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## NOTES

### **REASONABLE SEIZURE ON FALSE CHARGES: SHOULD PROBABLE CAUSE TO DETAIN A PERSON FOR ANY CRIME BAR A MALICIOUS PROSECUTION CLAIM UNDER THE FOURTH AMENDMENT?**

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#### INTRODUCTION

A man is held in jail awaiting trial for sixteen months, charged with the attempted murder of two police officers.<sup>1</sup> He claims the officers fabricated their statements to protect themselves after they shot him without justification.<sup>2</sup> Dashboard camera footage supports the suspect's story.<sup>3</sup> Once released, he sues the officers under the Fourth Amendment of the U.S. Constitution for causing him to be jailed pending trial.<sup>4</sup> The officers assert that the plaintiff could have been detained regardless of the attempted murder charges because he was carrying a concealed weapon without a license.<sup>5</sup> Will the Constitution vindicate the plaintiff for this malicious prosecution?

Today, when the Black Lives Matter movement has focused the world's attention on American law enforcement abuses like seldom before, it is vital to assess the adequacy of remedies for torts committed by government officers available under the Constitution and federal law. This Note asks whether the Fourth Amendment allows a person held pre-trial on false charges to succeed on a claim for unreasonable seizure when there were other grounds to detain him and finds that it does not. This omission is a reminder that the Bill of Rights was neither originally intended nor latterly interpreted to constitutionalize every aspect of civil rights, and that state law therefore retains vital importance for plugging the gaps and securing full protection against any injustices done by state

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1. *See Williams v. Aguirre*, 965 F.3d 1147, 1152–55 (11th Cir. 2020).

2. *Williams v. City of Birmingham*, No. 2:16-cv-0650-JEO, 2019 WL 11679764 at \*6 (N.D. Ala. 2019).

3. *Id.* at \*3–4.

4. *Id.* at \*10.

5. *Id.* at \*21.

officials.

To state the legal question more fully, when a police officer or other official fabricates evidence that becomes the basis of a criminal charge on which a person is held in jail awaiting trial, can the officer defend a malicious prosecution action brought as a constitutional tort claim under Section 1983<sup>6</sup> by asserting the existence of probable cause<sup>7</sup> to detain that person for *any other* crime? Or should the officer have to justify the prosecution of every charge separately by showing probable cause on a charge-by-charge basis? In 2020, two U.S. Courts of Appeals gave conflicting answers to this question of the “any-crime” rule versus the “charge-by-charge” rule, creating a circuit split.<sup>8</sup>

This Note argues that the any-crime rule, though appropriately barred for valid policy reasons under state law,<sup>9</sup> should nevertheless be available as a defense to malicious prosecution brought as a Fourth Amendment constitutional tort claim under Section 1983. The argument proceeds by analyzing the two alternative interpretations of the charge-by-charge rule: a “constitutional” interpretation focused on unreasonable seizure drawing on Fourth Amendment jurisprudence, and a common law “tort” interpretation focused on the evils of false charges in themselves. These interpretations give rise to a dilemma when analyzed under the U.S. Supreme Court’s Section 1983 and Fourth Amendment jurisprudence. Under the “constitutional” interpretation, the charge-by-charge rule meshes with the Fourth Amendment but is redundant because it merely duplicates the results of the any-crime rule, whereas, under the “tort” interpretation, the charge-by-charge rule produces different results but conflicts with the values and purposes of the Fourth Amendment. Because the charge-by-charge rule is either redundant or unconstitutional, the any-crime rule should apply.

Following a presentation of relevant background in Part I, Part II explains the facts, reasoning, and holdings of the two divergent cases decided in 2020, clarifying the Eleventh Circuit’s two principal arguments against the any-crime rule.

Part III surveys the debate over the any-crime defense to malicious prosecution as it stands in the federal Courts of Appeals following the U.S. Supreme Court’s decision in *Manuel v. City of Joliet*.<sup>10</sup> It explains that although the ruling addressed malicious prosecution, it failed to provide sufficient guidance to settle the any-crime question definitively. This Part also explains the remaining circuit split on taking a “constitutional” or a “tort” approach to Fourth

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6. 42 U.S.C. § 1983, Rev. Stat. § 1979 (2021).

7. “Probable cause exists where ‘the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ [sic] an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

8. *See* *Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020); *Williams v. Aguirre*, 965 F.3d 1147 (11th Cir. 2020).

9. *See infra* Part VI.

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

Amendment malicious prosecution claims.

Part IV sets out the U.S. Supreme Court's jurisprudence on Section 1983 and the Fourth Amendment. It explains how Section 1983 sits at the intersection of constitutional and tort law. On the one hand, it operates as a cause of action informed by background tort principles; on the other hand, it provides for bringing claims whose substantive content is drawn from elsewhere in the U.S. Constitution and federal laws. This Part concludes that tort principles may be integrated into Fourth Amendment claims only to the extent that they mesh with its values and purposes, namely protection against unwarranted interference with personal liberty.

Part V presents the first horn of the dilemma by applying the "constitutional" approach to the charge-by-charge rule. This interpretation, followed by the Eleventh Circuit, means that every charge which is an actual, but-for cause of a period of detention must be separately justified by probable cause. Because this approach looks only to restraint of liberty as the relevant injury, it meshes with the values and purpose of the Fourth Amendment. However, as this Part argues, under this interpretation the charge-by-charge rule collapses into the any-crime rule and always produces the same result.

Part VI presents the second horn of the dilemma by applying the "tort" approach to the charge-by-charge rule. This interpretation, suggested by the dissenting opinion in the Sixth Circuit and developed further here, means that any charge unsupported by its own probable cause constitutes an actionable injury regardless of whether it caused a person's detention to be extended. This interpretation may produce different results from the any-crime rule because it recognizes not only detention as an injury but false charges and the other tangible and intangible harms that false charges cause as well. However, as this Part argues, the relevant Fourth Amendment principles do not recognize injury to any interest except a person's liberty, and therefore the "tort" interpretation represents a tort rule that does not fit the constitutional claim.

Part VII considers the Eleventh Circuit's argument that malicious prosecution should not be subject to ordinary Fourth Amendment principles developed in false arrest and police stop cases. The basis of the argument is that malicious prosecution involves a special danger of harm caused by stacking false charges on top of reasonable charges. This Part argues, however, that the harms caused by malicious prosecution have been recognized as stemming from Fourth Amendment claims generally, and there is therefore insufficient reason to justify a special exception for malicious prosecution.

This Note argues that malicious prosecution claims should not lie under the Fourth Amendment when probable cause exists to detain a person for any crime—no matter how abusive, as a matter of common sense, the false charge that is challenged may be. This Note then concludes with a brief consideration of the implications of this argument.

## I. RELEVANT BACKGROUND

The dispute over the any-crime rule arises from the complex issue of how to delineate the rules for a claim brought under Section 1983. This provision was

enacted as part of the Civil Rights Act of 1871<sup>11</sup> and provides a federal cause of action for the deprivation of rights under the Constitution and laws of the United States by persons acting under color of state law or custom.<sup>12</sup> Section 1983 thus enables claims for the violation of rights that are guaranteed by other laws; it gives a right to sue but does not define the substance of the claims which may be brought. A 1983 claim should allege that a state actor violated a substantive federal constitutional or legal right, rather than Section 1983 itself. Problems arise when the sources of law offer conflicting guidance on the contents of a 1983 claim.

The tort of malicious prosecution is a state common law claim which may also form the basis of a 1983 claim under the Fourth Amendment.<sup>13</sup> At common law, the plaintiff must allege that the defendant instituted or continued a criminal proceeding against the plaintiff without probable cause and for an improper purpose, and the claim may be brought only after the criminal proceeding has terminated in the plaintiff's favor.<sup>14</sup> The essence of the tort is thus that the defendant caused the plaintiff to be prosecuted on criminal charges without reasonable justification. A Section 1983 claim may be brought on the same facts against a state official, if the plaintiff was actually detained, thus invoking the Fourth Amendment's protection against unreasonable seizure.<sup>15</sup>

A claim under the Fourth Amendment for unreasonable seizure and detention generally turns on whether the official detaining the plaintiff had probable cause to seize and detain him for any crime at all.<sup>16</sup> Applying this Fourth Amendment rule to a malicious prosecution claim under Section 1983, probable cause for detention for any crime seems to be a sufficient defense, even if multiple unreasonable charges were stacked on top of a single reasonable charge. However, the U.S. Supreme Court has repeatedly held that Congress enacted Section 1983 intending it to be applied according to the settled tort principles of the time.<sup>17</sup> One such traditional tort principle, still observed today in the state law of malicious prosecution, is that every unreasonable charge is actionable in itself, and the defendant must separately justify each charge, charge by charge.<sup>18</sup> The

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11. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 203-04 (1970).

