THE DEMISE OF § 1983 MALICIOUS PROSECUTION: SEPARATING TORT LAW FROM THE FOURTH AMENDMENT

*Erin E. McMannon**

Introduction

"Actions for malicious prosecution are regarded by law with jealousy and they ought not to be favored but managed with great caution."[1] Despite this common sentiment among courts, every state recognizes the common-law tort of malicious prosecution. After the Supreme Court's decision in *Albright v. Oliver*,[2] the first time the Court addressed *federal* malicious prosecution claims under 42 U.S.C. § 1983, lower federal courts spent twenty-three years trying to define the constitutional tort of malicious prosecution.[3] What are the elements of the claim? What constitutional provision, if any, does a malicious prosecution violate? Does an independent claim for malicious prosecution under § 1983 even exist? In 2017 in *Manuel v. City of Joliet*,[4] the Supreme Court appeared ready to answer these questions and to resolve the various circuit splits surrounding federal malicious prosecution claims. As it turns out, the Court mostly ignored the malicious prosecution question, once again leaving the lower courts without guidance.[5] This Note suggests that the confusion in this area of law derives from the use of the language of malicious prosecution tort law to describe what really amounts to a Fourth Amendment seizure claim under § 1983. There is no constitutional right to be free from malicious prosecution. The better lens through which to ana-

* Candidate for Juris Doctor, Notre Dame Law School, 2019; Bachelor of Arts in History Honors and Political Science, University of Notre Dame, 2014. I would like to thank Professor Jennifer Mason McAward for her continuous support and guidance throughout the writing process, Professor A.J. Bellia for his helpful comments and advice on this Note, and the members of the *Notre Dame Law Review* for their tireless and diligent editing. Most of all, I thank my family and friends for their constant love and encouragement. All errors are my own.

1 Roblyer v. Hoyt, 72 N.W.2d 126, 128 (Mich. 1955) (quoting Van Sant v. Am. Express Co., 158 F.2d 924, 931 (3d Cir. 1946)).

2 510 U.S. 266 (1994) (plurality opinion); *see infra* Section I.B.

3 *See infra* Section II.C.

4 137 S. Ct. 911 (2017). *See generally infra* Part II.

5 *See Manuel*, 137 S. Ct. at 922. *See generally infra* Part II.

lyze these claims, as the Court acknowledged in both *Albright* and *Manuel*, is the Fourth Amendment.[6]

The common-law tort of malicious prosecution originally developed to provide a remedy for plaintiffs who were unjustly prosecuted in a criminal proceeding. Today, malicious prosecution actions can be brought to redress wrongful civil actions as well.[7] The "central thrust" of an action for malicious prosecution is a right not to be involved in an unjustified litigation.[8]

A malicious prosecution plaintiff at common law must show that the "prior proceeding: (1) was maliciously instigated or continued by the defendant, without probable cause; (2) was terminated in the plaintiff's favor; and (3) damaged the plaintiff."[9] "Malice," as used in the malicious prosecution context, "involves an intentional wrongful act done without legal justification" and "may consist of any improper and wrongful motive for bringing a criminal proceeding and does not require hatred of, or ill will toward, the plaintiff."[10] It is a term of art that "refers to the defendant's objective, not his attitude."[11]

Part I of this Note briefly discusses the history of 42 U.S.C. § 1983 and the development of the "constitutional tort" doctrine. It then summarizes the first Supreme Court § 1983 malicious prosecution case, *Albright v. Oliver*, and outlines the circuit split that developed in *Albright*'s wake. Part II describes *Manuel v. City of Joliet* and the limited circuit court caselaw that followed. Lastly, Part III of the Note asserts that the confusion surrounding

---

6 *See infra* Part III.

7 19 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 93.01(1), Lexis (database updated Oct. 2018).

8 *Id.* While the term "malicious prosecution" covers a wide range of conduct, this Note focuses specifically on malicious *criminal* prosecution, because that is the meaning implicated in the § 1983 "constitutional tort" of malicious prosecution. Additionally, though common-law malicious prosecution claims are not limited to actions against law enforcement officers, this Note is concerned with actions against state and local law enforcement officers because § 1983 claims can only be brought against "person[s]" acting "under color of" state law. 42 U.S.C. § 1983 (2012). In other words, § 1983 provides a cause of action against state and local officials only. This includes not only law enforcement, but other public officials such as legislators, prosecutors, judges, mayors, etc. However, suits against many public officials will not stand because the defendants are entitled to absolute or qualified immunity. *See infra* notes 144–46, 162–63 and accompanying text (describing absolute prosecutorial and judicial immunity). Therefore, actions against law enforcement are most pertinent for the purpose of this Note.

9 FRUMER & FRIEDMAN, *supra* note 7, § 93.01(3).

10 DARRELL L. ROSS, CIVIL LIABILITY IN CRIMINAL JUSTICE 52 (5th ed. 2009) (citing Davis v. Muse, 441 A.2d 1089 (Md. Ct. Spec. App. 1982)); *see also, e.g.*, Oliver v. Skinner, No. 4:09-cv-29, 2013 U.S. Dist. LEXIS 24518, at *15 (S.D. Miss. Feb. 22, 2013) ("'[T]he term "malice" in the law of malicious prosecution . . . applie[s] to prosecution instituted primarily for some purpose other than that of bringing an offender to justice.' It therefore 'does not refer to mean or evil intent as a layman might ordinarily think.'" (first alteration in original) (citation omitted) (quoting Trilogy Commc'ns, Inc. v. Times Fiber Commc'ns, Inc., 47 F. Supp. 2d 774, 780 (S.D. Miss. 1998))).

11 Strong v. Nicholson, 580 So. 2d 1288, 1293 (Miss. 1991).

§ 1983 malicious prosecution claims stems from the tendency of courts to become bogged down in semantics. By trying to force the malicious prosecution tort into the Constitution, the courts have remained faithful to neither tort principles nor constitutional principles. While Justice Alito correctly noted in his *Manuel* dissent that there is a "severe mismatch" between the Fourth Amendment and the elements of malicious prosecution, the real failing of *Manuel* was not, as Justice Alito suggested, that it refused to answer the "malicious prosecution" question.[12] Rather, the problem with *Manuel* was the Court's failure to specify the elements of the type of § 1983 claim it recognized in *Manuel*—namely, unlawful detention after the start of legal process in violation of the Fourth Amendment. Part III ends with a suggested framework for such a claim.

I. Background

In order to understand the confusion surrounding § 1983 malicious prosecution claims, it is necessary to briefly review 42 U.S.C. § 1983 and the rise of the "constitutional tort," as well as the Supreme Court's subsequent effort to rein in § 1983 liability. After this review, this Part proceeds to describe the Supreme Court's decision in *Albright v. Oliver* and the resulting circuit split.

A. Section 1983 and the Development of the Constitutional Tort Doctrine

Shortly after the Civil War, Congress passed the Ku Klux Klan Act of 1871 in response to the breakdown of justice in Southern states during Reconstruction.[13] The first section of the Act, codified today at 42 U.S.C. § 1983, provides a federal remedy for persons whose constitutional rights have been violated by state officials.[14] Until 1961, plaintiffs primarily used § 1983 to challenge state laws that allegedly violated the Constitution.[15] In *Monroe v. Pape*, however, the Supreme Court interpreted § 1983 to have a broader scope. Specifically, the Court affirmed that § 1983 applies to actions

12 Manuel v. City of Joliet, 137 S. Ct. 911, 925 (2017) (Alito, J., dissenting).

13 *See* Monroe v. Pape, 365 U.S. 167, 171 (1961); Kristin J. Brandon, Case Note, *Taking the Tort Out of Constitutional Law: The "Constitutional Tort" of Malicious Prosecution,* Albright v. Oliver*, 114 S. Ct. 807 (1994)*, 63 U. Cin. L. Rev. 1447, 1451 (1995).

14 *Monroe*, 365 U.S. at 171; Jacob Paul Goldstein, Note, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 Colum. L. Rev. 643, 644 (2006). The statute reads:

> 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 (2012).

15 Brandon, *supra* note 13, at 1452; *see also* Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441, 1446 (1989).

that violate state law as well as actions taken pursuant to state law.[16] Under *Monroe*, plaintiffs may use § 1983 to challenge both the constitutionality of state laws and policies, and the actions of state officials that violate state laws or policies and the Constitution.[17]

The Court's decision in *Monroe* significantly increased the scope of liability under § 1983, creating what has come to be known as the "constitutional tort."[18] The scope of § 1983 liability continued to expand in the lower courts[19] until 1976 when the Supreme Court began to rein in the reach of constitutional torts in *Paul v. Davis*.[20] There, then-Justice Rehnquist made clear that not all tort injuries inflicted by the state as the tortfeasor implicated federal constitutional rights. He held that such an interpretation would "make of the Fourteenth Amendment a font of tort law," which is not what Congress intended when it passed § 1983.[21] In the 1980s, *Parratt v. Taylor*[22] restricted access to federal remedies by holding that "availability of an adequate state remedy precluded the finding of constitutional deprivation required to maintain a section 1983 cause of action."[23] Then, in *Daniels v. Williams*, the Court held that negligent acts by state officials do not provide the requisite deprivation for a due process claim under § 1983.[24] "Historically," Justice Rehnquist wrote, "[the Fourteenth Amendment's] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property . . . . [I]t serves to prevent govern-

16 *Monroe*, 365 U.S. at 184 (citing United States v. Classic, 313 U.S. 299, 326 (1941)); *see also* Brandon, *supra* note 13 at 1453.

