrant applications.¹²⁴

More importantly for present purposes, courts have properly extended *Franks* to cover applications not just for search warrants but also for arrest warrants.¹²⁵ After all, the Fourth Amendment protects against seizures as well as searches. Discussing the applicability of the warrant requirement to arrests, Justice Powell observed that "as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater" than those on searches.¹²⁶ At the very least, there is

123. *Id.* at 155–56.

124. See, e.g., *United States v. Martinez-Garcia*, 397 F.3d 1205, 1215 (9th Cir. 2005), cert. denied, 126 S. Ct. 241 (2005); *Hale v. Kart*, 396 F.3d 721, 726 (6th Cir. 2005); *United States v. Ketzeback*, 358 F.3d 987, 990 (8th Cir. 2004); *United States v. Awadallah*, 349 F.3d 42, 64–65 (2d Cir. 2003); *Dahl v. Holley*, 312 F.3d 1228, 1235 (11th Cir. 2002); *United States v. Runyan*, 290 F.3d 223, 234 n.6 (5th Cir. 2002); *United States v. Castillo*, 287 F.3d 21, 25 (1st Cir. 2002); *Wilson v. Russo*, 212 F.3d 781, 787–89 (3d Cir. 2000); *Stewart v. Donges*, 915 F.2d 572, 581–83 (10th Cir. 1990); *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990); *Olson v. Tyler*, 771 F.2d 277, 281 n.5 (7th Cir. 1985); *United States v. Johnson*, 696 F.2d 115, 118 n.21 (D.C. Cir. 1982).

125. See, e.g., *Burke v. Town of Walpole*, 405 F.3d 66, 81 (1st Cir. 2005); *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003); *Holmes v. Kucynda*, 321 F.3d 1069, 1083 (11th Cir. 2003); *Wilson*, 212 F.3d at 786–88; *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996); *Moody v. St. Charles County*, 23 F.3d 1410, 1412 (8th Cir. 1994); *Colkley*, 899 F.2d at 299–303; *Olson*, 771 F.2d at 281 n.6; *United States v. Martin*, 615 F.2d 318, 327–29 (5th Cir. 1980). The Second Circuit, however, has cautiously approached any extension to arrest warrants:

The *Franks* doctrine arose in the context of a search warrant, and neither the Supreme Court nor this Court has extended it to arrest warrants. Other courts have applied it to arrest warrants. For purposes of this appeal, we assume without deciding that *Franks* applies to material witness arrest warrants; even if it applies, it does *Awadallah* no good.

Awadallah, 349 F.3d at 64 n.17 (citations omitted).

126. *United States v. Watson*, 423 U.S. 411, 428–29 (1976) (Powell, J., concurring) (discussing this abstract argument, but concluding that "logic sometimes must defer to history and experience"); see also Ronald Jay Allen et al., *Comprehensive Criminal Procedure* 509 (2d ed. 2005) ("[O]f all the police behaviors that Fourth Amendment law regulates, arrests should be subject to the most stringent legal standards.").

no reason to apply a lesser standard of honesty, or none at all, to applications for arrest warrants.¹²⁷ As the Seventh Circuit held, “there is no principled basis for finding [*Franks’s*] reasoning inapplicable to arrest warrants. The misconduct of the officer is the same; only the remedy differs.”¹²⁸ Although the Supreme Court has not explicitly applied the *Franks* search warrant standard to arrest warrants,¹²⁹ when deciding what degree of immunity to afford police officers, the Court observed that this is a distinction without a difference.¹³⁰ The Court also noted that standards under § 1983 liability actions should not diverge from those applicable under the exclusionary rule: “[I]t would be incongruous to test police behavior by the ‘objective reasonableness’ standard in a suppression hearing, while exempting police conduct in applying for an arrest or search warrant from any scrutiny whatsoever in a § 1983 damages action.”¹³¹

This review of *Franks* and its progeny highlights three striking similarities between claims to suppress evidence flowing from perjurious warrant applications and common law malicious prosecution claims. First, a remedy is available for conduct relating to the initiation of a prosecution. Initiation is one of the elements of a malicious prosecution claim.¹³² The correspondence to *Franks* results from *Franks’s* applicability to arrest warrants, for an arrest warrant qualifies as a means of initiating a criminal prosecution.¹³³

Second, a remedy is available only in the absence of probable cause. This, too, is a necessary feature of a malicious prosecution claim.¹³⁴ Under *Franks*, probable cause is determined by removing the taint of the officer’s misconduct and evaluating the remaining circumstances objectively.¹³⁵

127. Cf. *Watson*, 423 U.S. at 443–45 (Marshall, J., dissenting) (“[T]he logical presumption is that arrests and searches should be treated equally under the Fourth Amendment. Analysis of the interests involved confirms this supposition.”).

128. *Olson*, 771 F.2d at 281 n.6.

129. *Awadallah*, 349 F.3d at 64 n.17.

130. *Malley v. Briggs*, 475 U.S. 335, 344 n.6 (1986) (“[T]he distinction between a search warrant and an arrest warrant would not make a difference in the degree of immunity accorded the officer who applied for the warrant.”).

131. *Id.* at 344 (citation omitted); accord *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1148 n.3 (9th Cir. 1990) (per curiam) (“[W]e incorporate the *Franks* standard because we find it incongruous to employ one standard to deal with alleged falsities in a warrant affidavit in the context of a suppression motion and another in a civil rights action.”).

132. Restatement (Second) of Torts §§ 654–55 (1977); Keeton et al., *supra* note 6, § 119, at 871–73.

133. See cases cited *supra* note 12.

134. Restatement (Second) of Torts §§ 662–67; Keeton et al., *supra* note 6, § 119, at 876–82.

135. 438 U.S. 154, 156, 171–72 (1978); see also, e.g., *United States v. Awadallah*, 349 F.3d 42, 65 (2d Cir. 2003).