12. *Id.* at 150. Section 1983 provides, in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ." 42 U.S.C. § 1983, Rev. Stat. § 1979 (2021).

13. Jacob Paul Goldstein, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 646 (2006).

14. *Id.*

15. U.S. CONST. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated"); *Manuel*, 137 S. Ct. at 919.

16. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 152-53 (2004).

17. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

18. *See, e.g., Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 683 (7th Cir. 2007).

sources of law are therefore in conflict: the Fourth Amendment points towards an any-crime rule but background tort principles point towards a charge-by-charge rule.

The common law tort of malicious prosecution traditionally disallowed the any-crime defense for fear of protecting officials who stacked false charges on top of legitimate ones. In *Williams v. Aguirre*, the Eleventh Circuit took this common law principle to indicate that the any-crime rule did not apply to a Fourth Amendment malicious prosecution claim.<sup>19</sup> It applied the charge-by-charge approach, allowing the plaintiff to proceed with a claim based on one unreasonable charge despite valid probable cause existing for another charge. On the other hand, a line of U.S. Supreme Court cases has allowed probable cause to detain for any crime to apply as a defense to a Fourth Amendment claim of false arrest.<sup>20</sup> In *Howse v. Hodous*, the Sixth Circuit took this to mean that probable cause to detain for any crime defeats a Fourth Amendment malicious prosecution claim.<sup>21</sup> These cases, both decided in 2020, produced a circuit split which will be described in the next Part, then set in broader legal context in Part III.

## II. THE 2020 CASES: *WILLIAMS V. AGUIRRE* AND *HOWSE V. HODOUS*

This Part explains the facts, reasoning, and holdings in the Eleventh and Sixth Circuits' divergent decisions on the any-crime rule.<sup>22</sup> In particular, it clarifies the Eleventh Circuit's two principal arguments against the rule. First, the court asserted that there was a special danger of harm from prosecutors stacking unreasonable charges on top of charges justified by probable cause, and that malicious prosecution claims should be handled differently from false arrest claims.<sup>23</sup> Second, nothing in the Fourth Amendment precluded following the common law policy of disallowing the any-crime defense to deter such charge-stacking.<sup>24</sup>

### A. *Williams v. Aguirre*

In *Williams v. Aguirre*, the Eleventh Circuit rejected an any-crime defense to a Fourth Amendment malicious prosecution claim. Aubrey Williams alleged that two police officers, Aguirre and Haluska, had fabricated an accusation of attempted murder.<sup>25</sup> Williams was carrying a concealed gun without a license when he walked into a gas station with his friend Devon Brown to buy snacks.<sup>26</sup>

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19. *Williams v. Aguirre*, 965 F.3d 1147 (11th Cir. 2020).

20. *See infra* Part IV.

21. *Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020).

22. *Williams*, 965 F.3d 1147; *Howse*, 953 F.3d 402.

23. *Williams*, 965 F.3d at 1161-62.

24. *Id.* at 1161.

25. *Id.* at 1152.

26. *Id.* at 1153.

Brown was carrying a licensed concealed gun.<sup>27</sup> When Williams saw police officers questioning somebody outside, he slipped his gun into a grocery bag.<sup>28</sup> Williams and Brown then walked into an alley to avoid police attention.<sup>29</sup> The officers followed them and ordered them to lie down.<sup>30</sup> Brown, who denied having a gun on him, though it was visible to the officer, scuffled with Haluska.<sup>31</sup> Aguirre tased and handcuffed Brown.<sup>32</sup> Williams dropped onto his hands and knees.<sup>33</sup> Williams tried to tell officer Aguirre about his gun, but Aguirre “did not appear to hear him.”<sup>34</sup> The gun had by now dropped underneath Williams onto the ground.<sup>35</sup> When Williams turned onto his side, Aguirre spotted the gun, jumped back, and shot Williams before kicking the gun away and handcuffing him.<sup>36</sup> With Williams in hospital for his wounds, the two officers concocted a story that Williams had pointed his gun at each of them just before Aguirre shot him.<sup>37</sup> When dashcam video footage failed to show Williams holding the gun, the officers’ stories began to diverge.<sup>38</sup> Despite these inconsistencies, their accusations formed the basis for two counts of attempted murder charged against Williams.<sup>39</sup> An arrest warrant issued and Williams was moved from hospital to jail.<sup>40</sup> He was indicted on both counts by a grand jury, after which he remained in jail, unable to post bail, for over sixteen months.<sup>41</sup> Eventually the district attorney dropped the case, one year after the dashcam footage was published in the media.<sup>42</sup>

Williams sued the officers for malicious prosecution under both the Fourth Amendment and state law, alleging they fabricated the evidence on the basis of which he was held in pre-trial detention.<sup>43</sup> As one of their defenses to the Fourth Amendment claim, the officers raised the any-crime rule, claiming qualified immunity on the basis that there was probable cause to arrest and detain Williams for carrying a concealed gun without a license, and they therefore violated no clearly established right.<sup>44</sup> The district court denied summary judgment for the

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1153-54.

38. *Id.* at 1154-55.

39. *Id.* at 1155.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 1155-56.

officers on this defense.<sup>45</sup>

The Eleventh Circuit affirmed, holding that probable cause to arrest someone for an unlicensed concealed gun was not a valid defense to malicious prosecution on a charge of attempted murder.<sup>46</sup> The court followed a two-step process to reach this decision, first examining the settled principles of the common law tort of malicious prosecution as they stood at the adoption of Section 1983 in 1871, then considering their compatibility with the Fourth Amendment.<sup>47</sup> The court reviewed historical treatises, and cases both English and American, finding a traditional concern that the any-crime rule would allow defendants “to ‘escape liability’ ‘by uniting groundless accusations with those for which probable cause might exist.’”<sup>48</sup> It then determined that the traditional rule harmonized with the Fourth Amendment’s guarantee against unreasonable seizure.<sup>49</sup> All seizures were not equal: the specific charges brought could determine the duration of detention by affecting the availability and amount of bail, or by necessitating more preparation for trial.<sup>50</sup> The existence of probable cause for another crime might of course make damages unavailable, for the false charges would not then be a but-for cause of the detention, but this did not affect whether there had been a malicious prosecution.<sup>51</sup> Second, and crucially, the court distinguished malicious prosecution from false arrest under the Fourth Amendment, in which context the Supreme Court has settled the applicability of the any-crime defense.<sup>52</sup> It accepted that, when an individual is arrested without legal process, he “is no more seized when he is arrested on [several] grounds rather than one . . . .”<sup>53</sup> But when an individual is detained pursuant to legal process, traditional concerns, specific to malicious prosecution, about the stacking up of false charges, are invoked.<sup>54</sup>

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45. *Id.* at 1156.

46. *Id.* at 1162.

47. *Id.* at 1159-62.

48. *Id.* at 1160-61 (quoting *Boogher v. Bryant*, 86 Mo. 42, 50 (1885)).

49. *Id.* at 1161.

50. *Id.*

51. *Id.*

52. *Id.* at 1162 (citing *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004)).

53. *Id.* (alteration in original) (quoting *Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 682 (7th Cir. 2007)).