17 Abernathy, *supra* note 15, at 1446.

18 Professor Marshall Shapo coined this term in his article analyzing *Monroe*. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965). The Court in *Monroe* indicated that § 1983 "should be read against the background of tort liability." *Monroe*, 365 U.S. at 187. Courts agree that constitutional torts are different from their common-law counterparts, but have struggled to define the boundary between the two. *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 201 (1984).

19 *See, e.g.*, Whirl v. Kern, 407 F.2d 781, 787–89 (5th Cir. 1968) (relying on *Monroe* to suggest that a § 1983 claim should be read in a manner consistent with common-law tort principles); *see also* Brandon, *supra* note 13, at 1455–56.

20 424 U.S. 693 (1976).

21 *Id.* at 701; Brandon, *supra* note 13, at 1457. The Court "emphasized that the Due Process Clause should not be 'superimposed' upon the various state law torts." *Id.* (quoting *Paul*, 424 U.S. at 701).

22 451 U.S. 527 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986).

23 Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 646 (1987). *Parratt* was further limited and qualified in subsequent cases. *See Daniels*, 474 U.S. 327. *But see* Zinermon v. Burch, 494 U.S. 113 (1990) (expanding *Parratt*'s holding to deprivations of liberty, but also indicating that for a postdeprivation remedy to be adequate under the Fourteenth Amendment, the deprivation must have been truly unforeseeable by the state); Hudson v. Palmer, 468 U.S. 517 (1984) (extending *Parratt* to intentional deprivations of property).

24 *Daniels*, 474 U.S. at 330–31.

mental power from being 'used for purposes of oppression.'"[25] Mere negligence does not implicate those concerns.[26] Not all common-law duties owed by officials acting under color of state law were "somehow constitutionalized by the Fourteenth Amendment."[27]

The decisions addressing "constitutional torts" raised more questions than they answered, leaving lower courts to puzzle over the scope of liability under § 1983. The lower courts' treatment of § 1983 malicious prosecution claims, and the Court's fractured opinion in *Albright v. Oliver*,[28] exemplified this struggle.[29]

B. Albright v. Oliver

The Supreme Court first addressed § 1983 malicious prosecution claims in the case of *Albright v. Oliver*. Although prior to *Albright* the appellate courts dealt extensively with such claims, they could not agree on the proper analysis for evaluating the constitutional tort.[30] As it turned out, neither could the Supreme Court. In a plurality opinion, four concurring opinions, and a dissent, the Court agreed on little more than the dismissal of Albright's complaint. Five Justices did agree that Albright should have brought his claims under the Fourth Amendment, but they disagreed about the scope and elements of any such claim.

The Court considered Albright's § 1983 claim that the defendant deprived him of his right to be free from prosecution without probable cause under the substantive Due Process Clause of the Fourteenth Amendment.[31] After observing that "the Court has always been reluctant to expand the concept of substantive due process,"[32] Chief Justice Rehnquist explained that incorporation of the Bill of Rights by the Fourteenth Amendment protects against arbitrary abuses of power by the government and diminishes any need to expand substantive due process.[33] "Where a particular Amendment 'provides an explicit textual source of constitutional protection' . . . 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[34] Against this background,

25 *Id.* at 331–32 (citations omitted) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)).

26 *Id.*

27 *Id.* at 335.

28 510 U.S. 266 (1994) (plurality opinion).

29 Brandon, *supra* note 13, at 1459–60.

30 *See id.* at 1460–62; *see also Albright*, 510 U.S. at 270 n.4 (noting that "the extent to which a claim of malicious prosecution is actionable under § 1983 is one 'on which there is an embarrassing diversity of judicial opinion,'" and describing said "diversity" (quoting Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992))).

31 Albright's claim was narrow—he neither claimed that the State of Illinois denied him procedural process due under the Fourteenth Amendment, nor a violation of his Fourth Amendment rights to be free from search and seizure. *Albright*, 510 U.S. at 271.

32 *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

33 Brandon, *supra* note 13, at 1464; *see also Albright*, 510 U.S. at 272–73.

34 *Albright*, 510 U.S. at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

the Court held that the Fourth Amendment is the proper vehicle to protect against arbitrary pretrial deprivations of liberty. The Court refused, however, to opine on whether Albright's claim would succeed under the Fourth Amendment. Instead, the plurality determined merely that because a specific constitutional provision governed Albright's case, Fourteenth Amendment substantive due process did not.[35]

The myriad opinions in *Albright* demonstrated that, like the courts of appeals, the Supreme Court could not agree on the appropriate analysis for a § 1983 malicious prosecution claim. In addition to the plurality opinion, joined by Justices O'Connor, Scalia, and Ginsburg, there were four concurring opinions and a dissent.[36] Justice Scalia wrote separately to explain that the protections afforded by the Bill of Rights cannot "be supplemented through the device of 'substantive due process.'"[37] Justice Ginsburg wrote a separate opinion to expand upon her idea of a "continuing seizure" under the Fourth Amendment.[38] A third opinion, written by Justice Kennedy, concurred only in the judgment.[39] Relying on an expansive reading of *Parratt*, he noted that, while the Due Process Clause may protect interests like those protected by the common law of torts,[40] "[i]n the ordinary case where an injury has been caused . . . by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under § 1983."[41] Because Illinois had an adequate tort remedy for malicious prosecution, Albright could not invoke § 1983.[42] Conversely, Justice Souter agreed with the Court's conclusion but provided different reasoning.[43] After objecting generally to the idea that one specific constitutional provision can preempt a more general one,[44] Justice Souter claimed that because Albright had shown no injury related to the initiation of prosecution, as distinct from his ensuing time in custody, Albright should have brought his claim under the Fourth Amendment. A Fourth Amendment violation was the only cause of any injury Albright may have had.[45] Justice Stevens dissented,[46] arguing that

35 *Id.* at 274–75.

36 For a brief synopsis of the six opinions, see Goldstein, *supra* note 14, at 649–53.

37 *Albright*, 510 U.S. at 276 (Scalia, J., concurring).

38 *See id.* at 276–81 (Ginsburg, J., concurring). Justice Ginsburg explained that at common law, a person's seizure was deemed to continue up until trial, even if he were released from official custody during that time. Because "[t]he common law . . . regarded the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person," a pretrial release did not mean the defendant was not "seized." *Id.* at 277–78. Nor, argues Justice Ginsburg, should that distinction matter for purposes of a Fourth Amendment seizure, since a pretrial defendant, though released, is not "free" in the same way the average citizen is free. *Id.* at 279.

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

40 *Id.* at 283–84.

41 *Id.* at 285–86.

42 *Id.*

43 *Id.* at 286 (Souter, J., concurring in the judgment).

44 *Id.* at 286–87.

45 *Id.* at 289.

criminal prosecution is a deprivation of liberty within the meaning of the Fourteenth Amendment, and the Due Process Clause imposes a probable cause requirement on state prosecutions.[47] Thus, because the State had no probable cause, Albright appropriately brought his claim under the Fourteenth Amendment.[48]

C. *From* Albright *to* Manuel*: The Circuit Split*

In the wake of *Albright*, a complex circuit split developed that eventually led to the Court's grant of certiorari in *Manuel*. After *Albright*, the courts of appeals were left to figure out what exactly the Supreme Court held, and they lamented the lack of guidance.[49] One commentator described the significance of the common-law tort elements for purposes of § 1983 claims as the "major fault line splitting the circuits."[50] In the "Tort Circuits," plaintiffs had to satisfy the common-law elements of malicious prosecution in addition to proving the constitutional violation, while the "Constitutional Circuits" focused on whether a constitutional violation existed. But the split was not necessarily that neat. There was an additional division over which constitutional provision a § 1983 malicious prosecution claim implicates.[51] Although by the time of *Manuel* there was "broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause"[52] was the appropriate basis for a federal malicious prosecution claim under § 1983, not all circuits agreed.[53]

The First, Second, and Eleventh Circuits comprised the "Tort Circuits."[54] The First Circuit required plaintiffs to prove deprivation of some federally protected right and the elements of common-law malicious prosecution,[55] except the subjective malice element.[56] Although the First Circuit recognized the Fourth Amendment as an avenue for a § 1983 malicious prosecution claim,[57] whether an independent Fourth Amendment malicious prosecution claim is actually cognizable under § 1983 remained an open

46 *Id.* at 291 (Stevens, J., dissenting).

