

Eliminating the Malice Requirement for Fourth Amendment Malicious Prosecution Plaintiffs

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Someone who has been wrongfully prosecuted in violation of their Fourth Amendment rights can sue a government actor, such as a police officer, for malicious prosecution under 42 U.S.C. § 1983. Malicious prosecution arises when a government actor initiates a criminal case without probable cause, the prosecution leads to the accused's seizure, and the accused is ultimately not convicted. Fourth Amendment malicious prosecution claims are critical to holding officers and prosecutors accountable for misconduct. Official misconduct is common: more than half of the people exonerated since 1989 were incarcerated due in part to misconduct by the police or prosecutors.

Fourth Amendment malicious prosecution claims occupy a unique space in Fourth Amendment doctrine. Because the closest common law analogue is the tort of malicious prosecution, some federal appellate courts require plaintiffs to prove that the government actor acted with malice, an element of the common law tort. Courts have defined malice in various ways, ranging from the absence of probable cause, to personal animosity, to a reckless disregard for the plaintiff's constitutional rights. But any test that examines a government actor's subjective mindset contravenes the standard that has come to dominate Fourth Amendment doctrine—objective reasonableness.

This Comment argues that courts should eliminate the subjective malice requirement for Fourth Amendment malicious prosecution claims. It draws on other constitutional torts that arise during encounters with actors in the criminal justice system to show that a plaintiff-friendly objective standard is more appropriate than a subjective standard. If courts are unwilling to eliminate the malice requirement, this Comment proposes an alternative: a burden-shifting test. The intended effects of both proposals are to expand relief to more litigants across jurisdictions, harmonize Fourth Amendment jurisprudence, and deter police and prosecutorial misconduct.

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INTRODUCTION

Andre Evans is walking into an apartment building when he sees two police officers on his tail. Unbeknownst to him, someone in the neighborhood reported a burglary and the police believe Evans matches the description of the suspect: “[A]n African American male, about 5’8”, wearing a navy blue jacket.”¹ Scared, Evans runs into an apartment. His gun drops to the ground. The officers chase him, enter the apartment, and tase him. They charge Evans with resisting a police officer and possessing a gun as a felon. Evans is detained for one week before he posts bond. Prosecutors bring a criminal case against him, but a court grants his motion to suppress the evidence obtained during the officers’ warrantless entry. The court eventually dismisses Evans’s case. He is never charged with the burglary, the very crime that led to his violent encounter with the police.

Evans is traumatized from the incident. He sues the police officers for maliciously prosecuting him in violation of his Fourth Amendment rights. To prevail on his claim, Evans must show that the officers acted with malice, defined in his jurisdiction as personal animosity or a complete lack of probable cause. He points out that his motion to suppress was granted, which demonstrates the absence of probable cause. But there is no other evidence that proves the officers’ subjective intent. The court grants the officers’ motion for summary judgment. Evans is devastated. He cannot help but wonder, “Was it ever possible for me to succeed on my claim?”²

Fourth Amendment malicious prosecution occurs when a government actor (ordinarily a law enforcement officer) causes someone to be prosecuted without probable cause, the person is seized as a result of that prosecution, and the prosecution does not end in a conviction.³ The challenged conduct—“unreasonable seizure pursuant to legal process”⁴—violates the Fourth Amendment, which protects individuals from “unreasonable searches and seizures.”⁵ Plaintiffs can bring Fourth Amendment malicious prosecution claims under 42 U.S.C. § 1983, the statute allowing

¹ *Evans v. Matson*, 2024 WL 2206638, at *1 (7th Cir. May 16, 2024).

² These paragraphs describe the events in *Evans*, 2024 WL 2206638.

³ See *Thompson v. Clark*, 142 S. Ct. 1332, 1337–38, 1337 n.2, 1341 (2022) (explaining the elements of a Fourth Amendment malicious prosecution claim alongside the elements of the common law tort of malicious prosecution).

⁴ *Id.* at 1337.

⁵ U.S. CONST. amend. IV.

individuals to sue for constitutional violations by government officials.⁶ Because these suits are civil, the remedy for a malicious prosecution claim is damages—unlike criminal cases, where the principal remedy for a violation of Fourth Amendment rights is the exclusion of incriminating evidence.⁷

Malicious prosecution claims occupy a unique space in Fourth Amendment jurisprudence. Courts ordinarily analyze Fourth Amendment claims under an objective reasonableness standard with no inquiry into the government actor’s subjective mental state at the time of the action.⁸ For that reason, some circuits do not require plaintiffs bringing Fourth Amendment malicious prosecution claims to establish that a government official acted with malice.⁹ But other circuits do require plaintiffs to prove malice because the common law tort of malicious prosecution (the “closest analogy” to the constitutional tort¹⁰) requires such a showing.¹¹ This circuit split has persisted for decades.¹² The issue remained unresolved even after *Thompson v. Clark*,¹³ in which the Supreme Court formally recognized a malicious prosecution claim under the Fourth Amendment but expressly declined to decide whether a litigant must establish malice or another mental state.¹⁴ To make matters more confusing, the circuits that do require a showing of malice define the term in various ways: Some circuits hold that malice can be inferred from a lack of probable cause because state common law defines it as such.¹⁵ Others draw

⁶ *Thompson*, 142 S. Ct. at 1336–37 (explaining that § 1983 creates “a species of federal tort liability for individuals to sue state and local officers for deprivations of constitutional rights”).

⁷ Compare *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (describing the damages available in Fourth Amendment malicious prosecution cases), with *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (describing the exclusionary rule and incorporating it against the states).

⁸ See *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

⁹ See *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 184 n.5 (4th Cir. 1996); *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010).

¹⁰ *Heck*, 512 U.S. at 484.

¹¹ See *Manganiello v. City of New York*, 612 F.3d 149, 160–61 (2d Cir. 2010); *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3d Cir. 2009); *Armstrong v. Ashley*, 60 F.4th 262, 279 (5th Cir. 2023); *Welton v. Anderson*, 770 F.3d 670, 674 (7th Cir. 2014); *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009); *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007); *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010).

¹² *Armstrong*, 60 F.4th at 279.

¹³ 142 S. Ct. 1332 (2022).

¹⁴ *Id.* at 1338 n.3.

¹⁵ *Manganiello*, 612 F.3d at 161, 163 (applying New York law).

on broader common law principles and require more than mere negligence, such as a showing of recklessness, to prove malice.¹⁶

Why is this circuit split important? Requiring a showing of malice makes it more difficult for a Fourth Amendment malicious prosecution plaintiff to prevail. Thus, the differences among these jurisdictions mean that a plaintiff's ability to seek relief for a malicious prosecution will depend in part on geography. But whether a plaintiff is entitled to damages for a constitutional violation should not depend on her location. Adding an additional barrier disadvantages plaintiffs and fails to hold government actors accountable for intentional wrongdoing. Considering the devastating impacts of incarceration¹⁷ and the significant number of people who are affected by wrongful prosecution, it is not clear why the barrier to success should be made more difficult. The Prison Policy Initiative estimates that, at any given time, 448,000 people are held in local jails without a conviction.¹⁸ Data from the National Registry of Exonerations shows that, as of 2022, 1,938 people—more than 50% of exonerated people—were wrongfully convicted due to official misconduct since the Registry started collecting data in 1989.¹⁹ In fact, 77% of exonerations obtained in 2023 had involved official misconduct, contributing to the incarceration of 118 people.²⁰ The errors in the criminal justice system disproportionately harm Black Americans. From 1989 through 2022, more than half of exonerates were Black, meaning that convictions of Black Americans were seven times more likely to be erroneous than convictions of white Americans.²¹ In murder exonerations, official misconduct is

¹⁶ *Taylor v. Meacham*, 82 F.3d 1556, 1563 (10th Cir. 1996); see also *Novitsky*, 491 F.3d at 1258 (applying common law); *Pierce v. Gilchrist*, 359 F.3d 1279, 1288 (10th Cir. 2004) (defining common law “in this context” as “general principles of common law among the several states” as opposed to the “specific terms of the tort law of any particular state”).

¹⁷ Samantha K. Brooks & Neil Greenberg, *Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review*, 61 *MED., SCI. & L.* 44, 50 (2020) (discussing long-term harms to “self-identity, reputation, psychological and physical health, relationships with others, attitudes towards the justice system, [and] finances”).

¹⁸ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLY INITIATIVE (Mar. 14, 2024), <https://perma.cc/LCJ2-8T44>.

¹⁹ The National Registry of Exonerations, *2022 Annual Report*, UNIV. OF MICH. L. SCH. 9, <https://perma.cc/E6YR-7PLK>.

²⁰ The National Registry of Exonerations, *2023 Annual Report*, UNIV. OF MICH. L. SCH. 4, <https://perma.cc/WH5J-EXFA>.

²¹ Samuel R. Gross, Maurice Possley, Ken Otterbourg, Klara Stephens, Jessica Weinstock Paredes & Barbara O'Brien, *Race and Wrongful Convictions in the United States: 2022*, NAT'L REGISTRY OF EXONERATIONS 1–2 (Sept. 2022), <https://perma.cc/HSJ2-H3WZ>.

more likely to take place when the accused is Black.²² As of 2022, 78% of Black exonerees experienced official misconduct compared to 64% of white exonerees.²³ These statistics do not capture the exact number of people who can assert a malicious prosecution claim because many potential claims are not even brought, and deserving claims do not always win. But they do reveal two important things. First, the criminal justice system harms many, and the harm disproportionately falls on Black Americans. Second, the wrongful exercise of police and prosecutorial discretion leads to innocent people getting locked up, both with and without a conviction. Basic notions of justice demand that no person be detained for a crime she did not commit. Yet we are seeing the exact opposite with no end in sight—and limited avenues for recourse.

This Comment argues that courts should no longer require Fourth Amendment malicious prosecution plaintiffs to prove a government actor's subjective malice. Mandating a showing of malice does not conform to the rest of Fourth Amendment jurisprudence, makes it difficult for a plaintiff to prevail on her claim, and does not advance a legitimate purpose. While some might argue that reducing a plaintiff's evidentiary burden will lead to frivolous litigation, this argument ignores the substantial barriers already posed by other elements of the claim, such as the requirement that plaintiffs prove a lack of probable cause and overcome qualified immunity to prevail.

This Comment proceeds in four parts. Part I discusses the development of the Fourth Amendment malicious prosecution claim and the long-standing circuit split on the malice requirement. Part II examines the mens rea requirements in analogous constitutional torts to extract principles that underlie a court's decision to examine a state actor's subjective intent. Part III then argues for the elimination of the malice requirement by drawing on Fourth Amendment jurisprudence, a comparative analysis between malicious prosecution and other constitutional torts, and normative concerns. Part IV proposes that, if courts insist on retaining the malice requirement, they adopt a burden-shifting test that interrogates whether a government actor acted with the requisite malice.

²² *Id.* at 6.

²³ *Id.*

I. THE EXISTING STATE OF THE LAW

Malicious prosecution, a traditional common law tort, entitles plaintiffs to damages when a government actor, state or local, unlawfully brings criminal charges against them.²⁴ Through a series of cases starting in the 1990s, the Supreme Court recognized a constitutional claim of malicious prosecution grounded in the Fourth Amendment.²⁵ But this innovation has raised crucial questions: Why the Fourth Amendment instead of other amendments? What is the relationship between the common law tort of malicious prosecution and the constitutional tort of malicious prosecution? What elements must a Fourth Amendment malicious prosecution claimant prove, and how do those differ from what a common law malicious prosecution claimant must prove?

This Part answers these questions. First, it explains two foundational concepts: constitutional torts and malicious prosecution. Then it describes how the constitutional tort of Fourth Amendment malicious prosecution evolved. Finally, this Part discusses the circuit split on whether malice is a required element of a Fourth Amendment malicious prosecution claim. In discussing the split, this Part also highlights the varying definitions of malice that underlie the confusing and disparate approaches to Fourth Amendment malicious prosecution.²⁶

A. Constitutional Torts and Malicious Prosecution

A constitutional tort arises when a government actor violates someone's constitutional rights. Aggrieved parties can pursue their claims under 42 U.S.C. § 1983, which creates a cause of action for individuals deprived of their "rights, privileges, or immunities secured by the Constitution and laws."²⁷ If held liable,

²⁴ See *Thompson*, 142 S. Ct. at 1336–37, 1338. States have developed their own common law on malicious prosecution. See, e.g., *Broughton v. State*, 335 N.E.2d 310, 314 (N.Y. 1975) (establishing the elements of a malicious prosecution claim under New York law); *Leon v. County of Riverside*, 530 P.3d 1093, 1100–01 (Cal. 2023) (holding that statutory immunity for public employees in California extends to injuries caused by malicious prosecution).

²⁵ See *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion); *Manuel v. City of Joliet*, 580 U.S. 357, 368 (2017); *Thompson*, 142 S. Ct. at 1337.