54. *Id.* at 1161-62. The court also argued that “‘the Constitution prohibits a police officer from knowingly making false statements in an arrest affidavit about the probable cause for an arrest in order to detain a citizen . . . if such false statements were necessary to the probable cause.’” *Id.* at 1169 (quoting *Jones v. Cannon*, 174 F.3d 1271, 1285 (11th Cir. 1999)) (emphasis added). An argument seeking to justify the charge-by-charge approach upon a police officer’s culpable state of mind thus depends on what constitutes probable cause, which this Note argues is sufficiently established by probable cause for any crime. *See also* *Franks v. Delaware*, 438 U.S. 154, 156 (1978) (holding that a knowingly, intentionally, or recklessly false statement in an affidavit may void a search warrant and require exclusion of its fruits, but only “if the allegedly false statement is necessary to the finding of probable cause”).

*B. Howse v. Hodous*

The Sixth Circuit's decision in *Howse v. Hodous* spelled out the argument for allowing the any-crime defense to apply to Fourth Amendment malicious prosecution.<sup>55</sup> Shase Howse alleged that two police officers, Hodous and Middaugh, bothered him outside his house, asking whether he lived there, prompting a physical scuffle and his arrest.<sup>56</sup> The officers reported that Howse struck them and resisted arrest.<sup>57</sup> Howse posted bail a few days later.<sup>58</sup> He was indicted for assaulting the officers and obstructing public business, but the charges were dismissed.<sup>59</sup> Howse then sued the officers for malicious prosecution under the Fourth Amendment, among other claims.<sup>60</sup> The officers prevailed in the District Court by asserting the any-crime defense.<sup>61</sup>

The Sixth Circuit affirmed: because there was probable cause, even on Howse's own evidence, to believe he resisted arrest, he was barred from pursuing his malicious prosecution claims over being held on charges of obstruction and assault.<sup>62</sup> The court explained that malicious prosecution was a misnomer for Howse's claims; he was really making a Fourth Amendment claim of "unreasonable prosecutorial seizure."<sup>63</sup> The any-crime rule applied to malicious prosecution just as to false arrest.<sup>64</sup> Both torts were claims for unreasonable seizure, and "a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge."<sup>65</sup>

The 2020 circuit split was thus rooted in divergent answers to two related questions. First, whether the charge-by-charge rule could be accommodated within Fourth Amendment jurisprudence. Second, whether the imperative of deterring the harm caused by stacking of unfounded charges on top of justifiable ones meant malicious prosecution required a different probable cause rule from the rule for false arrest. The split did not arise by chance, but mirrored deep divisions among the Courts of Appeals concerning the status of malicious prosecution as a constitutional claim, which will be explored next.

### III. MALICIOUS PROSECUTION UNDER THE FOURTH AMENDMENT AFTER *MANUEL V. CITY OF JOLIET*

A long-running debate over the rules of Fourth Amendment malicious prosecution claims has continued across the federal circuits even after the U.S.

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55. *Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020).

56. *Id.* at 405.

57. *Id.* at 406.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 406, 408-10.

62. *Id.* at 408.

63. *Id.* at 409.

64. *Id.*

65. *Id.*



Supreme Court addressed the issue in *Manuel v. City of Joliet*.<sup>66</sup> This Part analyzes which issues the decision in *Manuel* did and did not settle, finding the any-crime defense to be one of the issues that cannot be settled definitively by application of *Manuel*'s principles. It lays out the split between "constitutional" and "tort" circuits over which source of law predominates in defining the rules of Section 1983 malicious prosecution claims.

#### *A. Circuits Rejecting the Any-Crime Rule*

The Sixth Circuit's *Howse* decision<sup>67</sup> created a circuit split on the any-crime defense as the court took a position contrary to that previously taken by the Second, Third, and Eleventh Circuits.

The Second Circuit, in *Posr v. Doherty*, previously rejected the any-crime defense, at least when the allegedly false charge was more serious than the charge for which there was probable cause.<sup>68</sup> The *Posr* court held that probable cause for arrest on a lesser crime, even conviction for it, did not preclude a malicious prosecution claim based "on charges requiring different, and more culpable, behavior."<sup>69</sup> Its concern about justifiable lesser charges allowing the stacking up of greater but unjustified charges anticipated the Eleventh Circuit's *Williams* ruling.<sup>70</sup> Under the any-crime rule, "an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses."<sup>71</sup>

*Posr* was followed by the Third Circuit when it rejected the any-crime rule in *Johnson v. Knorr*:

[T]here is a distinction on the one hand between a simultaneous arrest on multiple charges where, in a sense the significance of the charges for which there was not probable cause for arrest is limited as the plaintiff in the ensuing civil action could have been lawfully arrested and thus seized on at least one charge and, on the other hand, prosecution for multiple charges where the additional charges for which probable cause is absent almost surely will place an additional burden on the defendant.<sup>72</sup>

The court held that "a defendant initiating criminal proceedings on multiple charges is not necessarily insulated in a malicious prosecution case merely because the prosecution of one of the charges was justified."<sup>73</sup> But it declined to

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

67. *Howse*, 953 F.3d 402.

68. *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991).

69. *Id.*

70. *Williams v. Aguirre*, 965 F.3d 1147 (11th Cir. 2020).

71. *Posr*, 944 F.2d at 100.

72. *Johnson v. Knorr*, 477 F.3d 75, 84 (3d Cir. 2007).

73. *Id.* at 85.

follow the nuance of the Second Circuit's holding that this rule only applies when the false charge is more serious than the charge based on probable cause.<sup>74</sup>

With the Second, Third, and now the Eleventh Circuits having rejected the any-crime rule and mandated a charge-by-charge approach, the Sixth Circuit has become an outlier among circuits that have made a definitive ruling on the issue.

*B. Manuel v. City of Joliet: The U.S. Supreme Court and the Seventh Circuit*

The status of malicious prosecution in the Seventh Circuit, where the *Manuel* case originated, is complicated. *Manuel* involved a malicious prosecution claim brought by a man who was held in jail after a police officer and a technician falsely stated that his pills were a controlled substance.<sup>75</sup> He sued for malicious prosecution less than two years after his case was finally dismissed and he was released, but more than two years after his initial arrest.<sup>76</sup> Seventh Circuit precedent dictated, against the consensus of ten other circuits, that malicious prosecution claims were not cognizable as unreasonable seizures under the Fourth Amendment, but as deprivations of liberty without due process in violation of the Fourteenth Amendment, and even then only if the State did provide an adequate process.<sup>77</sup> The Supreme Court confirmed the applicability of the Fourth Amendment, which “guaranteed ‘a fair and reliable determination of probable cause as a condition for any significant pretrial restraint’ . . . If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment.”<sup>78</sup> However, as the case involved only a single charge, the any-crime defense did not arise, and the nature of the probable cause required to support detention pursuant to legal process was not clarified.

On remand, the Seventh Circuit had to address the question of when the plaintiff's cause of action for unconstitutional seizure accrued.<sup>79</sup> The city argued that accrual occurred at the latest when he was bound over for pre-trial detention, as in a false arrest claim, whereas the plaintiff argued that accrual occurred when he was “vindicated” by dismissal of the charge against him, as in a common-law

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74. *Id.*

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

76. *Manuel v. City of Joliet*, 903 F.3d 667, 669 (7th Cir. 2018).

77. *Id.* A majority of the U.S. Supreme Court had previously held in *Albright v. Oliver* that a Fourteenth Amendment substantive due process claim was inappropriate where the plaintiff sought damages for prosecution without probable cause. 510 U.S. 266, 268 (Rehnquist, C.J., plurality opinion); *id.* at 276 (Scalia, J., concurring); *id.* (Ginsburg, J., concurring); *id.* at 282-85 (Kennedy, J., concurring) (1994). The Seventh Circuit's position was not strictly contrary to the *Albright* majority on this point. *Albright* dealt with a purported right “to be free from criminal prosecution except upon probable cause,” *id.* at 268, rather than with pre-trial detention. *See, e.g., Manuel*, 137 S. Ct. at 916 (“According to [the Seventh Circuit's] line of decisions, a § 1983 plaintiff challenging [pre-trial] detention must allege a breach of the Due Process Clause . . .”).

78. *Manuel*, 137 S. Ct. at 919 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975)).