Third, the mere absence of probable cause is insufficient to secure the remedy. The right to relief also depends on a higher threshold of culpability. The state of mind required under *Franks*—“deliberate falsehood or . . . reckless disregard for the truth,” with “[a]llegations of negligence or innocent mistake [deemed] insufficient”¹³⁶—is the constitutional equivalent of the malicious prosecution tort’s element of malice. Perjury or reckless disregard for the truth indicates conduct not primarily for the purpose of doing justice—the tort’s definition of malice.¹³⁷ Moreover, the Court expressly defined this state of mind as “actual malice” in *New York Times Co. v. Sullivan* when it announced the First Amendment’s constraints on libel law.¹³⁸ Courts have looked to libel law to help define malice when evaluating *Franks* suppression claims¹³⁹ and state malicious prosecution claims.¹⁴⁰

Based on these similarities, a § 1983 malicious prosecution claim emerges as the logical tort remedy equivalent to the evidentiary suppression available on similar facts through *Franks* in the course of a criminal prosecution. The Fourth Amendment violation is not magically cured just because the claim arises in a § 1983 suit. If courts are prepared on these facts to exclude evidence, then courts should grant the parallel relief of monetary damages. In fact, federal courts appear willing to entertain such § 1983 claims so long as they bear the *Franks* label instead of raising a constitutional claim of malicious prosecution.¹⁴¹

Tort liability is especially appropriate in these cases because “the exclusionary rule offers absolutely no compensation or deterrence whatsoever” when “the cops know you are innocent and just want to harass you.”¹⁴² Instigators of a malicious prosecution by definition operate with an interest other than justice in mind,¹⁴³ nullifying the force of the threat of evidentiary suppression at trial. As Chief Justice Warren observed, the

136. 438 U.S. at 171.

137. Restatement (Second) of Torts § 668; Keeton et al., *supra* note 6, § 119, at 882–85.

138. 376 U.S. 254, 280 (1964) (describing “actual malice” as acting “with knowledge that [a statement] was false or with reckless disregard of whether it was false or not”).

139. See, e.g., *United States v. Davis*, 617 F.2d 677, 694 (D.C. Cir. 1979) (“*Franks* gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases, except to state that ‘negligence or innocent mistake [is] insufficient.’ By way of analogy, however, we can draw upon precedents in the area of libel and the first amendment.” (quoting *Franks*, 438 U.S. at 171)).

140. See Keeton et al., *supra* note 6, § 119, at 884 (noting that some states have “adapted the constitutionally required definition of malice from *New York Times v. Sullivan* and like cases” in malicious prosecution suits).

141. See, e.g., *Haywood v. City of Chi.*, 378 F.3d 714, 717–20 (7th Cir. 2004); *Holmes v. Kucynda*, 321 F.3d 1069, 1083–84 (11th Cir. 2003); *Mendenhall v. Riser*, 213 F.3d 226, 237, 241–43 (5th Cir. 2000) (Garza, J., dissenting); *Sherwood v. Mulvihill*, 113 F.3d 396, 403–05 (3d Cir. 1997) (Sloviter, C.J., dissenting).

142. Amar, *Criminal Procedure*, *supra* note 109, at 154–55 & 251 n.42 (citing *Terry v. Ohio*, 392 U.S. 1, 14–15 & n.11 (1968)).

143. Keeton et al., *supra* note 6, § 119, at 871.

exclusionary rule “is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”¹⁴⁴ A § 1983 malicious prosecution remedy therefore helps shore up some weaknesses of the exclusionary rule.

Nor in such cases would tort liability as a supplement to the exclusionary rule result in excessive deterrence of constitutional violations.¹⁴⁵ Since probable cause is lacking at the initiation of every malicious prosecution, unless probable cause materializes from further investigation, the case will likely be dismissed.¹⁴⁶ Given this foreseeable absence of a prosecution, the exclusionary rule provides no relief and fails to deter. The fear of deterring officials too much by making tort damages available may even be unwarranted with respect to most arrestees since, according to one study of several large jurisdictions, “the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution.”¹⁴⁷

B. *Contrasting with Other Potential Constitutional Claims*

Two other rights resemble the one described here: a right to be free from prosecution without probable cause and a right to be free from false arrest. The first presents a more expansive right than a malicious prosecution right entails. The second, false arrest, highlights the miserly view of the Fourth Amendment that has wrongly excluded malicious prosecution from its purview.

1. *Distinct from Probable Cause.* — Justice Stevens argued in his *Albright* dissent that the Fourteenth Amendment imposed a probable cause requirement on state prosecutions, even if it did not specifically incorporate the Fifth Amendment’s grand jury indictment procedure.¹⁴⁸ This more extensive right to be free from prosecution without probable cause suffices for the goal of locating a textual home for a constitutional right to be free from malicious prosecution, but it is not necessary.

144. *Terry*, 392 U.S. at 14.

145. Contra Posner, *supra* note 114, at 57 (“[A] combination of the exclusionary rule and an effective tort remedy [would] produce overdeterrence.”).

146. For example, *Albright’s* prosecution was dismissed. See *supra* text accompanying note 35.

147. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 Md. L. Rev. 1, 3 (2000); see also Allen et al., *supra* note 126, at 347 (“Twenty-seven percent of felony arrestees are never convicted of anything, usually because the charges against them were voluntarily dismissed. . . . [T]he percentages are higher for misdemeanor arrests.” (citing Sourcebook of Criminal Justice Statistics tbl. 5.57 (Ann L. Pastore & Kathleen Maguire eds., 2002), available at <http://www.albany.edu/sourcebook/pdf/sb2002/sb2002-section5.pdf> (on file with the *Columbia Law Review*))).

148. 510 U.S. 266, 292 (1994) (Stevens, J., dissenting); see also *Hurtado v. California*, 110 U.S. 516 (1884) (holding that Fourteenth Amendment does not incorporate Fifth Amendment’s Grand Jury Clause).

As noted above,¹⁴⁹ the elements of a state law malicious prosecution claim require more than the absence of probable cause: “The plaintiff must establish malice in addition to the absence of probable cause.”¹⁵⁰ The two elements—lack of probable cause and malice—are related, yet they are distinct requirements. Absence of probable cause suggests that the initiator acted with malice,¹⁵¹ and while the Restatement views lack of probable cause as evidence that the accuser acted with an improper purpose since it is evidence “that the accuser did not believe in the guilt of the accused,”¹⁵² this inference is not mandatory. The tort’s separate malice element thus limits the Fourth Amendment right to be free from malicious prosecution and distinguishes it from a general right to probable cause.

Moreover, in suits against public officials the inference is deemed especially weak because officials are, in a sense, privileged to make accusations—police officers are trained and expected to apply for warrants.¹⁵³ Since the prosecution of criminal suspects is a traditional and generally beneficial state function, the higher threshold imposed by the malice requirement allows greater latitude for those who undertake this socially valuable activity.