47 *Id.* at 295–97.

48 *Id.* at 298, 316.

49 *See* Goldstein, *supra* note 14, at 653–54 (quoting several appellate court judges commenting on the confusion created by *Albright*).

50 *Id.* at 654.

51 *See id.* at 655.

52 Manuel v. City of Joliet, 137 S. Ct. 911, 917 (2017) (quoting Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013)).

53 *See id.* at 917 n.4 (collecting cases in agreement with *Hernandez-Cuevas v. Taylor* from all circuits except the Seventh and Eighth); *see also* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2:14 (3d ed. 2007).

54 *See* Goldstein, *supra* note 14, at 654.

55 *See* Joseph G. Yannetti, Note, *Who's on First, What's on Second, and I Don't Know About the Sixth Circuit: A § 1983 Malicious Prosecution Circuit Split That Would Confuse Even Abbott and Costello*, 36 SUFFOLK U. L. REV. 513, 517–18 (2003).

56 *See* Hernandez-Cuevas v. Taylor, 836 F.3d 116, 123 (1st Cir. 2016).

57 *See* Yannetti, *supra* note 55, at 517.

question in the First Circuit.[58] Panels on the Second Circuit noted that *Albright* did not foreclose the possibility of a § 1983 malicious prosecution claim under the Fourth Amendment,[59] but also held that "[t]o determine whether a Section 1983 plaintiff has sufficiently pleaded malicious prosecution, the court 'borrow[s] the elements of the underlying malicious prosecution from state law.'"[60] Though the Fourth Amendment analysis employs an objective reasonableness standard, the Second Circuit required plaintiffs to prove the subjective malice element.[61] The Eleventh Circuit's analysis was similar to that of the Second Circuit, requiring plaintiffs to establish both the Fourth Amendment seizure and the common-law tort elements of malicious prosecution.[62]

The "Constitutional Circuits" were the Fourth, Fifth, Seventh, and Tenth Circuits.[63] The Fourth Circuit maintained its pre-*Albright* position that it remains unclear whether there is a separate constitutional right to be free from malicious prosecution.[64] Instead, it claimed that "what has been inartfully 'termed a "malicious prosecution" claim . . . is simply a claim founded on a Fourth Amendment seizure that incorporates the elements of the analogous tort of malicious prosecution.'"[65] Similarly, the Fifth Circuit, lamenting its (and its sister circuits') failure to "demand[ ] that this genre of [malicious prosecution] claims identify specific constitutional deprivations," believed this "weak discipline has permitted the blending of state tort and constitutional principles, inattentive to whether the court is adopting state law as federal law . . . or whether the court is creating a freestanding constitutional right to be free of malicious prosecution."[66] It concluded, like the Fourth Circuit, that no freestanding constitutional right to be free from malicious prosecution exists, and insisted on clarity in identifying the constitutional violations alleged.[67] The Tenth Circuit also analyzed federal malicious

58 *See* Burke v. McDonald, 572 F.3d 51, 58 n.7 (1st Cir. 2009) (quoting Nieves v. McSweeney, 241 F.3d 46, 54 (1st Cir. 2001)). The *Burke* court refused to close the question, noting "the essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort." *Id.* (quoting Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995)).

59 *See* Singer v. Fulton Cty. Sheriff, 63 F.3d 110, 114 (2d Cir. 1995); *see also* Yannetti, *supra* note 55, at 518.

60 Laboy v. County of Ontario, 668 F. App'x 391, 393 (2d Cir. 2016) (second alteration in original) (quoting Washington v. County of Rockland, 373 F.3d 310, 315 (2d Cir. 2004)).

61 *Id.*

62 *See* Yannetti, *supra* note 55, at 524.

63 *See* Goldstein, *supra* note 14, at 654.

64 *See* Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012) (quoting Snider v. Lee, 584 F.3d 193, 199 (4th Cir. 2009)).

65 *Id.* (omission in original) (quoting *Snider*, 584 F.3d at 199).

66 Castellano v. Fragozo, 352 F.3d 939, 945 (5th Cir. 2003) (en banc) ("[T]he latter appears to rest on a perception that the sum of elements borrowed from state tort law by some synergism is a constitutional right itself . . . .").

67 *Id.* Whether it was successful in achieving that "clarity" is debatable. *Id.* at 961 (Jones, J., dissenting); AVERY ET AL., *supra* note 53, § 2:14, at 83.

prosecution claims under the Fourth Amendment, and required the plaintiff to prove both the initiation or continuation of a proceeding against him, and an unreasonable seizure, to prevail.[68] The Seventh Circuit took a different approach, and at the time of *Manuel* was alone in holding that "[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention."[69] Thus, the Seventh Circuit required a tie to a specific constitutional provision, but that provision was the Fourteenth, rather than the Fourth, Amendment.[70]

The other circuits did not fit neatly into either category.[71] The Third Circuit seemed to align more closely with the Tort Circuits. It required a plaintiff alleging a § 1983 malicious prosecution claim to satisfy common-law elements of malicious prosecution, but essentially imported the Fourth Amendment seizure into the analysis as an additional element to be satisfied.[72] After several years of inconsistent application of precedent in its circuit,[73] the Sixth Circuit, recognizing that *Albright* required malicious prosecution claims based on continued detention without probable cause to be analyzed under the Fourth Amendment, "decline[d] to style [a plaintiff's] cause of action as an action for 'malicious prosecution' under § 1983" and instead "characterize[d] the cause of action simply as the right under the Fourth Amendment to be free from continued detention without probable cause."[74] The Eighth Circuit ignored *Albright* altogether and stated that "[section] 1983 only provides a remedy for violations of rights expressly secured by federal statutes or the Constitution."[75] It did not stray from circuit precedent that "uniformly held that malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury."[76] The Ninth Circuit incorporated elements of the common-law malicious prosecution tort into the § 1983 analysis, and held, "post-*Albright*, that a § 1983 malicious prosecution plaintiff must prove that the defendants acted for the purpose of depriving him of a 'specific constitutional right,' but . . . not limit[ing] that right to one protected by the Fourth Amendment."[77] By the time of *Manuel*, it was clear *Albright* had done little to resolve the "embarrass-

68 *See* Nielander v. Bd. of Cty. Comm'rs, 582 F.3d 1155, 1164–65 (10th Cir. 2009).

69 Llovet v. City of Chicago, 761 F.3d 759, 764 (7th Cir. 2014), *abrogated by* Manuel v. City of Joliet, 137 S. Ct. 911 (2017).

70 *See, e.g.*, Newsome v. McCabe, 256 F.3d 747, 750–52 (7th Cir. 2001), *abrogated by Manuel*, 137 S. Ct. 911.

71 *See* Goldstein, *supra* note 14, at 655.

72 *See* Boseman v. Upper Providence Township, 680 F. App'x 65, 68 (3d Cir. 2017).

73 *See* Yannetti, *supra* note 56, at 520–21.

74 Gregory v. City of Louisville, 444 F.3d 725, 750 (6th Cir. 2006).

75 Yannetti, *supra* note 56, at 523 (alteration in original) (quoting Kurtz v. City of Shrewsbury, 245 F.3d 753, 758 (8th Cir. 2001)).

76 *Kurtz*, 245 F.3d at 758.

77 Awabdy v. City of Adelanto, 368 F.3d 1062, 1066, 1069 (9th Cir. 2004) (citation omitted).

ing diversity of judicial opinion"[78] regarding the status of malicious prosecution as a cognizable constitutional tort under § 1983.

II. *MANUEL V. CITY OF JOLIET*

This Part examines the Supreme Court's decision in *Manuel v. City of Joliet*. It begins by summarizing the background of the case and discussing the majority and dissenting opinions, before providing an overview of the circuit courts' responses to the *Manuel* decision in the short time since it has been issued. As this analysis demonstrates, several courts remain confused about the relationship between malicious prosecution and § 1983. In Part III, this Note offers a solution, grounded in § 1983 and the Constitution, to dispel this ongoing confusion.

A. Background

On March 18, 2011, during a traffic stop, two police officers in Joliet, Illinois, removed Elijah Manuel from his vehicle and searched him.[79] Upon finding a vitamin bottle containing pills, the officers conducted a field test on the contents, which was negative for presence of any controlled substance. Without evidence that Manuel had committed a crime, the officers arrested him and took him to the Joliet police station, where an evidence technician tested the contents of the vitamin bottle. Once again, the results were negative for presence of a controlled substance.[80] Despite the negative test results, one officer wrote in his report that "[f]rom [his] training and experience, [he] knew the pills to be ecstasy."[81] The evidence technician wrote that one of the pills was "found to be . . . positive for the probable presence of ecstasy."[82] Based on these two false statements, another officer swore out a criminal complaint, which the judge held supported a finding of probable cause.[83] While Manuel sat in jail awaiting trial, the Illinois police laboratory retested the pills and determined, as the prior two tests had, that the pills did not contain a controlled substance. When Manuel was finally released, he had spent forty-eight days in pretrial detention.[84]

Manuel's § 1983 suit against the City of Joliet and several of its police officers alleged that his Fourth Amendment rights had been violated "first by arresting him . . . without any reason, and next by 'detaining him in police custody' for almost seven weeks based entirely on made-up evidence."[85] The district court dismissed Manuel's suit because the statute of limitations

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

79 Manuel v. City of Joliet, 137 S. Ct. 911, 915 (2017).

80 *Id.*

81 *Id.* (alteration in original) (quoting Joint Appendix at 91, *Manuel*, 137 S. Ct. 911 (No. 14-9496)).