²⁶ See Harper A. North, *Making Section 1983 Malicious-Prosecution Suits Work*, 110 VA. L. REV. 207, 226 (2024).

²⁷ 42 U.S.C. § 1983.

the government defendant may be ordered to pay the aggrieved party compensatory damages, like in a common law tort case.²⁸

Courts assess § 1983 claims by first identifying the specific constitutional right at issue and then applying common law tort principles. This is because § 1983 “is not itself a source of substantive rights” but “a method for vindicating federal rights.”²⁹ Thus, to bring a § 1983 claim, the aggrieved party must first identify “the specific constitutional right allegedly infringed.”³⁰ Courts then rely on the common law to guide their analysis of a constitutional tort claim.³¹ To determine the elements of a constitutional tort, courts “look to the elements of the most analogous tort as of 1871 when § 1983 was enacted, so long as doing so is consistent with ‘the values and purposes of the constitutional right at issue.’”³²

Courts have grounded § 1983 malicious prosecution claims in the Fourth Amendment,³³ which prohibits unreasonable searches and seizures.³⁴ This is because malicious prosecution implicates the constitutional right “to be free from an unlawful seizure which is part of the prosecution.”³⁵ Put another way, a Fourth Amendment malicious prosecution claim is a “claim for unreasonable seizure pursuant to legal process.”³⁶ But what does this critical term, legal process, mean? The litigant must have been seized as a result of the state acting under a judicial order, such as when a police officer arrests someone after executing a warrant or when someone is detained following an arraignment, indictment, or

²⁸ Wayne C. Beyer, *Police Misconduct: Principles Governing Money Damages and Other Relief Under 42 U.S.C. § 1983*, 32 TORT AND INS. L.J. 154, 158 (1996).

²⁹ *Albright*, 510 U.S. at 271 (plurality opinion) (quotation marks omitted) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

³⁰ *Id.*

³¹ *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (noting that the “rules, defining the elements of damages and the prerequisites for their recovery” and developed in the common law of torts, “provide the appropriate starting point for the inquiry under § 1983 as well” (quotation marks omitted) (quoting *Carey v. Phipps*, 435 U.S. 247, 257–58 (1978))).

³² *Thompson*, 142 S. Ct. at 1337 (quoting *Manuel*, 580 U.S. at 370).

³³ *Gordy v. Burns*, 294 F.3d 722, 725–26 (5th Cir. 2002), *abrogated by* *Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (collecting cases from other circuits holding that a malicious prosecution claim brought under § 1983 implicates the Fourth Amendment).

³⁴ U.S. CONST. amend. IV.

³⁵ *Gordy*, 294 F.3d at 725 (quotation marks omitted) (quoting *Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996)). Someone is seized when an officer, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

³⁶ *Thompson*, 142 S. Ct. at 1337.

hearing on probable cause.³⁷ Accordingly, damages for a malicious prosecution claim “remed[y] detention accompanied not by absence of legal process, but by *wrongful institution* of legal process.”³⁸ This is different from a due process claim in which the plaintiff claims that a government actor has deprived her of a constitutional right because the actor failed to provide sufficient notice or opportunity to be heard.³⁹ A plaintiff alleging malicious prosecution asserts that the initiation of process and the resulting seizure are unconstitutional.

B. Development of the Constitutional Tort of Malicious Prosecution

Lower courts acknowledged the existence of a Fourth Amendment claim for malicious prosecution long before the Supreme Court formally recognized such a claim in 2022.⁴⁰ In fact, it took the Supreme Court nearly three decades to ground a § 1983 malicious prosecution claim in the Fourth Amendment.

The doctrine found its footing in 1994, when the Court first considered whether criminal prosecution without probable cause amounted to a constitutional tort. In *Albright v. Oliver*,⁴¹ the plaintiff, Kevin Albright, brought a Fourteenth Amendment substantive due process claim after his drug charges were dismissed following a preliminary hearing.⁴² Seven Justices found that the Fourteenth Amendment did not support a right “to be free from criminal prosecution except upon probable cause,”⁴³ but a plurality acknowledged that Albright may find relief under the

³⁷ See *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 116–17 (2d Cir. 1995); *Williams v. Aguirre*, 965 F.3d 1147, 1158 (11th Cir. 2020).

³⁸ *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010) (emphasis in original) (quotation marks omitted) (quoting *Wallace v. Kato*, 549 U.S. 384, 390 (2007)).

³⁹ Compare *Mathews v. Eldridge*, 424 U.S. 319, 342–49 (1976) (holding that a plaintiff’s due process rights were not violated even though his disability benefits were terminated without an oral hearing), with *Sykes*, 625 F.3d at 312–17 (holding that officers were liable for malicious prosecution because they misrepresented information in an arrest-warrant application and lied during a hearing).

⁴⁰ See, e.g., *Pitt v. District of Columbia*, 491 F.3d 494, 510–11 (D.C. Cir. 2007) (collecting cases and holding that a malicious prosecution leading to an unreasonable seizure is actionable under § 1983 because it violates the Fourth Amendment); *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 99 (1st Cir. 2013) (“Prior to *Albright* only a minority of jurisdictions recognized a Fourth Amendment malicious prosecution claim, but it is now the majority rule.”).

⁴¹ 510 U.S. 266 (1994).

⁴² *Id.* at 268–69.

⁴³ *Id.* at 269.

Fourth Amendment, which protects against “pretrial deprivations of liberty.”⁴⁴ Soon after *Albright*, lower courts adopted the plurality’s view. In 1995, the Second Circuit held that malicious prosecution implicates a person’s Fourth Amendment right “to be free of unreasonable seizure of the person” and determined that a plaintiff “asserting a Fourth Amendment malicious prosecution claim under § 1983 must therefore show some deprivation of liberty consistent with the concept of ‘seizure.’”⁴⁵ Other circuits followed suit.⁴⁶

More than two decades after *Albright*, the Supreme Court held that the Fourth Amendment protects litigants against unlawful pretrial detention after the start of legal process.⁴⁷ In *Manuel v. City of Joliet*,⁴⁸ officers had charged plaintiff Elijah Manuel with unlawful possession of a controlled substance based on fabricated evidence, causing Manuel to spend forty-eight days in jail before the court dismissed his charge.⁴⁹ After he was released, Manuel sued the municipality for violating his Fourth Amendment rights by detaining him without probable cause.⁵⁰ The Supreme Court held that Manuel had a viable claim because the Fourth Amendment supports a right to be free from unreasonable pretrial detention both before and after “the start of legal process in a criminal case.”⁵¹ The Court explained that the start of 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

⁴⁴ *Id.* at 274.

⁴⁵ *Singer*, 63 F.3d at 116.

⁴⁶ See *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183–84 (4th Cir. 1996) (recognizing that “a § 1983 malicious prosecution claim alleging a seizure that was violative of the Fourth Amendment”); *Gregory v. City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006) (holding that “malicious prosecution claims which allege continued detention without probable cause must be pursued and analyzed under the Fourth Amendment”).

⁴⁷ *Manuel*, 580 U.S. at 368. The Court had long held that the Fourth Amendment governs claims of unlawful pretrial detention. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the “Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest”).

⁴⁸ 580 U.S. 357 (2017).

⁴⁹ *Id.* at 360–62.

⁵⁰ *Id.* at 361–62.

⁵¹ *Id.* at 366–67. In some ways, the Court’s holding in *Manuel* was not groundbreaking. Before *Manuel*, many circuits held that “the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period,” including *after* the start of legal process. *Hernandez-Cuevas*, 723 F.3d at 99 (collecting cases).

a crime.”⁵² The Court did not consider whether the Fourth Amendment supports a constitutional malicious prosecution claim. The Seventh Circuit, “in holding that detainees like Manuel could not bring a Fourth Amendment claim at all,” had foreclosed debate on “whether (and, if so, how) [Manuel’s] claim should resemble the malicious prosecution tort.”⁵³ Nevertheless, by recognizing that a form of malicious prosecution—unreasonable detention after the start of a criminal legal process—violated the Fourth Amendment, the Court inched closer to grounding a malicious prosecution claim in the Fourth Amendment.

Finally, the Supreme Court formally recognized a Fourth Amendment claim for malicious prosecution in 2022 in *Thompson*.⁵⁴ Officers arrested plaintiff Larry Thompson for “obstructing governmental administration and resisting arrest.”⁵⁵ Thompson spent two days in jail before a judge released him at his arraignment.⁵⁶ Before trial, the court dismissed his criminal charges without explanation.⁵⁷ Thompson sued the officers who charged and detained him for violating his Fourth Amendment rights under § 1983, asserting that they “maliciously prosecuted” him and “subjected him to an unlawful, illegal, and excessive detention.”⁵⁸ The Supreme Court noted that its precedents recognized “a claim for unreasonable seizure pursuant to legal process” and that nearly all circuits had permitted litigants to bring a malicious prosecution claim under the Fourth Amendment.⁵⁹ The Court went on to examine the elements that a malicious prosecution plaintiff must show to prevail on her claim.

To assist with its analysis, the Court looked to the common law tort of malicious prosecution because both the constitutional and common law claims derive from the “wrongful initiation of charges without probable cause.”⁶⁰ Common law malicious prosecution claimants must establish three elements: (1) that the defendant brought a suit or proceeding without probable cause; (2) that the defendant’s “motive in instituting’ the suit ‘was malicious,’ which

⁵² *Manuel*, 580 U.S. at 368–69.

⁵³ *Id.* at 372 n.10.

⁵⁴ 142 S. Ct. at 1337; see also Jonathan Halperin & Isaac McBeth, *A Clearer Path*, 58 TRIAL MAG., Sept. 2022, at 52.

⁵⁵ *Thompson*, 142 S. Ct. at 1335–36.

⁵⁶ *Id.* at 1336.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 1337.

⁶⁰ *Thompson*, 142 S. Ct. at 1337–38.

was often defined in this context as without probable cause and for a purpose other than bringing the defendant to justice”; and (3) that the prosecution ended “in the acquittal or discharge of the accused.”⁶¹ The Court did not articulate elements specific to a Fourth Amendment malicious prosecution claim.⁶² But it noted that a Fourth Amendment malicious prosecution claimant must prove that the malicious prosecution led to a seizure,⁶³ and she need not provide “affirmative indication of innocence” to prevail.⁶⁴ In a footnote, the Court declined to decide whether a Fourth Amendment malicious prosecution claimant must show that the defendant acted with malice or another mens rea.⁶⁵ By staying its hand, the Court preserved the variance in the circuits’ stances on whether malice was a required showing for a Fourth Amendment malicious prosecution claim. Indeed, one year after *Thompson* was decided, the Fifth Circuit held that the Court “largely left the question of elements [of a Fourth Amendment malicious prosecution claim] to the lower courts.”⁶⁶ Plaintiffs’ evidentiary burdens, therefore, still depend on where they file their claims.

C. The Circuit Split: Is Malice a Required Element of a Fourth Amendment Malicious Prosecution Claim?

With the Supreme Court still silent on the matter, the circuit courts are divided on whether a malicious prosecution plaintiff must show that a government defendant acted with malice. Circuits are split into two camps. The first camp, consisting of the First, Fourth, and Sixth Circuits, has adopted what one court has referred to as “a purely constitutional approach” that essentially requires “the plaintiff to demonstrate only a Fourth Amendment violation.”⁶⁷

⁶¹ *Id.* at 1338 (quoting THOMAS M. COOLEY, LAW OF TORTS 181 (Chicago, Callaghan & Co. 1880)).

⁶² *Armstrong v. Ashley*, 60 F.4th 262, 278 (5th Cir. 2023).

⁶³ *Thompson*, 142 S. Ct. at 1337 n.2; *see also* *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1748 (2024).

⁶⁴ *Thompson*, 142 S. Ct. at 1341.

⁶⁵ *Id.* at 1338 n.3.

⁶⁶ *Armstrong*, 60 F.4th at 278.

⁶⁷ *Hernandez-Cuevas*, 723 F.3d at 99. This Comment groups circuits differently than did *Hernandez-Cuevas*. Post-*Thompson*, the Fifth Circuit held that the elements of a Fourth Amendment malicious prosecution tort are the same as the state common law tort of malicious prosecution. *Armstrong*, 60 F.4th at 279. As for the Tenth Circuit, there has been debate over what approach it has adopted. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1287 n.4 (10th Cir. 2004). Based on available case law, it appears that the Tenth Circuit has adopted the elements of the common law tort. *See infra* notes 99–102 and accompanying text.

Because malice is not a required showing of a Fourth Amendment violation, plaintiffs do not need to prove malice. The second camp, consisting of most other circuits, has adopted “a blended constitutional/common law approach, requiring the plaintiff to demonstrate a Fourth Amendment violation *and* all the elements of a common law malicious prosecution claim.”⁶⁸ This blending includes establishing malice as required by common law.⁶⁹ The following sections discuss the split in more depth.