The malice element’s privileging function resembles the qualified immunity doctrine’s “balance between protecting the officer’s exercise of discretion, while still compensating and deterring violations of federal law.”¹⁵⁴ In general, prosecutors are granted absolute immunity from damages suits,¹⁵⁵ whereas police officers are granted only qualified immunity.¹⁵⁶

The question of official immunity was not before the Court in *Albright*,¹⁵⁷ but Justice Ginsburg and Justice Stevens each noted this difficult issue.¹⁵⁸ Nearly four years later, in *Kalina v. Fletcher*, the Court, without referring to *Albright*, partially answered the question, holding that a prosecutor who makes statements in an affidavit in support of an arrest war-

149. See *supra* notes 10, 137–140 and accompanying text.

150. Keeton et al., *supra* note 6, § 119, at 883.

151. *Id.* at 884.

152. Restatement (Second) of Torts § 669 (1977).

153. Keeton et al., *supra* note 6, § 119, at 884.

154. Chemerinsky, *supra* note 17, § 8.6.3, at 529.

155. See *Imbler v. Pachtman*, 424 U.S. 409, 424–29 (1976). However, a prosecutor’s immunity is absolute only for prosecutorial tasks, not investigatory ones. *Mitchell v. Forsyth*, 472 U.S. 511, 520–24 (1985).

156. *Malley v. Briggs*, 475 U.S. 335, 340–45 (1986); *Pierson v. Ray*, 386 U.S. 547, 555–57 (1967).

157. 510 U.S. 266, 269 n.3 (1994) (Rehnquist, C.J., plurality opinion).

158. See *id.* at 279 n.5 (Ginsburg, J., concurring) (“*Albright*’s theory raises serious questions about whether the police officer would be entitled to share the prosecutor’s absolute immunity. A right to sue someone who is absolutely immune from suit would hardly be a right worth pursuing.” (citations omitted)); *id.* at 308 n.26 (Stevens, J., dissenting) (noting that immunity defense issue “is neither free of difficulty nor properly before us” (citations omitted)).

rant acts as a complaining witness and so is entitled only to qualified immunity.¹⁵⁹ In his *Kalina* concurrence, Justice Scalia noted the similarity between qualified immunity and the elements of the malicious prosecution tort.¹⁶⁰

Malice and immunity perform similar functions in other contexts as well. An analogy to the immunity shielding a public official's own speech led the Court to adopt the "actual malice" standard in *New York Times Co. v. Sullivan*.¹⁶¹ In his explication of the qualified immunity doctrine in *Harlow v. Fitzgerald*, Justice Powell mimicked, without citation,¹⁶² Judge Learned Hand's explanation of immunity as "a balance between the evils inevitable in either alternative,"¹⁶³ which Justice Goldberg had expressly invoked in his *New York Times* concurrence.¹⁶⁴

If the immunity doctrine establishes the necessary balance, then perhaps the constitutional tort of malicious prosecution can do away with the malice requirement, becoming equivalent to a right to be free from prosecution without probable cause. Some courts of appeals have suggested abandoning the malice element, although their justification has been the Fourth Amendment's objective standard.¹⁶⁵ The addition of immunity to this evaluation, however, presents an alternative, functional argument for abandoning the malice element. Nevertheless, the Court has warned that immunity questions should not alter the elements of the underlying claim.¹⁶⁶

2. *Distinct from False Arrest.* — While the right to be free from prosecutions without probable cause goes farther than a Fourth Amendment right to be free from malicious prosecution, an examination of false arrest doctrine shows that current conceptions of the Fourth Amendment are unreasonably cramped, unjustifiably excluding malicious prosecution claims.

159. 522 U.S. 118, 129–31 (1997).

160. *Id.* at 132–33 (Scalia, J., concurring).

161. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282–83 (1964) ("Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. . . . Analogous considerations support the privilege for the citizen-critic of government."); see also *supra* note 138 and accompanying text.

162. 457 U.S. 800, 813–14 (1982) ("The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.").

163. *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

164. *N.Y. Times*, 376 U.S. at 303 (Goldberg, J., concurring).

165. See *supra* notes 95–96 and accompanying text.

166. *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) ("[A]lthough evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in *Harlow* . . . provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation.").

False-arrest claims enable recovery for damages from “the time of detention up until issuance of process or arraignment, but not more.”¹⁶⁷ In contrast, the tort of malicious prosecution is limited to claims for damages incurred after the initiation of a prosecution.¹⁶⁸

Unlike malicious prosecution, the status of false arrest as a constitutional tort grounded in the Fourth Amendment has not been the subject of controversy. Courts have long recognized claims for false arrest as Fourth Amendment violations while rejecting claims for malicious prosecution as lying beyond the scope of the Fourth Amendment.¹⁶⁹

Albright v. Oliver illustrates this difference in treatment. In the course of rejecting Albright’s malicious prosecution claim, the Seventh Circuit and several Supreme Court Justices suggested Albright would have fared better had he raised a (timely) false-arrest claim. Judge Posner stated that Albright had “a plausible claim for false arrest,” further remarking that “[t]o arrest a person on the scanty grounds that are alleged to be all that Oliver had to go on is shocking.”¹⁷⁰ Albright’s malicious prosecution claim failed on the merits.¹⁷¹ Similarly, in the Supreme Court, Chief Justice Rehnquist commented that Albright’s “surrender to the State’s show of authority constituted a seizure for purposes of the Fourth Amendment,” intimating that the Court would have been more receptive to a “claim . . . based on an unconstitutional arrest or seizure.”¹⁷²

This rosy assessment of a potential false-arrest claim ignores the fact that the authority to which Albright submitted was an arrest warrant, which is considered an issuance of legal process,¹⁷³ thereby limiting Al-

167. Keeton et al., *supra* note 6, § 119, at 888; see also *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (“[U]nlike the related cause of action for false arrest or imprisonment, [a malicious prosecution claim] permits damages for confinement imposed pursuant to legal process.”).

168. Keeton et al., *supra* note 6, § 119, at 885–86 (“So long as the plaintiff has been detained by legal process, it cannot be said that he has been falsely imprisoned and the claim, if there is one, must be for malicious prosecution, where malice and a want of probable cause must be shown.”).