79. *Manuel*, 903 F.3d at 668.

malicious prosecution claim.<sup>80</sup> The court noted that the plaintiff would be right if his Fourth Amendment claim was indeed akin to a common-law malicious prosecution claim.<sup>81</sup>

However, the Seventh Circuit took the Supreme Court's decision as mandating a drastic reaction against the very existence of a constitutional tort of malicious prosecution:

After *Manuel*, “Fourth Amendment malicious prosecution” is the wrong characterization. There is only a Fourth Amendment claim—the absence of probable cause that would justify the detention. The problem is the wrongful custody. “[T]here is no such thing as a constitutional right not to be prosecuted without probable cause.” But there *is* a constitutional right not to be held in custody without probable cause.<sup>82</sup>

The case was now “a plain-vanilla Fourth Amendment claim.”<sup>83</sup> The question of whether malice was an element of the claim had been mooted by doctrinal developments, since it was no longer a malicious prosecution claim at all.<sup>84</sup> The court found for the plaintiff on the accrual question, however, holding that, as no Section 1983 claim could be brought during detention to contest the validity of that detention (as opposed to a petition for habeas corpus), the limitations period ran only from his release.<sup>85</sup> For our purposes, the Seventh Circuit's position represents an exclusive focus on the Fourth Amendment for the delineation of a claim for unreasonable seizure pursuant to legal process, and the corresponding denial of any significant role for the common law of malicious prosecution. Although the Seventh Circuit has not ruled on the any-crime defense question, it is highly likely the court would adopt it: rejection of the defense has largely been motivated by considerations drawn from the history and policy of the tort of malicious prosecution.<sup>86</sup>

### C. “Constitutional Circuits” and “Tort Circuits”

*Manuel* left the circuits in continuing dissension as to the very elements of a Fourth Amendment malicious prosecution claim. Before *Manuel*, the “Tort Circuits” (the First, Second, and Eleventh) required proof of deprivation of a

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80. *Id.* at 669.

81. *Id.* at 669-70.

82. *Id.* at 670 (quoting *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013)).

83. *Id.*

84. *Id.*

85. *Id.* The applicable two-year limitations period, which the parties did not dispute, was based on *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (limitations period for Section 1983 suits brought against officials of a state should be governed by that state's limitations period for suits for “recovery of damages for personal injuries”).

86. The Seventh Circuit rejected the any-crime rule in favor of the “charge-by-charge” approach in *Holmes v. Village of Hoffman Estate*, but that was a state law case. 511 F.3d 673, 683 (7th Cir. 2007).

constitutional right plus the elements of common-law malicious prosecution.<sup>87</sup> Those common law elements differed slightly between circuits, but a typical, generalized statement is that “the ‘prior proceeding: (1) was maliciously instigated or continued by the defendant, without probable cause; (2) was terminated in the plaintiff’s favor; and (3) damaged the plaintiff.’”<sup>88</sup> The Third Circuit was close to this “tort” group.<sup>89</sup>

Conversely, the “Constitutional Circuits” (the Fourth, Fifth, and Tenth) required proof only of unreasonable seizure under the Fourth Amendment, and not of the elements of malicious prosecution.<sup>90</sup> The Sixth Circuit went even further by refusing to accept even the nomenclature of malicious prosecution and defining such a claim simply as “the right under the Fourth Amendment to be free from continued detention without probable cause.”<sup>91</sup> The Eighth Circuit took a similar stance, denying that malicious prosecution was cognizable under the Constitution at all.<sup>92</sup>

It is little surprise, therefore, that in 2020 the *Howse* case announcing a highly constitutionalized approach to the any-crime defense emanated from the Sixth Circuit, whereas the *Williams* case taking the tort-focused approach and rejecting it was issued by the Eleventh. *Manuel* did little to shed light on which approach is correct, leaving the constitutional and tort courts to continue to take different approaches. The Seventh Circuit took the Supreme Court’s opinion to mandate a continuation of its constitutionalizing approach, albeit using the Fourth instead of the Fourteenth Amendment.<sup>93</sup> On the other hand, the Eleventh Circuit in its *Williams* opinion held more or less defiantly to the contrary position. *Williams* admitted that “this Court uses ‘malicious prosecution’ as only ‘a shorthand way of describing’ certain claims of unlawful seizure under the Fourth Amendment.”<sup>94</sup> Yet the court still addressed it as the “common-law analogue” to the constitutional violation alleged<sup>95</sup> and insisted that “[n]othing in the Fourth Amendment counsels against applying the common-law rule to claims of

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87. Erin E. McMannon, Note, *The Demise of § 1983 Malicious Prosecution: Separating Tort Law from the Fourth Amendment*, 94 NOTRE DAME L. REV. 1479, 1485-86 (2019).

88. *Id.* at 1480 (citing 19 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 93.01(1), Lexis (database updated Oct. 2018)).

89. *Id.* at 1487. The Ninth Circuit was also close in that it incorporated elements of the common law tort. *Id.*

90. *Id.* at 1486. The Seventh Circuit was also a “Constitutional Circuit” but, as we have seen, used the Fourteenth Amendment’s Due Process Clause. *Manuel v. City of Joliet*, 137 S. Ct. 911, 916 (2017).

91. McMannon, *supra* note 79, at 1487 (citing *Gregory v. City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006)).

92. *Id.*

93. *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) (quoting *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013)).

94. *Williams v. Aguirre*, 965 F.3d 1147, 1157 (11th Cir. 2020).

95. *Id.* at 1160.

malicious prosecution under [S]ection 1983.”<sup>96</sup> Similarly, the Second Circuit interpreted *Manuel* to mean that

[T]he Supreme Court confirmed that plaintiffs can sustain Section 1983 suits under the Fourth Amendment for deprivations of liberty suffered as a result of improper or maliciously instituted legal process. However, the Court’s opinion in *Manuel* did not directly address the other “elements of, and rules associated with, an action seeking damages for” an unlawful pretrial detention.<sup>97</sup>

*Manuel* has thus left open both the role of the common law of malicious prosecution in Fourth Amendment claims for unreasonable seizure pursuant to process in general and the any-crime question specifically. To begin to determine which side has the better of the argument, the next Part examines how the U.S. Supreme Court has instructed lower courts to manage the tensions between constitutional and tort sources of Section 1983 law.

#### IV. CONSTITUTIONAL TORT CLAIMS UNDER 42 U.S.C. § 1983 AND THE FOURTH AMENDMENT

Section 1983 sits at the intersection of constitutional and tort law. It affords a cause of action that is informed by background tort principles and provides for the bringing of claims whose substantive content is drawn from the U.S. Constitution. Problems arise when these two sources of law point in different directions. The circuit split over the any-crime rule arose because the Eleventh and Sixth Circuits disagree about whether the common law charge-by-charge approach is compatible with the Fourth Amendment. This Part investigates U.S. Supreme Court doctrine on the integration of tort principles into Section 1983 claims. It finds that the Court uses tort principles only to the extent that the principles fit with the values and purposes of the constitutional protections invoked. Applying this doctrine to the Fourth Amendment, this Part identifies the amendment’s values and purposes as protecting against unwarranted interference with or restraint of personal liberty and concludes that tort principles may be integrated into claims for unreasonable seizure only to the extent that they mesh with this concern.

##### *A. Section 1983*

On the one hand, Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.”<sup>98</sup> This suggests that the rights that a Section 1983 action protects come from the Constitution or federal law. On the other hand, the U.S. Supreme Court, in *Monroe v. Pape*,

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96. *Id.* at 1161.

97. *Spak v. Phillips*, 857 F.3d 458, 461 n.1 (2nd Cir. 2018) (internal citation omitted) (citing *Manuel v. City of Joliet*, 137 S. Ct. 911, 918, 920 (2017)).