1. Circuits in which malice is not a required showing.

The Fourth, Sixth, and First Circuits do not require plaintiffs to establish malice. In *Brooks v. City of Winston-Salem*,⁷⁰ the Fourth Circuit held that the plaintiff sufficiently alleged a Fourth Amendment malicious prosecution claim for unlawful seizure.⁷¹ It distinguished between common law and Fourth Amendment malicious prosecution claims. Because Supreme Court precedent requires “the reasonableness of a seizure under the Fourth Amendment [to] be analyzed from an objective perspective,”⁷² the Fourth Circuit reasoned that “the subjective state of mind of the defendant, whether good faith or ill will, is irrelevant”⁷³ in malicious prosecution claims alleging a Fourth Amendment violation. In subsequent cases, the Fourth Circuit has emphasized that the “foundation for [a constitutional malicious prosecution claim is] ‘a seizure that was violative of the Fourth Amendment’”⁷⁴ and has not listed malice as an element for such a claim.⁷⁵ Instead, to prevail, a plaintiff need only show “the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff’s favor.”⁷⁶

The Sixth Circuit also does not require Fourth Amendment malicious prosecution claimants to prove malice. In *Sykes v. Anderson*,⁷⁷

⁶⁸ *Hernandez-Cuevas*, 723 F.3d at 99 (emphasis in original).

⁶⁹ *Thompson*, 142 S. Ct. at 1338 (citing THOMAS M. COOLEY, LAW OF TORTS 181 (Chicago, Callaghan & Co. 1880)).

⁷⁰ 85 F.3d 178 (4th Cir. 1996).

⁷¹ *Id.* at 183–84.

⁷² *Id.* at 184 n.5 (citing *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

⁷³ *Id.*

⁷⁴ *Lambert v. Williams*, 223 F.3d 257, 262 (4th Cir. 2000) (quoting *Brooks*, 85 F.3d at 184).

⁷⁵ See *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012).

⁷⁶ *Id.* at 647.

⁷⁷ 625 F.3d 294 (6th Cir. 2010).

the court critiqued other circuits for “import[ing] elements from the common law,” arguing that such an approach fails to “reflect[] on [the common law elements] consistency with the overriding *constitutional* nature of § 1983 claims.”⁷⁸ The court explained that “[c]ommon-law and § 1983 claims have different foundations,”⁷⁹ which means that § 1983 (i.e., constitutional) claims are “not tied to the formal categories and procedures[] of the common law.”⁸⁰ Like the Fourth Circuit, the Sixth Circuit found that the Fourth Amendment harm, an unreasonable seizure, “obviates the need for demonstrating malice” because Fourth Amendment doctrine “makes clear that [courts] should not delve into the defendants’ intent.”⁸¹ Accordingly, the Sixth Circuit held that a Fourth Amendment malicious prosecution plaintiff must establish the following elements to prevail: (1) she was criminally prosecuted and the defendant “ma[d]e, influence[d], or participate[d] in the decision to prosecute”;⁸² (2) the prosecution lacked probable cause; (3) as a result of the prosecution, she “suffered a ‘deprivation of liberty’ . . . apart from the initial seizure”; and (4) the prosecution was resolved in her favor.⁸³ For the Sixth Circuit, a better name for “malicious prosecution” might be “unreasonable prosecutorial seizure.”⁸⁴

Finally, the First Circuit requires Fourth Amendment malicious prosecution claimants to prove the same elements required by the Fourth Circuit.⁸⁵ In explaining why it does not require claimants to establish malice, the First Circuit reasoned in *Hernandez-Cuevas v. Taylor*⁸⁶ that “the rights guaranteed by the Fourth Amendment are not superseded by the common law.”⁸⁷ Thus, in the First Circuit’s view, there is no reason why “plaintiffs alleging a constitutional injury should be entitled to relief only if

⁷⁸ *Id.* at 309 (emphasis in original).

⁷⁹ *Id.*

⁸⁰ *Id.* (quotation marks omitted) (quoting *Albright*, 510 U.S. at 277 n.1 (Ginsburg, J., concurring)).

⁸¹ *Id.* at 309.

⁸² *Sykes*, 625 F.3d at 308 (alterations in original) (quotation marks omitted) (quoting *Fox v. DeSoto*, 489 F.3d 227, 237 (6th Cir. 2007)).

⁸³ *Id.* at 308–09 (quoting *Johnson v. Knorr*, 477 F.3d 75, 81 (3d Cir. 2007)).

⁸⁴ *Id.* at 310 (quotation marks omitted) (quoting *Frantz v. Village of Bradford*, 245 F.3d 869, 881 (6th Cir. 2001) (Gilman, J., dissenting)).

⁸⁵ *Hernandez-Cuevas*, 723 F.3d at 101 (citing *Evans*, 703 F.3d at 347).

⁸⁶ 723 F.3d 91 (1st Cir. 2023).

⁸⁷ *Id.* at 101.

they can demonstrate that their claim meets all the elements of a common law claim.”⁸⁸

2. Circuits in which malice is a required showing.

On the other hand, the Second, Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits require a plaintiff to establish the elements of a common law or state law malicious prosecution claim (the constitutional tort’s closest analogue).⁸⁹ Because the common law tort, which may vary by state, generally requires a showing of malice,⁹⁰ these circuits hold that someone who asserts a constitutional claim of malicious prosecution must also show malice.⁹¹ For instance, in *Manganiello v. City of New York*,⁹² the Second Circuit held that a plaintiff must not only show that the defendant violated her Fourth Amendment rights but also prove all the elements of a state-law malicious prosecution claim.⁹³ After “*Thompson’s* clear recognition of the constitutional tort of malicious prosecution,” the Fifth Circuit reached the same conclusion.⁹⁴

The Eleventh Circuit has held that the “elements” of a Fourth Amendment malicious prosecution claim “and whether they are met ultimately are controlled by federal law.”⁹⁵ But a claimant must prove that a state actor maliciously prosecuted her at common law and violated her “Fourth Amendment right to be free from unreasonable seizures”⁹⁶ because, in determining the elements of a constitutional tort, courts “must seek help from the common law tort which is most analogous to the claim in the case before [them].”⁹⁷ To that end, Fourth Amendment malicious prosecution plaintiffs must prove malice, an element of the common law tort of malicious prosecution.⁹⁸

The Tenth Circuit has described the elements of a common law malicious prosecution claim as a “starting point’ for the analysis of a § 1983 malicious prosecution claim” but held that

⁸⁸ *Id.*

⁸⁹ *See supra* note 11 and accompanying text.

⁹⁰ *See Hernandez-Cuevas*, 723 F.3d at 99 n.8.

⁹¹ *See, e.g., Manganiello v. City of New York*, 612 F.3d 149, 160–61 (2d Cir. 2010).

⁹² 612 F.3d 149 (2d Cir. 2010).

⁹³ *Id.* at 160–61.

⁹⁴ *See Armstrong*, 60 F.4th at 279.

⁹⁵ *Grider v. City of Auburn*, 618 F.3d 1240, 1256 (11th Cir. 2010).

⁹⁶ *Id.*

⁹⁷ *Whiting v. Traylor*, 85 F.3d 581, 585 (11th Cir. 1996).

⁹⁸ *Grider*, 618 F.3d at 1256, 1258 (holding that, when viewing the facts in the light most favorable to the plaintiff, a police officer acted maliciously when he fabricated a bribery charge to close the plaintiff’s business).

“the ultimate question . . . [is] whether the plaintiff has proven a *constitutional* violation.”⁹⁹ This articulation has engendered debate on whether the Tenth Circuit requires a Fourth Amendment malicious prosecution claimant to prove all of the elements of the common law claim.¹⁰⁰ But for all intents and purposes, the Tenth Circuit’s language suggests that the common law is a bar that Fourth Amendment malicious prosecution claimants must clear to prevail. For example, in *Novitsky v. City of Aurora*,¹⁰¹ the Tenth Circuit laid out the elements of a common law malicious prosecution claim and found that the plaintiff had failed to prove, among other elements, that an officer’s mistake in his police report amounted to malice.¹⁰²

3. Defining malice.

Courts are not only split on whether malice is required; they are also split on what amounts to malice. Some courts stress motive or intent. The Second Circuit has determined that malice could generally be inferred from a lack of probable cause and actions taken on “improper or wrongful motives, or in reckless disregard of the rights of the plaintiff.”¹⁰³ In *Manganiello*, the Second Circuit held that a reasonable factfinder could conclude that a police detective acted with malice because he selectively targeted the plaintiff over the course of an investigation, made statements about the plaintiff’s conduct that contradicted others’ firsthand knowledge, and was willing to coerce witnesses or rely on untrustworthy sources to indict the plaintiff.¹⁰⁴ In a similar vein, in *Novitsky*, the Tenth Circuit held that the plaintiff failed to prove the defendant acted with malice because, the court reasoned, the error was likely an inadvertent mistake,¹⁰⁵ distinguishable from an intentional error done “in bad faith to vex, annoy, or harass the adverse party.”¹⁰⁶

Other courts permit a plaintiff to prevail if he can show the defendant demonstrated a “reckless disregard for his rights,” a

⁹⁹ *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996) (emphasis in original) (quoting *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996)).

¹⁰⁰ *Pierce*, 359 F.3d at 1287 n.4.

¹⁰¹ 491 F.3d 1244 (10th Cir. 2007).

¹⁰² *Id.* at 1258.

¹⁰³ *Manganiello*, 612 F.3d at 163–64 (quoting *Pinsky v. Duncan*, 79 F.3d 306, 313 (2d Cir. 1996)).

¹⁰⁴ *Id.* at 164.

¹⁰⁵ *Novitsky*, 491 F.3d at 1258.

¹⁰⁶ *Pinsky*, 79 F.3d at 313 (citing 52 AM. JUR. 2D *Malicious Prosecution* § 152 (1970)).

step below a willfulness requirement.¹⁰⁷ In *Bledsoe v. Willis*,¹⁰⁸ the Western District of Louisiana held that “a showing of recklessness can adequately satisfy the malice . . . element in malicious prosecution claims.”¹⁰⁹ The court found that the plaintiff, who was incarcerated for two years before acquittal,¹¹⁰ succeeded in showing malice because he presented evidence that officers acted recklessly when they obtained an arrest warrant without conducting a proper investigation and presented an inaccurate report to the relevant authorities.¹¹¹ But in *Stonecipher v. Valles*,¹¹² the Tenth Circuit held that an officer did not recklessly disregard the plaintiff’s rights when he acted on a mistaken belief of the law in filing a criminal complaint.¹¹³ For these courts, mere negligence is insufficient to prove malice; rather, a plaintiff must prove an error that extends beyond a mere mistake.

In contrast, some courts define malice broadly with different mens rea options. The Seventh Circuit has held that malice can be established “by evidence of personal animosity or inferred from a complete lack of probable cause or a failure to conduct an adequate investigation.”¹¹⁴ In *Evans v. Matson*,¹¹⁵ whose factual background was discussed in this Comment’s introduction, police officers entered the plaintiff’s apartment without a warrant and tased him. Though the evidence obtained during the unlawful search was suppressed, the Seventh Circuit held that plaintiff Andre Evans had failed to show malice because he “at most . . . articulate[d] why, in hindsight, the officers should not have suspected him of the robbery.”¹¹⁶ On the other hand, the Western District of Texas in *Soto v. Monge*¹¹⁷ found that a plaintiff’s allegations of an officer’s decision to intentionally arrest the plaintiff without probable cause and

¹⁰⁷ *Green v. Thomas*, 734 F. Supp. 3d 532, 549 (S.D. Miss. 2024).

¹⁰⁸ 665 F. Supp. 3d 810 (W.D. La. 2023).

¹⁰⁹ *Id.* at 820.

¹¹⁰ *Id.* at 816.

¹¹¹ *Id.* at 820.

¹¹² 759 F.3d 1134 (10th Cir. 2014).

¹¹³ *Id.* at 1147 (“We have already concluded that the failure to perform a correct legal analysis after examining materials with conflicting information does not show reckless disregard for the truth.”).

¹¹⁴ *Welton v. Anderson*, 770 F.3d 670, 674 (7th Cir. 2014) (quotation marks omitted) (quoting *Golden Years Homestead, Inc. v. Buckland*, 557 F.3d 457, 462 (7th Cir. 2009)) (applying Indiana law).

¹¹⁵ 2024 WL 2206638 (7th Cir. May 16, 2024).

¹¹⁶ *Id.* at *3.