169. See, e.g., *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003) (Posner, J.) (“[T]he Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions.”). When discussing a tort remedy alternative for Fourth Amendment violations, Posner omits malicious prosecution, but lists conversion, trespass to real and personal property, assault, battery, false arrest, false imprisonment, intentional, reckless, or negligent infliction of mental distress, and invasion of privacy. Posner, *supra* note 114, at 50–51.

170. *Albright v. Oliver*, 975 F.2d 343, 344–45 (7th Cir. 1992) (Posner, J.). However, Albright opted for a malicious prosecution claim instead because “his constitutional claim of false arrest was barred by the statute of limitations.” *Id.* at 345. But see *Albright v. Oliver*, 510 U.S. 266, 280 (1994) (Ginsburg, J., concurring) (contending that “dismissal of the criminal charges,” not arrest itself, should trigger limitations period, but noting that Albright had abandoned his Fourth Amendment claim).

171. *Albright*, 975 F.2d at 345–48.

172. 510 U.S. at 271 & n.5 (Rehnquist, C.J., plurality opinion); see also *id.* at 277–79 (Ginsburg, J., concurring); *id.* at 289–91 (Souter, J., concurring in the judgment).

173. See cases cited *supra* note 12.

bright to a malicious prosecution claim. Moreover, this disparate treatment reveals how incongruous it is to recognize false arrest as a constitutional tort but not malicious prosecution. A suspect arrested without a warrant may later sue for false arrest, but a suspect arrested pursuant to a warrant is confined to a malicious prosecution claim of heretofore dubious value.

Furthermore, the Court has already acknowledged that the issuance of process is not actually cloaked with magical powers: “[O]urs is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should.”¹⁷⁴ Finally, the Fourth Amendment “provides both procedural and substantive protections.”¹⁷⁵ The substantive protections should not be cut off once the procedural protections are satisfied. Knocking down the false division based on issuance of process enables recognition of malicious prosecution’s proper place within the Fourth Amendment.

III. SOME IMPLICATIONS OF A CONSTITUTIONAL TORT OF MALICIOUS PROSECUTION

The preceding analysis demonstrates the plausibility of a Fourth Amendment right to be free from malicious prosecution based on its analogy to a suppression claim under *Franks*. The viability of such a right, however, depends on responses to several constitutional and tort objections. Although “[a]s constitutional issues go, the status of a constitutional tort of malicious prosecution may seem like small potatoes,”¹⁷⁶ the proposed right raises some of the biggest potatoes in the field.¹⁷⁷

In addition to the interests described above as the foundations of Anglo-American law¹⁷⁸ and the balancing of these with the important goal of law enforcement,¹⁷⁹ malicious prosecution claims implicate the scope of the Fourth Amendment, the legitimacy of substantive due process, and the nature of federalism. After addressing these constitutional questions, this Part will respond to a tort-based objection—that the continuation of the criminal process is a superseding cause cutting off the police officer’s liability.

174. *Malley v. Briggs*, 475 U.S. 335, 345–46 (1986); see also *Franks v. Delaware*, 438 U.S. 154, 169 (1978) (“[T]he hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct.”).

175. *Albright*, 510 U.S. at 301 (Stevens, J., dissenting); see also Amar, *Criminal Procedure*, supra note 109, at 40 (“[T]he Fourth Amendment clearly speaks to substantive as well as procedural unfairness . . .”).

176. *Kerr v. Lyford*, 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., specially concurring).

177. See Jacques L. Schillaci, Note, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 Nw. U. L. Rev. 439, 460 n.172 (2002) (“The constitutional tort of malicious prosecution was significant enough to arouse the concern of the Supreme Court in *Albright*. Indeed, the justices evidently found it sufficiently divisive that they were unable to reach any consensus on the matter.”).

178. See supra text accompanying note 7.

179. See supra text accompanying notes 154–166.

A. Constitutional Questions

A Fourth Amendment right to be free from malicious prosecution raises questions as to the definition of “seizure,” the relationship between the Fourth Amendment and substantive due process, and the proper role of the federal courts.

1. *The Scope of the Fourth Amendment.* — The outer limits of the Fourth Amendment’s protections are uncertain. “Between arrest and sentencing lies something of a legal twilight zone.”¹⁸⁰ After holding in *Graham v. Connor* that the Fourth Amendment, not substantive due process, governs claims of excessive force during a “seizure,” the Court left unresolved “the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins.”¹⁸¹ This uncertainty over the scope of the Fourth Amendment’s guarantee that police interferences with individual liberty be executed in a reasonable manner has also created uncertainty over the scope of the concomitant guarantee that such interferences have a reasonable justification¹⁸²—the guarantee at stake in malicious prosecution claims.

Part II revealed that the interests protected by the Fourth Amendment include those threatened by malicious prosecution,¹⁸³ but that Amendment, far from being a catchall provision guaranteeing reasonableness in all sovereign-subject relationships, only protects these interests if they are impaired by unreasonable searches or seizures. Submitting to an arrest warrant or another assertion of legal authority constitutes a seizure triggering the Fourth Amendment.¹⁸⁴ Adoption of the continuing seizure theory touted by Justice Ginsburg would further define the scope of damages recoverable in a § 1983 suit.¹⁸⁵

180. *Wilson v. Spain*, 209 F.3d 713, 715–16 (8th Cir. 2000) (applying Fourth Amendment analysis to arrestee’s excessive force claim, though noting that if such a claim fails to satisfy that burden it will certainly fail any substantive due process analysis).

181. 490 U.S. 386, 395 n.10 (1989).

182. See *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (“[I]t is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out.”); see also Rubin, *supra* note 32, at 867 (“[The Fourth Amendment] has been held to mean not only that searches must be reasonable in terms of justification, but that they must be conducted in a reasonable manner.”).

183. See *supra* text accompanying notes 114–115.

184. See *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (Rehnquist, C.J., plurality opinion); *California v. Hodari D.*, 499 U.S. 621, 626 (1991); see also Amar, *Criminal Procedure*, *supra* note 109, at 39 (discussing search and seizure as Fourth Amendment “triggers”).

185. *Albright*, 510 U.S. at 277–79 (Ginsburg, J., concurring). Note that although a seizure triggers the Fourth Amendment’s protections, a seizure that falls short of the restraints of arrest may be justified by reasonable suspicion less than probable cause. See *Terry v. Ohio*, 392 U.S. 1, 20–27 (1968). Thus, liberty restrictions that constitute a continuing seizure but not a full arrest do not require a finding of probable cause.