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

instructed that Section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”<sup>99</sup> This indicates that Section 1983 applies principles of tort law to liability for deprivation of federal rights. The Court has stated that Congress enacted Section 1983 intending it to be applied according to the settled tort principles of the time.<sup>100</sup> The Court is thus “guided in interpreting Congress’ intent by the common-law tradition.”<sup>101</sup> Indeed, Section 1983 created “a species of tort liability . . .”<sup>102</sup> The result is that Section 1983 has been taken as creating “constitutional torts,”<sup>103</sup> the rules of which draw on both the Constitution and tort law. Then again, the Court has warned against “any attempt to derive from congressional civil rights statutes a body of general federal tort law . . .” and has rejected an attempt to make the Due Process Clause of the Fourteenth Amendment specifically “a font of tort law to be superimposed upon whatever systems may already be administered by the States.”<sup>104</sup>

The Court has given advice for managing the uneasy marriage of the two sources of law. Once federal courts have pinpointed the constitutional right implicated by a Section 1983 claim, they must “determine the elements of, and rules associated with, an action seeking damages for its violation. . . . In defining the contours and prerequisites of a [Section] 1983 claim . . . courts are to look first to the common law of torts,”<sup>105</sup> and especially to “common-law principles that were well settled at the time of [Section 1983’s] enactment.”<sup>106</sup> The Court has “examined common-law doctrine when identifying both the elements of the cause of action and the defenses available to state actors.”<sup>107</sup> Sometimes, the court may “adopt wholesale the rules that would apply in a suit involving the most analogous tort.”<sup>108</sup> With particular reference to tort defenses, the Court has stated that members of the Forty-Second Congress, which enacted Section 1983, “were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law

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99. *Monroe v. Pape*, 365 U.S. 167, 187 (1961) *overruled by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (*Monell* overrules *Monroe* insofar as *Monroe* held that local governments were immune from suit under Section 1983. Under *Monell*, local governments are included among those persons who can be liable under Section 1983.).

100. *See, e.g., Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

101. *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

102. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

103. The first appearance of the phrase in a Supreme Court opinion was in *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). The phrase is also used to describe *Bivens* causes of action against federal government officials. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *see, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001).

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

105. *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017).

106. *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997).

107. *Id.*

108. *Manuel*, 137 S. Ct. at 920.

principles to obtain, absent specific provisions to the contrary.”<sup>109</sup> But caution:

Common-law principles are meant to guide rather than to control the definition of §1983 claims, serving “more as a source of inspired examples than of prefabricated components.” . . . In applying, selecting among, or adjusting common-law approaches, *courts must closely attend to the values and purposes of the constitutional right at issue.*<sup>110</sup>

From these remarks, a rule may be synthesized: under Section 1983, traditional tort rules and principles may be integrated into constitutional claims from analogous common law torts, but only with care that the principles are selected and adjusted to harmonize with the underlying constitutional values and purposes. In this case, the values and purposes of the Fourth Amendment’s protection against unreasonable seizures must be identified.

### *B. The Fourth Amendment*

The U.S. Supreme Court has often explained the values and purposes underlying the unreasonable seizure component of the Fourth Amendment. It protects “the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>111</sup> This is essentially the concept of “negative liberty,” keeping the individual free from unwarranted restraint and “warding off interference.”<sup>112</sup> The evil the Fourth Amendment protects against is “intrusion upon the sanctity of the person” by unreasonable search or seizure.<sup>113</sup> It guarantees “the right of each individual to be let alone.”<sup>114</sup> With specific reference to the requirement of probable cause for seizure of a person, Justice Brennan wrote: “By requiring that arrests be made only on probable cause, the Framers sought to preclude custodial detentions resulting solely from common rumor or report, suspicion, or even strong reason to suspect.”<sup>115</sup>

To summarize, the Fourth Amendment protects a person’s right to freedom from interference, restraint, or seizure by the government, except when justified by a reasonably probative level of evidence of an offense. Aside from such interference, restraint, or seizure, the Amendment does not protect against the prosecution of unfounded charges as such. Tort principles may therefore be

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109. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

110. *Manuel*, 137 S.Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)) (emphasis added).

111. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

112. ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 127 (1969).

113. *Terry*, 392 U.S. at 17.

114. *Schneckloth v. Bustamonte*, 412 U.S. 218, 242 (1973) (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)).

115. *United States v. Sharpe*, 470 U.S. 675, 717-18 (1985) (Brennan, J., dissenting) (quoting *Henry v. United States*, 361 U.S. 98, 101 (1959) (internal citations omitted)).

integrated into the rules of a Fourth Amendment claim only if they fit with its guarantee of freedom from unreasonable restraint. The next Part shows that analyzing the charge-by-charge rule against this understanding of the Fourth Amendment reveals a dilemma whereby the rule is either redundant or unconstitutional.

V. THE “CONSTITUTIONAL” INTERPRETATION: CHARGE-BY-CHARGE AND ANY CRIME RULES REACH THE SAME RESULTS

The charge-by-charge rule may be interpreted in two ways, but both come to grief on the horns of a dilemma. The rule can be given a “constitutional” or a “tort” interpretation. The “constitutional” interpretation meshes with the Fourth Amendment’s protection against unreasonable restraint, but at a cost: it will always produce the same result as the any-crime rule. The “tort” interpretation will produce different results when unreasonable charges, stacked on top of reasonable charges, cause a person an injury other than unreasonable detention, but to that extent the rule exceeds the values and purposes of the Fourth Amendment. This Part presents the first horn of the dilemma by giving a “constitutional” interpretation to the charge-by-charge rule.

The Eleventh Circuit gave such a “constitutional” interpretation to the rule in *Williams* when it focused on whether charges lacking probable cause “meaningfully affect the existence and duration of that seizure.”<sup>116</sup> The court described examples of the mechanisms by which additional charges might cause longer pre-trial detention: “[T]he availability and amount of bail, which determine whether a pretrial seizure occurs at all, are often charge-dependent. . . . The charges a criminal defendant faces can also prolong his pretrial seizure by requiring additional trial preparation.”<sup>117</sup> Note that the court’s argument starts from the assumption that the charge-by-charge rule must be justified on the basis that unwarranted charges extend detention.<sup>118</sup> The court thus conceived of the existence and duration of seizure alone as the relevant injury.<sup>119</sup> It did not consider whether the emotional, reputational, and financial harm flowing from heavier charges were cognizable injuries. But the court did reiterate that false charges are not injuries in themselves.<sup>120</sup> This is an important point because it shows that the Eleventh Circuit’s argument was correctly based on the Fourth Amendment guarantee against unreasonable seizure. But this constitutional validity comes at a heavy price: if the charge-by-charge rule protects only against charges that are actual, but-for causes of extended detention, then it collapses into

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116. *Williams v. Aguirre*, 965 F.3d 1147, 1161 (11th Cir. 2020).

117. *Id.*

118. The court also stated that a plaintiff could not recover any damages unless he could “‘show that, but for that illegitimate charge, he would have been released’ earlier or would not have faced detention.” *Id.* (quoting *Kelly v. Curtis*, 21 F.3d 1544, 1557 (11th Cir. 1994)). However, a constitutional claim may be stated for nominal damages even without actual harm. *Id.* at 1161-62.

119. *Id.*

120. *Id.*



the any-crime rule.

One might assume that, in departing from the standard Fourth Amendment any-crime defense, the charge-by-charge rule would enable a plaintiff to succeed on a claim that would otherwise fail. However, upon inspection, the Eleventh Circuit's interpretation of the charge-by-charge rule would not do so. Consider the circumstances in which the Eleventh Circuit's charge-by-charge rule would allow a claim based on detention for an unreasonable charge to survive the existence of probable cause for detention on another charge. This could occur only with reference to a period when the unreasonable charge was the sole cause of detention; in other words, when the duration of the detention caused by the unreasonable charge exceeded the duration of the detention which would reasonably be caused by charges based on probable cause.<sup>121</sup> The problem is that the any-crime rule also allows such a claim to proceed.

The identity of the any-crime rule and the "constitutional" interpretation of the charge-by-charge rule may be cemented by considering a concession made by the Sixth Circuit in *Howse*. In the course of upholding the any-crime rule, the court wrote that additional, invalid charges that cause a longer detention than would have been incurred but for those invalid charges might avoid the any-crime defense.<sup>122</sup> The Sixth Circuit's any-crime rule would not therefore insulate from liability any period of detention for which there was no probable cause at all, such as detention for a longer period than would have been endured based only on charges for which there was probable cause. The Eleventh Circuit's "constitutional" interpretation of the charge-by-charge rule thus goes no further than the Sixth Circuit's any-crime rule, making the difference between them illusory.