¹¹⁷ 735 F. Supp. 3d 792 (W.D. Tex. 2024).

then fabricate probable cause in a police report supported an inference of malice.¹¹⁸ Courts have also defined malice as “a purpose other than bringing the plaintiff to justice.”¹¹⁹

II. COMPARATIVE ANALYSIS OF CONSTITUTIONAL TORTS

To determine whether malice should be an element of a Fourth Amendment malicious prosecution claim, this Part examines other constitutional torts. Drawing inspiration from the comparisons courts make between common law torts and constitutional torts, this Part explores three constitutional torts: false arrest, excessive force, and deliberate indifference to medical needs. Like malicious prosecution claims, these other tort claims aim to remedy harm experienced by litigants engaged with law enforcement.

For each tort, this Part considers the following questions: What is the constitutional source of the claim? What factual circumstances give rise to the claim, and what rights are implicated? And what right does the claim attempt to protect? To be clear, the comparisons that this Comment draws are not perfect. For one, the claims do not all arise out of the Fourth Amendment. Because each amendment’s text, purpose, and scope of protection are different, courts’ reasons for applying an objective or subjective standard of proof may vary. Nevertheless, examining courts’ treatment of similar constitutional torts can shed light on the factors that courts should consider important when analyzing malicious prosecution claims.

This Part’s examination of constitutional torts reveals several factors that are relevant to understanding the mens rea requirement in Fourth Amendment malicious prosecution claims. These include whether a claim arises before or after conviction, the text of the amendment that a litigant alleged a state actor has violated, and the central legal question that courts must answer in deciding a claim. Part III expands on these factors, explicitly connects them to Fourth Amendment malicious prosecution doctrine, and explains why they support the argument that

¹¹⁸ *Id.* at 804.

¹¹⁹ *McKenna v. City of Philadelphia*, 582 F.3d 447, 461 (3d Cir. 2009); *see also Amobi v. D.C. Dep’t of Corr.*, 755 F.3d 980, 992 (D.C. Cir. 2014) (defining malice as “a primary purpose in instituting the proceeding other than that of bringing an offender to justice” (quotation marks omitted) (quoting *Dewitt v. District of Columbia*, 43 A.3d 291, 296 (D.C. 2012))).

Fourth Amendment malicious prosecution claims should require claimants to make *only* an objective showing.

A. False Arrest

A person can bring a claim for false arrest when a government actor detains her without probable cause or a warrant before the start of the legal process (i.e., between arrest and arraignment).¹²⁰ To bring a false arrest claim under the Fourth Amendment, a claimant must show that the defendant arrested her and that there was no probable cause for the arrest.¹²¹

Despite their differences, false arrest claims serve as a useful comparator to malicious prosecution claims because both fall under the Fourth Amendment and both require the plaintiff to allege an unreasonable seizure by a state actor. Like malicious prosecution claims, false arrest claims are defeated by a showing of probable cause for the arrest.¹²² Probable cause exists when the state actor has “knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to” persuade “a person of reasonable caution . . . that the person to be arrested has committed or is committing a crime.”¹²³ More broadly, probable cause requires “only a probability or substantial chance of criminal activity, not an actual showing of such activity.”¹²⁴ Courts do not consider the state actor’s motivation in this analysis.¹²⁵

*Brooks v. Miller*¹²⁶ demonstrates how courts analyze false arrest claims. The plaintiff asserted that a police officer falsely arrested him when the officer grabbed and handcuffed him after he refused to provide identification.¹²⁷ The Eleventh Circuit held that the officer did not violate the plaintiff’s Fourth Amendment right because there was probable cause to arrest him: the officer saw the plaintiff exit a car, the plaintiff said he did not have a

¹²⁰ See *Brooks v. Miller*, 78 F.4th 1267, 1281 (11th Cir. 2023) (explaining that “a warrantless arrest without the existence of probable cause violates the Fourth Amendment and forms a basis for a § 1983 claim”); *Heck v. Humphrey*, 512 U.S. 477, 484 (1994) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 8 (5th ed. 1984)).

¹²¹ See, e.g., *James v. City of Wilkes-Barre*, 700 F.3d 675, 680 (3d Cir. 2012); *Brooks*, 78 F.4th at 1281; *Weser v. Goodson*, 965 F.3d 507, 513 (6th Cir. 2020).

¹²² See, e.g., *Brooks*, 78 F.4th at 1281; *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995); *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

¹²³ *Weyant*, 101 F.3d at 852.

¹²⁴ *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983).

¹²⁵ *Singer*, 63 F.3d at 119.

¹²⁶ 78 F.4th 1267 (11th Cir. 2023).

¹²⁷ *Id.* at 1272.

driver's license, and Florida law penalizes people for driving without a license.¹²⁸ The court did not inquire into the officer's mental state, limiting its analysis to the objective facts of the case.¹²⁹ *Brooks* demonstrates that, when probable cause is an element of a claim, as it is for Fourth Amendment malicious prosecution claims, courts conduct an objective inquiry.

B. Excessive Force

An individual can bring a use of excessive force claim when a state actor, such as a law enforcement officer, has used unlawful force against her. Three constitutional provisions support the constitutional claim: the Fourth, Eighth, and Fourteenth Amendments. The factual circumstances surrounding the challenged action determine which amendment gives rise to an excessive force claim.

1. First encounter with police: the Fourth Amendment.

A claimant can bring a Fourth Amendment claim of excessive force in response to a state actor's use of force during an arrest, stop, or seizure.¹³⁰ Because the Fourth Amendment "provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct" during a search or seizure,¹³¹ courts consider Fourth Amendment excessive force claims under an "objective reasonableness" standard.¹³² Officers' intentions, whether good or bad, do not factor into this analysis.¹³³ The inquiry is purely objective: courts must decide whether an officer, "in light of the facts and circumstances confronting [the officer]" at the time, was reasonable.¹³⁴

In *Graham v. Connor*,¹³⁵ the Supreme Court declined to consider a defendant's subjective motivations when analyzing a

¹²⁸ *Id.* at 1281.

¹²⁹ *Id.* at 1280–82.

¹³⁰ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

¹³¹ *Id.*

¹³² *Id.* at 399. The Court rejected the "malicious and sadistic" standard that the appellate court applied. *Id.* at 397.

¹³³ *Id.* at 399.

¹³⁴ *Graham*, 490 U.S. at 397. The Court explained that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97.

¹³⁵ 490 U.S. 386 (1989).

Fourth Amendment excessive force claim for two reasons.¹³⁶ First, the Fourth Amendment's language ("unreasonable") does not suggest that a defendant's mental state is relevant.¹³⁷ Second, a heavier burden on the plaintiff, like "the less protective Eighth Amendment standard[,] applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'"¹³⁸ This is because "the State does not acquire the power to punish . . . until after it has secured" a lawful conviction.¹³⁹ Because a stop precedes a conviction, the person stopped has not been entitled to the due process protections accompanying a criminal prosecution.

Meeting a subjective standard is more difficult than meeting an objective standard. The former requires proof of a defendant's mental state, which can be hard to prove, whereas the latter does not. The *Graham* Court's description of the Eighth Amendment's subjective standard as "less protective" reflects this sentiment.¹⁴⁰ When someone brings a claim regarding state action that arises before a formal conviction and the due process guarantees associated with it, the State has not acquired permission to punish that person, which suggests that a more protective standard—an objective one—is more appropriate. Like Fourth Amendment excessive force claims, Fourth Amendment malicious prosecution claims arise before conviction. This means that a plaintiff-friendly objective standard can better shield litigants (who, again, have not been found guilty of a crime) than can a subjective standard. Part III explores this argument further.

2. Pretrial detention: the Fourteenth Amendment.

Someone who is detained pretrial can bring a claim of excessive force against a state actor under the Fourteenth Amendment's Due Process Clause.¹⁴¹ Courts consider the defendant's state of mind with respect to both the act of using force and whether the act of force was excessive.¹⁴² Courts apply a subjective

¹³⁶ *Id.* at 398.

¹³⁷ *Id.*

¹³⁸ *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

¹³⁹ *Ingraham*, 430 U.S. at 671 n.40.

¹⁴⁰ *Graham*, 490 U.S. at 398.

¹⁴¹ *Ingraham*, 430 U.S. at 671 n.40 (explaining that when there is not "a formal adjudication of guilt in accordance with due process of law" and "the State seeks to impose punishment . . . the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment").

¹⁴² *See, e.g., Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015).

standard to the use of force analysis, requiring a plaintiff show that the defendant knowingly used force.¹⁴³ On the other hand, to prove excessiveness, a claimant “must show only that the force . . . used against him was objectively unreasonable.”¹⁴⁴ Courts examine factors such as the “severity of the security problem” and the “relationship between the need for the use of force and the amount of force used.”¹⁴⁵

The objective reasonableness standard applies to the excessiveness question because courts must decide whether the defendant’s use of force amounts to preconviction “punishment.”¹⁴⁶ This inquiry does not require “proof of [the defendant’s] intent (or motive) to punish,”¹⁴⁷ but intent can instead be inferred from “objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.”¹⁴⁸ Because pretrial detention precedes the “formal adjudication of guilt in accordance with due process”¹⁴⁹—the stage after which the state “acquire[s] the power to punish with which the Eighth Amendment is concerned”¹⁵⁰—the Supreme Court has stated that “pretrial detainees . . . cannot be punished at all, much less ‘maliciously and sadistically.’”¹⁵¹ This means that excessive force during pretrial detention does not implicate the Eighth Amendment and that its subjective standard does not apply. Accordingly, in *Kingsley v. Hendrickson*,¹⁵² which concerned a pretrial detainee who alleged that his Fourteenth Amendment due process rights were violated when he was handcuffed, forcibly removed from his cell, and tased,¹⁵³ the Court held that a jury instruction requiring jurors to find that the officers “acted with reckless disregard of plaintiff’s rights” was erroneous.¹⁵⁴ The instruction impermissibly “suggested

¹⁴³ *Id.* at 396 (noting that “recklessness in some cases might suffice as a standard for imposing liability,” but reserving the question because the officers conceded that they acted “purposefully or knowingly with respect to the force they used against [the defendant]”).

¹⁴⁴ *Id.* at 396–97.

¹⁴⁵ *Id.* at 397.

¹⁴⁶ *Graham*, 490 U.S. at 395 n.10.

¹⁴⁷ *Kingsley*, 576 U.S. at 398.

¹⁴⁸ *Id.*; see also *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

¹⁴⁹ *Ingraham*, 430 U.S. at 671 n.40.

¹⁵⁰ *Id.*

¹⁵¹ *Kingsley*, 576 U.S. at 400.

¹⁵² 576 U.S. 389 (2015).

¹⁵³ *Id.* at 392–94.

¹⁵⁴ *Id.* at 394.

the jury should weigh [the defendants'] subjective reasons for using force and subjective views about the excessiveness of the force.”¹⁵⁵

Fourteenth Amendment excessive force claims demonstrate that the stage in the criminal process at which a claim arises is relevant to the evidentiary standard. As discussed above, Fourth Amendment malicious prosecution claims arise before conviction and therefore before a litigant has been afforded the due process protections accompanying a formal determination of guilt. This again suggests that an objective standard should apply because it is more protective of an unconvicted litigant's constitutional rights. Beyond that, Fourteenth Amendment excessive force claims show that an objective standard should apply when a court's central inquiry is whether a state actor had legal justification to behave in a particular way. When a state actor does not have an “expressed intent to punish,” the actor can still be found liable if the court determines that the challenged action was “not rationally related to a legitimate governmental objective.”¹⁵⁶ That inquiry is “solely [] objective” in that it does not require proof of the defendant's mental state.¹⁵⁷ Objective circumstances are sufficient.¹⁵⁸ Part III elaborates on this argument as it relates to Fourth Amendment malicious prosecution claims.

3. Post-conviction incarceration: the Eighth Amendment.

After a person has been convicted and is incarcerated, she can bring an Eighth Amendment claim for use of excessive force.¹⁵⁹ Because the Eighth Amendment's bar on “cruel and unusual” punishment¹⁶⁰ “was designed to protect those convicted of crimes,” it is “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions” that the Eighth Amendment's protections apply.¹⁶¹ To prevail on an excessive force claim, an incarcerated person must show that

¹⁵⁵ *Id.* at 403–04.

¹⁵⁶ *Id.* at 398.

¹⁵⁷ *Kingsley*, 576 U.S. at 397.

¹⁵⁸ *Id.* at 397–99 (contending that an objective standard is “consistent with [] precedent,” “workable,” and adequately protective of “an officer who acts in good faith”).

¹⁵⁹ *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

¹⁶⁰ U.S. CONST. amend. VIII.