The continuing seizure theory has been used to fill the apparent gap in constitutional protection of a pretrial suspect.¹⁸⁶ The Second, Third, and Eighth Circuits have held that postarrest, pretrial restrictions on a suspect's liberty can amount to a "seizure" meriting Fourth Amendment protection.¹⁸⁷ However, the First, Fourth, and Seventh Circuits have rejected the concept of continuing seizure.¹⁸⁸

Although the definition of a government "seizure" has been contracted so as "[t]o avoid some of the absurdities created by the so-called warrant and probable cause requirements,"¹⁸⁹ judges appear more sympathetic to continuing seizure in the context of malicious prosecution claims.¹⁹⁰ Indeed, Judge Posner, the author of an early opinion rejecting continuing seizure,¹⁹¹ recently expressed doubts about that position in a § 1983 malicious prosecution case. Regarding the effect of *Newsome v. McCabe* on such claims,¹⁹² he wrote, "perhaps that decision will provoke a reexamination of the issue [of continuing seizure]—it is shocking to think that a police frame-up which lands a person on death row is not a constitutional tort, though every false arrest made without probable cause is."¹⁹³

While a majority of the Court has not yet expressly endorsed continuing seizure, the Court's habeas corpus jurisprudence offers a persuasive

186. Full discussion of continuing seizure is beyond the scope of this Note, but some observations seem warranted.

187. See *Wilson v. Spain*, 209 F.3d 713, 715–16 (8th Cir. 2000); *Gallo v. City of Phila.*, 161 F.3d 217, 222–25 (3d Cir. 1998); *Murphy v. Lynn*, 118 F.3d 938, 945–46 (2d Cir. 1997). The Fifth Circuit had joined these courts in recognizing continuing seizure. *Evans v. Ball*, 168 F.3d 856, 860–61 (5th Cir. 1999). However, more recently the court expressed doubts about the vitality of this approach. See *Castellano v. Fragozo*, 352 F.3d 939, 959 (5th Cir. 2003) (en banc) (stating that Justice Ginsburg's continuing seizure concurrence "did not attract support in *Albright* and we need not here further define its limits").

188. See *Nieves v. McSweeney*, 241 F.3d 46, 55–57 (1st Cir. 2001); *Riley v. Dorton*, 115 F.3d 1159, 1162–64 (4th Cir. 1997) (en banc); *Wilkins v. May*, 872 F.2d 190, 192–94 (7th Cir. 1989) (Posner, J.).

189. *Amar*, Criminal Procedure, supra note 109, at 19; cf. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in the judgment) ("Our intricate body of law regarding 'reasonable expectation of privacy' has been developed largely as a means of creating [warrant-requirement] exceptions, enabling a search to be denominated not a Fourth Amendment 'search' and therefore not subject to the general warrant requirement.").

190. See *Gallo*, 161 F.3d at 224 (noting that of courts of appeals expressing doubts about continuing seizure, "none appear to have rejected such a theory in the context of a malicious prosecution claim"). But see *Nieves*, 241 F.3d at 55–57 (doing just that).

191. *Wilkins*, 872 F.2d at 190.

192. 256 F.3d 747 (7th Cir. 2001).

193. *Gauger v. Hendle*, 349 F.3d 354, 359 (7th Cir. 2003) (Posner, J.). Use of the adjective "shocking" hints at substantive due process, with its "shocks the conscience" standard for police conduct, see *County of Sacramento v. Lewis*, 523 U.S. 833, 846–50 (1998), and *Rochin v. California*, 342 U.S. 165, 172 (1952), but the *Albright* decision precludes such a claim, see supra note 107 and accompanying text. Note that Judge Posner also described the circumstances of *Albright's* arrest as "shocking." *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992).

analogue in its expansive interpretation of “custody.” The habeas statute requires that an application for the writ be filed by a person “in custody.”¹⁹⁴ As the Court recently remarked in the habeas case *Rumsfeld v. Padilla*, “our understanding of custody has broadened to include restraints short of physical confinement.”¹⁹⁵ A similar expansion of “seizure” is appropriate in the Fourth Amendment context for restraints short of pretrial detention. “[B]oth seizure and custody concern governmental restriction of the freedom of those suspected of crime.”¹⁹⁶ Neither Justice Ginsburg in her *Albright* concurrence nor other Justices elsewhere have declared the habeas “in custody” jurisprudence as analogous to or even relevant to Fourth Amendment “seizure” jurisprudence. However, a few courts of appeals have noted the parallels.¹⁹⁷ The Court’s maintenance of this broad “custody” standard suggests it is potentially willing to reexamine continuing seizure.

Critics argue that “maybe the Constitution is not a seamless web, and contains gaps that courts are not authorized to fill either by stretching the Fourth Amendment or by invoking the nebulous and historically much-abused concept of substantive due process.”¹⁹⁸ This view, however, is out of line with Fourth Amendment jurisprudence. As the plurality noted in *Albright*, “[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it.”¹⁹⁹ That consideration would amount to very little if a suspect’s pretrial liberty received no protection whatsoever past the moment of arrest.

2. *Substantive Due Process.* — The debate over continuing seizure reflects differences not only over the scope of the Fourth Amendment’s own coverage but also over the relationship between that Amendment and substantive due process. In addition to complicating the definition of “seizure,” placing a right to be free from malicious prosecution within the Fourth Amendment raises the question of whether the right described is really a substantive due process claim dressed up in the rhetoric of the Fourth Amendment.²⁰⁰

194. 28 U.S.C. §§ 2241(c)(3), 2254(a) (2000).

195. 542 U.S. 426, 437 (2004); see also *id.* at 437 n.10 (listing “landmark cases addressing the meaning of ‘in custody’ under the habeas statute”).

196. *Gallo v. City of Phila.*, 161 F.3d 217, 223 (3d Cir. 1998) (making comparison while adopting continuing seizure).

197. See *Johnson v. City of Cincinnati*, 310 F.3d 484, 491–92 (6th Cir. 2002) (citing *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 301 (1984), while avoiding resolution of question of continuing seizure); *Gallo*, 161 F.3d at 223 (citing *Lydon* while deciding to adopt continuing seizure); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997) (same).

198. *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989) (rejecting continuing seizure).

199. 510 U.S. 266, 274 (1994) (Rehnquist, C.J., plurality opinion).

200. See *supra* notes 108–117 and accompanying text. Such a position would avoid the concern over the “stretching” of seizure.