Consider, conversely, the situation where detention on invalid charges runs concurrently with the detention that probable cause on any other offense would justify. The Sixth Circuit's any-crime rule of course protects against liability: "[J]ust like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge."<sup>123</sup> Nor, however, would the Eleventh Circuit's rule allow a claim to proceed in such a situation: a claim based on an unreasonable charge would be defeated as long as a person was held concurrently on a charge based on probable cause, because the unreasonable charge would not then be a but-for cause of detention during any period of time.

The Eleventh Circuit's "constitutional" interpretation of the charge-by-charge

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121. Under the "objective" approach to justifying a seizure, it is immaterial whether the probable cause that (on the assumptions of the "constitutional" interpretation) justifies a portion of the detention actually resulted in a charge or not. *See, e.g.*, *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (the probable cause that justifies detention need not relate to the offense for which a person is actually detained). In *Williams*'s case, the probable cause on which the officers' defense was based did not actually result in indictment on a weapons charge. *Williams v. City of Birmingham*, No. 2:16-cv-0650-JEO, 2019 WL 11679764 at \*6 (N.D. Ala. 2019).

122. *Howse v. Hodous*, 953 F.3d 402, 409 n.3 (6th Cir. 2020).

123. *Id.* at 409.

rule is not in reality any different from the any-crime rule. The charge-by-charge rule cannot be justified based solely on the fact that unreasonable charges sometimes extend detention. If the rule is to be justified, it must therefore protect not only against detention served without probable cause, but against some other injury, such as the unreasonable charges in and of themselves.

#### VI. THE “TORT” INTERPRETATION: THE CHARGE-BY-CHARGE RULE CONFLICTS WITH THE FOURTH AMENDMENT

The charge-by-charge rule can be given a “tort” interpretation whereby it protects, as the traditional common law does, against unreasonable charges in and of themselves, as well as the many kinds of harm, tangible and intangible, that flow from them, besides detention. This “tort” interpretation of the charge-by-charge rule escapes the difficulty of the “constitutional” interpretation in that it gives different results; but it falls on the second horn of the dilemma because it conflicts with the values and purposes of the Fourth Amendment. This Part shows that the “tort” interpretation of the rule is well supported by common law tradition, and that it will produce different results from the any-crime rule. However, this interpretation cannot be integrated into Section 1983 claims because it is incompatible with the Fourth Amendment.

##### *A. The Common Law of Malicious Prosecution*

The charge-by-charge approach to the defense of a common law malicious prosecution claim was well established at the time of Section 1983’s enactment in 1871.<sup>124</sup> This is a *prima facie* reason for integrating it into Section 1983 malicious prosecution claims. Blackstone articulated the charge-by-charge approach: “In case of criminal prosecution of an innocent party any probable cause for preferring *the charge* is sufficient to justify the defendant . . . the burden of proof is cast upon the plaintiff to show that *the accusation* was unreasonably false, and malicious.”<sup>125</sup> Addison, in a treatise on torts, made the charge-by-charge approach to probable cause explicit: “If an indictment preferred by the defendant contains several charges against the plaintiff, and he is convicted on some and acquitted on others, this does not prevent the plaintiff from maintaining an action for a malicious prosecution in respect of the charges of which he was acquitted.”<sup>126</sup> The charge-by-charge approach was part of common law in the United States: a plaintiff must “prove that the charge preferred against him was unfounded;”<sup>127</sup> “the want of probable cause need not be shown to extend to all the particulars charged.”<sup>128</sup>

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124. See *Williams*, 965 F.3d at 1160-61.

125. WILLIAM BLACKSTONE, COMMENTARIES 48 (Henry W. Ballantine ed., 1915) (emphasis added).

126. CHARLES GREENSTREET ADDISON, A TREATISE ON WRONGS AND THEIR REMEDIES 235 (Horace Smith ed., 6th ed. 1890).

127. *Wheeler v. Nesbitt*, 65 U.S. 544, 549 (1861).

128. *Barron v. Mason*, 31 Vt. 189, 198, 1858 WL 4797 at \*6 (1858).

The policy underlying the charge-by-charge approach was based on the sense that false charges in themselves, not only seizure upon false charges, constituted legal injuries. Common law malicious prosecution requires the creation or continuation of a criminal charge for an improper purpose and without probable cause, plus favorable termination of that particular charge and actual damages.<sup>129</sup> Seizure or detention are not required at all. Three years after the enactment of Section 1983, a treatise stated that malicious prosecution was based “primarily, more especially in a case of a criminal prosecution, [on] a wrong to *character or reputation*.”<sup>130</sup> Pollock and Maitland called it “an aggravated form of defamation.”<sup>131</sup> The any-crime approach would not properly recognize these kinds of injuries as it permits defendants to insulate themselves against liability for harm caused by false charges, so long as a single charge based on valid probable cause is made. The policy rationale for rejecting the any-crime defense was explained in the decade following Section 1983’s enactment: “[I]f groundless charges are[,] maliciously and without probable cause, coupled with others which are well founded, they are not on that account the less injurious, and, therefore, constitute a valid cause of action.”<sup>132</sup>

Modern courts have analyzed when exactly the injury inflicted by a state-law malicious prosecution occurs in the context of insurance disputes over whether the insured person was covered at the time of the injury. In a majority of jurisdictions, the injury occurs upon the filing of charges.<sup>133</sup> The Massachusetts Supreme Judicial Court has held that “[a] plaintiff suffers actual damages from a malicious prosecution on the filing of the underlying complaint, which at a minimum triggers the need to invest the time, money, and effort to prepare a defense.”<sup>134</sup> The Third Circuit, applying Pennsylvania law, has held that:

[T]he injuries caused by the tort—incarceration, humiliation, suspense, physical hardship, and legal expenses—first manifest themselves and become evident to a reasonable plaintiff at the time of arrest and filing of charges. Therefore, we hold that the tort of malicious prosecution occurs for insurance purposes at the time the underlying charges are filed.<sup>135</sup>

It is thus recovery for the harm done by false charges, not for seizure upon them, that is particularly protected by the charge-by-charge approach.

Among the opinions analyzed in this Note, Sixth Circuit Chief Judge Cole,

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129. Jacob Paul Goldstein, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 646, 664 (2006); *Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 682-83 (7th Cir. 2007).

130. FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 433 (4th ed. 1874).

131. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 537 (1895).

132. *Boogher v. Bryant*, 86 Mo. 42, 49 (1885) (citing SIMON GREENLEAF, *2 A TREATISE ON THE LAW OF EVIDENCE* 450 (14th ed. 1883)).

133. *See Billings v. Commerce Ins. Co.*, 936 N.E.2d 408, 412 (Mass. 2010).

134. *Id.* at 413.

135. *City of Erie v. Guar. Nat’l Ins. Co.*, 109 F.3d 156, 163 (3d Cir. 1997).

dissenting in *Howse*, went furthest in recognizing the tangible and intangible harms caused by false charges:

As a practical matter, the precise nature of a prosecution matters a great deal to the defendant who must grapple with its consequences. . . . We can imagine, for example, that putting on a defense against multiple charges *requires more resources* than defending against a single one. We might also note that the severity of the crimes charged could have *psychological impacts* for the defendant, as well financial ones: it may impact the amount the defendant must post in bail in order to maintain his liberty. We ought further consider that a defendant facing a list of charges where only a single one is supported by probable cause would be in a much *worse negotiating posture for plea bargaining* than one who is only bargaining over the disposition of a single charge. It follows that the damages suffered by a defendant in an unlawful prosecution would depend largely, if not entirely, on which specific charges are at issue in that prosecution.<sup>136</sup>

The charge-by-charge rule, per the “tort” interpretation, works because it protects against all these harms, not just detention itself.<sup>137</sup> Conversely, under the any-crime rule, the harm done by false charges—when a person is seized with valid probable cause for at least one charge—is not just unrecoverable, but fails to state a claim at all. The harm done by false charges is real; the problem is that, apart from harm caused by detention itself, it is not protected against by the Fourth Amendment.