¹⁶¹ *Whitley*, 475 U.S. at 318 (quotation marks omitted) (quoting *Ingraham*, 430 U.S. at 664).

a state actor used force unnecessarily, “maliciously[,] and sadistically for the very purpose of causing harm.”¹⁶² In a case concerning the constitutionality of a correctional officer’s decision to shoot an incarcerated claimant during a prison disturbance, the Supreme Court emphasized that “[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”¹⁶³

Unlike the Fourth Amendment’s reasonableness language, the Eighth Amendment’s prohibition of “cruel and unusual punishments” suggests that courts should assess a defendant’s subjective mental state.¹⁶⁴ To that end, courts examine factors such as the context in which the force was used and the extent to which there was a threat to the state actor’s safety to assess whether the “wantonness” of the force was “tantamount to a knowing willingness that it occur.”¹⁶⁵ *McCottrell v. White*¹⁶⁶ shows how this inquiry works in practice. Incarcerated plaintiffs alleged that prison guards violated their Eighth Amendment rights by shooting into the ceiling of the prison’s dining hall following a fight, injuring the plaintiffs.¹⁶⁷ The Seventh Circuit found that the guards intended to harm (or at least “used force with a ‘knowing willingness’ that harm would occur”) because they sent a cascade of bullets into a crowded hall.¹⁶⁸

Fourth Amendment malicious prosecution claimants are not convicted—their criminal cases were terminated in their favor. Therefore, the Eighth Amendment’s standard, which requires a claimant to show a state actor used force with knowledge or intent to cause harm, is not relevant.

C. Deliberate Indifference to Medical Needs

Finally, a person can bring a claim of deliberate indifference to medical needs if a state actor ignored her medical condition while she was incarcerated. Two amendments support the constitutional claim: the Eighth and Fourteenth Amendments.

¹⁶² *Id.* at 320–21 (quotation marks omitted) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

¹⁶³ *Id.* at 319.

¹⁶⁴ See *Graham*, 490 U.S. at 398 (“[T]he terms ‘cruel’ and ‘punishments’ clearly suggest some inquiry into subjective state of mind, whereas the term ‘unreasonable’ does not.”).

¹⁶⁵ *Whitley*, 475 U.S. at 321.

¹⁶⁶ 933 F.3d 651 (7th Cir. 2019).

¹⁶⁷ *Id.* at 655–56.

¹⁶⁸ *Id.* at 665 (quoting *Whitley*, 475 U.S. at 321).

1. Pretrial detention: the Fourteenth Amendment.

Someone who is detained pretrial can bring a deliberate indifference to medical needs claim if a state actor, such as a prison guard or doctor, refuses to provide medical care or interferes with medical treatment. Like a Fourteenth Amendment excessive force claim, a Fourteenth Amendment deliberate indifference claim arises when an individual is in state custody but has not been convicted.¹⁶⁹ Circuit courts are split on whether to apply an objective or subjective standard to Fourteenth Amendment deliberate indifference claims.

On one side of the split, the Tenth Circuit applies a subjective standard.¹⁷⁰ In *Strain v. Regalado*,¹⁷¹ the Tenth Circuit rejected the objective standard articulated in *Kingsley*, a Fourteenth Amendment excessive force case.¹⁷² First, the court noted that the use of excessive force is distinguishable from deliberate indifference to medical needs: whereas use of excessive force is an affirmative act, deliberate indifference to medical needs “often stems from inaction.”¹⁷³ This difference means that *Kingsley* does not govern deliberate indifference claims.¹⁷⁴ Second, “a deliberate indifference claim presupposes a subjective component” because the word “deliberate” means “intentional” or “premeditated.”¹⁷⁵ Accordingly, a plaintiff must prove that the defendant “subjectively disregard[ed] a known or obvious, serious medical need.”¹⁷⁶ Why a state actor did or did not do something is material.¹⁷⁷

On the other side, the Fourth Circuit applies an objective standard. In *Short v. Hartman*,¹⁷⁸ the court imported *Kingsley*’s objective standard to Fourteenth Amendment claims of deliberate indifference to medical needs.¹⁷⁹ It held that a plaintiff bringing a deliberate indifference claim need not show that the defendant “had actual knowledge of the detainee’s serious medical condition

¹⁶⁹ See *Short v. Hartman*, 87 F.4th 593, 606 (4th Cir. 2023); *Strain v. Regalado*, 977 F.3d 984, 991–92 (10th Cir. 2020).

¹⁷⁰ The Fifth, Eighth, and Eleventh Circuits also employ a subjective standard. *Strain*, 977 F.3d at 990 n.4.

¹⁷¹ 977 F.3d 984 (10th Cir. 2020).

¹⁷² *Id.* at 991.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 992.

¹⁷⁵ *Id.*

¹⁷⁶ *Strain*, 977 F.3d at 992.

¹⁷⁷ *Id.*

¹⁷⁸ 87 F.4th 593 (4th Cir. 2023).

¹⁷⁹ *Id.* at 608–09. In addition to the Fourth Circuit, the Second, Sixth, Seventh, and Ninth Circuits employ an objective standard. *Id.* at 611 (collecting cases).

and *consciously disregarded* the risk that their action or failure to act would result in harm.”¹⁸⁰ The court, in line with the Supreme Court’s reasoning in *Kingsley*, distinguished Eighth Amendment claims brought by post-conviction prisoners from Fourteenth Amendment claims brought by pretrial detainees, noting that “pretrial detainees (unlike convicted prisoners) cannot be punished at all” because pretrial detainees have not been formally found to be guilty of a crime.¹⁸¹ Thus, the “heightened, subjective Eighth Amendment deliberate indifference standard does not extend to Fourteenth Amendment cases,”¹⁸² in which liability can be found on a “purely objective basis.”¹⁸³

The Fourth Circuit expressly rejected the Tenth Circuit’s *Strain* holding, finding no reason to limit *Kingsley*’s objective standard to excessive force claims.¹⁸⁴ This split demonstrates that the name of a claim does not determine its elements in all courts. Part III makes this argument in the context of malicious prosecution claims and showings of malice.

2. Post-conviction incarceration: the Eighth Amendment.

Incarcerated persons can also bring Eighth Amendment claims for deliberate indifference to medical needs.¹⁸⁵ Because it is a condition of imprisonment¹⁸⁶ that “[a]n inmate must rely on prison authorities to treat his medical needs,” the denial of or interference with medical care can cause “unnecessary suffering” and “wanton infliction of pain” under the Eighth Amendment.¹⁸⁷ For an incarcerated litigant to prevail on a claim alleging deliberate indifference to medical needs, a court must find that the state official acted with “subjective recklessness”¹⁸⁸—the official must have known of but chosen to disregard an excessive risk to

¹⁸⁰ *Id.* at 611 (emphasis added).

¹⁸¹ *Id.* at 609 (quotation marks omitted) (quoting *Kingsley*, 576 U.S. at 400).

¹⁸² *Short*, 87 F.4th at 609.

¹⁸³ *Id.* at 611.

¹⁸⁴ *Id.* (“In short, we find *Strain*’s reasoning unpersuasive and hold that *Kingsley* is irreconcilable with our prior precedent.”).

¹⁸⁵ *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

¹⁸⁶ *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

¹⁸⁷ *Estelle*, 429 U.S. at 103–04 (quotation marks omitted) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). The Eighth Amendment “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency,’ against which [courts] must evaluate penal measures.” *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁸⁸ *Farmer v. Brennan*, 511 U.S. 825, 839 (1994).

the litigant's safety.¹⁸⁹ Courts interrogate the defendant's subjective mindset because the Eighth Amendment prohibits "cruel and unusual *punishment*," which requires an intent to harm.¹⁹⁰ Conditions of confinement, including official conduct, are not necessarily a part of the "penalty formally imposed for a crime."¹⁹¹ Thus, to qualify as "punishment" triggering Eighth Amendment protections, a plaintiff must prove that the state actor had the requisite mens rea.¹⁹²

To be clear, the subjective standards for Eighth Amendment deliberate indifference claims and Eighth Amendment use of excessive force claims are different.¹⁹³ Deliberate indifference to medical needs claims use a recklessness mens rea, while excessive force claims use a purposefulness or knowledge mens rea, despite arising from the same Amendment. Why? Law enforcement officers use force "in haste, under pressure, and frequently without the luxury of a second chance,"¹⁹⁴ but in situations in which a deliberate indifference to medical needs claim may arise, state actors are rarely faced with an immediate danger necessitating an impulsive response. As a result, it is more difficult to prevail on an excessive force claim than on a deliberate indifference claim; the former requires proof of the defendant's purpose or knowledge, whereas the latter requires a less demanding mens rea.¹⁹⁵ This suggests that, when a state actor does not act in the heat of the moment, the law should afford her fewer protections because the time she had to reflect upon the legality of her actions makes her more responsible for them.

How does this distinction relate to malicious prosecution claims? A prosecution does not arise in the heat of the moment. Preparation by officers and prosecutors alike is possible. The absence of an immediate danger in the malicious prosecution context suggests that a state actor does not deserve as many protections as she does when faced by a sudden, life-threatening situation.

¹⁸⁹ *Id.* at 837.

¹⁹⁰ *Wilson*, 501 U.S. at 300 (emphasis in original).

¹⁹¹ *Id.* at 300–02.

¹⁹² *Id.* at 299–300.

¹⁹³ *Farmer*, 511 U.S. at 835–36.

¹⁹⁴ *Id.* at 835 (quotation marks omitted) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)).

¹⁹⁵ *Id.*

* * *

The constitutional torts discussed in this Part reveal factors useful in determining whether Fourth Amendment malicious prosecution claims require a showing of malice. These factors include: (1) whether a claim arises before or after conviction, (2) the text of the Amendment that a claimant alleges that a state actor has violated, (3) the legal inquiry that courts must conduct when analyzing a claim, (4) whether a state actor had to make a split-second decision, and (5) the name of a claim. Part III explores these factors in the context of malicious prosecution claims and concludes that courts should eliminate the subjective malice requirement.

III. ELIMINATE THE MALICE REQUIREMENT

Establishing subjective intent should not be required for Fourth Amendment malicious prosecution claims. Instead, a lack of probable cause should suffice to establish malice. This Part discusses why. First, courts have traditionally applied an objective reasonableness standard to claims asserting an unreasonable search or seizure, including the Fourth Amendment torts of false arrest and excessive force discussed in Part II. Second, the policy aims served by a subjective standard of proof in other contexts are not served here. Third, eliminating the malice requirement has normative benefits that can extend relief to more people in an equitable manner.

A. Courts Apply an Objective Reasonableness Standard in Fourth Amendment and Other Constitutional Torts

Fourth Amendment jurisprudence and an examination of other constitutional torts that arise prior to conviction suggest that an objective reasonableness standard applies to Fourth Amendment malicious prosecution claims. First, unlike the Eighth Amendment, the Fourth Amendment typically does not require an inquiry into a state actor's subjective mindset. Because constitutional malicious prosecution claims are brought under the Fourth Amendment, they should be governed by the same standard as other Fourth Amendment claims. Second, an objective standard better suits the character of malicious prosecution claims.

1. Objective reasonableness is the centerpiece of Fourth Amendment jurisprudence.

Traditional Fourth Amendment analysis examines a state actor's conduct to assess whether it was objectively reasonable. For more than three decades, the Supreme Court has reminded lower courts time and again that the Fourth Amendment inquiry typically ignores the subjective mindset of state actors. In *Graham*, the plaintiff alleged that police officers had used excessive force against him during a traffic stop.¹⁹⁶ The Court rejected the use of the Eighth Amendment's subjective standard and noted that "subjective concepts like 'malice' and 'sadism' have no proper place in [the Fourth Amendment] inquiry."¹⁹⁷ In *Whren v. United States*,¹⁹⁸ a criminal defendant alleged that a police officer had stopped him for pretextual reasons.¹⁹⁹ The Court reiterated that the officer's subjective intentions "play no role in ordinary, probable-cause Fourth Amendment analysis."²⁰⁰ In *Torres v. Madrid*,²⁰¹ the plaintiff alleged that police officers had seized her when they shot her in the back as she fled.²⁰² The Court emphasized that courts must apply an objective reasonableness standard to Fourth Amendment seizure claims, explaining that "we rarely probe the subjective motivations of police officers in the Fourth Amendment context"²⁰³ because "[o]nly an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'"²⁰⁴ As discussed below, there are instances in which the Fourth Amendment permits courts to examine the subjective intentions of government actors, such as special needs searches and inventory searches.²⁰⁵ But in cases concerning the run-of-the-mill search or seizure requiring probable cause, the rule is clear: the Fourth Amendment analysis ignores a state actor's motivations.

The text of the Fourth Amendment itself also does not invite courts to examine a defendant's subjective intentions. The Fourth Amendment bars "unreasonable" searches and seizures.

¹⁹⁶ See *supra* text accompanying notes 135–39.

¹⁹⁷ *Graham*, 490 U.S. at 399.

¹⁹⁸ 517 U.S. 806 (1996).

¹⁹⁹ *Id.* at 809.

²⁰⁰ *Id.* at 813.

²⁰¹ 141 S. Ct. 989 (2021).

²⁰² *Id.* at 994.

²⁰³ *Id.* at 998.