The connections between the Fourth Amendment and substantive due process have been noted.²⁰¹ Despite *Albright*, at least one court of appeals has used substantive due process to uphold a malicious prosecution claim.²⁰² Furthermore, Professor Colb's argument that imprisonment pursuant to a conviction should trigger strict scrutiny under substantive due process analysis has comparable implications for pretrial impositions on liberty.²⁰³

The choice between the two provisions, however, may be theoretically inconsequential. Professor Rubin notes that conscience-shocking behavior would never be reasonable and so "the Fourth Amendment can be understood to provide the measure of substantive due process protection concerning the manner in which searches are conducted."²⁰⁴ This applies equally to the protection concerning the justification for police conduct, the aspect of the Fourth Amendment's reasonableness guarantee challenged by a malicious prosecution claim. Although it confined itself to seizures, "including the detention of suspects pending trial," the Court in *Gerstein v. Pugh* stated that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due.'"²⁰⁵ The debate over continuing seizure aside, this view of the Fourth Amendment as incorporating pretrial substantive due process rights renders this objection a merely superficial challenge.

However, given the Court's aversion to substantive due process claims in general,²⁰⁶ and in this particular context,²⁰⁷ and its silence on the Fourth Amendment nature of the claim, the Fourth Amendment ground may prove more fruitful in practice.

3. *Federalism*. — The controversy over malicious prosecution's status as a constitutional tort also reflects disagreement over the proper role of the federal courts. This disagreement exposes the tension between

201. See *supra* notes 109–113 and accompanying text.

202. See *Moran v. Clarke*, 296 F.3d 638, 643–48 (8th Cir. 2002) (en banc) ("[W]hen a person is damaged by outrageous police misconduct but the resulting injury does not neatly fit within a specific constitutional remedy, the injured party may, depending upon the circumstances, pursue a substantive due process claim under section 1983.").

203. See Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781, 841–44 (1994).

204. Rubin, *supra* note 32, at 867–68 ("The practical consequence ought to be insignificant . . ."). However, unreasonable behavior might not shock the conscience.

205. 420 U.S. 103, 125 n.27 (1975); see also *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50–51 (1993) (discussing *Gerstein* while noting "that the Fourth Amendment is [not] the beginning and end of the constitutional inquiry whenever a seizure occurs").

206. See, e.g., Rubin, *supra* note 32, at 833 ("[T]he Court continues sporadically to generate rules that seem to undermine [substantive due process's] legitimacy, rules that appear to reflect continuing deep discomfort with the project of substantive due process.").

207. See *supra* note 107 and accompanying text.

Monroe and *Parratt*.²⁰⁸ On the one hand, as the Court has frequently made clear, § 1983 was enacted to ensure a federal role in protecting federal rights from violation by state actors. This is the teaching of *Monroe v. Pape*²⁰⁹ and *Mitchum v. Foster*,²¹⁰ for example. On the other hand, the *Parratt v. Taylor* line of cases emphasizes greater deference to state actors and state law.²¹¹ In the context of malicious prosecution, this tension ought to be resolved in *Monroe's* favor, and not just because that would be "gratifying for plaintiffs and their lawyers."²¹²

As a purely doctrinal matter, *Parratt* does not affect § 1983 claims for violations of incorporated provisions of the Bill of Rights such as the Fourth Amendment.²¹³ This limitation on *Parratt's* reach is not, as Justice Kennedy contends, "a mere pleading exercise."²¹⁴ Rather, this limitation is essential to the preservation of "the fundamental transformation of the relationship between federal and state power in our constitutional structure wrought by the Fourteenth Amendment."²¹⁵ So long as the scope of the Fourth Amendment covers a right to be free from malicious prosecution, *Parratt's* strictures do not apply, and federal relief is still available under *Monroe*.

208. See Chemerinsky, *supra* note 17, § 8.9, at 561 (discussing "the underlying tension between the cases"); Hart & Wechsler, *supra* note 17, at 1109–10 & n.4 (discussing *Albright* in light of tension between *Parratt* and *Monroe*).

209. 365 U.S. 167 (1961). In *Monroe*, the Court found that one reason [§ 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

...

... The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

Id. at 180–83.

210. 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880))).

211. 451 U.S. 527 (1981); see also *supra* notes 26–30 and accompanying text.

212. *Albright v. Oliver*, 975 F.2d 343, 347 (7th Cir. 1992) (Posner, J.).

213. See *supra* note 32 and accompanying text.

214. *Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring in the judgment) ("The *Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims . . . and by treating claims based on the Due Process Clause as claims based on some other constitutional provision.").

215. Rubin, *supra* note 32, at 887. To Justice Kennedy's argument that *Parratt* has been unjustifiably evaded, 510 U.S. at 285 (Kennedy, J., concurring in the judgment), Prof. Rubin persuasively responds: "Different causes of action aren't just labels. . . . [I]n choosing to allege a violation of one doctrine rather than another, one has not merely 'evaded' the doctrinal restrictions of the claim one has chosen not to urge." Rubin, *supra* note 32, at 883.

Moreover, while *Parratt's* rule does not require restricting relief to a state forum, neither do the policy rationales supporting *Parratt*. Professor Fallon, a self-described critic of *Parratt*,²¹⁶ nonetheless amasses three policies underlying that case, which he would recast “as an abstention decision.”²¹⁷ Such claims, the argument goes, should be kept out of federal court in order to: (1) reduce the burden on the federal docket; (2) avoid constitutional issues, especially difficult ones like substantive due process; and (3) avoid interference with state authority.²¹⁸

These justifications, though worth considering, should not close the federal courthouse door to § 1983 malicious prosecution claims.