82 *Id.* (quoting Joint Appendix at 92, *Manuel*, 137 S. Ct. 911 (No. 14-9496)).

83 *Id.*

84 *Id.* at 915–16.

85 *Id.* at 916 (quoting Joint Appendix at 79–80, *Manuel*, 137 S. Ct. 911 (No. 14-9496)).

barred his unlawful arrest claim, and because Seventh Circuit precedent held that pretrial detention after the start of legal process could not support a Fourth Amendment claim.[86] The appellate court, noting Supreme Court silence on the issue, refused to overrule circuit precedent,[87] and affirmed the dismissal.[88] "[G]iven the position [the Seventh Circuit] ha[s] consistently taken in upholding *Newsome*," the court wrote, "Manuel's argument is better left for the Supreme Court."[89] The Supreme Court, on cue, granted certiorari to decide "[w]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process *so as to allow a malicious prosecution claim based upon the Fourth Amendment*."[90]

B. The Majority Opinion

Justice Kagan began her opinion for the Court by explaining that a § 1983 claim challenging a pretrial detention falls within the scope of the Fourth Amendment.[91] Almost twenty years earlier in *Albright*, five Justices, in two separate opinions, indicated that one challenging "a pretrial deprivation of liberty may invoke the Fourth Amendment when . . . that deprivation occurs after legal process commences."[92] For Justice Kagan, the *Albright* analysis clearly reflected the idea that a "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case."[93] As Justice Kagan stated: "If the complaint is that a form of legal process resulted in pretrial detention unsupported by

86 *Id.* Manuel's detention was "pursuant to 'legal process'—because it followed from, and was authorized by, the judge's probable-cause determination." *Id.* at 915.

87 Manuel v. City of Joliet, 590 F. App'x 641, 643 (7th Cir. 2015), *rev'd*, 137 S. Ct. 911 (2017).

88 *Id.* at 644. "*Newsome* held that federal claims of malicious prosecution are founded on the right to due process, not the Fourth Amendment, and thus there is no malicious prosecution claim under federal law if . . . state law provides a similar cause of action." *Id.* at 642–43 (citing Newsome v. McCabe, 256 F.3d 747, 750–51 (7th Cir. 2001), *abrogated by Manuel*, 137 S. Ct. 911)); *see also* Llovet v. City of Chicago, 761 F.3d 759, 764 (7th Cir. 2014) (endorsing *Newsome*'s rationale that "[w]hen, after the arrest or seizure, a person is not let go when he should be, the Fourth Amendment gives way to the due process clause as a basis for challenging his detention"), *abrogated by Manuel*, 137 S. Ct. 911.

89 *Manuel*, 590 F. App'x at 643.

90 *Manuel*, 137 S. Ct. at 923 (Alito, J., dissenting) (quoting Petition for Writ of Certiorari at i, *Manuel*, 137 S. Ct. 911 (No. 14-9496)).

91 *Id.* at 914 (majority opinion); *see also* Gerstein v. Pugh, 420 U.S. 103, 125 (1975) (holding that the Fourth Amendment guaranteed "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint").

92 *Manuel*, 137 S. Ct. at 918 (citing Albright v. Oliver, 510 U.S. 266, 268–69 (1994) (plurality opinion)).

93 *Id.* Under the Fourth Amendment, government officials cannot detain a person without probable cause, which can happen both when the police detain someone without reason prior to the formal onset of a criminal proceeding, and when legal process itself goes wrong. *Id.*

probable cause, then the right allegedly infringed lies in the Fourth Amendment."[94]

In reaching this conclusion, the Court only resolved the threshold inquiry in § 1983 suits—"'identif[ication of] the specific constitutional right' at issue."[95] It made no mention of the elements required to prove such a claim—only that Manuel's claim fell within the scope of the Fourth Amendment. That did not resolve the case, however, because the parties disagreed about the accrual date of Manuel's claim.[96] To determine the elements of a § 1983 claim, including its rule of accrual, courts have used the common law of torts as a guide.[97] Manuel argued that the most analogous tort was malicious prosecution, and because an element of that tort is "termination of the [underlying criminal] proceeding in favor of the accused," the statute of limitations does not begin to run until such termination.[98] Therefore, the accrual date was May 4, 2011, when the charges were dismissed—less than two years before he brought his suit.[99] The City, however, claimed that the most comparable tort was false arrest, and therefore the accrual date was March 18, 2011, the date legal process initiated, which was more than two years before Manuel brought his suit.[100] Alternatively, the City argued, even if malicious prosecution were the appropriate comparison, the Court should not adopt the favorable termination rule "because 'the Fourth Amendment is concerned not with the outcome of a prosecution, but with the legality of searches and seizures.'"[101]

After describing this debate, the Court refused to weigh in and instead remanded the case for resolution of the accrual issue. Though the Court held that Manuel appropriately brought his claim under the Fourth Amendment, "it entirely ignore[d] the question that [it] agreed to decide, . . . [which is] whether a claim of malicious prosecution may be brought under the Fourth Amendment."[102] After *Albright* and *Manuel*, it is clear that the Fourth Amendment is the proper constitutional provision under which to bring § 1983 claims challenging the type of conduct courts have lumped

94 *Id.* at 919. "Legal process did not expunge Manuel's Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime." *Id.* at 919–20.

95 *Id.* at 920 (citing *Albright*, 510 U.S. at 271).

96 *Id.*

97 Sometimes, after review of common law, a court will adopt the rules from the most analogous tort and apply them to the § 1983 suit. *Id.* But, "[i]n applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Id.* at 921.

98 *Id.* at 921 (quoting Heck v. Humphrey, 512 U.S. 477, 484, 489 (1994)).

99 *Id.* (citing Wallace v. Kato, 549 U.S. 384, 389–90 (2007)) (discussing accrual rule for false arrest suits).

100 *Id.*

101 *Id.* (quoting Brief for Respondents at 16, *Manuel*, 137 S. Ct. 911 (No. 14-9496)).

102 *Id.* at 923 (Alito, J., dissenting).

under the "constitutional tort of malicious prosecution."[103] What was unclear after *Albright*, and remains unclear after *Manuel*, is exactly what elements comprise such Fourth Amendment seizure claims.

C. Justice Alito's Dissenting Opinion[104]

Justice Alito dissented. He agreed with the Court that "[t]he protection provided by the Fourth Amendment continues to apply after 'the start of legal process.'"[105] But he proceeded to address what he believed to be the core of the question presented: "whether a malicious prosecution claim may be brought under the Fourth Amendment."[106] This question is important, he explained, because the Illinois statute of limitations for personal injury torts is two years from the accrual of the claim. The date of accrual, in turn, depends on the analogous tort.[107] Because only under the malicious prosecution accrual rule would Manuel's claim fall within the statute of limitations, if it were to go forward, "it is essential that his claim be treated like a malicious prosecution claim."[108]

Justice Alito maintained that the answer to the question the Court granted certiorari to resolve is straightforward: "A malicious prosecution claim cannot be based on the Fourth Amendment."[109] After determining the precise constitutional violation alleged in a plaintiff's § 1983 complaint—seizure without probable cause in violation of the Fourth Amendment—the Court must look for "tort analogies" to flesh out the elements of the constitutional tort—here, malicious prosecution.[110]

---

103 *Id.* at 925 (referring namely to claims for unlawful detention after the start of legal process).

104 Justice Thomas, who joined Justice Alito's dissent in full, wrote a separate dissent to address the accrual date for a Fourth Amendment unreasonable seizure claim. *See id.* at 922 (Thomas, J., dissenting).

105 *Id.* at 923 (Alito, J., dissenting) (quoting *id.* at 913 (majority opinion)).

106 *Id.* at 924 (citing Petition for Writ of Certiorari at i, *Manuel*, 137 S. Ct. 911 (No. 14-9496)). The majority dismissed Justice Alito's position in a single footnote. The Seventh Circuit "in holding that detainees like Manuel could not bring a Fourth Amendment claim at all, never considered whether . . . that claim should resemble the malicious prosecution tort," and therefore "the decision below did not implicate a 'conflict on the malicious prosecution question.'" *Id.* at 922 n.10 (majority opinion) (quoting *id.* at 923 (Alito, J., dissenting)). The Court said it resolved the only issue implicated by the Seventh Circuit decision: "[W]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process." *Id.* (quoting Petition for Writ of Certiorari at i, *Manuel*, 137 S. Ct. 911 (No. 14-9496)). The secondary issue—whether, in the instance of an affirmative answer to the primary question, the Fourth Amendment allows a malicious prosecution claim—was brought prematurely. "Manuel jumped the gun" on the malicious prosecution issue, "[a]nd contra the dissent, his doing so provides no warrant for [the Court to] do[ ] so too." *Id.*

107 *See id.* at 924–25 (Alito, J., dissenting).