²⁰⁴ *Id.* (quoting *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

²⁰⁵ See *infra* Part III.B.2.

Unreasonable does not imply that a state actor intended to unnecessarily harm someone; rather, it means that external circumstances offered no reason for the actor to believe there was criminal activity.²⁰⁶ Compare this language to that of the Eighth Amendment, which prohibits “cruel and unusual punishments.” Cruel suggests that someone intends to harm another. Unusual connotes conduct that exceeds what is proper. And punishment assumes that someone wants to deprive another of a basic right for retributive or deterrent purposes. Given these textual hooks, it is no surprise that courts examine a defendant’s subjective mindset when analyzing post-conviction claims of excessive force and deliberate indifference to medical needs brought under the Eighth Amendment. The Fourth Amendment is different. “Unreasonable” is not as extreme as “cruel and unusual,” which courts have understood to mean “unnecessary and wanton,” nor does it entail a liable mens rea.²⁰⁷ Reasonableness, as traditionally interpreted in tort law, is judged objectively.²⁰⁸

2. An objective standard is better suited for Fourth Amendment malicious prosecution claims.

When examining other Fourth Amendment constitutional torts, such as false arrest and use of excessive force, courts apply an objective standard.²⁰⁹ Both false arrest and excessive force claims arise during unjustified searches or seizures—actions that the Fourth Amendment explicitly prohibits.²¹⁰ As a result, courts have ignored the defendant’s subjective mindset.²¹¹ Similarly, Fourth Amendment malicious prosecution claims arise during unjustified seizures that are part of unlawful prosecutions.²¹² Of course, the nature of the challenged conduct for each claim is different. Malicious prosecution claimants argue that the initiation of criminal process violated their Fourth Amendment rights, whereas false arrest and excessive force claimants allege

²⁰⁶ Cf. *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) (explaining how probable cause can be met by corroborating evidence).

²⁰⁷ E.g., *Whitley v. Albers*, 475 U.S. 312, 319–20 (1986).

²⁰⁸ See *Vaughan v. Menlove*, [1837] 132 Eng. Rep. 490; RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1977).

²⁰⁹ See *supra* Part II.A–B.1.

²¹⁰ See *Graham*, 490 U.S. at 394–95.

²¹¹ See *id.* at 397 (“As in other Fourth Amendment contexts . . . the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.”).

²¹² *Thompson*, 142 S. Ct. at 1337 n.2.

a Fourth Amendment violation before any legal process. Regardless, the challenged conduct for these three claims arises during a search or seizure. The same standard should control: courts should apply the objective standard of other Fourth Amendment torts to Fourth Amendment malicious prosecution claims.

Beyond the Fourth Amendment, Fourteenth Amendment excessive force claims demonstrate that an objective standard governs when a court must decide whether a state actor had legal justification for her conduct. Like Fourth Amendment malicious prosecution claims, Fourteenth Amendment excessive force claims arise before conviction. Thus, both claims protect litigants at a stage of the criminal process in which they have not been entitled to the procedural protections of a trial and the State has not obtained the power to lawfully punish them. Fourteenth Amendment excessive force litigants do not need to prove the state actor's intent; absent evidence of a defendant's intent to punish, the focus of a court's analysis is whether the challenged action was unrelated to a legitimate state interest.²¹³ The objective nature of courts' central inquiry in Fourteenth Amendment excessive force claims is similar to that of Fourth Amendment malicious prosecution claims, in which courts must determine whether a state actor had probable cause to initiate a criminal proceeding against the claimant.²¹⁴ Because the probable cause analysis does not consider a state actor's subjective intent,²¹⁵ the focus of the malicious prosecution inquiry should be similarly objective.

To be sure, the Fourth and Fourteenth Amendments protect different rights and were enacted at different times. But that has not stopped lower courts from importing standards of one amendment to the other when the claims are similar.²¹⁶ Malicious prosecution is not the same as excessive force, but the conduct challenged in both claims arises at a critical time: before a litigant has been convicted and when the litigant is "still entitled to the constitutional presumption of innocence."²¹⁷ Further, to be actionable, a malicious prosecution must have caused a litigant's seizure beyond her initial arrest, which is akin to the conduct at

²¹³ See *Kingsley*, 576 U.S. at 398; *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

²¹⁴ See *Thompson*, 142 S. Ct. at 1337.

²¹⁵ See *Whren*, 517 U.S. at 813.

²¹⁶ See, e.g., *Strain*, 977 F.3d at 989 (applying the subjective standard governing an Eighth Amendment deliberate indifference claim to a Fourteenth Amendment deliberate indifference claim).

²¹⁷ *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018).

issue in Fourteenth Amendment excessive force claims—pretrial detention. The similarities between the claims make it reasonable to apply the same standard to both.

Additionally, the circumstances that surround a malicious prosecution do not warrant heightened legal protections for government actors. The decision to prosecute someone is not made in the spur of the moment like a decision to use excessive force often is. Government actors have time to consider whether to start a criminal case. It may take days or even months to gather evidence, obtain an arrest warrant, and bring charges. In short, officers and prosecutors are not forced to make a split-second decision in the face of an imminent deadly threat. When such a threat exists, courts are willing to extend grace to government actors.²¹⁸ Prosecutorial action does not warrant that kind of deference. Of course, the presence of an imminent danger is not the only relevant consideration here. Some might argue that eliminating malice as a requirement will chill zealous enforcement of the law. But the difference brought about by a shift in a plaintiff's evidentiary burden likely will not make it unduly easy to prevail in Fourth Amendment malicious prosecution cases. Fourth Amendment claims are not easily granted regardless of the standard applied.²¹⁹ Therefore, governments need not worry about compensating scores of litigants for constitutional violations.

Finally, the fact that a malicious prosecution claim has “malicious” in its name does not mean that a state actor's mental state is necessarily relevant. While the Tenth Circuit argued that the term deliberate “presupposes a subjective component” and accordingly applied a subjective standard,²²⁰ not all circuits agree. The Fourth Circuit acknowledged that the average person will understand “deliberate indifference” to require a subjective motivation but held that deliberate indifference could, in reality, be objective because the Supreme Court formerly used deliberate indifference to describe an objective test.²²¹ The Sixth Circuit, which also applies an objective standard, has argued that “deliberate indifference” does not have the same meaning across contexts because it is “a judicial gloss, appearing neither in the Constitution

²¹⁸ See *Graham*, 490 U.S. at 396–97.

²¹⁹ See Brent E. Newton, *The Supreme Court's Fourth Amendment Scorecard*, 13 STAN. J.C.R. & C.L. 1, 14 (2017) (finding that, between 1982 and 2015, the Supreme Court decided against Fourth Amendment claimants in 75.7% of cases involving a Fourth Amendment claim, whether civil or criminal).

²²⁰ *Strain*, 977 F.3d at 992.

²²¹ *Short*, 87 F.4th at 605 n.7.

nor in a statute.”²²² The Fourth and Sixth Circuits’ arguments are convincing because the ordinary meaning of a word might not translate to the showing that it requires of plaintiffs in court. We have seen this with the term malice. Merriam-Webster defines malice as a “desire to cause pain, injury, or distress to another.”²²³ But some courts have inferred malice from the absence of probable cause,²²⁴ which does not consider a state actor’s desire. The legal questions raised by the claim, not its name, determine the elements that must be shown.

B. The Purposes Served by a Subjective Standard Are Not Met in Fourth Amendment Malicious Prosecution Claims

Courts examine a state actor’s subjective intent after a plaintiff has been convicted of a crime and the state acquires the power to punish. Malicious prosecution litigants have not been convicted (in fact, their cases either were dismissed or ended in an acquittal), so the more protective objective standard (as opposed to the less protective subjective standard) should apply. Furthermore, in Fourth Amendment jurisprudence, courts analyze a state actor’s subjective intent only in the unusual circumstances in which probable cause is not required or not central to courts’ analyses.²²⁵ Because a lawful prosecution requires probable cause and a Fourth Amendment malicious prosecution plaintiff must prove that a state actor lacked probable cause to prosecute her, the state actor’s intent should be irrelevant.

1. Malicious prosecution claimants were not afforded due process protections.

Someone who asserts a Fourth Amendment malicious prosecution claim should not need to establish that the defendant acted with malice. Requiring a plaintiff to prove that the defendant had an improper motive makes it more difficult to prevail even when it is clear that the plaintiff’s constitutional rights have been violated. In many cases, the government actor will not admit what her true intent was, forcing a claimant to scrape together evidence suggesting that the defendant intended to prosecute her for

²²² *Brawner v. Scott County*, 14 F.4th 585, 595 (6th Cir. 2021) (quotation marks omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 840 (1994)).

²²³ *Malice*, MERRIAM-WEBSTER, <https://perma.cc/5YRW-GPTV>.

²²⁴ See, e.g., *Manganiello*, 612 F.3d at 163.

²²⁵ Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 456–61 (2022).

the wrong reasons. But that evidence may not amount to “malice” in the court’s eye. For example, in *Evans v. Matson*, the plaintiff brought a malicious prosecution claim after police officers entered his home without a warrant, tased him, and arrested him.²²⁶ The trial court granted the plaintiff’s motion to suppress all evidence obtained during the warrantless search, and the prosecution dismissed his charges.²²⁷ But the Seventh Circuit still denied the plaintiff’s malicious prosecution claim because he did not prove “a lack of good faith, a failure to adequately investigate, or personal animosity” on the officers’ part.²²⁸ This example demonstrates how difficult it can be to prove subjective malice—and why malice should not be required.

Courts should apply a subjective standard only when a plaintiff has already been afforded the due process protections required to make conviction possible. Consider, for instance, Eighth Amendment excessive force and deliberate indifference to medical needs claims. Both claims arise after conviction, which means that “the State has complied with the constitutional guarantees” and procedural protections “traditionally associated with criminal prosecutions.”²²⁹ Convictions grant the state permission to deny the plaintiff certain liberties, but before a conviction, the state does not have that power. The accused does not forfeit her constitutional rights until after the state has determined through the crucible of trial that she has committed a wrong. Because the accused has not been entitled to the same constitutional protections as a convicted person, she is in a vulnerable position and deserves more legal protection. Malicious prosecution plaintiffs are in that position because they have not been convicted of a crime. Requiring a malicious prosecution plaintiff to present evidence of the defendant’s motivations may make it more difficult for her to succeed, undermining the legal protections to which she should be entitled. Therefore, the more government-friendly subjective standard should not apply. Instead, courts should require a plaintiff to prove only that a state actor lacked probable cause—an objective reason—to prosecute her.

²²⁶ *Evans*, 2024 WL 2206638, at *1.

²²⁷ *Id.*

²²⁸ *Id.* at *3.

²²⁹ *Whitley*, 475 U.S. at 318 (quotation marks omitted) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

Due process concerns are not the only factor that determines which standard to apply. But courts have recognized that there are differences between the claims brought by pretrial detainees and by people who are incarcerated post-conviction—and those differences translate into legal protections.²³⁰ As the Sixth Circuit reasoned, “Pretrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence.”²³¹

2. Probable cause means that state actors’ subjective intentions are irrelevant.

Even though objective reasonableness is the cornerstone of Fourth Amendment jurisprudence, courts examine a defendant’s subjective intent when analyzing certain government conduct that does not require probable cause.²³² Because a prosecution requires probable cause, courts need not consider a defendant’s motivation in Fourth Amendment malicious prosecution cases.

Courts consider an officer’s subjective mindset when determining whether an inventory search was reasonable.²³³ In *Colorado v. Bertine*,²³⁴ the Supreme Court held that an officer can search an arrestee’s inventoried possessions as long as two factors are met: (1) the officer follows her department’s standard criteria, and (2) the officer was motivated by “something other than suspicion of evidence of criminal activity.”²³⁵ The second factor requires courts to interrogate an officer’s motivation because, unlike most other Fourth Amendment conduct, an inventory search is a “routine administrative caretaking function[]” that does not require probable cause.²³⁶ Professor Orin Kerr summarized the distinction between *Whren*, which does not permit inquiry into an officer’s subjective intentions during a traffic stop, and *Bertine* as follows: “The key was that searches ‘for the purpose of inventory or administrative regulation’ did not require probable cause. Only when probable cause was not required did subjective intent matter.”²³⁷

²³⁰ See, e.g., *Short*, 87 F.4th at 609.

²³¹ *Miranda*, 900 F.3d at 350.

²³² Kerr, *supra* note 225, at 451.

²³³ *Id.* at 458–59.

²³⁴ 479 U.S. 367 (1987).

²³⁵ *Id.* at 375.

²³⁶ *Id.* at 371 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976)); accord *Whren*, 517 U.S. at 811–12.

²³⁷ Kerr, *supra* note 225, at 459 (quoting *Whren*, 517 U.S. at 811–12).