#### *B. The Charge-by-Charge Rule and the Fourth Amendment*

The Sixth and Eleventh Circuits disagreed about how to manage the common law concern with deterring the stacking of false charges within the context of a Section 1983 suit. For the Eleventh Circuit, the Fourth Amendment could easily accommodate the charge-by-charge approach.<sup>138</sup> For the Sixth Circuit, malicious prosecution is “really a claim for an ‘unreasonable prosecutorial seizure’ governed by Fourth Amendment principles,” and the any-crime rule was firmly established in Fourth Amendment jurisprudence: “[J]ust like in the context of false arrests, a person is no more seized when he’s detained to await prosecution

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136. *Howse v. Hodous*, 953 F.3d 402, 416 (6th Cir. 2020) (Cole, C.J., dissenting) (emphasis added).

137. In a parallel context, the Indiana Supreme Court has held that statutory rights to a speedy trial apply even when a prisoner awaiting trial is simultaneously serving a sentence of incarceration: “[R]estraint on liberty is one policy underlying [speedy trial rights], but it is not the only policy. There is also the anxiety and humiliation that can accompany public accusation. These considerations are unrelated to whether the accused is incarcerated on other grounds at the time the speedy trial is demanded.” *Poore v. State*, 685 N.E.2d 36, 40 (Ind. 1997). The logic is the same as for malicious prosecution: charges cause harm even when they are not but-for causes of detention.

138. *Williams v. Aguirre*, 965 F.3d 1147, 1161 (11th Cir. 2020).

for several charges than if he were seized for just one valid charge.”<sup>139</sup>

The Sixth Circuit’s portrayal of the U.S. Supreme Court’s Fourth Amendment jurisprudence is correct. As discussed in Part IV, that Amendment protects a person’s “negative liberty” or “the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”<sup>140</sup> This guarantee meshes properly with the any-crime rule’s concern for protection against detention unjustified by probable cause, and with the “constitutional” interpretation of the charge-by-charge rule, which is in reality the same rule. The Fourth Amendment injury—the basis of the constitutional claim—as the Supreme Court held in *Manuel*, is “pretrial detention unsupported by probable cause.”<sup>141</sup>

The “tort” interpretation of the charge-by-charge rule, on the other hand, recognizes injuries that the Fourth Amendment does not protect against: there is no independently cognizable Fourth Amendment injury in being charged for a more serious crime when probable cause only existed for a less serious one. The “tort” interpretation of the charge-by-charge rule would allow a claim to proceed on the basis of detention for which there was some probable cause, and which did not therefore violate the Fourth Amendment. As Lyle Kossis has written, the malicious prosecution tort’s concern with indictment and prosecution simply does not fit with the Fourth Amendment’s focus on seizure: “[T]he indictment itself is nothing more than a piece of paper that alleges certain crimes the defendant(s) committed. The piece of paper itself does not amount to a seizure, as many people who are indicted were either free from official custody at the time the indictment was filed or were never arrested at all.”<sup>142</sup>

The charge-by-charge rule, on the “tort” interpretation which differentiates it from the any-crime rule, seeks to protect interests not protected by the Fourth Amendment, as interpreted in the U.S. Supreme Court’s case law. It thus cannot be integrated into Section 1983 claims, unless there is good reason for making malicious prosecution claims an exception to the ordinary Fourth Amendment approach to probable cause.

#### VII. DOES MALICIOUS PROSECUTION REQUIRE A SPECIAL PROBABLE CAUSE RULE?

If the Eleventh Circuit is right that malicious prosecution ought not to be subject to the ordinary Fourth Amendment rule of “objective” probable cause developed in false arrest and police stop cases, then such an exception would avoid the horns of the dilemma. Section 1983 could then integrate the “tort” interpretation of the charge-by-charge defense to malicious prosecution. The basis

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139. *Howse*, 953 F.3d at 409.

140. *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

141. *Manuel v. City of Joliet*, 137 S.Ct. 911, 919 (2017).

142. Lyle Kossis, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA.L. REV. 1635, 1651 (2013).

of the Eleventh Circuit's argument is that malicious prosecution involves a special danger of harm caused by the stacking of false charges on top of reasonable charges.<sup>143</sup> This Part argues, however, that the harms caused by malicious prosecution have been recognized as stemming from false arrest too, and therefore there is insufficient difference between them to justify making a special exception for malicious prosecution.

The Eleventh Circuit stated in *Williams* that, although the any-crime rule indisputably applied to false arrest, one reason it should not apply to malicious prosecution claims under the Fourth Amendment was that the tort of malicious prosecution involved a special concern for deterring the stacking of unwarranted charges on top of justifiable ones:

The any-crime rule threatened to [allow] defendants to “escape liability” “by uniting groundless accusations with those for which probable cause might exist” [and] make “almost a mockery” of malicious prosecution. . . . For a warrantless arrest, “[a]n arrested individual is no more seized when he is arrested on [several] grounds rather than one,” so the only question relevant to the objective reasonableness of a seizure is whether probable cause for *some* crime exists . . . But this logic does not apply to seizures pursuant to legal process. The particular charges that a criminal defendant faces objectively affect the ensuing pretrial detention. . . . Centuries of common-law doctrine urge a charge-specific approach . . . .<sup>144</sup>

The potentially lengthy duration of pretrial detention thus differentiated it from the limited interference with freedom caused by an arrest.

The any-crime rule, however, is firmly ensconced in Fourth Amendment jurisprudence. The “objective reasonableness” test sets the standard:

[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . [I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search “warrant a man of reasonable caution in the belief” that the action taken was appropriate?<sup>145</sup>

A seizure is therefore appropriate when there are facts known to the officer that justify it, regardless of whatever other facts may be known or whatever motives the officer may act from. Applied to the malicious prosecution context, therefore,

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143. *Williams v. Aguirre*, 965 F.3d 1147, 1161 (11th Cir. 2020).

144. *Id.* (quoting *Boogher v. Bryant*, 86 Mo. 42, 50 (1885)).

145. *Terry*, 392 U.S. at 21-22 (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925); *see also* *Scott v. United States*, 436 U.S. 128, 138 (1978) (“the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.”))

pre-trial detention on a reasonable charge would not be invalidated by an unfounded charge.

The Supreme Court has been reluctant to make exceptions to the principle that the existence of probable cause for a seizure is all that is needed to comply with the Fourth Amendment. Although the Court has stated that “the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,”<sup>146</sup> it has qualified the scope of this analysis:

Where probable cause has existed, the only cases in which we have found it necessary actually to perform the “balancing” analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body.<sup>147</sup>

Even in such cases, “the question was whether the totality of the circumstances justified a particular sort of search or seizure,”<sup>148</sup> not, as here, whether a seizure that would be entirely justified by some existing probable cause could be rendered unreasonable by the existence of other, faulty reasons or motives.

The justification for making an exception for malicious prosecution would therefore need to be very strong. Such strong justification is absent here because the harms that the common law charge-by-charge rule protects against have also been recognized as flowing from false arrest, in which context the any-crime rule is firmly settled.

False arrest and malicious prosecution claims arise from different phases of the law enforcement process: “False-arrest claims enable recovery for damages from ‘the time of detention up until issuance of process or arraignment, but not more.’ In contrast, the tort of malicious prosecution is limited to claims for damages incurred after the initiation of a prosecution.”<sup>149</sup>

Part VI discussed harms other than detention itself that may stem from malicious prosecution; for example, damage to reputation, expenses of making a defense, the psychological burden of false accusations. Courts (even the fervently “constitutional” Seventh Circuit) recognize these harms when dealing with state-law malicious prosecution:

[W]hen it comes to prosecution, the number and nature of the charges matters: the accused must investigate and prepare a defense to each charge, and as the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the

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146. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

147. *Whren v. United States*, 517 U.S. 806, 818 (1996) (internal citations omitted).

148. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985).