108 *Id.* at 925.

109 *Id.*

110 *See id.* (quoting Wilson v. Garcia, 471 U.S. 261, 277 (1985)).

Justice Alito argued that there is a "severe mismatch" between the elements of malicious prosecution[111] and Fourth Amendment analysis.[112] First, typical defendants in Fourth Amendment seizure cases are law enforcement officers, who have no authority to initiate or dismiss a prosecution.[113] Second, *subjective* bad faith, or malice, a fundamental element of malicious prosecution, cannot coexist with the *objective* reasonableness standard of Fourth Amendment analysis.[114] Lastly, the "favorable termination" requirement of malicious prosecution does not make sense in the context of a Fourth Amendment unreasonable seizure claim because "[t]he Fourth Amendment . . . prohibits *all* unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends."[115] For these reasons, Justice Alito would have held that the Fourth Amendment does not give rise to a § 1983 malicious prosecution claim, rendering Manuel's suit untimely.[116]

The second part of Justice Alito's dissent stems from a fear that the Court's opinion may be understood "to mean that every moment of pretrial confinement without probable cause constitutes a violation of the Fourth Amendment."[117] Justice Alito argued, on the basis of definitions of "seizure" at the time of ratification of the Fourth Amendment, that a period of detention spanning weeks or months cannot be considered one long seizure.[118] A seizure is one single event, and though "the damages resulting from an unlawful seizure may continue to mount during the period of confinement caused by the seizure, . . . no new Fourth Amendment seizure claims [can] accrue after th[e] date" of the initial seizure.[119] After briefly reviewing the precedent relied upon by the majority to reach the contrary conclusion, *Albright* and *Gerstein v. Pugh*, and determining the Court was mistaken to rely on that precedent, Justice Alito concluded that the Court's opinion "has the potential to do much harm—by dramatically expanding Fourth Amendment liability under § 1983 in a way that does violence to the text of the Fourth Amendment."[120]

---

111 *Id.*; *see supra* notes 9–12 and accompanying text.

112 *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting).

113 *Id.* (noting that the requisite authority lies with the prosecutor, and though the officer may testify at a hearing or trial, in that situation, the officer is not responsible for the decision to press charges and is merely a witness).

114 *Id.* ("In some instances, importing a malice requirement into the Fourth Amendment would leave culpable conduct unpunished. An officer could act unreasonably, thereby violating the Fourth Amendment, without even a hint of bad faith. In other cases, the malice requirement would cast too wide a net. An officer could harbor intense personal ill will toward an arrestee but still act in an objectively reasonable manner in carrying out an arrest.").

115 *Id.* at 925–26.

116 *Id.* at 926.

117 *Id.*

118 *Id.* at 926–27.

119 *Id.* at 927.

120 *Id.* at 929.

*D. The Post-*Manuel *Landscape*

The courts of appeals have not had much chance to grapple with *Manuel*, but when they have, it has not seemed to affect their post-*Albright* analysis of § 1983 malicious prosecution claims. For example, the First Circuit declined to address the scope of the Fourth Amendment malicious prosecution theory, but noted that *Manuel* provides some guidance by establishing that a § 1983 claim is cognizable under the Fourth Amendment for pretrial detention.[121] However, it relied on First Circuit precedent for the proposition that § 1983 *malicious prosecution* claims are cognizable under the Fourth Amendment.[122] The Second Circuit, on the other hand, noted that the Supreme Court "has never squarely held that a plaintiff may bring a suit under Section 1983 for malicious prosecution based on an alleged violation of his Fourth Amendment rights."[123] The Court in *Manuel* did not address "the other 'elements of, and rules associated with, an action seeking damages for' an unlawful pretrial detention."[124] Accordingly, the Second Circuit followed its own rule that "plaintiffs may bring what is in effect a state law suit for malicious prosecution in federal court under Section 1983, so long as they are able to demonstrate a deprivation of liberty amounting to a seizure under the Fourth Amendment."[125]

The Fourth Circuit held that "[b]ecause [the plaintiff's] malicious prosecution claim is based on the *Fourth Amendment's* right to be free from unreasonable seizure, . . . [the plaintiff] must show that the *legal process* instituted against him was without probable cause."[126] After concluding that legal process was instituted against the plaintiff without probable cause, the Fourth Circuit used *Manuel* to affirm a jury verdict in favor of the plaintiff's § 1983 malicious prosecution claim.[127] In other words, it equated a § 1983 malicious prosecution claim with the type of claim addressed by the Supreme Court in *Manuel*. Similarly, the Tenth Circuit acknowledged that "*Manuel* did not address whether the tort of malicious prosecution . . . provides an appropriate framework for . . . Fourth Amendment § 1983 claims" challenging pretrial detention.[128] Nevertheless, the court took *Manuel*'s analysis of

121 Filler v. Kellett, 859 F.3d 148, 152 n.2 (1st Cir. 2017) (citing *Manuel*, 137 S. Ct. at 914–15); *see also* Gadd v. Campbell, 712 F. App'x 796, 799–800 (10th Cir. 2017) (citing *Manuel* as confirming that the Fourth Amendment applies to pretrial detention that occurs after the start of legal process); Miller v. Maddox, 866 F.3d 386, 393 (6th Cir. 2017) (same).

122 *See Filler*, 859 F.3d at 152 n.2 (citing Hernandez-Cuevas v. Taylor, 723 F.3d 91 (1st Cir. 2013)).

123 Spak v. Phillips, 857 F.3d 458, 462 n.1 (2d Cir. 2017).

124 *Id.* (quoting *Manuel*, 137 S. Ct. at 920).

125 *Id.* (citing Singer v. Fulton Cty. Sheriff, 63 F.3d 110, 116 (2d Cir. 1995)); *see also* Manganiello v. City of New York, 612 F.3d 149, 160–61 (2d Cir. 2010).

126 Humbert v. Mayor & City Council of Balt. City, 866 F.3d 546, 559 (4th Cir. 2017) (first emphasis added).

127 *See id.* at 561 (citing *Manuel*, 137 S. Ct. at 918).

128 Margheim v. Buljko, 855 F.3d 1077, 1084 (10th Cir. 2017) (citing *Manuel*, 137 S. Ct. at 920–22).

Fourth Amendment rights enforceable in a § 1983 action as "instructive,"[129] and used it to support Tenth Circuit precedent, which held that the Fourth Amendment is the "relevant constitutional underpinning for a claim of malicious prosecution under § 1983."[130]

Other circuit court decisions cited *Manuel* for purposes not directly related to the existence of a § 1983 malicious prosecution claim. For example, the Third,[131] Fifth,[132] and Seventh[133] Circuits referenced *Manuel* with respect to the accrual of a plaintiff's § 1983 claims. The Sixth Circuit cited *Manuel* while discussing an exception to the presumption of probable cause.[134] Finally, at the time of writing, the courts of appeals in the Eighth, Ninth, and Eleventh Circuits have not addressed *Manuel* in any context related to § 1983 and malicious prosecution.

III. Discussion

Claims brought in federal court as § 1983 malicious prosecution claims are essentially unlawful seizure claims in violation of the Fourth Amendment.[135] What, then, is the cause of the confusion? By using the terms "con-

129 *Id.*

130 *Id.* at 1085 (quoting Becker v. Kroll, 494 F.3d 904, 914 (10th Cir. 2007)).

131 *See* Johnson v. Duncan, 719 F. App'x 144, 148 (3d Cir. 2017) (per curiam).

132 *See* Morrill v. City of Denton, 693 F. App'x 304, 306 (5th Cir. 2017) (per curiam); *see also* Winfrey v. Rogers, 882 F.3d 187 (5th Cir. 2018), *superseded by* 901 F.3d 483 (5th Cir. 2018).

133 *See* Wilson v. Ill. Dep't of Fin. & Prof'l Regulation, 871 F.3d 509, 512 (7th Cir. 2017).

134 *See* King v. Harwood, 852 F.3d 568, 588 (6th Cir. 2017).

135 *See supra* Sections I.B–C and II.C (explaining that the *Albright* Court, most courts of appeals, and the *Manuel* Court agreeing on this point). The *Albright* Court rejected substantive due process as the constitutional hook for detention after the start of legal process under § 1983. The Framers, Chief Justice Rehnquist argued, "considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." Albright v. Oliver, 510 U.S. 266, 274 (1994) (plurality opinion). "Where a 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.'" *Id.* at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). The *Albright* Court indicated, therefore, that Albright should have brought his claim under the Fourth Amendment, not the "more generalized notion of 'substantive due process.'" *Id.* (quoting *Graham*, 490 U.S. at 395).