Similarly, courts consider intent when assessing the reasonableness of a special needs search or seizure.²³⁸ Special needs activities are constitutional if they serve a “lawful primary purpose.”²³⁹ Special needs searches and seizures do not require probable cause because they are conducted for a purpose “beyond the normal need for law enforcement,”²⁴⁰ such as drug testing student athletes²⁴¹ or keeping drunk drivers off the street.²⁴² Kerr emphasized that, in deciding what is reasonable, courts examine the “programmatic purpose” of a special need search or seizure instead of an individual’s intent: “Courts measure whether a search or seizure reflects and advances [a government’s non-law enforcement] interest by first determining whether [the government’s] motivation matches its legal justification.”²⁴³ If a special needs search or seizure solely advances a “general interest in crime control,” it is unreasonable because probable cause would then be necessary.²⁴⁴

The emphasis on intent for inventory searches and special needs searches and seizures makes sense when viewing probable cause as an evidentiary basis for assessing the reasonableness of state action. Probable cause requires a government actor to develop a reasonable belief that there is criminal activity before acting. It is something tangible that a court may analyze. Absent probable cause, the only available evidence of reasonableness is the government’s purpose or motivation. In the Fourth Amendment malicious prosecution context, a plaintiff must prove that the government actor had no probable cause to prosecute her. Probable cause provides sufficient information for courts to analyze, so it is unnecessary to consider a defendant’s subjective intent.

C. Normative Benefits of Eliminating the Malice Requirement

Eliminating the malice requirement would benefit both plaintiffs and courts. First, it would create uniformity across jurisdictions and within Fourth Amendment jurisprudence, which would lead to more predictable outcomes and increase the legitimacy of the legal system. Second, it would encourage more people to sue by reducing their burden of proof, thereby extending

²³⁸ See *id.* at 457.

²³⁹ *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

²⁴⁰ *Id.* at 37.

²⁴¹ See generally *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

²⁴² See generally *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990).

²⁴³ Kerr, *supra* note 225, at 458.

²⁴⁴ *Edmond*, 531 U.S. at 41.

relief to more aggrieved parties and remedying the tangible harm from the collateral consequences of an arrest. This change might encourage an influx of claims, but other procedural hurdles would limit damages to deserving litigants. Last, it may hold police officers and prosecutors in check by encouraging departments to consider systemic policies as opposed to focusing on individual officers.

1. Uniformity.

Eliminating the malice requirement would create uniformity across jurisdictions that better serves plaintiffs' interests. First, outcomes would be more predictable, which could help parties understand the law and adjust their behavior accordingly.²⁴⁵ While litigants know the jurisdiction in which they bring their case, the convoluted nature of malicious prosecution doctrine makes it difficult to understand what they must prove to prevail. Second, predictability would cabin the discretion of officers and prosecutors, which may promote better policing. Third, abolishing the subjective element of malicious prosecution claims would eliminate the variation in how circuits that adopt the malice requirement define malice,²⁴⁶ limiting the discretion that courts have in denying a claim. Finally, eliminating the malice requirement would harmonize Fourth Amendment jurisprudence. The vast majority of Fourth Amendment claims are analyzed under an objective reasonableness standard. Applying that standard to Fourth Amendment malicious prosecution claims would unite them with other Fourth Amendment constitutional torts. Doing so would create an internally consistent body of law, which may minimize confusion among both courts and litigants.²⁴⁷

²⁴⁵ Cf. Larry Kramer, *On the Need for a Uniform Choice of Law Code*, 89 MICH. L. REV. 2134, 2137 (1991) (explaining the benefits of uniformity in the choice of law context).

²⁴⁶ See *supra* notes 103–04 and accompanying text (discussing circuits that infer malice from a lack of probable cause); *supra* notes 107–19 and accompanying text (discussing circuits that require a higher standard).

²⁴⁷ See Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1801–02 (2020) (noting that uniformity can reduce transaction costs because “there will be fewer legal challenges and fewer practitioners and judges trying to make sense of inconsistencies in the process”).

2. Expanding relief to remedy individual harms.

Eliminating a subjective showing may extend relief to more people by reducing plaintiffs' burden of proof. If it is less onerous to prevail on a malicious prosecution claim, people who otherwise were not inclined to sue may seek a legal remedy. Critics might fear that this change will lead to more lawsuits, but to prevail, a Fourth Amendment malicious prosecution plaintiff must still prove that the defendant acted without probable cause and is not shielded by qualified immunity. For some courts, the malice and probable cause inquiries are essentially the same because these courts hold that malice can be inferred from a "lack of probable cause."²⁴⁸ This approach's existence suggests that malice need not be its own element. Requiring plaintiffs to essentially prove the absence of probable cause twice causes courts to waste time and may afford state actors an additional opportunity to justify their unconstitutional behavior, perhaps with pretextual explanations of their knowledge, recklessness, or lack thereof.

Lessening a plaintiff's evidentiary burden may also improve her chances of prevailing. In some cases, it may be nearly impossible to obtain proof of a state actor's intent to fabricate evidence or reckless disregard of a plaintiff's rights.²⁴⁹ If a plaintiff cannot access information during discovery, her claim is dead on arrival. But if her burden of proof is lower, a plaintiff can more easily obtain the necessary materials to build a strong case. Making relief more attainable furthers the remedial aim of civil rights damages, which compensate the plaintiff for "injuries arising from the violation of legal duties."²⁵⁰ Official misconduct, such as fabricating evidence, concealing exculpatory evidence, and witness tampering,²⁵¹ led to the incarceration of more than two thousand people who were exonerated between 1989 and 2023.²⁵² Conditions of incarceration are often abysmal: incarcerated people may be

²⁴⁸ *Amobi v. D.C. Dep't of Corr.*, 755 F.3d 980, 993 (2014); *see also Stonecipher*, 759 F.3d at 1146; *Manganiello*, 612 F.3d at 163.

²⁴⁹ *See United States v. Armstrong*, 517 U.S. 456, 463–64 (1996) (establishing that selective prosecution plaintiffs must provide some evidence of discriminatory intent and effect simply to obtain discovery).

²⁵⁰ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 952 (2014) (quoting *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring)).

²⁵¹ *See Gross et al.*, *supra* note 21, at 30.

²⁵² *See supra* notes 19–20.

abused, raped, denied medical treatment, and even killed.²⁵³ Conditions outside of incarceration are also cruel: an arrest charge, though dismissed, can make it more difficult to secure a job²⁵⁴ and find housing.²⁵⁵ Malicious prosecution violates people's constitutional rights; they deserve to be made whole after such a deprivation and the collateral consequences accompanying prosecution. By reducing plaintiffs' evidentiary burden, eliminating their need to make a subjective showing could better ensure that their dignity and rights are restored.²⁵⁶

3. Increasing police and prosecutorial accountability.

Eliminating a subjective showing would also move the focus of a court's analysis from an individual actor's conduct to the broader policy that gave rise to the challenged conduct. Professor Sofia Yakren has argued that a state actor's decision to prosecute someone may not be intentional but instead a result of "tunnel vision," which leads people to behave unreasonably without meaning to.²⁵⁷ Professors Keith Findley and Michael Scott, whom Yakren cited, described tunnel vision as a process wherein "investigators, prosecutors, judges, and defense lawyers alike [] focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion."²⁵⁸ Tunnel vision "is more often the product of the human condition" (namely, cognitive shortcuts such as confirmation bias and hindsight bias), "as well as institutional and cultural pressures, than of maliciousness or indifference."²⁵⁹ If government officials act on unconscious biases or under institutional pressures, there will be little to no proof of their malice; after all, they may not intend to act unconstitutionally. Yakren suggested that plaintiffs should be allowed to present evidence about a department's

²⁵³ *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://perma.cc/N2MF-VEG8>.

²⁵⁴ Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 84–88 (2017).

²⁵⁵ *The Cascading Consequences of an Arrest*, ACLU FLA., <https://perma.cc/9PDN-GM4J>.

²⁵⁶ See Jason NE Varuhas, *The Concept of 'Vindication' in the Law of Torts: Rights, Interests and Damages*, 34 OXFORD J. LEGAL STUD. 253, 284 (2014).

²⁵⁷ Sofia Yakren, *Removing the Malice from Federal "Malicious Prosecution": What Cognitive Science Can Teach Lawyers About Reform*, 50 HARV. C.R.-C.L.L. REV. 359, 376–79 (2015).

²⁵⁸ *Id.* at 376 (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006)).

²⁵⁹ *Id.* at 377 (quoting Findley & Scott, *supra* note 258, at 291–92); see also *id.* at 379–84 (explaining flawed reasoning processes that cause tunnel vision).

practices to demonstrate that a government actor was primed to behave unreasonably.²⁶⁰ That evidence, though not specific to the individual plaintiff, is certainly relevant in that it can establish a culture of misconduct that is difficult to tease out when examining one incident in isolation but that nevertheless influenced a state actor's behavior. Yakren argued that permitting plaintiffs to sue municipalities "for failing to train and supervise their police officers and prosecutors to recognize and neutralize cognitive bias" may push departments to enact policies that address damaging biases.²⁶¹ This is because municipalities, not individuals, pay the vast majority of civil settlements,²⁶² and they consequently have an interest in deterring misconduct.

But this payment structure also means that the deterrent effects of civil settlements may be limited, as scholars like Professor Joanna Schwarz have noted.²⁶³ Municipalities "absorb[] the costs of individual officer liability" as they would any other public expense and do not change policing practices.²⁶⁴ This practice suggests that eliminating the malice requirement, which can enable more plaintiffs in more jurisdictions to receive damages, must be accompanied by local or state laws requiring municipalities to collect data on the type, number, and cost of lawsuits against government actors.²⁶⁵ Reducing a plaintiff's burden of proof alone is not enough to radically alter what happens on the ground. And it is because a change in the evidentiary standard is a small step that fears about chilling law enforcement or prosecution are not as significant as they may appear. It is only when paired with broader reforms that reducing plaintiffs' burden of proof can push departments to modify their practices.

Moreover, Fourth Amendment malicious prosecution litigants must overcome the nearly insurmountable obstacles of courts' deference to state actors' discretion and immunity for state action. Police officers are entitled to qualified immunity, which shields government actors from liability unless a litigant can show that the actor violated a "clearly established" constitutional

²⁶⁰ *Id.* at 388–89 (listing practices that can help police and prosecutors reject cognitive bias).

²⁶¹ Yakren, *supra* note 257, at 396.

²⁶² *See id.* at 396–400; Schwartz, *supra* note 250, at 913 (finding that in forty-four large jurisdictions between 2006 and 2011, "[o]fficers were financially responsible for . . . approximately .02% of the total dollars paid").

²⁶³ Schwartz, *supra* note 250, at 953.

²⁶⁴ *Id.* at 955.

²⁶⁵ *Id.* at 956–58.

right.²⁶⁶ That bar is extraordinarily high: from 2010 to 2020, federal appellate courts granted qualified immunity to government defendants in 54% of appeals.²⁶⁷ Courts also presume that prosecutors act in accordance with the Constitution.²⁶⁸ Consequently, prosecutors are protected by absolute immunity for prosecutorial acts (e.g., presenting testimony at trial, requesting an arrest warrant) and qualified immunity for investigative or administrative acts (e.g., fabricating evidence, speaking at a press conference).²⁶⁹ This means that if a Fourth Amendment malicious prosecution litigant wants to prevail against a prosecutor, she must show that the prosecutor (1) engaged in an investigative or administrative act and therefore is not shielded by absolute immunity, (2) is not entitled to qualified immunity, and (3) did in fact maliciously prosecute her. Eliminating malice will not lower the threshold showing that a plaintiff must make to sue a state actor. Change comes from courts' willingness to curtail immunity, whether qualified or absolute, and sanction state actors who break the law.²⁷⁰ The merits of a case are only half of the picture.

IV. AN ALTERNATIVE TO ELIMINATING THE MALICE REQUIREMENT: A BURDEN-SHIFTING TEST

Changing policing and prosecutorial practices is difficult.²⁷¹ Public will may not be strong enough to push state courts to redefine common law malice nor to influence federal courts to

²⁶⁶ Jason Tiezzi, Robert McNamara & Elyse Smith Pohl, *Unaccountable: How Qualified Immunity Shields a Wide Range of Government Abuses, Arbitrarily Thwarts Civil Rights, and Fails to Fulfill Its Promises*, INST. FOR JUST. 9 (2024), <https://perma.cc/UL9B-HXN7>.

²⁶⁷ *Id.* at 21.

²⁶⁸ See *Armstrong*, 517 U.S. at 464 (describing a “presumption of regularity” for prosecutorial decisions (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926))).

²⁶⁹ See Erwin Chemerinsky, *Prosecutorial Immunity*, 15 *TOURO L. REV.* 1643, 1648–50 (1999) (discussing absolute immunity); *id.* at 1650–52 (discussing qualified immunity).