First, it seems that as long as there are federal courts, there will be cries seeking to reduce their workload.²¹⁹ But as Justice Harlan pointed out, the need to conserve scarce judicial resources reduces simply to a question of prioritization:

[T]he question appears to be how Fourth Amendment interests rank on a scale of social values compared with, for example, the interests of stockholders defrauded by misleading proxies. . . . [W]hen we automatically close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests.²²⁰

The skeptic may respond, however, that despite the high regard for the Fourth Amendment in general, malicious prosecution claims, since they typically involve only insignificant injuries, should be limited to state courts. In the case of a suspect released before trial, a malicious prosecution may harm the accused's reputation, security, and property, but these injuries amount to very little, especially when compared with injuries to a suspect detained in jail. As one circuit judge objecting to continuing seizure noted, the belief “that release on one's own recognizance is analogous to being held in jail . . . is a view that no one in a cell is likely to share.”²²¹ And so malicious prosecutions may, it is argued, safely be confined to the state forum.²²²

216. Fallon, *supra* note 32, at 344 (“Were the judgment mine, I would reject *Parratt* as both mistakenly reasoned and wrongly decided and would allow plaintiffs to bring their substantive due process claims in federal court, where state tort claims could also be brought under established principles of pendent or ‘supplemental’ jurisdiction.”); cf. Rubin, *supra* note 32, at 880 (describing Professor Fallon as “articulating the most comprehensive argument that would support applying” *Parratt* as confining certain claims to state courts).

217. Fallon, *supra* note 32, at 311.

218. *Id.* at 348–50.

219. Various reforms have been proposed, notably in 1969, 1990, and 1996. See Hart & Wechsler, *supra* note 17, at 49–50 (“By most if not all accounts, the federal district courts are seriously overtaxed by their current caseloads . . .”).

220. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410–11 (1971) (Harlan, J., concurring in the judgment) (citation omitted).

221. *Murphy v. Lynn*, 118 F.3d 938, 953 (2d Cir. 1997) (Jacobs, J., dissenting).

222. See, e.g., *Webster v. Doe*, 486 U.S. 592, 611–14 (1988) (Scalia, J., dissenting) (rejecting “some general principle that *all* constitutional violations must be remediable in

This objection to the size of the injury should not be used to keep the constitutional tort out of federal courts. Perhaps federal judges do not want to bother with small sums, but that disinclination is especially out of place in a § 1983 suit. The 1871 statute lacked an amount in controversy requirement,²²³ a noteworthy omission because until 1980 federal question jurisdiction had such a requirement,²²⁴ as diversity jurisdiction continues to have.²²⁵ The minimal harm is relevant to damages, but it should not affect liability.²²⁶ Nor does this vitiate the deterrence function. The fact that damages may be small “is not necessarily a criticism of the tort remedy. The goal is not simply to deter violations of the Fourth Amendment; it is optimum deterrence. . . . [I]f the costs of the violation are slight, so should be the sanction.”²²⁷ For these reasons, the perceived need to ease the burden on the federal courts does not justify excluding malicious prosecution claims.

Nor does *Parratt*'s second goal—avoiding constitutional issues—have much force in this context. The federal courts are fully qualified to handle malicious prosecution claims without merely stabbing in the dark. Two sources of law are readily available to guide their exercise of judicial authority in this field. In general, § 1983 jurisprudence is informed by state tort law. Common law tort rules “provide the appropriate starting point” for constitutional tort liability under § 1983.²²⁸ More specifically, since § 1983 malicious prosecution claims are the monetary damages equivalent of *Franks v. Delaware* suppression claims,²²⁹ the federal courts already have a well-developed body of law at hand. Thus, there is no need to fear the constitutional issues raised by these claims.

Finally, the *Parratt* goal of avoiding interference with state authority should not preclude federal relief. In part, this counterargument stems

the courts”); Fallon, *supra* note 32, at 311, 313, 337–38 (“The dictum of *Marbury v. Madison* notwithstanding, there is no right to an individually effective remedy for every constitutional violation.” (footnote omitted)).

223. See Ku Klux Klan Act, ch. 22, 17 Stat. 13 (1871) (codified as amended at 28 U.S.C. § 1343(a)(3) (2000)). See generally Hart & Wechsler, *supra* note 17, at 1081 (discussing jurisdiction over § 1983 actions).

224. See Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369, 2369 (codified at 28 U.S.C. § 1331); Hart & Wechsler, *supra* note 17, at 1093 (noting that elimination of amount in controversy requirement in § 1331 renders § 1343(a)(3) “superfluous”).

225. 28 U.S.C. § 1332(a).

226. See *Gallo v. City of Phila.*, 161 F.3d 217, 225 (3d Cir. 1998).

227. Posner, *supra* note 114, at 59 (rebutting critique of tort remedies presented by Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 *Minn. L. Rev.* 493 (1955)).

228. *Carey v. Phipus*, 435 U.S. 247, 257–58 (1978); see also *Albright v. Oliver*, 510 U.S. 266, 277 n.1 (1994) (Ginsburg, J., concurring) (“In my view, the constitutional tort 42 U.S.C. § 1983 authorizes stands on its own, influenced by the substance, but not tied to the formal categories and procedures, of the common law.”). After *Albright*, the circuits are divided over precisely how the common law tort rules should inform § 1983 malicious prosecution claims. See *supra* Part I.C.

229. See *supra* Part II.A.

from the same low regard for malicious prosecution claims that motivates the scarce judicial resources argument.²³⁰ This critique also ignores the fact that the claim incorporates screening elements, such as the malice requirement,²³¹ and is subject to the official immunity doctrine's respect for state action.²³²

Moreover, the nature of federalism and the reliability of the state courts further rebut the notion that federal relief for such claims causes undue interference with state sovereignty. Federalism does not automatically require deference to state authority. Rather, there is much support for the view that "[t]he Framers split the atom of sovereignty"²³³ partially in order to preserve citizens' liberty by enabling each sovereign to check the other.²³⁴ The creation of "two political capacities, one state and one federal, each protected from incursion by the other,"²³⁵ was meant to alleviate the potential for government oppression.

In *Gregory v. Ashcroft*, the Court expressly endorsed this goal of federalism, quoting Alexander Hamilton²³⁶ and James Madison²³⁷ at great length.²³⁸ The Court stated:

Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the

230. See *supra* text accompanying note 30.

231. See *supra* text accompanying notes 137–140, 149–153.

232. See *supra* text accompanying notes 154–164.

233. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

234. See Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 *Vand. L. Rev.* 1229, 1246–49 (1994) [hereinafter *Amar, Five Views*]; Akhil Reed Amar, *Using State Law to Protect Federal Constitutional Rights: Some Questions and Answers About Converse-1983*, 64 *U. Colo. L. Rev.* 159, 176–77 (1993).

235. *U.S. Term Limits*, 514 U.S. at 838.

236. Hamilton argued:

Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. *If their rights are invaded by either, they can make use of the other as the instrument of redress.*

The *Federalist* No. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

237. Madison argued:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence *a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.*

Id. No. 51, at 323 (James Madison) (emphasis added).