State malicious prosecution actions foreclose the procedural due process clause as the constitutional hook for such § 1983 claims. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." Zinermon v. Burch, 494 U.S. 113, 125 (1990) (first citing Parratt v. Taylor, 451 U.S. 527, 537 (1981); and then citing Carey v. Piphus, 435 U.S. 247, 259 (1978)). *Postdeprivation* remedies can satisfy due process requirements. *Parratt*, 451 U.S. at 538. In *Zinermon*, Justice Blackmun held that postdeprivation remedies satisfy procedural due process when the state is truly unable to anticipate and prevent a random constitutional deprivation. *Zinermon*, 494 U.S. at 132. The Supreme Court has held that "[a]lthough the state remedies may not provide the [plaintiff] with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the

stitutional tort" and "malicious prosecution," courts have "blend[ed] . . . state tort and constitutional principles,"[136] resulting in unnecessarily inconsistent and confusing standards that vary by circuit, and even by panels within each circuit. They have overlooked the fact that the elements of a cause of action for a Fourth Amendment seizure are completely separate from the elements of the common-law tort of malicious prosecution. The *Manuel* Court rightly observed that "[c]ommon law principles are meant to guide rather than to control the definition of § 1983 claims."[137] The failure, therefore, of *Manuel* is not that the Court ignored the malicious prosecution question, as Justice Alito alleges.[138] Instead, the failure is that, despite announcing that Manuel's claim was cognizable under the Fourth Amendment, the Court never explained what elements would constitute such a claim. Section A traces Justice Alito's analysis in his *Manuel* dissent to show why the elements of common-law malicious prosecution cannot be the elements of a § 1983 claim for unlawful detention after the start of legal process in violation of the Fourth Amendment. Section B then suggests elements for such a cause of action and identifies potential issues the Court would have to address, were it to adopt this framework.

A. The Fourth Amendment

This Section explains why a § 1983 malicious prosecution claim cannot be based on the Fourth Amendment, using Justice Alito's *Manuel* dissent as a guide. The *Manuel* Court concluded that detention after the start of legal process was a seizure within the meaning of the Fourth Amendment, reaffirming the position of the plurality and Justice Souter in *Albright*.[139] In resolving the threshold inquiry of a § 1983 claim, identification of the specific constitutional right at issue, the Court refused to address whether such a Fourth Amendment claim constituted a malicious prosecution claim, as Justice Alito complained in dissent.[140] He criticized the majority for failing to answer the question it granted certiorari to address. Justice Alito would have held that a malicious prosecution claim cannot be based on the Fourth Amendment because there is a "severe mismatch" between the elements of malicious prosecution and Fourth Amendment seizure cases.[141] He is cor-

---

state remedies are not adequate to satisfy the requirements of due process." *Parratt*, 451 U.S. at 544. Because state tort malicious prosecution claims are adequate postdeprivation remedies, there can be no § 1983 malicious prosecution claim based upon the procedural due process component of the Fourteenth Amendment—the state remedy satisfies due process, so there has been no constitutional violation. *See id.* at 542 (citing Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975)).

136 Castellano v. Fragozo, 352 F.3d 939, 945 (5th Cir. 2003) (en banc).

137 Manuel v. City of Joliet, 137 S. Ct. 911, 921 (2017) (citing Hartman v. Moore, 547 U.S. 250, 258 (2006)).

138 *See supra* Section II.D.

139 *See supra* Section II.C.

140 *See supra* notes 101–03 and accompanying text.

141 *See Manuel*, 137 S. Ct. at 923–26 (Alito, J., dissenting).

rect, as this Section demonstrates, which suggests that an alternate framework is needed to analyze claims such as Manuel's. The next Section suggests such a framework.

First, in a state tort malicious prosecution claim, the underlying criminal proceeding must have been initiated or continued *by the defendant*.[142] Justice Alito argues that malicious prosecution does not fit within the Fourth Amendment analysis, because law enforcement officers, typical Fourth Amendment defendants, do not have authority to initiate or dismiss a prosecution.[143] According to Justice Alito, only prosecutors have that authority. This argument is unpersuasive because malicious prosecution is a state tort frequently brought against law enforcement officers.[144] Despite Justice Alito's assertions to the contrary, a malicious prosecution action against a police officer is cognizable if the officer "fil[es] false charges or provid[es] false information to the prosecuting attorney, but only if the officer advised, assisted, ratified or directed the prosecution."[145] In this respect alone are the two claims, malicious prosecution and Fourth Amendment unlawful detention after the start of legal process, analogous. Additionally, prosecutors are protected by absolute prosecutorial immunity with respect to their prosecutorial duties. They cannot be sued for initiating a prosecution.[146] If

142 *Id.* at 925.

143 *Id.* at 925.

144 *See* 52 AM. JUR. 2d *Malicious Prosecution* § 90 (2018). Unlike prosecutors and judges, only qualified immunity protects law enforcement officers. If no reasonable officer would believe there was probable cause for the arrest and detention that formed the basis of the claim, there is no immunity. However, some jurisdictions have held that law enforcement officers are judicial or quasi-judicial actors who are immune from suit if acting within the scope of their authority. Either way, the officer can be held liable if he acts outside the scope of his authority. *Id.*

145 AVERY ET AL., *supra* note 53, § 2:14, 87 (first citing Awabdy v. City of Adelanto, 368 F.3d 1062, 1068 (9th Cir. 2004); then citing Reed v. City of Chicago, 77 F.3d 1049, 1054 (7th Cir. 1996); then citing Eubanks v. Gerwen, 40 F.3d 1157, 1161 (11th Cir. 1994); then citing Dellums v. Powell, 660 F.2d 802, 805 (D.C. Cir. 1981); and then citing Hampton v. Hanrahan, 600 F.2d 600, 630 (7th Cir. 1979)). Additionally, if "an officer withholds exculpatory evidence from the prosecutor during the course of criminal proceedings, the continuation of the criminal case establishes malicious prosecution against that officer." *Id.* (citing Sanders v. English, 950 F.2d 1152, 1164 (5th Cir. 1992); Goodwin v. Metts, 885 F.2d 157, 164 (4th Cir. 1989)).

146 "Prosecutors are absolutely immune from malicious prosecution suits, since the very act of filing charges falls directly within the ambit of their prosecutorial responsibilities." *Id.*; *see also* Imbler v. Pachtman, 424 U.S. 409 (1976) (holding that prosecutors are absolutely immune from suit for initiating prosecution and presenting the state's case). There are limited exceptions. For example, prosecutors are not entitled to absolute immunity for giving advice to police because "[s]uch activity was not protected . . . at common law and is not intimately connected with the judicial process . . . . [A]bsolute immunity is appropriate only for activity 'connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.'" AVERY ET AL., *supra* note 53, § 3.3, at 213 (quoting Burns v. Reed, 500 U.S. 478, 494 (1991)); *see also* Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (holding that no absolute immunity is available for preliminary investigative activity before there is sufficient probable cause to warrant an arrest).

Justice Alito's argument were true, there could be no state tort of malicious prosecution, let alone a federal constitutional tort under the Fourth Amendment. The important difference is that while a malicious prosecution defendant can be, and often is, a state or local official, that is not required.[147] On the other hand, in a § 1983 action for a Fourth Amendment violation, the defendant must be a "person" acting "under color of" state law, meaning a state or local official acting in the scope of their employment.

The second element of a malicious prosecution claim at common law requires the defendant to have instituted the proceeding maliciously. The Fourth Amendment standard, however, is objective reasonableness. As Justice Alito explains, the subjective bad faith standard of malicious prosecution[148] is incompatible with the objective reasonableness test. For example, a seizure initiated with malice may nonetheless be objectively reasonable, and conversely, a seizure, though objectively unreasonable, may have been free from malicious intent. Importing the scienter requirement from common-law malicious prosecution into the Fourth Amendment analysis shifts the focus of the analysis away from the main concern, the unreasonableness of the seizure.[149]

Lastly, the criminal proceedings must have terminated in favor of the accused for a plaintiff to allege malicious prosecution. "Where termination of the underlying criminal charge is achieved without a determination on the merits, an issue arises as to whether the disposition was sufficiently consistent with innocence to permit an action for malicious prosecution."[150] A claim for malicious prosecution may be barred if there is a pretrial disposition short of acquittal.[151] This bar is also inconsistent with the Fourth Amendment, which prohibits *all* unreasonable seizures, regardless of whether a prosecution is initiated or how it ends. Like the bad faith element, the favorable termination element shifts the focus away from the reasonableness of the seizure, in this case to the result of the prosecution. In other words, the reasonableness of the seizure becomes dependent upon the termination of the proceedings, which is inconsistent with Fourth Amendment jurisprudence.[152]

---

147 *See* RESTATEMENT (SECOND) OF TORTS § 653 & cmts. c, e (AM. LAW INST. 1977) (delineating the elements of malicious prosecution against a private person, defining "private person," and stating that the section has no application to public officials).