149. Jacob Paul Goldstein, *From the Exclusionary Rule to a Constitutional Tort for Malicious Prosecutions*, 106 COLUM. L. REV. 643, 666 (2006).

prosecution on the accused increase.<sup>150</sup>

The problem is that such harms may be caused by false arrest for additional crimes, as well as by malicious prosecution of additional charges, and yet such harms have not provoked the U.S. Supreme Court to adopt a charge-by-charge approach to false arrest.

Justices of the U.S. Supreme Court discussed the harms caused by malicious prosecution in *Albright v. Oliver*, a case that resulted in six opinions issued by a split court. A majority agreed that the filing of malicious charges would not violate the Fourteenth Amendment on substantive due process grounds.<sup>151</sup> Justice Kennedy recognized that “a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish—both by tarnishing one's name and by costing the accused money in legal fees and the like.”<sup>152</sup> Justice Stevens acknowledged that, “The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately produces ‘a wrenching disruption of everyday life.’”<sup>153</sup> However, Justice Souter noted a list of the damages for which compensation had been upheld by Courts of Appeal in *other* types of Fourth Amendment claims: pain, suffering, mental anguish, embarrassment, humiliation, reputational harm, destruction of business due to adverse publicity, and legal fees.<sup>154</sup> Similarly, in *United States v. Marion*, the Court described arrest as “a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”<sup>155</sup> It is notable how similar are the lists of harms from malicious prosecution and from false arrest and other Fourth Amendment claims generally. This suggests malicious prosecution does not involve special kinds of harms requiring a special rule.

The nature of compensable damages in state-law false arrest cases shows that

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150. *Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 682 (7th Cir. 2007).

151. *Albright v. Oliver*, 510 U.S. 266, 268 (1994) (plurality opinion); *id.* at 276 (Scalia, J., concurring); *id.* (Ginsburg, J., concurring); *id.* at 282-85 (Kennedy, J., concurring). Justice Souter's concurring opinion would have held a narrow window open for considering such a claim. *Id.* at 291 (Souter, J., concurring).

152. *Id.* at 283 (Kennedy, J., concurring).

153. *Id.* at 295-96 (Stevens, J., dissenting) (quoting *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987)).

154. *Id.* at 290 (Souter, J., concurring) (citing *Hale v. Fish*, 899 F.2d 390 (5th Cir. 1990) (a false arrest case); *B.C.R. Transport Co. v. Fontaine*, 727 F.2d 7 (1st Cir. 1984) (search and seizure of property); *Seigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988) (false arrest); *Dennis v. Warren*, 779 F.2d 245 (5th Cir. 1985) (false arrest); *Konzcak v. Tyrrell*, 603 F.2d 13 (7th Cir. 1979) (unlawful search and false arrest, as well as malicious prosecution)). Justice Souter also considered that only in “exceptional cases” would false charges cause harm separately from arrest on those charges, a view contrary to the common law tradition of malicious prosecution discussed in Part VI. *Id.* at 291 (Souter, J., concurring).

155. *United States v. Marion*, 404 U.S. 307, 320 (1971).



the increased qualitative harms flowing from arrest for more serious crimes are taken account of in such claims. False arrest may cause damages in the form of loss of reputation, loss of business, mental anguish, and disgrace,<sup>156</sup> and naturally each of these may vary with the character of the crimes for which a plaintiff has been arrested. Just as being charged with attempted murder, when probable cause exists to charge only possession of an unlicensed gun, worsens the severity of the harms suffered, the same goes for false arrest on heavier charges. It is worse for one's emotional condition, reputation, and possibly financial position to be arrested for attempted murder than for an unlicensed firearm. If the qualitative harms flowing from the crimes for which a plaintiff was arrested could themselves give rise to a legal injury, then a plaintiff could state a false arrest claim merely by showing that he suffered greater humiliation, mental distress, or legal or business costs from being accused upon arrest, without probable cause, of worse crimes than he had in fact committed. Yet these considerations have not prevented the U.S. Supreme Court from allowing any-crime probable cause as a defense to false arrest.

A rule for malicious prosecution different from the rule for false arrest cannot be based on the specialness of harms suffered from prosecution on additional charges, when similar harms arise from arrest on suspicion of probable cause for additional crimes. Malicious prosecution should not therefore be subject to a special exception from ordinary Fourth Amendment probable cause principles.

#### CONCLUSION

The Eleventh Circuit held in *Williams* that probable cause for another crime did not defeat a Fourth Amendment malicious prosecution claim based on a charge that lacked probable cause. This charge-by-charge rule cannot be sustained: when it is given a “constitutional” interpretation in line with the Fourth Amendment, as in *Williams*, it produces the same results as the any-crime rule; when it is given a “tort” interpretation in line with common law, it is incompatible with the limited protections of the Fourth Amendment. This dilemma cannot be avoided on the grounds that malicious prosecution causes special forms of harm, because similar harms stem from false arrest and other Fourth Amendment claims, indicating that the same rule should apply to all. The Sixth Circuit was right to hold, in *Howse*, that the any-crime rule applies to malicious prosecution.

This Note has also shown that the common law policy of deterring the stacking of false charges protects a valuable interest and exists to prevent real harms. This finding points to a deeper lesson about how far Section 1983 and the U.S. Constitution can be relied on to protect people's rights. Before the process began of incorporating the protections of the Bill of Rights against the states under the Fourteenth Amendment, the U.S. Supreme Court wrote that “nearly every civil right for the establishment and protection of which organized government is instituted [belong in] the class of rights which the State

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156. *Kleve v. Negangard*, 330 F.2d 74, 75 (6th Cir. 1964).

governments were created to establish and secure.”<sup>157</sup> Since then, incorporation of the Bill of Rights has come to make virtually all the individual rights it secures applicable to the States.<sup>158</sup> Yet, this Note shows, not every valuable interest an individual may have against a government was provided for in the Bill of Rights, at least as interpreted by the Court. Section 1983 cannot therefore serve as a federal cause of action for every complaint one may have about one’s treatment by those acting under color of official authority.

The Fourteenth Amendment’s due process requirement could theoretically fill the breach made by the any-crime rule if it were held to encompass a right to not be unreasonably prosecuted. In *Albright v. Oliver*, however, a majority of the U.S. Supreme Court, comprising four opinions, rejected the idea of a substantive due process claim based on the institution of charges without probable cause.<sup>159</sup> The plurality opinion expressed reluctance to stake out new rights in this “unchartered area” of “‘scarce and open-ended’ ‘guideposts.’”<sup>160</sup> Only Justices Stevens and Blackmun would have recognized that the laying of charges implicates liberty interests meriting constitutional protection even when a person is not detained.<sup>161</sup>

For now, state law rights remain essential to plug the holes in the Bill of Rights. It is to state law that victims of malicious prosecution must look when they seek to impose liability for the institution of false charges in and of themselves. Plaintiffs may find no remedy even there, however, given that some states confer on official defendants immunity from state-law malicious prosecution suits.<sup>162</sup> The limits of the Fourth Amendment and its corresponding any-crime rule may leave such plaintiffs with no remedy at all. They will justly question whether, in this respect, the Constitution and laws of the United States are adequate to protect them from official abuse.

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157. *Slaughter-House Cases*, 83 U.S. 36, 76 (1872).

158. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010).

159. *Albright v. Oliver*, 510 U.S. 266, 268 (1994) (plurality opinion); *id.* at 276 (Scalia, J., concurring); *id.* (Ginsburg, J., concurring); 282-85 (Kennedy, J., concurring). Justice Souter’s concurring opinion would have held a narrow window open for considering such a claim. *Id.* at 291 (Souter, J., concurring).

160. *Id.* at 271-75.

161. *Id.* at 295-96 (Stevens, J., dissenting); see also Lyle Kossis, *Malicious Prosecution Claims in Section 1983 Lawsuits*, 99 VA. L. REV. 1635, 1657-58 (2013) (arguing that malicious prosecution is cognizable under the Fourteenth Amendment because it offends fundamental principles of justice and is concerned with deprivation of life, liberty, and property without due process of law).

162. See, e.g., IND. CODE § 34-13-3-3(a)(6) (2023) (“A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following: . . . (6) The initiation of a judicial or an administrative proceeding.”)