238. 501 U.S. 452, 457–59 (1991).

States and the Federal Government will reduce the risk of tyranny and abuse from either front.²³⁹

This conception of federalism, in tune with *Monroe v. Pape*, suggests that the federal government should stand ready to relieve abuses by state officials. One of the mechanisms for utilizing the federal power “to protect our liberties against the excesses of state law enforcement” is a private action under § 1983.²⁴⁰

While the preceding suggests that federal courts should generally be receptive to claims of state oppression, malicious prosecution claims in particular require a federal forum because such claims, more so than other § 1983 claims, call into doubt the reliability of state courts.

At its root, the tension between *Monroe* and *Parratt* arises because *Monroe* “rests on a premise of distrust of state courts” while “*Parratt*, by contrast, assumes that state courts generally can be trusted to adjudicate cases involving claims against state officials under the Due Process Clause.”²⁴¹

At first blush, a malicious prosecution claim appears no more critical of state courts than an excessive force claim. Both typically allege misconduct by a few bad apples but need not challenge the conduct or character of the rest of the participants in the criminal justice system. However, even if the initial misconduct in a malicious prosecution was executed by a single official, when the rest of the system unwittingly perpetuates the initial wrong, the mere continuation of the wrong brings into question the competency of the system as a whole. And to the extent that the initial malicious prosecutor was able to pull the wool over the other participants’ eyes, this allegation of incompetence in the state criminal system seems most likely to result from excessive deference to state officials. Thus, the competency of the state court—an issue raised by malicious prosecution claims but not by excessive force or other § 1983 claims²⁴²—implicates the reliability of the state court. Malicious prosecution claims,

239. *Id.* at 458.

240. *Idaho v. Horiuchi*, 253 F.3d 359, 361 (9th Cir. 2001) (en banc), vacated as moot, 266 F.3d 979 (9th Cir. 2001) (en banc); see also Amar, *Five Views*, *supra* note 234, at 1231 (describing § 1983 “as a towering example” of a method for “policing state compliance with constitutional norms” to “reduce and remedy state threats to individual liberty”).

241. Fallon, *supra* note 32, at 355.

242. This competency issue is, however, raised by claims relating to the exclusionary rule, where the trial court’s willingness to admit the evidence arguably continues the initial misconduct, even if it “work[s] no new Fourth Amendment wrong.” *United States v. Calandra*, 414 U.S. 338, 354 (1974). In *Stone v. Powell*, 428 U.S. 465 (1976), the Court rejected the notion that state courts were not sufficient guardians of the Fourth Amendment interests protected by the exclusionary rule. The Court held that exclusionary rule challenges are not cognizable on federal habeas review of state court judgments and rejected the “policy arguments” for federal review that

stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. . . . [W]e are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like

therefore, necessarily undermine the empirical premise supporting *Parratt*.

Although the federalism issues implicated by a constitutional tort of malicious prosecution are significant, neither current doctrine nor policy rationales compel denying federal relief on the basis of *Parratt*.

B. Tort Critique

The preceding section raised the question of the significance of the perpetuation of the police officer's original wrong. However, tort liability is limited to injuries caused by the actor's violation of a legal duty. On this basis, a malicious initiator of a prosecution may argue that subsequent acts along the criminal procedure timeline, such as an indictment, break the chain of causation and limit liability for the initiation. This argument essentially replicates the dividing line between malicious prosecution and false arrest: Just as the wrongful jailer's liability is cut off by the issuance of process,²⁴³ the malicious initiator's liability, it is argued, is cut off by continuance of the prosecution.

This theory of causation has rightly been rejected. As the Court noted in *Malley v. Briggs*, § 1983 incorporates the tort principle "that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link.²⁴⁴ The common law treats a magistrate's commitment or an indictment as "important evidence" relating to the plaintiff's burden of proving a want of probable cause, but not as dispositive evidence precluding the plaintiff from making the prima facie case.²⁴⁵

Given the heightened culpability requirement, it would be incongruous to let perjurious or reckless officers "hide behind the officials whom they have defrauded."²⁴⁶ This reading is also more consistent with the Framers' "general mistrust of officialdom":

federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Id. at 493 n.35. This reflects the classic *Monroe/Parratt* tension. However, *Stone v. Powell* appears to be an aberration, a step along the path toward making federal habeas relief available only for claims of innocence. See, e.g., id. at 515–16 (Brennan, J., dissenting). That path was not taken. See *Withrow v. Williams*, 507 U.S. 680, 682–83 (1993) (holding that *Miranda* claims are cognizable on habeas review).

243. See supra note 167 and accompanying text.

244. 475 U.S. 335, 345 n.7 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

245. See Keeton et al., supra note 6, § 119, at 881 (noting that some states require proof of "fraud, corruption or falsification in the magistrate's court" to overcome inference of probable cause from these subsequent rulings); see also Restatement (Second) of Torts § 663(2) (1977) (discussing significance of a "magistrate's commitment"); id. § 664(2) (discussing significance of a grand jury indictment).

246. *Jones v. City of Chi.*, 856 F.2d 985, 994 (7th Cir. 1988) (Posner, J.).

The use of the magistrate as a shield against liability would be the opposite of what the draftsmen of the warrant clause intended. Had they not been particularly concerned about magistrates issuing warrants that police would hide behind, they would have had no reason to include a separate warrant clause.²⁴⁷

Thus, while issues of superseding causation may present case-specific difficulties for a claim, the principle does not negate wholesale a constitutional tort of malicious prosecution.

CONCLUSION

In *Albright v. Oliver*, the Court addressed the question of malicious prosecution's status as a constitutional tort. However, since a Fourth Amendment claim was not squarely presented, the Court avoided that dimension of the issue. This dodge left the status of malicious prosecution claims under § 1983 unresolved and subject to debate in the lower courts. This Note has placed the tort directly within the sphere of interests protected by the Fourth Amendment. The tort elements of initiation of prosecution, want of probable cause, and malice correspond to the standards already established for deciding whether the Fourth Amendment has been violated and evidence must be suppressed pursuant to *Franks v. Delaware*. The parallel relief of § 1983 liability is an appropriate remedy on similar facts. Recognizing malicious prosecution as a constitutional tort may help restore the tort remedy to its rightful place, rescuing it from the shadows of the exclusionary rule.

247. Posner, *supra* note 114, at 72-73.