148 *See supra* notes 10–11 and accompanying text.

149 Manuel v. City of Joliet, 137 S. Ct. 911, 925 (2017).

150 AVERY ET AL., *supra* note 53, § 2:14, at 85 n.14 (citing RESTATEMENT (SECOND) OF TORTS § 660 (AM. LAW INST. 1977)).

151 *Id.* (citing Evans v. Ball, 168 F.3d 856 (5th Cir. 1999) (noting favorable termination requires an affirmative indication of lack of guilt)); Washington v. Summerville, 127 F.3d 552, 559 (7th Cir. 1997) (holding nolle prosequi, with no explanation, is not enough to show termination in favor of accused)).

152 *Manuel*, 137 S. Ct. at 925–26.

B. Suggested Fourth Amendment Framework

The preceding analysis leads to the conclusion that there is no constitutional right to be free from malicious prosecution, and, in the words of the Fourth Circuit, "what has been inartfully 'termed a "malicious prosecution" claim . . . is simply a claim founded on a Fourth Amendment seizure.'"[153] This Section suggests a framework for the type of claim courts have been calling the constitutional tort of malicious prosecution, and addresses several potential issues that may result from that framework. In defining the Fourth Amendment claim at issue—unlawful detention after the start of legal process—it is important to forego the language used in malicious prosecution tort claims in favor of the language of the Fourth Amendment. The law surrounding § 1983 is complex, but the approach courts have taken to defining the right at issue and its related cause of action, by analogizing it to the common-law tort of malicious prosecution, has made defining that right more complicated than necessary. By being deliberate about the language used, it becomes easier to separate tort principles from constitutional principles, thereby diminishing the confusion that has developed around the "constitutional tort" of malicious prosecution.

This Note seeks to define a § 1983 claim under the Fourth Amendment for unlawful detention pursuant to the start of legal process. The claim at issue, the so-called "constitutional tort" of malicious prosecution, is detention based on the wrongful initiation of legal process.[154] To make out such a claim, the plaintiff should be required to show that the defendant, acting under color of state law, took some action that (1) caused (2) the initiation or continuation of legal process against the plaintiff, (3) resulting in the unreasonable detention or seizure[155] of the plaintiff. These elements establish a clear framework derived from familiar Fourth Amendment principles, eliminating the confusing analogy to common-law malicious prosecution tort claims.

The Supreme Court has articulated the "'general rule that Fourth Amendment seizures are "reasonable" only if based on probable cause' to believe that the individual has committed a crime."[156] Applying this standard to the third element of the framework suggested above, detention after the start of legal process is unreasonable if the legal process did not establish, or was not based on, probable cause. Again, the "unreasonable" element here is not the same as the "malice" element in malicious prosecution. The malice required for malicious prosecution tort claims is a *subjective* stan-

153 Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012) (quoting Snider v. Lee, 584 F.3d 193, 199 (4th Cir. 2009)).

154 *See* Wallace v. Kato, 549 U.S. 384, 390 (2007).

155 "Seizures" may occur absent actual physical restraint. Probation, parole, and release on bond all constitute seizures for purposes of the Fourth Amendment. *See* United States v. Place, 462 U.S. 696, 711 n.1 (1983) (Brennan, J., concurring).

156 Bailey v. United States, 568 U.S. 186, 192 (2013) (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)).

dard.[157] The defendant must have initiated the proceeding with an "improper or wrongful motive" or "for some purpose other than that of bringing an offender to justice."[158] The "reasonableness" standard used in the context of Fourth Amendment cases is an *objective* standard that is unrelated to the defendant's intentions. The reasonableness of a seizure is established by the existence of probable cause for the seizure.

Much of this involves typical Fourth Amendment analysis. One complicated aspect of the analysis, however, is causation. The actions of the defendant officers must have caused the unreasonable detention. The question is what the appropriate causation analysis should be. Consider *Manuel*. Was the initial falsification of the reports by the officers, which resulted in Manuel's arrest, also the cause of his detention after the probable cause hearing? Or would the officers have needed to take some other affirmative action at the time of the probable cause hearing to be liable for the resulting seizure? Were the officers' false reports the proximate cause of Manuel's detention because the judge relied on them for his probable cause determination? There appear to be three approaches the Court might take to answer these questions.

1. Common-Law Proximate Causation

The first approach would be to borrow the causation analysis from tort law. For this specific element, the Court could look to common-law malicious prosecution for guidance. Courts have held that "police officers may argue that the decision of a prosecuting attorney, judge or grand jury to file or approve charges should insulate them from liability for malicious prosecution."[159] In circuits holding that intervening acts bar the malicious prosecution claim, for the officers to be held liable, they must have taken some additional affirmative action to initiate this second seizure. Some jurisdictions, however, have held that "the intervening action by a prosecuting attorney or a court only creates a rebuttable presumption that an independent judgment as to probable cause has been made, and that the plaintiff may

157 *See supra* notes 10–11 and accompanying text.

158 Oliver v. Skinner, No. 4:09-cv-29, 2013 U.S. Dist. LEXIS 24518, at *15 (S.D. Miss. Feb. 22, 2013) (quoting Trilogy Commc'ns, Inc. v. Times Fiber Comm'ns, Inc., 47 F. Supp. 2d 774, 780 (S.D. Miss. 1998)).

159 AVERY ET AL., *supra* note 53, § 2:14, at 87 (first citing Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999) (holding that grand jury indictment broke the causal chain, despite defendant officer's false testimony before the grand jury); and then citing Taylor v. Meacham, 82 F.3d 1556, 1564 (10th Cir. 1996) (holding chain of causation is broken by an indictment, absent allegation of pressure or influence by police, or knowing misstatements made to prosecutor)); *see also* ROSS, *supra* note 10, at 52 ("Proximate cause is also critical in malicious prosecution cases if the initiator of a criminal proceeding loses control of it due to the actions of a prosecutor or judge—actions that may be deemed to supersede the original complaint."). *But see* Wheeler v. Cosden Oil & Chem. Co., 744 F.2d 1131, 1132 (5th Cir. 1984) (holding that the "break in the causal chain" argument does not bar an action for malicious prosecution).

demonstrate that the police officer's deliberate misrepresentation of certain facts caused the charges to be filed."[160]

Though the circuits are split on the effect of the intervening act upon causation, in the majority of circuits, such an act is *presumed* to be an independent determination of probable cause. The causal chain is therefore broken, absent a rebuttal by the plaintiff. The separation of the two time periods described here, before and after the finding of probable cause, tracks the Fourth Amendment framework in which there are two seizures resulting from lack of legal process: first, the false imprisonment or arrest, and second, the seizure or detention after wrongfully initiated legal process.[161]

In *Manuel*, the judge relied on falsified reports prepared in connection with the initial arrest. Under the tort causation analysis, the causal chain would be broken because the judge made an independent determination of probable cause. If, however, the plaintiff could show a sufficient nexus between the misrepresentations by the officers and the resulting detention, unaffected by the probable cause hearing, the officers may still be held liable. There would still be two separate causal analyses: the cause of the first seizure without legal process, and the cause of the second seizure after the start of legal process. The caveat is that, under proximate causation rules adopted from tort law, the plaintiff must be able to show that actions of the officers *unrelated to* the probable cause hearing resulted in the erroneous finding of probable cause, which may significantly reduce the liability of police officers for detention after the start of legal process. Police officers have absolute immunity for actions taken as part of the judicial process—meaning in their role as witnesses at hearings.[162] Additionally, the judge cannot be held liable for the unreasonable detention after initiation of legal process because he has absolute judicial immunity.[163] Adopting this approach might therefore result in restricted access to remedies for plaintiffs who were unreasonably detained following the start of legal process if those plaintiffs are unable to rebut the presumption of an independent probable cause determination.[164]

2. The "Continuing Seizure" Theory

A second approach to causation would be to adopt a modified version of Justice Ginsburg's continuing seizure theory from *Albright*.[165] Under this approach, the defendant is seized at the time of the arrest without probable

160 AVERY ET AL., *supra* note 53, § 2:14, at 87.

161 *See supra* note 85 and accompanying text.

162 *See* Briscoe v. LaHue, 460 U.S. 325, 345–46 (1983).

163 A judge is absolutely immune in a suit for damages if the judge is acting in his judicial capacity, or if the parties perceive him to be acting in his judicial capacity. Stump v. Sparkman, 435 U.S. 349 (1978).

164 For an argument that there should be weaker proximate cause limits on liability for constitutional torts, as opposed to common-law torts, to provide greater remedies to plaintiffs in constitutional tort cases, see Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157 (1988).