²⁷⁰ See Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 *CARDOZO L. REV.* 2139, 2156–59 (2010) (suggesting that community prosecution and prosecutorial review boards can reform prosecutorial misconduct).

²⁷¹ One such reform effort is the progressive prosecution movement. Progressive prosecutors are “committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity.” Avani Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 *STAN. J.C.R. & C.L.* 475, 476 (2021). Public response to progressive prosecution has not always been positive. See Laurie L. Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 *AM. CRIM. L. REV.* 1495, 1496 n.4 (2023) (listing efforts to recall or remove progressive prosecutors in San Francisco, Los Angeles, and Philadelphia).

eliminate the malice requirement in constitutional claims. Courts may also want to retain the malice requirement due to circuit precedent. But that reluctance does not mean that Fourth Amendment malicious prosecution jurisprudence should remain in its current state, considering that official misconduct often drives wrongful convictions.²⁷²

To address the shortcomings of discretionary prosecution, this Part proposes an alternative to eliminating the malice requirement: a burden-shifting test. The test's purpose is twofold: (1) require the government actor to explain why she prosecuted the plaintiff, and (2) make public the decision-making processes that are ordinarily left to the private discretion of government actors.

A. Justifications for the Test

A burden-shifting test has two critical benefits. First, by imposing a burden of production on government actors to provide a legitimate reason for prosecution, the test would force them to explain their decisions on the record. Fourth Amendment malicious prosecution plaintiffs are not privy to the motivations that led to their prosecutions, making it difficult to establish evidence of malice absent a smoking gun. Discovery otherwise poses a high barrier. Prosecutors are often protected from discovery,²⁷³ and for pro se litigants who lack the resources to navigate the legal system, barriers to navigating discovery may restrict access to information that is crucial to building their cases. Because the government actor is better positioned to explain prosecutorial actions, she should be required to provide that information.

Second, the information-forcing nature of the test would require government actors to both turn over evidence about discretionary practices that may not otherwise be known to the public and affirmatively rebut, through evidence of their own, arguments that their actions were unconstitutional. This may increase the transparency of a highly discretionary system.

B. Proposed Three-Step Test

This Comment proposes that, as an alternative to eliminating the malice requirement, courts follow a three-step test to analyze Fourth Amendment malicious prosecution claims. The *McDonnell*

²⁷² *Wrongful Convictions*, EQUAL JUST. INITIATIVE, <https://perma.cc/6BGY-J3MF>.

²⁷³ See *supra* Part III.C.2.

*Douglas Corp. v. Green*²⁷⁴ burden-shifting framework, often used to analyze employment discrimination claims, is a clear example of how such a test might work. The *McDonnell Douglas* test proceeds as follows: First, a litigant must establish a prima facie case of employment discrimination based on a protected classification.²⁷⁵ Second, if the plaintiff succeeds, the burden shifts to the employer, who must “articulate some legitimate, nondiscriminatory reason” for the adverse employment decision.²⁷⁶ Third, if the employer produces such a reason, the burden returns to the plaintiff, who must prove that the employer’s reason was pretextual.²⁷⁷

When adjudicating a Fourth Amendment malicious prosecution claim, a court could apply the following test. First, the plaintiff must establish a prima facie case that the defendant acted with malice. Like in the employment discrimination context, this first step should not be “onerous.”²⁷⁸ A plaintiff need only present evidence demonstrating that the government actor lacked probable cause to prosecute her. Because malice is inferred from the absence of probable cause in some circuits, this step is simply a continuation of existing practices.²⁷⁹ But by defining malice as the absence of probable cause, the first step standardizes the definition of malice across the board. Though this does not perfectly match the common law doctrine, the elements of a constitutional tort need not be *identical* to an analogous common law tort.²⁸⁰ Tethering malice to the absence of probable cause and nothing more achieves the best of both worlds: it creates uniformity across jurisdictions without eliminating the malice requirement altogether. The standard is also neither too stringent nor too lenient. The plaintiff must find objective evidence that advances her case, but she will not lose simply because it may be practically impossible to prove a state actor’s improper motives.

If the plaintiff succeeds in establishing a prima facie case of malice, the burden of proof shifts to the government actor, who must prove that she had probable cause to prosecute the plaintiff.

²⁷⁴ 411 U.S. 792 (1973).

²⁷⁵ *Id.* at 802.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 804.

²⁷⁸ *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981).

²⁷⁹ See *Manganiello*, 612 F.3d at 163 (Second Circuit); *Stonecipher*, 759 F.3d at 1146 (Tenth Circuit).

²⁸⁰ *Albright*, 510 U.S. at 277 n.1 (Ginsburg, J., concurring) (“[T]he 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.”).

The design of these first two steps mirrors the status quo with one exception: it forces the government actor to affirmatively disclose information that explains her conduct. Because a malicious prosecution claim arises when the prosecution “ended without a conviction,”²⁸¹ there should be a presumption that a government actor prosecuted the claimant without probable cause. What does this mean? Courts must assume that the government actor intended to violate the plaintiff’s constitutional rights. Because government actors are repeat players, there is a concern that they will learn what to say to avoid liability, even if their proffered reasons are pretextual. This problem plagues jury selection challenges under the framework articulated in *Batson v. Kentucky*,²⁸² when litigants allege that the opposing party’s counsel used her peremptory strikes in a discriminatory manner.²⁸³ *Batson* challenges are premised on a similar burden-shifting test,²⁸⁴ but the difficulty of prevailing on a challenge has led some to argue for the abolition of peremptory strikes altogether.²⁸⁵ To avoid gamesmanship in the malicious prosecution context, courts should not permit a defendant to offer a reason that meets an easily satisfied criterion. Instead, courts should require government actors to prove that they had a clear and compelling reason to believe there was probable cause. In reviewing the government’s proffered evidence, courts should be skeptical; they should find liability if the government defendant fails to articulate a persuasive justification for her actions.²⁸⁶

²⁸¹ *Thompson*, 142 S. Ct. at 1341.

²⁸² 476 U.S. 79 (1986).

²⁸³ *Id.* at 96.

²⁸⁴ The *Batson* burden-shifting test proceeds as follows. First, the moving party must establish a prima facie case of racially discriminatory selection. *Batson*, 476 U.S. at 96. If that party succeeds, the burden shifts to the party who exercised the peremptory challenges, who must provide a race-neutral explanation for exercising her peremptory challenges. *Id.* at 97–98. If the nonmoving party provides a race-neutral explanation, the court must determine whether it is pretextual. Nancy S. Marder, Foster v. Chatman: A Missed Opportunity for *Batson* and the Peremptory Challenge, 49 CONN. L. REV. 1137, 1154 (2017). But over time, prosecutors, against whom *Batson* challenges are often brought, have learned that they “could give any seemingly race-neutral reason as long as it was ‘related to the particular case to be tried.’” *Id.* at 1153 (quoting *Batson*, 476 U.S. at 98). As a result, *Batson* challenges have not eliminated discrimination in the jury selection process. *Id.* at 1181.

²⁸⁵ See, e.g., Marder, *supra* note 284, at 1181–1204 (noting that the *Batson* framework is ineffective at stopping prosecutors from excusing potential jurors because of their race and arguing that peremptory challenges should be eliminated); see also Deana Kim El-Mallawany, Johnson v. California and the Initial Assessment of *Batson* Claims, 74 FORDHAM L. REV. 3333, 3334 n.10 (listing scholarly works arguing for the abolition of peremptory challenges).

²⁸⁶ In other areas of law, courts examine certain actions with heightened skepticism. See, e.g., *Coster v. UIP Companies*, 300 A.3d 656, 672 (Del. 2023) (holding that Delaware

Shifting the burden of proof to the government actor means that actor cannot rely merely on rebutting the plaintiff's case. Instead, the government actor must present her own case in chief: she must provide a clear and compelling reason to convince the court that she had probable cause in order to refute the plaintiff's initial showing that the government lacked probable cause. This requirement would be more demanding than the status quo.

If the government actor succeeds in providing a plausible explanation that she prosecuted the plaintiff with probable cause (i.e., without malice), the burden returns to the plaintiff, who must prove that the proffered reasons are pretextual. The plaintiff may present circumstantial evidence that the defendant knowingly misrepresented facts in a police report,²⁸⁷ falsified evidence,²⁸⁸ or failed to reasonably investigate the matter before instituting a criminal proceeding against the plaintiff.²⁸⁹ She should also be allowed to present evidence of a department's policies or a pattern and practice of misconduct to demonstrate the institutional pressures under which an individual actor operated.²⁹⁰ Policies provide objective evidence that can demonstrate a state actor's mindset and help a plaintiff prevail on her claim, even when she lacks evidence of the defendant's mens rea (due to either discovery hurdles or the fact that a state actor has tunnel vision).

C. Ramifications of the Test

Because the burden-shifting test forces government actors to shoulder the burden of production, the test would presumably deter actors from engaging in behavior that may require them to explain their conduct to a judge, fearing not only legal repercussions but also negative publicity and expensive discovery processes. The effects of the test should be particularly pronounced in jurisdictions where malice requires more than the absence of probable cause, such as personal animosity toward the plaintiff or a reckless disregard of the plaintiff's rights. These courts impose a difficult burden on plaintiffs, so the burden-shifting test

courts must apply "enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control"); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that racial classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

²⁸⁷ See *Novitsky*, 491 F.3d at 1258.

²⁸⁸ See *Armstrong*, 60 F.4th at 279.

²⁸⁹ See *Evans*, 2024 WL 2206638, at *3.

²⁹⁰ See *supra* notes 257–65 and accompanying text.

will help even the playing field. On the other hand, the effects of the burden-shifting test should be less pronounced in circuits in which a lack of probable cause alone already establishes malice.

The burden-shifting test alone may not change much on the ground. Courts may find creative ways to quash plaintiffs' claims. And even if more plaintiffs are awarded relief, individual actors may not change their conduct due to doctrines that limit their liability, such as qualified immunity²⁹¹ and indemnification.²⁹² Cities, in turn, may treat settlements as another operating expense rather than as an impetus for change.²⁹³ As discussed in Part III.C.3, changes in litigation must be paired with additional accountability measures, such as increased data gathering by law enforcement and fewer protections for prosecutorial discretion.

CONCLUSION

Courts should no longer require a Fourth Amendment malicious prosecution plaintiff to establish that the defendant acted with malice; the absence of probable cause should be sufficient. Because courts traditionally do not examine a defendant's subjective intentions when evaluating Fourth Amendment claims, they should also ignore a defendant's mental state in Fourth Amendment malicious prosecution claims. Importantly, malicious prosecution arises before a litigant is convicted, so the lack of process afforded to her until that point entitles her to greater legal protections. Further, while "malicious prosecution" suggests a "malice" requirement, plaintiffs need not show actual malice, as evidenced by the handful of circuits that apply an objective standard to claims of "deliberate" indifference to medical needs. In addition, the purposes served by a subjective standard are missing for malicious prosecution. Plaintiffs must prove probable cause and overcome qualified immunity; there is already a safeguard in place that limits frivolous suits. Finally, removing the malice requirement may lessen plaintiffs' evidentiary burden. By encouraging more plaintiffs to seek relief and making it easier in many circuits for them to obtain relief, eliminating the malice requirement and relying on probable cause alone can further the compensatory aim of the civil damages system.

²⁹¹ See WHITNEY NOVAK, CONG. RSCH. SERV., LSB10492, POLICING THE POLICE: QUALIFIED IMMUNITY AND CONSIDERATIONS FOR CONGRESS 3 (2023).

²⁹² See Schwartz, *supra* note 250, at 940 ("[S]ome will contend that widespread indemnification . . . reduces the deterrent effect of lawsuits nearly to zero.").

²⁹³ *Id.* at 956–58.

This Comment began by describing the experience of an actual person, Andre Evans, who was tased for looking like a burglary suspect.²⁹⁴ Evans was detained for one week before his criminal charges were dismissed.²⁹⁵ Others are detained for longer before trial, though they have not been convicted of a crime.²⁹⁶ Law enforcement and prosecutors have a great deal of discretion in deciding whom to charge. They often make mistakes, as shown by the frequency with which official misconduct occurs in exonerated cases. Those mistakes have grave consequences. Incarceration, whether for one day or one year, is valuable time lost. The state's bearing down on an individual with the full weight of the law—threatening devastating, lasting consequences—is terrifying. Yet there is nothing inevitable about a criminal justice system that destroys innocent lives. It need not, and must not, continue in this way. Courts must abandon the malice requirement to bring coherence to Fourth Amendment jurisprudence, expand access to relief, and hold those who cause wrongful incarceration accountable.

²⁹⁴ *Evans*, 2024 WL 2206638, at *1.

²⁹⁵ *Id.*

²⁹⁶ In *Bledsoe*, 665 F. Supp. 3d at 816, the plaintiff was incarcerated for two years and then put in home confinement for an additional year before he was acquitted.