165 *See supra* note 38 and accompanying text.

cause, and that unreasonable seizure continues until either probable cause is established, or the defendant is released. Consider *Manuel* as an example. Manuel was detained without probable cause when the officers arrested him for having pills they falsely alleged were ecstasy—an unreasonable seizure under the Fourth Amendment. Under the continuing seizure theory, this detention, resulting from the officers' falsified reports, would continue until probable cause was actually established, or until Manuel was released. Because the probable cause hearing did not satisfy the probable cause requirement, the unreasonable seizure never terminated. And because the seizure never terminated, it was still caused by the initial falsified documents, even after the start of legal process.

Justice Ginsburg's continuing seizure argument has not gained much traction among the circuit courts,[166] and as Justice Alito notes, it is inconsistent with traditional understandings of the word "seizure" as a single event.[167] Perhaps more problematically, for purposes of developing a framework for the cause of action implicated in situations like *Manuel*, the continuing seizure theory completely ignores the distinction between unlawful imprisonment, or unreasonable seizure *without* legal process, on the one hand, and unreasonable seizures resulting from *wrongfully initiated* legal process on the other. Though it likely would be easier for plaintiffs to recover under the continuing seizure theory than under causation adopted from common-law tort analysis, because they would not have to prove a separate act resulting in a seizure, or that the same act resulted in a separate seizure, it rings less true to traditional § 1983 Fourth Amendment analysis. For these reasons, the approach to causation based on tort law is better than the "continuing seizure" approach. It strikes a reasonable balance between providing a remedy to plaintiffs whose constitutional rights have been violated and the

166 *See* Rapp v. Putnam, 644 F. App'x 621, 628 (6th Cir. 2016) (not adopting the "continuing seizure" theory); Cordova v. City of Albuquerque, 816 F.3d 645, 663 (10th Cir. 2016) (noting the circuit's rejection of the "continuing seizure" theory); Welton v. Anderson, 770 F.3d 670, 675 (7th Cir. 2014) (same); Kingsland v. City of Miami, 382 F.3d 1220, 1236 (11th Cir. 2004) (rejecting "continuing seizure" theory); Nieves v. McSweeney, 241 F.3d 46, 56 (1st Cir. 2001) (same); Riley v. Dorton, 115 F.3d 1159, 1162 (4th Cir. 1997) (en banc) (same), *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34 (2010) (per curiam). *But see* Black v. Montgomery County, 835 F.3d 358, 366–67 (3d Cir. 2016) (noting that the circuit has expressly adopted Justice Ginsburg's theory); Fontana v. Haskin, 262 F.3d 871, 879–80 (9th Cir. 2001) (adopting the "continuing seizure" theory); Evans v. Ball, 168 F.3d 856, 861 (5th Cir. 1999), *overruled in part by* Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (explaining *Evans* aligns the circuit's analysis with the "continuing seizure" theory, but *Castellano* casts doubts surrounding the theory and refusing to define it further). For additional analysis, compare Goldstein, *supra* note 14, at 668–70 (finding support for his theory that a § 1983 claim for malicious prosecution is cognizable under the Fourth Amendment), with Lyle Kossis, Note, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA. L. REV. 1635, 1666–71 (2013) (analyzing, and discrediting, Goldstein's argument).

167 Manuel v. City of Joliet, 137 S. Ct. 911, 926–27 (2017) (Alito, J., dissenting).

government's interest in preventing § 1983 from becoming a "font of tort law."[168] But there is a better option.

3. A New Approach

Arguably the biggest obstacle in analogizing causation in a § 1983 claim to causation in common-law torts is that courts forget, as the Supreme Court explained in *Carey v. Piphus*,[169] that the common law is "the appropriate starting point," but is not "a complete solution."[170] Courts must answer the causation question in cases involving constitutional rights with reference to the Constitution itself.[171] "[W]hen the interests of constitutional torts diverge from those of common law torts, courts must adapt the rules to serve those distinct interests."[172] For example, in *Townes v. City of New York*,[173] the Second Circuit held that a plaintiff whose conviction was based on an unlawful search could not hold the searching officer liable for his postconviction imprisonment, because the trial judge's independent decision not to suppress the evidence broke the causal chain.[174] But this is not the appropriate basis for the decision. "Instead it should have based its holding on an understanding that the Fourth Amendment applies only to pre-trial conduct, and therefore, a pre-trial violator should not be liable for any post-trial harms."[175] The starting inquiry must therefore be identification of the contours of the constitutional right at stake.[176] In other words, because the rights at issue are specifically provided by the Constitution, and the remedy for violation of those rights is specifically provided by § 1983, as opposed to common-law rights and remedies, the rules of causation that courts adopt should conform to the constitutional right, not the other way around.

Establishing exactly how such an approach would work in the context of the suggested framework would have to be on a case-by-case basis. However, because causation is such an important part of the suggested framework, it is helpful to apply this approach to the facts of *Manuel*. As explained above, under traditional common-law causation principles, the probable cause hearing would likely break the causal chain, and no one would be held liable for the unlawful seizure of Manuel. In a state case for malicious prosecution, that makes sense because the plaintiff must prove a subjective malicious intent. An intervening finding of probable cause would break the causal chain unless the officers take some additional action independent of the

168 Paul v. Davis, 424 U.S. 693, 701 (1976).

169 435 U.S. 247 (1978).

170 Joel Flaxman, Note, *Proximate Cause in Constitutional Torts: Holding Interrogators Liable for Fifth Amendment Violations at Trial*, 105 MICH. L. REV. 1551, 1556 (2007) (quoting *Carey*, 435 U.S. at 258).

171 *See id.* at 1561–62.

172 *Id.* at 1564.

173 176 F.3d 138, 147 (2d Cir. 1999).

174 *See* Flaxman, *supra* note 170, at 1560 (citing *Townes*, 176 F.3d at 147).

175 *Id.* at 1562.

176 *See id.* at 1565.

probable cause hearing to maliciously cause the continued prosecution after the probable cause hearing. The continued prosecution is no longer based on the malicious actions of the officers, but rather on a probable cause hearing.

Conversely, in a Fourth Amendment action under § 1983, the standard is one of objective reasonableness. The first seizure, the unlawful arrest, is unreasonable because it is not predicated on probable cause, but rather on evidence fabricated by the officers. The second seizure is also objectively unreasonable because it too is based on fabricated evidence rather than probable cause. After the probable cause hearing, there still was no probable cause because the evidence was falsified. At least in the case of *Manuel*, there are two reasons that there can be no presumption that the causal chain was broken. First, there were two separate seizures. The detention after the start of legal process was not a continuation of the first seizure, even though it was based upon the same evidence. Second, while the probable cause hearing eliminated the continuation of the malice element of malicious prosecution by introducing an independent, intervening actor with a different intent, it cannot change the fact that a seizure based on fabricated evidence was objectively unreasonable. It was unreasonable before the hearing, and even though the judge found probable cause for the detention, the evidence was fake so there actually was no probable cause. The seizure was thus unreasonable after the hearing.

While *Manuel* is only one of any number of possible scenarios to which this framework may apply, it is a good starting place. The merits and flaws of each of these approaches to causation become apparent upon application to *Manuel*'s facts. Rules of causation from the common law of torts provide a base, but violations of constitutional rights are not torts, and the causation analysis must be adjusted accordingly. In this case, that may mean eliminating the presumption of a break in the causal chain by an intervening independent act. Any further attempt to define what exactly causation analysis should look like requires more space than available in this Note, and perhaps could be the subject of future scholarship.

Conclusion

It has been twenty-three years since the Supreme Court decided *Albright v. Oliver*. During that time, the courts of appeals have struggled to settle the law governing § 1983 malicious prosecution claims. They tried, without success, to combine malicious prosecution tort actions and Fourth Amendment seizure actions to define a "constitutional tort" of malicious prosecution. The "embarrassing diversity of judicial opinion"[177] pervading this area of law developed because the courts are caught in semantics. Instead of attempting to weave malicious prosecution and the Fourth Amendment together, courts need to recognize that "what has been inartfully 'termed a "malicious prosecution" claim . . . is simply a claim founded on a Fourth Amendment

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

seizure.'"[178] There is no constitutional right to be free from malicious prosecution. There is, however, a Fourth Amendment right to be free from seizures except upon probable cause, even after the start of legal process.[179]

This Note has suggested a framework for the types of claims the courts have been labeling § 1983 malicious prosecution claims, or "constitutional tort" claims of malicious prosecution. That framework, true to Fourth Amendment principles, would require plaintiffs to show the defendant officer's actions (1) caused (2) the initiation or continuation of legal process against the plaintiff, (3) resulting in the unreasonable detention or seizure of the plaintiff. Under this framework, courts may analogize to malicious prosecution tort law to establish the rule of accrual under the statute of limitations, or perhaps even as a starting place to determine the appropriate causation analysis required. But the framework also makes clear that this is a Fourth Amendment claim, and should be governed by Fourth Amendment principles, without the distraction of malicious prosecution tort principles.

178 Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012) (quoting Snider v. Lee, 584 F.3d 193, 199 (4th Cir. 2009)).

179 *See* Manuel v. City of Joliet, 137 S. Ct. 911 (2017).